

Return to School FAQ for Special Education Practitioners

MAISA's Special Education Instructional Leadership Network, 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 Return to School FAQ addressing several pressing issues facing special education practitioners as they prepare to 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 for her assistance and valuable contributions on this project.

IEP Process

- 1. The Roadmap recommends limiting guests in the building. Does continuing to hold IEP meetings via phone or virtual means as a default make sense (still allowing for face-to-face meetings when needed)?**

Whether school facilities are open to the public or not does not determine whether a school may hold an IEP team meeting via alternate means (e.g. Zoom, conference calls). With parental consent, schools may continue to convene meetings via alternate means, including telephone or videoconference. However, remote IEP meetings may not be the only format considered. 34 CFR 300.322.

- 2. Should IEPs be written to account for phases 1-5? What is the role (if any) of the Continuity of Learning Plan?**

- (a) We recommend against tying the IEP to all 5 phases of the Roadmap and MI Safe Start Plan and, instead, recommend that the IEP Team write the IEP to plan for a contingency or alternative plan that address the differences between in-person/face-to-face instruction/services and some form of remote, virtual, or distance learning.

State and Federal guidance continues to recommend that students' IEPs be written for the return to normal school operations (sometimes referred to as the brick and mortar environment). Since the IEP is presumably being written for a full year, the expected return to normal school operations should be the program that drives the IEP.

In some respects, the platform your school is using at the beginning of 2020-2021 may trigger the student's Contingency Learning Plan (alternate plan). (See Question 3 for further details regarding Contingency Learning Plans). In other words, if the IEP is written for FAPE to be delivered in the full-time brick-and-mortar setting and your school is using distance learning at the beginning of the year, the Contingency Learning Plan may be immediately triggered. As an alternative, the IEP Team could write the IEP for the platform your school is using at the beginning of the 2020-2021 school year (e.g., distance learning) and develop contingency or alternative plans that address what happens if the school moves away from that platform. If the

school chooses to write a program other than full-time, in-person brick and mortar instruction into students' IEPs as the primary program, that program must meet or be modified to meet the traditional FAPE standard for all students with IEPs. In addition, depending on how the IEP and contingency learning plan are drafted, when the school returns to in-person instruction after the pandemic, the school may need to reconvene those IEPs to restore the full-time brick and mortar platform as the school's offer of FAPE.

(b) Continuity of Learning Plans (CoLPs) were required by the Governor's Executive Order 2020-65. That section of the Governor's Executive Order was rescinded with Executive Order 2020-142. In its place, LEAs must now come up with a COVID-19 Preparedness and Response Plan ("Preparedness Plan") that is informed by the Michigan Return to School Roadmap from the COVID-19 Task Force on Education and Return to School Advisory Council ("Return to School Roadmap"). While LEAs may choose to include or incorporate all or portions of the CoLP into their Preparedness Plan, the CoLP as it existed prior to June 30, 2020 is no longer available as a stand-alone option.

3. Should we draft Contingency Learning Plans (or other alternate plans)? Julie Weatherly (CASE Webinar) referred to a "Pivot Plan." Has there been any discussion about new language for the CLP?

It depends. Some IEPs can be fully implemented regardless of environment. For example, an IEP for an SLI student likely could be implemented in both an in-person setting and through distance learning. For those IEPs, an alternative plan would not be required.

We recommend that, to the extent practicable, IEP teams draft the IEP document so that it is "setting neutral," i.e., in a way so that the IEP can be implemented in an in-person, online, or hybrid model without modification. For those IEPs, an alternative plan would likewise not be required.

To the extent an IEP cannot be implemented as written across all settings, we recommend completing Contingency Learning Plans or "pivot plans." Importantly, the framework for those plans should be completed through the IEP process (either at the meeting itself or through an amendment if the parents agree to amend without a meeting), and all of the procedural safeguards (e.g., notice, hearing rights) attach the same as they do for all other IEP team decisions.

Finally, because the COVID-19 pandemic is a fluid situation, and individual student needs may change quickly, we recommend that the IEP include language authorizing prompt amendment of the contingency learning plan outside of the IEP process, similar to how schools currently modify behavior intervention plans and health plans.

