

COVID-19 School Shutdown: Compensatory Education Guidance for Students with IEPs or 504 Plans

March 17, 2020

On March 13, 2020, Governor Evers directed that all K-12 schools, public and private, are to be closed until at least April 6, 2020. This Legal Update will discuss the circumstances, process, and considerations according to which school officials should determine whether compensatory services are required for eligible students under the Individual with Disabilities Education Act or Section 504.

Are Services Required During the Shutdown?

If the District closes schools and does not provide educational services to the general student population (including virtual instruction), then the District would not be required to provide services to students with IEPs or Section 504 Plans during the time schools are closed. After schools re-open, the IEP or 504 Team should determine whether and to what extent compensatory services are required.

If the District provides virtual or other alternate instruction to the general student population during the closure, the District must ensure that students with IEPs and 504 Plans also have equal access to the same educational opportunities, including the provision of FAPE. (34 CFR §§104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). The District 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 developed under IDEA, or a plan developed under Section 504 (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)). It should be noted that Governor Evers' Order only prohibits the provision of instruction and extra-curricular activities at school. It does not prohibit services at alternate sites, which could include IEP or 504 Plan services.

Must IEP and Section 504 Plan Services be Modified during the Shutdown?

As limited above, for closures of more than 10 consecutive school days, the IEP or Section 504 Team should meet to determine the appropriate services to provide FAPE, to the extent possible. Such additional services could include the provision of special education and related services at an alternate location, or the provision of online or virtual instruction in combination with instructional telephone calls and other curriculum-based instructional activities. The Team could identify which special education and related services, if any, could be provided at an alternative safe location, or virtually. This determination would be made consistent with health department and school medical professionals' advice.

If the closure is short-term, (generally 10 consecutive school days or less), the provision of services such as online or virtual instruction, instructional telephone calls and other curriculum-based instructional activities, to

the extent available, is not considered a change in placement, regardless of the extent it limits the provision of FAPE.

However, given the anticipated length of the current shutdown, a student's parent, the school, or an IEP team member should request an IEP meeting to discuss the potential need for services given that the closure is likely to be of long duration (generally more than 10 consecutive school days). It would be prudent to notify parents of the school's plan in this regard. Depending upon staffing, absences, etc., the timelines may become impossible to meet in every case.

A change in placement must be made by the IEP Team in Wisconsin § 115.78(2) Wis. Stats. If the IEP Team determines that the child's needs could not be met through virtual instruction, then under 34 CFR § 300.503(a)(1), the District must consider alternative special education, supplementary aids and services, related services, and other accommodations during the shutdown. This could also include compensatory instruction, which could be provided when school resumes or possibly over the summer. The IEP Team must issue a written notice proposing the change in placement and revisions of the IEP. A parent who disagrees with the placement change and revised IEP notice retains all of the due process rights included in 34 CFR §§ 300.500-300.520. A parallel process would be required for students with 504 Plans.

A "prior written notice" must be provided if the IEP Team refuses to provide services requested by the parents. See Wis. Stat. § 115.792.

What Happens When School Reopens?

Once school resumes, the school must make every effort to provide special education and related services to the student in accordance with the student's IEP or 504 Plan. The IEP or 504 Plan Team may or may not be required to meet immediately if the IEP or 504 Plan remains appropriate. OSEP has advised that it understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, the IEP or 504 Team would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements, given the length of the shutdown. In this instance, schools should send a letter to the parents of children with IEPs or Section 504 Plans that explains the situation and details the schools process to determine and develop compensatory services.

How Does the IEP or Section 504 Team Determine the Type and Amount of Compensatory Services?

Compensatory education, in this situation, is generally defined as educational services above and beyond that normally due to a student resulting from the failure or inability of a school to provide services pursuant to an IEP or 504 Plan. The purpose of compensatory education is to place the student in the position that the student would be in had the school remained open and been able to provide the appropriate services. The determination of what services will be provided must be made on a case-by-case basis, considering the disability and unique needs of the student, the context and length of lapse in services that occurred, and other factors, such as the student's present levels and progress on annual goals, for example.

Given the extraordinary nature of the shutdown and its systemic effect, it is likely that the DPI and courts will show deference to the emergency determinations made by school officials, if challenged. Careful adherence to IEP and Placement procedures, including the prudent and precise use of the Prior Notice Requirements (DPI Form M-1, Wis. Stat. § 115.792) will enhance the probability that challenges by parents will not be successful.

Conclusion & Additional Resources

Additional Resources:

- Department of Education, *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak*, March 2020, <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>
- Tony Evers, Office of the Governor, K-12 School Closure FAQs, updated March 15, 2020, https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/K-12_FAQ_3.15.20_.pdf

We will keep you updated as the DPI and OSEP provide additional guidance.

If you have any questions or concerns regarding the Compensatory Education Guidance for Students with IEP's and 504 Plans during the COVID-19 Shutdown, please contact Alana M. Leffler at aleffler@buelowvetter.com or (262) 364-0267, Gary M. 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.

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