

# COVID-19 and Students with Disabilities

## Frequently Asked Questions (FAQ)



## **Acknowledgments**

This FAQ was prepared by Linda Sweet Marks, Esq., Elizabeth Athos, Esq., and Rebecca Spar, Esq., with support from the IOLTA Fund of the Bar of New Jersey and the New Jersey State Bar Foundation.

## **About the Education Law Center**

Founded in 1973, the Education Law Center (ELC) serves as the leading voice for New Jersey's public school children and has become one of the most effective advocates for equal educational opportunity and education justice in the United States. Widely recognized for groundbreaking court rulings on behalf of at-risk students, ELC also promotes educational equity through coalition building, litigation support, policy development, communications, and action-focused research in New Jersey, in other states, and at the federal level.

ELC's legal and policy advocacy, which includes such landmark rulings such as Abbott v. Burke, has significantly advanced the provision of fair school funding, high quality early education, safe and adequate school facilities, and school reform, especially to schools serving high concentrations of at-risk students and students with disabilities and other special needs. These successes have, in turn, resulted in strong academic gains and progress in closing student achievement gaps in New Jersey.

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## COVID-19 and Students with Disabilities Frequently Asked Questions (FAQ)

The closure of school buildings due to the COVID-19 pandemic has caused a particular hardship for many students with disabilities and their families. School buildings were closed effective March 18, 2020 through the end of the 2019-20 school year, and only some schools started the 2020-21 school year with traditional in-person classroom instruction, while others have been using alternatives, such as remote or hybrid learning. Nonetheless, public schools (including all New Jersey school districts, charter schools, renaissance schools, and approved private schools for students with disabilities) are still required to provide educational services. The following are answers to questions regarding your child with a disability's educational rights during this time.

### 1. Question: Is my child's Individualized Education Program (IEP) still in effect during this COVID-19 pandemic?

**Answer:** Yes. The core requirement of the Individuals with Disabilities Education Act (IDEA) -- for schools to provide a free appropriate public education (FAPE) in the least restrictive environment (LRE) -- has not been modified.<sup>1</sup> Unless an IEP is changed by parental agreement or in accordance with IDEA, the IEP in place at time of the COVID-19 school closure remains in effect. If your child has an IEP, your child has the right to receive the special education and related services required by that IEP, as appropriate and to the greatest extent practicable, during the COVID-19 pandemic. This includes specialized instruction, related services such as speech and language therapy, counseling, and occupational therapy, and accommodations (such as extra time to complete assignments) or modifications that are spelled out in the IEP.

In [guidance](#) issued on September 28, 2020, the United States Department of Education (USED)'s Office of Special Education (OSEP) reaffirmed a school district's obligation to provide FAPE to all students classified for special education regardless of the method of delivering instruction, including delivery options such as remote/distance instruction, in-person attendance, and a hybrid model combining both remote/distance instruction and in-person attendance.

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<sup>1</sup> United States Secretary of Education Betsy DeVos notified Congress in a [report](#) dated April 27, 2020 that her Department was not asking to waive "any of the core tenets of the IDEA..." (p. 11).

Further, the [guidance](#) stated that school district also remains responsible to give such children “the chance to meet challenging objectives.”

If it is not appropriate or possible to implement all portions of your child’s IEP during the pandemic, compensatory education services for your child should be considered by the IEP team, including you, when schools reopen. [See](#) Answer to Question 12, below.

**2. Question: How will my child’s IEP be implemented during the COVID-19 pandemic?**

**Answer:** In [New Jersey Specific Guidance for Schools and Districts](#), the New Jersey Department of Education (NJDOE) directed school districts to consult with parents to explore how students with disabilities will have the necessary supports in place and can gain equitable access to home instruction during the COVID-19 pandemic. Educational services are to be consistent with the child’s IEP “to the most appropriate extent possible.” According to this guidance, IEP teams might “need to consider compensatory services when students return to school and IEPs may need to be adjusted accordingly.” [See](#) Answer to Question 12, below.

In [guidance](#) issued on March 5, 2020, NJDOE established its [regulations](#) for home instruction due to a temporary or chronic health condition ([see N.J.A.C. 6A:16-10.1](#)) as the guidepost for districts in delivering instruction during school closures.

From March 18, 2020 through June 2020, school facilities were closed and no in-person learning was allowed. New Jersey schools were [required](#) under [N.J.A.C. 6A:14-1.1\(d\)\(5\)](#) to provide special education and related services through electronic communications, virtual, or other online platforms, as appropriate and as required by your child’s IEP. These temporary modifications to the State’s special education regulations were adopted by the State Board of Education on April 1, 2020. Further, on April 14, 2020, New Jersey enacted [legislation](#) recognizing speech-language therapy, counseling services, physical therapy, occupational therapy, and behavioral services as related services that may be delivered “through the use of electronic communication or a virtual or online platform.”

As stated in NJDOE’s [guidance](#) issued on April 3, 2020, the rule modifications are intended to provide school districts with the flexibility necessary to provide educational services and do not relieve them of their responsibility to provide students with FAPE.

On May 5, 2020, the Commissioner of Education issued [guidance](#) requiring all New Jersey public schools to submit updated Public Health-Related School Closure Plans to their County Office of Education by no later than May 22, 2020. Those plans covered the rest of the 2019-2020 school year and were required: (1) to detail how remote/virtual instruction meets the needs of students with disabilities “to the greatest extent possible, including accessible materials and platforms”; and (2) to be posted to each district or school’s website. NJDOE designed a [checklist](#) of required plan components to determine plan approval.

Under Governor Murphy’s [Executive Order 175](#), dated August 13, 2020, and the State’s June 26, 2020 reopening guidance, [The Road Back: Restart and Recovery for Education](#) (The Road Back), for the 2020-2021 school year, school districts were encouraged to fully reopen as long as they can meet [New Jersey Department of Health’s health and safety requirements](#). All school districts were required to prepare reopening plans and to submit the plans to NJDOE for approval. Again, NJDOE devised a [checklist](#) for evaluating district plans.

On August 28, 2020, the State issued [Supplemental Guidance to Executive Order 175](#), allowing school districts the option to begin the school year fully remote or to have full-time or hybrid in-person instruction with only a portion of the students in-person while the rest are learning remotely. If your school district chose to implement “hybrid” schedules such as half days in school and half in the home, this does not mean that your child can receive only half of the IEP services during in-person learning. You can work with your child’s IEP team to decide which IEP services need to be provided in-person and to schedule them on days your child will be attending in-person instruction. For example, if your child’s IEP requires special reading instruction for 1 hour per day (duration) on 2 days per week (frequency) and your child will attend in-person instruction on Monday, Wednesday, and Friday, then the special reading instruction should be scheduled: (a) on the days your child is attending in-person instruction; and (b) for the full amount of time set out in the IEP.

In its [guidance](#) issued on September 28, 2020, the USED’s OSEP confirmed the school’s obligation during the COVID-19 pandemic to provide classified students with FAPE.

Regardless of whether your school district is providing full-time or hybrid in-person instruction, pursuant to NJDOE’s [Guidance Clarifying Expectations Regarding Fulltime Remote Learning Options for Families](#), school districts must accommodate families’ requests for full-time remote instruction for special

education and related services. Further, a family may request that some services be delivered remotely, while other services delivered in-person. See Answer to Question 4, below.

Note that [Executive Order 175](#) includes a requirement that school districts must submit documentation to NJDOE for each school that has not fully reopened due to an inability to satisfy health and safety requirements, including the date by which each school anticipates the resumption of in-person instruction. Moreover, when health and safety standards can be met for some, but not all, students, the [Supplemental Guidance to Executive Order 175](#), authorizes schools to “offer in-person instruction and related services to those students for whom it is most educationally beneficial....”

