

Additional Guidance on Educating Students with Disabilities During COVID-19 School Closures

March 23, 2020

Since our [March 17th Legal Update](#), the Wisconsin Department of Public Instruction (DPI) and the Office for Special Education and Rehabilitative Services (OSERS) have issued additional guidance related to the education of students with disabilities while schools are closed due to the COVID-19 pandemic. The guidance reinforces the importance of making determinations regarding individual services and compensatory education on a case-by-case basis, documenting what is being provided (or not provided) and why, and communicating and collaborating with parents.

Summary of DPI Guidance

On March 18, 2020, the DPI issued a [Question and Answer Document](#) responding to questions it had received about the impact of the extended school closures on special education requirements. Consistent with our March 17th Legal Update, the Guidance advised that if services required by an IEP cannot be provided or minutes are reduced, school districts should “consider, whether and to what extent, compensatory services are required once the school reopens. These determinations must be made on an individual student basis.”

The Guidance also advised that school districts may use the *Notice of Changes to IEP Without An IEP Meeting* (DPI Model Form I-10) to make changes to IEPs that are necessary in light of the school closures, including changes in placement.

In addition, the Guidance clarifies the application of certain timelines, such as the 60-day timeline for initial evaluations or the annual review of IEPs. The Guidance states,

“If a student is not available because the school is closed, the timeline may be extended. LEAs should maintain documentation as to why the timeline was extended, and communicate to the parent as to why the evaluation cannot be completed within the 60 days. If the IEP team determines that there is sufficient data to determine eligibility, then the IEP team should proceed to determine eligibility, and it would be appropriate to conduct the meeting through virtual technology or a teleconference.”

The Guidance goes on to explain,

“LEAs should make every attempt to comply with the required timelines, including conducting annual IEP team meetings. The review of existing data can take place with the required IEP team members outside of an IEP team meeting, and input gathered via email or phone call. Annual IEP

team meetings should be conducted through alternative means such as conference calls or virtual technology. However, during a school closure due to a public health order, IEP team meeting timelines may be extended only if:

- The LEA has reasonably determined the use of virtual technology is not a suitable method of conducting the required meeting; or
- Information necessary for the IEP team’s deliberation is not attainable due to recommendations of the state or local health departments.”

Summary of OSERS Guidance

On March 21, 2020, OSERS issued a [Supplemental Fact Sheet](#) as a follow-up to its initial guidance, which was summarized in our March 17th Legal Update. To alleviate concerns regarding the ability of school districts to comply with the IDEA and Section 504 when providing distance instruction, the Supplemental Guidance emphasized that “these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.” The IDEA does not require that specific methodologies be used to make distance instruction accessible to students with disabilities. The Guidance goes on to explain,

“The Department understands that, during this national emergency, schools may not be able to provide all services in the same manner they are typically provided. While some schools might choose to safely, and in accordance with state law, provide certain IEP services to some students in-person, it may be unfeasible or unsafe for some institutions, during current emergency school closures, to provide hands-on physical therapy, occupational therapy, or tactile sign language educational services. Many disability-related modifications and services may be effectively provided online. These may include, for instance, 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.”

The Supplemental Guidance concludes by encouraging school districts to “collaborate creatively” to meet the needs of students with disabilities to the extent possible during the school closings.

Buelow Vetter Recommendations

In light of the guidance from OSERS and DPI, we recommend the following:

1. If a school district offers distance or alternate instruction to the general student population, then the school district must make such instruction accessible to students with disabilities. In certain instances, this may require providing educational materials in a different format or by using a different methodology. For example, if a blind student cannot access a document that is electronically distributed to the class, then an audio recording of the document being read aloud could be provided to the student instead.
2. If a school district offers distance or alternate instruction to the general student population, the school districts must also consider how to implement IEPs and Section 504 Plans and provide

students with a free appropriate public education, consistent with the need to protect the health and safety of students and staff. This is separate and apart from the accessibility requirement discussed in #1, above. School districts should determine, on a case-by-case basis, what special education and related services in student IEPs and 504 Plans can be provided virtually or telephonically.

3. School districts should document what services are/are not being provided and why, and promptly communicate this to the parents. DPI Model Form I-10 may be used for such documentation, but use of this form is not necessarily required. Keep in mind that not all IEPs will require changes during the school closings. Communication to parents should include the Procedural Safeguards Notice, which informs parents of their rights under the IDEA. If the school district is unable to provide services requested by the parents, prior written notice should be provided to parents as required by Wis. Stat. § 115.792.
4. School districts should document the progress that students had made toward meeting annual IEP goals as of the date schools were closed, as well as the students' present levels of academic achievement and functional performance. This will assist school districts in determining whether to offer compensatory services.
5. If some services required by a student's IEP or Section 504 plan cannot be provided during the school closing, or if minutes are reduced, then IEP Teams should determine whether to provide compensatory services when school resumes. This determination should be made on a case-by-case basis, taking into account factors such as the extent of any gaps in services, and the student's progress (or regression) over the shutdown. (We understand that some school districts may be hesitant to refer to these services as "compensatory," as compensatory education is often associated with a denial of FAPE. By using this terminology, we are not implying that school districts would be in violation of state or federal law if circumstances related to the COVID-19 pandemic make it impossible to implement student IEPs or 504 Plans in their entirety. "Compensatory services" is the phraseology used by the DPI and OSERS. Although school districts could refer to it as something else, if they wish, that may lead to a misunderstanding about whether the school district has complied with guidance from DPI and OSERS.)
6. IEP Teams should make every effort to comply with required timelines, including the 60-day timeline for evaluations and annual review of the IEP. Timelines may be extended in certain circumstances, as explained above. Documentation and communication with parents is key.

It is our understanding that Congress has recognized that school districts may not be able to safely provide certain services during the pandemic and is considering relaxing particular IDEA requirements, perhaps by the end of this week. We'll keep you advised of any new developments in this regard. If you have any questions about this Legal Update or the education of students with disabilities during extended school closings, please contact Attorney Alana Leffler at aleffler@buelowvetter.com or (262) 364-0267, Attorney Gary Ruesch at gruesch@buelowvetter.com or (262) 364-0263, or your Buelow Vetter attorney.

This Legal Update is intended to provide information only on general compliance issues and should not be construed as legal advice. Please consult an attorney if you have any questions concerning the information discussed in this Legal Update.

In order to comply with Treasury Circular 230, we are required to inform you that any advice we provide in this Legal Update concerning federal tax issues is not intended or written to be used, and cannot be used, to avoid federal tax penalties or to promote, market, or recommend to another person any tax advice addressed herein.

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