

Guidance for Compliance with the Individuals with Disabilities Education Act and the Michigan Administrative Rules for Special Education During the COVID-19 Pandemic

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Table of Contents

A. SPECIAL EDUCATION REGULATORY QUESTIONS	4
B. DISPUTE RESOLUTION QUESTIONS	14
C. SPECIAL EDUCATION FISCAL QUESTIONS	16
D. SUBSTANTIVE REQUIREMENTS QUESTIONS	20
Impact of COVID-19 for ALL students:	20
Extended School Year (ESY).....	20
Exceeding Entitlement to FAPE	22
200-Day Programs.....	22
Non-public Schools	23
Behavior.....	24
Behavior Planning Resources.....	26
E. FEEDBACK	27



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The Michigan Department of Education (MDE) Office of Special Education (OSE) through the *Individuals with Disabilities Education Act* (IDEA) and the Michigan Administrative Rules for Special Education (MARSE) require districts to provide special education and related services to students with individualized education programs (IEPs) regardless of the challenges of the COVID-19 pandemic and public health emergency. MDE has created this document to compile questions we are receiving and provide answers in a uniform and consistent manner. The MDE has worked to ensure this guidance is aligned and consistent with information provided by the federal Office of Special Education Programs (OSEP). This is a rapidly changing situation school districts and families are all learning to navigate through together. This document will be continually revised to provide the most up to date information. Districts will be notified of any updates.

This document is not intended to provide legal advice. For legal advice, please consult with the attorney representing your district. MDE staff are not permitted to provide legal advice.

When adhering to the requirements of IDEA and MARSE, districts are encouraged to consider whether an activity can occur via telephone or virtually. Many requirements can continue to be met in this manner. Special education timelines and requirements are set forth in statute, which was written and enacted by the United States Congress and the Michigan Legislature. MDE does not have the authority to alter or waive these statutory requirements and timelines. However, MDE is committed to a reasonable approach and will exert flexibility whenever possible within the parameters of the IDEA requirements.

For the purpose of establishing common language and understanding, as districts demonstrate good faith effort in meeting the needs of all students, including students with IEPs, the following terms are provided for context and clarification:

Continuity of Learning Plan: A district plan to detail the way in which the district will provide and support educational instruction to all enrolled students. This plan should include additional strategies to target children who may be English Language Learners, those eligible under the *McKinney-Vento Homeless Assistance Act*, socio-economically disadvantaged, and those eligible under Section 504 and the IDEA and MARSE.

Contingency Learning Plan for Students with IEPs: For each student with an IEP, the current or most recent IEP is the offer of free appropriate public education (FAPE). The IEP team is encouraged to determine the programs and/or services which are able to be provided, given Governor Whitmer's Executive Order 2020-65,

through the contingency learning plan. The contingency learning plan is developed in accordance with a student's IEP and will only be in effect for the remainder of the 2019-2020 school year.

- Staff should consider accessibility, including accommodations and modifications
- To the greatest extent possible, keep equity at the center of the work to develop the individual contingency learning plans
- Document effort:
 - Focused;
 - Consistent;
 - Detailed; and
 - Demonstrates good faith effort to provide programs and/or services to students with an IEP

When a district creates a continuity of learning plan, the IEP team is then encouraged to create a contingency learning plan for each student with an IEP, in order to meet the requirements of IDEA and MARSE.

A. SPECIAL EDUCATION REGULATORY QUESTIONS

1. What special education and related services must be provided when a district is closed due to COVID-19 pandemic, and is not yet providing any services to the general student population?

When a district is closed due to a COVID-19 pandemic and is not providing any services to the general student population, a district is not required to provide a Free Appropriate Public Education (FAPE) or any IEP services to children with IEPs.

2. What special education and related services must be provided to students with IEPs when school buildings are closed due to COVID-19 pandemic, and instruction is being provided through a continuity of learning plan?

When school buildings are closed as a result of the COVID-19 pandemic, districts are to implement a continuity of learning plan. IEP teams must also ensure each student with an IEP has equal access to the same opportunities, including, and to the greatest extent possible, a FAPE.

The services and supports in a child's current or most recent IEP, prior to the implementation of a district's continuity of learning plan, reflect the traditional educational environment.

All services and supports are intended to support the child both in accessing the general education curriculum and participating with their nondisabled peers, to the

maximum extent appropriate. A district's continuity of learning plan should be considered the general education curriculum in place under these circumstances.

The child's IEP team is encouraged to develop an individualized contingency learning plan to enable the child to:

- 1) advance appropriately toward attaining the child's annual IEP goals.
- 2) be involved in and make progress in the general education curriculum (in this instance, a district's continuity of learning plan), or appropriate activities for children ages 3–5.
- 3) participate in extracurricular and other nonacademic activities; and
- 4) be educated and participate with their nondisabled peers to the maximum extent appropriate in all these activities, or in this instance, participate in the continuity of learning plan along with their nondisabled peers.

A child's IEP team is encouraged to consider the definition of specially designed instruction in the context of a district's continuity of learning plan. "Specially designed instruction" means adapting, as appropriate to the needs of each exceptional child, the content, methodology or delivery of instruction for the following purposes:

- 1) to address the unique needs of the child that result from the child's exceptionality; and
- 2) to ensure access of the child with a disability to the general curriculum (in this instance, a district's continuity of learning plan), so the child can meet the educational standards.

The child's IEP team is encouraged to consider related services in the context of what specially designed instruction (special education services) means within a district's continuity of learning plan. Related services are developmental, corrective, and supportive services required to assist a child who has been identified as a child with an IEP to benefit from special education services.