For the 2020-21 school year, schools are offering students learning options that vary among remote, hybrid, and in-person, depending on health conditions and each school or district’s ability to comply with the State’s reopening guidance. When your child is attending in-person instruction full time, it should be possible and appropriate to fully implement his/her/their IEP as written. However, it may not be appropriate or possible to implement all portions of your child’s IEP through instruction at home. Whenever your child’s IEP is not fully implemented, your child’s IEP team, which includes you, should meet to consider compensatory education services. See Answer to Question 12, below.

### **3. Question: How long must each school day be?**

**Answer:** An in-person or remote school day during the pandemic must be at least four hours long for students in first grade and beyond, while a continuous session of two and one-half hours may be considered a full day in kindergarten. This standard for minimum hours of instruction was set forth initially in [The Road Back](#) (p. 49), relying on an existing regulation, [N.J.A.C. 6A:32-8.3](#). That regulation also says that a school day is “a day on which...students are under the guidance and direction of a teacher or teachers engaged in the teaching process.”

[Executive Order 175](#) further clarified that the requirement is for “active instruction” by an “appropriately certified teacher” with “opportunities for both synchronous [in live time] and asynchronous [not live, such as a pre-recorded lecture] instruction” in accordance with “the New Jersey Student Learning Standards.” The requirement for 180 school days in each school year remains in effect under this Executive Order.

#### **4. Question: If my child's school reopens in-person this fall must I send my child to school?**

**Answer:** No. Even if in-person instruction reopens in some capacity, you can choose to have your child engage in full-time remote learning. See NJDOE's [guidance](#) issued on July 24, 2020. You have an unconditional right to request full-time remote learning for your child and your request for full-time remote learning "cannot be conditioned on a family/guardian demonstrating a risk of illness or other selective criteria." The guidance also requires school districts to allow for your child to transition from full-time remote learning to in-person learning and vice-versa.

School districts must establish procedures for submitting full-time remote instruction requests and for transitioning from all remote to in-person instruction. Procedures can include how long a student must remain in remote learning before transitioning to the in-person option. You should contact your school district for a copy of these procedures.

In its July 24, 2020 [guidance](#), NJDOE said that students choosing the remote learning option must be offered the same quality and scope of instruction and other educational services as any student participating in the school district's hybrid or in-person instruction model.

On August 6, 2020, NJDOE clarified in [School Reopening Frequently Asked Questions](#) that parents who choose the full-time remote learning option but whose district is partially open, may "request that some services be delivered entirely remotely, while other services follow the same schedule they otherwise would according to the district's reopening plan." In other words, you may choose the full-time learning option but ask that some or all of your child's related services be provided in school following the in-school schedule.

If your child is medically fragile or has health issues that make it risky to attend school in person while the pandemic continues, but at the same time does not benefit from virtual special education or related services, speak with the case manager about your concerns. One possibility is that your school district could contract with a private provider who is offering in-home services or even send district staff into the home.

During this past summer, NJDOE's [guidance](#) stated that school districts may choose to provide extended school year (ESY) services through home instruction. Regardless of the form of learning, public schools remain legally mandated to continue to provide students with disabilities a FAPE in the LRE.

**5. Question: What if my child does not have a computer (or other device) or internet service at home?**

**Answer:** IDEA requires that school districts provide the assistive technology devices or services students with disabilities need to receive FAPE, including in the home. (See [N.J.A.C. 6A:14-3.7\(c\)10](#).) If your child does not have adequate access to the internet or a device such as a computer, please reach out first to your child's IEP team. Many schools are providing Chromebook laptops or other devices and establishing Wi-Fi hot spots for their students. Some internet service providers are offering free months of internet access. If your child's IEP team is not responsive, you can contact the New Jersey Department of Education's Special Education Ombudsman, Cynthia Hoenes-Saindon at 609-376-9060 or [specedombsman@doe.nj.gov](mailto:specedombsman@doe.nj.gov). If this does not resolve the problem, please contact Education Law Center at 973-624-1815, ext. 10 or [elc@edlawcenter.org](mailto:elc@edlawcenter.org).

In its reopening guidance, [The Road Back](#), NJDOE states (on page 75): "each school district should seek to ensure that every student has access to a device and internet connectivity. Districts should prioritize the provision of technology, or alternatively, in-person instruction, to students that are otherwise without access." Further, it states: "For students with special needs, accommodations according to their instructional program must be addressed as appropriate for each student."

In this [guidance](#), NJDOE states that school districts should think "outside of the box." For example, school districts can use school buses as mobile hotspots and park the school buses in strategic locations to provide internet connection to remote communities.

According to [COVID-19 Updates and Frequently Asked Questions guidance](#) updated by the Commissioner of Education on March 23, 2020, "If students with disabilities do not have access to internet connectivity to participate in remote or online home instruction, the IEP team will need to determine what compensatory education a student may require when their school district reopens" (p. 6). See Answer to Question 12, below.

**6. Question: Can I be required by my child's school to sign a document waiving my child's legal rights or releasing the school from its legal obligations in order for my child to receive educational services during the COVID-19 school closure?**

**Answer:** No. NJDOE released guidance on April 30, 2020 titled [Parental Waivers for the Delivery of Remote or Virtual Special Education and Related Services](#) to

inform all school administrators that requiring the signing of a waiver or release of any claims as a condition to receiving services during the COVID-19 closure is prohibited. NJDOE states that this practice violates both IDEA and its own regulations in that “a key right guaranteed by both the IDEA and the state’s regulation is the right to disagree with a school district’s determination or action...utilizing various dispute resolution options.” Further, the guidance clearly states:

Neither the IDEA nor the state’s special education regulations require or allow for the waiver of present or future claims, including claims to compensatory services, in order for students with disabilities to receive the services to which they are entitled as determined by the student’s IEP. These entitlements include related services through telehealth, telemedicine, electronic communications, remote, virtual, or other online platforms.

If you signed such a waiver or release in order to obtain services for your child and your school district attempts to hold you to it, we suggest sending the school district a copy of NJDOE’s April 30, 2020 [guidance](#). You can also contact the New Jersey Department of Education’s Special Education Ombudsman, Cynthia Hoenes-Saindon at 609-376-9060 or [specedombudsman@doe.nj.gov](mailto:specedombudsman@doe.nj.gov). If this does not resolve the problem, please contact Education Law Center at 973-624-1815, ext. 10 or [elc@edlawcenter.org](mailto:elc@edlawcenter.org).

Regarding students who have 504 plans under the Rehabilitation Act of 1973 (Section 504), in its [guidance](#) issued on September 28, 2020 , the USED’s Office of Civil Rights (OCR) stated school districts may not require parents of Section 504 students to sign any waivers before the school district delivers online services. Further, in this [guidance](#), OCR stated school districts may not require parents of Section 504 students with disabilities to waive any rights as a condition of receiving a FAPE.

**7. Question: What is a “distance learning plan” for implementing my child’s IEP during COVID-19 pandemic and what if I disagree with the plan developed by my school district?**

**Answer:** USED said in its March 2020 [guidance](#) that IEP teams may consider including a “distance learning plan” within a child’s IEP (Question & Answer A-5). The distance learning plan – which is also referred by some as a temporary learning plan or a continuous learning plan – is to set out a contingency plan to be implemented only during school closures due to a COVID-19 outbreak. Contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction,

instructional telephone calls, and other curriculum-based instructional activities. It may also identify which special education and related services the child's IEP team believes can be appropriately provided during school closures.

A distance learning plan is only for the time period that school facilities are closed or partially closed and once facilities reopen with full time in-person instruction, your child should receive all the services set out in his/her/their IEP.

NJDOE does not require school districts to create "distance learning plans" for students with disabilities during the COVID-19 pandemic. If your child's IEP will be fully implemented during school closures except that the services will be offered through remote, virtual or online platforms, NJDOE said in its April 30, 2020 [guidance](#) that school districts do not need, nor can districts require, parental consent in order to implement a student's IEP through remote, virtual, or online platforms during COVID-19.

