

**SPECIAL EDUCATION, SECTION 504, AND THE CORONAVIRUS
GUIDANCE MEMORANDUM**

March 13, 2020

With school closures beginning to occur around the nation in response to COVID-19, we at Drummond Woodsum want to get out to you our best read of how school responses to the coronavirus may intersect with special education and Section 504 duties that you normally carry. Keep in mind that the situation is always evolving, and just yesterday (March 12), the U.S. Department of Education issued its own memorandum on this topic. If you haven't seen it yet, we have given you a link to the document below.¹

The U.S. DOE guidance is very useful. Our advice below fully follows that guidance, but also goes into a bit more depth on some of the issues that might arise. Set forth below are some of the steps schools may be considering, and how those steps intersect with special education and Section 504 responsibilities.

1. Closures of a school building or an entire school system.

The legal issues for special education are basically the same if you close a single school building or if you close all your schools in response to COVID-19. In such a situation, most importantly, you are treating all students the same, whether they have disabilities or not. If you take this step, you have NO duty to provide special education to students with disabilities during times when you are not serving students generally. There would also be no "compensatory education" duty either. In essence, you have really just shortened the school year, and the IEP obligation is for services during the regular school year, whatever its length may be.

School closures can impact the calculations you have made regarding extended school year (ESY) services, however. A school closure lengthens the time period that children are out of school, thereby raising the likelihood of regression and recoupment issues for children in special education. For those children who regularly receive ESY services, you might expect to hear requests for somewhat more ESY services, given that the time without services is now longer, increasing regression possibilities. In addition, some students who in the past have not received ESY services may now qualify since the time period in which all students do not receive school services is now longer because of the school closure.

¹ <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

If the school closure period is relatively short, though, the closure may have no impact on ESY duties. For example, for school closures of 10 school days in a row or fewer (roughly two weeks when school services have been suspended), we do not think schools have additional special education obligations as a result of that closure. This reflects the position of the U.S. DOE,² and also the fact that a loss of service for 10 school days or fewer is almost never a “change of placement” under special education laws. In the world of special education, a two or three week break in services would seem rarely to impact ESY considerations. But the longer the break, the more likely schools will see an impact on the ESY decision.

Advice: If your school closure is for more than 10 school days in a row, we think you should take the shorter school year into consideration when you make your ESY decisions. Depending on the length of the closure, ESY programming may have to be beefed up because of the shorter year. This is NOT to make up for lost services. Rather, it is simply because your normal ESY calculation of the regression/recoupment issue could cut differently given the longer break.

An altered ESY calculation because of a long school closure could mean that schools need to revisit ESY decisions that were made earlier in the school year. But don’t forget that parents and schools can amend IEPs by agreement, including documentation through the Written Notice. If you and the family agree on a need for a change, there may be no need for a meeting.

2. Schools remain in session, but have moved to online education.

Like colleges, some schools are considering closing down in-person classes and moving instead to online education for a period of time. It is hard to see how this would work for younger students, but perhaps it is being considered for upper grade levels.

A move to online learning would mean that your schools are still in session. This means that during that time period, you continue to have an obligation to provide a free, appropriate public education (FAPE) to children with disabilities. This could be a very challenging scenario in special education.

Of course, some children in special education receive relatively low levels of service, and the online option would function similarly for those children as for students without disabilities. Special education teachers and related service providers certainly can deliver lessons and provide student support online just as well as regular education

² See *id.* at Question A-1

teachers – again, for students with lower-level needs. The recent guidance from the U.S. DOE identifies ways in which special education can be delivered, including: “online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities.”³

But we all realize that some children are unlikely to be able to learn through these online systems. If a school system or school building is going completely online as a COVID-19 response, expect to face requests for compensatory education at later points in time for children who cannot meaningfully be served through an online process.

Advice: If your school moves to an online delivery system, you will need to address service complications with families in special education. Communication will be key. If you believe an online delivery system will not work for some children in special education, you will need to hold IEP team meetings to address that issue, will need to make that determination, and must then decide what is to be done about those complications. Expect to have to provide some sort of compensatory education if the team believes that a gap in service will likely result in educational harm to the student. This is different than the ESY decision discussed earlier. Here, because school has remained in session, your ESY decisions would not need to change. But instead you may have a compensatory education duty, if an extended gap in service is educationally harmful for the child.

