

## Alerts & Articles

### An Analysis of CDE's and OSERS' Most Recent Guidance for Serving Students with Disabilities During COVID-19 Related Closures

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On March 20, 2020, the California Department of Education (CDE) published online "COVID-19 School Closures and Services to Students with Disabilities," an update to March 18, 2020, guidance information. On March 21, 2020, the federal Office for Special Education and Rehabilitative Services disseminated a "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities." This Alert summarizes the two advisories in turn.

#### **CDE's March 20 Update**

The March 20 Update acknowledges that local educational agencies (LEAs) face unprecedented challenges in serving students with disabilities and in meeting special education procedural requirements (including annual and triennial review deadlines) during the school closure caused by the novel coronavirus of 2019. Highlights of the CDE March 20 Update include the following:

- LEAs are still expected and required to provide students with disabilities a free appropriate public education (FAPE); to implement individualized education programs (IEPs); and to meet other procedural requirements under the Individuals with Disabilities Education Act (IDEA) and California special education laws. Most legal requirements have not been waived "[a]t this time." (For an explanation of AB and SB 117, which waive some timelines, see <https://www.aalrr.com/newsroom-alerts-3620>.)
- However, the March 20 Update refrains from concluding that LEAs violate the law if closure prevents literal, or exact, implementation of

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students’ IEPs and compliance with timelines. Rather, the CDE recommends that “LEAs should do their best in adhering to IDEA requirements, including federally mandated timelines, to the maximum extent possible” (emphasis added). The CDE emphasizes its “commit[ment] to a reasonable approach to compliance monitoring that accounts for the exceptional circumstances facing the state.” One possible interpretation is that CDE will factor in the impacts of COVID-19 closures should compliance complaints be filed against LEAs that do not or cannot implement IEPs exactly as written.

- Significantly, the March 20 Update states that “the CDE will consider the days of school site closure as days between the pupil’s regular school session, similar to school breaks in excess of five days” for purposes of special education timelines. And, “[f]or annual or triennial IEP reviews that fall on a day when the LEA is closed due to COVID-19, the CDE will take the exceptional circumstances causing the delay into consideration for purposes of LEA compliance monitoring.”
- The CDE expects LEAs to serve all students, including students with disabilities, during closure. To receive ADA funding during the closure, LEAs must provide services to all students, including students with disabilities. Schools will receive funding only on delivery of educational opportunities to students to the extent feasible.
- During the closure, LEAs must ensure that students with disabilities have *equitable access* to learning opportunities, tailored to individual needs to ensure meaningful access, as determined through the IEP process to the extent feasible.
- LEAs should comply with a student’s IEP, or IEP amendment developed for the closure period, when implementing the distance learning model, if possible. “The LEA can also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services.”
- The CDE encourages LEAs to utilize and pay Nonpublic Schools and Agencies. The CDE also encourages LEAs “to work collaboratively with Nonpublic Schools and Agencies (NPS/As) to ensure continuity of services, including moving to virtual platforms for service delivery to



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the extent feasible and appropriate.” In implementing services, regardless of delivery model, LEAs should comply with public health agencies’ recommendations.

- Toward providing students equitable access, LEAs should plan distance learning models with a variety of service delivery options, to incorporate appropriate modifications or accommodations, and to account for differences between school-based and home-based instructional modalities. LEAs should provide educational and support services commensurate with those identified in students’ IEPs.
- The CDE encourages LEAs to consider “classroom-based instruction to small groups of students” in compliance with health directives. State and federal authorities appear to recognize that even partial school openings may not occur, at least in the short run. Given Governor Gavin Newsom’s statewide shelter-in-place directive imposed as of March 19, 2020, it is unclear *when* and *how* any classroom-based instruction on school sites may be feasible to consider and implement.
- The March 20 Update states that, in “some exceptional situations, LEAs may need to provide certain supports and services to individual students with extensive support needs in order to maintain their mental/physical health and safety.” This should be in keeping with Public Health Department guidance regarding social distancing and maintenance of safety while educating either groups of students or students in congregate settings.
- The March 20 Update states that, following the closure, “LEAs should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory education and services may be needed for a student.”
- Funded federal and state grants (e.g., Alternative Dispute Resolution, Workability, Supporting Inclusive Practices, etc.) should continue, if possible, and in compliance with health directives.
- Deadlines for CDE Special Education Division monitoring activities, including Targeted Monitoring, Intensive Monitoring, and Significant Disproportionality have been extended for a minimum of two months from March 20. LEAs that have difficulty meeting timelines, or that have questions, should contact their regional Intensive Monitoring Consultant ([cde.ca.gov/sp/se/qa/fmtacnct.asp](https://cde.ca.gov/sp/se/qa/fmtacnct.asp)).
- The CDE is extending current complaint investigation timelines for good cause by the length of any school site closure during the stated emergency. When LEAs reopen and are available to participate in the investigation process, the 60-day timeline will recommence and both the complainant and LEA will be notified.
- The Office of Administrative Hearings (OAH) remains operational, although some processes and/or timelines might be affected by the closures, and by measures to comply with federal, state and local health directives.
- To learn more about the impact of the COVID-19 response on services to students with disabilities, ages 0 to 3, served under Part C of the IDEA, the CDE recommends reviewing the guidance published by the state Department of Developmental Services (<https://www.dds.ca.gov/corona-virus-information-and-resources>).

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## **OSERS Supplemental Fact Sheet**

The OSERS Supplemental Fact Sheet warns LEAs against taking no action during school closures for fear of being unable to serve students with disabilities in compliance with law: "Some educators... have been reluctant to provide any distance instruction because they believe that federal disability law presents insurmountable barriers to remote education. This is simply not true. We remind schools they should not opt to close or decline to provide distance instruction, at the expense of students, to address matters pertaining to services for students with disabilities." (Emphasis in original) At the same time, the OSERS Supplemental Fact Sheet does not state that either procedural or substantive FAPE requirements have been waived or relaxed.

Instead, the OSERS states that it "understands that, during this national emergency, schools may not be able to provide all services in the same manner they are typically provided." The OSERS further suggests that LEAs adjust service delivery models, methodologies, and accommodations and modifications to provide students a FAPE. While implicitly acknowledging that closure prevents literal IEP implementation for nearly all special education students, at the same time, OSERS offers compensatory services following the return to standard school operations.

Promisingly, the OSERS states that "where we can offer flexibility, we will. OSERS has provided the attached list with information on those IDEA timeframes that may be extended." That list enumerates typical LEA procedural timelines, which, we must emphasize, are not yet relaxed or waived. Rather, OSERS encourages LEAs "to work with parents to reach mutually agreeable extensions of time, as appropriate." That stated, the OSERS Supplemental Fact Sheet does indicate that state complaint timelines are relaxed if, because of COVID-19, a large number of SEA staff are unavailable or absent for an extended period of time.

## **Conclusion**

Our office agrees with the CDE and the OSERS that LEAs should work to serve all students – particularly students with disabilities. This calls for brave action by parents and educators alike. We especially applaud the CDE's recognition of LEAs' efforts to provide students distance learning, and encouragement of equitable access to the greatest extent possible. LEAs should therefore do what they can, particularly for our most vulnerable students. Our office will continue to advocate for and assist educational entities throughout this crisis. Please do not hesitate to contact us with any questions. We will be issuing more guidance in hours and/or days to come.

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