

CLIENT NEWS BRIEF

Special Considerations for Students with Exceptional Needs Related to School Closures Due to COVID-19

Frequently Asked Questions – Part 2

Background

The following updates and expands on the Frequently Asked Questions (FAQ) we issued on March 12, 2020 (available [here](#)), which provided general guidance for K-12 school districts in responding to the needs of students with disabilities during the COVID-19 pandemic. Since that date, additional statutory and federal and state guidance has been issued, listed below. The information in this document is current through March 24, 2020, but is subject to change in light of this rapidly evolving situation and potential legislation from the federal government waiving certain IDEA requirements. We recommend you consult with a Lozano Smith special education attorney or your legal counsel before taking action based on these FAQs.

- Governor Gavin Newsom issued Executive Order N-26-20 on March 13, 2020, addressing local educational agencies' (LEAs) response to COVID-19 (Executive Order N-26-20);
- Senate Bill 117 (SB 117) received Governor Newsom's approval on March 17, 2020, and went into effect immediately upon signature, impacting, in part, special education timelines;
- United States Department of Education Office for Civil Rights (OCR) on March 16, 2020, issued a "Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students" (OCR Fact Sheet) and an accompanying seven-minute webinar (OCR Webinar);
- California Department of Education (CDE) and the Health and Human Services Agency (HHS) jointly issued guidance on March 17, 2020, addressing, in part, the implementation of distance learning strategies and equity and access issues related to differential access to internet connectivity and technology (CDE Distance Learning Guidance);
- CDE issued "Special Education Guidance for COVID_19: COVID_19 School Closures and Services to Students with Disabilities" on March 20, 2020 (CDE Special Education Guidance); and
- OCR, on March 21, 2020, issued a "Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities" (OCR Supplemental Fact Sheet).

As a means of providing general guidance to LEAs, this updated FAQ discusses the above, in the context of serving students with disabilities under the IDEA and Section 504 during school closures due to COVID-19.

March 2020
Number 16



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CLIENT NEWS BRIEF

March 2020
Number 16

1. [Q: Does an LEA need to provide educational services to students with an existing IEP or Section 504 Plan if schools are closed due to COVID-19 concerns?](#)

A: Yes. We recommend that LEAs provide educational services to both general education and special education students while schools are closed due to COVID-19.

(Note that this question was answered in our March 12, 2020 FAQ document. However, in light of the additional guidance note above, our answer has been revised.)

With the issues of Executive Order N-26-20, and the passage of SB 117, state funding is available for LEAs that continue to provide “high quality instruction.”

The CDE Distance Learning Guidance specifically provides that LEAs must “immediately” begin to develop Distance Learning Plans, for educating students and providing trainings to teachers and staff. Two major implications of the CDE Distance Learning Guidance are: (1) schools are *strongly encouraged* to provide some sort of educational opportunity going forward to all students, given that state funding is tied to the delivery of such services; and (2) schools must provide some degree of special education and related services during this crisis.

The CDE Distance Learning Guidance provides examples of what to include in a Distance Learning Plan, including a range and continuum of options to consider, including but not limited to:

- in-school computer instruction;
- classroom instruction (with social distancing);
- work packets;
- videoconferencing, and
- online curriculum.

Note that two of these options contemplate students (and staff) returning to schools, and using social-distancing. The viability of these options are subject to change, and may be contingent upon state and local officials determinations and directives, including as the nature, extent and duration of county/city “shelter-in-place” orders, or other developing circumstances.

2. [Q: Is an LEA permitted to provide optional enrichment activities to students as opposed to instruction during a school closure?](#)

A: Per Executive Order N-26-20, an LEA can continue to receive state funding to support the continued delivery of “high-quality educational opportunities to students to the extent feasible” during a COVID-19 related school closure. However, “high-quality educational opportunities” is left undefined. When providing optional enrichment activities to students, an LEA should ensure that, those opportunities are accessible to students with disabilities, in an equitable manner, and comparable to those provided to the general student population.

3. [Q: Is an LEA permitted to provide instruction to students in an alternative mode of education during a school closure?](#)

A: Yes, LEAs that physically close schools should focus their planning efforts on how to continue serving students with disabilities by tailoring distance learning to provide educational benefit to

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CLIENT NEWS BRIEF

March 2020
Number 16

those students, to the greatest extent practicable under the circumstances. At this time, California LEAs are not prohibited from offering distance learning or independent study to students impacted by a COVID-19 related school closure, and to the extent any state or local law may be interpreted to the contrary, that law is waived by Executive Order N-26-20. The CDE Distance Learning Guidance urges LEAs to develop distance learning plans immediately.

