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EXECUTIVE ORDER NO. 104

WHEREAS, through Executive Order No. 102, which I signed on February 3, 2020, I created the State's Coronavirus Task Force, chaired by the Commissioner of the New Jersey Department of Health ("DOH"), in order to coordinate the State's efforts to appropriately prepare for and respond to the public health hazard posed by Coronavirus disease 2019 ("COVID-19"); and

WHEREAS, in light of the dangers posed by COVID-19, I issued Executive Order No. 103 (2020) on March 9, 2020, the facts and circumstances of which are adopted by reference herein, which declared both a Public Health Emergency and State of Emergency; and

WHEREAS, in accordance with N.J.S.A. App. A:9-34 and -51, I reserved the right to utilize and employ all available resources of State government to protect against the emergency created by COVID-19; and

WHEREAS, in accordance with N.J.S.A. App. A:9-40, I declared that, due to the State of Emergency, no municipality, county, or any agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of my Executive Orders, or which will in any way interfere with or impede their achievement; and

WHEREAS, on March 11, 2020, COVID-19 was declared to be a global pandemic by the World Health Organization; and

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WHEREAS, on March 13, 2020, the President of the United States declared a national emergency pursuant to his constitutional and statutory powers, including those granted by Sections 201 and 301 of the National Emergencies Act (50 U.S.C. § 1601, *et seq.*) and consistent with Section 1135 of the Social Security Act, as amended (42 U.S.C. § 1320b-5); and

WHEREAS, the President of the United States also determined on March 13, 2020, that the COVID-19 pandemic was of sufficient severity and magnitude to warrant an emergency determination under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121-5207; and

WHEREAS, as of March 16, 2020, according to the Centers for Disease Control and Prevention (“CDC”), there were more than 130,000 confirmed cases of COVID-19 worldwide, with over 6,500 of those cases having resulted in death; and

WHEREAS, as of March 16, 2020, there were more than 4,900 confirmed cases of COVID-19 in the United States, with 67 of those cases having resulted in death; and

WHEREAS, as of March 16, 2020, there were 178 positive cases of COVID-19 in New Jersey, spread across numerous counties; and

WHEREAS, social mitigation strategies for combatting COVID-19 requires every effort to reduce the rate of community spread of the disease; and

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WHEREAS, as of March 15, 2020, the CDC recommends that for the next eight weeks, gatherings of 50 or more people be canceled or postponed throughout the United States; and

WHEREAS, public and private preschool programs, elementary and secondary schools, and institutions of higher education are locations where significant numbers of students, educators, and support staff gather, often in close proximity in classrooms, hallways, cafeterias, and gymnasiums; and

WHEREAS, suspending in-person preschool programs, K-12 education, and in-person instruction at institutions of higher education are part of the State's mitigation strategy to combat COVID-19 and reduce the rate of community spread; and

WHEREAS, my Administration is committed to ensuring that all students will continue to have access to a quality education, in addition to school meals that are provided or subsidized for students from low-income families; and

WHEREAS, casinos, racetracks, gyms, fitness centers, movie theaters, performing arts centers, other concert venues, nightclubs, and other entertainment centers, which are vital to the economic health of the State, are also locations where large numbers of individuals gather in close proximity; and

WHEREAS, many individuals also come into contact with common surfaces at gyms, fitness centers, and other entertainment centers; and

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WHEREAS, suspending operations at these businesses is part of the State's mitigation strategy to combat COVID-19 and reduce the rate of community spread; and

WHEREAS, even on casino floors, where slot machines or other casino games may be several feet apart, many individuals come into contact with common surfaces; and

WHEREAS, in contrast to gaming at brick-and-mortar facilities, online gaming provides a safe mode of entertainment during a time when physical proximity to other individuals can be dangerous; and

WHEREAS, the CDC has advised that COVID-19 spreads most frequently through person-to-person contact when individuals are within six feet or less of one another; and

WHEREAS, as a result, the CDC has recommended that individuals practice "social distancing" to prevent community spread of the virus; and

WHEREAS, the CDC has defined social distancing as the practice of "remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible"; and

WHEREAS, bars and restaurants are locations where significant numbers of individuals gather in close proximity, making adherence to social distancing protocols impossible or impracticable; and

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WHEREAS, to mitigate community spread of COVID-19, it is necessary to limit the unnecessary movement of individuals in and around their communities and person-to-person interactions in accordance with CDC and DOH guidance; and

WHEREAS, on March 15, 2020, the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, called for “a dramatic diminution of the personal interaction that we see in restaurants and in bars,” and recommended pursuing “[w]hatever it takes to do that”; and

WHEREAS, the provision of take-out and delivery services do not pose the same danger of widespread person-to-person contact while still preserving necessary food delivery services for New Jersey residents; and

WHEREAS, narrowing scope of service or hours of operation for restaurants and certain retail establishments permits individuals to access food, clothing, and other essential materials while also limiting unnecessary person-to-person contact; and

WHEREAS, it is critical to ensure that law enforcement resources, particularly those that might otherwise be required to respond to late-night incidents, not be unnecessarily diverted from responding to COVID-19 related issues and maintaining public safety; and

WHEREAS, the Constitution and statutes of the State of New Jersey, particularly the provisions of

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N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:2-4 and all amendments and supplements thereto, confer upon the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. All gatherings of persons in the State of New Jersey shall be limited to 50 persons or fewer, excluding normal operations at airports, bus and train stations, medical facilities, office environments, factories, assemblages for the purpose of industrial or manufacturing work, construction sites, mass transit, or the purchase of groceries or consumer goods.

2. All public, private, and parochial preschool program premises, and elementary and secondary schools, including charter and renaissance schools, shall be closed to students beginning on Wednesday, March 18, 2020, and shall remain closed as long as this Order remains in effect.

3. All institutions of higher education shall cease in-person instruction beginning on Wednesday, March 18, 2020, and shall cease such in-person instruction as long as this Order remains in effect. The Secretary of the Office of Higher Education shall have the authority to grant a waiver to allow in-person instruction to students on a case-by-case basis where a compelling rationale to allow such access exists. The Secretary of the

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Office of Higher Education shall coordinate with institutions of higher education to determine appropriate student housing conditions for those students who reside in on-campus housing as their primary residence.

4. The Commissioner of the Department of Education (“DOE”), in consultation with the Commissioner of DOH, shall be authorized to permit schools to remain open on a limited basis for the provision of food or other essential, non-educational services, or for educational or child care services if needed in emergency situations after consultation with the Commissioner of DOH. The Commissioner of DOE shall also have the authority to close any other career or training facilities over which he has oversight, after consultation with the Commissioner of DOH.

5. The Commissioner of DOE shall continue working with each public school district, and private and parochial schools as appropriate, to ensure that students are able to continue their educations during this time period through appropriate home instruction. Local school districts, charter schools, and renaissance schools, in consultation with the Commissioner of DOE, shall have the authority and discretion to determine home instruction arrangements as appropriate on a case-by-case basis to ensure all students are provided with appropriate home instruction, taking into account all relevant constitutional and statutory obligations.

6. The Secretary of the Department of Agriculture, in conjunction with the Commissioner of DOE,

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shall take all necessary actions to ensure that all students eligible for free or reduced meals shall continue to receive the services or supports necessary to meet nutritional needs during closures.

7. The following facilities are ordered closed to members of the public, effective 8:00 p.m. on Monday, March 16, 2020. These facilities are to remain closed to the public for as long as this Order remains in effect. The State Director of Emergency Management, who is the Superintendent of State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to this list:

- a. Casino gaming floors, including retail sports wagering lounges, and casino concert and entertainment venues. Online and mobile sports and casino gaming services may continue to be offered notwithstanding the closure of the physical facility.
- b. Racetracks, including stabling facilities and retail sports wagering lounges. Mobile sports wagering services may continue to be offered notwithstanding the closure of the physical facility.
- c. Gyms and fitness centers and classes.
- d. Entertainment centers, including but not limited to, movie theaters, performing arts centers, other concert venues, and nightclubs.

