

ANSWERS TO FREQUENTLY ASKED QUESTIONS REGARDING SPECIAL EDUCATION AND DISTANCE LEARNING (“DL”)

TABLE OF CONTENTS

- I. EVALUATIONS AND TIMELINES
 - A. Do days on which school is closed count as school days?
 - B. Do days on which school is closed count against the timeline for completing a Part B special education evaluation?
 - C. Do distance learning (“DL”) days count against the timeline for completing a Part B evaluation?
 - D. Do days on which school is closed count against the timeline for a Part C evaluation?
 - E. Do school closure days or DL days impact when an annual IEP or triennial reevaluation is due?
- II. SPECIAL EDUCATION SERVICES
 - A. Are special education students entitled to services when school is “closed”?
 - B. Are special education students entitled to receive services on DL days?
 - C. Are school districts required to amend IEPs to reflect a change of services that will be provided on DL days?
 - D. Are there circumstances in which a school district will not need to amend an IEP to reflect the provision of services on DL days?
 - E. If a school district amends an IEP to reflect a change of special education services on DL days, what might the services look like?
 - F. If a school district amends an IEP to reflect a change of special education services on DL days, what services are prohibited?
 - G. May a school district document the amendment to the IEP on an addendum?
**Sample Addendum: Services Provided on Distance Learning Days*
- III. IEP AMENDMENTS AND IEP MEETINGS
 - A. Are school districts required to hold an IEP meeting in order to amend an IEP to reflect the services provided on DL days?
 - B. What options are available if the parent refuses to waive the right to have an IEP meeting before changes are made to the IEP?
 - C. Should the IEP manager contact parents before sending a proposed amendment to an IEP and a form for the parent to waive a meeting?
 - D. Are school districts required to send prior written notice to parents describing the amendment to the IEP that will take effect on school days that are designated as DL days?
 - E. May the PWN that is sent regarding DL be fairly general? **See Sample PWN*
 - F. May school districts accept an electronic signature or email from a parent giving permission to implement the amendment to the IEP that will take effect on DL days?
 - G. What happens if the parent refuses to provide consent?
 - H. What happens if a school district does not have consent to implement an amended IEP on March 30, 2020?
 - I. What happens if a school district is unable to make DL services available to a special education student?
- IV. DATA PRIVACY AND SECURITY OF ELECTRONIC PLATFORM
 - A. Does the platform for DL services (e.g. zoom, Skype, blink, etc.) need to comply with the Health Insurance Portability and Accountability Act (“HIPAA”)?

- B. What should a school district do if a platform would disclose private educational data to parents, such as the names of students who are receiving special education instruction?
-
-

I. EVALUATIONS AND TIMELINES

- A. Do days on which school is closed count as school days?** No. Days on which school is closed (such as March 18 through March 27) do not count as a “school day” because, unlike a distance learning (“DL”) day, no instruction or educational services are provided to students on days when school is closed.¹
- B. Do days on which school is closed count against the timeline for completing a Part B special education evaluation?** Under Part B and Minnesota law, school districts have 30 “school days” to complete a special education evaluation. Days on which school is closed do not count against the 30 school day timeline for completing a special education evaluation under Part B of the IDEA.²
- C. Do DL days count against the timeline for completing a Part B special education evaluation?** Yes. If evaluation components can be completed online, the team may move forward with the evaluation. However, the MDE has stated that “activities that are not reasonable to carry out if a school is closed or a student is ill” can be delayed until school reconvenes. Similarly, when DL days are declared because of concerns related to COVID-19 exposure, an evaluation can be delayed if face-to-face assessment is required.
- D. Do days on which school is closed count against the timeline for a Part C evaluation?** The MDE has stated: “During the eight-day statewide closure of all public schools in Minnesota, school staff should be focused on determining processes for evaluation timelines in the event of extended school closures due to COVID-19. If this results in the 45 calendar timeline not being met, then the exceptional circumstances language in the Part C regulations would be applicable.”³
1. The “exceptional circumstances” language is found in the Part C regulations at 34 C.F.R. § 303.310(b).
 2. 34 C.F.R. § 303.310(b) states: “Subject to paragraph (c) of this section, the 45-day timeline described in paragraph (a) of this section does not apply for any period when - (1) The child or parent is unavailable to

¹ See Special Education and COVID-19 Questions and Answers: Due Process, A-2 (MDE March 17, 2020).

