

Special Education Compliance During COVID-19 Closures

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Agenda

Review relevant guidance

Items for Discussion

- Distance learning planning
- IEP implementation
- Nonpublic School Students
- Documentation
- Progress Monitoring
- Compensatory Education
- FERPA/HIPAA Implications
- Timelines
- IEP Progress Reports

Questions



Federal Guidance

- [Q&A on Providing Services to Children with Disabilities During an H1N1 Outbreak – December 2009, Department of Education \(ED\)](#)
- [Q&A on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak – 3/12/20, ED – LINK HERE](#)
- [Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students, 3/16/20, Department of Education Office of Civil Rights \(OCR\) – LINK HERE](#)
- [Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, 3/21/20, OCR – LINK HERE](#)
- [FERPA & Coronavirus Disease 2019 FAQ, March 2020, Student Privacy Policy Office – LINK HERE](#)
- [Notification of Enforcement Discretion for telehealth remote communications during the COVID-19 nationwide public health emergency, March 2020, Office of Civil Rights at Department of Health and Human Services – LINK HERE](#)

H1N1 Guidance

Issued by Office of Special Education and Rehabilitative Services (OSERS) to address questions concerning the provision of special education and related services during extended student absences or school closure due to an H1N1 outbreak

Non-regulatory guidance - Informal guidance; not legally binding

Primarily addresses responsibility for providing services when individual students are absent for extended period of time for medical reasons while schools remain open

- extended absence (“generally more than 10 days”) = *change in placement* = IEP meeting required
- IEP team determines what is appropriate – could include instructional telephone calls, homework packets, Internet-based lessons, and other distance-based learning approaches, to the extent available
- If services are missed, individualized compensatory education determination is required to make up for any skills that may have been lost because the child did not receive FAPE

H1N1 Guidance

Also addresses closure of individual schools (schools for medically fragile students)

- *Guidance does not require IEP meetings or changes in placement in these instances*
- LEA determines what distance learning approaches are appropriate – could include instructional telephone calls, homework packets, internet-based lessons, and other distance-based learning approaches, to the extent available
- If services are missed, individualized compensatory education determination is required to make up for any skills that may have been lost because the child did not receive FAPE

Does not address closure of entire LEA

Use of IDEA Part B Funds

- May be used for activities that directly relate to providing, and ensuring the continuity of, special education and related services to children with disabilities
- May not be used for activities that are not specific to children with disabilities

ED Coronavirus Q&A

Non-regulatory guidance - Informal guidance; not legally binding

Addresses responsibility for providing FAPE during closure of entire LEA

- No educational services to the general student population = not required to provide services to SWD during that same period of time
 - IEP/504 Team required to make an individualized determination as to whether compensatory services are needed when school resumes
- Educational opportunities provided to the general student population = must ensure that SWD have *equal access* to the same opportunities, *including the provision of FAPE*
 - IEPs/504 Plans must be implemented *to the greatest extent possible*
 - No requirement that IEP teams meet (except to determine compensatory education) or that closure constitutes a change in placement

ED Coronavirus Q&A

- Reiterates H1N1 guidance for:
 - Responsibility for providing services when individual students are absent for extended period of time while schools are open
 - Closure of individual schools (schools for medically fragile students)
 - Use of IDEA Part B Funds

OCR Fact Sheet

- Non-regulatory guidance - Not legally binding
- LEAs 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.”
 - BUT, must be mindful of federal civil rights laws (Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act and Title VI of the Civil Rights Act) and avoid discrimination on the basis of race, national origin, disability, etc.
- Addresses Bullying and Denial of Access Based on Race, Color, National Origin

OCR Fact Sheet

Services for SWD

- If SWD must stay home for an extended period of time (not defined) while school is open – must ensure continued provision of FAPE
 - Student’s IEP/504 team (“if feasible”) “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 noted as one method
- If entire LEA is closed – same rules stated by ED apply
 - No services for anyone = no services for SWD
 - Compensatory education determinations must be made
 - Doesn’t address what is required if educational services are provided to general student population

OCR Fact Sheet

IEP Team Meetings

- In person meetings not required when schools are closed

Evaluations

- If an evaluation requires a face-to-face assessment or observation, the evaluation would need to be delayed until school re-opens

OCR Supplemental Fact Sheet

- Seeking to “ensure that all students have *access to meaningful educational opportunities* even under these difficult circumstances.”
- Clarify that schools should not decline to provide any distance learning out of concern that they can’t comply with federal disability laws:

“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.”