8. Other non-essential retail, recreational, and entertainment businesses must cease daily operations from 8:00 p.m. until 5:00 a.m.. From 5:00 a.m. until

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8:00 p.m., these businesses may remain open if they limit their occupancy to no more than 50 persons and adhere to social distancing guidelines. Examples of essential businesses excluded from this directive include: grocery/food stores, pharmacies, medical supply stores, gas stations, healthcare facilities and ancillary stores within healthcare facilities. The State Director of Emergency Management, who is the Superintendent of State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to the list of essential businesses and to the timelines applicable to operating hours.

9. All restaurants, dining establishments, and food courts, with or without a liquor license, all bars, and all other holders of a liquor license with retail consumption privileges, are permitted to operate their normal business hours, but are limited to offering only food delivery and/or take-out services. If alcoholic beverages are to be sold from a restaurant, dining establishment or bar with a liquor license, such sales shall be limited to original containers sold from the principal public barroom. All retail sales of alcoholic beverages by limited brewery licensees, restricted brewery licensees, plenary and farm winery licensees (and associated salesrooms), craft distillery licensees and cidery and meadery licensees must be in original containers and must be delivered by licensed entities and/or by customer pick up.

10. In accordance with N.J.S.A. App. A:9-33, et seq., as supplemented and amended, the State Director of Emergency Management, who is the Superintendent

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of State Police, through the police agencies under his control, to determine and control the direction of the flow of vehicular traffic on any State or interstate highway, municipal or county road, and any access road, including the right to detour, reroute, or divert any or all traffic and to prevent ingress or egress from any area that, in the State Director's discretion, is deemed necessary for the protection of the health, safety, and welfare of the public, and to remove parked or abandoned vehicles from such roadways as conditions warrant.

11. The Attorney General, pursuant to the provisions of N.J.S.A. 39:4-213, shall act through the Superintendent of State Police, to determine and control the direction of the flow of vehicular traffic on any State or interstate highway, municipal or county road, and any access road, including the right to detour, reroute, or divert any or all traffic, to prevent ingress or egress, and to determine the type of vehicle or vehicles to be operated on such roadways. I further authorize all law enforcement officers to enforce any such order of the Attorney General or Superintendent of State Police within their respective municipalities.

12. No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Executive Order, or which will in any way interfere with or impede its achievement.

13. It shall be the duty of every person or entity in this State or doing business in this State and of the

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members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Executive Order.

14. Penalties for violations of this Executive Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and -50.

15. This Order shall take effect immediately and shall remain in effect until revoked or modified by the Governor, who shall consult with the Commissioner of DOH as appropriate.

GIVEN, under my hand and seal this
16th day of March,
Two Thousand and Twenty,
and of the Independence of
the United States, the Two
Hundred and Forty-Fourth.

[seal] /s/ Philip D. Murphy
Governor

Attest:

/s/ Matthew J. Platkin
Chief Counsel to the Governor

EXECUTIVE ORDER NO. 107

WHEREAS, through Executive Order No. 102 (2020), which I signed on February 3, 2020, I created the State's Coronavirus Task Force, chaired by the Commissioner of the New Jersey Department of Health ("DOH"), in order to coordinate the State's efforts to appropriately prepare for and respond to the public health hazard posed by Coronavirus disease 2019 ("COVID-19"); and

WHEREAS, in light of the dangers posed by COVID-19, I issued Executive Order No. 103 (2020) on March 9, 2020, the facts and circumstances of which are adopted by reference herein, which declared both a Public Health Emergency and State of Emergency; and

WHEREAS, in accordance with N.J.S.A. App. A:9-34 and -51, I reserved the right to utilize and employ all available resources of State government to protect against the emergency created by COVID-19; and

WHEREAS, in accordance with N.J.S.A. App. A:9-40, I declared that, due to the State of Emergency, no municipality, county, or any agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of my Executive Orders, or which will in any way interfere with or impede their achievement; and

WHEREAS, to further protect the health, safety, and welfare of New Jersey residents by, among other

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things, reducing the rate of community spread of COVID-19, I issued Executive Order No. 104 (2020) on March 16, 2020, the facts and circumstances of which are also adopted by reference herein, which established statewide social mitigation strategies for combatting COVID-19; and

WHEREAS, Executive Order No. 104 (2020) limited the scope of service and hours of operation for restaurants and certain retail establishments to balance the need to allow individuals to access food and other essential materials with the need to limit unnecessary person-to-person contact; and

WHEREAS, Executive Order No. 104 (2020) deemed a subset of businesses as “essential,” including grocery/food stores, pharmacies, medical supply stores, gas stations, healthcare facilities, and ancillary stores within healthcare facilities, and it authorized the State Director of Emergency Management, who is the Superintendent of State Police, to make additions, amendments, clarifications, exceptions, and exclusions to that list; and

WHEREAS, Executive Order No. 104 (2020) made clear that such essential businesses may continue operating without limits on their scope of service or hours of operation, absent further amendments by the State Director of Emergency Management; and

WHEREAS, Executive Order No. 104 (2020) and subsequent Administrative Orders issued by the State Director of Emergency Management also placed restrictions on other businesses’ scope of service and

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hours of operation, and also placed restrictions on the size of gatherings in the State; and

WHEREAS, as of March 20, 2020, according to the Centers for Disease Control and Prevention (“CDC”), there were more than 234,000 confirmed cases of COVID-19 worldwide, with over 9,800 of those cases having resulted in death; and

WHEREAS, as of March 20, 2020, there were more than 15,000 confirmed cases of COVID-19 in the United States, with at least 201 of those cases having resulted in death; and

WHEREAS, as of March 20, 2020, there were at least 890 positive cases of COVID-19 in New Jersey, with at least 11 of those cases having resulted in death; and

WHEREAS, social mitigation strategies for combatting COVID-19 require every effort to reduce the rate of community spread of the disease; and

WHEREAS, the CDC has advised that COVID-19 spreads most frequently through person-to-person contact when individuals are within six feet or less of one another; and

WHEREAS, as a result, the CDC has recommended that individuals practice “social distancing” to prevent community spread of the virus; and

WHEREAS, the CDC has defined social distancing as the practice of “remaining out of congregate settings, avoiding mass gatherings, and maintaining

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distance (approximately 6 feet or 2 meters) from others when possible”; and

WHEREAS, to mitigate community spread of COVID-19, it is necessary to limit the unnecessary movement of individuals in and around their communities and person-to-person interactions in accordance with CDC and DOH guidance; and

WHEREAS, the best way for New Jersey residents to keep themselves, their families, and their communities safe during the COVID-19 outbreak is to stay at home as much as possible; and

WHEREAS, as of March 15, 2020, the CDC recommends that for the next eight weeks, gatherings of 50 or more people be canceled or postponed throughout the United States; and

WHEREAS, as of March 16, 2020, the White House went further than the CDC had and recommended that Americans avoid social gatherings in groups of more than 10 people; and

WHEREAS, restricting the physical presence of individuals in office environments and work sites is critical to preventing future spread of COVID-19; and

WHEREAS, accommodating work-from-home arrangements is an effective means to ensure continuity of operations while also limiting person-to-person contact; and

WHEREAS, the CDC has recommended employers to establish policies and practices to increase the

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physical distance among employees and between employees; and

WHEREAS, permitting the workforce to work from home may reduce stress on the State's child care system; and

WHEREAS, as of March 19, 2020, I have instructed all State departments and agencies to utilize work-from-home arrangements for both essential and non-essential employees wherever feasible; and

WHEREAS, given the rapidly rising incidence of COVID-19, temporarily closing non-essential retail businesses will strengthen New Jersey's efforts to slow the spread of COVID-19; and

WHEREAS, even as we institute social distancing measures, the number of COVID-19 cases in New Jersey is likely to increase for the immediate future, meaning we must take all possible steps to preserve our health care system's capacity to treat those who require emergency or intensive care; and

WHEREAS, the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:2-4 and all amendments and supplements thereto, confer upon the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the

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authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. The operative paragraphs of Executive Order No. 104 (2020) are hereby superseded in full. The factual findings of Executive Order No. 104 (2020) remain applicable except to the extent they are in conflict with the factual findings in this or any intervening Executive Order.