Lastly, a child's IEP team is encouraged to consider supplementary aids and services, program modifications, and supports for school personnel "to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate," or in this instance, to participate in a district's continuity of learning plan with their nondisabled peers.

Districts must provide a FAPE consistent with the need to protect the health and safety of students with IEPs and those individuals providing the education, specialized instruction, and related services to these students. In this unique and ever-changing environment, these exceptional circumstances may affect how all educational and related services and supports are provided. A FAPE may include, as appropriate, special education, and related services provided through a continuum of instruction opportunities that may be provided virtually, through instructional

materials sent home, or telephonically, etc. ([OCR and OSERS Supplemental Fact Sheet, March 2020](#)).

3. Does an intermediate school district (ISD) or district operated center-based program need to develop a continuity of learning plan even though all associated districts have completed individual district continuity of learning plans?

Yes. The purpose of a continuity of learning plan is to detail the way in which a district will provide and support educational instruction to all enrolled students, including students who are placed in a center-based program. Therefore, ISD or district operated center-based programs are to complete a continuity of learning plan to describe their plan for supporting educational instruction for all students served in the center-based programs.

In addition, IEP teams for students attending ISD and district operated center-based programs are encouraged to develop a contingency learning plan for each student with an IEP placed in a center-based program, in order to define how the ISD or district is able to provide FAPE, due to school building closures as a result of the COVID-19 pandemic.

4. How should districts proceed with special education and related services when districts resume normal operations next school year?

When districts resume normal operations, IEP teams will need to review individual student IEPs to determine whether changes are needed as a result of the extended absence from school. An IEP team may consider using informal assessments or screenings to determine whether there have been changes in a student's performance and educational need.

Where, due to the COVID-19 pandemic and resulting closures of school buildings, there has been an interruption in providing IEP services, IEP teams must make an individualized determination whether and to what extent compensatory education may be needed when districts resume normal operations in consultations with parents.

Information needed to make this determination will likely not be known until after the interruption in services has ended. *Thus, the most appropriate time for the IEP team to determine the need for compensatory education or the need for the review and revision of a student's IEP will be when districts return to normal operation.*

The Michigan Department of Education will provide further guidance regarding compensatory education at a later date.

5. Should all student IEPs be amended in response to special education and related services not being provided in accordance with a student’s IEP during an extended school closure caused by the COVID-19 pandemic?

No. In the context of a district’s continuity of learning plan, an IEP team must look at each student’s IEP and address how it can provide special education and related services for each student. Districts are encouraged to utilize a contingency learning plan, which developed by an IEP team and is based on the special education and related services the district is able to provide in light of the circumstances.

6. What confidentiality concerns should providers have, if any, related to setting up an online “classroom” with students on their caseload? What should a district consider when parents can see the other “classmates”?

In its document titled [FERPA and Virtual Learning Related Resources March 2020](#), the Department of Education Student Privacy Policy Office (SPPO) reiterates FERPA is the federal law that protects the privacy of personally identifiable information (PII) in students’ education records. The SPPO references the 2003 Letter to Mamas, which established that observation is not part of an educational record and therefore not a violation of FERPA or confidentiality so long as the provider is not sharing information from a student’s educational record. A provider talking about a student’s behavior plan could be violating FERPA, whereas a provider who implements interventions that are part of a student’s behavior plan would not be violating FERPA.

Best practice strategies may include district and IEP teams having intentional conversations with families regarding student privacy while developing the contingency learning plan. Identify what parents are and are not comfortable with and explain they may become aware of things they didn’t know about other students. Parents should be informed of small groups, individual instruction, or whole group work, and whether there will be parents and families listening and in attendance. *A district should determine and share whether classes will be recorded, as recordings are part of the educational record and would be subjected to FERPA.*

Districts are reminded school personnel are mandatory reporters in the event they suspect possible abuse or neglect of a student. As teachers enter a virtual learning environment, it is important they are aware of and fully understand the obligation of this requirement.

7. Is it permissible to provide services to a child with an IEP through video conferencing with only one student and one staff member present?

Yes. Nothing in the IDEA or MARSE prohibits one-on-one (1:1) video conferencing between a staff member and a student. Special education administrators should make local decisions about how services will be provided. Districts are encouraged to utilize contingency learning plan. IEP teams can document these decisions, which

may include 1:1 service, as appropriate. Administrators are encouraged to consider precautions, such as asking a parent to join the child or be in the same space with the child when the child is receiving 1:1 service.

Many video conferencing systems permit recording; therefore, administrators should make providers aware of any video recordings maintained by a district which contain information directly relating to a student and could be considered education records under the *Family Educational Rights and Privacy Act* (FERPA; 34 CFR § 99.3).

8. What should a district do when it cannot meet the 30-school day timeline for initial special education evaluations due to school building closure or student illness/absence because of the COVID-19 pandemic?

MARSE requires a district to complete an initial evaluation within 30 school days of the date a district receives written parental consent for evaluation of the child.

Exceptions to this requirement are specified in 34 CFR §300.301(d)-(e):

- (1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or (2) A child enrolls in a school of another public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under § 300.8. The exception in paragraph (d)(2) of this section applies only when the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.
- a. With this in mind, the department interprets the 30-day timeline requirement in light of the COVID-19 pandemic as follows: For the period beginning March 16, 2020, the days districts were closed due to the COVID-19 pandemic and were not providing any services to the general student population are not counted in the 30-school-day timeline.
- b. For the days when school buildings are closed but instruction has resumed through continuity of learning plans, those days will be counted as school days.