4. [Q: If an alternative mode of education is made available to the general student population during a school closure, is the LEA required to make the same alternative education available to students with disabilities?](#)

A: Yes, per the OCR Fact Sheet, if a student who has an IEP through the IDEA or is receiving services under Section 504 is not attending school for an extended period of time due to COVID-19, whether because required or advised to by public health authorities or school officials, provision should be made to maintain education services. If an alternative mode of education is made available to the general student population during a school closure, such as online instruction, tele-instruction, independent study, or some other form of alternative education that does not require “in-person” school attendance, the LEA must ensure that students with disabilities have equal access to the same opportunities, including the provision of a free appropriate public education (FAPE). (34 C.F.R §§ 104.4, 104.33 (Section 504) and 28 C.F.R § 35.130).

For students with disabilities, LEAs must determine on an individual basis whether each student could benefit from online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available, and in following appropriate health guidelines to assess and address the risk of transmission in the provision of such services.

5. [Q: If an alternative mode of education is made available during a school closure, is the LEA required to make a FAPE available to students with disabilities?](#)

A: At this time, the federal government has not waived the federal requirements under the IDEA. Accordingly, those obligations continue to apply. As a result, LEAs must ensure that, to the “greatest extent possible,” each student with a disability is provided special education and related services. (34 C.F.R §§ 300.101 and 300.201 (IDEA), and 34 C.F.R § 104.33). The same is true for those students with a Section 504 plan.

6. [Q: What is distance learning?](#)

A: By Executive Order N-26-20, the CDE and HHS jointly developed guidance addressing, in part, the implementation of distance learning strategies and addressing equity and access issues that may arise due to differential access to internet connectivity and technology. For purposes of this guidance, “distance learning” is defined to mean instruction in which the student and instructor are in different locations, which could include interacting through the use of computer and communications technology. It includes video or audio instruction in which the primary mode of communication between the student and instructor is online interaction, instructional television, video, tele-courses, or other instruction that relies on computer or communications technology. It may also include the use of print materials incorporating assignments that are the subject of written or oral feedback.

CLIENT NEWS BRIEF

March 2020
Number 16

LEAs must assess their ability to deliver distance learning instruction both in an online setting and also in a non-technological setting, keeping in mind that not all students have access to devices or high-speed internet, and that an LEA may not be able to meet the needs of all its students through online instruction. The CDE Distance Learning Guidance includes appendices with guidance, resources, and strategies for providing online instruction to students with disabilities.

Finally, there are confidentiality and privacy considerations relating to distance learning. LEAs should be aware of and put in place steps to ensure that their usage of video, audio, or online interaction for distance learning purposes complies with state and federal data and other privacy laws, as well as LEAs' own student data or other privacy policies.

7. **Q: What if a student does not have a computer or internet access?**

A: The California Constitution prohibits LEAs from requiring students to purchase devices or internet access, to provide their own devices, or otherwise pay a fee as a condition of accessing required course materials under the free schools guarantee, per CDE Guidance. LEAs should therefore assess whether a distance learning strategy would provide the most meaningful educational opportunity for students and, if so, steps they can take to ensure equitable access—which does not require, per CDE Guidance that LEAs offer the exact same content through the same channel for all students. Rather than abandoning e-learning because not all students will have equal access to it from home, the plan should include an analysis of alternate deliveries of comparable educational content. These alternate deliveries might include providing students access to a device or internet at school or a community site, consistent with social distancing guidelines. Therefore, in considering the development and implementation of a distance learning plan, LEAs are to assess the continuum of available strategies, with most schools needing to offer multiple options and a combination of strategies to students, depending on accessibility to devices and the internet. This includes considering the means by which students access content, such as by mobile devices like smartphones.

8. **Q: Is there any guidance on including students with disabilities in distance learning?**

A: Yes. LEAs should consider to the following in supporting students with disabilities in relation to distance learning:

- **Individualized Instruction in Distance Learning Settings.** As an LEA considers options for distance learning, the LEA should generally assess the extent to which its students with disabilities will be able to attain educational benefit under each option.
- **Related Services.** To the greatest extent possible, LEAs should continue providing related services consistent with the student's IEP. This may involve providing services on one or more school sites consistent with social distancing guidelines and accounting for the health needs of students and staff.
- **Assistive Technology.** LEAs should be flexible in providing access to school-purchased assistive technology devices when necessary, consistent with law, to ensure children have access to devices they typically use at school.

Related, last year's Assembly Bill (AB) 605 requires that LEAs provide, on a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings if the student's IEP team determines that the child needs access to those devices in order to receive a FAPE.

