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COVID-19 and Students with Disabilities
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On June 9, 2020, Governor Sisolak issued Declaration of Emergency Directive 022 requiring school districts and charter schools to develop plans for reopening school buildings, providing instruction, and related activities for the 2020/2021 school year based on the June 9, 2020 framework issued by the Nevada Department of Education (NDE), Nevada's Path Forward: A Framework for a Safe, Efficient, and Equitable Return to School Buildings¹, and subsequent NDE guidance issued June 24, 2020². Recognizing that the circumstances regarding COVID-19 were fluid and social distancing protocols and other health and safety requirements were subject to change, the reopening plans were required to contemplate instruction offered through: in-person instruction following social distancing protocols; distance education; or a combination of distance education and in-person instruction (hybrid learning).

Prior to the commencement of the 2020/2021 school year, all Nevada school districts and the State Public Charter School and school district sponsored charter schools submitted their reopening plans that had been approved by their governing body.³ Given the diversity among the reopening plans throughout the State and the continued impact of the COVID-19 national emergency on in-person instruction at school for students with disabilities, the NDE determined that additional guidance was necessary to assist each local educational agency (LEA)⁴ in fulfilling their responsibilities to students with disabilities under the Individuals with Disabilities Education Act (IDEA) and Chapter 388 of the Nevada Revised Statutes (NRS) and Nevada Administrative Code (NAC).

¹ Nevada's Path Forward: A Framework for a Safe, Efficient, and Equitable Return to School Buildings is publicly available at:

https://gov.nv.gov/uploadedFiles/govnewnv.gov/Content/News/Emergency_Orders/2020_attachments/022_2020-06-09_Nevada_Path_Forward_FRAMEWORK.pdf

²NDE Guidance Memorandum 20-05: Guidance for Path Forward Programs of Distance Education is publicly available at:

[www.doe.nv.gov/uploadedFiles/ndedoenv.gov/content/News__Media/Guidance_Memos/2020/PathForwardDistanceEducationGuidanceMemo20-05\(1\).pdf](http://www.doe.nv.gov/uploadedFiles/ndedoenv.gov/content/News__Media/Guidance_Memos/2020/PathForwardDistanceEducationGuidanceMemo20-05(1).pdf)

³ The school district, school district sponsored charter schools, and State Public Charter School Authority plans can be found at: <http://www.doe.nv.gov/DistrictReopeningPlans/>

⁴While the terminology LEA is used throughout this guidance, it applies to all public agencies as that term is defined in NAC §388.092 and used in NAC/NRS, Chapter 388.

It is recognized that these laws were not designed to address a national health emergency, particularly one of this duration. However, it is uncontroverted that the mandates of the IDEA and NRS/NAC, Chapter 388, must drive all decision making with regard to the provision of a free appropriate public education (FAPE) to each student with a disability during these unprecedented times.

In order to provide the most reliable information to assist LEAs and parents of students with disabilities as they navigate the evaluation, identification, placement, and FAPE requirements of the law during this pandemic, this guidance from the NDE, Office of Inclusive Education, is based not only on the pertinent IDEA and NRS/NAC, Chapter 388, requirements and binding judicial precedence, but informal guidance to date provided by the United States Department of Education, Office of Special Education Programs (OSEP).

Question 1: Is the requirement to provide FAPE to students with disabilities waived as a result of the prolonged impact of COVID-19?

No.

“As public agencies and officials grapple with challenging decisions, administrators, educators, and parents may need to consider multiple options for delivering instruction, including special education and related services to children with disabilities. Those options could include remote/distance instruction, in-person attendance, or a combination of both remote/distance instruction and in-person attendance (hybrid model). However, OSEP reminds SEAs and LEAs that no matter what primary instructional delivery approach is chosen, SEAs, LEAs, and individualized education program (IEP) Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities. If State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, SEAs, LEAs, and IEP Teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA.” *COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services*, (OSEP September 28, 2020)⁵

Question 2: Does the circumstance of COVID-19 change the definition of a FAPE for an individual student?

No.

