



GARRETT HEMANN ROBERTSON P.C.

Special Education FAQ

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ODE recently issued “**Distance Learning for All: Extended School Closure Special Education Guidance.**” Districts have had many questions about how to provide special education in a distance learning environment and the requirements and expectations for teacher, parent, and student as distance learning begins.

USDOE/OSERS guidance specifically highlights that educational programming provided via “distance instruction” must include all students, regardless of disability. Access for students under the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act (“Section 504”), and the Individuals with Disabilities Education Act (“IDEA”) must be carefully considered when implementing distance instruction available for all students. Districts must identify and address barriers for all students. Ensuring compliance with the IDEA, Section 504, and the ADA “**should not prevent any school from offering educational programs through distance learning.**”

The USDOE reinforces decisions which must be based on individualized needs and protect the health and safety of students with disabilities and those involved in providing services. If students’ needs cannot be met through distance learning, districts must make individualized determinations regarding the need for compensatory services. Distance learning, teletherapy, tele-intervention, digital platforms for meetings, online options for data tracking and any available provision of services, as well as “low-tech” strategies, must be considered for all students in a non-discriminatory manner.

Frequently asked questions are below. Contact your legal counsel to discuss specific situations within the context of your district’s distance learning plan.

1. **When will School and Educational Service Districts be required to have “Distance Learning Plans” in place?**

Answer: ODE established a timeline for developing and implementing distance learning plans in its recent [Distance Learning for All](#) guidance, and the “required implementation date” for district distance learning plans is **April 13, 2020**.

2. **What are districts’ Child Find obligations during implementation of a distance learning plan?**

Answer: Child Find obligations are still in place during the implementation of distance learning plans, although obligations may look different while students are learning in atypical, distance-learning environments. Districts should consider when students’ educational needs might require an initial evaluation for special education or a 504 plan.

Districts should not make determinations regarding eligibility based solely on circumstances specific to school closures due to COVID-19. Determinations of eligibility should be based on total knowledge of a student, including data or information acquired **prior** to the school closure, not only **during** the school closure.

Districts should follow typical processes to communicate with families regarding districts’ or parents’ concerns related to identification of students for special education and 504 plans. Districts should issue a Prior Written Notice (“PWN”) that identifies a potential need for special education or a 504 plan and state that due to the unique circumstances of the COVID-19 closure and limitations of staff to conduct evaluations of students while following social distancing protocols, the evaluation planning team will convene as soon as social distancing is not a barrier.

3. **How should evaluation requests be handled during school closures and distance learning?**





Answer: For any evaluation request for a student already identified for special education or a 504 plan, a district should respond to parents and communicate to receive additional information. If the information is related to a new area of suspected disability, a district should inform parents that evaluations in new areas of suspected disability will be addressed when school resumes and the evaluation planning team can convene.

If parents provide information regarding concerns related to the impact of distance learning on a student's IEP or 504 plan, inform parents that any identified issues that may impact access to distance learning will be addressed through the IEP or 504 process (explained in more detail below under item 7).

If parents provide information related to an initial request for evaluation, districts should respond as described in item 2 above.

4. How should eligibility determinations be processed during distance learning?

Answer: All eligibility determinations should be reviewed on a case-by-case basis. For initial eligibility, if evaluations had begun and were completed prior to the school closure, the IEP team or 504 team should discuss whether eligibility can be determined based on the data available. If the team requires more information, notify parents and issue a PWN explaining that evaluations will be completed, and eligibility determined, when school resumes. Districts should continue eligibility until the IEP team can convene to discuss evaluation results, data, and continuing eligibility.

If a student is due for a three-year reevaluation and eligibility determination, the IEP team may consider whether reevaluation is necessary based on the needs and unique circumstances of the student. ODE has clarified that although "[t]here is no provision that allows for an extension of time" in this situation, "if the IEP team determines that no additional data are needed to determine continued eligibility and the child's educational needs," then a review of existing data may suffice to determine a student's continued eligibility for services. If the IEP team, including parents, decides no additional data is needed, the district should send parents a PWN documenting that determination, the reason for that determination, and the right of parents to request an assessment to determine whether the student remains eligible and to determine the student's educational needs.