We understand that MDE/OSE may be providing guidance on Contingency Learning Plans sometime in August.

4. The Roadmap recommends "systematic review" of IEPs. What should that look like?

The Roadmap does not require a "systematic review" of all IEPs, although doing so may be advisable for the reasons stated below. Rather, the Roadmap strongly recommends that schools in Phases 4 and 5 "systematically review" the IEPs, 504 plans, IFSPs, and health plans of students with special healthcare needs to make sure that those plans appropriately address the student's health-related needs in light of COVID-19. The term "students with special healthcare needs" is not defined in the Roadmap but we believe the term includes students who have healthcare needs but may not be SXI eligible.

For those students whose IEPs and IFSPs include specific provisions about healthcare needs, school officials should convene IEP Team or other meetings to determine whether the student requires additional supports in light of COVID-19. With parent agreement, the school may amend the student's IEP without a formal IEP team meeting. Schools that employ or contract with school nurses or RNs should consider inviting those individuals to any meeting about a student's healthcare needs during the pandemic.

While not specifically required by the Roadmap, it is also advisable that schools be proactive and identify those special education students who may have been more significantly impacted by the spring school closure. If necessary, an IEP Team meeting should be convened to discuss student needs resulting from the closure.

5. If a parent opts out of sending their child to school due to COVID-related health concerns when the FAPE offer is for all day, every day, in person, what are our obligations to provide FAPE? How do we write the IEP?

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 a FAPE can be provided in the delivery model proposed by the parent, it should be considered a viable option even if it does not maximize a student's progress.

If the parent's request not to return to school is based on a doctor's advice, homebound instruction may be considered.

A clearly articulated, detailed PLAAFP statement regarding the student's strengths and needs in both virtual and in-person settings should serve as the foundation for decision-making by the IEP team regarding the offer of FAPE, including goals, programs/related services in the least restrictive environment, and other necessary supports.

If the IEP team cannot reach agreement with the parent about the provision of a FAPE, the district has the following options:

- Request IEP facilitation or mediation to attempt to find agreement.
- Make an offer of a FAPE under a delivery model not preferred by the parent and be prepared to defend that offer in a state complaint or due process hearing.
- In deference to the parent during this time of heightened health and safety concerns, develop an IEP to provide services under the delivery model proposed by the parent, understanding that doing so may expose the district to a state or due process complaint for failing to offer the student a FAPE.

NOTE: If the district is not offering full time virtual learning as an option for all students, and if the student does not meet requirements for homebound instruction, failure to educate the student in a full-time, brick-and-mortar model may have implications for pupil accounting/state aid as the student may not meet the requirements for membership.

For additional discussion related to this topic, see question 3 under "Service Provision."

Service Provision

1. How and when do we proactively identify students who have medical concerns that limit/prevent attendance? A survey of all with follow up?

Under Phases 4 and 5 of the Return to School Roadmap, schools are required to conduct a systematic review of all current plans (e.g. Individual Healthcare Plans, Individualized Education Programs, Individualized Family Service Plans, or 504 Plans) in order to accommodate students with special healthcare needs and update their care plans as needed. See Return to School Roadmap, p. 28 and 44. As part of the systematic review of all current plans, the school should be identifying students who may have medical concerns that limit or prevent a student's attendance.

In addition, concurrent with the school's systematic review of all current plans, under Phases 4 and 5 of the Return to School Roadmap, schools are also required to create a process for students and their families to self-identify as high-risk for severe illness due to COVID-19. The self-identification process is not limited to students with preexisting plans. See Return to School Roadmap, p. 28 and 44. Attention should be given to any information received under this process which may trigger a school's independent child find obligations under Section 504 or IDEA. 34 CFR 104.32 and 34 CFR 300.111(a)(1)(i).

Finally, both the systematic review of existing plans and the process allowing students and their families to self-identify should occur prior to the start of the school year in order to allow sufficient time to consider potential changes to the current plan pursuant to the respective processes governing the plan or to allow for the creation of such a plan.