While it is recognized that there may be exceptional circumstances that affect **how** an individual student with a disability’s IEP will be implemented, the student’s IEP reflects the IEP Team’s “careful consideration of the child’s present levels of achievement, disability, and potential for growth” and was a “prospective determination of an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”. The “in light of the child’s circumstances” standard articulated by the United States Supreme Court in *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 69 IDELR 174 (2017) is not applicable to a change

⁵ This memorandum is publicly available at: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf>

in the school's circumstances. Rather, the focus remains on the individual student and his/her unique needs.⁶ "The "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁷ As such, any reduction or elimination of the determined services in the student's IEP must also be determined by the student's IEP Team and must be due to the unique needs of the student, notwithstanding the pandemic and resultant school closure. It is recognized, however, that the student's unique needs may require modifications to the manner some of the special education and related services are delivered during the pandemic and resultant school closure. For example, the student's IEP Team may need to consider other supplementary aides and services to support the student while these services are alternatively delivered through, for example, online instruction, teletherapy, or videoconferencing.

Question 3: What is the relationship between a student's IEP and a school's plan to implement the student's IEP during the pandemic, such as a COVID-19 distance learning plan?

It is each student's IEP that establishes the specially designed instruction and other services and supports that are individually designed to provide educational benefit to the student with a disability. While it is recognized that COVID-19 may affect how a student's instruction, services and supports set forth in the student's IEP are provided, any alternative delivery plan is subordinate to, and does not substitute for the IEP Team's determination of FAPE. Therefore, it is critical during this disruption to in-person instruction at school that each LEA collect data on the determination and implementation of the alternative manner in which instruction, services and supports in each student's IEP are delivered, including ongoing progress data relative to each student's IEP goals. This data will be important to an IEP Team in its determination and consideration of the impact of the school closure on the individual student and how, if appropriate, the student's needs must be addressed to remedy any resultant loss of skills/regression.

⁶ To interpret *Endrew* differently would, for example, change the standard of FAPE for a student if the LEA encountered the circumstance of being unable to procure a speech/language pathologist to provide a student the speech/language therapy required in the student's IEP.

⁷ *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 69 IDELR 174 (2017). "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.... That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be "specially designed" to meet a child's "unique needs" through an "[i]ndividualized education program." §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv). As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." 458 U.S., at 202."

See also: *Board of Education of the Hendrick Hudson Central School District, Westchester County, Et. Al v. Rowley*, 458 U.S. 176 (1982). ". . . The "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."

Question 4: Can a LEA require parents of a student with a disability to waive rights under the IDEA or NRS/NAC Chapter 388 as a condition to receive special education or related services?

No.

A LEA must obtain informed parental consent prior to the initial provision of special education. 34 C.F.R. §300.300; NAC §388.300(1). In the State of Nevada, a parent’s consent is not required for any subsequent provision of special education and related services, including the implementation of a student’s IEP after that initial IEP. While a parent of a student with a disability may withdraw consent at any time for the continued provision of special education and related services for the student, neither the IDEA nor the NRS/NAC, Chapter 388, allow a LEA to condition a student with a disability’s receipt of services in the student’s IEP upon a parent’s waiver of parental rights under the law.⁸ Likewise, given the responsibilities of a LEA under Child Find to identify, locate and evaluate and serve students with disabilities who are in need of special education and related services in the manner appropriate to the unique needs of the student (34 C.F.R. §300.111; NAC §388.215), a practice of counseling a student identified as a student with a disability out of special education would be contrary to the IDEA and NRS/NAC, Chapter 388.

Question 5: Are the evaluation, reevaluation and IEP timelines under the IDEA and NAC, Chapter 388, still in effect during this pandemic?

Yes.

None of the timelines for the conduct of evaluations, reevaluations, and IEP meetings have been waived as a result of the pandemic. The following, however, describes the timelines and existing exceptions or flexibilities that may facilitate adherence to the mandatory processes and timelines.

A. Initial Evaluation -Timeline and Exceptions

In accordance with the IDEA, 34 C.F.R. §300.301(c)(1), an initial evaluation of a student suspected of being a student with a disability must be conducted within 60 days of receiving parental consent for the evaluation, or if the State has established a timeframe within which the evaluation must be conducted, within that timeframe. Nevada has established a State timeframe for the conduct of an initial evaluation; therefore, it is that timeframe that must be followed.

