

## **Requested Additional Guidance from the U.S. Department of Education, Office of Civil Rights**

### **Recommendation #1: Require Districts and Part C Providers to Develop Distance Learning IEPs and IFSPs to Ensure Equal Access to Educational Opportunities Uniquely Designed to Meet Each Child’s Disability Related Needs During the Period of School Closures and Freeze Last Agreed Upon IEP/IFSP to Resume Once Schools Reopen**

Each child with a disability has a right to a free appropriate public education (FAPE). Federal guidance makes clear that to the extent possible during the COVID-19 pandemic, children with disabilities should continue to receive their IEP/IFSP services.<sup>1</sup> To the extent that all of a child’s IEP placement and services cannot be provided due to school closures caused by the outbreak, an IEP team must be convened to determine which services can be provided, which can be provided through alternate or additional methods, and how to otherwise meet the child’s disability related education needs during the crisis.<sup>2</sup> An IEP team can consider distance learning options in a child’s IEP including online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities.<sup>3</sup> Disability related modifications and services that can be effectively provided online include extensions of time for assignments, accessible reading materials, and some types of speech and language services through video conferencing.<sup>4</sup> Teams may also determine that the parent will need access to consultative time in the IEP, so that they, as the current providers of the child’s instruction in many cases, have the tools and modification materials that they need to support the youth. A modified educational program and IEP must be uniquely designed by a qualified team including their general and special education teachers and any service providers (e.g., speech and language pathologist).<sup>5</sup>

IFSP services can also be provided in an alternate location, using a different provider, or through alternate means such as consultative services to the parent.<sup>6</sup> It is the responsibility of the lead agency to ensure continuity of services.<sup>7</sup> A child’s early intervention program must be designed by qualified personnel in each of the child’s areas of need.

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<sup>1</sup> 34 C.F.R. Sections 300.101, 300.201; Department of Education Guidance: Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020), hereinafter “DOE Guidance March 2020”, found at <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>, pages 2, 7.

<sup>2</sup> DOE Guidance March 2020, page 2.

<sup>3</sup> DOE Guidance March 2020, page 5.

<sup>4</sup> Department of Education Guidance, Office for Civil Rights, Office of Special Education and Rehabilitation Services, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary schools (March 21, 2020), hereinafter “DOE/OCR Guidance March 21, 2020”, found at <https://www2.ed.gov/about/offices/list/ocr/frontpage/fag/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.

<sup>5</sup> 34 C.F.R. Section 300.116; DOE Guidance March 2020, page 4.

<sup>6</sup> DOE Guidance March 2020, page 8.

<sup>7</sup> DOE Guidance March 2020, pages 7-8.

A child's parent or court appointed education rights holder has a right to meaningfully participate in the IEP/IFSP process.<sup>8</sup> IEP teams are not required to meet in person and can use technology to ensure meaningful parent participation.<sup>9</sup> Convening an IEP/IFSP with relevant staff and parents allows an opportunity to reach agreement on what services will be provided during a school closure.<sup>10</sup> Further, IFSPs must be convened when conditions warrant it.<sup>11</sup>

While it is critical that parents of children with disabilities be able to seek a distance learning IEP/IFSP to address the child's immediate needs during the COVID-19 crisis, which will likely include some type of modified or reduced services, they should be permitted to do so without giving up their right to the full program of special education services they received prior to the COVID-19 pandemic. This will enable more flexibility about services offered and accepted by all parties during this unique period.

In order to ensure that children with disabilities receive equal access to their education during periods of school closure and to ensure that they can resume full services and supports once the schools reopen, we recommend guidance that:

- Requires school districts and Part C providers to convene IEP and IFSP meetings within 45 days of a school closure or Part C cessation of services for all children with disabilities to design an individualized program to meet the unique education needs of the child with a disability, and their family, including necessary assistive technology specialists, to put into place assistive technology, essential academic and other support services, including extended school year services,<sup>12</sup> accommodations, and modifications to allow them equal access to their education through distance learning as their general education peers. These meetings can occur via tele or video conference to protect the health and safety of all involved.
- All related services (e.g., speech and language, occupational therapy, school based mental health/counseling services) should be provided through telehealth virtual options until the distance learning IEP/IFSP is held and the school district/Part C provider and parent agree otherwise. Order that the provision of all mental health/counseling services be provided with the confidentiality required under existing law, including for children in juvenile justice detention centers or congregate care settings.
- A child's last agreed upon IEP/IFSP, prior to school closures or the cessation of Part C services mandated by the COVID-19 pandemic is the child's last agreed upon IEP/IFSP. This last agreed upon IEP/IFSP must be implemented once the outbreak is over and

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<sup>8</sup> 34 C.F.R. Section 300.322, 300.342(d)-(e); California Education Code Sections 56341(b), 56343(c), 56400.4(b)..

