



OCTOBER 2020

NO. 20-12

Federal Laws Governing Services to Students with Disabilities Remain in Full Force

The United States Department of Education recently released two guidance documents addressing the provision of a free, appropriate public education (“FAPE”) to students with disabilities during the COVID-19 pandemic.

The Office of Special Education Programs (“OSEP”), which enforces compliance with the Individuals with Disabilities Education Act (“IDEA”), confirmed in [OSEP QA 20-01](#) that the IDEA remains in full force and effect regardless of pandemic conditions. Similarly, the Office for Civil Rights (“OCR”), which enforces compliance with several federal civil rights laws that prohibit discrimination including Section 504 of the Rehabilitation Act (“Section 504”), confirmed in [Questions for Answers for K-12 Public Schools in the Current COVID-19 Environment](#) that students with disabilities must continue to receive a FAPE and not be subjected to discrimination during the pandemic.

FAPE

The new federal guidance affirms the following:

- LEAs that provide distance learning must continue to comply with the IDEA, Section 504, and the Americans with Disabilities Act. LEAs remain responsible for ensuring children with disabilities receive a FAPE regardless of the method of service delivery.
- LEAs must not require parents to waive any rights under Section 504 as a condition of receiving a FAPE. Although not specifically addressed by the new federal guidance, LEAs likely may not require parents to waive any rights under the IDEA as a condition of receiving a FAPE.
- LEAs may prioritize the provision of in-person instruction to students with disabilities for whom an individualized review of that student’s needs has determined that in-person instruction is needed to ensure that the student receives a FAPE or avoid discrimination on the basis of disability.

IEP/Section 504 Amendments

Some special education and related services may need to be provided in a different manner than they would be if students were on campus, full time, in light of health and safety concerns. Section 504 Plans and IEPs do not have to be changed or updated solely to reflect a temporary shift to distance learning. That said, LEAs still must provide students with a FAPE, so individualized determinations should be made to determine whether an IEP or Section 504 Plan should be revised to ensure that students receive a FAPE. Changes to an IEP made between annual reviews can be done by amendment if the parent and LEA agree not to convene the IEP team.

Evaluations and Reevaluations: IDEA

Federal timelines for evaluations and reevaluations have not been waived due to COVID-19. COVID-19 conditions may make in-person assessments impracticable, so LEAs should explore assessment instruments to determine if any can be administered virtually, in whole or in part, provided that evaluation of the student is based on personal observation (whether in person or remotely). If an LEA chooses to conduct a triennial reevaluation by a review of student records, the review must be sufficiently comprehensive to determine whether the child continues to have a disability and to identify the educational needs of the child.

Evaluations and Reevaluations: Section 504

LEAs must conduct Section 504 evaluations and reevaluations during distance learning consistent with health and safety practices, which may impose limitations on the assessment or make in-person or face-to-face assessment impracticable. Where in-person evaluations are not possible, LEAs must make good faith efforts to conduct them virtually or by other comparable methods to the extent that assessment instruments can be administered by trained personnel in conformance with the test producer's instructions. LEAs and parents may agree to waive or postpone evaluations or reevaluations under Section 504 and the IDEA. For a child suspected of having a disability, LEAs may utilize a diagnostic placement until an appropriate comprehensive evaluation can be conducted safely under Section 504 and the IDEA, though OCR's guidance does not expressly address the latter.

Extended School Year ("ESY")

A student whose IEP team determines needs ESY services must be provided with those services even if schools are closed due to COVID-19. LEAs that were unable to provide ESY for the 2019-20 school year should consider providing it during the 2020-21 regular school year during school breaks or vacations.

Face Coverings

Enforcement of face covering requirements could impede a child's ability to receive a FAPE if the child's disability or medical condition makes wearing a face covering impossible. To avoid discrimination, LEAs must make reasonable modifications to face covering policies, practices and procedures that are consistent with the health, safety, and well-being of all students and staff. Although an LEA generally may prohibit an individual from participating in or benefiting from the LEA's services, programs, or activities when that individual poses a direct threat to the health or safety of others, whether an individual poses such a threat must be based on an individualized assessment (based on current medical knowledge or on the best available objective evidence) of the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures, or the provision of auxiliary aids or services, will mitigate the risk.

In light of the guidance documents issued by OSEP and OCR, LEAs should consider:

- Notifying staff that there have been no waivers of IDEA and Section 504 requirements.
- Continuing to conduct evaluations and reevaluations under the IDEA and Section 504 during partial or full school closures, taking into account state and local safety and health requirements.
- Developing IEPs and Section 504 Plans in accordance with statutory timelines unless parents agree to an extension.
- Convening IEP team meetings virtually or by other alternative methods if state and local safety and health requirements prohibit in-person meetings.
- Determining whether and how to provide ESY services to students eligible for such services during the 2019-20 regular school year, but who did not receive them due to school closures.
- Implementing face covering policies in a non-discriminatory manner.

Please contact one of our six office if you need any support navigating the many issues arising from the COVID-19 pandemic and/or if you have any other questions.

F3 NewsFlash® Written by:

Tiffany Santos, partner and Kathleen McDonald, associate

FRESNO | INLAND EMPIRE | LOS ANGELES | OAKLAND | SACRAMENTO | SAN DIEGO

www.f3law.com

This F3 NewsFlash® is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this legal development may apply to your specific facts and circumstances.

© 2020 Fagen Friedman & Fulfroost LLP All rights reserved, except that the Managing Partner of Fagen Friedman & Fulfroost LLP hereby grants permission to any client of Fagen Friedman & Fulfroost LLP to use, reproduce and distribute this NewsFlash intact and solely for the internal, noncommercial purposes of such client.