

March 16, 2020

Now that we have a statewide soft closure across the state and some schools are actually on home quarantine, I know you have questions about 1) providing services students with disabilities while school, but not instruction, is dismissed and also while students/staff are on quarantine 2) providing online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and 3) meeting timelines for initial referral, annual reviews and reevaluations.

PROVIDING SERVICES AND SUPPORTS

Last week the Director of OSEP, Laurie VanderPloeg participated in a webinar which you can access here: <https://zoom.us/rec/share/5uJEf6ms7Ullf9aSwWjuZI0dXYr4T6a813IX-fALxEjMSlCba7SQ8UntTJxXCS9k?startTime=1584110179000>. A couple quotes from the Office of Special Education Programs (OSEP) Director, Laurie VanderPloeg, that seem most relevant to the questions I've been receiving this morning are:

"What we're really hoping that you guys do is look at some really good alternative ways of meeting the needs in that FAPE offer in order to reduce the need for the compensatory services and that we can ensure [students'] needs are being met at this point in time..."

"...what we'd like to advise you to consider is when school resumes ... take into consideration if there was a significant loss of services to the student during that period of time and whether or not, on an individual basis, the compensatory services need to be considered."

Further, she said OSEP is considering the "potential unintended consequences of disruptions to timelines, funding implications, and the potential flexibilities around reporting requirements." I will keep you posted as I hear anything from new from OSEP.

There is no defined or correct delivery method that will equitably meet the needs of all students. LEAs need to be flexible and consider employing a variety of delivery options. The USBE cannot tell LEAs how to provide services to students as contexts and capacities differ and *services (as always) have to individualized. IEP Teams need to decide what, how and when services and supports are provided.* Decisions must be made on a case-by-case basis. Applicable staff members should be aware of their specific responsibilities related to IEP implementation to ensure the LEA is complying with 34 CFR § 300.323.

LEAs should prioritize health and safety of students, staff, and communities. LEAs should identify and acknowledge service delivery limitations, as well as the need for districts to "make every effort to fully implement a student's IEP or 504 plan" once school resumes. This requirement to "make every effort..." does not allow a district to decline all services to students with an IEP and only offer compensatory services at a later date.

Districts should communicate the expectation and plan to meet with IEP Teams, including parents, when school resumes, to address student-specific needs resulting from the closure. This might include discussions of compensatory education and extended school year (ESY) services, made on a case-by-case basis. As educational services are provided, LEAs should collect progress data for IEP goals in order to inform parents and IEP Teams and assist in any compensatory service decisions later.

Many of you have expressed concerns about providing services to students who would have a difficult time accessing online/virtual/teleconference resources, such as students with significant needs. In these cases, having IEP Teams meet after the closure to determine the need for compensatory services may be your best option. Again, determinations need to be individualized.

As the OSERS (OSEP) guidance I sent out last week outlined, services can be provided online, virtually, through instructional telephone calls, and other curriculum-base instructional activities. The USBE has and will continually be adding to a robust repository of *instructional* resource options on our Coronavirus website: <https://schools.utah.gov/coronavirus?mid=4985&aid=3> that links to the UEN learn@home site: <https://www.uen.org/learnathome/>. An OSEP-funded Technical Assistance center, the Special Education Technology Center also tools for providing nontraditional services to students with disabilities: <https://sites.google.com/view/specialedtechcenter/home>.

As always, meetings can held virtually and by teleconference.

Parents may choose not to take advantage of offered services and when this happens LEAs are not required to make up those services. (Similarly, when a student is absent on a day that he/she would receive services, the LEA does not have to make up that session.) LEAs should not ask parents to formally revoke IDEA services as that could be considered discriminatory and, in addition, initial eligibility would have to be determined once the student wanted to receive special education again.

