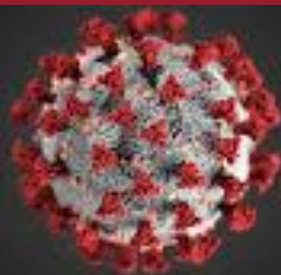


# **ADA IN THE AGE OF COVID-19**



**Michigan Association of School Personnel Administrators**

**October 15, 2020**

**Nancy Mullett  
Jordan Bullinger**

**CLARK HILL**

# WELCOME PARTICIPANTS FROM CLARK HILL AND MASPA!

**Sarah Earnest**

***Assistant Superintendent for Employee Relations, Wyoming Public Schools  
President, MASPA***



# TODAY'S PLAYERS

## SPEAKERS



**Nancy Mullett**



**Jordan M. Bullinger**

## MODERATOR

**Micky Savage**

***Director of Human Resources and Labor Relations, Grand Rapids Public Schools***  
***Secretary, MASPA***

## BUT BEFORE WE START...

- The rules are out the window!
- Update on the changing laws, EOs, MDHHS Rules, Open Meetings Act...



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## **BUT BEFORE WE START...**

- March 10, 2020 the first two positive tests of COVID-19 identified by MDHHS.
- Same day Gov. Whitmer issued Executive Order 2020-4, which declared a state of emergency in Michigan under both the Emergency Management Act and the Emergency Powers of the Governor Act.
- April 30, 2020 Executive Order 2020-67 and 68 were issued declaring a new state of emergency and state of disaster.
- Gov. Whitmer's power under the various Orders were challenged by various groups in State and Federal Courts.

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## **BUT BEFORE WE START...**

- October 2, 2020, the Michigan Supreme Court ruled that the law under which Gov. Whitmer's exercised her power to issue orders was unconstitutional.
- The ruling created confusion around whether or not her orders were still in effect. At the time, Gov. Whitmer's office claimed the orders would remain in effect for 21 days.
- October 5, 2020, Gov. Whitmer asked the MSP to reconsider and delay implementation of ruling for 28 days.
- October 5, 2020, MSP said no – their ruling was effective immediately.

## **In the meantime...**

## BUT BEFORE WE START...

- Michigan Department of Health and Human Services started issuing its own emergency orders, mirroring Gov. Whitmer's previous executive orders.
- October 5, 2020, MDHHS issued "Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order." This Order, mirrored many aspects of the Governor's executive orders with respect to limits on gatherings, social distancing requirements, penalties for violations of the Order, and the requiring of "face coverings" while in businesses, government offices, schools, and other public operations.
- On October 6, 2020, MDHHS issued "Reporting of Confirmed and Probable Cases of COVID-19 at Schools" (Order). This Order was effective October 12, 2020, and mandates that school districts report positive COVID-19 tests among its students, teachers, staff members, coaches, volunteers, or any other person present on school property.

## BUT BEFORE WE START...

- The October 6<sup>th</sup> Order states that within 24 hours of being notified by a local health department, the school must provide public notice that someone associated with the school or that was present on school property tested positive for COVID-19. This notice must be highly visible on the school website. The notice must also include which specific buildings/locations are potentially impacted.
- October 9, 2020, MDHHS issued "Gathering Prohibition and Face Covering Order" (Face Covering Order). The Face Covering Order, effective immediately, clarifies that face covering must continue to be worn in the classroom and during the participation of athletics, except if swimming or when consistently maintaining six feet of social distance.

## BUT BEFORE WE START...

- The Face Covering Order requires that all staff and students **5 years and older** wear face coverings while in the classroom and indoor settings. The Face Covering Order encourages, but does not require, face coverings for children 2 years and older in classroom and indoor settings.
- May impact some Districts Preparedness Plans.
- Left out in the cold is any mention of how a public body should conduct open meetings.
- The MSC ruling nullifies any legal basis for continuing virtual meetings.
- Also raises questions about the validity of any action taken since April 30, 2020.
- Legislature is furiously at work drafting legislation .... Legislation may even be passed since the day I prepared this presentation and today.