When a district believes it will not be able to meet the 30-school day timeline for an individual student, the district should ask the parent to agree to an extension of time (R 340.1721b). This request for agreement to extend the evaluation timeline must be obtained on an individualized basis. Requests for timeline extensions must not become a standard practice nor may standard language regarding the COVID-19 pandemic or school building closures be inserted into every prior written notice when seeking consent to evaluate. The agreement must be in writing and include a specific extension of time measured in school days.

Working within the parameters of the IDEA requirements, in lieu of ordering corrective action for untimely IEPs due to the COVID-19 pandemic, the MDE will issue data alerts. Districts will be required to verify the untimely IEP was due to the public health emergency.

9. What is the district’s obligation to a child not yet eligible where there is a delay in the ability to complete assessments as part of an initial evaluation?

When initial eligibility cannot be determined due to the need for face-to-face assessment and observations, a district is encouraged to have an IEP team develop a contingency learning plan for the child who is not yet eligible. The contingency learning plan should be based on the suspected disability and the needs which resulted in the request for an evaluation. Through the contingency learning plan, an IEP team should describe the special education and related services a district is able to provide during school building closures as a result of the COVID-19 pandemic until districts resume normal operations and the necessary evaluations can be completed.

10. What is a districts obligation to have an IEP in effect for a child transitioning from Part C to Part B no later than the child’s third birthday?

34 CFR §§ 300.101(b) and 300.124(b) require an IEP to be developed and implemented by the third birthday of a child participating in Part C programs and who will participate in Part B preschool programs. There is no exception to this requirement. An IEP must be developed and implemented by the child’s third birthday. To accomplish this, teams may conduct meetings virtually via telephone or videoconference, but are reminded of the IDEA requirement to establish a mutually agreeable time and place. Therefore, when a parent is not able or is unwilling to participate virtually, the IEP team may need to delay the meeting.

Working within the parameters of the IDEA requirements, in lieu of ordering corrective action for untimely IEPs due to the COVID-19 pandemic, MDE will issue data alerts. Districts will be required to verify the untimely IEP was due to the public health emergency.

11. How does a mandated school closure due to COVID-19 pandemic affect a district’s obligation to provide IEP services to students who transfer within the state and from out-of-state?

Students with IEPs who transfer to a new district within Michigan or from out-of-state and enroll in a new district within the same school year must be provided with a FAPE, including services comparable to those described in the child’s IEP from the previous district, until the new district either adopts the child’s IEP from the previous district or develops a new IEP within 30 school days, or (in the case of an out-of-state student) conducts an evaluation (34 CFR § 300.323(e)-(f)).

Districts should be careful not to create unreasonable logistical barriers to enrollment, keeping in mind their obligation to provide FAPE to a student with an IEP who has transferred into the district.

- a. For the period beginning March 16, 2020, districts were closed due to COVID-19 pandemic and were not providing any educational services to the general student population. Districts would not be required to provide services to students with IEPs during the same period, including transfer students with IEPs.
- b. When school buildings remain closed, but instruction has resumed through implementation of a district's continuity of learning plan, upon enrollment,
 - i. a district must review and consider the previous district's offer of FAPE. The IEP team is encouraged to develop a contingency learning plan, in accordance with the current or most recent IEP from the previous district, through the remainder of the 2019-2020 school year, or
 - ii. a district must assess and develop a new IEP

12. What should a district do when it cannot meet the requirement to review and revise each IEP at least annually due to school closure or student illness/absence because of COVID-19 pandemic?

34 CFR § 300.324(b)(1)(i) requires each district to ensure the IEP team reviews the child's IEP not less than annually to determine whether the annual goals for the child are being achieved and to revise the IEP as appropriate to address any lack of expected progress toward the IEP goals and in the general education curriculum.

There is no exception to this annual requirement.

To accomplish this, teams may conduct meetings virtually via telephone or videoconference. Any required IEP team members who are unable to attend may be excused by written consent of the parent or written agreement between the parent and the district pursuant to the procedures outlined in 34 CFR § 300.321(e).

However, districts are reminded of the IDEA requirement to establish a mutually agreeable time and place. Therefore, when a parent is not able or is unwilling to participate virtually, the IEP team may need to delay the meeting.

Working within the parameters of the IDEA requirements, in lieu of ordering corrective action for untimely IEPs due to the COVID-19 pandemic, MDE will issue data alerts. Districts will be required to verify the untimely IEP review was due to the public health emergency.

13. As IEP teams are meeting during COVID-19 pandemic closures and restrictions, what should the IEP include for the dates of services?

MDE OSE recommends districts use an implementation date which reflects the IEP team meeting date. Subsequently, upon completion of the annual IEP, an IEP team is encouraged to develop a contingency learning plan which will reflect an appropriate FAPE in light of the circumstances of the COVID-19 pandemic.

14. Should the initial or annual IEP be based on the options available through the continuity of learning plan, or based on what a district would have offered as FAPE if districts were in operation as normal?

An IEP is an entitlement under IDEA, and therefore must be written to reflect the services, modifications, supports, and placement that support a student's unique education and behavior-related needs and are reasonably calculated to provide a FAPE to the individual student. An IEP must not be written to accommodate a temporary situation, administrative convenience, or lack of time and resources. An IEP team may, but is not required to, create a contingency learning plan for a child with an IEP as a best practice, which will be implemented during school building closures due to COVID-19 pandemic. ([OSERS Q&A March 2020](#))

The IEP team would need to complete the initial and/or annual review IEP as the full offer of a FAPE for the ensuing annual timeframe, as if districts were in operation as normal. District IEP teams are encouraged to develop a contingency learning plan to detail those programs and/or services the district is able to provide during the school building closure due to COVID-19 pandemic.

15. If an IEP team creates a contingency learning plan, is prior written notice (PWN) needed? Must parent consent be obtained?

