



Special education continuation concerns

March 23, 2020

Multiple pieces of guidance related to serving students with disabilities have been issued since Governor DeWine announced the closure of Ohio's schools on March 12, 2020.

Federal guidance

On March 12, 2020, U.S. Department of Education issued a [Q&A document](#) that provides answers related to the delivery of special education during the coronavirus outbreak.

On March 16, 2020, the U.S. Department of Education Office for Civil Rights issued a [Fact Sheet](#) on Addressing the Risk of COVID-19 in Schools While Protecting Civil Rights of Students.

On March 21, 2020, the U.S. Department of Education, Office for Civil Rights, and Office of Special Education and Rehabilitative Services issued a [Supplemental Fact Sheet](#).

There have also been at least two public webinars broadcast with U.S. Department of Education officials from OSEP and OCR.¹

Ohio considerations

On March 18, 2020, the Ohio Department of Education released "Considerations for Students with Disabilities during

Ohio's Ordered School Closure.”

Are districts required to provide special education and related services during a school closure caused by the outbreak?

The law does not specifically address this situation. However, if a district determines that it is going to continue instruction by offering alternative learning options, the district must ensure the instruction is provided in a way that does not discriminate against students with disabilities. During the school closure, similar to a snow day or other calamity, a district does not have to provide any special education services if the district is not providing instruction or education to other students. While this may be an unlikely option for many districts, it serves as a reminder that if a district is providing any form of instruction to students, it must do so in a manner that does not discriminate against disabled students. In other words, if a district elects to implement alternative learning options, administrators, intervention specialists and other relevant employees must make sure that students with disabilities on IEPs and 504 plans have equal access to that option in order to provide the student with the required free and appropriate public education.

This position was reemphasized on March 16, 2020, when the U.S. Department of Education issued [guidance](#) to remind educators that schools moving to online learning must comply with civil rights laws, making sure such tools are available to students with disabilities.

Additionally, the U.S. Department of Education Q&A issued March 12, 2020, provides that “IEP teams may, but are not required to, include distance learning plans in a child’s IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the child’s home.”

What does virtual special education look like?

The short answer is that this, like every other decision in special education, will not be a one-size-fits-all approach and must be individualized based on the identified needs of the student. Some services might be deliverable in a small group online format, via a one-to-one Skype session or even an instructional conference call. Some modifications and accommodations, such as extended time for assignments, can be offered remotely. Other services, such as one-to-one tutoring or speech therapy, could be delivered via video or telephone conferencing. However, it may not be possible to virtually deliver some services like “hand-over-hand” assistance, physical prompts and related services like physical or occupational therapy.

What related services on IEPs can be virtually delivered and under what conditions?

ODE, within the “Considerations for Student with Disabilities” issued on March 18, 2020, suggested that districts should make a “good faith effort” to provide SLP, OT and PT services to students “in an online format to the extent practicable.” Each related service provider should make an individualized determination regarding each student’s candidacy for telehealth services. Options may include online and virtual instruction, instructional calls and activities.

For audiologists and SLPs: Licensed audiologists and speech-language pathologists (SLPs) are authorized to provide services to students via telehealth in accordance with the provisions of Chapter 4753-2 of the Ohio Administrative Code. Specific delivery models are specified in the regulations, as well as procedures for the

service provider to assess the student's behavioral, physical and cognitive abilities to participate in services provided via telecommunications.

For physical therapists and occupational therapists: While there are no regulations in place to guide physical therapists like there are for SLPs, Ohio does appear to recognize telehealth communications as a viable way of providing physical therapy and occupational therapy.

Physical therapy: Ohio Administrative Code Section 4755-27-01 defines telehealth as "the use of electronic communications to provide and deliver a host of health-related information and healthcare services, including, but not limited to, physical therapy related information and services, over large and small distances. Telehealth encompasses a variety of healthcare and health promotion activities, including, but not limited to, education, advice, reminders, interventions, and monitoring of interventions." The regulations require that physical therapists or physical therapy assistants who provide physical therapy services via telehealth must hold a valid Ohio license.