2. All New Jersey residents shall remain home or at their place of residence unless they are 1) obtaining goods or services from essential retail businesses, as described in Paragraph 6; 2) obtaining takeout food or beverages from restaurants, other dining establishments, or food courts, pursuant to Paragraph 8; 3) seeking medical attention, essential social services, or assistance from law enforcement or emergency services; 4) visiting family or other individuals with whom the resident has a close personal relationship, such as those for whom the individual is a caretaker or romantic partner; 5) reporting to, or performing, their job; 6) walking, running, operating a wheelchair, or engaging in outdoor activities with immediate family members, caretakers, household members, or romantic partners while following best social distancing practices with other individuals, including staying six feet apart; 7) leaving the home for an educational, religious, or political reason; 8) leaving because of a reasonable fear for his or her health or safety; or 9) leaving at the direction of law enforcement or other government agency.

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3. When in public, individuals must practice social distancing and stay six feet apart whenever practicable, excluding immediate family members, caretakers, household members, or romantic partners.

4. Individuals who have to travel pursuant to Paragraph 2 should only use public transportation only if they have no other feasible choice. Individuals who ride public transportation should abide by best social distancing practices, including making all efforts to stand or sit six feet away from other riders and frequently use sanitizing products.

5. Gatherings of individuals, such as parties, celebrations, or other social events, are cancelled, unless otherwise authorized by any part of this Order. The State Director of Emergency Management, who is the Superintendent of the State Police, shall have the discretion to make clarifications and issue orders related to this provision.

6. The brick-and-mortar premises of all non-essential retail businesses must close to the public as long as this Order remains in effect. Essential retail businesses, listed below, are excluded from this directive and may remain open during their normal business hours. Essential retail businesses must, wherever practicable, provide pickup services outside or adjacent to their stores for goods ordered in advance online or by phone. Additionally, online and telephonic delivery services are permitted to the extent the retail business is authorized to operate an online or telephonic delivery service under existing law. The State Director

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of Emergency Management, who is the Superintendent of the State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to this list:

- a. Grocery stores, farmer's markets and farms that sell directly to customers, and other food stores, including retailers that offer a varied assortment of foods comparable to what exists at a grocery store;
- b. Pharmacies and alternative treatment centers that dispense medicinal marijuana;
- c. Medical supply stores;
- d. Retail functions of gas stations;
- e. Convenience stores;
- f. Ancillary stores within healthcare facilities;
- g. Hardware and home improvement stores;
- h. Retail functions of banks and other financial institutions;
- i. Retail functions of laundromats and dry-cleaning services;
- j. Stores that principally sell supplies for children under five years old;
- k. Pet stores;
- l. Liquor stores;

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- m. Car dealerships, but only to provide auto maintenance and repair services, and auto mechanics;
- n. Retail functions of printing and office supply shops; and
- o. Retail functions of mail and delivery stores.

7. Any essential retail business whose brick-and-mortar premises remain open to the public shall abide by social distancing practices to the extent practicable while providing essential services. These include all reasonable efforts to keep customers six feet apart and frequent use of sanitizing products on common surfaces.

8. All restaurants, cafeterias, dining establishments, and food courts, with or without a liquor license, all bars, and all other holders of a liquor license with retail consumption privileges, are permitted to operate their normal business hours, but are limited to offering only food delivery and/or take-out services in accordance with their existing liquor licenses. If alcoholic beverages are to be sold from a restaurant, dining establishment or bar with a liquor license, such sales shall be limited to original containers sold from the principal public barroom. The on-premises consumption of alcohol is prohibited. All retail sales of alcoholic beverages by limited brewery licensees, restricted brewery licensees, plenary and farm winery licensees (and associated salesrooms), craft distillery licensees and cidery and meadery licensees must be in original

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containers and must be sold through customer pick up and/or delivered by licensees in accordance with their existing licenses.

9. All recreational and entertainment businesses, including but not limited to the following list, must close to the public as long as this Order remains in effect. The State Director of Emergency Management, who is the Superintendent of State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to this list:

- a. Casino gaming floors, including retail sports wagering lounges, and casino concert and entertainment venues. Online and mobile sports and casino gaming services may continue to be offered notwithstanding the closure of the physical facility.
- b. Racetracks, including stabling facilities and retail sports wagering lounges. Mobile sports wagering services may continue to be offered notwithstanding the closure of the physical facility.
- c. Gyms and fitness centers and classes.
- d. Entertainment centers, including but not limited to, movie theaters, performing arts centers, other concert venues, and nightclubs.
- e. All indoor portions of retail shopping malls. Restaurants and other stores located within shopping malls that have their own external entrances open to the

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public, separate from the general mall entrance, may remain open pursuant to the terms and directives of this Order for operating hours and takeout or food delivery services. All entrances and exits to the common area portions of retail shopping malls must remain closed.

- f. All places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement parks, water parks, aquariums, zoos, arcades, fairs, children's play centers, funplexes, theme parks, bowling alleys, family and children's attractions.
- g. Facilities where personal care services are performed that, by their very nature, result in noncompliance with social distancing guidelines, including but not limited to cosmetology shops; barber shops; beauty salons; hair braiding shops; nail salons; electrology facilities; spas, including day spas and medical spas, at which solely elective and cosmetic medical procedures are performed; massage parlors, tanning salons, tattoo parlors, and public and private social clubs, whether or not they serve alcohol, including but not limited to facilities owned or operated by the American Legion, Veterans of Foreign Wars, Knights of Columbus, and any other social clubs associated with community service organizations. This excludes any health facilities that provide medically necessary or therapeutic services.

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- h. All municipal, county, and State public libraries, and all libraries and computer labs at public and private colleges and universities.

10. All businesses or non-profits in the State, whether closed or open to the public, must accommodate their workforce, wherever practicable, for telework or work-from-home arrangements. For purposes of this order, “telework” means the practice of working from home or alternative locations closer to home through the use of technology that equips the individual to access necessary materials.

11. To the extent a business or non-profit has employees that cannot perform their functions via telework or work-from-home arrangements, the business or non-profit should make best efforts to reduce staff on site to the minimal number necessary to ensure that essential operations can continue. Examples of employees who need to be physically present at their work site in order to perform their duties include, but are not limited to, law enforcement officers, fire fighters, and other first responders, cashiers or store clerks, construction workers, utility workers, repair workers, warehouse workers, lab researchers, information technology maintenance workers, janitorial and custodial staff, and certain administrative staff.

12. All public, private, and parochial preschool program premises, and elementary and secondary schools, including charter and renaissance schools,

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shall remain closed to students as long as this Order remains in effect.

13. All institutions of higher education shall continue to cease such in-person instruction as long as this Order remains in effect. The Secretary of the Office of Higher Education shall have the authority to grant a waiver to allow in-person instruction to students on a case-by-case basis where a compelling rationale to allow such access exists. The Secretary of the Office of Higher Education shall coordinate with institutions of higher education to determine appropriate student housing conditions for those students who reside in on-campus housing as their primary residence.