## BUT BEFORE WE START...

- We **EXPECT** the legislature to allow for continuation of virtual meetings
- We **EXPECT** the legislature to provide protection for decisions made by public bodies since April 30, 2020.
- **BUT** its election time and in the fast and furious recent changes no one knows for sure.



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# ADA: BACK TO THE BASICS

CLARK HILL

## QUESTION 1:

**What is the definition of disability and what are the requirements for the interactive process?**



## Q1: DEFINITION OF DISABILITY

- **An employee's condition qualifies as a disability if:**
  - The person has a physical or mental impairment that substantially limits one or more major life activities, or
  - The person has a history of an impairment, or
  - Is regarded as having such an impairment.
- **To qualify under the ADA, an employee must:**
  - Be disabled as defined under the ADA;
  - Be otherwise qualified for the position; and
  - Be able to perform the essential functions of the job, with or without reasonable accommodation; and
  - Be employed by an employer that employs 15 or more employees (or under state law, one or more).

## Q1: INTERACTIVE PROCESS

- The ADA requires covered employers to provide (effective), reasonable accommodations for employees with disabilities.
- To help determine a reasonable accommodation employers use an “interactive process,” which simply means that employers and employees with disabilities who request accommodations work together to come up with accommodations.
- According to the EEOC, the interactive process is not always required under the ADA. In many instances, the appropriate accommodation is obvious and therefore it is not necessary to go through a step-by-step process.
- For example, if an employee who uses a wheelchair requests that his desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without the need for a formal process.

## Q1: INTERACTIVE PROCESS

- However, ***when an accommodation is not obvious***, an appropriate accommodation is best determined through a flexible, interactive process:
  - 1) Analyze the particular job involved and determine its purpose and essential functions;
  - 2) Make sure you understand the precise job-related limitations imposed by the employee's disability and how those limitations could be overcome with a reasonable accommodation;
  - 3) In consultation with the employee to be accommodated, gather information and identify potential accommodations and how the accommodation would enable the employee to perform the essential functions of the position;
  - 4) Consider the preference of the employee BUT implement the accommodation that is most appropriate for both the employee and the employer.

## Q1: INTERACTIVE PROCESS



- Interactive Process is the heart of ADA.
- For every employee question you receive about COVID in the workplace and its effect on employees assume you will initiate the interactive process.
- Required job modifications, accommodations and workplace rules are changing VIRTUALLY EVERY DAY!
- Conclusions and decisions made today may be different tomorrow.
- Interactive process is your roadmap for protecting the District's liability.
- Mantra should be: recognize the accommodation request; gather information; explore, choose, implement when required, and monitor accommodations.

## QUESTION 2:

**How does the ADA come into play when FMLA runs out?**

**Leave No Leave Behind**

*Could Returning Employees  
Be Entitled to More Leave?*



## Q2: ADA AND FMLA

- Always a concern because despite being separate laws they are often both at play with an employee's condition. Timing is only one issue. In general:
  - Disabilities are typically a chronic condition and typically a permanent condition
  - FMLA serious health condition may be acute and temporary
  - FMLA does not require the interactive process



## Q2: ADA AND FMLA

**WE NEED A CHEAT SHEET!**



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## GENERAL PURPOSE

**ADA:** Prohibits discrimination against disabled individuals

**FMLA:** Provides leave to employees

## WHO IS ELIGIBLE?

**ADA:** Individuals with a qualifying disability

**FMLA:** Employees who have worked for at least 12 months and at least 1250 hours during the previous 12 months at a location within a 75-mile radius of where at least 50 employees work

## WHAT CONDITIONS ARE COVERED?

**ADA:** "Disability" that substantially limits one or more major life activities (or a history or perception of having such a disability)

**FMLA:** "Serious health condition" of employee or certain family members of employee. Birth, adoption and foster care placement of employee's child. Certain types of military-related leave.

## WHAT LEAVE IS REQUIRED?

**ADA:** Leave for employee may be required if it would constitute a reasonable accommodation that doesn't impose undue hardship on the employer. Leave typically must be for a defined period and is unpaid unless employer pays for other similar leaves.

**FMLA:** Up to 12 weeks/year for serious health condition-related leave. Up to 26 weeks/year for certain military-related leave. Leave may be intermittent and is unpaid but the employer can require or the employee can choose to use accrued paid benefits.