Occupational therapy: There is not a section of the Ohio Administrative Code that addresses the provision of occupational therapy services by telehealth. However, the Ohio Occupational Therapy, Physical Therapy and Athletic Trainers Board did issue a statement on telehealth in 2010 that occupational therapy personnel may provide individual client services, including evaluation and intervention, via tele-rehabilitation and, to do so, must be in possession of a valid Ohio license. The board defined telehealth using the definition in the Ohio Administrative Code provision relating to physical therapy.

It is recommended that physical therapists and occupational therapists engage in a process like SLPs to assess the student's behavioral, physical and cognitive abilities to participate in services provided via telecommunications.

What if a district simply cannot provide the appropriate services for a student with a disability?

It is important to remember that this situation is, unfortunately, not business as usual. That means some students with disabilities will not be able to receive the services provided on their IEPs or 504 plans. There is simply no way to replicate all services in a distance or virtual learning environment.

For this reason, districts will need to be aware of the standards for compensatory education. When a student with an IEP or 504 plan does not receive the required services, or when the student misses school for a period time due to closure, U.S. Department of Education Q&A issued March 12, 2020, provides that "the child's IEP/504 team (or appropriate personnel under Section 504) must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost." Services implemented upon returning to normal school operations might include additional tutoring during the school day, sessions before or after school, or an extended year program. During the shutdown, intervention specialists and others should monitor their students' progress closely and identify which students are most likely to need compensatory education and what those services might look like. It is important to emphasize that, like IEP and 504 services generally, these services need to be determined on a case-by-case basis. A district cannot simply have all students on IEPs and 504 plans stay after school for an extra hour after the district reopens. If services are interrupted and the school is unwilling or unable to provide compensatory services themselves, parents can seek an award of services or reimbursement for private services they obtain through administrative and court processes. These awards can be costly for districts, but a proactive approach can minimize that cost.

What information and documentation should we be collecting to address future claims of compensatory education?

The totality of a student's circumstances will be important in the compensatory education calculations to come. Like always in special education, progress monitoring data is going to be critical to have when schools reopen and educators begin to examine the need for compensatory education.

- Know where the student was on March 12, 2020
- Document what the district is able to provide and what it actually provides
- Monitor what is provided to assess whether student skills have been gained, lost or maintained

If a district offers services, but the student/family chooses not to participate, will the school district be required to provide compensatory services?

We do not have a definitive answer for this question. If a district offers virtual services, distance learning or other alternative learning options, and such offer is rejected by the parents, the offer and refusal should be carefully documented in a PR01. It is unknown if the compensatory education services will be a minute-for-minute makeup of services that could not be provided during the school closure. We are hopeful that there will be more guidance forthcoming on what compensatory education will look once school resumes. However, based on the notion that FAPE is very different during this extraordinary time, it is reasonable to think that any compensatory education will focus on the student's individualized needs at the time school resumes, rather than be viewed as a remedy for IEP services that could not be provided when the schools were closed in response to this pandemic.

Will my district need to amend all student IEPs?

Arguably, no. The Director of the Office of Special Education Programs (OSEP) stated in a webinar on March 13, 2020, that "if the move to online or virtual [learning] is part of the school closure recommendation, we are not requiring you to go back into the IEP to address it. This is going to be considered an alternative mode of instructional delivery." On March 21, 2020, OSEP provided additional guidance indicating that changes to a student's IEP necessitated by the COVID-19 closure can be made without convening an IEP team. Guidance from ODE issued on March 18, 2020, states that "[i]f adjustments to specialized services are needed, school personnel should convene the IEP team to review and determine specific services that will be provided during the ordered school building closure period and amend the IEP accordingly." OSEP's guidance suggests first that IEP amendment will not be necessary, but then offers an alternative means to amend an IEP when it is necessary. ODE's guidance could be read to mean that all IEPs must be amended due to the school closure and amended again once schools reopen.

In reading all of this guidance, it is important to keep in mind that these sources of guidance are not changes in the law and that both ODE and U.S. Department of Education recognize that the FAPE school districts are providing is different during this national emergency. It is not practical for districts to convene IEP teams and/or amend IEPs if the sole change is a move to distance learning due to the school closure. That would mean that every single IEP must be amended now and amended again when school resumes. Rather, a reasonable interpretation of the ODE guidance is that it was intended to capture the need to amend an IEP if new goals or services need to be added to the IEP during the school closure and after the development of the initial IEP. In that event, relying on OSEP, the parents and school can develop a written document to amend the IEP without convening the team. If a student regresses, IEP teams will need to consider that regression when making an individualized determination about the need for compensatory services once schools reopen.