OCR Supplemental Fact Sheet

Acknowledge that FAPE will look different:

FAPE must be provided “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.”

FAPE can be provided through distance instruction provided virtually, online, or telephonically.

- “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’s okay if you are not able to provide all services in the same manner they are typically provided.

- “May be unfeasible or unsafe...to provide hands-on physical therapy, occupational therapy, or tactile sign language educational services.”

OCR Supplemental Fact Sheet

You have flexibility

Distance learning must be accessible to students with disabilities, but decisions on methodology are up to the school

Collaboration and creativity encouraged

“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 lowtech strategies that can provide for an exchange of curriculum-based resources, instructional packets, projects, and written assignments.”

Individualized compensatory education determinations must be made when school resumes

OCR acknowledges that there will be “inevitable delay[s] in providing services – or even making decisions about how to provide services”

OCR Supplemental Fact Sheet

Timelines

- Encourage schools to work collaboratively with parents to agree upon extensions of timelines
- IEPs
 - 30 days from eligibility and annually
 - IEP meetings can be held through alternative means such as phone and video conferences
 - Encourage schools and parents to work collaboratively to meet IEP timeline requirements
- Initial Eligibility Determination
 - Evaluations must be completed within 60 days of consent, but no explicit timeline for making eligibility determination
- Reevaluation
 - Must be completed every three years unless parent and LEA agree that reevaluation is unnecessary
 - When appropriate, 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
- State Complaints and Due Process Hearings

FERPA and HIPAA

FERPA FAQ

- Addresses disclosure of information to school community and public health agencies when students contract COVID-19
- Doesn't address FERPA questions related to provision of distance learning services

HIPAA Enforcement

- Office of Civil Rights (OCR) at Department of Health and Human Services (HHS) enforces HIPAA
- HHS OCR will exercise discretion when enforcing HIPAA compliance requirements in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency
 - Providers may use “any non-public facing remote communication product that is available to communicate with patients”
 - “may use popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype, to provide telehealth without risk that OCR might seek to impose a penalty for noncompliance with the HIPAA Rules related to the good faith provision of telehealth during the COVID-19 nationwide public health emergency”
 - “Facebook Live, Twitch, TikTok, and similar video communication applications are public facing, and should not be used in the provision of telehealth by covered health care providers”
- Notice includes list of providers that are HIPAA compliant and who will enter into a business associates agreement

OSSE Guidance – 3/12/20

Informal guidance

LEA must continue to provide FAPE during absences arising from a public health emergency

- BUT, if LEA closes and doesn't provide educational services to any students, not required to provide services to SWD – when school resumes, must make individualized compensatory education determinations
- If the LEA does provide educational services to general student population, must ensure that SWD have *equal access to the same opportunities, including the provision of FAPE*

If SWD has an extended absence from school (more than 10 days) even if school is closed for all students, IEP team must convene to review placement

- *I DISAGREE WITH THIS*

If SWD does not receive services for extended period of time, compensatory education determination must be made

OSSE Guidance FAQ – 3/25/20

Informal guidance

OSSE committed to being “flexible and accommodating where possible” – in the absence of guidance, LEAs should establish policies and procedures consistent with IDEA requirements

No services to anyone = no services to SWD

- Should not decline to provide instruction to all students to avoid provision of special education

If educational opportunities being offered to all, must ensure access for SWD

- FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically
- FAPE can be provided through equally effective alternate access to the curriculum or services

OSSE is still suggesting that school closure with provision of distance learning for more than 10 days = change in placement – **I STILL DON'T AGREE**

OSSE Guidance FAQ – 3/25/20

If parent/student refuse to participate in remote services, document attempts to provide and that student was unavailable

- I would suggest going a step further and making efforts to contact that family to determine and troubleshoot barriers to access/participation

Document related services in SEDS – may get a warning that date of service is on a school holiday or other non-working day but continue to document as usual

- If you are having trouble documenting in service trackers, upload a log as a Miscellaneous Document
- Services provided and documented during a school closure will appear in the Related Services Management Report (RSMR) under “School Closure” in the Delivered Services Type field

Consider individualized needs of student when ensuring access to homebound instruction – assistive technology may be needed – OSSE says IEP teams should consider, I think it is sufficient for LEA personnel to make these individualized determinations consistent with the IEP

OSSE Guidance FAQ – 3/25/20

Dedicated Aides should be provided “to the extent practicable”

