USDOE Guidance for the Development and Implementation of IEPs: FAQ for School Psychologists

The U.S. Department of Education’s Office of Special Education and Related Services recently released guidance related to the development and implementation of Individualized Education Programs (IEPs) and other key information that state and local education agencies, special education teachers, and related services providers should consider. Additional guidance related to IDEA Part C (infants and toddlers) will be forthcoming. Topics in this guidance and FAQ include:

- Meeting timelines
- Initial and reevaluation procedures
- Determining eligibility for special education
- Ensuring all students with disabilities are provided a free appropriate public education (FAPE)
- Compensatory services
- Virtual IEP meetings and service delivery

In short, the Department of Education “repeats and emphasizes that, notwithstanding the challenges associated with the COVID-19 pandemic, families and children retained their rights to receive appropriate services under IDEA.” This FAQ contains selected information most salient to the practice of school psychologists and is paraphrased to increase readability. Please consult the full guidance document for additional details and justifications for the Department’s response, specifically on the topics not covered in this FAQ, such as local education agency (LEA) obligations when a student with a disability moves within or out of state, extended school year services, secondary transition services, and due process.

Please note that this document should not be considered legal advice. If you have questions regarding specific cases, you are encouraged to consult with your direct supervisor or district counsel.

IEP IMPLEMENTATION

Although many school districts have returned for in-person learning, some students opted for virtual instruction and others have had additional instructional disruptions due to quarantine and other procedures intended to stop the spread of COVID-19. This guidance makes it clear that regardless of instructional setting, LEAs must ensure that every student with a disability is receiving FAPE. For the purposes of this document, the term parent refers to parents, caregivers, legal guardians, or others who have the legal authority to make educational decisions on behalf of the child.

Q: Should each child with a disability have an IEP in effect at the beginning of the 2021–2022 school year?

A: Yes. For some students, it may be appropriate to reconvene the IEP team to ensure that goals and provided services are appropriate and that the IEP is able to be appropriately implemented. Parents may request an IEP meeting at any time.
Q: Are LEAs required to convene an IEP team meeting prior to the beginning of the school year to review the IEP of every child with a disability?

A: No, generally. If the IEP has been reviewed within the past year, and the LEA and parents do not believe revisions are necessary at this time, then you do not need to convene a meeting. However, it is important to consider the context in which the IEP was developed and convene a meeting if any services need to be modified to reflect in-person versus virtual delivery or vice versa.

Q: Can IEP meetings include a discussion about potential changes to the service delivery approach (i.e., virtual, in person, or hybrid) and how services would be provided if circumstances change?

A: Yes. IEP teams can identify how the special education and related services included in a child’s IEP can be provided if circumstances require a change from in-person learning. A proactive method that an IEP team may implement is developing a contingency plan that outlines a child’s specific services, frequency, type, and duration for each delivery approach, and collaboratively identifying what circumstances would trigger the use of the contingency plan.

IEP TEAM MEETINGS

IEP Teams are required to meet at least annually, to review and revise, as appropriate, a child’s IEP. The Department understands that, during the pandemic, it is challenging to find effective ways to meet and obtain the information necessary to develop IEPs that fully addressed the unique needs of each child with a disability. IDEA provides flexibility for participation using alternate methods, as well as permitting some members of the IEP team to be excused under certain circumstances. Furthermore, a parent and the LEA may agree to amend a child’s IEP without convening the full IEP team, but not as a substitute for the annual review.

Q: May LEAs continue to hold IEP team meetings virtually after school buildings reopen for in-person instruction or must these meetings be conducted face to face?

A: Yes, if the parent agrees to a virtual meeting or if continued COVID-19 prevention practices necessitate it. Moreover, the parents and the LEA can agree to participate in IEP team meetings through alternate means such as telephone conference calls or videoconferences for any reason.

CONSIDERATION OF SPECIAL FACTORS

Q: For LEAs that provided laptops or other technology devices or services to some or all children to facilitate virtual instruction, must they continue to provide such devices or services for a child with a disability who is returning to school for in-person instruction?

A: It depends. Each child’s IEP team must consider whether the child needs assistive technology devices and services as part of the determination of special education, related services, and supplementary aids and services that are needed to enable the child to receive FAPE. For some children with disabilities, the continued provision of these devices or services will be appropriate.