No. PWN has broad application. A PWN must be given to parents whenever a district proposes any change to any matter related to identification, evaluation, placement, or the provision of a FAPE, or when a district refuses a parent's proposal regarding any of these matters (34 CFR § 300.503).

The United States Supreme Court has interpreted FAPE to mean an IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances (*Endrew F. ex rel. Joseph F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988, 994 (2017)). In short, any change by a district to the education program for a child with a disability requires a PWN.

Due to the COVID-19 pandemic, which has resulted in the governor's Executive Order 2020-35, subsequently 2020-65 closing all school buildings for the remainder of the 2019-2020 school year, all children are to be supported through a continuity of learning plan. Through this guidance being issued, MDE recommends all children with an IEP are additionally supported through a contingency learning plan which is

written in accordance with each individual student's IEP. In this situation, districts must comply with the Executive Order 2020-65. This was not a district or IEP team decision. Therefore, any contingency learning plan developed *in accordance with* the IEP for a student does not constitute a material change in services or a substantial change in placement and would not require prior written notice or parent consent.

16. When a district opts to write a contingency learning plan would the district need to conduct an IEP team meeting or amend the IEP?

No. When a district opts to follow the State's guidance and IEP teams develop an individual *contingency learning plan* for students with IEPs, the district is not required to conduct an IEP team meeting, complete a revision amendment, or issue prior written notice. The district is not changing the offer of a FAPE. A contingency learning plan is intended to document a district's good faith effort to provide students with a FAPE which is appropriate in light of the circumstances of the COVID-19 pandemic. A *contingency learning plan* is developed in accordance with an IEP and on an individualized basis and does not require parent agreement or consent. However, the schedule for the implementation of the contingency learning plan should be developed in collaboration with the parent.

Unless an IEP team is able to fully implement the current or most recent IEP, IEP teams must either hold a new IEP, complete a revision amendment, issue prior written notice, or develop a contingency learning plan in accordance with the student's IEP, for each student with an IEP in the district for the remainder of the 2019-2020 school year.

17. May a district obtain parent consent using electronic signatures and send all copies of prior written notice electronically?

Yes. There is nothing in the MARSE or IDEA that would prohibit the use of electronic signatures. Therefore, schools wishing to utilize electronic or digital signatures for consent may do so, if they choose.

18. What should a district do when it cannot meet the requirement to reevaluate each child with a disability at least once every 3 years due to school closure or student illness/absence because of COVID-19 pandemic?

A reevaluation of each child with a disability must be conducted at least every three years, unless the parents and district agree that a reevaluation is unnecessary (34 CFR § 300.303(b)). When appropriate, a reevaluation may be conducted through a review of existing evaluation data (REED), which includes any evaluation and additional information provided by a student's parents. This review may occur without a meeting and without obtaining parental consent, unless it is determined additional evaluations are needed (34 CFR §300.305(a))

- a. When the IEP team, through the REED, determines the need for additional evaluation and identifies an evaluation plan will not require face-to-face assessments or observations, the reevaluation can be completed during the period of learning at a distance so long as a student's parent or legal guardian consents.
- b. When the IEP team, through the REED, determines the need for additional evaluation and identifies an evaluation plan requiring face-to-face assessment or observation that cannot occur during the period of learning at a distance, the reevaluation would need to be delayed (Office of Civil Rights, Fact Sheet March 16, 2020).

Where a change in eligibility cannot be determined due to the need for face-to-face assessment and observations, a district should continue to support the student's unique educational needs until the district resumes normal operations and the necessary evaluations can be completed. This may include, but is not limited to, a child who is eligible under MARSE R 340.1711 early childhood developmental delay and who has turned eight years old during the mandated school closure.

19. Must reevaluations be completed within 30-school days?

Yes. MARSE R 340.1721b states within 10-school days of receipt of a written request for any evaluation, the public agency shall provide the parent with written notice consistent with 34 CFR §300.503 and shall request written parental consent to evaluate. The time from receipt of parental consent for an evaluation to the notice of an offer of a free appropriate public education or the determination of ineligibility shall not be more than 30 school days. This timeline begins upon receipt of the signed parental consent by the public agency requesting the consent.

20. How should a district handle the provision of IEP annual goal progress reports to parents during a school closure due to COVID-19 pandemic?

The regulations implementing the IDEA require each IEP include a description of when progress reports for annual IEP goals will be provided to the parents (34 CFR § 300.320(a)(3)(ii)). When a child's IEP indicates the progress report will be provided concurrent with the issuance of report cards or in the same manner and frequency as general education, the IEP progress report would only need to be issued when general education report cards are also issued. When the IEP indicates the progress report will be provided in a different manner and frequency than general education report cards, a district should make every effort to issue the IEP progress report in the manner required by the IEP.

B. DISPUTE RESOLUTION QUESTIONS

1. Can parents and districts request special education mediation, during the required school building closure under Executive Order 2020-35?

Yes. Parents and districts can mutually agree to special education mediation and request a mediator at any time from the [Special Education Mediation Services](#).

2. Can individuals and organizations continue to send special education state complaint requests to MDE during the required school building closure under Executive Order 2020-35?

Yes. Individuals and organizations can send special education state complaint requests to MDE at any time. State complaints are officially filed when they are received by MDE staff in the Office of Special Education. Investigations begin on the day the complaints are filed. The mandatory school closures as a result of the COVID-19 pandemic have not disrupted the ability of MDE to receive and/or investigate state complaints.

3. What happens with pending special education state complaint investigations that were started before the required school building closure under Executive Order 2020-35 but are not yet completed?