## WHAT LEAVE IS REQUIRED AFTER FMLA RUNS OUT?

**ADA:** Employers may have a duty under the ADA to accommodate an employee who is on FMLA leave **with additional time off** beyond FMLA leave and even the employer's normal leave policy, depending on what its terms are.

- Evaluate the request for additional time off. Is it reasonable?
- Will the additional time off assist in getting the employee back to work?
- Is there an end date?
- Employers may have a duty under the ADA to accommodate an employee returning from FMLA by modifying the non-essential functions of the employee's job.

## WHAT ABOUT BENEFITS?

**ADA:** No specifics under the law, other than the prohibition of discrimination based on disability.

**FMLA:** Benefits (other than health insurance) typically don't accrue during leave, but seniority, service and vesting continue. May require use of certain paid leaves depending on type of FMLA leave. Check CBA.

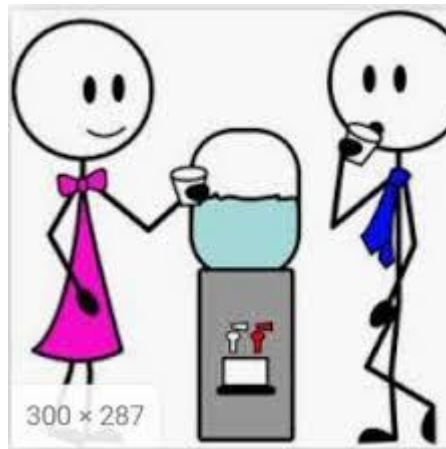
## WHAT ABOUT REINSTATEMENT?

**ADA:** If leave is required as a reasonable accommodation, the employer generally must keep the employee's position open during the leave.

**FMLA:** Generally, employees must be reinstated to the same or a substantially equivalent position.

## QUESTION 3:

**What can I ask an employee?**





## Q3: MEDICAL INQUIRES

### During Employment:

- Can make any medical inquiry as long as it is job related and consistent with business necessity.
  - E.g., if employee asks for time off for medical reasons, you can ask why to make sure that the leave qualifies as a reason for which you would give a leave. You can ask for medical support (per policy).
  - Employer can conduct physical examination if the examination is job-related and consistent with business necessity. (COVID temperature scans and health questions).
  - Such an exam may be job related if there is a question as to whether the employee can perform the essential function of the job or if the employer is testing to meet safety regulations, especially if required.
  - During COVID, employers may ask employees if they are experiencing symptoms such as fever, chills, cough, shortness of breath, or sore throat. The list of symptoms continues to expand.

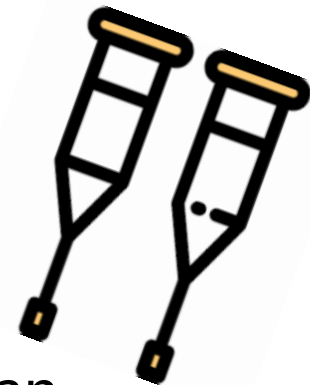
## QUESTION 4:

**Do I have to modify the employee's job duties?**



## Q4: JOB MODIFICATIONS

- Modifying some job duties can be a reasonable accommodation under the ADA.
- But if the modification would eliminate or reallocate an essential function of the employee's job, the requested accommodation is not reasonable under the ADA.
- An employer may have a duty to transfer the employee to another, vacant position.
- **REMEMBER:** Has to be a qualified person with a disability.



# ADA APPLIED TO COVID-19

CLARK HILL

## QUESTION 1:

**Should a doctor's note indicating a teacher has an increased risk of COVID but doesn't say "no work" be considered an ADA request?**



## Q1: IS THIS AN ADA REQUEST?

- The note certainly starts the ball rolling...
- There's no magic to the language needed to request an accommodation.
- The note triggers the need to gather additional information and begin the interactive process.
- May need and ask for more information from BOTH employee and medical provider.
- If an underlying medical condition is exacerbated by COVID-19 and is a disability, an employee is entitled to a reasonable accommodation, absent undue hardship.
- Accommodation is not necessarily a leave of absence.