Some New Jersey districts have indicated in their 2020-21 plans that they will be developing distance learning plans. It is important to keep in mind that you have the same procedural rights during the COVID-19 pandemic as you had previously (for example, prior written notice of any changes in the number of your child's IEP's speech therapy sessions).

You are a member of your child's IEP team and are entitled to be involved in the development of any distance learning plan for your child whether it is called a distance learning plan, a continuous learning plan, a temporary learning plan or by any other name. USED made clear in its March 2020 [guidance](#) (Question & Answer A-5) that the purpose of having an IEP team create a contingency distance learning plan within the child's IEP before school facilities had to close was to give "the child's service providers and the child's parents an opportunity to reach agreement as to what circumstances would trigger the use of the child's distance learning plan and the services that would be provided during that time."

A distance learning plan can be developed and added to your child's IEP by: (1) convening an IEP meeting with you (virtually, by telephone or even in person, if needed); or (2) by obtaining your written consent to the written plan and agreement to add the written distance learning plan to your child's IEP without a meeting.

We recommend that any distance learning plan state that it is a contingency plan to operate only during COVID-19 school closures and will automatically revert to the original IEP once school facilities reopen.

If your child's IEP team proposes a "distance learning plan" that eliminates or reduces any of the related services or special education services, accommodations or modifications, goals and objectives, or supplementary aids and services contained in your child's IEP, the school district must provide you with 15 calendar days prior written notice before the changes can go into effect unless you agree to an earlier implementation date. The written notice must include the basis for any changes, what the IEP team relied upon in making the changes, any other options considered, and why these options were rejected. See, e.g., [34 CFR 300.503](#); [N.J.A.C. 6A:14-2.3\(f\), \(g\) & \(h\)](#). Should your school develop a distance learning plan by amending your child's IEP, see Answer to Question 8, below.

If you choose to sign the distance learning plan, you can let your school district know that you are preserving your child's rights, by including the following language in that plan:

*"I agree to these services temporarily and only until schools reopen after the COVID-19 pandemic at which time the original services and supports in the IEP developed prior to the temporary learning plan will resume automatically. I do not waive my right to challenge the appropriateness of services being offered to my child and do not agree that these services constitute a free appropriate public education. I reserve my right to seek compensatory services for my child when school reopens."*

If you are given a distance learning plan that was created without an IEP meeting, you should first raise any concerns you may have with your child's IEP team by writing a letter and requesting an IEP meeting to discuss the plan.

If you disagree with the distance learning plan developed by your child's IEP team, you are free to use any of the dispute resolution procedures normally available under IDEA, such as requesting mediation, due process, or a state complaint investigation. For more information on challenging school district actions, please see pages 31-40 of ELC's publication, [The Right to Special Education in New Jersey](#) or pages 16-26 of NJDOE's [Parental Rights in Special Education](#) (PRISE).<sup>2</sup> See also Answer to Question 25, below, for information on maintaining your child's special education and related services while you challenge the school district's distance learning plan.

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<sup>2</sup> PRISE is also available in [Spanish](#), [Arabic](#), [Chinese](#), and [Portuguese](#).

**8. Question: Can my child's IEP be changed during the COVID-19 pandemic?**

**Answer:** Yes. During the COVID-19 pandemic, the school district remains obligated to hold an IEP meeting for each classified child at least once a year to review and revise the IEP and determine the child's placement. See N.J.A.C. 6A:14-3.7(i). OSEP stated in its September 28, 2020 [guidance](#) that face to face meetings may not be possible or practicable during the COVID-19 pandemic and encouraged the use of flexibility by school districts to conduct the annual review IEP meetings through alternative means such as a telephone or video conference call.

If changes are made to the student's IEP, the school district must provide parents with prior written notice (which in New Jersey must be at least 15 calendar days (see [N.J.A.C. 6A:14-2.3\(h\)\(1\)](#)) before any changes can go into effect. As before the COVID-19 pandemic, a parent may challenge the school district's decision to propose or deny a change in the IEP by requesting mediation or a due process hearing as described on pages 31 to 40 of ELC's publication "[The Right to Special Education in New Jersey](#)." If a parent wishes to maintain the child's current classification, IEP or placement while challenging a school district's decision, see Answer to Question 25, below.

If the annual IEP meeting is held and an IEP is developed, that IEP may be amended during the year without an IEP meeting with consent of the parent and school district. See N.J.A.C. 6A:14-3.7(d). Either the parent can submit a written request for a specific amendment and the school district agrees to it or the school district sends the parent a written proposal and the parent signs consent within 15 days of when the district's written proposal was provided to the parent. The amendment is then incorporated into the student's IEP and a copy of the amended IEP or addendum shall be provided to the parent within 15 days of receipt of parental consent by the school district. It is important to note that an amendment to an IEP cannot take the place of the annual IEP team meeting.

**9. Question: Is my child entitled to a paraprofessional if it is set forth in the IEP?**

Scenario A: My child's school is doing a blended model this fall – two days in-person instruction and three days at home. Is my child entitled to have a paraprofessional as provided by the IEP both during in-person and at-home instruction?

Scenario B: My child's school is going to full-time remote instruction and the IEP provides for a 1:1 paraprofessional. Is my child still entitled to a paraprofessional?

**Answer:** Yes. Both children can receive the services and supports that are set out in their IEPs whether the children are fully remote, or partially/fully attending school in-person. In March 2020, USED issued [guidance](#) to states and local governments, setting out the responsibilities of schools during the pandemic and partial or full closures of school facilities. If schools are offering any educational services, the USED requires that schools "must make every effort to provide special education and related services" in accordance with the child's IEP. On page 57 of its June 2020 guidance, [The Road Back](#), NJDOE emphasized that paraprofessionals may "provide support in the virtual environment, especially for struggling students, those with special needs, English language learners, and those that need additional support at home." Examples of support that NJDOE said might be provided by paraprofessionals include real-time support to students during virtual sessions and support to students in accessing and participating in remote learning.

What does this mean for the students in Scenario A and B? The child in Scenario A who has a blended model should have an in-class paraprofessional for the two days each week that the child is in school. For both children, their district should replicate the support that a paraprofessional would provide during days the child is learning virtually. This could be done by having a paraprofessional come to the child's home or by having a paraprofessional work virtually with the child to support instruction provided by the teacher.

Parents should reach out to your child's IEP team to clarify how the school will continue to implement the IEP and provide the FAPE that the IDEA requires. If it is not possible to fully implement the provisions of the IEP, the IEP team, including the parent, should make an individualized determination as to whether compensatory education services may be needed. See Answer to Question 12, below.

#### **10.Question: What additional steps should I take during this COVID- 19 pandemic?**

**Answer:** It is important that you communicate with your school district. Let your school district know, preferably in writing, and if permitted by your school district's policy, by email, if the services being provided are not working for your child. This could include asking for additional direct instruction by your child's teacher. Document everything and ask for the help you believe your child needs

or that you need to support your child's learning. You should keep a log of which IEP services are being provided to your child and which are not, including the date each service began, its frequency, and duration. (To help you do this, **a sample log sheet is attached at the end of this FAQ.**) You should also keep a written record of: all communications received from your child's school, school district or IEP team; what special education services were offered and were not offered to your child; and all of your efforts to communicate with school staff to address your child's particular issues. You also want to keep copies of assignments completed by your child and indicate what level of support was required to complete each assignment. You may also want to take a video of your child completing school assignments. See Answer to Question 11, below. More information on strategies to help you get school data and track your child's progress can be found at Wrightslaw's article on ["9 Simple Strategies to Track Progress, Get Data, and Make Your Child's Case"](#).

