



**Special
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SEILN FAPE During COVID-19 Questions & Answers September 8, 2020

MAISA's Special Education Instructional Leadership Network (SEILN), with collaboration and support from attorneys Jordan Bullinger of Clark Hill; Robert Lusk of Lusk & Albertson; Jeffrey Butler of the Butler Law Group; and Robert Dietzel and Michele Eaddy of Thrun Law Firm, developed this SEILN FAPE During COVID-19 Questions & Answers document addressing several pressing issues facing special education practitioners as they reopen schools for the 2020-21 school year. The document reflects the results of several hours of discussion and debate among the attorneys. Special thanks to Donna Tinberg and Bob Lusk, for their assistance and valuable contributions on this project, as well as Newaygo County RESA, Kent ISD, Saginaw ISD and Marquette-Alger RESA for their support in the cost of this work.

Contingency Learning Plan

Please provide a form, required components checklist, and/or verbiage to include.

It is our understanding that the Michigan Department of Education ("MDE") will not publish a form, a checklist of required components, or verbiage to include within a Contingency Learning Plan ("CLP"). Similarly, we do not anticipate that the U.S. Department of Education will publish a form, checklist of required components, or verbiage to include within a CLP. However, several of the Firms have either developed a form or have worked directly with schools on the development of a form that addresses the unique needs presented by their respective circumstances.

In general, the CLP should have language which captures when a disruption to in-person instruction triggers the implementation of the CLP. It is encouraged that the trigger language is divorced from specific phases of the MI Safe Schools Roadmap in order to allow for instances where the student's access to instruction is disrupted but in-person instruction remains viable for the rest of the district – such as a quarantine arising from the shut-down of a specific class or building or where the student is quarantined. When an IEP provides for programming through a model that does not include in-person instruction, a CLP may not be needed.

The CLP is the vehicle by which the district documents its efforts to "...strive in good faith and to the extent practicable based upon available resources, technology, training, and curriculum, as well as the circumstances presented by COVID-19, to provide equal access to any alternative modes of instruction to students with disabilities" ([Executive Order 2020-142](#)). The CLP should consider accessibility, including accommodations and modifications, and should document efforts which are focused, consistent, detailed and demonstrates a school's good faith attempt to provide programs and services to students with IEPs (see [MDE Guidance for Compliance with IDEA and MARSE for Special Education During the COVID-19 Pandemic](#), p. 3-4).



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On August 26, 2020, MDE provided guidance for the development of CLPs during the 2020-2021 school year. School officials should review and consider that guidance and consult with legal counsel about any questions or concerns they have about the guidance.

Should we develop a CLP for Phases 1-3 now?

According to [MDE's August 26, 2020 Guidance](#), during IEP Team meetings, the Team should discuss the potential triggers for the Contingency Learning Planning Process. Staff should remind parents that, during Phases 1-3 of the Roadmap, schools must remain closed for in-person instruction. Such a backslide is identified by MDE as one of the triggers for the Contingency Learning Planning Process. School officials should review the MDE guidance and consult the law firm they work with for special education matters to further discuss the CLP process, including when a CLP should be developed, by whom, and what it should include.

What is a reasonable timeline to get CLPs completed?

[MDE's Guidance from August 24, 2020](#) identifies the Contingency Learning Planning Process as one of the Six Priorities for the 2020-2021 school year (see [MDE's Guidance to Address Return to Learn for Students with IEPs](#), Priority 2). Schools should prioritize the timing for the IEP Team's discussion of the Contingency Learning Planning Process based upon the individual needs of the student and the timing of other IEP mandated deadlines, such as the annual review IEP or other conditions that may require an IEP review or IEP amendment. For students who can receive full implementation of their IEP in the school's current mode of instruction, the discussion of the Contingency Learning Planning process by the IEP Team should take place no later than the annual review deadline.

Face Coverings

Please provide a form to document a medical exemption or explain what has to be on the exemption? Are there ADA considerations?

Before exempting a student from the face covering requirement for medical reasons, a district should obtain documentation from a "medical professional" confirming that the student cannot medically tolerate a face covering. We recommend that districts require that the documentation be from a physician or physician assistant. Districts may also wish to request additional information, including whether the student can tolerate less restrictive personal protection equipment, such as a face shield.

Districts that receive credible information that a student cannot medically tolerate a face covering may be required to refer the student for an evaluation under either IDEA or Section 504 if the medical information provides reason for school officials to suspect that the student has a disability.