## QUESTION 2:

If a job may only be performed at the workplace, are there reasonable accommodations, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?



## Q2: WORKING IN PERSON

- Is the condition a disability?
- If not – no accommodation necessary.
- If yes there may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19.
  - Interactive process
  - Low-cost solutions may include changes to the work environment such as designating one-way aisles;
  - Using plexiglass, tables, or other barriers to ensure minimum distances between students and coworkers.
- Temporary job restructuring of ***marginal job duties***, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job.

## QUESTION 3:

**Is working from home a reasonable accommodation under the ADA?**



## Q3: WORKING FROM HOME

- **YES...** it certainly can be a reasonable accommodation. In some cases the request must be granted.
- There are a few concepts that are worth considering:
  - People considered to be at higher risk for severe illness include those aged 65 years and older
  - People of any age who have a serious underlying medical condition that is not well controlled (such as chronic lung disease, asthma, heart conditions, immune deficiencies, cancer, HIV or AIDS, severe obesity, diabetes, kidney disease and liver disease).
  - Higher-risk employees should let the employer know of the potential need for an accommodation.

## Q3: WORKING FROM HOME

- Confirm the need for the accommodation.
- Medical documentation may be requested if the need is not obvious.
- Determine if a disability exists.
- Start the interactive process centering around questions of:
  - How the requested accommodation will impact the performance of essential job functions;
  - Whether another accommodation would better address the issue;
  - How an accommodation would enable the performance of the position's essential functions.
- If the only accommodation for a disability is work from home then ***absent undue hardship*** should grant the request.
- If working from home is not possible still should consider an unpaid leave.

## Q3: WORKING FROM HOME

- Ultimately, these decisions are a balancing test between the requested (or alternative) accommodation and any undue hardship to the employer.
- A fear of returning to work (absent an underlying mental health condition) is not a disability, but if the request is made, the interactive process may be initiated.
- Age is not a disability.
- Immune compromised does not automatically qualify for working for home.
- If the individual does not have a disability and is only seeking to avoid the risk of exposure to COVID-19, then this is not an ADA issue.
- Employees who are also caregivers of individuals with disabilities are not entitled to receive workplace accommodations.

## QUESTION 4:

**Does diabetes type II qualify for EFMLA?**



## Q4: IS DIABETES COVERED?

- No.
- As a review, covered employees must be given up to 12 weeks of leave (first 10 days unpaid but remainder paid) when the employee is unable to work (or telework) in order to care for the employee's minor child whose school or daycare is closed or whose child-care provider is unavailable due to COVID-19.
- Remember: The FFCRA extension of FMLA eligibility is only in effect through December 31, 2020.
- Employee may be entitled to leave under ADA or FMLA...

## QUESTION 5:

**Can third party employer reveal the name of an employee who tests positive for COVID to district? (Whole lot of questions about disclosing identity).**



## Q5: DISCLOSING IDENTITY

- An employer may disclose the name of an employee to a public health agency when it learns that the employee has COVID-19.
- A temporary staffing agency or a contractor that places an employee in an employer's workplace may notify the employer if it learns the employee has COVID-19 and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.
- A supervisor who learns that an employee has COVID-19, or has symptoms associated with the disease may disclose to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.
- ADA confidentiality does not prevent an employee from communicating to his supervisor about a coworker's symptoms.
- District now has reporting requirements as to positive test results but the name is excluded.

## Q5: DISCLOSING IDENTITY



### Analysis regarding disclosure of identity

- Is it the fact that an employee, unnamed, has symptoms of COVID-19 or a diagnosis the important information (notifying workforce or parents)? **or**
- Is it the identity of that employee that is also critical? (contact tracing)?
- Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information?
- Employers should make every effort to limit the number of people who get to know the name of the employee.