- make individualized determinations as to what is appropriate; alternative means of providing support such as the provision of remote or virtual supports, services, or instruction are permissible

Timelines

- OSSE offers no specific guidance – encouraged to work with parents to reach mutually agreeable extensions of time as appropriate

Only have to hold an IEP meeting or amend IEP to reflect a change in placement if school is open but SWD is absent for an extended period of time (more than 10 days) due to medical need – **this contradicts what they say earlier in the guidance**

IEP meetings should be held virtually if possible; if not possible should be held as soon as possible after school reopens

OSSE Guidance FAQ – 3/25/20

Overdue evaluations/eligibility/IEPs, etc

- LEA should work expeditiously when school reopens to address overdue items
- Should convene to determine whether compensatory education is owed due to delays

Evaluations

- If they can be conducted virtually, they should be completed in a timely manner
- If the evaluation requires face-to-face assessment or observation, will need to be delayed until school reopens
- Hold virtual meetings wherever possible to adhere to eligibility timelines – if parents refuse or are unable to participate, document in SEDS Communication Log to have evidence of noncompliance due to parental delay
- Complete process as soon as possible when school reopens

OSSE Guidance FAQ – 3/25/20

Nonpublic Schools

- Guidance applies to students in nonpublics – LEA should collaborate with nonpublic school to ensure equal access to educational opportunities, as appropriate
- LEAs may submit a formal request that OSSE continue making tuition payments to a nonpublic special education school for up to thirty (30) calendar days from the date of a student LEA or school closure

Residential Schools

- Doesn't appear that these schools have closed so should be business as usual – reach out to your residential schools to confirm

Nonpublic Placement Process will continue as normal to the extent possible – meetings held virtually

Monitoring – guidance forthcoming

OSSE Guidance Re: Nonpublic Schools – 3/25/20

Nonpublic schools must notify OSSE and LEA of changes in operating status

OSSE expects LEAs and nonpublic schools to collaborate to ensure equal access to educational opportunities, as appropriate

Nonpublic school must submit learning plans to OSSE if nonpublic intends to continue student learning

OSSE will continue tuition payments for up to 30 days regardless of operating status and submission of distance learning plans – LEA must make request

- Additional guidance forthcoming regarding additional tuition payments and reimbursement for related services provided remotely

So Now What?

Priorities

- 1) Making general education distance learning program accessible to SWD
- 2) Determining how to implement IEPs to the greatest extent possible
- 3) Documentation
- 4) Progress Monitoring
- 5) Compensatory Education

IEP Implementation

It is okay if you can't fully implement IEPs – that is not the expectation – make good faith efforts to do the best you can

- Special education
 - Collaboration with teachers
 - Consultation with parents
 - Check-ins with students
 - Direct instruction to students – 1:1, co-teaching, small group, etc.
- Related services
 - Collaboration with teachers
 - Consultation with parents
 - Check-ins with students
 - Direct services when appropriate/possible – 1:1, small group

Some students are not going to be able to access distance learning/remote services as easily as others

Some services just won't work remotely

- Rely on the expertise of your providers to determine what can be appropriately addressed remotely

Nonpublic Students

What about nonpublic students?

- Ultimately, the LEA is responsible for ensuring FAPE
- BUT, non publics should be doing their part if they continue to operate/receive tuition

OSSE will continue to pay tuition for 30 days – LEA should request this if the nonpublic is willing to support with distance learning

OSSE may also continue tuition payments beyond the initial 30 days and may reimburse for related services provided remotely, but waiting on confirmation through additional guidance

Contact each nonpublic to determine what their plans are and work from there...

Do we have to hold IEP meetings/amend IEPs?

Federal guidance does not suggest that distance learning provided in response to a school closure amounts to a change in placement that requires an IEP team meeting/amendment to the IEP:

- placement decisions are individualized – school closures for all students are not
- no choice of any other “placement”
- parent consent not required
- this is not FAPE/LRE in the traditional sense
- parents can’t invoke “stay put” and compel student to return to school
- not practical to suggest that IEP teams must convene and all IEPs must be amended before homebound instruction begins and before students return to school

Federal guidance does suggest that IEP teams must meet once school resumes to make individualized determinations regarding compensatory education

Documentation: PWN

Do we need to issue PWNs?