What about upcoming IEP and ETR deadlines?

When school districts faced the H1N1 pandemic in 2009, the US DOE issued guidance in which it stated it would not

waive requirements for school districts to evaluate and assess students during school closures. As of yet, the U.S. Department of Education has not specifically waived these requirements for this pandemic either.

The U.S. Department of Education's Supplemental Fact Sheet issued on March 21, 2020, did include two full pages that addressed "IDEA Timelines." For the most part, the Supplemental Fact Sheet reiterated the required timelines (which are well known by special educators) outlined in the federal regulations and noted which could be extended because of an exceptional circumstance or, in the case of a due process hearing, extended by mutual agreement of the parties.

Notably, however, there were not extensions of time provided for (1) the development of an initial IEP following an eligibility determination or (2) the annual review of a student's IEP.

Relief may come in Phase 3 of the Coronavirus Response Act. We know that Secretary DeVos will be able to provide Congress with "recommendations on any additional waivers the secretary believes are necessary to be enacted into law under the Individuals with Disabilities Education Act and the Rehabilitation Act of 1973 to provide limited flexibility to ... local educational agencies to meet the unique needs of students with disabilities during the emergency." Thus, it remains to be seen if the required IEP and ETR timelines will be waived.

Please note that OCR's March 16, 2020, Fact Sheet does provide some ETR relief when it states that "[i]f an evaluation of a student with a disability requires a face-to-face assessment or observation, the evaluation would need to be delayed until school reopens. Evaluations and re-evaluations that do not require face-to-face assessments or observations may take place while schools are closed, so long as a student's parent or legal guardian consents. These same principles apply to similar activities conducted by appropriate personnel for a student with a disability who has a plan developed under Section 504, or who is being evaluated under Section 504." Also, in the case of an ETR, districts may wish to consider if it is possible and appropriate to complete a record review for an ETR.

As for IEP development, under the IDEA, IEP teams are not required to meet face-to-face. Therefore, school districts should evaluate their ability to use teleconferencing and videoconferencing in their efforts to timely complete IEPs. Additionally, it should be remembered that a member of an IEP team is not required to attend a meeting if a district and the parent agree in writing that the person can be excused because the member's area of curriculum or related services is not being modified or discussed. A required team member may also be excused if the parent and the district agree and the team member submits written input into the development of the IEP prior to the meeting. (See 34 CFR 300.)

What are the "best practices" we need to be thinking about to make virtual IEP and ETR meetings successful?

We encourage video conferencing, if that option is available. Those without video conferencing capability can, of course, always hold a telephone conference. In either case, it is important to consider in advance how to do this effectively without hindering parental participation. We recommend at a minimum (1) test driving the technology, (2) having a back-up plan to connect in the event technology fails, (3) making sure to circulate drafts of documents under discussion in advance and in a manner that ensures that confidentiality will be maintained and (4) knowing how you are going to ask to collect signatures.

Does HIPAA's security rule prohibit school personnel from delivering virtual related services, such as OT, PT, SLP and behavioral health services that schools choose to bill back for as Medicaid providers?

In most cases, FERPA is the applicable privacy law in schools, because schools are not HIPAA-covered entities. However, if schools choose to bill for Medicaid services, then they might be subject to HIPAA. HIPAA's Security Rule does have

some limitations on the platforms that can be used to deliver telehealth services. However, during COVID-19 closures, the platforms on which telehealth services can be provided have been relaxed. More specifically, on March 18, 2020, [OCR announced](#) that any non-public technology or application may be used (including cell phone, texting and FaceTime), even if it does not comply with HIPAA.)

The district has a facilitated IEP meeting or mediation with an ODE mediator scheduled. Is that still happening?

ODE has indicated that its facilitators and mediators are still conducting these meetings, but they have been instructed not to conduct them in a face-to-face setting through April 10, 2020.

¹ See [Joint Webinar of NASDE/CASE/CCSSO](#) with OSEP Director Laurie VanderPloeg on March 13, 2020, and [OCR's Short Webinar on Online Education and Website Accessibility](#) on March 16, 2020.

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