In accordance with NAC §388.337, except as otherwise provided, when a LEA determines that good cause exists to evaluate the student, it must conduct the initial evaluation within 45 school days after the parent provides written consent; or 45 school days after the receipt of a hearing decision ordering the evaluation or the time set forth in the decision, whichever is shorter; or at

⁸ See also *Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment*, United States Department of Education, Office of Civil Rights (OCR), September 28, 2020: “Question 9: May a school district require parents to sign waivers before the district delivers online services to students with disabilities under Section 504? Answer: No. Public school districts may not require parents of students with disabilities to waive any rights afforded to students under Section 504 as a condition of receiving a FAPE.”

any other time agreed upon in writing by the parent and the LEA. The exceptions are as follows:

- Upon the request of a LEA, the NDE Superintendent of Public Instruction may extend the deadline for conducting initial evaluations for not more than 15 school days.
- If a student enrolls in a school served by the LEA after the 45 school day timeframe has begun and before a determination by the student's previous LEA as to whether the student is a student with a disability, but only if the succeeding LEA is making sufficient progress to ensure a prompt completion of the evaluation and the parent and subsequent LEA agree to a specific time when the evaluation will be completed.
- The parent of the student repeatedly fails or refuses to deliver the student for the evaluation.

For the purposes of NAC §388.337, a "school day" means any day in which students enrolled in a school are scheduled to be engaged in registration, classes, other instructional activities or testing during the required minimum daily period for each grade or department. NAC §388.337(4).

B. Reevaluation – Timeline

The reevaluation of each student with a disability must be conducted if the LEA determines that the needs of the student for educational or related services, including, without limitation, improved academic achievement and functional performance, warrant a reevaluation or if the parent or teacher of the student requests a reevaluation. A reevaluation must occur not more than once a year, unless the parent and the authorized representative of the LEA otherwise agree; and at least once every 3 years, unless the parent and the authorized representative of the LEA agree that a reevaluation is not necessary. NAC 388.440; 34 C.F.R. §300.303.

Flexibility – Initial and Reevaluation

As part of the initial evaluation (if appropriate) and as part of any reevaluation, the IEP team and other qualified professionals, as appropriate, are required to review existing evaluation data, including evaluations and information provided by the parents, current classroom-based and educational agency-based assessments, and classroom-based observations, and teacher and related services providers observations. The group may conduct its review without a meeting. 34 C.F.R. §300.305; NAC §388.336.

C. Initial IEP -Timeline

An IEP must be in effect at the beginning of each school year and before the initiation of special education or related services. In addition, a meeting to develop an IEP for a student must be conducted within 30 days of a determination that the student needs special education and related services; and as soon as possible following the development of the IEP, special education and related services must be made available to the student in accordance with the child's IEP. 34 C.F.R. §300.323(a) and (c); NAC §388.281(1) and (13).

D. IEP Review -Timeline

While most individuals focus on the outside requirement that a student's IEP must be reviewed

not less than annually, both the IDEA and the NRS/NAC, Chapter 388, require a student's IEP Team to review the student's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the student are being achieved; and to revise the IEP as appropriate to address--

1. any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
2. the results of any reevaluation conducted;
3. information about the student provided to, or by, the parent;
4. the student's anticipated needs; or
5. other matters.

Flexibility – Both Initial IEP and Review

Alternative Means: When conducting IEP meetings and placement meetings and carrying out administrative matters under procedural safeguards (such as scheduling, exchange of witness lists, and status conferences), the parent and the LEA may agree to use alternative means of meeting participation, such as video conference and conference calls or other means.⁹ 34 C.F.R. §300.328; NAC §388.281(10).

Attendance Not Necessary: A member of the IEP Team is not required to attend an IEP meeting, in whole or in part, if the parent and the LEA agree, in writing, that the member's attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. 34 C.F.R. §300.321(e)(1); NAC §388.281(4).

Excusal: A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if the parent consents in writing to the absence of the member; the authorized representative of the LEA consents to the absence of the member; and before the meeting, the member submits, in writing to the parent and the IEP Team, the member's input concerning the development of the IEP. 34 C.F.R. §300.321(e)(2); NAC §388.281(5).

IEP Review – Additional Flexibility

In making changes to a student's IEP after the annual IEP meeting for a school year, the parent and the authorized representative of the LEA may agree not to convene the IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the IEP and portions of the student's IEP may be revised without redrafting the entire IEP. 34 C.F.R. §300.324(a)(4) and (a)(6); NAC §388.281(7). In Nevada, the agreement to amend the student's IEP without an IEP meeting must be in writing.¹⁰

⁹ If neither parent is able to attend an IEP meeting, the LEA must use alternative methods to ensure the participation of a parent, including, without limitation, the use of a video conference, a telephone conference call or other means consistent with §300.328 (related to alternative means of meeting participation). 34 C.F.R. §§300.322(c), 300.328; NAC §388.281(10).

¹⁰The parent must be provided with a copy of the revised IEP at no cost and the LEA must ensure that the student's IEP Team is informed of those changes. NAC §388.281(7); 34 C.F.R. §300.324(a)(4) and (a)(6).