<sup>9</sup> Department of Education, Office for Civil Rights, Fact Sheet: Addressing the Risk of Covid-19 in Schools While Protecting the Civil Rights of Students (March 16, 2020), hereinafter "DOE/OCR Guidance March 16, 2020" found at <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>, page 3.

<sup>10</sup> DOE Guidance March 2020, page 5.

<sup>11</sup> 34 C.F.R. Section 303.342 (b)(1); DOE Guidance March 2020, page 7.

<sup>12</sup> Given the high risk that all children with disabilities, not provided with their full IEP/IFSP services during the outbreak, will experience regression, we suggest that IEP/IFSP teams consider extended school year services for all children.

schools/Part C providers resume normal operations. A distance learning IEP/IFSP does not change the child's last agreed upon IEP/IFSP in any way and is only considered a interim placement agreement during school/Part C provider closures caused by the COVID-19 pandemic.<sup>13</sup>

**Recommendation #2: Provide Equal Technology and Connectivity Access to All Children with Disabilities Immediately, Including Parent Support in Native Language** Federal guidance makes clear that if a school district is providing educational opportunities to the general student population during a school closure, the district must ensure that children with disabilities have equal access to educational opportunities.<sup>14</sup> This means that if districts are providing electronic devices and/or connectivity to all students, they must ensure that all children with disabilities can access and benefit from their education in an equally effective manner, including by providing different technology options for children with disabilities if needed. Students with disabilities also have a right to such technology as a reasonable accommodation under Section 504 of the Rehabilitation Act. We recommend guidance that:

- All school districts and Part C agencies provide all children with disabilities access to a laptop, tablet, or similar devices and internet connectivity of high enough quality to adequately support specially designed distance learning, including any assistive technology that those children need, as determined by their IEP/IFSP team and agreed to by their parent. Ensure school districts and Part C agencies provide parents support, in their native language, to adequately utilize the technology, including hardware, software, and connectivity, required by children to access distance learning.
- All learning materials and programs should comply with Web Content Accessibility Guidelines 2.0 AA levels of access to ensure that any assistive technology can access these materials.

### **Recommendation #3: Shorten Special Education Assessment Timelines for Assistive Technology**

When a child with a disability requires a special education assessment, the district must gain parental consent, conduct the assessment, and review the results with an IEP team within 60 calendar days, excluding school breaks of longer than five days.<sup>15</sup> Children with disabilities may require immediate assistive technology assessments to determine how to meet their distance learning needs during the pandemic. The purpose of these assessments is to try different types of hardware and software, assess various access methods, and evaluate the need for

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<sup>13</sup> Alternatively, schools and Part C providers can write IEP/IFSP documents with an end date for distance learning and a start date for the resumption of normal services. This may not be the most efficient method, as the Covid-19 Pandemic continues to be fluid and the IEP/IFSP team may have to reconvene multiple times to extend the distance learning services end date and start date for resumption of normal services if school/Part C provider reopen dates are moved.

<sup>14</sup> 34 C.F.R Sections 104.4, 104.33; 28 C.F.R. Section 35.130; DOE Guidance March 2020, page 2.

<sup>15</sup> Federal guidance states that if general education children are receiving distance learning, children with disabilities have a right to services. DOE/OCR Guidance March 16, 2020, page 3. Despite the physical closure of schools, districts are receiving average daily attendance payments and many are providing educational services to students; these days should count in special education assessment timelines.

modifications, curriculum delivery strategies, or online programs. Assessments should include a review of education records and history, parent and teacher distance interviews, and technology and curriculum trials explored remotely, ensuring that these assessments do not require face-to-face testing or observations<sup>16</sup>. Assistive technology experts can suggest trials of assistive technology solutions and remain available to the IEP/IFSP team, and parents through a collaborative IEP/IFSP service, for trouble-shooting and ongoing curriculum modifications.