## QUESTION 6:

**If a District is using a (hybrid) virtual platform and a teacher has a pre-existing condition, does the District have to give the teacher priority to the online teaching position?**

**What if they are not a good fit for online instruction?**



## Q6: ONLINE TEACHING?

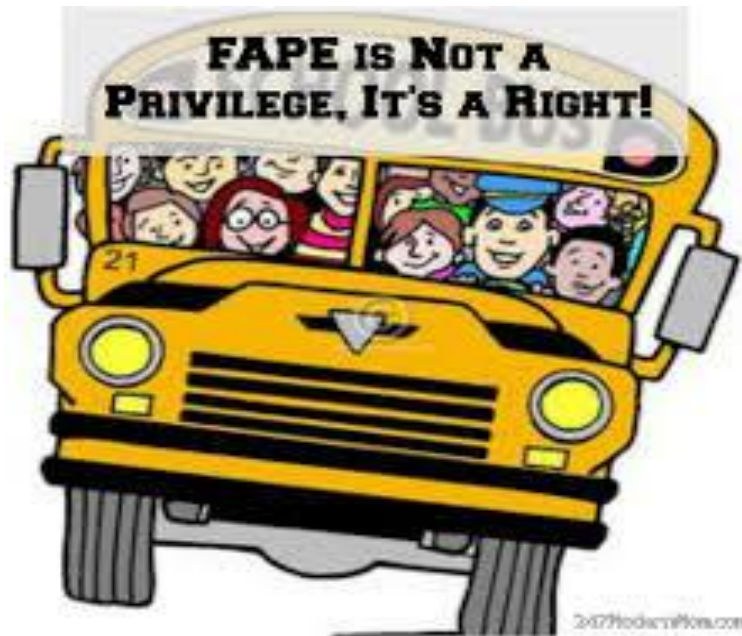
- There is no “priority” rule for determining who fills online teaching positions.
- Instead the District should first determine if the pre-existing condition is a disability. (Gather information - make reasonable medical inquiries).
- If the pre-existing condition IS a disability start the interactive process.
- The interactive process should be well documented and, if the employee cannot be accommodated without an unreasonable hardship to the employer, that employee would not be entitled to the accommodation.
- An unreasonable hardship could be created if, for example:
  - The employee does not possess proper certification;
  - The employee does not have access to the technology at home and refuses (or can't, due to the disability) to come to school.
- Simply using generic terms like “not a good fit” is not recommended, unless there is documentation in the personnel file to support the decision.

# **ADA, IDEA, SECTION 504 AND STUDENT SERVICES**

CLARK HILL

## QUESTION 1:

**Are we still required to provide FAPE during COVID-19? And if so, how do we provide FAPE during a global pandemic?**



# Q1: PROVISION OF FAPE DURING COVID-19

- IDEA was not written for:
  - A pandemic;
  - Extended school closures; or
  - An attempt to return to school while trying to mitigate illnesses
- There is no one right way for districts to provide special education and related services during COVID-19.



# Q1: PROVISION OF FAPE DURING COVID-19



100%  
Face to Face  
Learning



Hybrid  
Learning  
*w/Rotating  
Schedules:  
Face to Face +*



Sporadic,  
Short-Term  
Closures  
*w/Shifts to  
Remote Learning*



100%  
Remote  
Learning

## Q1: PROVISION OF FAPE DURING COVID-19

- No one-size fits all approach to addressing student needs during the pandemic.
- Must provide students with disabilities the same opportunities that provide to nondisabled students.
- Federal law mandates that all eligible students have a right to FAPE even in times of crisis.
- IDEA and Section 504 should not be used as a per se rule to deny virtual and/or online/remote learning.
- As stated in USDOE March 21, 2020 guidance, the provision of FAPE may include, as appropriate, special education and related services provided through specially designed instruction that is provided in person, virtually, online, telephonically, and/or in a combination.

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## Q1: PROVISION OF FAPE DURING COVID-19

- COVID-19 has not changed or altered the IEP Team's obligation to put FAPE on the table.
- Decisions about the nature and extent of IEP services must be made on individualized basis and is based on the needs of that student.
- IEP Teams must keep the needs of the student front and center and work creatively to consider the student's present level, the effects of his/her disability, his/her disability-related needs and develop an IEP that meets those needs in an appropriate placement regardless of how the services will be delivered.

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## Q1: PROVISION OF FAPE DURING COVID-19

- Don't ignore data from reactive COVID-19 closure.
- Consider:
  - The individual needs of the student;
  - The context and environment in which the student interacts;
  - The student and family's comfort level with and access to technology;
  - The types of services that can be provided;
  - Any alternative ways to meet the students' needs, when necessary; and
  - Level of parent participation/engagement.