In addition to medical exemptions, districts should also consider whether students with disabilities require any disability-related accommodations related to face coverings, including a waiver or modification of a face-covering requirement. Those decisions should be made by the IEP or 504 Team.



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Districts are not necessarily required to permit students who are medically exempt from the face-covering requirement to participate in in-person instruction if the district has a comparable remote option available. If, however, the district's remote instruction option does not meet the needs of a student with a disability, the district may be required to allow the student to participate in in-person instruction without a face covering, subject to other reasonable social distancing and mitigation measures.

Whether a school employee is medically exempt from a face-covering requirement should be addressed through the ADA's interactive process. That process requires a fact-specific inquiry about whether the employee has a disability and whether an exemption to the face-covering requirement is a reasonable accommodation. As part of that inquiry, districts may request limited medical documentation supporting why the accommodation is necessary.

School officials should contact their legal counsel to inquire about specific medical exemption forms for students and employees.

What should we do when parents refuse to mask during an Early On home visit?

If the parent and student (two years of age or older) can medically tolerate wearing a face covering, the parent and student should wear one. The service provider should remind parents that school guidelines for face covering use and social distancing apply to Early On services whether those services are provided at school or in the home. If the parent continues to refuse to wear a face covering during a home visit, consider conducting the home visits virtually.

What if the ISD employs the ancillary staff and the district is not enforcing student masking? Can the ISD require that students are masked during therapy? What authority does the ISD have to impose mask requirements?

In phase 4 of the MI Safe Schools Roadmap facial coverings are required for all staff; for all students in grades 6-12; and for students in grades PreK-5 in hallways, common areas, and classrooms which are not restricted to cohorts. Limited exceptions apply.

If an ISD staff member has concerns that a local district is not acting in a manner consistent with the current executive orders, the MI Safe Schools Roadmap, or the district's approved Preparedness Plan, and is unable to resolve that concern through conversation with local building administration, the ISD staff member should seek assistance from an ISD supervisor. ISD leadership may need to speak with local district leadership and/or work with the local health department to ensure that proper safety protocols are being followed for the safety of all staff and students. If concerns persist that the local district is not following the requirements of current executive orders, the MI Safe Schools Roadmap, or the district's approved Preparedness Plan, the ISD may need to consider whether it will continue to supply staff to the LEA. The ISD Plan, the ISD collective bargaining agreement, and any contract between the ISD and the local district may provide guidance on how to resolve issues related to maintaining a safe working environment for itinerant employees.



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When can providers and/or students unmask for service delivery?

A provider or a student may be unmasked for service delivery, subject to other reasonable social distancing and mitigation measures, if masked service delivery or some other alternative mode of service delivery does not meet the disability-related needs of a student. It is important to note that under the MI Safe Schools Roadmap, special education teachers, and arguably by extension, service providers, should consider wearing clear masks. Accordingly, clear masks should be considered as an alternative prior to permitting providers or students be unmasked during service delivery (see [MI Safe Schools Roadmap](#), p. 22).

How should we respond to districts and health departments that want students who cannot mask to go virtual only based on health risk?

Schools and health departments may recommend virtual learning options for students. Where there is an active safety concern related to a student who is unable to wear a face covering because of a medical condition or a documented or identified trait of their disability, schools may assign a student to a virtual or distance learning mode of instruction, provided the mode of instruction is accessible to the student and supports implementation of their IEP. If schools have given parents a choice to select between modes of instruction as a whole, schools should be cautious about restricting or denying that choice without first ensuring that the parent's preference has been considered and that reasonable accommodations and IEP interventions will not address the safety concern for a particular student. A blanket policy that denies a parent a school-given choice among modes of instruction should be avoided. Schools will need to take individual circumstances of students into account. This is especially true with respect to special education students and students with Section 504 Plans or other legitimate health conditions that may prevent the use of face coverings.

What recommendations do you have relative to disciplining students for not wearing masks?

Please see [SEILN's July 31, 2020 FAQ document](#) for information about disciplining students who refuse to wear face coverings.

Additionally, for students with disabilities, districts should carefully consider whether removing a student to a virtual or distance learning platform due to noncompliance with face covering rules constitutes a "disciplinary removal" or a "change of placement." A disciplinary removal occurs when a student is excluded from the current educational placement due to a violation of the student code of conduct and does not have the opportunity to: (1) continue to be involved in and make progress in the general education curriculum; (2) receive instruction and services identified in the IEP; and (3) participate with nondisabled students to the extent the student would have in the current placement. School officials should note that when disciplinary removals result in a change of placement, certain notice and procedural safeguard requirements apply (e.g., manifestation determination reviews).