Current ongoing state complaint investigations will continue, and investigators will issue state complaint final decisions as usual. Complaint investigators are in communication with special education directors involved in open investigations in order to gather information about their district's closure, their level of access to documentation, and whether staff are available for interviews. With information, MDE will determine whether there is a need to permit an extension of the regulatory time limit for completing the complaint investigation due to exceptional circumstances with respect to each particular complaint pursuant to 34 CFR § 300.152(b)(1)(i). When an extension of time is permitted to complete the investigation, both the district and complainant will be notified.

4. Given the mandated school closure and the additional requirement to close school buildings for the remainder of the 2019-2020 school year, is a district still required to complete existing corrective action within the established timeframe identified in the final decision?

Yes. Each complaint final decision that identifies a violation of special education law includes required corrective action within a specified timeline. Complaint investigators will be mindful of the current COVID-19 pandemic restrictions when establishing new timelines. MDE will monitor the completion of corrective action activities. When any corrective action cannot be completed within the established timeline, and a district requests an extension, MDE will work with the district and consider the need for a reasonable timeline extension.

5. Can parents continue to file due process complaints requesting a hearing during the mandated school closure under Executive Order 2020-05 or during the required school building closure under Executive Order 2020-35?

Yes. A parent's due process complaint requesting a hearing against a district is filed when the district receives notice (34 CFR §§ 300.508(a)(1), (e), (f); 300.510(a)-(b)). MDE sends email notifications of due process complaints to the district through Catamaran on the date they are received. Timelines for holding a resolution session and appointing a hearing officer begin when the district staff receive the Catamaran notification through email.

6. When a district receives notification a parent has filed a due process complaint request for a hearing during the mandated school closure under Executive Order 2020-05 or during the required school building closure under Executive Order 2020-35, how will timelines for holding a resolution session and appointing a hearing officer be affected?

When a parent files a due process complaint request for a hearing, the district must convene a resolution meeting within 15 days of receiving notification of the parent's complaint request unless the parties agree in writing to waive the meeting or to use mediation (34 CFR § 300.510(a)). While the IDEA specifically mentions circumstances in which the resolution period can be adjusted in 34 CFR § 300.510(c), it does not prevent the parties from mutually agreeing to extend the timeline because of unavoidable delays caused by the COVID-19 pandemic.

7. What is the impact of school building closures on special education monitoring timelines and processes?

At this time, the federal government has not waived the federal requirements under the IDEA. MDE is working with USED to determine whether there are any flexibilities or waivers that may be issued in light of the COVID-19 pandemic. Until and unless USED provides flexibilities under federal law, districts should make a good faith effort to adhere to IDEA requirements, including federally-mandated timelines, to the maximum extent possible.

Districts are encouraged to consider ways to use technology to meet these obligations. However, MDE acknowledges the complex, unprecedented challenges districts are experiencing as a result of COVID-19 pandemic. MDE is committed to a reasonable approach to compliance monitoring within the parameters of IDEA requirements.

C. SPECIAL EDUCATION FISCAL QUESTIONS

1. Is it allowable to charge salaries and benefits to IDEA Part B funds for staff who are teleworking and staff who are not working though they may now be temporarily performing non-special education but necessary duties as a result of the COVID- 19 pandemic?

Yes. It is allowable to continue to charge salaries and benefits for approved special education personnel teleworking and not working using IDEA Part B funds or reported on the SE-4096 Special Education Actual Cost Report for state aid reimbursement following the district's policy of paying salaries from all funding sources, federal and non-federal.

It is important to remember while certain flexibilities may be provided during the COVID-19 pandemic, the **purposes and beneficiaries** of the IDEA Part B grant remains the same. Therefore, if approved special education personnel re-deployed to other non-special education but necessary duties as a result of the COVID-19 pandemic, other funds must be used to support the non-special education assignment. This requirement also applies to those costs reported on the SE-4096 Special Education Actual Cost Report.

- 1) Staff who are teleworking will be paid from the same funding sources in a similar manner as prior to the COVID-19 pandemic and supported by time and effort documentation.
- 2) When charging IDEA Part B funds for special education staff who are not working, the district will need to consider how to allocate funds using a prior, representative period.

District's should consider their policies, procedures and documentation of personnel expenses to support all charges to the grant or reported for state aid reimbursement.

Time and Effort Documentation

The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in [2 CFR 200.430\(i\)](#) Standards for Documentation of Personnel Expenses details records for salaries and benefits that must be kept to accurately reflect work performed. This language provides considerable flexibility for districts to develop systems to track time and effort for employee compensation. While Personnel Activity Reports (PARS) and Semi-annual Certifications are no longer required, maintaining sufficient documentation to support costs following [2 CFR 200.430\(i\)](#) is required with a strong reliance on internal controls. As part of a districts processes and procedures they may include PARS and Semi-annual Certifications, though these documents are not a substitute but rather additional

documentation reflecting the district's internal controls that provide an assurance charges are accurate, allowable and properly allocated.

2. Is it allowable to purchase technology to support a district's continuity of learning plan for students with IEPs?

Yes. When a district buys certain technology for all students, purchases for students with IEPs should be included. IDEA Part B funds are to be used for the excess costs of special education. Additional technology to address a child's disability-related needs is allowable. Any equipment \$5,000 or greater is considered a capital outlay and must receive prior approval from MDE OSE.

Any equipment, including computing devices less than the \$5,000 threshold for equipment are considered "supplies" and do not require prior approval. These supplies, including computing devices, hotspots, etc., purchased with federal funds **must be documented and tracked to safeguard these assets**. During the COVID-19 pandemic there is anticipated to be increased purchasing and distribution of technology where procedures for documenting what items of technology have been purchased and where those items have been distributed.