Question 6: What is the role of data collection, progress monitoring, and reporting for each student with a disability during the implementation of alternative delivery plans?

It is critical.

This data collection will provide parents and LEAs essential data when in-person instruction at school recommences and will focus the data collection at that time on the student's performance as compared to the baseline data pre-COVID-19 to enable the determination whether there was any regression or lack of expected progress and to ascertain the degree, if any, of the student's recoupment of lost skills and progress. In addition, progress monitoring that reveals a student's loss of skills or expected progress toward annual goals during the implementation of the alternative delivery plans may allow a timely amendment of the plan to, at minimum, mitigate any such regression.

Therefore, it is recommended that LEAs and parents of students with disabilities begin now to gather available baseline data on the student's progress toward meeting his/her annual IEP goals prior to COVID-19; and student participation data and progress, or lack of expected progress, toward meeting his/her annual IEP goals during the implementation of the alternative delivery plan; and through any transition to in-person instruction at school.

Question 7: If chronic absenteeism or removal of the student from school by the parent causes a student to repeatedly miss the instruction or services made available to the student in accordance with student's IEP, what obligation does the LEA have with regard to providing the student a FAPE?

Why is the student chronically absent or removed from school by the student's parent? Given the overarching obligation of a LEA to provide a FAPE to the student, (34 C.F.R. §300.17, §300.101); to conduct a reevaluation of each student with a disability if the educational or related services needs of the student warrant a reevaluation (34 C.F.R. §300.503); and to have the student's IEP Team review and revise the student's IEP as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum (34 C.F.R. §300.324(b)), the LEA should consider the possibility that there may be an underlying academic, developmental or functional need of the student associated with the student's disability that caused the absenteeism.

Therefore, the LEA should contact the student's parent and inquire as to reason for the student's chronic absenteeism; gather any evaluation data/information from the parent on the student's current academic, developmental or functional needs; and any observed changes at home that may have impacted the student's engagement in instruction and services. Together with observations and information from the student's teachers and related services providers, the LEA must determine whether circumstances warrant a reevaluation of the student or, if no additional data is necessary, whether the student's IEP Team should meet to review and revise, as appropriate, the student's IEP to ensure the student's IEP is designed to provide meaningful educational benefit. In 2007 OSEP provided the following written guidance that addressed missed services for a variety of reasons, including the student's absence from school:

"Second, you requested written guidance on the need to use substitutes and to schedule make-up sessions when speech-language pathology sessions are missed due to a child's absence from school cancellation for a class or school activity, or absence of the speech language pathologist. IDEA and the regulations do not address these issues. States and local educational agencies (LEAs) are required to ensure that all children with disabilities have available to them FAPE, consistent with the child's individualized education program (IEP) (see 34 CFR §300.101). We encourage public agencies to consider the impact of a provider's absence or a child's absence on the child's progress and performance and determine how to ensure the continued provision of FAPE in order for the child to continue to progress and meet the annual goals in his or her IEP. Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis." (*Letter to Clarke*, 48 IDELR 77 (OSEP March 8, 2007))¹¹

Given the likelihood that the student is engaged in an alternative instructional delivery system during this pandemic, it is particularly important that the LEA ascertain whether there is an undetermined instructional access issue or a unique need of the student, such as a physical, emotional or medical condition, that is impacting the student's engagement and progress in the alternative instructional delivery method. It is recognized that, while it is the LEA's obligation to ensure that all students with disabilities have FAPE available to them, when a student has failed to take advantage of available specially designed instruction and other services and supports in the student's IEP, courts have considered this mitigating factor. However, during this pandemic, the LEA may not have been able to make some of the services available to the student that were determined by the student's IEP Team as necessary to provide the student educational benefit.

If the LEA is making available all of the student's specially designed instruction and other services and supports in accordance with the student's IEP; there are no newly emerged academic, developmental or functional needs of the student that were not considered by the student's IEP Team in the development of that IEP and the student is able to benefit from the services offered; there are no access issues with regard to the alternative instructional delivery method; and the student's lack of expected progress toward the annual goals is caused only by the parent's refusal of services or removal of the student from instruction, then making FAPE available to the student in accordance with the student's IEP may excuse the obligation of the LEA to make other arrangements to provide services to the student if the student is absent from school at the time of the services. In that case, the LEA should document all attempts to provide services to the student in accordance with the student's IEP and all communications with the student's parent in that regard and are advised to consult with their legal counsel with regard to the specific factual circumstances in each case.

