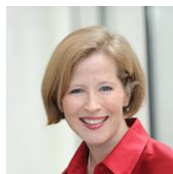


Free and Appropriate Public Education to Students with Disabilities during Social Distancing



By Tara Adams Ragone
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As the COVID-19 pandemic has forced social distancing and self-quarantining, schools have had to wrestle with how they will satisfy their legal obligation to provide special education services to students with disabilities from a distance.

The [Individuals with Disabilities Education Act \(IDEA\)](#) requires schools to provide a free and appropriate public education (FAPE) for eligible students ages 3–21 who are identified as having a disability that adversely affects academic performance and as being in need of special education and related services. [Millions of students each year receive special education and related services](#) under IDEA and other federal and state disability and civil rights laws, including [Section 504 of the Rehabilitation Act](#) and [Title II of the Americans with Disabilities Act](#) (Title II of the ADA).

Many individualized education programs (IEPs) and Section 504 accommodation plans include [in-person assistance](#) for eligible students, such as instructional aides, speech therapy, occupational therapy, physical therapy, or behavioral therapy. Even where services [may be provided via remote technology](#), some students entitled to special education services and, in some cases, the instructional aides who provide those services, [may not have adequate technological resources or training](#) to use those tools.

As a result some states, including [California](#) and [Pennsylvania](#), initially delayed offering distance learning instruction to any students because they were concerned they could not provide equitable instruction to special education students.

[Federal Legal Guidance Post-COVID-19](#)

On March 12, 2020, the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) released a [Question and Answer Document](#) (Q&A)¹ outlining states' responsibilities to children with disabilities, their families, and the staff serving these children during the COVID-19 outbreak.

Question A-1 addresses whether local educational agencies (LEAs) (i.e., school districts) are required to continue to provide a FAPE to students with disabilities during a school closure caused by a COVID-19 outbreak. After noting that the IDEA, Section 504, and Title II of the ADA do not specifically address extended elementary and secondary school closures due to exceptional circumstances, the Q&A offers a two-fold response to a district's responsibilities to students with disabilities if it closes its schools for periods generally longer than ten (10) consecutive days to slow or stop the spread of COVID-19:

- If the LEA does not provide any educational services to the general student population during the extended closure, it is not required to provide services to students with disabilities during the same time period. When school resumes, "the LEA must make every effort to provide special education and related services . . . in accordance with" each child's IEP or Section 504 plan, although the Q&A expresses the Department's understanding that "exceptional circumstances . . . could affect how a particular service is provided." ([See here for a press release from the National Center for Youth Law that maintains that this position is "wrong as a matter of law, and more importantly, deeply harmful to students with disabilities."](#))
- If, however, the LEA continues to provide educational opportunities to the general student population during an extended school closure, as many schools across the country are, then the district "must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE . . ." (citations omitted). The Q&A immediately [seems to qualify this language](#) by stating that state educational agencies (SEAs), LEAs, and schools "must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP . . . [or 504 plan]" (emphasis added and internal citations omitted).

The Q&A directs LEAs during the outbreak "to collaborate with their state educational agency (SEA), Bureau of Indian Education (BIE), or local public health department, as appropriate, to address questions about how, what, and when services should be provided to children with disabilities."

On March 16, 2020, the U.S. Department of Education's Office for Civil Rights (OCR) released a [Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students](#) (OCR Fact Sheet) and [Short Webinar Online Education and Website Accessibility](#) that provided additional guidance to states regarding their legal obligation to comply with non-discrimination obligations under civil rights law including Section 504 and Title II of the ADA by, among other things, facilitating access to distance learning for all students.

In a [Supplemental Fact Sheet issued March 21, 2020](#), OCR and OSERS reiterated, in bold font, that “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.” Indeed, the [Supplemental Fact Sheet expressly recognized that “FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.”](#) In a [press release announcing the Supplemental Fact Sheet](#), Secretary DeVos urged that “[t]his is a time for creativity and an opportunity to pursue as much flexibility as possible so that learning continues. It is a time for all of us to pull together to do what's right for our nation's students.”

Sampling of State Responses to Federal Guidance

Several states have taken steps to exercise the [needed flexibility to provide special education services](#) despite the unavoidable constraints imposed by the public health response to the COVID-19 pandemic.

For example, [New Jersey’s State Board of Education voted in early April 2020](#) to temporarily modify its rules to permit “school districts and educational agencies to deliver special education and related services to students with disabilities through the use of telehealth, telemedicine, electronic communications, remote, virtual, or other online platforms” during the state of emergency. This vote provides schools with some flexibility to provide needed services during social distancing.

Although special education advocates reportedly lobbied for this modification, [they also have warned](#) that it is not always possible to provide certain special education services, such as physical therapy or [occupational therapy](#), safely or effectively via remote tools. [School districts fear](#) that their efforts to provide required services remotely may expose them to lawsuits. Nica Cox, president of the California Association of Resource and Special Educators, is quoted [in a recent article](#) raising similar concerns about the limits of remote services for some students with disabilities:

There’s fear, there’s frustration, there’s disparity. [Educators] just don’t know what to do,” Cox said. “They are compassionate and they’re stepping up. But these are kids with visual impairments, mobility issues, severe cognitive delays, going from having a one-on-one aide at school to being home all day. How does a parent do that? How does a teacher do that online?

