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

Office of Special Education and Rehabilitative Services

Office for Civil Rights

N/A

March 21, 2020

Related Index Numbers

200.050 Right to FAPE

405.043 FAPE

519. VIRTUAL/CYBER SCHOOLS

Judge / Administrative Officer

N/A

Ruling

In a fact sheet, the Office of Special Education and Rehabilitative Services and the Office for Civil Rights reminded districts seeking ways to deliver instruction during the coronavirus pandemic that efforts to shift school online shouldn't stop due to IDEA or Section 504 worries. The agencies explained that the determination of how FAPE is to be provided "may need to be different in this time of unprecedented national emergency."

Meaning

The IDEA and Section 504 pose no barriers to districts using online or virtual instruction as a result of COVID-19. Instead, where due to the global pandemic and resulting closures of schools there has been an "inevitable delay in providing services ... or making decisions about how to provide services," districts must make an individualized determination about what compensatory education may be needed when normal operations resume.

Case Summary

Addressing a "serious misunderstanding" regarding the delivery of FAPE and the

unprecedented steps districts are taking to manage the impact of COVID-19, OSERS and OCR explained that the IDEA and Section 504 should not impede the use of virtual or online education. The agencies stated that "school systems must make local decisions that take into consideration the health, safety, and well-being of all their students and staff." Previous guidance reported at 76 IDELR 77 and 76 IDELR 78 reminded districts that if they were providing services to students during school closures, the IDEA and Section 504 required that students with disabilities continued to receive FAPE. In this latest fact sheet, OSERS and OCR clarified that compliance with the IDEA, the ADA, and Section 504 "should not prevent any school from offering educational programs through distance instruction." Answering concerns that districts shouldn't provide any distance instruction because the IDEA and Section 504 present barriers to remote education, OSERS and OCR stated "[t]his simply is not true." The agencies noted that some IEP services may be provided safely in person during a school closure. When it's not feasible to do so, however, online options or other modifications may be available. "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 videoconferencing," the agencies wrote. OSERS and OCR further noted that when educational materials are not available in an accessible format, educators can provide "equally effective alternate access" to the curriculum. For example, the agencies explained that an educator might read a document to a student with a visual impairment over the phone. Encouraging collaboration between districts and families, the agencies also advised reaching mutually agreeable extensions of time on state complaints, due process hearings, IEP decisions, eligibility determinations, and reevaluations. "[W]here we can offer flexibility, we will," the agencies wrote.

Full Text

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 straining to address the challenges of this national emergency. We also know that educators and parents are striving to provide a sense of normalcy 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 for 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),** 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 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 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." The COVID-19 pandemic could be considered an "exceptional family circumstance."

*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.

76 IDELR 78

120 LRP 10108

Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students

Office for Civil Rights

N/A

March 16, 2020

Related Index Numbers

200.030 FAPE Generally

405.043 FAPE

265.025 Participants in/Procedures for IEP Meeting

185.015 Evaluation Generally

Judge / Administrative Officer

N/A

Ruling

The Office for Civil Rights advised school officials of their obligation to avoid disability-based discrimination under Section 504 and ADA Title II during coronavirus-related school closures. The agency reminded districts that, for students with IEPs or 504 plans who are required or advised to stay home by public health authorities or school officials for an extended period of time because of COVID-19, provision should be made to maintain education services.

Meaning

If a school district closes schools and does not provide any educational services to the general student population, the district wouldn't be required to provide services to students with disabilities during the same period. Once school resumes after a closure, the school must return to providing special education and related services to students with disabilities in accordance with the student's IEP or 504 plan. If a

district is serving other students, such as through distance learning, it must ensure that students with disabilities continue to receive FAPE. When possible, technology can be used in place of face-to-face meetings or evaluations.