Finally, as discussed below in the Answer to Question 11, we recommend that you try to measure your child's progress towards his/her/their IEP goals and objectives and to document if you observe that your child is losing skills possessed when school facilities closed. These records could be extremely helpful to determine whether your child receives compensatory education when school buildings reopen.

**11. Question: How do I document my child's progress on IEP goals and objectives or my child's loss of skills during school closure?**

**Answer:** Your child's IEP is supposed to have measurable goals and objectives, so we suggest that you try to track your child's ability to make progress towards each goal and objective on a weekly basis. We recommend that you ask your child's teacher or IEP Team case manager for any rubrics that the school uses to measure progress so that you can try to implement them at home. It would not be unreasonable to request parent training in data collection to assist you in doing so. Parent training is a recognized related service that can be included in an IEP when it is necessary for a child to achieve FAPE, as it may be when you are overseeing your child's program at home during the school closure.

Note that you can also videotape your child performing activities or schoolwork required by the child's IEP. Weekly videos of a particular activity may be a good way to demonstrate that your child's skills are not improving or that skills have been lost. In order to protect the privacy of other students, you should not record any live video conferences showing other students.

Remember that your school district is still required to provide IEP progress reports. Progress reports from before the shut-down, which may show that your child was progressing satisfactorily and expected to achieve IEP goals and objectives, should be compared to more recent progress reports and your own data. Your child's report card as well as informal assessments conducted by your child's teacher are also data sources.

For more information on how to track your child's progress and get data, [see](#) Answer to Question 10, above.

**12. Question: What if my child does not receive all or some of the services set out in the IEP, does not make progress on IEP goals and objectives, or has lost skills?**

**Answer:** If your child didn't have access to a device or adequate internet access, or it wasn't possible for your child to receive all or some of the IEP services through distance learning, or the distance learning services received were not appropriate, your child may be entitled to receive make-up services called "compensatory education" when schools reopen. None of the core requirements of IDEA, including the requirements to provide a student with a FAPE and to fully and appropriately implement a student's IEP have been modified or waived during school closures. The only difference is that New Jersey regulations were changed so that the IEP services could be provided through electronic communications, virtual, or other online platforms **as appropriate** for your child. When students' rights under IDEA are violated, students are entitled to appropriate relief. Courts have held that compensatory education is appropriate relief to make up for IEP services, as well as accommodations or modifications that were not provided at all, or because the services offered were not appropriate for the student.

In its March 12, 2020 [guidance](#), USED made it clear that the inevitable delay in providing educational services or making decisions about how to provide those services, resulting from the global pandemic and school closure, requires IEP teams to "make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost."

In its April 30, 2020 [guidance](#), NJDOE stated that the need for compensatory education services "is an individual determination made by the student's IEP team, including the student's parent(s)/guardian(s)" and that school districts should begin to consider how the extended school closures may affect students' progress toward IEP goals to determine whether compensatory education

services were needed. In its April 30, 2020 [guidance](#), NJDOE also said that IEP teams including the parents didn't need to wait until schools reopened to start considering whether compensatory education services were warranted.

In the Answers to Questions 10 and 11, we discuss how to keep track of the services offered and not offered. If some IEP services were not provided at all during distance learning, then courts in New Jersey's judicial circuit have generally required lost time to be made up on a 1:1 basis. For example, if your child's IEP required 90 minutes a week of physical therapy and none was provided during school closures, then your child may be entitled to 90 minutes of physical therapy for each week it was not provided. In some instances, the school district provided less than the amount of time required by the student's IEP. If there is more than a minimal difference between what the IEP required and what was actually provided, then compensatory education services may be warranted.

When the school district attempted to provide services consistent with the IEP, but the remote services were not appropriate for your child, then figuring out what compensatory education services are warranted requires more data. During the COVID-19 school facilities closures, school districts are entitled to provide IEP services virtually but only "as appropriate." We suggest in Answers to Questions 10 and 11, that you could track your child's progress, if any, with respect to the IEP goals and objectives. In addition, if you observe your child losing skills during distance learning or developing new needs, this may be additional evidence that the distance learning services that were offered were not appropriate for your child. Your child's teachers are also supposed to be monitoring your child's learning during remote instruction so you may request copies of any data collected by the teachers.

Some school districts have said that to be entitled to compensatory education services, a student must regress or lose skills the student had when school facilities closed. In its March 12, 2020 [guidance](#), USED did include skill loss as one indicator of a need for compensatory education. However, its full statement was that "a school must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, **including** to make up for any skills that may have been lost." The standard in New Jersey's judicial circuit for when a student is entitled to compensatory education does not require that a student lose skills in order to receive compensatory education. If your child did not receive all or some of the services set out in the IEP during the time school buildings were closed, or the online platform was not appropriate for your child, then compensatory education services may be warranted.

Further, some school districts have also said that to receive compensatory education services, your child must not only lose skills, but must take an inordinate time to recoup or regain the lost skills. Regression and recoupment is not the required standard for determining whether a student is entitled to compensatory education services.

Instead, the regression and recoupment standard is often used to decide whether a student needs an ESY. ESY services are included in a student's IEP when the student's IEP team decides that a student cannot receive a FAPE if services are only provided for the usual 180 days and/or during the hours of a typical school day. In contrast, compensatory education services are to make up for an inappropriate IEP or to make up for services in the student's IEP that were either not fully or appropriately provided. Compensatory education is for a past failure to provide a FAPE while ESY is to ensure that a child has a FAPE going forward. In its September 28, 2020 [guidance](#), the USED's OSEP confirmed this by stating "it is important to remember that IEP Team determinations regarding ESY services are prospective and not intended to make up for past denials of FAPE."

Compensatory education services can be provided by school staff or private providers before or after school, on the weekends or during the summer or when school is not in session. They are in addition to the IEP services your child receives.

If you believe your child needs compensatory education, make a written request to your child's case manager to convene an IEP meeting to discuss what services are warranted and how they will be provided. Bring to the IEP meeting all the supporting data you have collected as recommended in the Answers to Questions 10 and 11, above. If your concerns are not resolved, you are free to use any of the dispute resolution procedures normally available under IDEA, such as requesting mediation, due process, or a state complaint investigation. For more information on challenging school district actions, please see pages 31-40 of ELC's publication, [The Right to Special Education in New Jersey](#) or pages 16-26 of NJDOE's [PRISE](#).

Note: if your school district told you that your child could not receive virtual services unless you signed a document consenting to the services and agreeing to waive any future claims against the district and you refused to sign the document, your school district cannot use this refusal as the basis for denying your child compensatory education. NJDOE's April 30, 2020 [guidance](#) instructed school districts that it was a violation of IDEA to require parents to sign waivers or

releases and that school districts “may not require additional parental consent prior to implementing a student’s IEP through remote, virtual, or online platforms during COVID-19.” For more information on your right to refuse school waivers, see Answer to Question 6, above.

### **13. Question: Are timelines still in effect during COVID-19?**

**Answer:** All timelines regarding IEPs and evaluations are still in effect. This includes the 60-day time requirement to complete evaluations and reevaluations, the 90-day time requirement to conduct an initial evaluation and implement an initial IEP, the annual requirement to have IEP meetings and unless waived by both the parent and the school district, the requirement to conduct a reevaluation at least once every three years. In its [guidance](#) issued on September 28, 2020, the USED’s OSEP reaffirmed the school district’s obligation to conduct initial evaluations, triennial reevaluations, and initial and annual IEP meetings within the mandatory timeframes.

The US Secretary of Education recommended on April 27, 2020 that Congress grant a relatively narrow [timeline waiver](#) under IDEA that would have extended the evaluation timeline for children making the transition from early intervention services for infants and toddlers to special education services for school-aged children. Under this waiver, children receiving early intervention services could continue to receive services until health and safety factors allow the child to be evaluated face-to-face. This limited waiver provided that a toddler with a disability would not lose access to services once he or she turns 3 years old until an evaluation was completed and an eligibility determination made. As of now, Congress has not acted on the waiver request and NJDOE has not issued any guidance on children making the transition from early intervention services to special education for preschool children. Thus, there was no waiver of school district obligations to timely complete evaluations for students transitioning from early intervention services.

