

## Questions/Answers for serving SWD under the emergency guidelines with COVID-19

**Purpose:** This guidance addresses the issues that LEAs should consider when developing and implementing procedures for serving students with disabilities during the COVID-19 outbreak.

### General Guidance

In response to the coronavirus outbreak, the USDE has offered the following guidance: *“school officials must keep students safe and secure. In keeping students safe, school officials should keep in mind the federal civil rights requirements and respond appropriately to allegations of discrimination on the basis of race, color, national origin, sex or disability. School districts have significant latitude and authority to take necessary actions to protect the health, safety, and welfare of students and school staff. School officials must respond to evolving conditions related to the coronavirus and 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. 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.”*

*While school remains in session, “if a student with a disability (SWD) is expected to stay home for an extended period of time (beyond 10 days) for medical purposes as recommended by the student’s treating physician, provisions should be made to maintain educational services for SWD. If school is out of session and schools provide educational services (e.g., online) to the general student population, then provisions should be made to maintain educational services for SWD. 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. If a student does not receive services after an extended period of time, the student’s IEP team... must make an individualized determination whether and to what extent compensatory services are needed... including to make up for any skills that may have been lost.”*

### Q&A (Adapted from the Federal Guidance and resources shared by various Colorado School Districts).

**Question 1:** Is an LEA required to continue to provide a free appropriate public education (FAPE) to students with disabilities during a school closure caused by a COVID-19 outbreak?

**Answer:** Yes. The IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which elementary and secondary schools are closed for an extended period (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease.

*If an LEA closes its schools to slow or stop the spread of COVID-19 and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during*

*that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.*

*If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). 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 developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).*

**Question 2: What services must an LEA provide if a public school for children with disabilities is selectively closed due to the possibility of severe complications from a COVID-19 outbreak?**

**Answer:** *If a public school for children with disabilities is closed solely because the children are at high risk of severe illness and death, the LEA must determine whether each dismissed child could benefit from online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available. In so doing, school personnel should follow appropriate health guidelines to assess and address the risk of transmission in the provision of such services. The Department understands there may be exceptional circumstances that could affect how a particular service is provided.*

*If a child does not receive services during a closure, a child's IEP team (or appropriate personnel under Section 504) must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost.*

**Question 3: May an IEP Team consider a distance learning plan in a child's IEP as a contingency plan in the event of a COVID-19 outbreak that requires the school's closure?**

**Answer:** *Yes. IEP teams may, but are not required to, include distance learning plans in a child's IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the child's home.*

*Creating a contingency plan before a COVID-19 outbreak occurs gives the child's service providers and the child's parents an opportunity to reach agreement as to what circumstances would trigger the use of the child's distance learning plan and the services that would be provided during the dismissal.*

*Furthermore, according to the language that the Colorado Governor made in his recent emergency announcement on 3/18/20, the Charter School Institute schools "will need to make every effort to provide alternative learning opportunities during this time, while taking into account the needs of their local communities. School buildings, as approved by local emergency management in coordination with the local public health agency, may be utilized to assist families and students in accessing alternative learning, including online learning, opportunities, provide emergency sheltering, distribute food, and for other services for students, families, and educators during the period in which this Executive Order is in effect, including for providing child care for the essential workforce necessary to respond to COVID-19."*

**Question 4: Do Schools need to continue to complete IEP meetings and Evaluations (Child Find)?**

**Answer:** *In the country's past experience with these types of emergencies, the U.S. Department of Education has not exempted districts from IEP meeting and evaluation obligations. That being said, everyone will make good faith efforts to serve students with disabilities in compliance with IDEA requirements.*

*IEP teams would not be required to meet in person if a school closes. IEP teams, however, must continue with special education processes, including conducting informal assessments or formal assessments of the student, including parent surveys and standardized reports, and consult, as needed. If an evaluation of a student with a disability requires a face-to-face meeting or observation, the evaluation can be delayed until school reopens. Evaluations and reevaluations that do not require face-to-face assessments or observations may take place while schools are closed, if the parent consents.*

*Special education staff should plan ahead for assessments and evaluations that are scheduled for the remainder of the 2019-2020 school year. Teams should consider advancing assessments that require a face-to-face meeting. Case managers may reach out to parents now to determine the plan for the evaluation or reevaluation process in the event of a school closure. (If an evaluation of a SWD requires face-to-face assessment or observation, the evaluation would need to be delayed until school reopens. We concur and we have included this language in our guidance to IEP teams. We have also put provisions in place to document these unique situations through our Prior Written Notice process. On March 17, 2020, CDE offered this guidance: "Please use code 61 (NOT VALID) and 'COVID-19 School Closure' as the reason to identify those evaluations which are delayed due to school closures."*