² See Special Education and COVID-19 Questions and Answers: Due Process, A-2 (MDE March 17, 2020).

³ See Special Education and COVID-19 Questions and Answers: Due Process, A-9 (MDE March 17, 2020).

complete the screening (if applicable), the initial evaluation, the initial assessments of the child and family, or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records.”

- E. Do school closure days or DL days impact when an annual IEP or triennial reevaluation is due?** As a general rule, the answer is no. Timelines for annual reviews and triennial evaluations are based on calendar days and generally will not be extended because of school closures or distance learning. With that said, if a district is unable to meet a timeline because of a COVID-19 related concern, the district should use a statement such as: “The annual IEP was not able to be held within the mandatory timeline due to the COVID-19 pandemic.”

II. SPECIAL EDUCATION SERVICES

- A. Are special education students entitled to services when school is “closed”?** On days when the school district or governor has “closed” school, and thus general education students are not receiving educational services, the school district is not required to provide services to special education students. Days on which schools are “closed” must be distinguished from days that are designated as DL days.
- B. Are special education students entitled to receive services on DL days?** Students with disabilities are entitled to receive FAPE on DL days. But FAPE may look very different on DL days *if* the District has amended the IEP to reflect different services on DL days.
- C. Are school districts required to amend IEPs to reflect a change of services on DL days?** For all practical purposes, the answer is yes. The Office of Special Education Programs (“OSEP”) has stated that “IEP teams may, but are not required to, include distance learning plans in an IEP that could be triggered and implemented during a . . . COVID-19 outbreak.”⁴ However, if a school district does not amend a student’s IEP to reflect a change of services on DL days, the district must implement the IEP to the “greatest extent possible” on DL days. This will be impossible in most cases. Accordingly, the MDE has stated that “IEPs may need to be reviewed and amended during the school planning period [March 18 through March 27] as districts move to distance learning instruction on March 30.”⁵ In other words, if a school district plans to provide a significantly different type and quantity of services on DL days, the district must modify the IEP to reflect the changes.

⁴ See Q&A Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, at A-5 (OSEP March 2020).

⁵ See Special Education and COVID-19 Questions and Answers: Special Education Instruction, Services and Programming (MDE March 17, 2020).

- D. Are there circumstances in which a school district will not need to amend an IEP to reflect the provision of services on DL days?** Yes, a school district does not need to amend an IEP if the district can implement the IEP, as written, on a DL day. For example, if a student receives only 30 minutes of SLD direct service per week in the area of math and the district can deliver that service through its DL plan, no change to the IEP is necessary to reflect the change in delivery or setting. To this point, during a March 12, 2020 webinar, OSEP stated that school districts were not required to amend IEPs if the only change was the provision of distance learning for all students (meaning the only thing that is changing is the manner in which the service is being delivered).
- E. If a school district amends an IEP to reflect a change of special education services on DL days, what might the services look like?** The MDE has stated that if a school district amends the services in an IEP, the services may consist of the special education teacher connecting daily over the phone with the parent or student on the activities provided for special education services and also a check-in on how things are going with the general education instruction or work.⁶ Such services may also include the use of virtual or online learning, paper packets or worksheets, electronic or paper textbooks, telephone instruction, tele-therapy for mental health services, tele-services for speech and language services, online resources, instruction via the school’s learning management system, and other curriculum-based instructional activities.
- F. If a school district amends an IEP to reflect a change of special education services on DL days, what services are prohibited?** The MDE has stated that school districts may *not* provide face-to-face instruction on DL days and may not send any staff member to a student’s home. The MDE has also stated that a school district may not bus any students to an alternate location to receive face-to-face instruction on a DL day. To reiterate, “the distance learning plan cannot include having a staff member or direct service provider being physically in the same location for the provision of specialized instruction or related services.”⁷
- G. May a school district document the amendment to the IEP on an addendum?** Yes. School districts may use an addendum to document the special education and related services that will be delivered on DL days.⁸ The document should be

⁶ See Special Education and COVID-19 Questions and Answers: Special Education Instruction, Services and Programming (MDE March 17, 2020).