If your child has turned, or will turn, 3 while school buildings are closed, and a waiver for the continuation of early intervention services has not yet been granted, he/she/they should be referred to your public school district for an initial evaluation for special education and related services at least 120 days prior to your child turning 3. See Answer to Question 15, below for more information on evaluations.

**14. Question: Was my child entitled to receive an Extended School Year (ESY) during summer 2020?**

**Answer:** If your child’s IEP as of March 18, 2020 required an ESY for the summer of 2020, your school district was obligated to provide one. In some cases, IEP meetings were held after school facilities were closed and it was decided to include an ESY program for the summer of 2020. In both cases, your child was entitled to an appropriate ESY program. Whether the ESY programs were offered remotely or in-person depended upon whether the district reopened facilities in July 2020, as allowed by NJDOE’s guidance on the [Delivery of Extended School Year Services to Students with Disabilities](#).

In its [guidance](#) issued on September 28, 2020, the USED recognized that ESY services may not have been able to be delivered this past summer, particularly those that required direct in-person contact, and stated that while ESY services are typically provided in the summer months, in such instances, school districts “should consider providing ESY services to the child during the normal school year, during school breaks or vacations.”

If your child’s IEP provided for ESY services during the summer of 2020 and the services provided were not appropriate for your child, the school district failed to provide all or any of the ESY services required, or the school district refuses or is unable to provide this past summer’s ESY services during this 2020-2021 school year, then your child may be entitled to receive compensatory services. See Answer to Question 12, above.

**15. Question: What if my child needs to be evaluated during school closure?**

**Answer:** IDEA requires that school districts conduct timely evaluations and reevaluations and none of the evaluation requirements were modified or waived during the COVID-19 pandemic. You may continue to make written requests (by email, if possible, and if permitted by your school district’s policy) for an initial evaluation, re-evaluation, or independent educational evaluation for your child with a disability. Those requests should go to the school district’s Director of Special Education and/or your child’s case manager.

If your child has been receiving early intervention services, your child should be referred to your school district for an initial evaluation for special education and related services at least 120 days before your child’s 3<sup>rd</sup> birthday. For more information on your child’s transition from early intervention services to special education services for school-aged children, see Answer to Question 12 above.

Some school districts have been reluctant to conduct evaluations while school facilities have been closed. This has resulted in a backlog in evaluations and has left students who may qualify for special education and related services without needed services. In its guidance, [The Road Back](#), NJDOE recommends (on page 74) that IEP teams “shall develop procedures to complete overdue and/or incomplete evaluations to determine eligibility for special education services.”

In its September 28, 2020 Guidance, USED urged school districts to investigate appropriate assessment instruments and tools to determine if some can be administered or completed remotely. Publishers of many of the educational tests that schools use to conduct initial evaluations or reevaluations have said that their tests can be given virtually. Further, in its guidance on the [Delivery of Extended School Year Services to Students with Disabilities](#), NJDOE said that now that school districts can reopen, they may be able to conduct in-person evaluations to determine eligibility for special education and reevaluations in accordance with New Jersey Department of Health standards.

With regard to initial evaluation requests, a meeting should be scheduled within 20 days, by telephone, video conference or in person, to determine whether an evaluation is warranted. If evaluations cannot be conducted virtually or on a 1:1 in-person basis, sufficient information may still be available to make a determination of eligibility (such as school data or state testing), pending more comprehensive testing when school facilities reopen. In addition, your school district can choose to contract with private testing centers that have re-opened on a limited basis, with full health and safety precautions, to conduct in-person evaluations. If a determination of eligibility is delayed, your child may be entitled to compensatory education if eventually found eligible for special education. See Answer to Question 12 above.

Regarding evaluations and reevaluations required under Section 504, see Answer to Question 26, below.

**16. Question: Are mediations and due process hearings still being done during the COVID-19 pandemic?**

**Answer:** Yes. Mediation conferences and due process hearings are being conducted remotely using telephone and video conferences. In ELC’s view, a parent has the right to ask that a hearing be postponed until it can be conducted in person, but a school district does not, since school districts do not have the same rights under IDEA as parents. Parents should note that the first hearing date scheduled at the Office of Administrative Law (OAL), where due process

hearings are conducted, is conducted as a settlement conference, not as an evidentiary hearing.

OAL posts [updated messages](#) on its website about the work of its Administrative Law Judges (ALJs). Although due process hearings are required by federal law to be completed within 45 days, barring extensions that are requested by the parties and granted by an ALJ, hearings at OAL often take considerably longer. New Jersey is currently under a federal corrective action plan to improve the timeliness of its special education due process hearings.

**17. Question: Who is responsible for providing education to students with disabilities attending schools outside of the school district?**

**Answer:** It is the responsibility of the sending school district to ensure students with disabilities attending out-of-district placements are provided with instruction during school closures consistent with the student’s IEP as appropriate and to the greatest extent possible. This includes in-state and out-of-state approved private schools for students with disabilities, county educational services commissions, special services school districts, Naples placements, regional day schools, and other school districts. School districts should collaborate with the student’s school of attendance regarding the nature and delivery of instruction.

**18. Question: I have been calling and emailing my case manager regarding my child’s IEP services and not getting any response.**

**Answer:** If your child’s school is not responsive, contact your school district’s Director of Special Education. If there is still no response, you can contact the New Jersey Department of Education’s Special Education Ombudsman, Cynthia Hoenes-Saindon at 609-376-9060 or [specedombudsman@doe.nj.gov](mailto:specedombudsman@doe.nj.gov). If this does not resolve the problem, please contact Education Law Center at 973-624-1815, ext. 10 or [elc@edlawcenter.org](mailto:elc@edlawcenter.org).

**19. Question: During this COVID-19 pandemic is the school district still required to provide the transitional services required by my child’s IEP including pre-employment transition services?**

**Answer:** Yes. The USED’s Office of Special Education and Rehabilitation Services (OSERS) stated in a [Letter](#) dated August 31, 2020 that regardless of whether educational services are provided virtually, in-person, or through a hybrid approach, “the importance of the provision of transition and pre-employment

transition services has not changed.” The Letter noted the importance of the provision of quality pre-employment transition and transition services for students with disabilities and how crucial it is for school districts to collaborate with New Jersey vocational rehabilitation agencies to provide, or arrange for the provision of, such pre-employment transition services to maximize independence in these students’ communities and prepare them for self-sufficiency and competitive integrated employment.

To aid in transition planning and implementation, in August 2020, OSERS released a guide on transition services titled [A Transition Guide to Postsecondary Education and Employment for Students and Youth with Disabilities](#). This transition guide addresses the following topics:

- Transition planning: opportunities and programs;
- Transition services and requirements, as authorized by IDEA and the Rehabilitation Act;
- Education and employment options for students and youth with disabilities after leaving secondary school; and
- Supporting the decisions made by students and youth with disabilities.

**20. Question: What are my options if my child received a diploma at the end of the 2019-20 school year or turned 21 years of age but did not receive all of the services in his/her/their 2019-20 IEP?**

**Answer:** When a student accepts a high school diploma or completes the school year after turning 21, the student is no longer entitled to a FAPE. However, if the school district did not provide the student with a FAPE prior to issuing the diploma or to the student aging-out, the student may be entitled to “compensatory education” for the period in which the school district failed to provide the student with a FAPE. See Answer to Question 12, above.