2. In the event a student is suspected of having or is diagnosed with COVID - resulting in not being in school, do we continue to provide instruction?

- (a) Depending on the length of the student's absence or quarantine, "Yes". This scenario was addressed as early as the H1N1 guidance from the USDOE and has been perpetuated through the guidance from MDE in March and in April. Again, depending on the length of absence or quarantine, the student's Contingency Learning Plan (alternative plan) could be triggered, at which point the student would be educated under the terms of that plan. (See question 3 above for additional information about Contingency Learning and alternative plans).
- (b) Recall that MDE waived the requirement for a physician's letter related to confinement to the home under the Homebound Hospitalized sections of the MARSE with its initial guidance in March of 2020 and with State Superintendent Michael Rice's MARSE Waivers issued on May 20, 2020, which have been extended through September 30, 2020. (See May 20, 2020 Waivers, paragraph 3.
https://www.michigan.gov/documents/mde/COVID_19_MARSE_waiver_691977_7.pdf.

The United States Department of Education also confirmed that, if a student with an IEP is unable to attend school because of a COVID-19 "infection", then the LEA has an obligation to provide the student homebound instruction and may need to reconvene the IEP if the absence is for an extended period of time (defined as more than 10 consecutive school days by OSEP). Therefore, depending on the length of absence, if a student with an IEP is confined to the home or hospitalized due to a positive test result, an active infection, or a mandatory quarantine, the student would be provided continued access to FAPE and instruction under the Contingency Learning (or alternative plan), through an amended IEP, or through homebound/hospitalized services based upon the Michigan Revised School Code and the MARSE homebound hospitalized rule. (See MARSE 340.1746).

Please note that the OSE waiver of the homebound hospitalized requirement for a physician's letter under MARSE does not automatically address, nor does it appear to waive, requirements under the Revised School Code or the State School Aid Act related to homebound / hospitalized services for all students.

3. What approach should we take in the event a parent chooses the district's virtual service delivery option, but the district IEP team members do not believe that FAPE can adequately be provided in a virtual setting?

FAPE first. The IEP should always reflect the District's offer of FAPE. An IEP that offers less than FAPE—even at parent request—is not a defensible IEP.

Students with disabilities should be allowed to access virtual and other options on the same basis as their nondisabled peers. Districts must, through the IEP process, determine whether, with special education and related and supplemental services, the virtual program can be accommodated to meet the individual student's needs. If so, the IEP should reflect those supports.

When the student cannot receive FAPE in the virtual environment, we recommend that the IEP either identify and offer a program that constitutes FAPE for the student or provide notice that the student will receive alternative programming at the parents' request. Importantly, this latter option could expose the district to risk of a possible state or due process complaint alleging a denial of FAPE.

We also recommend that school officials contact legal counsel to navigate how best to proceed when a parents' placement demand related to COVID-19 safety concerns conflicts with the student's right to a FAPE.

4. The idea of cohorts to prevent co-mingling impacts opportunities for inclusion as well as student access to resource rooms. How do we balance service provision with safety measures? Does an adult "pushing in" break the cohort? Can classes "team up" as cohorts?

The Roadmap defines "cohort" as a "mass of students who are grouped together and do not mix with other groups of students." The CDC describes "cohorting" as the process of "identifying small groups and keeping them together." Neither the EO nor the Roadmap requires placing students in cohorts, but the CDC encourages the use of cohorts to ensure that students and staff are "as static as possible by having the same group of children stay with the same staff" all day for younger students and as much as possible for older students. Nevertheless, cohorting cannot be used to justify a school's failure to implement a student's IEP, including any IEP-required LRE opportunities. A school must implement the student's IEP as written unless the school and parent agree otherwise during an IEP meeting or through an IEP amendment.

Additionally, if cohorts are used at the K-5 level during Phase 4, students are not required to wear face coverings in the classroom *as long as* the students remain with their class throughout the school day *and* do not come into close contact with students in another class. Thus, if a student leaves a class during the school day for pullout services or other reasons, or the students in the class are in close contact with other students during the school day, face coverings are required in the classroom. Similarly, if a class "teams up" with another class, the cohort is broken and the face covering requirement is triggered.