We recommend guidance that special education assessment timelines for assistive technology assessments for the purpose of determining distance learning needs of children with disabilities, when requested by the parent or determined necessary by the school district/Part C provider, should be shortened to 30 days and should run during the outbreak. Districts and Part C providers must still provide assistive technology to meet children's needs during the assessment process. Parental consent to such assessment can be given in writing through email or text, document signing technology, or verbally.

#### **Recommendation #4: Provide a Clear Right to Compensatory Education Services**

While focusing on the immediate safety and health needs during the COVID-19 pandemic, we must also protect the rights of children with disabilities to access a FAPE. Acknowledging that many IEP and IFSP services will be unavailable during the outbreak (e.g., special day class programs; center based programs), difficult to provide through distance learning (e.g., physical or occupational therapy), and of lesser quality when not shared within a group or classroom setting (e.g., social skills instruction), efforts must be made to protect the rights of these children to compensatory services to make up for these losses. Children with disabilities are so vulnerable to regression that there are statutory rights to extended school year services to attempt to prevent it.<sup>17</sup> Current federal guidance references that children with disabilities may be eligible for compensatory services as determined on an individual basis by their IFSP<sup>18</sup> and IEP teams<sup>19</sup> due to any delays in service provision or decision making about how to provide services. Yet, that guidance triggers the right to compensatory services on a parent's ability to demonstrate regression or lost skills,<sup>20</sup> placing an undue burden upon the parent to prove the harm to their child, without adequate data typically collected by the school or Part C provider, or the tools or professional qualifications required to measure progress. This process of determining regression or lost skills can also take significant time, which would mean additional months that children are not receiving these compensatory services. Further, not providing a clear path to compensatory services will require many families to undertake extensive legal action, incurring unnecessary cost, delay, and a further break down of relationships between districts/regional centers and families.

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<sup>16</sup> DOE/OCR Guidance March 16, 2020, page 3.

<sup>17</sup> 34 C.F.R. Section 300.106.

<sup>18</sup> 34 C.F.R. Section 303.342(b)(1); DOE Guidance March 2020, page 7.

<sup>19</sup> DOE/OCR Guidance March 21, 2020, page 2

<sup>20</sup> DOE/OCR Guidance March 16, 2020, page 3.

We recommend guidance that creates a guarantee that compensatory services will be provided to children with disabilities at a rate of twice the services that should have been provided but were not due to closures caused by the COVID-19 outbreak, as defined by the state and county stay at home orders and school district closures or Part C provider cessation of services, in an effort to help children recoup. Regression must be assumed and not the responsibility of the parent to prove to school district officials or Part C providers. A child and family should be given twice the length of school/Part C closures to utilize these compensatory services. Require IEP/IFSP teams to convene a meeting within 30 days of the stay at home order being lifted to determine what additional compensatory services will be provided.

**Recommendation #5: Toll the Statute of Limitations on All Dispute Resolution**

Although administrative due process cases and mediations are still occurring, there are many reasons why a parent may chose not to seek these dispute resolution options during the COVID-19 outbreak, including their inability to access records in a timely manner, their inability to gain appropriate assessments requiring face-to-face testing, the general unavailability of witnesses, or the strategic ineffectiveness of successfully arguing a child’s case through video conferencing technologies.

We recommend guidance that tolls all special education statutes of limitation, under Part B and Part C of the IDEA, for complaints, mediations, due process complaints, and civil actions to remain in effect during the Covid-19 Pandemic, as defined by the start and final end date of state and county stay at home orders and school district closures or Part C cessation of services, and providing a minimum of 60 days after the final end date to file such actions.

**Recommendation #6: Extend Age of Special Education and Early Intervention Exits**

Children age out of Part C early intervention services on their third birthday. Young adults age out of Part B of the IDEA special education services when they graduate high school or the semester in which they turn 22.

We recommend guidance that children will not be exited from either Part B or Part C of the IDEA until the equivalent time of the COVID-19 pandemic (defined by state and county stay at home orders and school district/Part C provider closures or cessation of services) has passed after such birthday exits. This should in no way affect age three transition timelines or prevent a youth who qualifies for high school graduation, and whose parent consents, from completing their timely graduation.