14. The Commissioner of the Department of Education (“DOE”), in consultation with the Commissioner of DOH, shall be authorized to permit schools to remain open on a limited basis for the provision of food or other essential, non-educational services, or for educational or child care services if needed in emergency situations after consultation with the Commissioner of DOH. The Commissioner of DOE shall also have the authority to close any other career or training facilities over which he has oversight, after consultation with the Commissioner of DOH.

15. The Commissioner of DOE shall continue working with each public school district, and private and parochial schools as appropriate, to ensure that students are able to continue their educations during this time period through appropriate home instruction. Local school districts, charter schools, and renaissance

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schools, in consultation with the Commissioner of DOE, shall have the authority and discretion to determine home instruction arrangements as appropriate on a case-by-case basis to ensure all students are provided with appropriate home instruction, taking into account all relevant constitutional and statutory obligations.

16. The Secretary of the Department of Agriculture, in conjunction with the Commissioner of DOE, shall take all necessary actions to ensure that all students eligible for free or reduced meals shall continue to receive the services or supports necessary to meet nutritional needs during closures.

17. Nothing in this Order shall be construed to limit, prohibit, or restrict in any way the provision of health care or medical services to members of the public.

18. Nothing in this Order shall be construed to limit, prohibit, or restrict in any way access to essential services for low-income residents, including but not limited to food banks.

19. Nothing in this Order shall be construed to limit, prohibit, or restrict in any way the operations of newspapers, television, radio, and other media services.

20. Nothing in this Order shall be construed to limit, prohibit, or restrict in any way the operations of law enforcement agencies.

21. Nothing in this Order shall be construed to limit, prohibit, or restrict in any way the operations of

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the federal government, or the movement of federal officials in New Jersey while acting in their official capacity.

22. In accordance with N.J.S.A. App. A:9-33, et seq., as supplemented and amended, the State Director of Emergency Management, who is the Superintendent of State Police, through the police agencies under his control, to determine and control the direction of the flow of vehicular traffic on any State or interstate highway, municipal or county road, and any access road, including the right to detour, reroute, or divert any or all traffic and to prevent ingress or egress from any area that, in the State Director's discretion, is deemed necessary for the protection of the health, safety, and welfare of the public, and to remove parked or abandoned vehicles from such roadways as conditions warrant.

23. The Attorney General, pursuant to the provisions of N.J.S.A. 39:4-213, shall act through the Superintendent of State Police, to determine and control the direction of the flow of vehicular traffic on any State or interstate highway, municipal or county road, and any access road, including the right to detour, reroute, or divert any or all traffic, to prevent ingress or egress, and to determine the type of vehicle or vehicles to be operated on such roadways. I further authorize all law enforcement officers to enforce any such order of the Attorney General or Superintendent of State Police within their respective municipalities.

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24. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Executive Order.

25. Penalties for violations of this Executive Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and -50.

26. This Order shall take effect on Saturday, March 21, 2020, at 9:00 p.m., and shall remain in effect until revoked or modified by the Governor, who shall consult with the Commissioner of DOH as appropriate.

GIVEN, under my hand and seal this
21st day of March,
Two Thousand and Twenty,
and of the Independence of
the United States, the Two
Hundred and Forty-Fourth.

[seal] /s/ Philip D. Murphy
Governor

Attest:

/s/ Matthew J. Platkin
Chief Counsel to the Governor

EXECUTIVE ORDER NO. 214

WHEREAS, on March 9, 2020, through Executive Order No. 103, the facts and circumstances of which are adopted by reference herein, I declared both a Public Health Emergency and a State of Emergency throughout the State due to the public health hazard created by Coronavirus disease 2019 (“COVID-19”); and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, and 210 issued on April 7, 2020, May 6, 2020, June 4, 2020, July 2, 2020, August 1, 2020, August 27, 2020, September 25, 2020, October 24, 2020, November 22, 2020, and December 21, 2020, respectively, the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency continued to exist and declared that all Executive Orders and Administrative Orders adopted in whole or in part in response to the COVID-19 Public Health Emergency remained in full force and effect; and

WHEREAS, in accordance with N.J.S.A. App. A:9-34 and -51, I reserve the right to utilize and employ all available resources of State government to protect against the emergency created by COVID-19; and

WHEREAS, as COVID-19 continued to spread across New Jersey and an increasing number of individuals required medical care or hospitalization, I issued a series of Executive Orders pursuant to my authority under the New Jersey Civilian Defense and Disaster Control Act, N.J.S.A. App. A:9-33 et seq., and

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the Emergency Health Powers Act, N.J.S.A. 26:13-1 et seq., to protect the public health, safety, and welfare against the emergency created by COVID-19, including Executive Order Nos. 104-133, Nos. 135-138, Nos. 140-166, Nos. 168-173, No. 175, Nos. 177-181, No. 183, Nos. 186-187, Nos. 189-198, No. 200, Nos. 203-204, No. 207, and Nos. 210-211 (2020), the facts and circumstances of which are all adopted by reference herein; and

WHEREAS, Executive Order No. 103 (2020) described both the symptoms and dangers presented by COVID-19 and the likelihood of community spread across the State, and it recognized the need to use all available statewide authorities to prepare for and respond to COVID-19 cases in New Jersey, to implement appropriate measures to mitigate the spread of COVID-19, and to prepare in the event of an increasing number of individuals requiring medical care or hospitalization; and

WHEREAS, to further protect the health, safety, and welfare of New Jersey residents by, among other things, reducing the rate of community spread of COVID-19, I issued Executive Order No. 104 on March 16, 2020, which established statewide social mitigation strategies for combatting COVID-19, including the closure of all public, private, and parochial preschool program premises, and elementary and secondary schools, including charter and renaissance schools (collectively “school districts”); and

WHEREAS, on March 21, 2020, I issued Executive Order No. 107, affirming the closure of all school district buildings to students for as long as that Order remained in effect; and

WHEREAS, on April 7, 2020, I issued Executive Order No. 117, which waived the graduation proficiency test requirement for any twelfth-grade student who was expected to graduate in the class of 2020 but had not satisfied said requirement; and

WHEREAS, Executive Order No. 117 also waived the statutory requirement mandating that student growth data be used as a measure of educator effectiveness in the evaluation of any educator for the 2019-2020 school year; and

WHEREAS, on August 13, 2020, I issued Executive Order No. 175, which permitted all school districts to reopen school buildings for in-person instruction subject to health and safety requirements specified therein; and

WHEREAS, Executive Order No. 175 (2020) also waived the requirement that student growth data based on standardized assessments and student growth percentiles be used as measures of educator effectiveness in the overall evaluation of any educator; and

WHEREAS, since the onset of the 2020-2021 school year, school districts have delivered education by way of all-remote instruction, in-person instruction, or a combination of the two forms (“hybrid”); and

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WHEREAS, as of January 11, 2021, 337 districts are providing all-remote instruction, 351 districts are providing hybrid instruction, 79 districts are providing full in-person instruction, and 44 districts are providing a combination of instructional modalities across school buildings; and

WHEREAS, pursuant to N.J.S.A. 18A:7C-6, all students must demonstrate proficiency on a State test as a condition of graduation from high school; and

WHEREAS, pursuant to N.J.S.A. 18A:7C-3, any twelfth-grade student who has not met the graduation proficiency test requirement but who has met all of the credit, curriculum, and attendance requirements for graduation shall be eligible for graduation by way of a portfolio appeal submitted by the school district to the New Jersey Department of Education (“NJDOE”); and

WHEREAS, the modifications to school schedules, operations, and instructional modalities implemented pursuant to Executive Order No. 175 (2020) have resulted in a challenging school year that has been unlike any prior year for students, families, educators, and school district staff; and