Case Summary

Despite the unique circumstances districts face thanks to coronavirus, or COVID-19, they still have to meet the antidiscrimination provisions of Section 504 and ADA Title II. In updated guidance, OCR reminded school personnel that if a student does not receive services after an extended period of time, the student's IEP or 504 team must make an individualized determination whether and to what extent compensatory services are needed to make up for any skills that may have been lost. Building on guidance reported at 76 IDELR 77, OCR explained that if school is open and serving other students, districts must ensure that students with disabilities continue to receive FAPE. Additionally, the agency emphasized that the IEP team or 504-responsible personnel can be utilized to assist with the effort to determine if some or all of the identified services can be provided through alternate or additional methods. As OCR pointed out, "Accessible technology may afford students, including students with disabilities, an opportunity to have access to high-quality educational instruction during an extended school closure, especially when continuing education must be provided through distance learning." OCR also advised that IEP teams don't have to meet in person while schools are closed, and evaluations and reevaluations that can be done without face-to-face assessments or observations may take place while school facilities are closed with parental consent. Otherwise, the evaluation would need to be delayed until facilities reopen.

Full Text

Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students

The U.S. Department of Education (Department)

has established a working group to provide information and resources to parents, students, teachers, schools, and school personnel related to the possible outbreak of COVID-19 ("coronavirus") in school districts and postsecondary schools. Schools play an important role in disseminating information about and limiting the spread of the coronavirus. In addressing the possible risk of an outbreak of coronavirus in school districts and postsecondary schools, school officials must keep students safe and secure. In doing so, school officials should keep in mind federal civil rights requirements and respond appropriately to allegations of discrimination on the basis of race, color, national origin, sex, or disability. Additional information is available at: www.ed.gov/coronavirus.

Schools and school administrators should use guidance from the Centers for Disease Control and Prevention (CDC) to determine, in close consultation with public health authorities, what actions to take to further reduce the potential risk of coronavirus transmission in schools, and should check the CDC website at "Coronavirus Disease 2019 (COVID-19)" (<https://www.cdc.gov/coronavirus/2019-nCoV/index.html>) periodically for any updated guidance.

Compliance with CDC's recommendations should not create civil rights concerns. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by schools receiving federal financial assistance. Title II of the Americans with Disabilities Act of 1990 (Title II) prohibits disability discrimination by public entities, including schools. Title VI of the Civil Rights Act of 1964 (Title VI) prohibits race, color, and national origin discrimination by schools receiving federal funds.

This document provides information representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented here and is not legally binding. The information in this document is not intended to be a replacement for the careful study of Section 504, Title II, or Title VI and their implementing regulations. Information regarding

these federal civil rights laws and regulations and other important documents can be found at <https://www2.ed.gov/about/offices/list/ocr/index.html>.

School districts and postsecondary schools have significant latitude and authority to take necessary actions to protect the health, safety, and welfare of students and school staff. School officials have discretion to make educational decisions based on local health needs and concerns, and OCR recognizes this decision-making authority. As school leaders respond to evolving conditions related to coronavirus, they should be mindful of the requirements of Section 504, Title II, and Title VI, to ensure that all students are able to study and learn in an environment that is safe and free from discrimination.

Responding to Discrimination in Schools

Bullying or Harassment

Both Section 504 and Title VI require that every postsecondary, secondary, or elementary school that receives federal funds take appropriate action to investigate or otherwise determine what occurred when responding to reports of bullying and harassment of students based on actual or perceived disability, race, color, or national origin. If a school's investigation reveals that bullying or harassment based on actual or perceived disability, race, color, or national origin limited or denied a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school, then the school must take prompt and effective steps reasonably calculated to end the bullying or harassment, and restore access to the educational program. The failure to do so could be a violation of Section 504 or Title VI.

Denial of Access on the Basis of Race, Color, or National Origin

In addressing the possible risk of an outbreak of coronavirus in school districts and postsecondary schools, school officials must keep students safe and secure. At that same time, school officials have an obligation to avoid discrimination on the basis of race, color, or national origin while cooperating with

public health authorities to ensure that individuals are assessed and treated appropriately based on their actual risk status. School officials may not rely on assumptions or stereotypes related to race, color, or national origin in identifying students who may have recently traveled to a country with widespread transmission of coronavirus or who may otherwise be at risk of coronavirus infection. For example, a practice of only inquiring about the recent travel of students or family members of a particular race or national origin, rather than screening students based on recent travel, could raise civil rights concerns. For information that schools can share to protect against any misinformation that might lead to discriminatory behavior, please see the CDC's "Share Facts About COVID-19," [at https://www.cdc.gov/coronavirus/2019-ncov/about/share-facts.html](https://www.cdc.gov/coronavirus/2019-ncov/about/share-facts.html).