- May not be required, but could be a best practice to document what is being provided during school closure
- “Other Notice Related to FAPE”
- Suggested language:
 - Proposed action section: PCS is providing the following supports and services during the school’s closure as a result of the COVID-19 pandemic: [describe general ed distance learning program and specific supports/services/accommodations/modifications being provided pursuant to the student’s IEP – the more detail the better]
 - Reason for proposed action section: Due to the COVID-19 pandemic, PCS is closed from [insert applicable dates] and is providing distance learning opportunities to students. The services and supports being provided are designed to ensure access to the general education distance learning program and implementation of the IEP to the greatest extent possible while students are unable to attend school. When school resumes, an individualized determination will be made to determine if the student requires compensatory education due to the school closure.

Documentation: Service Trackers

Tracking Services

- Schools should maintain detailed records of communication with parents/students and services/supports attempted/provided
- Related Services
 - Service trackers should absolutely be maintained in SEDS
 - Log missed services due to school closure in the same way you would for any other school closure and detail reason for closure in the note
 - Log any consultative services provided to parent/student and provide details in the note
 - Log direct services provided remotely and provide details on activities/goals addressed in the note
 - Log attempts to provide consult/direct services
- Use Parent Contact Log in SEDS Too!

Progress Monitoring

Do as much progress monitoring as you can – we will need as much information as possible to determine compensatory education needs when school resumes

Compensatory Education

Too early to tell now what is going to be owed and how best to provide this, but we should start thinking about when we anticipate students will actually return to school

- be creative
- capitalize on the summer(s) if you can
- budget planning
- data collection
 - where student was performing before schools closed
 - where student is performing when school resumes
 - progress monitoring during school closure

Documentation of services provided/attempted is critical

Other things to think about...

- FERPA/HIPAA Issues
- Timelines while schools are closed
- IEP Progress Reports
- Insurance coverage for future special education litigation

Applicability of HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) - medical privacy law that applies to health information created or maintained by health care providers who engage in certain electronic transactions, health plans, and health care clearinghouses.

Family Educational Rights and Privacy Act (FERPA) - governs the confidentiality and parent access to student education records.

HIPAA generally does NOT apply to schools – only applies if the school bills Medicaid electronically for related services provided to students

If school bills Medicaid, HIPAA still does not apply to records that are covered by FERPA

With exception of maybe Medicaid billing records, records related to the provision of related services pursuant to an IEP/504 Plan are subject to FERPA and therefore HIPAA does not apply

FERPA Issues

FERPA protects confidentiality of student education records – personally identifiable information that is maintained by the school

Questions have come up about FERPA implications of providing group instruction/services via video conference – I don't think there is a FERPA issue here as long as teachers/providers are using the same discretion as it relates to confidential student information that they would use in the school setting

- Video has to be “directly related” to the student and has to be maintained by the LEA as part of the student's record

Parent(s) seeing another student participate in a group activity via video conference is not really any different than parent observing their child's classroom (which they have a right to do in DC) or their child telling them who is in their class/small group

Timelines

IEPs

- teams should still be holding initial and annual IEP meetings remotely within required timelines

Initial Evaluations

- if face-to-face assessment or observation is required to complete evaluation, then evaluation will have to be delayed

Reevaluation

- if face-to-face assessment or observation is required to complete evaluation, then evaluation will have to be delayed
- What about relying on AED to complete triennial evaluation?
 - You can, BUT, I don't recommend foregoing formal reevaluations just for the sake of meeting triennial eligibility timelines
 - Remember, if you rely on AED, parent still has an absolute right to request a formal reevaluation and they must be informed of this right in writing (through the PWN)

IEP Progress Reports

3rd Quarter IEP Progress Reports coming due in the middle of school closure – what do we say about progress?

- Comments should be very detailed to document that school was closed for part of the 3rd quarter which resulted in some interruption to work on IEP goals and progress monitoring; AND
- Should include most up to date, detailed information about where the student was progressing when schools closed

Must still complete IEP progress reports

IEP Progress Reports

Possible language for IEP Progress Report comments:

Due to the COVID-19 outbreak, PCS has been closed since March 16, 2020. The last face-to-face assessment of your child's progress towards this goal showed [include detailed information about where student was performing before school closed]. Since that time, PCS has been providing continuous distance learning opportunities for all students and your child has received support and had progress assessed through a variety of ways, including virtual consultation and support from special education staff. During the school closure, your child has received support on this goal and progressed as follows: [include detailed information about how this goal has been addressed during the school closure and what progress (or maintenance of skill) has been made].

Insurance Coverage

Time to think about changing your policies...

Questions

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