

## **PROVIDING SPECIAL EDUCATION SERVICES** **DURING MANDATED SCHOOL CLOSURE**

Prepared by Udall Shumway PLC

Heather Pierson, Esq.  
Kimberly Davis, Esq.  
Denise Lowell-Britt, Esq.  
Cathleen Dooley, Esq.  
Jessica Sanchez, Esq.  
Erin Walz, Esq.

The purpose of this FAQ document is to provide information to Arizona School Risk Retention Trust (“Trust”) members on how mandated school closures may impact special education.

The Trust appreciates the following firms peer reviewing this document: Gust Rosenfeld, DeConcini McDonald Yetwin & Lacy, Sims Mackin, and Hufford, Horstman, Mongini, Parnell & Tucker. Please contact the Trust or local counsel if your district would like legal advice.

Please understand and note that as this situation unfolds, the guidance is continuously changing. To ensure you have the most up-to-date information, please make sure you familiarize yourself with the following websites:

<https://sites.ed.gov/idea/>

<https://www.azed.gov/specialeducation/special-education-guidance-for-covid-19/>

<https://www2.ed.gov/about/offices/list/ocr/index.html>

### **THE I.D.E.A.**

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## Initial Evaluations<sup>1</sup>

For evaluations in which all assessments have not been completed, school psychologists should contact the parent/guardian to obtain agreement to extend the evaluation timeline by thirty (30) days.<sup>2</sup> If the parent/guardian agrees, the school psychologist will issue a prior written notice reflecting the same.

If there is simply not a way to complete the evaluation and the parent/guardian has refused to extend the timeline, issue a Prior Written Notice reflecting the same and that the evaluation will be completed when school resumes for the 2020-2021 school year.

In any event, the Prior Written Notice may also need to indicate that the team will consider the need for compensatory education if the student is found eligible for special education and related services due to the delay in the evaluation and eligibility determination.

## Re-evaluations

For re-evaluations in which all assessments have not been completed, school psychologists should contact the parent/guardian to obtain agreement to extend the evaluation timeline by thirty (30) days.<sup>3</sup> If the parent/guardian agrees, the school psychologist will issue a Prior Written Notice reflecting the same. The thirty (30) day extension should not exceed the triennial evaluation date.

If the parent/guardian does not agree to the thirty (30) day extension, work with the school psychologist to determine how to complete the remaining assessments, including parents bringing the student to the campus or another designated District/School site.

If there is simply not a way to complete the evaluation and the parent/guardian has refused to extend the timeline or you will exceed the triennial date, issue a Prior Written Notice reflecting the same and the evaluation will be completed when school resumes for the 2020-2021 school year. The Prior Written Notice may also need to indicate that the team will consider the need for compensatory education if the team identifies additional areas of need and due to the delay in the completion of the evaluation, the student did not receive services to meet all areas of identified need.

Keep in mind that eligibility category does not drive services, needs do, so the IEP can and should be revised to address additional needs that are not captured by the current eligibility.

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<sup>1</sup> The OCR guidance issued on March 16, 2020, indicates that evaluations are not required to be completed during a school closure if the evaluation requires face-to-face assessments. As discussed below, OCR does not have the authority to enforce the IDEA, so this guidance does not waive any of the requirements set forth in the IDEA.

<sup>2</sup> Although schools are closed for the remainder of the school year, you should still request a 30-day extension to reduce the length time of time you are out of compliance.

<sup>3</sup> Again, you should still request a 30-day extension to reduce the length time of time you are out of compliance.

## Parent Requested Evaluations

If a parent requests an evaluation in writing, the District must within a reasonable amount of time, not to exceed fifteen (15) school days, begin the evaluation by conducting a review of existing data or issue a prior written notice refusing the parent's request.

Per ADE's guidance, schools are closed and the fifteen (15) day timeline does not commence until school resumes for the 2020-2021 school year.

## IEP and MET Meetings

On March 16, 2020, OCR issued guidance specific to the requirements to conduct IEP meetings during school closures. OCR states that Districts/Schools are not required to convene IEP meetings during a school closure. Unfortunately, OCR does not have the authority to enforce the IDEA, so while OCR may not consider the failure to convene an IEP meeting during a school closure a discriminatory act (for which an OCR complaint is filed), the IDEA timelines and requirements still apply (which are subject to state administrative complaints and due process complaints).

1. If meetings are currently scheduled **and staff are working**, the District/School should hold the scheduled meetings in-person (if the team is less than 10 people) or virtually, or a combination of the same. While this is not ideal, the District/School has an obligation to remain compliant with IDEA timelines.<sup>4</sup> In addition, delaying meetings further will inevitably cause a backlog of meetings when students return to school. If a parent/guardian requests that the meeting be postponed until after the students return to school, the staff must issue a Prior Written Notice that reflects that (1) the parent/guardian has requested that the meeting be postponed; (2) the IEP will be revised when the parent is available to attend a meeting; and (3) the current IEP will be implemented upon the student's return to school and until the team convenes. Develop the IEP as though the student is attending school. The team can discuss supports for the student during the current closure, but it is not necessary to include that information in the IEP. Document those discussions in the "Other Factors" section of the prior written notice.

Waivers of mandatory participants are permitted if: (1) the parent/guardian agrees in writing to the waiver; and (2) the teacher provides written feedback to the IEP team and the parent/guardian **prior to the IEP meeting**. This is permitted under the IDEA, but it is the exception and should not be standard operating practice or procedure.

2. Draft special education documents (IEP and MET reports) should be emailed to the parent/guardian (if the parent/guardian has email access) and IEP team members so they have a copy of what will be discussed during the meeting.