Staff pushing into a classroom to provide services does not break the cohort under the Roadmap so schools may want to consider this practice as an option.

- 5. For ISDs who employ all of their ancillary staff, what would some recommendations be for those who travel between buildings and/or districts to limit cross-contamination (e.g., provide teletherapy platforms for staff in order for them to stay in one building with the majority of their caseload while providing teletherapy to those in other buildings)?**

Cross contamination can be mitigated by using common sense, precautionary strategies, such as staying home if sick, washing hands often, wearing disposable gloves when touching students, etc. Minimizing shared workspaces through staff scheduling is another way to minimize opportunities for cross-contamination. Thinking strategically about itinerant staff assignments also may help prevent cross contamination, for example, by assigning a staff member to schools/districts with similar transmission rates or student populations that pose similar risks.

Teletherapy and other remote learning strategies may be appropriate for certain students based on individual considerations. As with any other service delivery strategy, teletherapy should not be provided unilaterally to all students with IEPs as individualized considerations are central to IDEA. Care should be taken that teletherapy or other remote service delivery is responsive to individual student needs as identified in the IEP/Contingency Learning Plan.

PPE/Cleaning

- 1. What can (or should) be required for staff/students who cannot “medically tolerate” a mask? What are the Child Find (SE & 504) obligations related to students with a doctor's note for no mask?**

Under Phase 4, facial coverings must be worn by staff except for meals. In addition, facial coverings must be worn by students during school transportation for preK-12 students, in hallways and common areas for preK-12 students in the building except for meals, in classrooms by all students grades 6-12, and by students K-5 unless those students remain with their classes throughout the school day and do not come into close contact with students in another class. See Return to School Roadmap, p. 22.

However, any staff or student who cannot medically tolerate a facial covering must not wear one. Similarly, any staff or student that is incapacitated or unable to remove the facial covering without assistance must not wear one. See Return to School Roadmap, p. 22.

Both the Return to School Roadmap and Executive Order 2020-142 are silent as to what is required for a determination that a student or staff member cannot medically tolerate a facial covering. It is anticipated that guidance will be forthcoming from the Governor’s Office clarifying the matter. In the absence of such clarification, schools are encouraged to treat such request as a request for a reasonable accommodation under the Americans with Disabilities Act (the “ADA”) to the policy requiring that facial coverings be worn. This analysis would apply equally to students eligible under IDEA, students eligible under Section 504, and students not yet found to be an individual with a disability.

Under such an analysis, the onus is on the individual to self-identify that they cannot medically tolerate a facial covering. On receipt of a request that an individual be exempt from wearing a facial covering because it cannot be medically tolerated, the school should meet with the individual to discuss the request. As part of that interactive process, the school may request medical documentation that is narrowly tailored and absolutely necessary to a) verify the individual meets

the ADA definition of disability; or, b) describe the needed modification; or c) show the relationship between the individual's disability and the need for the requested modification. For students, this process will generally occur through an IEP or 504 team.

Generally, a school would not be required to provide a reasonable modification if it results in a fundamental alteration to the program, service, or activity; if the action would result in an undue financial or administrative burden; or if the individual with a disability poses a direct threat to the health or safety of others. Moreover, as part of the process, the school may consider alternatives to accommodate the individual with the disability. This interactive process is fact-specific, and schools are encouraged to work with counsel to navigate it.

Finally, attention should be given to any information received under this process which may trigger a school's independent child find obligations under Section 504 or IDEA. 34 CFR 104.32 and 34 CFR 300.111(a)(1)(i).

2. Is there any liability for the schools if a staff member contracts the virus while working with students who cannot wear a mask?

As it presently stands, the laws related to liability and qualified governmental immunity continue as they existed prior to the pandemic. There is some discussion that liability waivers may be part of the federal HEROES Act, but that Act has not been passed or enacted at this point. Depending on the LEA's policy related to masks, the circumstances surrounding the refusal, the staff response to that incident, and the state of the law at the time of the incident, liability may attach for gross negligence or comparable standards that apply to governmental immunity.