In addition, OCR's March 17, 2020 webinar reminded LEAs of their obligations to ensure websites are accessible to students with disabilities. OCR advised that when LEAs are considering the use of online technology for distance learning during the COVID-19 pandemic, schools should keep in mind that many individuals are blind, have low vision, have mobility disabilities, are deaf, are hard of hearing, or have other disabilities such as seizure disorders or cognitive disabilities. As a result, OCR advised that it is important that websites and online learning are built and developed to be accessible to individuals with a variety of disabilities and compatible with the various forms of assistive technology these individuals utilize, such as speech-recognition software, eye tracking and pointing devices, and screen reader software.

9. [Q. What if LEAs with school closures have students with disabilities who attend nonpublic schools that are not closed—should those students continue to attend their nonpublic schools?](#)

A. Yes. LEAs are encouraged to work with nonpublic schools and agencies (NPS/A) to take advantage of services that can be offered by NPS/As that elect to continue to provide services during school closures. In addition, CDE Guidance encourages LEAs and NPS/As to work collaboratively to ensure continuity of services for students currently served by NPS/As, pursuant to the IEP, including exploring options related to distance learning. Also, because of continued funding provided to LEAs under Executive Order N-26-20 to offer educational opportunities to all students during school closures, LEAs are encouraged by CDE Guidance to review master contracts with NPS/As and explore options for payment given the likelihood of student absences and the fiscal impact on NPS/As.

10. [Q. Can an LEA provide home hospital instruction to students with disabilities who do not have that placement offered in an IEP or Section 504 plan?](#)

A: Home hospital instruction may be an acceptable form of alternative education for students with disabilities, but such a determination should be made on an individual basis. Typically, home hospital instruction is not provided to a student absent a specific medical reason and related documentation. Although by Executive Order N-26-20, only those state and local laws pertaining to independent study and distance learning are being waived, the implication is that the same would apply in relation to home hospital so as to ensure continued access to instruction.

11. [Q. Does an LEA need to hold IEP meetings or Section 504 meetings during a school closure?](#)

A: While IDEA timelines for holding IEP meetings (including, annuals, triennials, and IEP meetings to review assessments) are not waived, CDE states that *for purposes of its compliance monitoring*, CDE will not count days of school closure due to COVID-19. CDE also advises that, unless and until USDOE ultimately provides flexibility under the IDEA, districts should *do their best to adhere to IDEA federally mandated timelines* to the maximum extent possible. Districts are encouraged to consider ways to use distance technology to meet these obligations. OCR states as a general principle, during this unprecedented national emergency, LEAs are encouraged to work with

CLIENT NEWS BRIEF

March 2020
Number 16

parents to reach mutually agreeable extensions of time, as appropriate. It is also possible to conduct IEP meetings telephonically or via video-conferencing. During these times, it is advisable for an LEA to maintain communication with parents with regard to any delays, and seek consent to any timeline extensions, where appropriate. If there is a disagreement regarding the delay of a timeline, it is advisable to use a prior written notice (PWN). A PWN is required any time there is a dispute between a parent and an LEA regarding identification, evaluation or placement, and any time there is a proposal or refusal to assess, or make changes to, a student's education program. (34 C.F.R. § 303.421.)

12. **Q: If a referral is received during a school closure for an initial assessment to determine special education eligibility, must the LEA respond within 15 days?**

A: No. Typically, if proposed, the assessment plan must be developed within 15 calendar days of referral for assessment, not counting calendar days between the student's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. SB 117 mandates that CDE permit an LEA with school closures due to COVID-19 to consider those school closure days as days between the student's regular school session, up until the time the school reopens and the regular school session reconvenes.

13. **Q: How should an LEA handle pending assessments during a school closure?**

A: Given that IDEA timelines have not been waived (at this time), we recommend LEAs strive to meet timelines with minimal delay to avoid impacting students' education, or seek waivers of the timeline from the parents of students. CDE also advises that, unless and until USDOE ultimately provides flexibility under the IDEA, districts should *do their best to adhere to IDEA federally mandated timelines* to the maximum extent possible, and should use distance technology to meet these obligations. OCR encourages LEAs to work with parents to reach mutually agreeable extensions of time, as appropriate.

School closures are likely to disrupt special education timelines, including those regarding assessments and IEP meetings to review assessments. In cases where there is a disagreement between parent and an LEA regarding extension of the 60-day timeline, we recommend using PWN.

