

# Educating Pa.'s Special Needs Students During the COVID-19 Pandemic

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**O**n April 9, in response to the COVID-19 pandemic, and in recognition of the significance that health care experts have placed on social distancing to help curtail the spread of the virus, Gov. Tom Wolf and Pennsylvania Secretary of Education Pedro Rivera announced that all schools in Pennsylvania will be closed for the remainder of the 2019-2020 academic year. This decision has directly impacted thousands of students throughout Pennsylvania attending public K-12 schools, public charter schools (both cyber and brick-and-mortar), career and technical centers, intermediate units, early learning programs, and private and parochial schools.

With no immediate signs that the spread of COVID-19 was subsiding, schools to various degrees had been anticipating and planning for several weeks for the seemingly inevitable announcement that finally came on April 9. A number of schools were developing plans to transition to a remote or distance learning platform. Also, Act 13 of 2020, which amended the Pennsylvania Public School Code and was signed into law by Wolf on March 27, required all public school entities (including K-12 public school districts, public charter schools, career and technical centers and intermediate units) to submit continuity

of education plans to the Pennsylvania Department of Education (PDE) by April 17. Private and parochial schools were not required to submit continuity of education plans, although PDE advised these schools to reach out directly to students' home school entities for guidance.

For many public schools, the continuity of education plan, which will remain in place at least through the end of the 2019-2020 academic year, contemplates a combination of optional enrichment and review activities, as well as new instruction on essential course material to allow students to progress educationally and demonstrate competency for course and grade advancement and graduation. Still, schools—particularly schools unaccustomed to delivering a curriculum primarily online—almost universally have accepted that it will not be feasible to deliver the same level of instruction to their students in a remote setting as they could if the students were actually attending school as expected.

The development and implementation of continuity of education plans has been challenging. Even more challenging, however, is the question Pennsylvania public schools have been contemplating since school

closure became a reality: how, and to what extent, can schools provide continuity of educational instruction and related services to children with disabilities in a remote learning format, including students who benefit from Individualized Education Plans (IEPs) and Section 504 service plans? Indeed, both the federal and state governments have made clear that, despite the pandemic and resulting school closure, public schools remain obligated to deliver services to students with special needs and to comply with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act (ADA) and corresponding state law when providing for their identified students.

As COVID-19 became more pervasive in this country, the U.S. Department of Education (the department) began to publish informal guidance through a series of Q&As and “fact sheets” which, when read together and in their totality, unquestionably reaffirm that the public school system has a continuing obligation to meet the needs of identified students during the pandemic.

First, on March 12, the department published “Questions and Answers on Providing Services to Students with Disabilities During the Coronavirus Disease 2019 Outbreak.” Although the department cautioned the Q&A was not legally binding and was “not intended to be a replacement for careful study” of the IDEA, Section 504 and the ADA, it offered several preliminary recommendations for how Local Educational Agencies (LEAs), including K-12 public schools, could and should be responding to the pandemic and resulting school closures. For example, if an LEA offers educational instruction and opportunities to all of its students, even in a

remote format, the LEA must ensure that students with disabilities also have equal access to the same opportunities. Further, LEAs must ensure that, to the greatest extent possible, each student with a disability can be provided with the special education, related services or accommodations identified in that student’s IEP or Section 504 Plan. LEAs also must determine whether the student with an IEP or Section 504 Plan could benefit from online or virtual instruction, instructional telephone calls and other curriculum-based instructional activities, to the extent available, during the period of school closure.

Then, on March 16, the department published “Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students.” The fact sheet reinforced many of the department’s recommendations from its March 12 Q&A. It also clarified that IEP teams are not required to meet in person when schools are closed. Additionally, the department stated if an evaluation of a student with a disability requires an in-person assessment or observation, the evaluation needs to be delayed until school reopens; however, if an evaluation does not require an in-person assessment or observation, the assessment or observation still may take place while schools are closed if the student’s parent or guardian consents.

And on March 21, the department published a “Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities.” In it, the department made clear that LEAs have a continuing obligation to provide identified students a free appropriate public education (FAPE) and to deliver “education, specialized instruction and related services to these students,” although the department recognizes that the

“exceptional circumstances” of the pandemic may affect how all educational and related services and supports are provided. A FAPE may include special education and related services provided through remote instruction offered virtually, online or by telephone. Also, the department recognizes that it might not be safe or feasible to deliver instruction and related services (including hands-on physical therapy, occupational therapy or tactile sign language services) to students in person, even when following social distancing guidelines, but still the department encourages LEAs to offer disability-related modifications and services remotely online, including, by way of example, “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.”

Similarly, PDE published and has been periodically updating its “School Guidance—Answers to Common Questions” on its website. The publication, in part, specifically addresses special education services and likewise offers instructive suggestions to LEAs. For example, PDE recommends that LEAs “make every effort” to comply with IDEA-mandated timelines for evaluations, re-evaluations, IEP team meetings, and reporting and to utilize virtual means or teleconferences if appropriate and available to meet the deadlines. Also, LEAs are encouraged to ensure that identified students receive appropriate services during the closure, even through distance learning. To that end, IEP teams must determine what services can be provided in a remote learning format to best meet a student’s individual needs. And, perhaps most importantly, PDE makes clear that “LEAs are responsible for reviewing how the closure has impacted the delivery of

special education and related services to students eligible for special education services.” When school resumes, the student’s IEP team (or the team overseeing the student’s Section 504 plan) must determine on an individual basis “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 during the closure within a reasonable timeframe.”

Both the federal and state Departments of Education acknowledge the concern shared by many educators and service providers that it will be challenging to deliver the same level of instruction and services to special needs students through remote learning during the school closure than would be possible under normal circumstances. Nonetheless, LEAs still have an obligation to deliver a FAPE and otherwise meet the needs of their students to “the greatest extent possible.” Though the federal and state governments have offered informal guidance on how to meet this continuing obligation, neither has explicitly stated what LEAs must do to be considered compliant under the circumstances with IDEA and other applicable law.

As of this writing, there has been no formal proclamation from any government entity that the mandates of the IDEA (or Section 504 and the ADA for that matter) will at some point be loosened, suspended or waived entirely during this mandatory school closure, or that LEAs eventually may be absolved from liability if they do fall short of their obligations to their students because of the pandemic. On the other hand, one significant provision of the federal Coronavirus Aid, Relief and Economic Security (CARES) Act, signed into law by President Donald Trump on March 27 directs the department

to report to Congress within 30 days and advise whether waivers may be required in order for states and LEAs to implement and comply with the IDEA. These waivers potentially could excuse LEAs of their legal obligations under the IDEA, including developing and implementing IEPs and the delivery of a FAPE during the pandemic.

For now, many public schools are operating under the assumption that federal waivers will not be granted, and they are issuing to the parents and guardians of identified students notices of recommended educational placement/prior written notices (NOREP/PWN) detailing the interim plan for the remote special education and related services that will be offered to each individual student during the school closure. Notably, through this NOREP/PWN, a number of schools already have effectively acknowledged that the interim plan might not enable full implementation of a FAPE as required by that student's IEP or Section 504 plan, and that the student might be entitled to compensatory services when school resumes, based

on an individualized assessment of how the student's progress was impacted by the school closure, as compared to the progress made by all students. In an effort to minimize exposure to potential future claims, including claims for compensatory services, schools should endeavor to meet the requirements of the IDEA, Section 504 and the ADA, to the greatest extent possible, by following the guidance offered by the federal and state Departments of Education, using professional judgment and best practices, and maintaining an open line of communication with students and their parents and guardians.



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