As a result, school officials in some states, [including California](#), have [urged the Trump administration](#) to waive federal special education requirements given the pandemic.

The Need for Waivers?

Perhaps in response to these requests, the Coronavirus Aid, Relief, and Economic Security Act or the CARES Act required the Secretary of the U.S. Department of Education to submit a report to Congress within 30 days with recommendations of waivers of legal requirements “the Secretary believes are necessary to be enacted into law to provide limited flexibility to States and local educational agencies to meet the needs of students during the [the COVID-19] emergency”

There has been much anticipation regarding how the U.S. Department of Education would respond to the CARES Act invitation to suggest additional waivers. Advocates arguably had reason to be skeptical of Secretary DeVos’ knowledge of, much less support for, special education rights, given [her dubious testimony](#) concerning special education laws during [her 2017 confirmation hearings](#). [Disability rights advocates feared](#) that waivers might “give schools permission to throw their hands up, potentially putting special education students further behind.” There also was some concern that purportedly temporary waivers would [permanently weaken](#) disability and civil rights laws.

Some [advocates further worried](#) that families might waive their right to individualized services given the uncertainty surrounding the pandemic. There are [reports in New Jersey](#), for example, that some schools have asked families to sign a waiver of all claims as a condition of schools providing the counseling and speech services required by student’s legally-binding IEPs. A school district in [Pennsylvania also reportedly informed families](#) in a letter that “its special education attorney had ‘developed a waiver form’ to ‘help mitigate any ... issues’ that might arise as the district transitioned to online instruction.” According to Elizabeth Athos, a senior attorney with the Education Law Center, who is quoted in [this recent article](#), “[n]o parents should be asked to give up any rights or claims they may have in exchange for receiving constitutionally required educational services.”

In a [report to Congress submitted on April 27, 2020](#), Secretary DeVos surprised some by not requesting “waiver authority for any of the core tenets of the IDEA or Section 504 of the Rehabilitation Act of 1973, most notably a free appropriate public education (FAPE) in the least restrictive environment (LRE).” In doing so, the Department grounded its decision on a number of principles, namely, that:

- Schools can, and must, provide education to all students, including children with disabilities;
- The health and safety of children, students, educators, and service providers must be the first consideration;
- The needs and best interests of the individual student, not any system, should guide decisions and expenditures;

- Parents or recipients of services must be informed of, and involved in, decisions relating to the provision of services; and
- Services typically provided in person may now need to be provided through alternative methods, requiring creative and innovative approaches.

Moving Forward

While the Secretary's recent decision not to recommend waivers to Congress provides cause for advocates to bring optimism to their work, Congress, ultimately, has the power to decide whether to grant additional waivers. We will continue to monitor the Legislature's activity.

In the meantime, school districts and families with students entitled to special education services will continue to try to [flesh out](#) what it means to provide special education and related services identified in student IEPs or 504 plans "to the greatest extent possible," in the context of COVID-19 social distancing. Absent more specific guidance, it seems reasonable to anticipate increased litigation to help make these determinations.

Although there is no current express requirement that districts formally amend IEPs or 504 plans to reflect adjustments made in response to the pandemic, schools must continue to include families in decisions regarding student accommodations. The California Department of Education (CDE), for example, [recommends](#) "that LEAs maintain regular communication with parents of students with disabilities about their efforts to transition to distance learning, plans to ensure access for all students, and to identify and address any immediate support needs when feasible." The CDE [acknowledges](#) that parents, and not just school districts, may request an IEP meeting or propose an amendment to a special education plan, "particularly where it is deemed necessary to address unique circumstances related to alternative service delivery." As the [March 16, 2020 OCR Fact Sheet](#) made clear, while IEP Teams and personnel responsible for 504 plan compliance do not have to meet in-person while schools are closed, a student's parent or legal guardian may consent to evaluations or re-evaluations via teleconference or other remote methods when such evaluations do not require a face-to-face assessment or observation.

Families should [make known and document](#) any concerns they have that particular services are not being provided as required by a student's IEP or 504 plan, given constraints imposed by social distancing. Jennifer Gavin, an education lawyer in Massachusetts, offers a number of [practice tips to families here](#), including that they "keep a diary of evidence of any regression that they notice in their child's skills and any interventions that were needed, such as emergency mental health treatment, one on one adult support to complete assignments, or medication changes, during the closure of school buildings." When school resumes, the

IEP team, which includes parents, will have to make an [individualized determination](#) regarding whether and to what extent a particular student is entitled to compensatory services. ([See here for additional thoughts, concerns, and recommendations](#) regarding compensatory education from Andy Feinstein, co-chair of the Government Relations Committee for the Council of Parent Attorneys and Advocates (COPAA).)

Similarly, families should request an evaluation, annual review, or reevaluation if they believe their students are entitled to disability services that they are not receiving. Social distancing constraints may constitute extraordinary [circumstances that may impact the timeline](#) pursuant to which [districts must respond](#), but the obligation remains.

¹ The Q&A, as well as U.S. Department of Education fact sheets discussed below, provides informal agency advice based on the Department's interpretation of existing statutes and regulations and does not create legally binding and enforceable rights.

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