Question 8: Given the alternative delivery of some or all of a student with a disability's IEP services during this pandemic was caused by an unprecedented national emergency beyond the control of the LEA, does the LEA still have to address the student's resultant loss of skills/regression and/or the failure to progress?

¹¹ This letter is publicly available at: <https://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/clarke030807disability1q2007.pdf>

Yes.

The requirements of the provision of a FAPE to each student with a disability under the IDEA and the NRS/NAC, Chapter 388, necessitate that special education and related services and supplemental aids and services are provided in conformity with an IEP. 34 C.F.R. §§300.17(d), 300.101; NAC §388.281(6)(e). The limitation or absence of in-person instruction at school due to health and safety concerns during this pandemic does not relieve a LEA of the obligation to provide FAPE to each student with a disability under IDEA. While parents and LEAs typically consider compensatory education/compensatory services to describe services ordered by a hearing officer or a court to remedy a violation of the IDEA, this term has been used by the United States Department of Education, OSEP, to describe those services under applicable standards and requirements that may be required to make up for any skills that were lost due to the disruption of in-person attendance as a result of COVID-19. *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus 2019 Outbreak*, (OSEP March 2020)¹². Similarly, the NDE adopts the terminology ‘compensatory education/services’ (hereinafter, compensatory education) for this same purpose, as well as the clearly articulated applicable standards and requirements regarding compensatory education by the Ninth Circuit Court of Appeals.¹³

Individualized Determination

As with all decisions under the IDEA regarding a student with a disability, the determination of whether and to what extent a student has regressed or failed to progress toward meeting the annual goals set out in the student’s IEP during this disruption of in-person instruction at school and if so, how to remedy this regression or failure to progress, including the provision of compensatory education, if appropriate, is an individualized determination.

It is the student’s IEP Team, including the parent, who must make these determinations and it must be based on information and data. Even if the LEA and the parents gathered baseline data and transition data as previously recommended, some necessary data may not be available until a return to in-person instruction at school and the student is provided with the opportunity to recoup any lost skills and/or loss of expected progress toward the annual goals in the student’s IEP.

It is recommended that as soon as possible after resuming normal operations, school personnel begin to collect data to ascertain whether the student regressed and/or failed to make the expected progress toward the student’s IEP goals during the disruption to in-person instruction and whether and to what degree the student is demonstrating the ability to recoup any lost skills and expected progress. The length of the recoupment period to allow a student to regain any lost skills and loss of expected progress will not be the same for all students. After the appropriate recoupment period, if there is any remaining loss of skills and/or expected progress toward the student’s annual goals, the student’s IEP Team must be timely convened to review this data; determine what if any lost

¹² This memorandum is publicly available at: <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>

¹³ The State of Nevada is in the United States Court of Appeals, Ninth Circuit. See for example: *Parents of Student W. v. Puyallup*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994) and *Park v. Anaheim Union High School District*, 444 F.3d 1149, 45 IDELR 178 (9th Cir. 2006).

skills or progress the student has recouped; and determine the remedy that is reasonably calculated to provide the educational benefits that the student would have likely received, but for the disruption to in-person instruction at school.

Neither the IDEA or the NRS/NAC establish a timeframe applicable to the unique circumstances of this pandemic to complete any necessary data collection and to convene the student's IEP Team after LEAs resume normal operations. Given the length of this disruption to in-person instruction; the right of each student to receive a FAPE; and the limited duration of the student's IEP, including the annual IEP goals, these processes should be undertaken without unnecessary delay and be completed in a reasonable period of time.¹⁴ LEAs and parents are encouraged to work together to resolve any disagreements during this unprecedented health and safety crisis, including the appropriate time frame to collect necessary data based on information such as the student's past regression and rate of recoupment during prior time periods out of school; when to convene the student's IEP Team if the student does not recoup all lost skills and/or expected progress during that time period; and, the remedy, as appropriate, to address the regression and/or loss of expected progress.

Data and Factors an IEP Team May Want to Consider

The following are factors/data, a student's IEP Team may want to include in its determination whether and to what extent the student has lost skills and/or expected progress toward annual goals; the extent of recoupment of any or all of the lost skills and/or expected progress and, if appropriate, the remedy, to address the regression and/or loss of expected progress.

