



DEPARTMENT OF EDUCATION

Townsend Building
401 Federal Street Suite 2
Dover, Delaware 19901-3639
DOE WEBSITE: <http://www.doe.k12.de.us>

Susan S. Bunting, Ed.D.
Secretary of Education
Voice: (302) 735-4000
FAX: (302) 739-4654

Further Guidance Related to COVID-19:

IDEA, Part B Provision of FAPE

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Background

As part of Delaware's response to the COVID-19 outbreak in the United States, the Delaware Department of Education (DDOE) is offering this second guidance document to accompany all guidance issued by the U.S. Department of Education, Office of Special Education Programs (OSEP) on ensuring a free appropriate public education (FAPE) during the COVID-19 outbreak, which can be accessed online at

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

Please note: DDOE does not have authority to waive the requirements in Part B of the IDEA, but some of the requirements contain flexibility which may be helpful in ensuring the needs of exceptional children during the COVID-19 outbreak.

Scope

This document contains guidance on district and charter school responsibilities under Part B of the federal Individuals with Disabilities Education Act (IDEA) relating to the provision of FAPE. This document generally constitutes informal guidance and does not impose any additional requirements beyond those included in applicable federal and state regulations.

This document is not intended to provide legal advice. **For legal advice on your specific situation, please consult with the attorney representing your school district or charter school.** DDOE staff are not permitted to provide legal advice.

National Guidance Issued

1. [Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities](#) was issued on March 21, 2020
2. [Student Privacy Policy Office FERPA & Coronavirus Disease 2019 \(COVID-19\) Frequently Asked Questions \(FAQs\)](#) was issued March 2020
3. [Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students](#) was issued on March 16, 2020
4. [Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak](#) was issued on March 12, 2020

Guidance on the Provision of FAPE

In his March 23, 2020 [letter on school closures](#), Governor Carney directed schools in Delaware to remain closed through May 15th and shared that districts and charters will work with their staffs to create remote instruction plans so students can continue to learn during this crisis.

Remote learning¹ occurs when the learner and instructor, or source of information, are separated by time and distance and therefore cannot meet in a traditional classroom setting.

Providing FAPE in Remote Learning Plans

Remote learning plans must include instruction for students with disabilities. DDOE understands that, during this national emergency, schools may not be able to provide all services in the same manner 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.

Accessibility

Although federal law requires remote instruction 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.

DDOE 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.

¹ **Remote Learning** occurs when the learner and instructor, or source of information, are separated by time and distance and therefore cannot meet in a traditional classroom setting. Information is typically transmitted via technology (email, discussion boards, video conference, audio bridge) so that no physical presence in the classroom is required; otherwise, it would be *Hybrid* or *Blended Learning*. Remote learning can occur synchronously or asynchronously. Also referred to as *Distance Education*, *Virtual Instruction*, or *Remote Training*

Initial Eligibility Determination

Procedures for initial evaluation: *Within forty-five (45) school days or ninety (90) calendar days, whichever is less, of receiving written parental consent, the initial evaluation shall be conducted; and the child's eligibility for special education and related services must be determined at a meeting convened for that purpose. 20 U.S.C. 1414(a); 14 Del.C. §3110, 14 DE Reg. 1060.*

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.

As a general principle, during this unprecedented national emergency, districts and charter schools are encouraged to work with parents to reach mutually agreeable extensions of time, as appropriate.

The Evaluation Summary Report (ESR) should contain all available data. If additional data, which require face-to-face assessment(s) or observation(s), is needed, then the team may make a determination that the child is not eligible at this time. The team can then collect additional data and reconvene when school reopens. The eligibility decision reasoning should be documented in the ESR and PWN.

If OSEP provides any information regarding flexibility with timelines, DDOE will communicate this information immediately.

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).

As a general principle, during this unprecedented national emergency, districts and charter schools are encouraged to work with parents to reach mutually agreeable extensions of time, as appropriate.

As a district or charter school determines how to meet the individual needs of students with disabilities during this time, all efforts should be documented in a Prior Written Notice (PWN) and sent home to parents/guardians. The PWN should contain what can be provided and what cannot be provided during this crisis.

If OSEP provides any information regarding flexibility with timelines, DDOE will communicate this information immediately.

Re-evaluations

A re-evaluation of each child with a disability must be conducted at least every three years, unless the parents and the public agency agree that a re-evaluation is unnecessary 34 C.F.R. § 300.303(b)(2). However, when appropriate, any re-evaluation 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).

State Complaints

Parties may agree to extend the timeline for 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 U.S. Department of Education 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 state education staff are unavailable or absent for an extended period of time.

Due Process Hearings

When a parent files a due process complaint, the district or charter school 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).

Questions?

If you have questions relating to this guidance, please contact the Exceptional Children Workgroup at the Delaware Department of Education at 302-735-4210 or maryann.mieczkowski@doe.k12.de.us.