

Education Issues for Students with Disabilities During COVID-19

SEPT 2020

The COVID-19 pandemic caused a flurry of education guidances and executive orders to come out of Trenton in an effort to help students stay on track and succeed despite school closures, remote learning and hybrid models. Nevertheless, students with disabilities now face additional hurdles in obtaining a free appropriate public education from their school districts.

As a child's best advocate, parents* can take certain actions to ensure that their child receives the opportunity to achieve academically.

For more information or for advocacy assistance, reach out to Advocates for Children of New Jersey staff attorney Nina Peckman by emailing npeckman@acnj.org, or by calling (973) 643-3876 ext. 226.

A SUMMARY OF NEW JERSEY GUIDANCE AND EXECUTIVE ORDERS SINCE MARCH 2020 FOR SCHOOL DISTRICTS

- **March 2020** - New Jersey Department of Education (NJDOE) allowed for remote virtual instruction or by other means, such as instructional packets.
 - Remote instruction did not have to be with a teacher; it could be through pre-recorded classes or via email/paper packets.
- Each instructional day was to be four hours a day (two and a half hours for kindergarten), but not all districts complied.
- Teachers were to communicate with students daily and other school personnel were to communicate with students regularly for academic, behavioral and emotional supports.
- The [Individuals with Disabilities Education Act \(IDEA\)](#) and section 504 of the Rehabilitation Act did not change, but education plans were to be implemented flexibly and creatively. Students who did not get a free and appropriate public education (FAPE) have a right to request evaluations, additional services and possibly compensatory education.
- **By May 22nd**, districts had to develop plans explaining how they would provide remote instruction for the remainder of the school year, including the summer. These plans were posted on the districts' websites.
- **June 22** - NJDOE released a plan, [The Road Back: Restart and Recovery Plan for Education](#), which detailed districts' obligations for reopening plans this fall that met federal and state health and safety standards for COVID-19 and provided a high-quality and equitable education for all students. These plans were posted on the districts' websites.
- **July 24** - Updated NJDOE guidance stated students receiving full-time remote learning must have the same quality and scope of services as students with in-person services. Schools must describe expectations of remote learning plans. Students could transition from in-person to full-time remote learning, or vice-versa.
- **August 13** - Governor Phil Murphy's [Executive Order 175](#) stated that if schools were not ready to open safely, they could start remotely. Some New Jersey districts are remote through the first marking period and will reassess, while others are remote until mid-October and others are on a hybrid schedule. A few are open full-time.
- Schools are encouraged to assess all students in the fall to determine academic levels and need for remediation.
- Students with an Individualized Education Program (IEP) or a 504 Plan may receive informal assessments and may need educational and other evaluations through the child study team to determine present levels.
- Schools were advised to do their best to implement the rights of students with disabilities.
- Initially, districts received only vague guidance, causing confusion and disparate and unequal programs.
- None of the guidance has offered much in the way of specific information/requirements regarding a district's obligations during the pandemic to meet the needs of students with disabilities.

*Under special education laws parents are defined as "the natural or adoptive parent, the legal guardian, foster parent when willing to so serve, a surrogate parent who has been appointed according to 6A:14-2.2(a) through (i), a person acting in the place of a parent" and adult student. See N.J.A.C. 6A:14-1.3



PREPARING FOR AN IEP MEETING: MODIFICATIONS, ADDITIONAL SERVICES AND COMPENSATORY EDUCATION

Being well-prepared for a meeting with the child study team (CST) to discuss a child's IEP can greatly help in creating an effective IEP. Here are some steps that parents can take to aid in this discussion.

Prior to the Meeting:

- Parents should request all school records of the services that were provided since March 2020. They should also request performance data, including weekly assessments and teacher observations to track progress after schools closed, and see how recorded progress compared to the stated IEP goals.
- **For Spanish-speaking families:** Parents should request any school records of translated instructions, including translations for instructions to use Google Classroom/other platforms.
- If the CST does not schedule a meeting, parents can request a meeting through a written request.
- Parents should review current IEPs and evaluations to see what the student is entitled to. If possible, they should review these records with treating physicians/therapists to get opinions regarding the adequacy of the program and suggested changes. Professionals with relevant knowledge can be invited to the meeting.

During the Meeting:

- The district has the responsibility to show that students have made sufficient progress.
- The districts were advised to determine if students need compensatory education. Parents should ask how the student's current levels will be assessed.
- Parents who think their children experienced education loss should request assessments and possibly evaluations.

- An IEP can be developed/amended to provide the student with services before evaluations are completed if there is evidence of need through existing reports and other information.

AMENDING THE IEP TO ADAPT TO PERIODS OF TOTAL OR PARTIAL REMOTE LEARNING

Special education services were never intended to be implemented during extended periods of school closures. In order to learn remotely, students may need to have their IEPs amended to include additional modifications, supports and accommodations.

- Parents should review current services, supports and modifications. They should question how any modifications will be implemented remotely.
- If the student will not benefit from certain virtual services, they should discuss alternative in-person services, such as the student coming to school or the district paying for a community provider, therapy or special education instruction/tutor.
- Modifications or supports that a student might need for remote learning include:
 - Assistive technology.
 - A description of what technology and internet access will be available.
 - Synchronous small group instruction for more structured learning.
 - Training in the use of district technology and platforms for parents and students.
 - Aides and teachers in training can provide individualized or small group assistance.
 - Behaviorist or counseling services.
- The CST and the parents should establish the manner and frequency of communication with student and parents during and after instructional classes—by phone and/or by email/text, daily communication or weekly, so that students will meet their daily learning goals.
- If the student attends school in-person, parents should ask about transportation to daycare from school.
- Parents and the CST should discuss how the student's needs will be met if the student is unable to wear a mask in school due to a documented medical condition or disability.