5. What steps should be taken to address IEPs that were due or are due for review during the closure?

Answer: For expired IEPs due for annual review during the school closure, communicate with parents as soon as possible regarding the missed deadline and the need to reschedule the annual IEP meeting. A PWN should be issued regarding the district's inability to meet as scheduled during an emergency school closure due to the global COVID-19 pandemic.

For both situations, whether a deadline has been missed or is expected to occur during school closure, districts should communicate with parents regarding three options:

- (1) enter into a written agreement with a parent/guardian agreeing to extend the IEP until school resumes and the IEP team can convene in person;
- (2) enter into a written agreement with a parent/guardian to amend the IEP¹; or
- (3) offer to schedule a virtual or phone IEP meeting with parents.

Regardless of the method agreed upon, a PWN should be issued documenting the decision.

¹ ODE has developed a [parent input form](#) to assist with this process. Currently, we do not recommend using the ODE form. Each district may continue to use its usual forms for parent input in the IEP process and written parent agreement without an IEP meeting and should document any changes made to the IEP by PWN.





6. **Should the IEP team develop an interim IEP due to the COVID-19 closure in accordance with the district's distance learning plan?**

Answer: No. There is no requirement for an "interim" IEP. The IEP should still be written as an annual offer of services. Notify parents in writing prior to any virtual or telephonic IEP meeting during the school closure that the purpose of the meeting is to develop the IEP for the student upon return to school. The student's needs during school closure will also be discussed. The IEP should state that it will be "implemented upon the return to school." This should be documented in the IEP and a PWN. Districts and parents can also agree to revise certain services while distance learning is in place, if necessary, with a simple revision to the IEP and a documented PWN that indicates the revision is only necessary for students while in a distance learning environment.

There are some situations for which an IEP meeting will be appropriate, such as when districts and parents are unable to reach consensus on appropriate distance-learning services, or if there is an impact or barrier that requires an IEP meeting to address provision of services in the context of a district's distance learning plan. These situations are addressed in item 7 below.

7. **How should districts determine when it is necessary to convene an IEP meeting during school closure?**

Answer: Districts should consider convening or offering to convene an IEP meeting during distance learning in the following circumstances:

- (1) the annual IEP is due during the closure and parents do not agree to extend or amend the IEP by written agreement;
- (2) an internal review of the IEP reveals the district cannot meet the requirements of an IEP in accordance with the district's distance learning plan and parents do not agree to extend or amend the IEP by written agreement; or
- (3) a parent requests an IEP meeting.

Situation (1) is addressed above in item 5. The more complicated situations are (2) and (3), addressed below.

According to ODE's [Extended School Closure Special Education Guidance](#), districts must develop distance learning plans to provide educational services to all students under the Governor's Executive Order 20-08. Once each district has developed its own distance learning plan, the district "should review student IEPs in context of the district's distance learning plan." This review is an internal review² by the district to determine if each student's IEP can be implemented as written, including Specially Designed Instruction ("SDI"), Related Services, and Supplementary Aids and Services. Districts are encouraged to implement IEPs as written, to the maximum extent possible. This review should identify any issues which may impact access to the district's distance learning plan and curriculum. Not all IEPs will require revision, and some revisions may be accomplished by written agreement with parents without convening an IEP meeting.

If a district determines it is unable to provide a free appropriate public education ("FAPE") to a student during the school closure, the IEP team has the following options:

- (1) enter into a written agreement with a parent/guardian to amend the IEP; or
- (2) offer to schedule a virtual or phone IEP meeting with parents.

Regardless of the method agreed upon, a PWN should be issued documenting the decision and all changes to the IEP.

² Given each district's individual needs, resources, and volume of students receiving special education and related services, districts may need to prioritize review based on the most immediate concerns, for example, addressing the needs of students in fully self-contained placements or students who cannot access any form of online learning.





