

## **FAQ on COVID-19 and Students with Disabilities**

Over the past two weeks, educational institutions across the State of Texas have suspended normal operations and all direct in-person instruction of students in response to the COVID-19 health emergency. Most have implemented or are in the process of implementing virtual learning and/or distance learning opportunities for students. As this situation develops, many questions have arisen regarding how to best address the needs of students with disabilities throughout these school closures. As your educational institution develops its school closure/response plan, our firm has developed this FAQ to provide some initial guidance as to how to address the needs of students with disabilities during this time. In light of the fluid circumstances and unique issues affecting certain individual school districts, these comments are subject to change, only address certain questions, and do not constitute specific legal advice for your individual school district.

### **1. Is the district required to continue to provide a free appropriate public education (FAPE) to students with disabilities during a school closure or when a school provides only limited educational services?**

Federal law does not specifically address school closures due to exceptional circumstances such as those associated with the COVID-19 health emergency. According to the U.S. Department of Education's Office of Special Education Programs (OSEP), if the district has elected not to provide instruction or educational services to the general education student population, the district is not required to provide services to students with disabilities as outlined in their IEP or Section 504 plan. OSEP has encouraged districts to consider how the state is constituting school days<sup>1</sup>—for example, a school has no accountability to provide services to a disabled student where the school is treating the day as an inclement weather day, unless the ARD committee and/or Section 504 team determines that the student requires it.

If the district, however, provides limited educational services to the general student population while direct in-person instruction is suspended, such as through online or virtual learning, school work packet distribution, instructional telephone calls, and other curriculum-based instructional activities (hereinafter "limited educational services"), the school must ensure that students with disabilities also have equal access to the same opportunities. Guidance from OSEP states the district should, to the greatest extent possible, ensure every student with a disability is provided with special education and related services as outlined in the student's IEP or Section 504 plan. During the time when direct in-person instruction of students is suspended, it is unlikely the extent and nature of the services in the

---

<sup>1</sup> There is confusion and uncertainty regarding the definition of "school day," including when some instruction is being provided but in a different way and not on school campuses, and whether that day of "instruction" must be considered a "school day" for purposes of calculating timelines in the IDEA. For ease of reference, we will use the term "school day" throughout this document. Whether a particular day will count as a "school day" is uncertain and will depend on circumstances that may be unique to each district. TEA has indicated that days where a district is providing support to receive instruction at home will count as a school day for purposes of attendance.

IEP will remain as contemplated in the IEP. The district should continue to document delivery of services, including any alternative services/methodologies, such as teletherapy for speech, OT, and counseling; instructional telephone calls with a special educator; appropriately modified work packets, etc.; and student performance. According to OSEP, the focus is not on meeting all instructional minutes required in the student's IEP, but rather on what is most appropriate for that student to continue to make progress with the curriculum and the student's IEP goals.

On March 21, 2020, the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) released a Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities. According to OSERS,

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.

OSERS goes on to say that "The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency." And,

[w]here, due to the global pandemic and resulting closures of school, 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 as to what extent compensatory services may be needed when schools resume normal operations.

Thus, once direct in-person instruction resumes, an ARD committee and/or a Section 504 team will be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements. Compensatory time will have to be based on an ARD committee's individual determination, looking at the data for the specific student. It is important that districts are clear in their messaging to parents that compensatory time will be considered on an individual basis. OSEP has suggested that there will need to be an individual determination made as to every IDEA-eligible student as a result of the closures/suspension of direct in-person instruction, even if done informally. The district should prepare guidance for staff regarding what processes and procedures will be implemented when the district resumes normal operations.

- 2. If the district will be providing limited educational services to students with disabilities that are different than the services indicated in the student's IEP, what action should the district take?**

If a district is providing limited education services that results in providing different or fewer services from the services indicated in the student's IEP, the district must carefully document what services can be provided and effectively communicate this information to the student's parents through an IEP amendment and prior written notice. The district should send a request for an IEP amendment to the parent, including all elements of a prior written notice, indicating what services will be provided and asking the parent to agree to the amendment. If the parent agrees, this document becomes an IEP amendment for the student. The IEP amendment can be written so that it expires when direct in-person instruction fully resumes.

If the parent does not agree to the IEP amendment, then the district should schedule a virtual ARD committee meeting with the parent to discuss the provision of services during the time when only limited educational services are available. Sample language to describe the current situation and circumstances for ARD committee consideration is attached at [Attachment 1](#).

Documentation of the limited educational services being provided and student performance must be sufficiently detailed for the student's ARD committee or Section 504 team to determine whether compensatory services are needed once the district resumes normal operations.

**3. During the time of COVID-19 outbreak, what should the district do if it is simply unable to provide services to the student due to the unique circumstances caused by the COVID-19 outbreak?**

A district that is unable to provide any services identified in a student's current IEP should effectively communicate this information with the student's parents through an IEP amendment and prior written notice. This documentation must be sufficiently detailed for the student's ARD committee or Section 504 team to determine whether and/or to what extent compensatory services are needed once the district resumes normal operations.

**4. Does a District have an obligation to make online learning accessible to all students with disabilities?**

According to the March 16, 2020 OCR Fact Sheet, online learning must be equally accessible to individuals with disabilities unless alternative opportunities are provided in another manner. "Accessible" means that students with disabilities can acquire the same information, engage in the same interactions, and enjoy the same programs and activities as their nondisabled peers with substantially equivalent ease of use. A district must consider individuals with visual impairments, hearing impairments, and other disabilities that may impact their ability to access online learning. Additional technology assistance, such as PDF documents, speech recognition software, mouth sticks, eye-tracking software, and screen reader software, may need to be considered to best assist students with online learning.