## Q1: PROVISION OF FAPE DURING COVID-19

- The IEP is for documenting the IEP Team's offer of FAPE, not the parent's choice, unless those two things are the same.
- Traditional approach vs modified "COVID-19" approach.
- If going to pivot from IEP offer of FAPE, document what services/supports student will receive as part of a contingency learning plan ("CLP").
- CLPs are not mandated by federal or state law.
- Historical reference in guidance from USDOE in response to H1N1, etc.
- Continued use of CLPs to document "pivot" or "alternative plans" is endorsed by MDE.

## QUESTION 2:

**Do we still have to meet special education timelines when the school is virtual?**



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## Q2: CHILD FIND, EVALUATIONS AND TIMELINES

- No flexibility has been afforded regarding child find and evaluation timelines.
- Complete as many portions of the evaluation as possible.
- Use extensions judiciously to avoid potential denial of FAPE issues.
- Document adjustments to assessments because of COVID-19.
  - Be sure to have staff note in evaluation reports the assessments that could not complete and why.
  - Document the assessments that needed to be completed remotely because that was the only mechanism could use whether believe that the results are valid or whether should be considered with caution.

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## **QUESTION 3:**

**What are recovery services?**



**THE COVID SLIDE**

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## Q3: RECOVERY SERVICES

- Not required by IDEA or MARSE
- Not the same as “compensatory education” or “compensatory services.”
- Does not replace the duty to consider and, if necessary provide compensatory services.
- Aligns with IEP but does not supplant offer of FAPE, supplements it.
- Intended to address loss of educational opportunities that occurred due the COVID-19 closure and mandated closure of schools.
- Individualized determination (MDE recommends a modified regression/recoupment analysis).
- Determination made by end of December 2020.
- Documented in the IEP and Notice provided.
- Can be provided during the school day.

## Q3: RECOVERY SERVICES

Compensatory Education	Recovery Services
Results from a state complaint or due process hearing or focused monitoring corrective action, for district identified noncompliance leading to educational loss and a denial of a free appropriate public education (FAPE)	Results from a loss of instructional time due to the COVID-19 pandemic and the additional impact of the instructional loss for an individual student with an individualized education program (IEP)
Remedy to “place children in the position they would have been in but for the violation of the Act.”	Provide additional support to assist the student in meeting IEP goals as well as make progress in the general curriculum.
Provided outside of the normal school day.	Can be provided within the normal school day.
Services are based on the individual needs of the student and should align with the IEP goals and objectives as determined by the district with input from the parent as directed by the MDE OSE or the administrative law judge (ALJ).	Services are based on the individual needs of the student and should align with the IEP goals and objectives as determined by the IEP team, including the parent

## Q3: RECOVERY SERVICES

Compensatory Education	Recovery Services
Must be provided based on the conditions defined by the MDE OSE or the ALJ.	Must be provided within the IEP timeframe or within the school year (including summer).
Support to the student aligns with the IEP, with additional requirements for the district to address the area of identified noncompliance leading to the additional requirement for compensatory education.	Supplemental support to the individual student's identified needs based on the additional impact of the COVID-19 pandemic and aligned with the IEP goals and objectives.
Type, amount, frequency, and duration are determined by the MDE OSE or the ALJ.	Type, amount, frequency, and duration are determined by the IEP team including the parent, and is based on student level data.

## Q3: RECOVERY SERVICES

Compensatory Education	Recovery Services
Timeframe of a state complaint must not exceed one year from the date of filing a request for a state complaint investigation, or two years for a request for a due process hearing.	Timeframe specific to the mandatory school closure due to the COVID-19 pandemic and consistent with Executive Order 2020-65.
Decisions to award compensatory education must be made within 60 days of the filing of a state complaint, or the timeline established because of focused monitoring or by the ALJ as the outcome of a due process hearing decision.	Decisions regarding recovery services due to COVID-19 must be made within the first six months of the 2020-21 school year, including the summer. (December).

# THANK YOU TO OUR FRIENDS AT MASPA