1. What instruction and services in the student's IEP in effect at the time of the disruption were offered and delivered during the disruption to the student's in-person instruction at school, including consideration of the specific nature of the instruction/service, such as the amount, required frequency, delivery model, and involvement with students without a disability etc.;
2. The student's progress toward meeting the annual goals prior to the disruption; during the disruption; and after the determined reasonable recoupment period;
3. The student's present levels of academic achievement and functional performance, including behavior, prior to the disruption and after the determined reasonable recoupment period;
4. The student's ability to access and engage in the instruction and services provided through the alternative delivery system during the disruption;
5. Information from the student's parent;
6. The results of any assessments conducted; and
7. The student's anticipated needs.

¹⁴ OSEP has applied the "reasonable period of time" standard to several areas in the IDEA regulations where no specific timeframe is provided in the regulations. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, 71 Fed. Reg., 46540, 46637, 46728 (August 14, 2006).

The Remedy: What, How, and When Provided

While this discussion focuses on the remedy of compensatory education, the nature of the remedy is an individualized determination and LEAs and parents are encouraged to work together to resolve any disagreements. It is the student's IEP Team, including the parent, who must determine the appropriate remedy, including how and when it will be provided. No uniform remedy will fit all students given the unique needs of each student, including such factors as physical stamina and attention span. For one student providing compensatory education before or after school may be appropriate. For another student, the extension of the school day may cause fatigue or information overload and may negatively impact the educational benefit of instruction and services received during the school day. What is clear is that any determined compensatory education must be in addition to the services set forth in the student's IEP and cannot interfere with the student's receipt of these services. Given these factors and the need to timely remedy regression and/or loss of progress, IEP Teams are encouraged to consider creative and innovative remedies that take into consideration each student's unique needs and strengths. For example, for a student for whom an extended school day is not appropriate given a lack of stamina, changing the manner in which the targeted service is provided for a period of time may provide the student the required educational benefit (such as changing a related service from consultation to direct or providing a service one-to-one rather than in a small group).

Question 9: What flexibilities are available to a LEA during this pandemic with regard to obtaining parental consent and the issuance of Prior Written Notices and Procedural Safeguard Notices?

In a June 30, 2020 memorandum, *Questions and Answers on Implementing IDEA Part B Procedural Safeguards During COVID-19*¹⁵, OSEP provided guidance on obtaining parental consent through electronic and digital signatures and the electronic provision of Prior Written Notices and the Procedural Safeguard Notice.

Parental Consent

“Q1. May a public agency accept an electronic or digital signature to indicate that the parent consents to their child's initial evaluation, reevaluation, or the initial provision of special education and related services to their child?”

Yes, so long as the public agency ensures there are appropriate safeguards in place to protect the integrity of the process. IDEA requires public agencies to obtain informed consent from the parent of the child, consistent with 34 C.F.R. § 300.9, before conducting an initial evaluation and a reevaluation of a child, subject to certain exceptions, and before the initial provision of special education and related services to the child. 34 C.F.R. § 300.300. Under 34 C.F.R. § 300.9, consent, which must be voluntary on the part of the parent, means the parent has been fully informed of, and agrees in writing to the activity

¹⁵ This memorandum is publicly available at: <https://sites.ed.gov/idea/files/qa-procedural-safeguards-idea-part-b-06-30-2020.pdf>

for which his or her consent has been requested. Because of social distancing and other restrictions during the pandemic, it may not be possible to obtain a parent's signed, written consent in-person.

In developing appropriate safeguards for using electronic or digital signatures during the pandemic, a public agency may determine that a "signed and dated written consent" may include a record and signature in electronic form that identifies and authenticates a particular person as the source of the consent and indicates such person's approval of the information contained in the electronic consent. See 34 C.F.R. § 99.30(d) (consent for disclosure of personally identifiable information (PII) from education records).

These safeguards also should include a statement that indicates that the parent has been fully informed of the relevant activity and that the consent is voluntary on the part of the parent consistent with the IDEA definition of "consent" in 34 C.F.R. § 300.9. During the pandemic, the Department considers the use of these safeguards to be sufficient for public agencies to use in accepting electronic signatures for parental consent under IDEA for the activities described above.”

“Q2. May a public agency accept a parent’s electronic or digital signature as written parental consent to disclose PII from the child’s education records?”

Yes, so long as the safeguards described in Q1 above are applied and met. That is, electronic signatures for consent may be accepted to satisfy the IDEA Part B consent requirements for disclosure of PII from education records if there are appropriate safeguards, which could include the use of the safeguards for granting consent electronically to release PII from education records described in the response to Q1 above. 34 C.F.R. § 99.30(d).