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<sup>4</sup> Federal guidance issued on March 21, 2020, indicated that statutory timelines remain the same.

## Manifestation Determination Reviews (MDR)

Manifestation Determination reviews must be held within 10 school days of the decision to impose a disciplinary change in placement. The MDRs that are currently scheduled should be held. Further, the MDRs that are not currently scheduled should be held within the next two weeks via virtual participation.

Delaying these meetings will cause a backlog in the meetings that need to be held upon the return to school. In addition, the longer it takes to hold the meeting, the less reliable the recollection and information may become. In the instances where parents want to wait to hold the manifestation determination meeting, the staff must issue a prior written notice reflecting that the District/School remains “ready, willing, and able” to convene the meeting.

## IEP Implementation During Closures

In March 2020, OSEP issued guidance to school districts and charter schools facing school closures for an extended period of time due to the Coronavirus.<sup>5</sup> The recommendations below are based upon the *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak* document.

1. If the District/School does not provide any educational opportunities to general education students, then the District/School does not have to provide services to students with disabilities during that same time period.

Upon the return to school, the IEP team will be required to make an individualized determination as to whether the student is entitled to compensatory education. Generally, the team should consider the data collected prior to the school closure and the data collected following the student’s return to school. If there is significant regression (above what is expected for a general education student), then the District/School would likely owe the student compensatory education. Note: the determination should be similar to the ESY regression analysis.

Notwithstanding the above, HB 2910 requires that educational opportunities be made available to all students during the school closure. In addition, the *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Students with Disabilities* reminds LEAs that “schools should not opt to close or decline to provide instruction, at the expense of students, to address matters pertaining to services for students with disabilities.” Therefore, Districts/Schools should be providing all students with educational opportunities during the closures.

2. If the District/School provides educational opportunities to general education students, then the District/School must provide the same opportunities to students with disabilities, including the provision of FAPE. The OSEP guidance states that “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

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<sup>5</sup> OSEP has defined an “extended period of time” at more than 10 consecutive school days.

developed under the IDEA, or a plan developed under Section 504.” Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak (OSEP 2020).

OSEP recommends online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities (work packets and activities). Since many Districts/Schools anticipate moving to an online platform, many services can be provided in an online/virtual format.<sup>6</sup> Below are some options that District/Schools can consider providing special education and related services to students:<sup>7</sup>

### Related Services

- Virtual/Online – utilize video conferencing programs to provide individual and/or group services. Ensure that the privacy rights of students are protected when utilizing a group format.
- Supplemental Practice/Activities – providing parents with practice materials, exercises to complete at home, etc. If you use this mode of support, ensure staff are in contact with parents to explain activities and provide clear concise instructions.

### Specially Designed Instruction

- Virtual/Online – utilize video conferencing programs to provide individual and/or group lessons/services.
- Supplemental Practice/Activities – provide practice materials to complete at home. If you use this mode of support, ensure staff are in contact with parents to explain activities and provide clear concise instructions.

### General Education

- Collaborate with general education teachers to ensure accommodations and modifications are provided in compliance with the IEP.

### Assistive Technology

- Ensure students have access to the assistive technology set forth in their IEPs.

For the above approaches, it is important that parents are provided with support and ideas on ways to engage and support their students at home. This can be done via email, phone call, videoconferencing, etc. Ensure that any activities or assignments that are provided to families include clear and concise directions.

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<sup>6</sup> The District must ensure that students with disabilities have the same access to technology, e.g., laptops and wifi, as students without disabilities if instruction will be provided virtually or online.

<sup>7</sup> In-person instruction is an option - home instruction or students coming to campus. However, based on the everchanging guidance from the CDC and other health organizations, this option is not recommended.

A letter to families that notifies the parent/guardian that the District/School is moving to an online platform or other instructional model and that the student's case manager will contact the parent/guardian to review the services during this time should be sent to families. During this time, staff should communicate with families on a regular basis to ensure families are kept informed.

Because complete implementation of the IEP may not be possible during the closure, the IEP team should make an individualized determination as to whether the student is entitled to compensatory education. As discussed above, the team should consider the data collected prior to the school closure and the data collected following the student's return to school. If there is significant regression (above what is expected for a general education student), then the District/School would likely owe the student compensatory education.

### Section 504

The OCR guidance discussed above indicates that meetings are not necessary when school is closed. The District/School will need to determine if it would prefer to move forward with Section 504 meetings to prevent a backlog of meetings when students return to school.

Under the OCR and OSEP guidance, District/Schools are required to provide the supports and services under Section 504 if the District/School is providing educational opportunities to general education students. This includes providing the accommodations and other supports in enrichment activities, online instruction, etc.

Under the OCR and OSEP guidance, District/Schools are not required to provide the supports and services under Section 504 if the District/School is not providing educational opportunities to general education students.

Even if you are not providing new instruction, any enrichment activities or resources offered to all students must be accessible to disabled students, including those who are IDEA or Section 504 eligible. "Accessible" may require reasonable accommodation, such as ensuring that resources are compatible for screen reading software.

**DISCLAIMER: THESE MATERIALS HAVE BEEN PREPARED FOR GENERAL INFORMATIONAL PURPOSES ONLY AND ARE NOT INTENDED AS LEGAL ADVICE OR A SUBSTITUTE FOR SUCH ADVICE. DISTRICTS SHOULD CONSULT THEIR SCHOOL ATTORNEY FOR ANSWERS TO SPECIFIC QUESTIONS ON THESE ISSUES.**