Districts should provide ongoing monitoring of these services to detect any problems with access or implementation of the service and any issues should be addressed as appropriate.

## **5. Must a district provide related services while offering limited educational services?**

If a student's IEP requires the provision of related services, the district should provide these services to the extent it is possible. While there is no obligation to provide services within the home, the district must consider alternative ways to meet the student's needs. Many of these services, such as special education counseling or speech and language therapy, may be effectively provided through virtual learning and teletherapy.

Once the district resumes normal operations, an ARD committee and/or a Section 504 team must make an individualized determination whether and/or to what extent compensatory services are needed under applicable standards and requirements for any missed related services.

## **6. May a district provide a learning environment at the school or a designated site for students who are unable to have their needs met through virtual learning?**

Based on Executive Order GA08 issued by the Governor on March 19, 2020, it is questionable whether the district can open a facility for direct in-person instruction of some students with disabilities through at least April 3, 2020. Further clarification from TEA is needed on this issue.

Should this change and districts decide to offer education opportunities at a designated site, districts must carefully consider the potential health and safety risks to students and staff of providing such services face-to-face during the COVID-19 outbreak and should ensure that any learning environment is clean, disinfected, and meets local, state, and national safety guidelines. If the district is not providing transportation to the site and a student's IEP includes transportation, the district should consider reimbursement to the parent.

## **7. What should a district do about annual ARDs that are due to be held while schools are providing limited educational services?**

It is likely that districts will face challenges with meeting IDEA timelines during this period of time. It is best to plan ahead to identify the meetings that must be held in the upcoming weeks and determine whether the meetings can be held telephonically or through a video conference as required by law. If the meeting still cannot be held by the deadline, document the district's efforts to meet the timeline and communicate with parents about plans to convene the meeting immediately upon the district's resumption of normal operations through a prior written notice. In addition, after proper notice, consider at least beginning the annual ARD committee meeting even if it needs to be recessed to a later date for completion in order to obtain parental input.

## **8. What should a district do if an initial evaluation is being conducted and the normal operations of the district are suspended and all direct in-person instruction stops?**

The Texas Education Agency has issued guidance stating that state evaluation timelines halt in situations where the district is closed and not in session, i.e. no services are offered to anyone.

However, if the district is offering limited educational services, the 45 school-day timeline requirements of Texas Education Code § 29.004 apply. This is true even if the district is experiencing low attendance due to COVID-19 related concerns.

However, as stated by the U.S. Department of Education's Office for Civil Rights (OCR) on March 16, 2020, "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."

Thus, if the district believes that the assessment requires meeting face-to-face with the student to meet assessment validity requirements, an in-person assessment is not advisable, and/or a classroom observation is required, the district should provide prior written notice to families of all students involved stating that testing will be delayed to help contain and mitigate the spread of the new coronavirus that causes COVID-19. This prior written notice must sufficiently describe the reasoning behind the district's decision to suspend the evaluation timeline until the district resumes normal operations. A sample prior written notice is attached at [Attachment 2](#).

Again, if an evaluation is delayed due to the COVID-19 crisis, and if the student is found to be eligible for special education and an IEP is proposed, the ARD Committee may consider whether compensatory services are appropriate due to the delay of the timeline for the evaluation.

**9. What should a district do if a parent requests an initial evaluation during the time of school closure or when limited educational services are being provided?**

If a district receives a request for an initial evaluation during the period of time when the district is closed, the district has no obligation to proceed with the evaluation. If the district receives a request from a parent for an initial evaluation when the district is providing limited educational services, but has not yet resumed normal operations and is not providing direct face-to-face instruction, the district must respond within 15 school days with a prior written notice, and follow the guidance in FAQ No. 8.

**10. What should a district do if it received consent for a re-evaluation prior to the COVID-19 health emergency, or during the time when the district is providing only limited educational services?**

The 45-school day timeline does not apply to reevaluations or additional evaluations. The ARD committee may have assigned a date for completion of the reevaluation. If the district believes a face-to-face evaluation is required for the assessment to be accurate and valid, the district can advise the parents of this through a prior written notice that the evaluation will be completed when direct in-person instruction resumes. If the student's eligibility would lapse during this time, consider doing a REED to continue eligibility until the district resumes normal operations. This is supported by

OSERS's March 21, 2020 Supplemental Fact Sheet.

- 11. Upon completion of an initial Full Individual and Initial Evaluation, is the district still required to conduct an ARD meeting within 30 calendar day to determine initial eligibility and make IEP and placement decisions?**

OSEP is continuing to have internal conversations around timelines and potential flexibility and will continue to share that information. As of now, according to TEA guidance, the ARD committee is still required to meet by teleconference or other means to meet this timeline.

- 12. After providing consent, what if a parent does not want their child tested during this period of time when the district is only providing limited educational services due to the COVID-19 health emergency?**

The district should document that the parent has not made the child available for testing in a prior written notice.

For further information or should you have questions, contact your [Thompson & Horton](#) attorney. If you do not have a Thompson & Horton attorney with whom you currently work, please contact [David Hodgins](#) in Houston, [Holly McIntush](#) in Austin, or [Dianna Bowen](#) in Dallas/Fort Worth and they will put you in contact with the most appropriate T&H team member to assist you.