3. Is it allowable to use IDEA Part B funds to support professional development of special education staff for online learning and instruction?

Yes. The type of professional development needed during the COVID-19 pandemic may be new but continues to meet allowability within the IDEA Part B grant for approved special education personnel.

4. Will there be any relief provided for the IDEA Part B requirements related to LEA Maintenance of Effort, Excess Cost, Comprehensive Coordinated Early Intervening Services, and Proportionate Share?

Concern and requests for relief to the IDEA Part B fiscal requirements mentioned have been forwarded OSEP for consideration. We are waiting for guidance from OSEP. Until different guidance is provided the current requirements remain in place and must be met.

Excess Cost:

Currently, the IDEA Part B Excess Cost requirement is being implemented for the 2019-20 fiscal year as a pilot. In fall 2020, the 2019-20 Excess Cost compliance test will conclude the pilot year. Therefore, any LEAs not meeting the Excess Cost requirement will be for informational purposes.

IDEA Part B Maintenance of Effort:

If LEA expenditures for special education are reduced during the COVID-19 Pandemic or any other time from state or local funds related to personnel or other

reasons not currently supported with allowable IDEA Part B exceptions, there would be a risk of not meeting their MOE requirement.

If an LEA has reduced expenditures on their federal Part B grant(s) and do not have a plan to spend those freed up funds on one-time costs and move costs typically supported with state and local funds to the federal grant, the reduced state and local expenditures may put the LEA at risk of not meeting their MOE requirement.

5. What types of waivers can we expect from OSEP on MOE for both state and LEAs especially in lieu of potentially reduced funding in the current year (via executive order cuts) and particularly next year?

We have informed OSEP of the current challenges and are waiting for additional guidance from OSEP.

6. With the possibility of reduced funding and corresponding pay cuts is there a likelihood that MOE exceptions would be expanded to include voluntary reductions in pay/benefits?

We have informed OSEP of the current challenges and are waiting for additional guidance from OSEP.

7. Will there be any relief for coordinated early intervening services (CEIS) using IDEA Part B funds?

LEAs can use up to 15% of their IDEA Part B funds to provide voluntary CEIS or may be required to use 15% of their IDEA Part B funds to provide CEIS as a result of being identified with significant disproportionality.

It is unnecessary to provide relief to LEAs related to providing a program of voluntary CEIS.

For fiscal year 2019-20, no ISDs were identified with significant disproportionality and therefore required to reserve 15% of the IDEA Part B funds to provide a CEIS program.

For fiscal year 2018-19, member districts/LEAs were identified with significant disproportionality and therefore required to reserve 15% of their IDEA Part B funds to provide a CEIS program. There may be member districts required to complete their CEIS program in 2019-20 using carryover funds. In this situation, requests for relief have been submitted to OSEP for consideration. MDE is waiting for guidance from OSEP.

8. Can costs be charged to the proportionate share and considered allowable if services were not directly provided (in-person)?

During the COVID-19 pandemic, services to parentally placed private school children with disabilities specified in a non-public service plan to be provided in-person may now need to be provided virtually or through other means. Nothing in IDEA would prohibit costs being charged to the proportionate share funds for providing services to parentally placed private school children with disabilities in-person or virtually.

9. Will there be any extension on the time period to use federal funds?

OSEP is aware of the current challenges and MDE is waiting for additional guidance from OSEP.

10. Our ISD had to open an emergency daycare this week. We are trying to figure out how to staff the daycare. As an ISD, the majority of our staff is funded with IDEA funds or special education (restricted) dollars. The Q & A that MDE posted for IDEA says that we can continue to pay staff, but does not say we can reassign. Can I reassign an employee and still pay him or her with special education funds? Can I submit for the 28% reimbursement?

No. It is important to remember while certain flexibilities may be provided during the COVID-19 pandemic, the purposes and beneficiaries of the IDEA Part B grant remain the same. Therefore, if approved special education personnel are reassigned to other non-special education duties as a result the pandemic, other funds must be used to support the non-special education assignment. This requirement also applies to those costs reported on the SE-4096 Special Education Actual Cost Report.

11. Is it allowable to charge costs of contractors providing professional services, including special education transportation, to IDEA Part B funds, reported on the SE-4096 Special Education Actual Cost Report or the SE-4094 Transportation Expenditure Report who are continuing to provide services or not providing services as a result of the COVID-19 pandemic?

Yes. It is allowable to continue to charge costs for contracted special education professional services, including special education transportation, during this time when those services are still being provided, but in a different quantity or manner, or if necessary in order to maintain the availability of the contractors services in the future, when not providing any special education services. This is true regardless of the special education funding source (IDEA Part B funds or reported for reimbursement on the SE-4096 and SE-4094 special education cost reports for state aid reimbursement) and should follow the district's practice or policy for paying for contractors from all funding sources, federal and non-federal.

This response does not require a district to continue to pay contractors or to continue to pay contractors at the same rate as prior to the COVID-19 pandemic school closures.

If a district is paying contractors other than for services rendered, the district should consider paying only for those costs that are reasonable and necessary. In this case, districts may need to amend contracts to address and document this period of time to pay only for the assurance of future services.

It is important for districts to maintain documentation to support costs charged to the federal grant or reported for state aid reimbursement and how those decisions were made for future monitoring or audits.

D. SUBSTANTIVE REQUIREMENTS QUESTIONS

Impact of COVID-19 for ALL students:

Extended School Year (ESY)

Summer learning opportunities may be necessary for all students, and potentially funded through the CARES Act, or with other fiscal resources, to address student learning gaps resulting from the disruption in educational services. In the event districts consider summer learning for all students, students with individualized education program (IEPs) should be included in this consideration.