In addition, under 34 C.F.R. 300.9, consent, which must be voluntary on the part of the parent, means the parent has been fully informed of, and agrees in writing to the activity for which his or her consent has been requested. Parental consent must be obtained before PII is disclosed to parties other than officials of participating agencies or unless a specific exception applies under 34 C.F.R. § 300.622(b) of the IDEA Part B regulations or under the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations at 34 C.F.R. Part 99.1 34 C.F.R. § 300.622. In addition, under Part B of IDEA, these safeguards should include a statement that indicates that the parent has been fully informed of the relevant activity and that the consent is voluntary on the part of the parent consistent with the IDEA definition of “consent” in 34 C.F.R. § 300.9.

IDEA Part B also requires that prior to accessing a child’s or parent’s public benefits or insurance for the first time and after providing the annual notification to parents consistent with 34 C.F.R. § 300.154(d)(2)(v), the public agency must obtain written consent from the parent that meets the requirements of 34 C.F.R. §§ 99.30 and 300.622, for disclosure of PII from education records to a State’s public benefits or insurance program (e.g., Medicaid) in order for the public agency to bill that State’s program for services provided under 34 C.F.R. Part 300. 34 C.F.R. § 300.154(d)(2)(iv).”

Prior Written Notice

“Q3. How can a public agency provide parents with prior written notice required under 34 C.F.R. § 300.503, while school buildings and other public agency facilities are closed due to the pandemic?”

A public agency must provide parents written notice a reasonable time before it proposes or refuses to initiate or change the identification, evaluation, educational placement of the child, or the provision of a free appropriate public education (FAPE) to the child. 34 C.F.R. § 300.503. If the parent has previously agreed, or agrees during the pandemic, the prior written notice can be provided through electronic mail (email). 34 C.F.R. § 300.505.

The term, "reasonable time" is not defined in the regulation. The Department believes that it would be appropriate to consider factors such as the closure of public and school buildings and facilities, social distancing, and other health-related orders during the pandemic in determining what constitutes a reasonable time for this purpose. Nevertheless, public agencies should make every effort to ensure that written notice is provided as soon as possible prior to the proposed or refused action.

The determination of when prior written notice is required depends on the particular facts and circumstances, but OSEP encourages public agencies to ensure that parents are fully informed of how their child's special education and related services needs are addressed during remote learning.”

Procedural Safeguards Notice

“Q4. Given the challenges associated with school operations during the pandemic, how can a public agency ensure that a copy of the procedural safeguards available to parents under IDEA is provided in accordance with 34 C.F.R. § 300.504(a)?”

The public agency can provide a parent an electronic copy of the procedural safeguards notice (e.g., through email) instead of a paper copy, if the parent has previously agreed, or agrees to receive an electronic copy during the pandemic. See 34 C.F.R. § 300.505. The public agency must provide the parents a copy of the procedural safeguards available to the parents of a child with a disability only one time a school year, except that the notice also must be provided to parents in the circumstances specified in 34 C.F.R. § 300.504(a). The public agency is not required to provide a parent an electronic or paper copy of the notice of procedural safeguards if the parent declines a copy upon being offered a copy. The public agency should document that it offered the parent a copy and that the parent declined.”

Question 10: How can parents and LEAs resolve a disagreement regarding the provision of a FAPE to a student with a disability during this pandemic and/or the appropriate remedy?

“OSEP encourages parents and local educational agencies (LEAs) to work collaboratively, in the

best interest of children with disabilities, to resolve disagreements that may occur when working to provide a positive educational experience for all children, including children with disabilities. In its March 21, 2020 Supplemental Fact Sheet, the Department recognized that during this national emergency, schools may not be able to provide all services in the same manner that they are typically provided, and encouraged parents, educators, and administrators to collaborate creatively to continue to meet the needs of children with disabilities. Timely communication between parents and public agency staff can often help resolve disagreements that may arise regarding the educational services provided to a child with a disability during the pandemic. However, when those informal efforts prove unsuccessful, IDEA's three dispute resolution mechanisms -- mediation, State complaint, and due process complaint procedures -- are available.” (*Questions and Answers on IDEA Part B Dispute Resolution Procedures During COVID-19*, (OSEP June 22, 2020))¹⁶

The NDE has also always encouraged parents and school personnel to first work together at the school level to solve problems that arise concerning the evaluation, identification or placement of a student with a disability or the provision of a FAPE to a student with a disability. It is particularly important to do so during this unprecedented health and safety crisis that has impacted in-person instruction at school for students with disabilities for an extended period of time and caused inestimable stress to all involved.