14. **Q: During the period of a school closure, how should an LEA handle a request for student records from a parent or an attorney or advocate on behalf of a parent?**

A: Typically, LEAs must respond to a parent's request for student records within five business days (whether for special or general education student records). SB 117 directs that the normal five business day timeline to respond to requests for special education student records "shall be waived if a school is closed due to COVID-19, up until the time school reopens and the regular school session reconvenes." Note, however, even with the waiver of the timeline, SB 117 requires LEAs to respond to requests for student records from parents "as expeditiously as possible" during the period of school closures. Additionally, separate from state deadlines, *to date* the IDEA's and FERPA's 45 calendar day deadline for responding to student records requests has not been adjusted, and LEAs may still need to comply with these 45 calendar day timelines. (34 C.F.R. §§ 99.10(b), 300.613(a).)

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CLIENT NEWS BRIEF

March 2020
Number 16

15. Q: During the period of a school closure, how should an LEA handle a request for student records received from another school to which the student with a disability is transferring?

A: Typically, LEAs must provide student records to an LEA into which a special education student has transferred within five working days of the request from the student's new LEA. As with parent records requests, noted above, SB 117 directs that the normal five working day timeline to respond to student transfer records request "shall be waived if a school is closed due to COVID-19, up until the time school reopens and the regular school session reconvenes." Upon the reopening of schools by an LEA, the LEA should seek to transfer a former student's records to the student's new LEA within five working days.

Special Note on FAQs 14 and 15 Regarding Student Records Requests: As noted above, SB 117 waives the normal timelines for responding to student records requests until schools reopen following COVID-19 closures. In enacting this change, SB 117 expressly cites to the records request statutes which generally apply in the special education context (Education Code sections 56043, subdivisions (n) and (o), and 56504, and California Code of Regulations, title 5, section 3024). SB 117, however, is silent with regard to the waiver of the timelines in those statutes which generally govern records requests and the transfer of records for all students, regardless of whether the student is a special education student or a general education student (Education Code sections 49068 and 49069.7, and California Code of Regulations, title 5, section 438).

Because of what appears to be a Legislative oversight, some parents might assert that LEAs must respond to student records requests (within five business days), including the transfer of records to a student's new school district (within ten schooldays), according to normal timelines. It does not appear, however, that this was Legislature's intent, as failing to waive the overarching general student records request response timelines which apply to all students would negate the waiver of the timelines that specifically apply to special education students. As a result, LEAs should assume that the rules applicable to records requests under SB 117 apply to all student records requests, resulting in the waiver of timelines until COVID-19 school closures end. Still, LEAs should still respond to parent requests during this time period "as expeditiously as possible." With this in mind, if an LEA knows that, due to COVID-19 school closures, it is unable to comply with a request for records within the normal five business day timeline or the timeline to transfer records to a student's new school, the LEA is best served to provide notice of this in writing to parents who request records during this time period.

Finally, as noted above, FERPA and the IDEA require LEAs to respond to a request for records within 45 calendar days. At this time, no provisions of FERPA or IDEA have been waived in relation to school closures, and LEAs may still need to comply with these 45 calendar day timelines to provide student records in response to a parent request.

16. Q: Once school resumes, if it appears that a student with exceptional needs has lost skills, what is the LEA required to do?

A: Depending on a student's particular needs and the distance learning options available to the LEA, LEAs may also need to develop plans to provide additional services to some students with disabilities when onsite instruction and regular school operations resume. Once school resumes,

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CLIENT NEWS BRIEF

March 2020
Number 16

the student's IEP team (or appropriate personnel under Section 504) must make an individualized determination as to whether, and to what extent, it may be necessary to provide compensatory education. (34 C.F.R §§ 300.320-300.324, and 34 C.F.R §§ 104.33-104.35). Compensatory services may be necessary if there is a decline in the student's skills that occurred as a result of the student not receiving services during an extended closure, and such skills are not regained within a reasonable time.

17. **Q: Will CDE's compliance monitoring and investigation timelines be affected by a school closure?**

A: Yes. The CDE Special Education Guidance states that unless and until the U.S. Department of Education ultimately provides flexibilities under federal law, LEAs should do their best to adhere to IDEA federally mandated timelines to the maximum extent possible. LEAs are encouraged to consider ways to use distance technology to meet these obligations. However, the CDE has clarified *that for purposes of its compliance monitoring*, it will not count days of school closure due to COVID-19 when looking at when annual and triennial IEPs are due. Additionally, while CDE will continue to receive complaints that allege violations of IDEA, CDE's compliance investigation timelines will be extended for the period of time of a school closure to allow LEAs to meaningfully respond to complaint investigations. It is anticipated that once LEAs reopen and are available to participate in the investigation process, the 60-day timeline will recommence and both the complainant and LEA will be notified.

In our continued effort to equip public agencies with useful insights, we have compiled a suite of links to several resource and guidance documents and webpages available from the federal and state governments regarding COVID-19. You can access the suite here: <http://www.lozanosmith.com/covid19.php>.

If you have any questions, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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