WHEREAS, students expected to graduate in the class of 2021 have faced more challenges in accessing the State tests required for high school graduation pursuant to N.J.S.A. 18A:7C-6 than those students in previous graduating classes; and

WHEREAS, the NJDOE projects that a substantial number of students in the class of 2021 will utilize

the portfolio appeal process to satisfy the statutory graduation proficiency test requirement in light of the disruption to the 2019-2020 and 2020-2021 school years caused by the COVID-19 Public Health Emergency; and

WHEREAS, the modifications to school schedules, operations, and instructional modalities implemented pursuant to Executive Order No. 175 (2020) may present substantive and procedural difficulties for districts in the compilation of complete portfolio appeals; and

WHEREAS, pursuant to N.J.S.A. 18A:6-123(b)(3), student growth towards locally-determined academic goals (“student growth objectives”), must serve as a measure of educator effectiveness in overall educator evaluations; and

WHEREAS, pursuant to N.J.S.A. 18A:6-123(b)(6), educator performance must be linked to student achievement, which involves student growth objectives; and

WHEREAS, N.J.A.C. 6A:10-4.2(e) details the procedures necessary for developing and measuring student growth objectives; and

WHEREAS, the variety and variability of instructional modalities necessary for the delivery of education during the 2020-2021 school year make it challenging for school and district administrators to effectively utilize student growth objectives as a measure of educator effectiveness; and

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WHEREAS, the challenges in attempting to use locally-determined academic goals, particularly in remote learning situations, to extract valid evidence of educator performance render it inappropriate to utilize student growth objectives as a required measure of educator effectiveness; and

WHEREAS, N.J.S.A. 18A:16-1.1c dictates that a vacant teaching position shall not be filled in any school year by one or more individuals holding a certificate of eligibility or a certificate of eligibility with advanced standing issued by the State Board of Examiners and working in an area not authorized by their credentials for a total amount of time exceeding 20 school days; and

WHEREAS, N.J.S.A. 18A:16-1.1d dictates that a vacant teaching position shall not be filled in any school year by one or more individuals holding a standard instructional certificate issued by the State Board of Examiners and working in an area not authorized by their credentials for a total amount of time exceeding 40 school days; and

WHEREAS, the COVID-19 Public Health Emergency has led to an increase in teaching vacancies throughout the State that have interfered with the continuity of instruction; and

WHEREAS, it is necessary to relax the limitation imposed on the service of substitute teachers to allow for staffing flexibility; and

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WHEREAS, the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:2-4 and all amendments and supplements thereto, confer upon the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. The statutory graduation proficiency test requirement mandated by N.J.S.A. 18A:7C-1 et seq. is waived for any twelfth-grade student who has not yet met said graduation proficiency test requirement but who has met all of the credit, curriculum, and attendance requirements for graduation.

2. For the 2020-2021 school year, the requirements of N.J.S.A. 18A:6-123(b)(3) and (6) are waived and student growth data shall not be used as a measure of educator effectiveness in the overall summative evaluation of any educator. All other requirements concerning the development and measurement of student growth objectives enumerated in N.J.A.C. 6A:10-4.2(e) shall remain in effect.

3. For the duration of the COVID-19 Public Health Emergency, individuals holding either a certificate of eligibility or a certificate of eligibility with advanced standing working in an area not authorized by their credentials may fill vacant teaching positions for

up to 40 school days and shall not be subject to the time limitation in N.J.S.A. 18A:16-1.1c. Such individuals, as well as those employed as substitutes pursuant to N.J.S.A. 18A:16-1.1d, may serve for an additional 20 school days upon a school district's written application to the Commissioner of Education or her designee demonstrating the following:

- a) The district's efforts and inability to hire an appropriately certified teacher for the position within the 40-day period; and
- b) The individual(s) serving as substitute(s) are subject to periodic monitoring by a supervisor.

The Commissioner of Education shall issue guidance clarifying the requirements enumerated in Paragraph 3, Sections (a) and (b).

4. This Order shall take effect immediately.

GIVEN, under my hand and seal this
11th day of January,
Two Thousand and Twenty,
and of the Independence of
the United States, the Two
Hundred and Forty-Fourth.

[seal] /s/ Philip D. Murphy
Governor

Attest:

/s/ Parimal Garg

Chief Counsel to the Governor

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[SEAL] **UNITED STATES DEPARTMENT
OF EDUCATION**
*Office for Civil Rights
Office of Special Education
and Rehabilitative Services*

March 21, 2020

**Supplemental Fact Sheet
Addressing the Risk of COVID-19 in
Preschool, Elementary and Secondary Schools
While Serving Children with Disabilities**

We recognize that educational institutions are struggling to address the challenges of this national emergency. We also know that educators and parents are striving to provide a sense of normality while seeking ways to ensure that all students have access to meaningful educational opportunities even under these difficult circumstances. No one wants to have learning coming to a halt across America due to the COVID-19 outbreak, and the U.S. Department of Education (Department) does not want to stand in the way of good faith efforts to educate students on-line.

The Department stands ready to offer guidance, technical assistance, and information on any available flexibility, within the confines of the law, to ensure that all students, including students with disabilities, continue receiving excellent education during this difficult time. The Department's Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative

Services (OSERS) have previously issued non-regulatory guidance addressing these issues.*

At the outset, OCR and OSERS must address a serious misunderstanding that has recently circulated within the educational community. As school districts nationwide take necessary steps to protect the health and safety of their students, many are moving to virtual or online education (distance instruction). Some educators, however, have been reluctant to provide any distance instruction because they believe that federal disability law presents insurmountable barriers to remote education. This is simply not true. We remind schools they should not opt to close or decline to provide distance instruction, at the expense of students, to address matters pertaining to services for students with disabilities. Rather, school systems must make local decisions that take into consideration the health, safety, and well-being of all their students and staff.

To be clear: ensuring compliance with the Individuals with Disabilities Education Act (IDEA),†

* See Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students (March 16, 2020); OCR Short Webinar on Online Education and Website Accessibility Webinar (Length: 00:07:08) (March 16, 2020); Questions and Answers on Providing Services to Children with Disabilities During the COVID-19 Outbreak (March 12, 2020); Fact Sheet: Impact of COVID-19 on Assessments and Accountability under the Elementary and Secondary Education Act (March 12, 2020); and Letter to Education Leaders on Preventing and Addressing potential discrimination associated with COVID-19

† References to IDEA in this document include both Part B and Part C.

Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction.

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 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.

The Department encourages parents, educators, and administrators to collaborate creatively to continue to meet the needs of students with disabilities. Consider practices such as distance instruction, teletherapy and tele-intervention, meetings held on digital platforms, online options for data tracking, and documentation. In addition, there are low-tech strategies that can provide for an exchange of curriculum-based resources, instructional packets, projects, and written assignments.

The Department understands that, during this declared national emergency, there may be additional questions about meeting the requirements of federal civil rights law; where we can offer flexibility, we will. OSERS has provided the attached list with information on those IDEA timeframes that may be extended.

OSERS' technical assistance centers are ready to address your questions regarding the IDEA and best practices and alternate models for providing special education and related services, including through distance instruction. For questions pertaining to Part C of IDEA, states should contact the Early Childhood Technical Assistance Center (ECTA) at ectacenter.org. For Part B of IDEA, states should contact the

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National Center for Systemic Improvement (NCSI) at ncsi.wested.org.

If you have questions for OCR, want additional information or technical assistance, or believe that a school is violating federal civil rights law, you may reach out through email at OCRWebAccessTA@ed.gov, call your regional office (<https://ocrcas.ed.gov/contact-ocr>), or visit the website of the Department of Education's OCR at www.ed.gov/ocr. You may contact OCR at (800) 421-3481 (TDD: 800-877-8339), at ocr@ed.gov, or contact OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at OPEN@ed.gov. You may also fill out a complaint form online at www.ed.gov/ocr/complaintintro.html.