Data recently shared by the [Northwest Evaluation Association \(NWEA\)](#) have demonstrated projections in which students, will retain approximately 50% of the math content learned prior to the public health emergency and approximately 70% of the reading content learned prior to the public health emergency. The added impact for students with IEPs needs to be considered as districts determine the appropriate type and amount of services for individual students.

District consideration of potential summer learning opportunities for all students, including students with IEPs, maybe made in order to increase student skills, reduce loss of instructional time during summer break, and prepare students to resume their education without regression when the new school year begins. The determination for Extended School Year (ESY) services as defined in the Individuals with Disabilities Education Act (IDEA), is a supplemental opportunity for students with an IEP.

1. What are ESY Services?

ESY services are an individual entitlement for students with an IEP who have experienced a documented regression of skills during a break from instruction, who are in a critical stage of learning, or who due to the nature or severity of their disability, require service beyond the normal school year. ESY services are provided

outside the course of the normal school year and are designed for an individual student to maintain a skill in one or more goal areas of concern at no cost to the family.

The purpose of ESY is to support the student beyond the normal school year and to reduce thereby a period of no instruction to enable the student to continue making progress as soon as possible when the new school year begins. The need for ESY services is to be considered at each IEP team meeting and is based on data. The review of data allows the IEP team to be proactive in reducing the potential impact that the future time away from instruction may have for an individual student with an IEP.

2. What is Compensatory Education?

Compensatory education is a legal remedy to which a child is entitled when a district fails to provide appropriate educational services. The purpose of compensatory education is to place the student in a position in which he or she would have been if there had been no violations of the IDEA.

3. What is the key difference between ESY and compensatory education?

ESY services are proactive. ESY services are to be considered at each IEP team meeting on an individual basis. The IEP team determines the need for ESY services, based on data collected following other periods of a break in instruction.

Compensatory education is reactive. Compensatory education is a remedy issued as a result of a district's failure to provide Free Appropriate Public Education (FAPE) and is determined on an individual basis.

4. Are districts required to provide ESY services?

Districts are required to consider the need for ESY services at each IEP team meeting. ESY eligibility is based upon individual student needs using previously collected data. Data from multiple sources should include:

- end of year data from the previous school year,
- current school year data prior to the school closure, and
- data collected during remote instruction should be considered.

For students who have already been determined eligible for ESY, the district should provide—to the greatest extent possible—the ESY services identified in the student's IEP. Districts must recognize exceptional circumstances may affect how ESY services are provided. FAPE may include special education and related services provided through distance learning deemed reasonable and appropriate for a specific student, in consultation with parents, which may include services provided virtually, online, telephonically, and through paper and pencil tasks. The intent of ESY is to extend services beyond the end of the 2019-20 school year, shorten the

break in services during the summer in order to maintain the skill in the goal area of concern, and prepare the student for the new school year without opportunity for regression.

Where ESY services have not been determined, the IEP team, including the parent, should review data and decide as to whether a specific student is eligible for ESY services. Recognizing exceptional circumstances may affect the data normally used to make this determination, MDE encourages districts to use existing data, including prior eligibility for ESY when determining eligibility.

Specific to COVID-19 related circumstances, the IEP team should also examine the additional impact of school building closure on learning and students' progress toward their IEP goals. Providing appropriate ESY services may reduce the need for compensatory education services when schools return to normal operations, particularly for students for whom the absence of in-person instruction has had a significant impact.

Exceeding Entitlement to FAPE

5. What is a district's obligation regarding students who are either exiting due to exceeding the age of entitlement prior to September 1, 2020 or graduating with a high school diploma?

During this unprecedented time of school building closures, there are IDEA eligible students who are entitled to, but may have not been able to receive, the special education programs, services and supports as written in their IEP. These students may be determined to have experienced a denial of FAPE, through no fault of the district. This is a unique group of students, who would have otherwise been able to participate in all school instruction and activities had it not been for the COVID-19 pandemic. Districts are encouraged to consider the possibility or the extent to which there may be a need to compensate for the rights which may have been denied to these individual students with IEPs.

Districts are encouraged to review the contents of [Letter to Riffel, August 22, 2000 \(OSEP\)](#) as they consider the extent to which IEP teams may need to reconvene to discuss an appropriate response to how the COVID-19 pandemic may have affected this unique group of students and their individualized needs.

200-Day Programs

6. How will school building closures impact 200-day programs?

A school fiscal year spans July 1-June 30 of each year. 200-day programs that started September 2019 and will not end until August 2020, are considered part of the 2019-2020 school year as they should continue to be supported with 2019-2020 funding sources.

7. Does a district or ISD need to revise individual student contingency learning plans for students attending 200-day programs?

A contingency learning plan is effective for the remainder of the 2019-2020 school year. Contingency learning plans developed as a result of the COVID-19 pandemic will include the duration of the 200-day program and may not need to be adjusted, revised, or adapted, unless:

- the services provided during the summer will be different, or
- the services or supports during the summer portion of the 200-day program are not addressed in the original contingency learning plan.

Non-public Schools

8. What is a district's obligation for students with disabilities placed by their parents in non-public schools?

A parentally placed non-public school student does not have an individual right to receive some or all the special education and related services the child would receive if enrolled in a public school. 34 CFR § 300.137. A student with a disability parentally placed in a non-public school is not entitled to FAPE, ESY services or compensatory education services. Services for these students are addressed through a non-public service plan (NPSP) and opportunities for equitable participation.