ADDRESSING THE SOCIAL, EMOTIONAL, BEHAVIORAL, AND MENTAL HEALTH NEEDS OF CHILDREN WITH DISABILITIES

Many children have been exposed to trauma, disruptions in learning, physical isolation, and disengagement from school and peers, negatively affecting their mental health, and some children might require additional support and interventions. A child whose behavior impedes their learning may need new or increased services and supports for the child to receive FAPE. These increased services and supports may include new or adjusted specially designed
instruction, academic supports, positive behavioral interventions, and other supports such as counseling, psychological services, school health services, and social work services.

Q: When should social, emotional, behavioral, or mental health supports be included in a child's IEP?

A: As with other special education and related services, the IEP team makes the determination of whether, and if so which, social, emotional, behavioral, or mental health supports specific to conditions arising from COVID-19 or other situations should be included in a child's IEP. Schools should avoid using discipline to address a child's behavior that may arise when students return to school.

Q: Who can provide social, emotional, behavioral, or mental health supports to a child when the services are included in the child's IEP?

A: Related services must be carried out by a qualified professional who holds state-approved or state-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services.

Q: What are some examples of social, emotional, behavioral, and mental health supports related to the COVID-19 pandemic that could be included in a child's IEP?

A: Special education and related services (e.g., counseling services for mental health needs; social skill instruction; explicit reinforcement of positive behavior; and explicit instruction in stress, anxiety, and depression management), supplementary aids and services provided to the child (e.g., aids, services, and other supports that are provided to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate), and/or program modifications or supports for school personnel.

Q: What steps should the IEP team take when considering behavioral supports for children with disabilities as they return to in-person instruction?

A: If new or different social, emotional, behavioral, or mental health needs arise after a child has been determined to be eligible for special education and related services and an IEP has been developed, the IEP team must reconvene to consider these needs, including whether there is a need for additional related services and positive behavioral interventions and supports to ensure the child’s access to FAPE. In the alternative, the parent and the LEA may agree in writing to amend the IEP to address the child’s needs through the addition of such interventions and supports.

ADDRESSING THE SCHOOL-RELATED HEALTH NEEDS OF CHILDREN WITH DISABILITIES WITH UNDERLYING MEDICAL CONDITIONS

Some children with disabilities have underlying medical conditions that place them at increased risk of severe illness if they contract COVID-19. Parents have raised questions about whether and how IEP teams should consider school-related health or medical information for children with disabilities. The Department clearly notes that state or local laws, rules, regulations, or policies that have the effect of improperly limiting the ability of the IEP team to address the school-related health needs of a child with a disability, or the ability of the group of knowledgeable persons to propose an appropriate placement in the least restrictive environment for children with disabilities who have school related health needs, would be a violation of IDEA.

Q: Who should be included on a child’s IEP team when a child with a disability has one or more underlying medical conditions that puts them at increased risk of severe illness if they contract COVID-19?

A: The IEP team should include the child’s parents, relevant school officials including related service providers, and a professional who knows about the health needs of the child (e.g., school nurse) including whether COVID-19 prevention and reduction strategies may be needed.
Q: Are the child’s IEP team and the group of knowledgeable persons making educational placement decisions responsible for addressing the school-related health needs of a child with a disability in the context of COVID-19?

A: Yes. LEAs must address the school-related health needs of eligible children with disabilities who are at increased risk of severe illness from COVID-19 infection. If a parent or other member of the IEP team believes that COVID-19 prevention strategies are necessary to ensure FAPE for a child, the IEP team must consider whether and to what extent such measures are necessary. If it is determined that COVID-19 prevention and risk reduction measures are necessary in order to ensure FAPE—where the prevention measures constitute special education, related services, supplementary aids and services or program modifications and supports for school personnel—the IEP team must include these in the child’s IEP.

Q: Could a state or local law, regulation, rule, or policy that prohibits or limits COVID-19 prevention and risk reduction strategies in the regular education classroom or other settings where the child with a disability could interact with nondisabled peers be inconsistent with IDEA’s requirement to ensure a continuum of educational placements related to placement in the least restrictive environment?

A: Yes. State or local laws, regulations, rules, or policies must not result in the exclusion of, or prevention of, a student with a disability from being educated in the regular classroom with their nondisabled peers when such a placement is appropriate based on their needs. IEP teams must be able to appropriately address the in-person school-related health needs of a child with a disability with underlying medical conditions, including using COVID-19 prevention and risk reduction strategies. State or local laws, regulations, rules, or policies that prevent or improperly limit this individualized decision making or that effectively prohibit the provision of needed supplementary aids and services generally would be in violation of IDEA. Otherwise, the child’s parent is left with two equally unacceptable choices: an in-person educational placement that puts their child at increased risk of severe illness or the exclusion of their child from school.