⁷ See Special Education and COVID-19 Questions and Answers: Due Process, at A-7 (MDE March 17, 2020).

⁸ As stated in Section III.A., the MDE has stated that IEPs may be amended without holding an IEP team meeting in accordance with 34 C.F.R. § 300.324(a)(4)(i). A corresponding provision, 34 C.F.R. § 300.324(a)(6) states: “Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.”

simple, easy for parents to understand, and written in a way that gives school districts flexibility in how they will deliver the services. The addendum should be analogous to the modifications a school district makes when a student receives homebound services, with the exception that no in-person services may be provided. You should include the type of service, frequency of the service, general description of the setting in which the services will be delivered, and when the services will be implemented. Districts should also consider stating whether specific goals will or will not be worked on, analogous to ESY. For example:

Addendum: Services Provided on Distance Learning Days

Type of service:	Speech/language
Frequency of service:	Average of X minutes per week
IEP Goal Addressed:	Goal 2
Setting:	Instructional phone calls, online/virtual instruction, curriculum-based activities.
Start/end:	On school days designated as distance learning days. Currently anticipated to begin on March 30, 2020.
Accommodations:	[List those applicable to DL]

III. IEP AMENDMENTS AND IEP MEETINGS

A. Are school districts required to hold an IEP meeting in order to reflect the services provided on DL days? Yes, unless the parent agrees not to convene an IEP meeting for the purposes of making the changes. The MDE has stated that IEPs may be amended without holding an IEP team meeting in accordance with 34 C.F.R. § 300.324(a)(4)(i).⁹ The regulation at 34 C.F.R. § 300.324(a)(4)(i) states: “In making changes to a child’s IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child’s current IEP.”

1. **Document parent agreement.** School districts that utilize this option should document the parent’s agreement in writing. In addition if changes are made to the IEP without a meeting, the school district must ensure that the IEP team is informed of the changes.

⁹ See Special Education and COVID-19 Questions and Answers: Due Process, at A-4 (MDE March 17, 2020).

2. **MDE’s Expectations.** The MDE has repeatedly stated that “IEPs may need to be reviewed and amended during the school planning period [March 18 through March 27] as districts move to distance learning instruction on March 30.”¹⁰ However, the MDE has also stated that “school staff should postpone IEP team meetings scheduled during that eight-day planning period.” Thus, the MDE expects school districts to use the “planning period” from March 18 to March 27 to seek parental permission (a) to amend IEPs without a meeting and (b) to propose an amendment to the IEP to reflect the services that will be provided on DL days.

B. What options are available if the parent refuses to waive the right to have an IEP meeting before changes are made to the IEP? The MDE has stated that each school district’s DL plan “should address how the school will conduct IEP team meetings virtually in the event of an extended statewide school closure due to COVID-19.”¹¹ The District may attempt to convene a virtual IEP meeting, or a meeting by telephone conference call. Alternatively or in addition, the District may ask the parent to agree, in writing, to excuse members of the IEP team. To this end, the federal regulation at 34 C.F.R. § 300.321(e) states:

1. A member of the IEP Team . . . is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member’s area of the curriculum or related services is not being modified or discussed in the meeting.
2. A member of the IEP Team . . . may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member’s area of the curriculum or related services, if—(i) The parent, in writing, and the public agency consent to the excusal; and (ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

C. Should the IEP manager contact parents before sending a proposed amendment to the IEP and a form for the parent to waive a meeting? Yes, for several reasons. First, without contacting the parent, the IEP manager will not know what resources the student has available for receiving DL instruction. Second, the district is far more likely to obtain agreement from parents if the

¹⁰ See Special Education and COVID-19 Questions and Answers: Special Education Instruction, Services and Programming, at A-7(a) & A-7(b) (MDE March 17, 2020).

¹¹ See Special Education and COVID-19 Questions and Answers: Due Process, at A-3 (MDE March 17, 2020).

situation is explained in a phone call. Third, the MDE has stated that each school district's DL planning should include a process to communicate with parents and guardians regarding their child's services to ensure that students with disabilities have equal access to DL.