Many students had transitional services (such as community-based instruction and job placements) in their IEPs that could not be implemented due to the COVID-19 pandemic. In its June 12, 2020 Guidance on [Providing Additional Services for Students with Disabilities Who Will Graduate or Exceed Eligibility for Special Education Services](#), NJDOE encouraged IEP teams to convene virtual or in-person meetings to discuss the services that were not provided to students and to determine the need for additional services. In addition to making up for IEP services not provided or not provided appropriately, school districts were encouraged to consider conducting reevaluations so that students would have updated information for any necessary post-secondary accommodations or to

assist students to access services offered by the Division on Developmental Disabilities.

When a student is entitled to compensatory education but has received a high school diploma or aged-out, the school district is generally not obligated to develop an IEP for the student. NJDOE encourages school districts, however, to provide the adult student and/or the student's parents/guardians with a written description of the additional services being offered as well as notice of the student's right to seek compensatory services via a special education due process hearing if he/she/they disagreed with the services being offered.

Further, in its guidance, [The Road Back](#) (page 74), NJDOE recommended that IEP teams identify "students whose postsecondary plans may have been adversely affected by the COVID-19 pandemic and provide support, resources, and assistance, which may include facilitating connection to community organizations, scholarship programs, county, state, and federal opportunities to access support."

If no one from the school district reached out to you before your child aged-out or received a high school diploma, you can contact your child's case manager in writing and request an IEP meeting to discuss compensatory education services for your child. If you are not satisfied with the response, you can request mediation or due process. For more information on challenging school district actions, please see pages 31-40 of ELC's publication [The Right to Special Education in New Jersey](#), or NJDOE's [PRISE](#).

**21. Question: What are my options if prior to COVID-19 my child was expected to receive a high school diploma in June 2021 or June 2022 but I now believe may need additional educational services?**

**Answer:** In New Jersey, a student with disabilities can be eligible to receive IDEA services through the school year in which the student turns 21 years of age. For students who won't have aged-out by June 2021 or June 2022, it is up to a student's IEP team, including the parent or student age 18 and over, to decide when the student is ready to graduate from high school.

If you believe that your child needs additional educational services and should not receive a high school diploma until a later date, you should bring this up when the IEP team meets to revise your child's IEP for the 2020-21 school year. If that has already been done, you can request another IEP team meeting to discuss why you believe services should continue beyond the expected graduation date and what services you believe are needed.

One reason for extending your child’s graduation date may be the transitional services stated in your child’s IEP have not been implemented due to the COVID-19 pandemic. See Answer to Question 20. As an alternative, you could request that your child receive compensatory education services for the failure to provide the transition services required by your child’s IEP. See Answer to Question 12.

Another possible option is that, on June 26, 2020, the New Jersey Legislature directed the Commissioner of Education to establish a three year “[Bridge Pilot Program](#)” under which each school district with a high school must offer students in the graduating classes of 2021 and 2022 the opportunity to pursue a “bridge year” during the year immediately following their senior year of high school. The purpose of the bridge year program is to allow students an additional year of education, through a county college program, to address learning loss due to the COVID-19 pandemic as well as to make up for missed opportunities in extracurricular and sports programs. Although generally applicable to students 19 years and younger, if specified in the student’s IEP, classified students are eligible to participate in the Bridge Pilot Program even if the student will turn 20 years of age during the bridge year. The decision to pursue a bridge year must be made no later than seven days before the start of the student’s senior year, in the format and manner determined by the school district. NJDOE is supposed to develop regulations implementing the Bridge Pilot Program. If you are interested in more details on this program, we suggest you reach out to your school district or to NJDOE.

**22. Question: I want my child to return to in-person instruction in school but my child has health or physical issues that require accommodations or modifications. What can I do?**

**Answer:** Your child may be entitled to have reasonable accommodations or modifications incorporated into your child’s IEP or in a separate Section 504 plan. You may also ask that accommodations or modifications be set out in your child’s individualized health plan (IHP).

Throughout [The Road Back](#), NJDOE points to a school district’s obligations to provide reasonable accommodations or modifications in order to address the needs of students with physical or health impairments when schools reopen. NJDOE describes students who may require accommodations or modifications as medically fragile students, those with complex disabilities, and students with physical or medical needs. (See, e.g., pages 18, 20, 74 of [The Road Back](#).)

NJDOE recommends (on page 74 of [The Road Back](#)) that school districts have procedures to address the return to school of students who may require accommodations or modifications. The guidance states that school districts should communicate frequently with the families of students with significant medical risk factors to determine if additional precautions or unique measures are necessary in order for their child to return to school.

Accommodations or modifications would be determined by your child's individual needs. NJDOE did suggest (on page 20 of [The Road Back](#)), however, that for medically fragile students or students with complex disabilities, school districts would need to:

- Ensure mechanisms to secure personal protective equipment (PPE) prior to opening and maintain ongoing supplies, in order to remain open.
- Strongly consider the need for additional cleaning staff to ensure continuous disinfecting of classrooms and therapy rooms that service students with complex disabilities where multiple tools are used for communication, mobility, and instruction.
- Consider the need for heightened monitoring and frequent handwashing which will often require hand-over-hand assistance.

A question raised by some families is whether their child is required to wear a face covering while in school or on the school bus. NJDOE has said in [School Reopening Frequently Asked Questions](#) that students are not required to wear face coverings under the following circumstances:

- If doing so would inhibit the student's health;
- A student's documented medical condition, or disability as reflected in an IEP, precludes the use of face covering;
- The student is under the age of two (2) and could risk suffocation;
- If or when anyone has trouble breathing or is otherwise unable to remove the face covering without assistance.

Students who have Section 504 or IHP plans may also not be required to wear face coverings if the student's documented medical condition precludes the use of face covering. In its [guidance](#) issued on September 28, 2020, the USED's OCR recognized in some instances using a face covering can be challenging for some students and a school district's enforcement of a face covering requirement could impede the child's ability to receive a FAPE (such as where a child with a Section 504 plan has extreme sensory issues and cannot tolerate wearing a face covering). OCR stated districts should make reasonable modifications to the face

covering policy if it can be made consistent with the health, safety and well-being of all students and staff.

Some families have asked if their child can wear a face shield instead of a mask. At this time, the Centers for Disease Control and Prevention does not recommend using a face shield instead of a mask and NJDOE generally follows that guidance. However, in [School Reopening Frequently Asked Questions](#), NJDOE has said that face shields are an option for students with medical or other challenges that preclude the use of face coverings. If a face shield is used without a mask, NJDOE said the shield should wrap around the sides of the wearer's face and extend to below the chin.

Should you have these or other health concerns about in-school learning for your child during the COVID-19 pandemic, we recommend you communicate with your child's IEP or Section 504 team or the contact person for your child's IHP regarding the additional accommodations or modifications that are necessary for your child to safely return to school. In some circumstances, you may be asked to provide written information from your child's medical professional describing the accommodations or modifications that are required for your child.

If your child has an IEP, you may request that the accommodations or modifications are incorporated into the IEP or attached to the IEP in a separate document. If your child has a Section 504 Plan, any needed accommodations or modifications can be incorporated into the 504 plan. Similarly, if your child has an IHP, any additional accommodations/modifications can be included in the IHP.

The accommodations or modifications should be designed to allow your child to attend school safely and to participate in all school-sponsored programs, including classroom activities, field trips and after-school programs, as well as transportation to and from school and school-sponsored programs.

**23. Question: Is my child entitled to special education and related services if my child tests positive for COVID-19 while attending in-person learning? What if my child is in close contact with someone with COVID-19 in school or is sent home from school due to exhibiting symptoms that are consistent with COVID-19?**

**Answer:** Any time a student is confined to home or another out-of-school setting due to a temporary or chronic health condition that is projected to last at least 10 consecutive school days, the school district is obligated to provide instructional services. See [N.J.A.C. 6A:16-10.1](#). These services can be provided through online services. For students with disabilities, the home instruction must be consistent with the student's IEP to the extent appropriate and must meet the New Jersey Student Learning Standards.