EVALUATION RIGHTS AND COVID-19-RELATED SCHOOL CLOSURES

- The rights to receive evaluations did not change during the pandemic, but in many cases, the evaluations were not carried out. If they were conducted, it is possible they were not conducted in a valid way.

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- This year, students are supposed to have the opportunity to receive their assessments in person in a manner that complies with health regulations under COVID-19.
- Sometimes, due to the nature and severity of a child's disability, a virtual assessment cannot always be completed. For example:
 - Lack of access to technology, internet and equipment may make virtual assessment impractical.
 - Best practices/professional ethics may require in-person evaluations in some cases.



COMPENSATORY EDUCATION ISSUES

THE RIGHT TO COMPENSATORY EDUCATION AND ADDITIONAL SERVICES

"Compensatory education" is a term that describes a student's legal right to education services to make up for a district's failure to provide services that they were obligated to provide. The process to determine whether compensatory education is owed can be complicated. Compensatory education could be owed to the student when:

- There is evidence of education loss, and/or;
- There is evidence that the student did not progress according to the IEP goals. However, if IEP services were not provided, regression does not have to be proven.

When considering making a request for compensatory education, parents should keep these factors in mind:

- Requests for compensatory education should be based upon more than a minor IEP violation, such as more than a small gap in services.
- A CST's objections to compensatory education based upon their own lack of bad faith or the parent's failure to object to the district's decision/actions are not valid objections.
- The school district should first be given a reasonable amount of time to remedy the loss of education before compensatory education is requested.

Even if the district determines that compensatory education is not owed to the student, the student may still have the right to have additional services added to the IEP based upon an assessment/evaluation of the student's current levels of academic achievement and functional performance.



EXAMPLES OF EDUCATION LOSS THAT COULD REQUIRE COMPENSATORY EDUCATION

- The student did not receive services that were part of the IEP.
- The parent was unable to help or support the child when they required assistance to learn.
- The student did not receive language support, such as English as a Second Language (ESL) or bilingual instruction.
- The parent who helped the child did not receive needed support and translated instructions.
- Some school districts required parents to sign waiver forms for their children to receive remote services. This policy was not legal. If a parent refused to sign a waiver form, then each day that a student did not receive services would count as a day of education loss.
- If education services were not provided while the district was developing remote instruction plans or due to technology issues.
- If the student required in-person-related services and did not receive them.
- An aide was not provided when an aide is required by the IEP.
- The student became frustrated for not having an aide or teacher support and gave up.
- Online programs were not consistent with IEP goals.
- The lack of contact with teachers resulted in the student not receiving necessary supports.

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- The student did not receive related services and therefore could not understand/learn.
 - If the paper packets for students placed in general education settings were not “specifically designed instruction” materials, this violated the student’s right to special education services that include specially designed instruction to meet the individual learning needs of the student.
 - The student did not receive modifications that were required by the IEP, such as: repeated or reformulated instructions, positive reinforcement, modifications to the curriculum, behavior supports or lack of teacher contact.
 - The student needed a teacher/specialist to participate in a safe manner in therapies and during instruction periods.
 - The teacher did not regularly communicate or interact with the student.
 - Only paper packets were offered to students who have not yet learned to read, older students with severe disabilities or students with reading disabilities.
 - Only paper packets were offered to students who do not speak English well, and their parents do not speak English.
 - The student does not have a computer or internet.
- Compensatory education can be provided even if:**
- The student moves to another district or out of state.
 - The student graduates from high school.
 - The student turns 21 and no longer has the right to be in a public school.

CALCULATING THE HOURS/MINUTES OF COMPENSATORY EDUCATION OWED

Generally, calculations are based on hour/minute per hour/minute of education loss. In some cases, more hours may be owed, such as:

- The absence of related speech/reading services meant that the student could not understand class work.
- There was no access to the teacher for a student who could not learn remotely.
- The paper packet may not implement the IEP if the student needs a modified curriculum and the student only received the same packet as the general education students.
- If the student has an IEP and ESL/bilingual education and did not receive translated materials or access to the ESL teacher.

WAYS TO PROVIDE COMPENSATORY EDUCATION OR ADDITIONAL SERVICES

- The student may receive tutoring in or out of school, schooling during vacations, weekends, before or after school or in the summer (either with district staff or through private professionals), private day or residential placement and/or community-based services, including therapies.
- The students who graduate may receive college classes as long as they are considered part of the elementary/high school curriculum; community college transition programs are very similar to high school classes.
- Students who graduate may receive remedial college classes such as for basic skills
- Parents may request their district to reimburse them for services paid by the parent.
- The district may create a trust fund with a lump sum of money that parents can use with conditions on how the funds are used.

Parents who believe that their school district has violated their children's education rights and are not satisfied with the way the issues are being addressed/resolved should consider filing for due process and/or mediation through the Office of Special Education Programs located at the New Jersey Department of Education at www.nj.gov/education/specialed/legal.shtml and ACNJ's Basic Guide for Special Education at www.acnj.org

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