However, for those disputes that cannot be, or are perceived as not being not capable of being, resolved without outside intervention, there are five State level alternative dispute resolution processes under the IDEA, Part B, and NRS/NAC, Chapter 388, available in the State of Nevada to resolve a dispute between a parent and a public agency and/or an alleged violation of the IDEA and/or the State laws for the provision of special education to students with disabilities: IEP Facilitation; Mediation; Constituent Concern Investigation; State Complaint; and Due Process Hearing. 34 C.F.R. §§300.151, 300.506; 300.507; NAC §§388.305, 300.306, 388.318; NRS §388.4352. An overview of the State level dispute resolution processes, including the subject matter, who may file, and who holds the decision-making power (the parents and the LEA or an outside decision-maker), are available on the NDE website at: http://www.doe.nv.gov/Inclusive_Education/Dispute_Resolution/.

Question 11: During the closure of, or restricted access to, public buildings and facilities and health/safety orders and concerns in the State of Nevada during the pandemic, is it permissible to use alternative means, such as video conferencing, to conduct resolution meetings, mediations and due process hearings?

Yes.

In a June 22, 2020 memorandum¹⁷, OSEP provided guidance on the IDEA, Part B, dispute resolution procedures in a question and answer format that addressed alternative means to conduct

¹⁶ This memorandum is publicly available at: <https://sites.ed.gov/idea/files/qa-dispute-resolution-procedures-part-b.pdf>

¹⁷ This memorandum is publicly available at: <https://sites.ed.gov/idea/files/qa-dispute-resolution-procedures-part-b.pdf>

resolution meetings, mediations and due process hearings. *Questions and Answers on Implementing IDEA Part B Procedural Safeguards During COVID-19.*

Resolution Meeting

“Q5. Can the parent and LEA agree to hold a resolution meeting virtually, rather than face-to-face? Yes. Where the circumstances related to the pandemic prevent the parent or public agency representative from attending the resolution meeting in person, it would be appropriate for the public agency to offer to use alternative means, such as video conferences or conference calls, subject to the parent’s agreement, consistent with 34 C.F.R. § 300.328. Resolution meetings related to expedited due process complaints involving discipline may also be conducted through video conferences or conference calls, subject to the parent’s agreement.”

Mediation

“Q3. How can parents and public agencies use IDEA's mediation procedures to resolve disputes when schools and other public facilities are closed or have restrictions that prevent face-to-face meetings?

IDEA does not contain a specific timeframe in which mediation must occur so long as it is not used to deny or delay a parent's right to a hearing on the due process complaint or any other rights afforded under Part B. Because mediation is voluntary, the parties have the flexibility to identify a mutually agreeable time to meet. 34 C.F.R. § 300.506(a).

Where circumstances related to the pandemic prevent the parent or public agency representative from attending mediation in person, there is nothing in IDEA that would prevent the parties from agreeing to conduct the mediation through alternative means, such as video conferences or conference calls, if the State's procedures do not prohibit mediation from occurring in this manner.” (Referenced footnote 2: “The requirements for mediation are in 34 C.F.R. § 300.506.”)

Due Process Hearings

“Q6. May due process hearings be conducted virtually when schools and other public facilities are closed or have restrictions that prevent face-to-face meetings?

Yes. A State could permit hearings on due process complaints to be conducted through video conferences or conference calls, if a hearing officer concludes that such procedures are consistent with legal practice in the State. 34 C.F.R. § 300.511(c)(1)(iii). A hearing conducted virtually must ensure a parent's right to an impartial due process hearing consistent with all requirements in 34 C.F.R. §§ 300.511 through 300.515. If applicable, a State-level review can be conducted virtually if consistent with State procedures.” (Referenced footnote 4: “The requirements for hearings on due process complaints are in 34 C.F.R. §§ 300.507 through 300.516. The requirements for hearings on expedited due process complaints are in 34 C.F.R. §§300.532 through 300.533.”)

In the State of Nevada, in recognition of the health and safety restrictions and concerns during this pandemic, mediations and due process hearings may be conducted virtually. Given the independence of hearing and review officers, the determination of whether pre-hearing conferences and the due process hearing will be conducted virtually and the procedures to ensure the rights of the parties under the IDEA and NRS/NAC, Chapter 388, are protected are the appointed hearing/review officer's sole responsibility. The NDE is scrupulous in its obligation to avoid interference with, or influence over, any pending actions. Therefore, if a party has any concerns regarding any pending due process complaint or appeal, those concerns must be raised with the appointed hearing or review officer.