Additional information specific to the COVID-19 pandemic may be found online at <https://www.ed.gov/coronavirus>.

IDEA Timelines

As a general principle, during this unprecedented national emergency, public agencies are encouraged to work with parents to reach mutually agreeable extensions of time, as appropriate.

Part B of IDEA

State Complaints

Absent agreement by the parties, a state may be able to extend the 60-day timeline for complaint resolution

if exceptional circumstances exist with respect to a particular complaint. 34 C.F.R. § 300.152(b)(1). Although the Department has previously advised that unavailability of staff is not an exceptional circumstance that would warrant an extension of the 60-day complaint resolution timeline, the COVID-19 pandemic could be deemed an exceptional circumstance if a large number of SEA staff are unavailable or absent for an extended period of time.

Due Process Hearings

When a parent files a due process complaint, the LEA must convene a resolution meeting within 15 days of receiving notice of the parent's complaint, unless the parties agree in writing to waive the meeting or to use mediation. 34 C.F.R. § 300.510(a). While the IDEA specifically mentions circumstances in which the 30-day resolution period can be adjusted in 34 C.F.R. § 300.510(c), it does not prevent the parties from mutually agreeing to extend the timeline because of unavoidable delays caused by the COVID-19 pandemic.

Additionally, although a hearing decision must be issued and mailed to the parties 45 days after the expiration of the 30-day resolution period or an adjusted resolution period, a hearing officer may grant a specific extension of time at the request of either party to the hearing. 34 C.F.R. § 300.515(a) and (c).

Individualized Education Programs (IEPs)

If a child has been found eligible to receive services under the IDEA, the IEP Team must meet and develop an initial IEP within 30 days of a determination that the child needs special education and related services. 34 C.F.R. § 300.323(c)(1).

IEPs also must be reviewed annually. 34 C.F.R. §300.324(b)(1). However, parents and an IEP Team may agree to conduct IEP meetings through alternate means, including videoconferencing or conference telephone calls. 34 C.F.R. §300.328. Again, we encourage school teams and parents to work collaboratively and creatively to meet IEP timeline requirements.

Most importantly, in making changes to a child's IEP after the annual IEP Team meeting, because of the COVID-19 pandemic, the parent of a child with a disability and the public agency may agree to not convene an IEP Team meeting for the purposes of making those changes, and instead develop a written document to amend or modify the child's current IEP. 34 C.F.R. §300.324(a)(4)(i).

Initial Eligibility Determination

An initial evaluation must be conducted within 60 days of receiving parental consent under IDEA, or within the state-established timeline within which the evaluation must be conducted. 34 C.F.R. § 300.301(c). Once the evaluation is completed, IDEA does not contain an explicit timeline for making the eligibility

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determination but does require that the IEP be developed in accordance with 34 C.F.R. §§ 300.320-300.324 (34 C.F.R. § 300.306(c)(2)).

Reevaluations

A reevaluation of each child with a disability must be conducted at least every three years, unless the parents and the public agency agree that a reevaluation is unnecessary 34 C.F.R. § 300.303(b)(2). However, when appropriate, any reevaluation may be conducted through a review of existing evaluation data, and this review may occur without a meeting and without obtaining parental consent, unless it is determined that additional assessments are needed. 34 C.F.R. §300.305(a).

Part C of IDEA

State Complaints

Under 303.433(b)(1)(i), the lead agency's state Complaint procedures permit an extension of the 60 day timeline for a written decision if "exceptional circumstances exist with respect to a particular complaint" or the parent or organization and the agency or early intervention services (EIS) provider agree to extend the time for engaging in mediation.

Due Process Hearings

A state may choose to adopt Part B procedures for Due Process resolution under 34 C.F.R. §§303.440 – 303.449

or Part C procedures under 34 C.F.R. §§303.435 – 303.438. Conditions for extending the applicable timelines are similar under both sets of procedures.

Under 34 C.F.R. §303.447(c), the hearing or review officer may grant specific extensions of the Due Process timeline at the request of either party. Under 34 C.F.R. §303.447(d), each hearing and each review involving oral argument must be conducted at a time and place that is reasonably convenient to the parents and child involved.

Section 303.437 (a) and (c) provides similar language regarding scheduling a hearing at a time and place convenient to the parents and hearing officers granting extensions at the request of either party.

Initial eligibility/Individual Family Service Plan (IFSP)

Under 34 C.F.R. §303.310, the initial evaluation and assessments of child and family, as well as the initial IFSP meeting, must be completed within 45 days of the lead agency receiving the referral. However, under 34 C.F.R. §303.310(a), the 45-day timeline does not apply if the family is unavailable due to “exceptional family circumstances that are documented” in the child’s early intervention (EI) records.

The Department has previously provided guidance to states indicating that weather or natural disasters may constitute “exceptional family circumstances.”

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The COVID-19 pandemic could be considered an “exceptional family circumstance.”

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[SEAL]

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 07208-2021

AGENCY DKT. NO. 2022-33242

T.D. ON BEHALF OF N.D.,

Petitioner,

v.

**AUDUBON PUBLIC
SCHOOL DISTRICT**

BOARD OF EDUCATION,

Respondent.

Keri Avellini Donohue, Esq., for petitioner,
and **Sung Eun Lim**, Esq., on the opposition brief,
(Brain Injury Rights Group, Ltd, attorneys)

William C. Morlok, Esq. for respondent, and
Kaitlin McCaffrey, Esq., appearing at oral
argument (Parker McCay P.A., attorneys)

Record closed:
October 21, 2021

Decided:
October 27, 2021

BEFORE **ELAINE B. FRICK**, ALJ:

STATEMENT OF THE CASE

Petitioner, a parent on behalf of their minor child/student, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA). Respondent, Audubon Public School District Board of Education (the District), seeks to dismiss the petition, due to petitioner's failure to respond and comply with participation in a resolution session or mediation session within the mandated thirty-day time frame. Petitioner opposes the motion.

PROCEDURAL HISTORY

Petitioner's due process request was submitted by petitioner's counsel on July 26, 2021, to the New Jersey Department of Education, Office of Special Education Programs (OSEP). The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 25, 2021, to be heard as a contested matter. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. Respondent submitted its answer to the petition on September 7, 2021, with a motion for summary decision, seeking to dismiss the petition. Respondent requested that a settlement conference at the OAL be held in abeyance until the outcome of the motion. The matter was assigned to me and scheduled for a telephonic conference on September 28, 2021.

Petitioner's counsel, Sung Eun Lim, submitted opposition to the Board of Education's (BOE's) motion on September 28, 2021, prior to the telephonic conference. The telephone conference was conducted with counsel

for the parties, Sung Eun Lim, and William C. Morlok. During the conference, Mr. Morlok indicated he would not be filing a reply to petitioner's opposition to the District's motion. Oral argument on the motion was scheduled for October 21, 2021, at 9:30 a.m., via Zoom, which both attorneys confirmed was an available date for them.¹ Hearing dates were agreed upon during the telephonic conference and scheduled in the future, in the event the motion would be denied.

Mr. Morlock submitted a confirming email on September 28, 2021, to my judicial assistant and to opposing counsel, confirming the date and time for the Zoom oral argument on the summary decision motion, and that he would not be filing a reply to petitioner's opposition. He also confirmed the hearing dates that were scheduled during the telephonic conference.