If your child is diagnosed with COVID-19, then you should provide documentation of the COVID-19 diagnosis to your child's school. If your child feels well enough to engage in instruction, speak with your child's case manager and request that instruction be started in the home. Since all school districts are currently required to offer a remote learning option to families who request it, your child's school should be able to initiate instructional services with minimal delay.

You may receive notice from your school district that your child has been in close contact with someone who has a confirmed case of COVID-19 and told that your child cannot return to school for a set period of time from the date of exposure (usually 14 calendar days). As in the above, you should reach out to your case manager and ask that your child's IEP be implemented as appropriate during this time.

**24. Question: The teachers are asking my child to participate in live video conferencing. What steps can I take to protect my child's privacy?**

**Answer:** School districts must continue to protect student privacy during the COVID-19 pandemic. The two primary federal laws governing student privacy in schools are the Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA). In addition, the New Jersey Pupil Records Act and its implementing regulations ([N.J.A.C. 6A:32-7.1 to 7.8](#)) protect the privacy of student records.

FERPA is a federal law that protects a student's educational records held by a school or school district. FERPA also prohibits school districts from disclosing personally identifiable information (PII) to individuals who may not already have

access to that information. PII is any information that directly or indirectly identifies a student or any information that would allow a reasonable person in the school community to identify a student with reasonable certainty.

FERPA defines “education record” as any record that is “directly related” to a student and is “maintained by an educational agency or any party acting on their behalf.” Video recordings that are “directly related” to a student are considered education records as are other forms of instruction such as emails, group chats, and teleconferences. FERPA gives parents the right to review and amend their child’s education records. For a more detailed discussion of FERPA and its application during COVID-19 pandemic, [see FERPA & Coronavirus Disease 2019 \(COVID-19\) Frequently Asked Questions \(FAQs\) \(March 2020\)](#).

When live video conferencing takes place in a student’s home, this may raise privacy concerns not only for students but also for families. Many families do not have a private room in their house to devote to in-home learning. If you are concerned that live video conferencing will reveal private information about your household, including showing other family members sharing the room with your student, you should bring these concerns to the attention of your case manager and/or child’s teachers. You might ask for a schedule for live video conferencing involving your child which might enable you to find a private place for that more limited time period. Or if that is not possible, you can turn the video off which would still allow your child to view the video conference.

Some teachers have told parents that the teacher may record live video sessions. Ask your child’s teachers if they plan to record any video sessions with your child and if so, for what purpose and who will have access to the recordings. Make sure that any recorded sessions will be stored on the school’s system and accessible only to those school officials who have legitimate educational interests in the recordings. In addition, make sure that no live video sessions are being stored on the teachers’ private computers.

Recordings that are directly related to your child and maintained by your child’s school would be considered student records under FERPA and subject to FERPA and state laws governing disclosure of school records. If the recorded sessions are only of your child, you can request to view them or to be provided with a copy just as you can with any other components of your child’s student records. If the recorded sessions involve your child as well as other students, you would likely only be able to view those portions of the recorded sessions that pertain to your child.

If you have other privacy concerns about your child participating in live video conferencing, discuss these concerns with your child’s case manager. It is quite possible that some of your concerns can be addressed so that your child will be able to participate in at least some elements of the live video conferencing. If not, an alternate method may be established for contact with your child’s teacher.

If you believe that your school district has violated your child’s rights under FERPA, the name and address of the federal office that deals with this is:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Ave, S.W.  
Washington, D.C. 20202-5901

More information on FERPA can be found at FERPA’s [General Guidance for Parents](#).

**25. Question: What is my child’s stay-put placement if I file for mediation or due process to challenge a new IEP, a written distance learning plan or how the school district is implementing my child’s IEP in the home?**

**Answer:** The right to “stay-put” under IDEA means that pending the outcome of a mediation, a due process hearing, or any judicial proceeding, no change may be made to a child’s classification, program set out in the child’s IEP or placement unless both parties agree, or emergent relief is granted. [See 20 U.S.C. 1415\(j\); 34 CFR 300.518.](#)

If you file for a mediation conference or due process hearing claiming that your child is not able to access and/or benefit from remote learning (which may include virtual instruction, online platforms or paper packets) and needs in-person instruction in the home, IDEA’s “stay-put” provision may require the school district to provide in-person services in your home while the mediation or due process takes place.<sup>3</sup> The “stay-put” provision will also be invoked if you file for mediation or due process to challenge a new IEP or a distance learning plan making other changes to your child’s current IEP.

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<sup>3</sup> NJDOE issued its [Revised Procedures for Determining a Student’s Status During a Special Education Due Process Hearing](#) on August 6, 2019 to clarify that “a student’s right to ‘stay put’ applies even if the filing occurs more than 15 calendar days after the proposed change in the student’s program or placement.”

For example, your district decides to declassify your child (or to change IEP services such as eliminating or reducing speech-language services) and you disagree with this decision. If you file mediation or due process before these changes are implemented, your child should remain classified (or continue to receive speech-language services) until the proceedings have been completed unless both parties agree or emergent relief is granted.

“Stay-put” also applies when a school district changes a child’s IEP in other ways that are likely to affect a child’s learning in some significant way. [DeLeon v. Susquehanna, 747 F.2d 149 \(3d Cir. 1984\)](#). If the parent files for mediation or due process objecting to the IEP before the changes are implemented, then “stay-put” should be the IEP functioning when the parent filed and should stop the changes from going into effect until the dispute is resolved. Neither the newly proposed IEP nor a distance learning plan would be the “stay-put” IEP, absent agreement of the parties or a judicial order.

As explained in the Answer to Question 1, above, your child’s IEP remained in effect when school buildings closed on March 18, 2020 and all students were put on remote instruction. If your school district now proposes a new IEP or a distance learning plan ([see](#) Answer to Question 7, above) that you believe is not appropriate for your child, you can invoke “stay-put” by filing for mediation or due process. You can also file for mediation or due process and asked that “stay-put” be invoked when your school district continues to implement your child’s IEP during temporary school closures through virtual or online platforms or paper packets, but your child cannot access and/or does not benefit from this remote instruction.

If you file for mediation or due process contending that your child cannot access and/or does not benefit from the remote instruction being provided and needs in-person instruction with respect to some or all IEP services, then as long as health and safety guidelines allow in-person instruction in the home, you can take the position that “stay-put” requires the school district to provide in-person instruction in the home with either school staff or private providers until the mediation or due process petition is decided. [See, e.g., In the Matter of Parent On Behalf of Student v. Pleasanton Unified School District](#) (SEA Cal. Aug. 24, 2020) (granting stay-put motion and ordering in-person nursing services, speech therapy, physical therapy, and vision services as the “stay-put” related services for a student with significant disabilities.)

The fact that your child's IEP has not been fully implemented since school facilities closed does not mean that you waived the protection of "stay-put." A parent can waive the protection of IDEA's "stay-put" provision only by explicit agreement with the school district. See [Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859 \(3d Cir. 1996\)](#). Some districts did ask parents to sign waivers as a condition of receiving remote instruction during school facility closures but these waivers violated federal and state special education law and are, thus, not valid. See Answer to Question 6, above.

In short, if paper packets, virtual or other forms of distance learning are not appropriate or accessible to your child and instead, your child's IEP needs to be implemented fully or partially through in-person instruction in the home, you may have a viable argument that continuing to implement your child's IEP through remote instruction is not providing your child with a FAPE and is a violation of IDEA's "stay-put" provision.