**Question 5: We have an IEP meeting scheduled, do we still hold it if school is not in the building?**

**Answer:** *In the event that there is a school closure, IEP meetings can be held virtually on web platforms. This is strongly recommended. If this is not a possibility, the meeting can be held upon return to the school building.*

**Question 6: We are in the middle of an evaluation, what happens if school closes?**

**Answer:** *IEP teams must continue with the special education evaluation process. Assessments that do not require face to face meetings, such as parent surveys, standardized reports, and consultation can continue in the event of a building closure. Evaluations and observations requiring face to face contact can be postponed until the school building reopens.*

*Special Education providers should plan ahead for assessments that are scheduled between now and the end of the 19/20 school year. Prioritizing assessments requiring in person contact should be considered.*

**Question 7: Do we have to amend the IEP or change the service delivery for online learning?**

**Answer:** *You will not need to amend IEP's during this time for the change in service delivery. In a rare instance where schools cannot make Online services work for a student, the school would need to convene an IEP meeting to discuss options that are specific for a student. (Note that according to Paul Foster, CDE SPED Director- the Change of Placement process requirement is something that he agrees that does not make sense for districts to do and also confirmed that there may be some instances where Online services for a student might not be appropriate and that it would be up to the district and IEP team to come up with other options).*

## **Question 8: For students who have para educator support, how should they be utilized?**

*Answer: Paraprofessionals can be a great resource during a time of remote learning. Ultimately school leadership teams will need to provide direction to paraprofessionals during this time. Here are some guiding questions and suggestions for utilizing a paraprofessional.*

### **Considerations**

- *Do the paraprofessionals have access to technology to support learning? What resource does the school have that they can utilize?*
- *Do paraprofessionals have a means to call families without using their personal phones? Has the school considered usage of Google Voice or other apps that can create free phone numbers to call from?*
- *Do the paraprofessionals need to be trained on the technology needed to support remote learning?*

### **Suggestions**

#### *Maintain Relationships*

*Paraprofessionals play a critical role in a child's life. They could be calling their students and families to check in each day, guide them through any challenges, supporting with any social, emotional or academic needs and report back to teachers any concerns that can be address through the curriculum.*

#### *Support Learning*

*While students are learning at home, the paraprofessional can provide tutoring support virtually or over the phone during this time. While they are not primary teachers, they can reinforce skills teachers initially taught, support with working through difficult problems academic problems and be a primary contact for families.*

## **Question 9: Are there any privacy issues that need to be taken into consideration during the COVID-19 Outbreak with respect to delivery special education services.**

*Answer: Yes. There are some restrictions:*

*The Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) is responsible for enforcing certain regulations issued under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended by the Health Information Technology for Economic and Clinical Health (HITECH) Act, to protect the privacy and security of protected health information, namely the HIPAA Privacy, Security and Breach Notification Rules (the HIPAA Rules).*

*During the COVID-19 national emergency, which also constitutes a nationwide public health emergency, covered health care providers subject to the HIPAA Rules may seek to communicate with patients, and provide telehealth services, through remote communications technologies. Some of these technologies, and the manner in which they are used by HIPAA covered health care providers, may not fully comply with the requirements of the HIPAA Rules.*

*OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency. This notification is effective immediately.*

*A covered health care provider that wants to use audio or video communication technology to provide telehealth to patients during the COVID-19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients. OCR is exercising its enforcement discretion to not impose penalties for noncompliance with the HIPAA Rules in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID-19 nationwide public health emergency. This*

*exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19.*

*For example, a covered health care provider in the exercise of their professional judgement may request to examine a patient exhibiting COVID- 19 symptoms, using a video chat application connecting the provider's or patient's phone or desktop computer in order to assess a greater number of patients while limiting the risk of infection of other persons who would be exposed from an in-person consultation. Likewise, a covered health care provider may provide similar telehealth services in the exercise of their professional judgment to assess or treat any other medical condition, even if not related to COVID-19, such as a sprained ankle, dental consultation or psychological evaluation, or other conditions.*

*Under this Notice, covered health care providers 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. Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.*

*Under this Notice, however, 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.*

*Covered health care providers that seek additional privacy protections for telehealth while using video communication products should provide such services through technology vendors that are HIPAA compliant and will enter into HIPAA business associate agreements (BAAs) in connection with the provision of their video communication products. The list below includes some vendors that represent that they provide HIPAA-compliant video communication products and that they will enter into a HIPAA BAA.*

*Skype for Business, Updox, Vsee, Zoom for Healthcare, Doxy.me, Google G Suite Hangouts Meet*

**Question 10: Do “original” parent signatures need to be collected for IEP meetings (i.e. signature page?)**

**Answer:** *No. As a Witness, simply add the parents name on the participants page and indicate that the parent was present or not present.*