



Preparing to serve Ohio's students with disabilities during the 2020-2021 school year

August 17, 2020

On August 14, 2020, the Ohio Department of Education's Office of Exceptional Children (OEC) released an updated Reset and Restart guidance for serving [students with disabilities](#), along with updated [guidelines for telehealth](#). Other special education resources previously released August 7 include considerations for [special education services](#) and a compendium of [special education-specific resources](#) remained unchanged.

Recognizing that the start of school is just a week or two away for many Ohio school districts, we have prepared this Q & A to address key takeaways from these publications, as well as other recent developments in the world of special education.

This publication is designed to aid in interpreting these resources and is not intended to, and indeed should not, replace a full and thorough review of the resources by superintendents and special education professionals.

As Districts move between various learning environments this school year, are IEP teams required to revise and/or amend *all* IEPs to reflect the student's learning environment (e.g., face-to-face, blended, remote)?

When discussing LRE, OEC noted that a student's "least restrictive environment is determined by the student's IEP team and based on the student's unique needs rather than a change in placement due to a district-wide plan." This language comports with the understanding of many special educators that the LRE statement on a student's IEP should reflect what is dictated by what a full IEP team believes provides a FAPE which is reasonable calculated to enable a child to make educational progress, and not by what is available in the coronavirus pandemic. Should an IEP team determine that a student requires remote learning for the

provision of FAPE (e.g., a medically fragile or immunocompromised student), then the student's IEP should be updated to reflect that decision. However, it does not appear IEP teams are required to revise or amend the IEP of every student who is in remote (or blended) learning simply because of a district-wide decision to move to remote (or blended) learning.

OEC's updated guidance also offers some valuable insight on what discussions IEP teams should be having with parents during this ever-changing time. More specifically, OEC stated that the District's "plan could discuss multiple types of scenarios; a traditional (face-to-face) environment, blended learning environment or remote learning environment." OEC stated that all of these provisions "can be written into one IEP," but stopped short of stating that they *must* be, which may provide some flexibility for teams that wish to create "pandemic" or "contingency" plans to cover these provisions/scenarios. In the end, it is clear that these individualized discussions of the "multiple types of scenarios" must take place, must involve the parent(s), and should be documented in some fashion.

How should I begin planning for COVID recovery services?

In its Guidance, OEC clarified that COVID recovery services are distinguishable from compensatory education and extended school year (ESY) services for students with disabilities. OEC stated: "The term recovery services reflects the need of learners to recover from any educational gaps in learning caused by the unexpected school-building closures." OEC further stated that recovery services should be determined on a case-by-case basis; and be based on assessment data, evidence of student need, and available documentation. OEC indicated that when a team has determined that recovery services are necessary because of the coronavirus-related building closure - that should be noted in the "Other Information" section the IEP. Importantly, OEC noted that recovery services do not need to be provided as "minute for minute" replacements for lost services.

IEP teams should develop a plan designed to assess whether IEP students have lost skills and/ or have educational gaps and how to document each step in its plan. For example:

- IEP teams may wish to begin by examining the information available on student progress and available baseline measurements from when school buildings closed and remote learning began.
- IEP teams will most certainly want to review the extent to which the student was able to participate in educational activities and make progress during the closure period.
- Consider whether the student was accessible during the closure, or was there a refusal of the school district's good faith efforts to provide services during the closure period.
- Consider whether the IEP team has data and/or information about whether the student experienced skill loss during the closure.
- If that information is not available, how will the team assess for skill deficits or educational gaps?
- Consider how the IEP team will provide the recovery services on an individualized basis.

My school is not back to full-time in-person learning 5 days a week. Is there any way to mitigate future COVID related recovery services claims?

All of our nation's students have been affected by the coronavirus pandemic, but the effect has been particularly acute for many students with disabilities. In March, the U.S. Department of Education told all school districts that when school resumed *in-person* learning they would have to make "individualized determinations" as to what extent a student might need to make up for any skills lost during school closures.¹ During both continued remote and hybrid/blended learning scenarios, school districts may want to consider how they might prioritize and intensify the in-person learning opportunities for students with disabilities. In the absence of a statewide shelter-at-home order, even in times of remote learning, it appears that school districts can work with local health officials to safely design and provide small, in-person educational services for students whose needs require it. School districts should creatively strategize how they can most effectively intensify the specially designed instruction and related services provided to students with disabilities who currently may not be on track to meet the goals and objectives in their IEPs. Documentation of these efforts will be critical. The hope would be that undertaking such efforts now will mitigate the need for COVID recovery services later.

What do I need to know about telehealth related services, including mental and behavioral health services?

In its telehealth guidelines, ODE provided several clarifying pieces of information about related services and mental and behavioral health services, which include services provided by a speech-language pathologist, occupational therapist, physical therapist, educational audiologist, school psychologist, school nurse or school social worker. As schools reopen, whether remote, in-person, or using a hybrid approach, it is clear that they must consider how to continue to provide the related services and mental and behavioral health services necessary to meet the needs of students.

Several valuable points of clarification have been provided. First, ODE directed that if “the IEP does not already state that services will be provided via telehealth, the IEP should be amended to reflect this” and this may be accomplished through the IEP amendment process or by convening the IEP team. Like other IEP services, if the delivery of telehealth services is the result of a district-wide decision to move to a remote (or blended) plan for *all* students, “it is not necessary to amend each IEP,” but ODE clarified that the “District should document that it informed parents of the change.” Second, ODE clarified that telehealth services count as IEP minutes delivered. Third, ODE identified for school districts several delivery platforms which have been approved as HIPAA compliant. Finally, ODE addressed the confidentiality concerns that many providers have raised about providing telehealth services to a group of students in the same session. More specifically, ODE clarified that “providing services to students in groups via telehealth would not be a violation of FERPA, unless a student’s education records were discussed or viewed.”

Should I worry about the recent special education litigation I am hearing about?

We are beginning to see, and we anticipate that we will continue to see, more special education litigation - particularly as the methods for delivering special education and related services to students continue to fluctuate. On July 28, 2020, a group of over 100 plaintiffs filed a class action complaint² in a New York federal district court challenging the effects of school closures on students with disabilities. The plaintiffs (who each has a pending due process complaint) asserted that their stay put-placements consist of in-person services delivered in the school building, and demanded that all closed schools open for in-person learning for students with disabilities. The plaintiffs also requested vouchers for parents who had to hire help to carry out their student’s IEPs, as well as independent educational evaluations to assess learning losses. The complaint attempted to name every state and local school district in the United States as a defendant. While school districts in Ohio should keep an eye out in the event that they are actually served legal notice of this complaint (and contact their legal counsel if they are), at the moment, the viability of the class action complaint is uncertain. Nevertheless, the specter of additional litigation related to services for students with disabilities is bound to rise as services for students continue to be disrupted by the coronavirus pandemic.

¹ <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>

² *J.T. v. de Blasio*, No. 20 Civ. 5878 (S.D.N.Y. 07/28/20)

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