On September 29, 2021, Keri Avellini Donohue forwarded an email to the OAL, noting she was now attorney of record on behalf of petitioner, from the same law firm as Ms. Lim. My judicial assistant forwarded confirmation to all counsel on September 29, 2021, via email, that Ms. Donohue's letter of representation had been received at the OAL and stated that a copy of the OAL notices for the scheduled oral argument and the hearing dates were attached to the email.

On October 12, 2021, a Zoom connection link was sent via email from the OAL to the parties, regarding the oral argument scheduled for October 21, 2021, at

¹ In person proceedings continue to be suspended at the OAL due to the COVID-19 pandemic.

9:30 a.m. That email was addressed to Ms. Lim, and to respondent's counsel, Mr. Morlock.

On October 21, 2021, at 9:30 a.m., petitioner's counsel failed to connect in at the appointed point for the oral argument. Kaitlin McCaffrey, counsel from respondent's law firm, was present to argue the motion, standing in for Mr. Morlok. At my request, Ms. McCaffrey sent an email to Ms. Donohue, advising her that we were awaiting her appearance for the Zoom oral argument. Ms. Donohue responded via email that she was unaware the matter was scheduled for oral argument and wanted to request an adjournment of the proceeding. At my request, Ms. McCaffrey sent a reply email to Ms. Donohue, directing her to connect to the Zoom proceeding.

Ms. Donohue connected to the Zoom proceeding via phone only, indicating that her video did not connect. She stated that the oral argument date was not put on the law firm's calendar. She denied having received the email from my judicial assistant, of September 29, 2021, confirming that Ms. Donohue was now counsel of record, which had attached to that email the OAL notices of the oral argument and hearing dates. Ms. Donohue had not received the link for the Zoom proceeding directly, and had to get it from former counsel of record, Ms. Lim, from her law firm. Ms. Donohue's request to adjourn the oral argument was denied. She requested to be heard later in the day, which was granted. The matter was rescheduled to be heard at 11:00 a.m.

At 11:00 a.m., Ms. Donohue and Ms. McCaffrey were present for the Zoom oral argument, both by audio and video transmission. Oral argument was heard, and the record closed on October 21, 2021.

FACTUAL DISCUSSION AND FINDINGS

The following facts, pertinent to this motion, are undisputed and thus I **FIND** as **FACTS** the following:

Petitioner, T.D., is the parent of N.D., who is a minor child and special education student enrolled in the Audubon School District. On July 16, 2021, petitioner's counsel sent a letter to the District, regarding N.D. The letter was forwarded by the District to its counsel, Mr. Morlok. He sent email correspondence to petitioner's counsel on July 21, 2021, posing questions to petitioner's counsel about information contained in the letter regarding N.D. (Brief by Morlok, Ex B, pages 4-6.) Petitioner's counsel did not respond to Mr. Morlok's email.

On July 26, 2021, petitioner's due process request was received at OSEP.

Mr. Morlok sent a follow up email on August 2, 2021, to petitioner's counsel, inquiring again about information contained in her July 16, 2021, letter regarding N.D. (Brief by Morlok, Ex B, page 3.) Having not received a response, Mr. Morlok sent another email to petitioner's counsel on August 4, 2021, forwarding the same email thread, indicating "Hello, I am writing to follow up on the below." (Brief by Morlok, Ex B, page 3.)

On August 5, 2021, the District's answer to the petition was submitted to OSEP with a copy sent to petitioner's counsel.

On August 9, 2021, having still not received a response from petitioner's counsel, Mr. Morlok sent another email, forwarding the same email thread to petitioner's counsel, indicating, "Hello, I am writing again to follow up on the below, especially as to the requested IEEs. Thank you, Bill." (Brief by Morlok, Ex B, page 2.)

On August 10, 2021, at 12:28 p.m., a representative from the Office of Special Education Policy and Dispute Resolution (SPDR) sent an email to the parties, confirming receipt of the due process request on July 26, 2021, and indicating that the thirty-day resolution period would expire on August 25, 2021. (Brief by Morlok, Ex C, page 3-4.) The email provided information regarding N.J.A.C. 2.7(h), highlighting the time frame for completing the resolution meeting, and indicating that SPDR would convene a mediation session, in lieu of the resolution meeting, at the mutual request of the parties.

On August 10, 2021, at 12:34 p.m., Mr. Morlok sent an email to Ms. Lim, forwarding the thread of email inquiries he previously sent to counsel going back to his first email to counsel of July 21, 2021. (Brief by Morlok, Ex B, pages 1-2.) He asked her to review the information within the emails and respond to him. (Brief by Morlok, Ex B, page 1.)

On August 16, 2021, at 9:44 a.m., Mr. Morlok sent another email to Ms. Lim, again forwarding the thread

of email inquiries he previously sent to counsel, going back to his first email of July 21, 2021, contacting petitioner's counsel regarding her letter of July 16, 2021. (Brief by Morlok, Ex B, page 1.) Mr. Morlok made more detailed inquiries to Ms. Lim regarding her initial letter concerning petitioner's requested evaluations. He requested a response. (Brief by Morlok, Ex B, page 1.)

On August 16, 2021, at 10:23 a.m., Mr. Morlok forwarded to petitioner's counsel, via email, the SPDR's notification email of August 10, 2021, asking if Ms. Lim was available for mediation on September 10, 2021, "in the AM or PM[.]" (Brief by Morlok, Ex A, page 1.)

On August 17, 2021, at 4:06 p.m., Mr. Morlok responded to the August 10, 2021, notification email from SPDR, indicating he had emailed petitioner's counsel approximately five times to discuss evaluations and mediation and had not heard a response. He noted "For the record, Respondents [sic] demand a Resolution Session or mediation. If neither occur I request the opportunity to file a motion prior to transmittal." (Brief by Morlok, Ex C, page 3.) His email was copied to Ms. Lim via email.

On August 17, 2021, at 5:39 p.m., Ms. Lim responded to Mr. Morlok's email of 4:06 p.m., copying the SPDR representative, requesting information about proposed evaluators and the nature of the proposed evaluations, and requesting that emails between counsel should not be sent to a hearing officer or state agency unless the agency specifically requested same. (Brief by Morlok, Ex C, page 2.) Ms. Lim also noted,

“Please be advised that if we find that no independent provider will accept the DOE rate, Parents may request a hearing for an Order to conduct IEEs.” (Attachments to petitioner’s brief.)

On August 18, 2021, at 7:05 a.m., the SPDR representative responded to Ms. Lim’s email sent the day prior, August 17, 2021, at 5:39 p.m. (Brief by Morlok, Ex C, page 1-2.) The representative advised Ms. Lim of the thirty-day resolution period from the date petitioner filed their request for due process. The email further stated, “Please advise whether your client wishes to participate in a resolution meeting with the district or a mediation with the district and as state monitor. Additionally, please provide your availability for the same.” (Brief by Morlok, Ex C, page 2.)

Ms. Lim responded to the SPDR representative two days later, on August 20, 2021, at 2:59 p.m., stating “Good afternoon. Parent is willing to participate in mediation. She is available early October.” (Brief by Morlok, Ex C, page 1.) Mr. Morlok responded to that email within minutes, at 3:07 p.m., indicating “The District demands a resolution session prior to the expiration of the 30-day resolution period on August 25, 2021.” (Brief by Morlok, Ex C, page 1.)

On August 25, 2021, at 10:36 a.m., the parties were notified via email by OSEP that the file was being transmitted to the OAL, and to advise a representative at the OAL whether they wished to proceed with an agreed upon date and time for a settlement conference at the OAL. (Attachments to petitioner’s brief.) At 1:34

p.m. on August 25, 2021, Ms. Lim sent an email to the OAL representative, with a copy to Mr. Morlok, forwarding the OSEP email of August 25, 2021, stating “Good afternoon. Parent and counsel are not available on the proposed date. Would you please allow us to re-schedule for a date in mid to late September?” (Attachments to petitioner’s brief.) Presumably, Ms. Lim was referring to the September 10 date offered by Mr. Morlok, in his August 10, 2021, email to Ms. Lim.