FERPA AND PRIVACY CONSIDERATIONS (From USBE Chief Privacy Officer, Whitney Phillips)

The [Family Educational Rights and Privacy Act](#) (FERPA) permits LEAs/schools to disclose student personally-identifiable information without parental consent if they determine that the service provides ***a legitimate educational interest***. If they determine that the service provides *a legitimate educational interest*, the school can designate them as a "School Official." This short [video](#) describes the requirements of "School Officials:"

1. Performs an institutional service or function for which the school or district would otherwise use its own employees;
2. Has been determined to meet the criteria set forth in in the school's or district's annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records;
3. Is under the direct control of the school or district with regard to the use and maintenance of education records; and
4. Uses education records only for authorized purposes and may not re-disclose PII from education records to other parties (unless the provider has specific authorization from the school or district to do so and it is otherwise permitted by FERPA). See 34 CFR § 99.31(a)(1)(i).

As far as Utah state law, [U.C.A. 53E-9-309](#) applies when disclosing student personally-identifiable information, but there is an exception for "general audience applications." "General audience application" means an Internet website, online service, online application, mobile application, or software program that:

- (a) is not specifically intended for use by an audience member that attends kindergarten or a grade from 1 to 12, although an audience member may attend kindergarten or a grade from 1 to 12; and

(b) is not subject to a contract between an education entity and a third-party contractor.

I believe that both Zoom and Google Hangouts are general audience application and therefore, the contract provisions required in [U.C.A. 53E-9-309](#), do not apply.

- That being said, after reviewing Zoom's [privacy policies](#), I recommend that users opt out of sales. You can ask us to opt you out of certain advertising practices related to your Personal Data by clicking on the "Do Not 'Sell' My Personal Information" link. You can also use an authorized agent to submit a request to opt-out on your behalf if you provide the agent written permission to do so. We may require the agent to submit proof that you have authorized them to submit an opt-out request.
- Google Hangout's [privacy policies](#) provide a number of options to make sure that information is kept private. This [link](#) describes how to change those privacy settings on various devices.

IDEA TIMELINES

The USBE cannot waive timeline requirements as only Congress can do that. Now that the President has issued a state of emergency, the Secretary of Education may be able to do so but for now, if the school is providing any general education services (virtually, by phone, etc.) the LEA is beholden to the IDEA timelines.

So, consider, if USBE can't release and LEA from an IDEA timeline (at present), is that timeline more important than the health, safety and/or anxiety of students and your staff? Only your LEA can make that determination. LEAs should act judiciously and consider what is best for the students and the adults who serve them.

As always, meetings can held virtually and by teleconference.

The 45-school day requirement for an initial eligibility evaluation is a "school" day requirement so if the school is fully closed (not the soft closure that the Governor ordered) the timeline stops until the school opens again. The timeline continues during this soft closure. (Remember that on page 49 of the online version of the Special Education Rules, it states that an evaluation for a *Specific Learning Disability* can extend past the 45-day timeline with written mutual agreement of the parent and a group of qualified professionals as referenced in 34 CFR § 300.309(c)).

DISPUTE RESOLUTION

Parents always have the right to access dispute resolution services when they have concerns about compliance with the IDEA. All stakeholders can always file a state complaint. Doing your very best by students and families may not shelter you from hearings and complaints. Quoting me or copying and pasting this email into your hearing/complaint request response will not shelter you from hearings and complaints. Director VanderPloeg recommended that LEAs, "be creative," and it will be to an LEA's advantage to document that creativity. Should hearing requests or complaints be filed as a result of our closure, hearing officers and complaint investigators will be looking to see that your LEA *considered* the individual needs of the student(s) in light of his/her circumstances. This closure is a circumstance for consideration.

Remember, when the IDEA regulation do not specifically instruct an LEA on what to do, judges apply a “reasonableness” standard to special education case disputes.

SHARING SERVICE DELIVERY PLANS

As I’m sure you’d each appreciate and benefit from other LEAs’ service delivery plans/ideas, we created the [LEA Service Continuity Plans](#) (my title—it’s catchy, right? 😊) OneDrive folder to share plans with one another. If you are willing to send me your plans, I’ll upload them for others to view.

PRESHOOL COORDINATORS

Please forward this information to your Preschool Coordinators as we are receiving questions from them as well.

FURTHER QUESTIONS/CONCERNS

As always, I’m happy to respond to questions/concerns. As having a consistent message is vital, I am the USBE point of contact for all questions/concerns related to special education.