Please see the Answer to Question 12, above, as to the need to document how your child is doing with the remote instruction offered by your district and how that instruction is not accessible and/or appropriate for your child. Remember that, for "stay-put" to apply, your child's learning must be impacted in some significant way by changes to the IEP, or development of a distance learning plan, such as providing instruction virtually, through online platforms or paper packets, rather than through in-person instruction. You should ask for in-person instruction only for those services where your child is not benefiting from and/or cannot access the remote instruction offered by your district.

If you filed for mediation or due process raising objections to a new IEP, a distance learning plan, or the way your child's existing IEP is being implemented, and if the school district refuses to maintain the in-person instruction required by your child's existing IEP by providing it in the home pending mediation or a due process hearing, you may enforce your child's "stay-put" rights by requesting emergent relief. IDEA's "stay-put" serves "in essence as an automatic preliminary injunction." [Drinker](#), 78 F.3d at 864. Thus, once you show which IEP was "actually functioning" when you filed mediation or due process, this is the "stay-put" IEP that must be implemented while the mediation, due process or other proceedings are decided.

If the request for emergent relief is made in relation to a dispute still in mediation or a request for a due process hearing which has not yet been transmitted to OAL, the [application for emergent relief](#) should be filed with the Director of the New

Jersey Department of Education, Office of Special Education. See NJDOE's [PRISE](#), for sample forms and information for filing mediation, due process and emergent relief. To request legal assistance, low income parents may contact Education Law Center at 973-624-1815, ext. 10 or [elc@edlawcenter.org](mailto:elc@edlawcenter.org).

Note that if you are requesting in-person services in the home, New Jersey regulations state that "During all periods of instruction delivered in a student's home, the student's parent or other adult who has been designated by the parent shall be present." See [N.J.A.C. 6A:16-10.1\(d\)](#).

**26.Question: Is my child's 504 Plans still in effect during the COVID-19 pandemic?**

**Answer:** Yes. The USED's OCR stated in its March 16, 2020 [Fact Sheet](#), March 21, 2020 [Supplemental Fact Sheet](#) and September 28, 2020 guidance, that school districts remain obligated to implement 504 plans and provide students with a free and appropriate public education (FAPE). OCR stated the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.

In its March 21, 2020 Fact Sheet, OCR stated "Many disability-related modifications and services may be effectively provided online. These may include, for instance, extensions of time for assignments, videos with accurate captioning or embedded sign language interpreting, accessible reading materials, and many speech or language services through video conferencing." Further, the OCR noted that technology itself or educational materials may not be available in an accessible format and school districts may still meet their legal obligations by providing equally effective alternative access to the curriculum or services provided to other students. OCR gave as an example a teacher working from home who distributes a document to her class but cannot distribute a document accessible to one student who is blind. If appropriate for that student, the teacher can read the document over the phone or provide the student with an audio recording of a reading of the document aloud.

In the March 16, 2020 [Fact Sheet](#), OCR noted that if a student does not receive services after an extended period of time, compensatory services may be needed, including to make up for any skills that may have been lost. (See Answer to Question 12 above, for further discussion regarding compensatory services.)

Further, in [guidance](#) issued on September 28, 2020, OCR stated that distance learning must comply with Section 504 (as well as the Americans with Disabilities Act). It reminded school districts that failing to implement aids, services or accommodations/modifications identified in a student’s Section 504 plan could deny a student with FAPE. To determine whether there has been a denial of FAPE, OCR stated that it will take into consideration all relevant circumstances when evaluating a school district’s implementation of a Section 504 plan. Relevant circumstances include the impact that any discrepancies from a Section 504 plan have “on the student’s ability to participate in or benefit from the school district’s services, programs, and activities.”

Regarding evaluations and reevaluations required under Section 504, the USED’s OCR confirmed in its September 28, 2020 guidance that school districts remain obligated to conduct timely evaluations of any student who needs, or is believed to need, special education and related services. Districts are also obligated to conduct “periodic” reevaluations of students with Section 504 plans. OCR does not set a specific time frame for conducting evaluations and reevaluations but they must take place within a reasonable time frame under the circumstances. In addition, schools must conduct an evaluation before any significant change in placement or change in eligibility.

Further, in this [guidance](#), the USED’s OCR recognized that where in-person evaluations are not possible, school districts should try to conduct assessments virtually or via other comparable methods as long as these methods will result in accurate results. Finally, the USED’s OCR noted parents and school districts may mutually agree to postpone timelines and use other data for a child suspected of having a disability under Section 504 until an appropriate evaluation can be conducted safely.

In its September 28<sup>th</sup> guidance, OCR also discussed that there may be circumstances where a school may be required to prioritize in-person instruction for students with disabilities. Making this determination would depend on whether providing in-person instruction services is a reasonable modification and is either needed for the student to receive an appropriate education or to avoid discrimination on the basis of the student’s disability.

For more information about the rights of students under Section 504 during the COVID-19 pandemic, [see](#) the Answers to Questions 6 and 22, above.

### Sample Log Sheet: Tracking Your Student's Special Education Service Delivery Every Week

| Date                         | How was your student taught?   | Who provided instruction and for how long?   | What subjects did the Special Ed teacher teach?                       | What other services did your student get?                                    | Did your student get their accommodations?       | Notes (e.g., what went well or didn't go well?) |
|------------------------------|--|--|---|--|--|---|
| <b>Monday</b><br>__/__/20    | Online/Video (Google Classroom, ZOOM, etc.)<br>By phone<br>Work packets<br>Not at all<br>Other _____ | Special Ed Teacher<br>____hrs __min<br>Regular Ed Teacher<br>____hrs __min<br>No one | Reading<br>Writing<br>Math<br>Social/Emotional<br>Other _____<br>None | Speech/Language<br>Occupational Therapy<br>Counseling<br>Other _____<br>None | All<br>Some<br>None<br><br><i>If some, list:</i> |   |
| <b>Tuesday</b><br>__/__/20   | Online/Video (Google Classroom, ZOOM, etc.)<br>By phone<br>Work packets<br>Not at all<br>Other _____ | Special Ed Teacher<br>____hrs __min<br>Regular Ed Teacher<br>____hrs __min<br>No one | Reading<br>Writing<br>Math<br>Social/Emotional<br>Other _____<br>None | Speech/Language<br>Occupational Therapy<br>Counseling<br>Other _____<br>None | All<br>Some<br>None<br><br><i>If some, list:</i> |   |
| <b>Wednesday</b><br>__/__/20 | Online/Video (Google Classroom, ZOOM, etc.)<br>By phone<br>Work packets<br>Not at all<br>Other _____ | Special Ed Teacher<br>____hrs __min<br>Regular Ed Teacher<br>____hrs __min<br>No one | Reading<br>Writing<br>Math<br>Social/Emotional<br>Other _____<br>None | Speech/Language<br>Occupational Therapy<br>Counseling<br>Other _____<br>None | All<br>Some<br>None<br><br><i>If some, list:</i> |   |
| <b>Thursday</b><br>__/__/20  | Online/Video (Google Classroom, ZOOM, etc.)<br>By phone<br>Work packets<br>Not at all<br>Other _____ | Special Ed Teacher<br>____hrs __min<br>Regular Ed Teacher<br>____hrs __min<br>No one | Reading<br>Writing<br>Math<br>Social/Emotional<br>Other _____<br>None | Speech/Language<br>Occupational Therapy<br>Counseling<br>Other _____<br>None | All<br>Some<br>None<br><br><i>If some, list:</i> |   |
| <b>Friday</b><br>__/__/20    | Online/Video (Google Classroom, ZOOM, etc.)<br>By phone<br>Work packets<br>Not at all<br>Other _____ | Special Ed Teacher<br>____hrs __min<br>Regular Ed Teacher<br>____hrs __min<br>No one | Reading<br>Writing<br>Math<br>Social/Emotional<br>Other _____<br>None | Speech/Language<br>Occupational Therapy<br>Counseling<br>Other _____<br>None | All<br>Some<br>None<br><br><i>If some, list:</i> |   |