



BARGAINING ADVISORY

Special Education Concerns During the COVID-19 Pandemic

Background

The World Health Organization has declared COVID-19 a pandemic, and California has declared a state of emergency. The need to slow community spread through social distancing has resulted in the closure of many local education agencies (LEAs). During this time, student and staff safety are of paramount concern. The duration and potential depth of the crisis is currently unknown.

As a result, we will have to grapple with many serious concerns, chief among them is how to provide adequate support for our students who receive special education services. This advisory seeks to clarify and offer advice for confronting current special education issues and concerns.

Frequently Asked Questions and Issues to Address

Are Local Education Agencies (LEAs) required to provide a Free and Appropriate Public Education (FAPE) to students with Individualized Education Programs (IEPs) during a school closure due to the COVID-19 outbreak?

The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act (ADA) do not specifically address a situation in which schools are closed for an extended period of time (generally more than 10 consecutive days) due to exceptional circumstances, such as we currently face.

However, if an LEA closes schools and does not provide educational services to the general student population, then the LEA will not be required to provide services to students with disabilities during that same period. On the other hand, if the LEA continues to provide educational opportunities to general students during a school closure, it must ensure that students with disabilities have equal access to the same opportunities, including the provision of a FAPE (see 34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)).

State Educational Agencies (SEAs), LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504 (see 34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)). As directed in the Governor's March 13, 2020 Executive Order, the California Department of Education will provide additional guidance on these issues by this Tuesday, March 17.

If schools remain open and a student with a disability is absent for an extended period because the student has symptoms or is infected with COVID-19, is the LEA required to provide special education and related services to the student?

The LEA must provide special education and related services to a child with a disability who is absent for an extended period (generally more than 10 consecutive days), even if the child is infected with



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COVID-19. It has long been the US Department of Education's (USDOE) position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period, an IEP meeting is necessary to change the child's placement and/or the contents of his/her IEP, if warranted. Further, if the IEP goals remain the same during a period of extended absence, but the amount of time spent receiving special education services changes, then the IEP Team may add an amendment to the IEP stating the specific amount of time a student will receive services under the amendment.

If a child with a disability is absent for an extended period due to symptoms or an infection, and the school remains open, the IEP Team must determine whether the child is available for instruction and could benefit from homebound services, such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available. In so doing, school staff should follow appropriate health guidelines to assess and address the risk of transmission in providing such services, paying close attention to health and safety provisions in the chapter's collective bargaining agreement, as well as Occupational Safety and Health Administration (OSHA) requirements. The USDOE understands there may be exceptional circumstances that affect how a specific service is provided.

If a child does not receive services after an extended period, the LEA must make a determination as to whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost.

May an IEP Team consider a distance learning plan in a child's IEP as a contingency in the event the COVID-19 outbreak requires the school's closure?

IEP Teams may, but are not required to, include distance learning plans in a child's IEP that could be triggered and implemented during a selective closure due to the COVID-19 outbreak. Such contingent provisions may include providing special education and related services at an alternate location or providing online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities. Contingent provisions may also identify which special education and related services, if any, could be provided at the child's home. Creating a contingency plan before a school closure occurs gives the child's service providers and parents an opportunity to reach agreement as to what circumstances trigger the use of the child's distance learning plan and the services that would be provided during that period.

Are LEAs still responsible for providing accommodations and modifications to students with IEPs, even during this outbreak?

Yes. LEAs should be able to use the IEP process without restriction to make changes necessary due to COVID-19. However, meeting, consultation, and parental approval requirements must not be waived and may therefore have to occur off site. IDEA Parts B and C funds may be used for additional costs and activities that may be required due to the outbreak. The Department of Education has guidance on providing services to children with disabilities during the outbreak [here](#).



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Will schools that are closed have to make up the days at the end of the year?

The Education Code excuses districts from complying with the full school year requirements in the event of an epidemic or order by a federal, state, city, or county official in response to an emergency (Educ. Code Sec. 41422). See also Educ. Code Sec. 37202 (excusing schools in such circumstances from the “equal time” requirement). Additionally, the Governor’s Executive Order states for “LEAs that initiate a school closure to address COVID-19, the closure shall qualify as a condition that prevents the maintenance of the LEA’s schools during a fiscal year for at least 175 days pursuant to Education Code section 41422...” Finally, the Executive Order suspends the affidavit requirements for waiver of the 175-day mandate, if the LEA’s top administrator certifies that the closure occurred to address COVID-19.

The Right to Bargain Over the Provision of Special Education Services

California’s Educational Employment Relations Act (EERA) covers wages, hours of employment, and safety conditions falling within the scope of mandatory bargaining. The District’s obligation to give notice and an opportunity to bargain over those mandatory subjects remains in effect, even during a crisis. However, it is critical to review the specific provision of your collective bargaining agreement (CBA) and their impact on this situation. We strongly recommend consulting with your Primary Contact Staff person if you have questions or concerns.

If home visitations, distance learning, or other similar services are not part of the normal work expected of unit members, their implementation changes working conditions. Work beyond the normal expectations should through bargaining be compensated and/or accommodated in some other acceptable way(s). Any additional training, preparing alternative lessons, methods of alternative interaction with students, and changes to workload that affect one’s hours of employment should be negotiated. Caseload changes, along with teacher evaluation and grading requirements, should also be considered. In addition, LEA-provided access to equipment and internet resources are essential if education in the home or via remote access is considered, and unit members should not be expected to bear the financial burden for costs associated with distance learning or other nonclassroom-based programs.

Additional Information

This Advisory will be updated as additional information becomes available, particularly later this week when further clarification pursuant to the Governor’s Executive Order is issued. In the meantime, especially during these very difficult times, questions should immediately be directed to your local CTA Primary Contact Staff person.