3. A special education school closes, but regular schools are in session.

One can imagine the closing of a school that serves only special education students, while at the same time the school unit’s regular schools remain open. Perhaps this is due to spread of the virus within the population of that particular special education school.

In this situation, because your regular schools are still in session, you continue to have a duty to provide a FAPE to all of your special education students, including those who attend the special education school that has now been closed.⁴ This would seem to be just as true if that special education school is a private entity, but your school is using that entity to serve some of your students.

Because you continue to have a FAPE duty toward your students attending the closed special education school, but have lost their school program at least temporarily, you will have to hold IEP team meetings to address what to do about the loss of

³ *Id.* Question A-2.

⁴ *Id.* Question A-3.

programming. As noted earlier, a short closure for 10 school days in a row or fewer (roughly two school weeks) likely will NOT have to be addressed or remedied – although certainly you will want to be in close contact with impacted parents. But if the closure is for a longer time, you will usually have some sort of compensatory service obligation once the school is back in session.

We assume that for the population of students who attend a special education school, their needs will be too significant to be addressed meaningfully through some sort of online regimen. We also assume that their needs are too significant to be addressed through programs in your regular schools. But the IEP team will need to address these issues, and will need to come up with a way to provide FAPE – even if the only way to do so is through compensatory services after the fact.

Advice: If a special education school is closing because of COVID-19, you will need to hold IEP team meetings to address the closure, to address alternative ways to serve the student if possible, and possibly to address compensatory needs if the child will go without services for a period of time.

4. If a special education student is quarantined, but school remains in session.

If school is in session, but a student with a disability is quarantined, the school’s duty to provide that child with a FAPE continues. Of course, if the quarantine period is relatively short – say, 10 school days in a row or fewer (roughly) – then any gap in service is likely not a “change in placement” and need not be addressed.

But for longer quarantine time periods, the school certainly has a duty to provide services to the child if he or she is able to receive them. The U.S. DOE recognizes this duty, and as stated above, identifies some ways in which services could be provided as follows: “online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities.”⁵ And of course some schools might optionally offer such interventions even for the shorter quarantine periods.

But the online or virtual approach to learning may simply not be feasible for a particular child, or because of technology limitations. In this situation, the child is likely to have a gap in services, and again, any such gap of more than 10 school days in length is very likely to generate compensatory education obligations of some sort. All of this would have to be addressed at an IEP team meeting.

⁵ *Id.* Question A-2.

Please remember that in the event of a student missing school because of quarantine, this absence and any shortened school day that arises from it would be covered by state special education rules regarding “abbreviated school days” for medical reasons. In such situations, the IEP team must meet no less frequently than every 90 calendar days.⁶

Advice: Special education directors have considerable experience addressing the needs of children with disabilities who are absent for medical reasons. A child who has been quarantined because of COVID-19 would fall into that category, except that in-person tutoring is not a viable option. If the absence will be for more than a couple of school weeks, the team should meet and address the service issue.

5. How do these standards change if the child has a Section 504 plan?

If a school remains in session but moves to online programming, the school unit must consider whether the child’s disability will prevent or impair the child’s involvement in the online programming. If so, the 504 team should address whether different accommodations could ensure meaningful access for that student. And if the child is unlikely to be able to access the online programming meaningfully, then the team may have to address some sort of compensatory obligation because of a gap in services. We do not see a compensatory obligation, however, if gaps are short in length – for example, 10 school days in a row or fewer.

Much the same is true if schools remain in session but the child is quarantined. If the absence will likely exceed more than a couple weeks in length, the team may seek to address the child’s education in some other manner – for example, through “online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities.” In this instance, the school may be able to follow the same protocol it has in place for any student who is quarantined – including those without disabilities – since 504 necessitates that the educational needs of 504 students be met to the same degree as that of regular education students. If that approach is not effective for a 504 student given the nature of the student’s disability or accommodations, then the need for compensatory services should be assessed after the quarantine period.

When the school unit closes a regular school building, or closes schools generally, the school unit will not usually have additional obligations to students in Section 504 who are out of school under the same terms as students without disabilities.

⁶ See MUSER VI.L(2) (2017).

Advice: In each scenario, consider whether 504 students can take part in school programming to the same extent as the regular school population, or whether they can do so with modifications or accommodations to the approach utilized by the school for all students. If a 504 student cannot access the curriculum to the extent other students can, convene the 504 team to develop appropriate accommodations during the period school is interrupted or, possibly, compensatory education services afterwards.