On September 7, 2021, at 8:23 a.m., Ms. Lim responded to the OSEP email of August 25, 2021, stating “Good morning. Parent and Parent’s attorney are available on 10/28.” (Brief by Morlok, Ex D, page 1.) At 4:49 p.m. on September 7, 2021, Mr. Morlok submitted this motion for summary decision, and requested that the motion be assigned to an ALJ for determination, and requested the delay of scheduling an OAL settlement conference, since the decision on the motion could result in the matter being dismissed. (Attachments to petitioner’s brief.)

Ms. Lim replied three days thereafter, on September 10, 2021, to Mr. Morlok, with copies to OSEP and the OAL representative stating:

As you know, We [sic] have communicated and contacted in our effort to find mutually-agreed upon dates. As you can see in the attached emails, we have offered dates. We have not ignored the school district attorney’s outreach. September is full of religious holidays. We are willing to meet for the resolution meeting.

Please offer several dates you are available and we will contact parents.

(Attachment to petitioner's brief.)

Arguments of the parties

Respondent BOE contends that the matter should be dismissed. Petitioner was required to communicate their willingness to participate in the resolution meeting or mediation within the thirty-day time frame. They failed to respond to repeated requests by respondent's counsel. When petitioner's counsel did respond, she did not offer any dates within the thirty-day resolution period. Respondent contends petitioner did not comply with the regulations and their failure to do so shall result in the dismissal of this petition.

Petitioner asserts that although they did not respond within the thirty-day time frame with a proposed date for the resolution meeting or mediation, they were not "ghosting" respondent's counsel. Petitioner contends their desire to cooperate was communicated and they reiterated their willingness to participate in a resolution session after the matter was transmitted to the OAL. Petitioner acknowledges that they requested the date of October 28, 2021, as their first available date.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA) requires both parties in a matter to endeavor

to resolve disputed issues asserted in a due process petition by participating in a resolution conference or mediation before the matter proceeds to a hearing. This is a federal and state law regulation requirement.

The IDEA provides that prior to proceeding to a hearing, the local education agency (LEA) shall convene a meeting with the parents, unless the parent and the LEA agree in writing to waive the meeting. 20 U.S.C. §1415(f)(1)(B)(i). This is echoed in the federal regulations, which indicate that the LEA must convene the meeting with the parent within fifteen days of receiving notice of the parent's due process complaint unless the parties have waived participation in same in writing. 34 C.F.R. §300.510(a). If the matter is not resolved within thirty days of receipt of the due process complaint, then the matter can proceed to a due process hearing. 20 U.S.C. § 1415(f)(1)(B)(ii).

The New Jersey regulations specify that when a parent requests a due process hearing, the district BOE shall have an opportunity to resolve the matter before proceeding to a due process hearing in a resolution meeting. N.J.A.C. 6A:14-2.7(h). The resolution meeting can only be waived by mutual agreement of the parties, in writing. N.J.A.C. 6A:14-2.7(h)9. If the matter is not resolved within thirty days, then the petition shall be transmitted to the OAL for a hearing. N.J.A.C. 6A:14-2.7(h)4.

If the parent does not cooperate with the BOE's efforts to schedule the resolution meeting or participate in mediation within the appointed thirty-day time

frame, the district is entitled to assert its right to seek dismissal. 34 C.F.R. §300.510(b)(4). If the BOE has demonstrated that it made reasonable efforts to secure the cooperation of the parents to participate in the resolution process, and the parents failed to do so, the BOE's request to dismiss the due process petition should be granted. See, 34 C.F.R. § 300.510(b)(4); S.Z. and J.Z. o/b/o G.Z. v. School District of the Chathams BOE, EDS 08680-16, Final Decision, (July 15, 2016); and J.C. and S.C. o/b/o J.C. v. School District of the Chathams BOE, EDS 14176-18, Final Decision, (November 14, 2018).

Here, the regulations mandate that when petitioner submitted the due process petition to OSEP on July 26, 2021, the thirty-day clock begin to tick for the parties to participate in the resolution meeting or mediation through OSEP, unless written mutual waiver of participation was submitted to OSEP. Petitioner failed to respond with proposed dates or to confirm that they would participate in a resolution meeting or mediation prior to August 25, 2021, despite efforts by the district's counsel to schedule same and the SPDR representative reaching out to petitioner's counsel. Petitioner did not provide a mutually signed written waiver of participation in the resolution session or mediation.

The District reached out to petitioner's counsel within three days of having received the July 16, 2021, letter. Petitioner's counsel never responded, and instead forwarded the due process petition to DOE on July 26, 2021. The District continued to reach out to

petitioner's counsel, with follow up emails requesting a reply regarding the evaluations sought in the due process petition, and to schedule the resolution meeting within the mandated time frame. The SPDR representative also sent communication to petitioner's counsel on August 10, 2021, and again on August 17, 2021, emphasizing the time frame in which the resolution meeting or mediation was to occur. I **CONCLUDE** petitioner was noticed and aware of the mandated time requirements to participate in resolution process. I **CONCLUDE** that petitioner was obligated to participate in the process.

Petitioner's counsel never responded to any of the District's seven email inquiries from July 21, 2021, through August 17, 2021, until late in the day on August 17, 2021. That response by petitioner's counsel did not even address the issue of a resolution session or mediation or offer a date for same. It did include reference to their requested evaluations and that if they could not find independent evaluators who would accept the DOE's rates, the parents may request a hearing. Petitioner's next email communication was on August 20, 2021, in response to the SPDR representative's email from two days prior. It was a curt response that the parent was willing to participate in mediation and was available in early October. Within a few minutes, Mr. Morlok responded, reiterating the District's request to conduct a resolution session or mediation before August 25, 2021. Petitioner's counsel never responded.

Five days later, on the deadline date of August 25, 2021, petitioner's counsel finally responded that the parents were not available on the proposed date, presumably referring to the date which had been offered in the District's email of August 10, 2021. Petitioner suggested a date in mid to late September. On September 7, 2021, petitioner's counsel finally responded to the SPDR's August 25, 2021, email, stating that petitioner and counsel were available for mediation on October 28, 2021. Such responses are not reflective of a sincere desire to comply with the regulations and came after the thirty days had expired. The petitioner's communications do not represent reasonable and cooperative steps to meaningfully engage in the mandated resolution process. The responses by petitioner's counsel, after the petition was transmitted to the OAL, were too little, too late. I **CONCLUDE** that petitioner failed to respond in a timely or meaningful manner, in accord with the mandates of the federal and state regulations. I **CONCLUDE** that the petition shall be **DISMISSED**, without prejudice, for petitioner's failure to comply with the requirement that they must cooperate in the scheduling of a resolution meeting or mediation session, within the thirty-day time frame. I thus **CONCLUDE** that the District's motion for summary decision to dismiss the due process petition is **GRANTED**, but done so without prejudice.

ORDER

It is **ORDERED** that petitioner's due process petition shall be **DISMISSED**, without prejudice, for

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failure to comply with the requirement that petitioner cooperate in the scheduling of a resolution meeting or mediation session in a timely manner.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

October 27, 2021 /s/ Elaine B. Frick
DATE ELAINE B FRICK, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

EBF/tat

APPENDIX OF SUBMISSIONS

Respondent's September 7, 2021, submission:

Notice of Motion for Summary Decision

Brief in Support of Motion for Summary Decision,
with Exhibits A - D

Certification of Service

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Petitioner's September 28, 2021, submission:

Opposition to Respondent's Motion for Summary
Decision, with email attachments