DETERMINING APPROPRIATE MEASURABLE ANNUAL GOALS AND CONSIDERING THE CHILD’S NEED FOR COMPENSATORY SERVICES

During the COVID-19 pandemic, some LEAs report having difficulty consistently providing the services outlined in the student’s IEP. As a result, some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals. IEP teams should consider each child’s present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child’s receipt of appropriate services. IEP teams are encouraged to focus on the individual needs of the child when making these decisions, including ensuring that the instructional methodology for delivery (e.g., in person, virtual, hybrid), timing, frequency, and service setting to appropriately support the child with a disability in achieving the goals outlined in the student’s IEP.

Q: How should an IEP team address the adverse impact of educational disruptions caused by the COVID-19 pandemic when developing, reviewing, or revising a child’s IEP for the 2021–2022 school year?

A: IEP teams should consider any adverse impact of the pandemic on each child with a disability, including whether the child has new or different needs that had been identified prior to the pandemic. Teams should also consider (a) if student lost skills or did not make expected progress toward goals during the 2020–2021 school year; (b) all relevant data, including parent input, that reflects the child’s present level of performance; (c) all areas of need, regardless if such need is commonly related to the student’s identified disability; and (d) if the child requires new or different services to meet new areas of need.

Q: May an IEP team revise the measurable IEP goals to reflect a decline in knowledge and skills resulting from COVID-19 related instructional disruptions?
A: Yes.

Q: What are compensatory services?

A: Compensatory services are recognized as a remedy to address the failure or inability of an LEA to provide FAPE over a period of time.

Q: Who determines if and to what extent compensatory services are needed?

A: Neither IDEA nor its corresponding federal regulations explicitly address who determines the need for compensatory services. LEAs should consult with their attorneys and be transparent about relevant legal standards (e.g., case law, consent decrees) used when determining if compensatory services are necessary. IEP teams should consider all relevant available data, and how any additional services determined necessary can be delivered in a manner that does not diminish the child's opportunities to interact with nondisabled peers to the maximum extent appropriate, and to participate in extracurricular and other nonacademic activities.

Q: How can the IEP team use available data about the child to inform decisions about compensatory services?

A: IEP teams should consider how, if at all, specific SEA or LEA guidance and/or relevant state law addresses this issue. In addition, the IEP team could consider the following:

- The child's present levels of academic achievement and functional performance, including concerns raised by parents, the child, and outside service providers. When considering present level of performance, the team could consider where they would expect the child's skills to be had they not experienced COVID-19 related service and instructional disruptions.
- Previous rate of progress toward IEP goals.
- Documentation of services that were provided prior to COVID-19 related disruptions.

Q: What are some situations in which it may be necessary to provide compensatory service to a child with a disability?

A: These decisions should be made by the child's IEP team on an individual basis. A nonexhaustive list of situations that may warrant a conversation about the necessity for compensatory services include:

- Delay in the initial evaluation, eligibility determination, and development and implementation of an eligible child's IEP.
- Services provided during the pandemic that were not appropriate to meet the child’s needs.
- Some or all of the child's IEP could not implemented using available service delivery methods during the pandemic.

Q: Can compensatory services be provided to children who have graduated with a regular high school diploma or exceeded the age of eligibility for IDEA services?

A: Yes.

EDUCATIONAL PLACEMENT DECISIONS

Q: Is an LEA obligated to provide special education and related services virtually if parents request it?

A: It depends. If virtual instructional is available to all students, then the LEA must ensure that a student with a disability can have their needs met and that their IEP can be successfully implemented in a manner that ensures FAPE in the virtual environment. IDEA allows for "home instruction" in the continuum of alternative placements.
Q: How does the Department of Education consider virtual instruction under IDEA’s continuum of educational placements for students with disabilities?

A: IDEA continually stresses that students with disabilities should be educated in general education settings alongside nondisabled peers to the maximum extent possible. Virtual learning provided during the pandemic may be deemed less restrictive if it is available to all children and provides the child with a disability meaningful opportunities to be educated and to interact with nondisabled peers in the regular education environment.