Upon request for an IEP meeting, consider whether parents' concerns can be addressed by written agreement without convening an IEP meeting. If parents' concerns cannot be addressed by written agreement, convene a virtual or telephonic IEP meeting as soon as possible. Districts can prioritize the needs of students and availability of staff in scheduling virtual or telephonic meetings during school closure based on an undue burden in convening numerous virtual IEP meetings.

If students' IEPs are revised in any way, including revisions to the annual date to allow for an extension until school resumes, districts should issue a separate PWN documenting what services will be offered to students during implementation of the district's distance learning plan. **This document is not an interim IEP; it is a PWN describing how the district will provide special education, related services, and supplementary aids and services to students during the mandated school closure due to the global pandemic of COVID-19.** Because ODE has specified that IEPs should be reviewed in the context of each district's distance learning plan, this review is not necessary prior to the development of the district's individual plan.

8. Does distance learning constitute a change in placement?

Answer: No. ODE has been clear that moving the entire student population to a distance learning model does not constitute a change in placement during an emergency. This was not the district's or the IEP team's decision. The move to a distance learning plan does not require consent, PWN, amendment, or a placement change.

9. Will this closure result in a substantial increase in the number of students eligible for ESY?

Answer: No. We do not anticipate a substantial increase in the number of students eligible for Extended School Year ("ESY") services. Eligibility for ESY is determined by an IEP team's consideration that ESY services are necessary based on "regression and recoupment time based on documented evidence or, if no documented evidence, on predictions according to the professional judgment of the team."³ If districts have already taken regression and recoupment data over the previous summer or winter break, that data may be used to determine students' eligibility for ESY. Neither set of data will be impacted by any regression which might occur during the extended closure due to COVID-19.

If a district does not have any current regression or recoupment data available, the IEP team may rely on "predictions according to the professional judgment of the team." An important factor to consider is whether a student has been eligible for ESY services in the past. Do not base ESY eligibility decisions solely on anticipated regression or slow recoupment due to the extended closure from COVID-19. A closure of all schools due to a global pandemic has never been encountered in our schools before, and whether student demonstrates significant regression should not be based on this unusual circumstance. Professional judgment of the team should consider a student's needs *prior* to the extended closure, not only *during* the extended closure.

10. Will districts need to provide compensatory education once school resumes?

Answer: Compensatory services may be required for some students once school resumes. However, ODE has been clear districts "should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory education and services are needed for a student." ODE has also provided some factors districts may consider in determining whether compensatory education is necessary in its [Extended School Closure Guidance for Special Education](#).

Because the determination regarding a need for compensatory services is "individualized" and based on student's progress during the school site closure, we do not recommend making preliminary offers of compensatory education prior to school resuming. However, districts should be aware that when school resumes, students' IEP teams may need to consider the need for compensatory education based on students' ability to access curriculum in the context of districts' distance learning plans.

³ OAR 581-015-2065(5).





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Further Information: There are many more questions that are not addressed in this FAQ. For more information and resources to help your district navigate the provision of special education services within a distance learning plan, additional links to federal and state guidance are provided below. If you have a specific question you need addressed, please contact Kelly Noor (knoor@ghrlawyers.com), Elizabeth Polay (epolay@ghrlawyers.com), or Paul Dakopolos (pdakopolos@ghrlawyers.com), and please contact any of us if we may be of assistance as your district works through this unprecedented event.

Additional Resources:

- [OCR Fact Sheet](#): Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students;
- [OCR Supplemental Fact Sheet](#): Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities;
- [ODE's Distance Learning for All](#): Family and Educator Resources Page;
- [Oregon's Extended School Closure Guidance](#): Distance Learning for All;
- [ODE's FAQ](#) Regarding Special Education in Light of the Coronavirus (COVID-19) Outbreak;
- [Oregon's Extended School Closure Special Education Guidance](#);
- [Oregon's Extended School Closure Guidance](#): Distance Learning for All: Ensuring Care, Connection and Continuity of Learning for Students Who Experience Complex Learning Needs.

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