Students with disabilities parentally placed in non-public schools are supported through a NPSP. For this reason, districts should reach out to non-public schools in which they have parentally placed students with disabilities with a NPSP. The district should discuss the NPSP for each student to determine how those services may or may not be provided to ensure they understand which services are being provided during prolonged school closures. Changes to the NPSP should be documented with an amendment/addendum.

9. Does a district need to develop contingency learning plans for students with disabilities placed by their parents in non-public schools?

No. Students with disabilities parentally placed in a non-public school receive special education services through a NPSP. Current Executive Order 2020-65 addresses additional district obligations for non-public schools.

Behavior

10. Can a district complete a functional behavior assessment (FBA) during remote instruction?

- 1) When the FBA was initiated before the school building closures, and the required components can be completed in the current distance learning environment, the district can complete the FBA. A district may need to consider whether the behavior, which triggered the need for the FBA, may no longer be a concern in the new distance learning environment.
- 2) When the FBA was initiated before the school building closures, and the required components cannot be completed in the current distance learning environment, the district may need to seek agreement from the parent to extend the evaluation timeline until in-person instruction resumes to complete the remaining components.
- 3) When the FBA is initiated during the school building closure because behaviors emerge which impede the student's ability to learn in the distance learning environment, parental consent will be required before the FBA can be completed.
- 4) The FBA is not required to complete a BIP. The district is encouraged to work proactively with the parent/caregivers to address behavioral needs as they arise in the distance learning environment and to develop an appropriate BIP.

11. Is a district required to change a behavior intervention plan (BIP) during remote instruction?

A BIP may need to be developed, reviewed, or revised as needed to support a student's behavior and does not require an IEP team meeting or amendment, unless it is specified in the IEP. A student's BIP is context specific and is written to address behavior(s) occurring in the brick and mortar setting. The same behaviors may no longer be impeding the student's learning in the distance learning environment.

When new behaviors emerge, which impede the student's learning in the distance learning environment, a new behavior plan may be needed. The district is encouraged to consult with and provide coaching to parents/caregivers on the use of effective strategies. 34 CFR § 300.34(8)(i) Parent counseling and training means assisting parents in understanding the special needs of their child; (ii) providing parents with information about child development; and (iii) helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP.

The BIP may need to be revisited again when school resumes normal operations.

12. What is the definition of removal from remote instruction?

The definition of a removal from remote instruction is an exclusion from the distance learning environment for disciplinary reasons or a restriction from school-related activities.

13. Can a student be disciplined for inappropriate behavior during remote instruction?

Yes, a student can be disciplined for inappropriate behavior during remote instruction. To discipline a student for inappropriate behavior during remote instruction, districts may need to revise or amend its Student Code of Conduct. Districts must monitor and track behavioral removals. All expulsions, suspensions, and disciplinary removals must be documented and maintained as part of the student's educational record.

When a school decides to suspend or expel a student from the remote instruction, the student is to be extended the same procedural protections of any student with a disability in a brick and mortar setting.

14. What constitutes FAPE for students who were suspended or expelled at the time of school closure, and subsequent school building closure?

FAPE for students who experienced a change of placement prior to the closing of schools and the subsequent closure of school buildings, includes access to the general curriculum and progress toward meeting the goals set forth in the student's IEP. 34 CFR § 300.530(d)(1)(i). The continuity of learning plan may allow for alternate means of providing access or opportunities to participate the general education curriculum. Students may have options for participation in the general curriculum which were not previously available during the initial disciplinary removal. Those alternate options should be considered in the development of the student's contingency learning plan, as the district works to support a student suspended or expelled during this time.

15. Can a district refuse to provide learning opportunities for a student who was in the process of being suspended or expelled before school building closures?

No. If a district was in the process of suspending a student, the process must resume the first day school resumes under the district's continuity of learning plan.

16. What are a district's obligations for conducting a Manifestation Determination Review (MDR) during the remainder of the 2019-2020 school year?

Districts are obligated to conduct MDRs during the remainder of the 2019-2020 school year. An MDR is to be conducted within 10 school days of the date the

decision is made to make a change of placement due to violation of the Code of Student Conduct.

All MDRs should be considered on an individual basis and follow the district continuity of learning plan during the pandemic. Districts are encouraged to consider ways to use technology to meet the MDR obligations.

17. If a student was placed in an interim alternate education setting (IAES) prior to the COVID-19 pandemic, can the student participate in general education remote instruction with all students during the school building closure?

No. The district's response to the student's behavior was to remove the student from the education setting, away from peers. A student who was placed in an IAES, prior to school closures, can participate in remote instruction but must remain separate from peers for the duration of their IAES placement.

The district should consider:

- The mode of instruction in the continuity of learning plan (blend of online/printed materials, virtual classrooms, videos, and phone calls amongst things).
- The nature of the offense and any safety concerns of the student participating in the general education continuity learning plan; and
- Possible behavior supports necessary for the student to access the general education curriculum under the continuity learning plan.

Behavior Planning Resources

The [Center on Positive Behavioral Intervention and Supports](#) has developed the following practice brief to assist teachers in utilizing the principals of PBIS as part of their lesson planning development.

The practice brief shares tips for maintaining continuity of learning through defining classroom expectations for remote (i.e., distance) instruction and online learning environments. With a few adaptations, teachers can use a PBIS framework to make remote learning safe, predictable, and positive. School-wide positive behavioral interventions and supports (PBIS) is an evidence-based framework for improving school climate, social emotional competence, and academic achievement, and decreasing unsafe behavior in schools (Lee & Gage, 2020). Just as in a brick and mortar school, [PBIS can be used to make virtual \(i.e., online\) education more effective](#).

E. FEEDBACK

If you have additional questions or topics you want to see addressed in this guidance document, complete our [feedback form](#).