Under what conditions can a district recommend virtual rather than face to face when a student cannot wear a mask?

A district may recommend and require that a student who is unable or unwilling to wear a face covering participate in its remote option so long as the remote option and the in-person option are comparable. The same is true for students with disabilities only if the remote option, with special education services and supports, provides the student a free, appropriate public education.

Remote/Distance Learning

When are we required to provide transportation for virtual students?

Schools are required to provide transportation as a related service if the student needs transportation to access, or benefit from, special education. If a school *requires* a virtual student to come to the school or some location other than the student's home to receive special education or a related service, the school likely has an obligation to provide transportation to the program or service. If a school provides a parent the option of receiving IEP-required special education or related services virtually but the parent selects in-person programming, the district may not have the responsibility to provide transportation. Whether the district is required to provide transportation in a particular situation requires a fact-specific analysis.

Can we refuse face to face Special Education provision for parents choosing virtual?

In this time of heightened concern and heightened risk, due deference should be given to the parent's concerns for health and safety when developing an IEP. If the district offers all families the option of choosing among in-person, distance learning and/or a hybrid model, parents of students with disabilities must be afforded the same consideration, and IEP teams must determine, to the maximum extent possible, what accommodations and supports the student requires to receive FAPE in that environment. If some face to face instruction is necessary in order to provide a FAPE, it should be considered/proposed by the IEP team, even if the parent has opted for service delivery that is primarily virtual. IDEA requires individualized decisions based on the needs of the child, which might mean some face to face service within a primarily virtual approach.

In phases 4-5 can districts refuse to do face to face for special education if the district is virtual?

Under IDEA, any determination for the need for in-person or face to face instruction should be made on an individual basis. The IEP Team, as part of the development of the student’s individual plan, should consider the student’s individual need for in-person or face to face instruction. We continue to recommend the IEP Team write the IEP to be setting neutral and to account for a CLP where in-person or face to face instruction is unavailable – including where the district is virtual in phases 4-5. As part of this process, it may be determined that the student’s needs may be met in a virtual setting; however, it may also be determined that some degree of in-person or face to face instruction is necessary to meet the needs of the student even where the district is virtual in phases 4-5. Regardless of the individual determination, parental input and the team’s deliberations should be well-documented.

Consent: What options do we have other than hard copy?

The IDEA and the federal regulations contain specific criteria for documenting informed consent. (34 CFR § 300.9 and 34 CFR§ 300.300). While “hard copy” or “in-person” consent is one way of documenting the receipt of informed consent, during the Pandemic, OSEP issued a Q & A in which it confirmed that receipt and documentation of informed consent through a digital or electronic signature is permissible, provided there are “appropriate safeguards in place to protect the integrity of the process” (OSEP Q & A, June 30, 2020, Parent Consent, Q 1, available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-procedural-safeguards-idea-part-b-06-30-2020.pdf>).

Cohorting - Special Ed Services (programs, related services)

Is it permissible to pull students from different General Education rooms (not masked), and provide services (no sharing of materials) while masked, then return to the General Education room and unmask? Is it permissible to pull students from different General Education rooms (not masked), and provide services near end of day then exit school? Is social distancing required in these classrooms?

While recommended, cohorting is not required in any phase of the MI Safe Schools Roadmap. Likewise, the Roadmap recommends, but does not require, social distancing in classrooms. Classrooms are exempt from the 10-person indoor gathering limits. The scenarios described above are therefore legally “permissible.”

For schools in Phase 4, students in grades K-5 are not required to wear face coverings while in their classrooms so long as they remain with their classes throughout the school day and do not come into close contact with students from another classroom. If any student in a class comes into close contact with a student from another class, all students in both classes must wear face coverings. Although not specifically applicable to the MI Safe Schools Roadmap, the Governor has defined “close contact” in another Executive Order as “being within six feet of an individual for fifteen minutes.”



In the two scenarios described above, if the students from different classrooms come in close contact with one another, then students from all of the impacted classrooms must wear face coverings in their classrooms, regardless of when during the school day the contact occurs.

If a student has a medical exemption for masks and receives services in both general ed and special ed, can they move back and forth between cohort classes throughout the day?

Yes, a special education student who has a medical exemption for a face covering must still have full access to the student's education program. If the school offers a comparable virtual program option, virtual programming could be considered for the student but only if the student can receive FAPE virtually. If the student with the face covering exemption is in grades K-5, the students in both cohort classes are required to wear face coverings while in their classrooms.