Students with Disabilities at Elementary and Secondary Schools

School officials have an obligation to avoid discrimination on the basis of disability under Title II and Section 504, while cooperating with public health authorities to ensure that students with disabilities have access to the school's education program. School officials should acknowledge the expertise and role of public health authorities, as well as parental concerns, to determine whether students should stay home.

If a student who has an individualized education program (IEP) through the Individuals with Disabilities Education Act, or is receiving services under Section 504, is required or advised to stay home by public health authorities or school officials for an extended period of time because of COVID-19, provision should be made to maintain education services. This also applies if the student is absent from school as advised by the student's treating physician, consistent with school policy and documentation requirements. During such absences, if the school is open and serving other students, the school must ensure that the student continues to receive a free appropriate public education (FAPE), consistent with protecting the health and safety of the student and those providing that education to the

student. If feasible, the student's IEP Team, or the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, can be utilized to assist with the effort to determine if some, or all, of the identified services can be provided through alternate or additional methods. Accessible technology may afford students, including students with disabilities, an opportunity to have access to high-quality educational instruction during an extended school closure, especially when continuing education must be provided through distance learning.

If a school district closes its schools and does not provide any educational services to the general student population, then a school would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the school must return to providing special education and related services to students with disabilities in accordance with the student's IEP or, for students entitled to FAPE under Section 504, consistent with any plan developed to meet the requirements of Section 504.

The Department understands that there may be exceptional circumstances that could affect how a particular service is provided. If a student does not receive services after an extended period of time, the student's IEP Team, or appropriate personnel under Section 504, must make an individualized determination whether and to what extent compensatory services are needed consistent with the respective applicable requirements, including to make up for any skills that may have been lost.

Additionally, IEP Teams are not required to meet in person while schools are closed. If 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.

For more information on providing services to students with disabilities during the coronavirus outbreak, see:

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19->

Students with Disabilities at Postsecondary Schools

Officials at postsecondary schools should consult with public health officials in determining how to respond when there are cases of coronavirus in the community. Whatever decisions are made by the school (such as decisions to temporarily suspend classes), schools must continue to comply with their non-discrimination obligations under federal civil rights laws, including Section 504 and Title II.

Resources for Communicating about Coronavirus

Accurate information is an important tool in protecting the civil rights of students while addressing the risk of coronavirus.

- Assistant Secretary Kenneth L. Marcus' letter concerning reports of stereotyping, harassment, and bullying specifically related to coronavirus is available at <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders>

- The Department of Education's Readiness and Emergency Management for Schools (REMS) Technical Assistance Center offers a variety of resources related to infectious disease planning, available at rems.ed.gov/Resources_Hazards_Threats_Biological_Hazards.aspx.

- The CDC's coronavirus general information page can be found at https://www.cdc.gov/coronavirus/2019-ncov/community/index.html?CDC_9-ncov%2Fpreparing-individuals-communities.html.

Effective Communication and Language Assistance: When school officials provide information to students, parents, and the community about any aspect of coronavirus or actions the schools are taking in response to coronavirus, they generally

need to provide meaningful access to such information to English learner students and adults with limited English proficiency. School officials also must ensure equally effective communications with persons with disabilities (such as persons who are deaf, deaf-blind, or blind). Thus, the information and materials must be provided, as appropriate, in alternate formats to facilitate effective communication for individuals with disabilities.

Privacy Concerns: For information about the federal law that protects the confidentiality of students' records maintained by public elementary and secondary schools and institutions of higher education, you may visit the website of the Department of Education's Student Privacy Policy Office (SPPO) which administers the Family Educational Rights and Privacy Act (FERPA), at www.ed.gov/policy/gen/guid/fpco/index.html, contact SPPO at 1-855-249-3072, or submit questions at <https://studentprivacy.ed.gov/contact>.

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If you have questions, need additional information or technical assistance, or believe that a school is violating federal civil rights law, you may visit the website of the Department of Education's OCR at www.ed.gov/ocr, contact OCR at (800) 421-3481 (TDD: 800-877-8339) or 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.