- D. Are school districts required to send prior written notice to parents describing the amendment to the IEP that will be triggered on school days that are designated as DL days?** Yes. Nothing in the law allows a school district to amend an IEP without providing PWN of the proposed changes and giving the parent an opportunity to consent or object.
- E. May the PWN that is sent regarding DL be fairly general?** Yes, given that we are operating in an emergency pandemic situation, we believe that the MDE and U.S. Department of Education would agree that school districts may use more general PWN language, provided that changes are made as necessary for unusual situations. The following is sample language for a PWN:

Proposed Action: Consistent with guidance from the U.S. Department of Education and the Governor of Minnesota, the District is proposing to modify your child's IEP to indicate the type and quantity of special education services, related services, and accommodations that your child will receive on days that are designated as distance learning days. The specific changes are documented on the attached IEP addendum.

Reason for Proposed Action: The District is proposing these changes so your child can continue to receive a free appropriate public education on school days that are designated as distance learning days. The regular services, supports, and accommodations listed on your child's IEP will resume when face-to-face instruction in schools is reinstated.

Basis for Proposed Action: In proposing these changes to your child's IEP, the District considered your child's current IEP, most recent evaluation report, and input from staff members who work with your child. The District also considered guidance from the U.S. Department of Education, the Minnesota Department of Education, and the Minnesota Governor.

Other Options Considered: Based on the emergency nature of a pandemic and the direction from the federal and state government, no other options were considered.

Other Relevant Factors: The District considered the instructional options that are available through a distance learning model.

- F. May school districts accept an electronic signature or email from a parent giving permission to implement the amendment to the IEP that will take effect on DL days?** Yes. The MDE has stated that if a school district amends a student’s IEP, the district may accept an electronic signature or an email from a parent confirming consent to the amendments. According to the MDE, “This will expedite the amendment process to ensure that the amended IEPs are in place by March 30, 2020.”¹²
- G. What happens if the parent refuses to provide consent?** School districts may offer alternative dispute resolution, such as a conciliation conference, in an effort to resolve the disagreement. The full team does not need to participate. The Director of Special Education or a Supervisor is sufficient, and the conciliation conference may be held by phone. If the parent continues to refuse consent, the District should send a stand ready to serve notice.
- H. What happens if a school district does not have consent to implement an amended IEP on March 30, 2020?** When DL begins on March 30, 2020, fourteen days will not have passed between the time school districts send PWNs and the date the amended IEP services would begin. If a parent has not provided affirmative consent to implement the amended IEP, the IEP manager should follow up with the parent to ensure the parent does not have questions about the amendment. If the school district does not have consent in writing, it must implement the existing IEP to the “greatest extent possible” until fourteen days have passed or the district receives consent
- I. What happens if a school district is unable to make DL services available to a special education student?** The school should consider providing compensatory education once in-person attendance is expected. The District can and should discuss this with the parent. However, districts should distinguish between situations in which they are unable to make services available and situations in which a parent or student is not available at the time when a teacher attempts to make contact during a DL day.

IV. DATA PRIVACY AND SECURITY OF ELECTRONIC PLATFORM

- A. Does the platform for DL (e.g. zoom, Skype, blink, etc.) need to comply with the Health Insurance Portability and Accountability Act (“HIPAA”)?** No. The MDE has stated that in the school setting, FERPA, rather than the HIPAA privacy rule, applies to student information and student privacy. This includes information maintained by health-related service providers such as speech-language pathologists and occupational therapists when they are working for or on behalf of the school to provide services to students.

¹² See Special Education and COVID-19 Questions and Answers: Due Process, at A-5 (MDE March 17, 2020).

- B. What should a school district do if a platform would disclose private educational data to parents, such as the names of students who are receiving special education instruction?** The MDE has stated that if a school has concerns that use of a video platform to provide services could contain and thus could reveal personally identifiable information, then the school should use a platform that incorporates security measures to ensure that private data is encrypted and that it cannot be accessed by individuals who do not have authority to access the data.

RASW: 158474