Even if the HEROES Act does pass with some federal protection from "liability", questions of liability will still likely be governed by state law. Any protection from liability under state law would presumably require amendments to the state statutes governing qualified immunity through the Michigan Legislature and approval of the Governor.

3. What are the options for students with behavior challenges that refuse to wear a mask while in the school building? How do schools enforce the wearing of masks for students that do not have a medical issue? When would it be appropriate to conduct an MDR?

Procedural protections apply to students with disabilities who are removed for refusing or failing to comply with school rules, including rules related to mask wearing.

If a student's noncompliance interferes with the student's learning or the learning of others, the IEP team must consider individualized interventions and supports, including a possible behavior plan. As part of that process, IEP teams should consider whether there is a disability-related reason for the student's noncompliance and, if so, attempt to accommodate it. For example, if a student has sensory issues that make wearing a cloth face covering difficult, perhaps the student could wear a clear plastic shield.

Before a district changes a student's placement due to noncompliance (i.e., through long-term suspension or because of intermittent removals that constitute a pattern), the district must conduct a manifestation determination review. If the noncompliance is directly and substantially related to the student's disability, the student must be returned to the current educational setting unless either the parent agrees to a placement change or a court or hearing officer orders a placement change. If a student's noncompliance is not directly and substantially related to the student's disability, the district may impose the same consequences as it would for a nondisabled student.

Importantly, if a school concludes that a particular student's noncompliance with face covering requirements poses a health or safety emergency constituting a direct threat of harm to others, school officials may wish to seek relief from a court or hearing officer authorizing the student's removal, even if the noncompliance is a manifestation of the student's disability.

4. How do we handle cleaning for equipment that will be going back and forth between a student's home and school (wheelchair, etc.)?

The Roadmap requires in Phase 4, and strongly recommends in Phase 5, that schools "clean, sanitize, and disinfect" on a daily basis equipment that is transported to school on a bus or other school transportation, such as car seats, wheelchairs, walkers, and adaptive equipment. Additionally, depending on the phase in which the District is operating, the Roadmap either requires or strongly recommends regular cleaning of "frequently touched surfaces." At a minimum, schools should establish a cleaning schedule for a student's personal equipment if that equipment goes between home and school. Schools are encouraged to consult with their local health department to determine best practice.

5. What recommendations for situations in which staff, as a last result, need to restrain a student? How do we protect both the student and staff from potential exposure to COVID?

Michigan's restraint and seclusion law, MCL 380.1307, *et seq.*, describes restraint as a last resort intervention for emergencies only. As the physical contact necessary to apply restraint is the very opposite of all recommendations for avoiding or reducing the spread of COVID-19, staff should "double-down" on the last resort concept. In other words, restraint should not occur unless it is absolutely necessary to prevent a student from injuring self or others.

Nevertheless, there will be occasions when restraint is unavoidable. For these cases, we recommend maximum personal protective equipment (PPE); certainly including an effective mask and gloves. After physical contact, staff and, if possible, the student should wash up and change PPE. Staff involved in restraint should carefully self-monitor for symptoms consistent with COVID-19. Students should also be carefully monitored. The appearance of symptoms should be immediately followed-up with testing or a referral to the local health department. Staff should review and implement any other precautions recommended by CDC or the State of Michigan

6. What are recommendations for staff who need to be in physical contact with students who are likely not wearing facial coverings for when they do 1-2 person transfers, toileting, diaper changes, feeding, etc.? Should they be changing their PPE frequently throughout the school day? And should we recommend they wash their clothing when they arrive home after the school day?

Under current CDC guidance for childcare settings during the pandemic, in addition to wearing facial coverings, staff are encouraged to wash their hands before contact with a student, wear gloves during the contact, wash their hands after contact, and disinfect the area (e.g. changing station) following the contact. Staff should wash their hands, neck, and anywhere touched by a student's secretions during the contact. In addition, staff should be encouraged to wear an over-large button-down, long sleeved shirt and wear long hair up off the collar in a ponytail or other updo. Finally, gloves should be changed between contact, and any PPE or clothing that comes in contact with a child's secretions also should be changed. Schools are encouraged to consult with their local health department to determine best practice.