

Department of Public Instruction Updates COVID-19 Special Education Guidance

Boardman & Clark [previously reported](#) on the Department of Public Instruction's (DPI) guidance document COVID-19 Special Education Question and Answer Document (Question and Answer Document). Recently, DPI made significant updates to the Question and Answer Document and those revisions address issues regarding students with disabilities who are unable to wear face coverings, how districts can conduct appropriate specific learning disability (SLD) evaluations in virtual environments, providing choice of educational environments (virtual versus in-person) to students with disabilities, and changes of placement when school closures are not mandated. The updates to the *Question and Answer Document* are summarized below and the full version of DPI's guidance may be found here: https://dpi.wi.gov/sites/default/files/imce/sped/pdf/Extended_School_Closure_due_to_COVID.pdf

Students with Disabilities who are Unable to Wear Face Coverings

Emergency Order #1, which has been extended by Governor Evers to November 21, 2020, requires that, unless an exception applies, "every individual, age five and older, in Wisconsin shall wear a face covering if ... the individual is indoors or in an enclosed space . . . and another person or persons who are not members of individual's household or living unit are present in the same room or enclosed space." Emergency Order #1 applies to schools. In addition, school districts may independently approve a policy requiring students, staff, and visitors to wear a face covering on school property and/or at school events.

As acknowledged in the Emergency Order and in DPI's guidance, some students with disabilities may be unable to wear face coverings. When an accommodation to a face covering requirement is requested, DPI's guidance states that the IEP team should determine the need for such accommodation and document that need in the student's IEP. Districts may request, but may not require, that the parent/guardian produce a doctor's note in support of a request for an accommodation to face covering requirements. If the parent/guardian does provide medical documentation to support the need for an accommodation, that information must be considered by the IEP team.

Individuals who are interacting with students who are not able to wear face coverings should review DPI's guidance on appropriate personal protective equipment which is found at: https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/PPE_Considerations_for_Schools.pdf

Providing Choice of Educational Environments to Students with Disabilities

Due to the public health emergency, many districts are offering educational options to families. Those options may involve an in-person choice, a virtual choice, or some combination of in-person and virtual instruction, typically referred to as a "hybrid" option. DPI makes clear that if options are offered to students without disabilities, those same options must also be offered to students with disabilities and parents may freely choose from any of those options. In some circumstances in which a parent selects a virtual option, the IEP team may determine that in-person services are necessary to enable the student to receive a free

appropriate public education (FAPE). In those circumstances, the IEP team should discuss available options to provide such services that are consistent with local and state safety orders and guidelines and document that discussion in the IEP. If the parent refuses to make the student available for in-person services, the district should provide the parent with prior written notice detailing the parent's concerns, the options considered and why those options were rejected in favor of in-person services, a detailed description of the services being offered by the district, and any records or information relied upon in establishing the need for in-person services.

Districts should take further note that if no state or local order prohibits in-person instruction, but a district requires or offers the option of virtual instruction, providing services in a virtual setting for more than 14 consecutive calendar days is considered a change of placement. Districts must discuss the continuum of options available and ensure the least restrictive environment (LRE) requirements are met. Any change of placement must be documented in an IEP after holding an IEP team meeting or, with the agreement of the parent, on an I-10 form (Notice of Changes to IEP Without an IEP Meeting). If the I-10 is used, DPI notes that districts must update Form P-2 (Determination and Notice of Placement) to align with the revisions documented in the I-10.

SLD Assessments in a Virtual World

During the mandatory school closures at the conclusion of the 2019-2020 school year, districts struggled to conduct special education evaluations, particularly SLD evaluations. While no state-wide orders currently require school closures, many districts are providing virtual instruction only or parents are electing to have their children educated in a virtual setting. Consequently, conducting special education SLD evaluations remains a challenge for those students who may be unable, or because parents do not make their child available, to receive in-person instruction.

Initially, DPI warns that districts may not revert to using a severe discrepancy method to determine whether a SLD is present. That method may only be used to assess students parentally placed in private schools or homeschooled students. In prior guidance, DPI also notes that an SLD eligibility determination may be made at the conclusion of the review of existing data process. However, districts should be wary of making such a determination at that early stage and should only make such a determination "when there is a preponderance of existing data supporting adequate achievement and sufficient progress in the area(s) of concern." (*See Frequently Asked Questions about Making Specific Learning Disability (SLD) Eligibility Decisions*, located at: <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/sld-faq.pdf>)

When conducting an SLD initial evaluation, districts must determine whether a student is demonstrating insufficient progress and inadequate classroom achievement after the student has received at least two intensive, scientific, research-based, or evidence-based interventions (SRBIs). Districts must further conduct a minimum of two systematic observations related to the area(s) of concern. The first observation must occur during routine classroom instruction. The second must be conducted during the provision of the SRBIs. Finally, districts must assess a student's inadequate classroom achievement by individually administering a norm-referenced, valid, reliable, and diagnostic assessment tool.

Regarding the SRBIs, districts should determine if the student can receive SRBIs in-person. If in-person delivery is inconsistent with local or state safety orders or guidelines or jeopardizes the student's health, a district may then consider whether the SRBI can be delivered in a virtual format. Most SRBIs are designed to be delivered in-person and DPI notes that a limited number of SRBIs may be implemented virtually. However, given the current pandemic some vendors have updated SRBIs to specifically address virtual implementation. Districts should contact vendors to determine the viability of virtual implementation of SRBIs.

Districts must also conduct frequent probes to assess the student's progress in the SRBIs. The progress monitoring tool used to conduct those probes must provide reliable and valid measures of student performance. If a student is unable to receive in-person services, districts must consider whether the required progress monitoring during implementation of SRBIs may be conducted virtually.

If in-person services are not an option, Districts must further consider whether the two required observations may be completed in a virtual environment. Obviously, if SRBIs cannot be implemented in a virtual environment, the observation of the student while participating in an SRBI also cannot be completed. Districts will also need to determine whether observations “during routine classroom instruction” can be conducted in a virtual environment.

If in-person services are unavailable, districts must also consider whether the required assessment of academic achievement may be delivered in a virtual environment. Districts should review the test administration or technical manual of the available assessment to determine whether virtual administration is consistent with the test’s standardization procedures and will provide valid and reliable results.

More generally and in regard to all special education evaluations, whenever a district virtually administers standardized, norm-referenced tests, and those tests do not include normative data for virtual administration, the results must be interpreted “with caution.” Results from a non-standardized administration may still be reported and interpreted, but the IEP team must document how the administration of the test varied from the standardized procedures and also consider how the results may have been impacted by the lack of following standard administration requirements. DPI notes that such documentation may be included in Section II of Form ER-1.

If SRBIs, progress monitoring of a student’s performance in SRBIs, required observations of the student, or the assessment of academic achievement cannot be delivered in-person or virtually, districts must work with parents to determine an appropriate timeline to complete the evaluation and, with the agreement of the parent, complete form M-3 to document the extension of the timeline and include a date when the evaluation will most feasibly be completed. If the parent is not in agreement with extending the timelines, the timelines may still be extended “because the student was or is not available due to a public school closure or the district is unable to deliver interventions virtually or in-person.” In that instance, the extension should be documented via a memo to the student’s file, not the M-3 form.

Conclusion

In order to foster the health and safety of students and combat the continual spread of COVID-19, many districts are continuing to offer instruction to all students in a virtual environment. While virtual instruction certainly promotes social distancing, it presents numerous other challenges to a districts’ obligation to conduct special education evaluations and provide students with disabilities a free appropriate public education. The Boardman & Clark School Law Team is available and prepared to assist your district in working through those challenges.

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