UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICE

OSEP QA 21-06

RETURN TO SCHOOL ROADMAP:
DEVELOPMENT AND IMPLEMENTATION OF INDIVIDUALIZED EDUCATION PROGRAMS IN THE LEAST RESTRICTIVE ENVIRONMENT UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

September 30, 2021

The U.S. Department of Education (Department), Office of Special Education and Rehabilitative Services (OSERS) has received requests from a diverse group of stakeholders asking that the Department issue new guidance interpreting requirements of the Individuals with Disabilities Education Act (IDEA) in light of the many challenges of the COVID-19 pandemic and as more schools and programs are returning to in-person services. Topics include meeting timelines, ensuring implementation of initial evaluation and reevaluation procedures, determining eligibility for special education and related services, and providing the full array of special education and related services that children with disabilities need in order to receive a free appropriate public education (FAPE).[1] In addition, stakeholders have inquired about the implications of delayed evaluations and early intervention services to infants and toddlers with disabilities and their families served under IDEA Part C.[2] The purpose of the Return to School Roadmap IDEA guidance documents,[3] which focus on school reopening efforts, is to support the full implementation of IDEA requirements. The documents also serve to clarify that, regardless of the COVID-19 pandemic, or the mode of instruction, children with disabilities are entitled to FAPE, and infants and toddlers with disabilities and their families to appropriate IDEA Part C services.

The Department recognizes that some parents may have specific health and safety concerns about sending their children back to in-person instruction because of the health risk to the student, the student's immediate family, and to other household members — even as parents are also concerned about their child missing the instructional and social and emotional opportunities

[1] Free appropriate public education or FAPE means special education and related services that (1) are provided at public expense, under public supervision, and without charge; (2) meet the standards of the State educational agency (SEA), including the requirements of IDEA; (3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (4) are provided in conformity with an individualized education program that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. 34 C.F.R. § 300.17.

[2] Additional guidance, including requirements of Part C of IDEA, will be forthcoming.

[3] Other than statutory and regulatory requirements included in this Q&A document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. The questions and answers in this document are not intended to be a replacement for careful study of IDEA and its implementing regulations. The IDEA, its implementing regulations, and other important documents related to IDEA and the regulations are found at: https://sites.ed.gov/idea/.

that come with in-person learning.[4] Therefore, reopening schools safely is of utmost importance. State educational agencies (SEAs) and local educational agencies (LEAs)[5] should put in place layered prevention strategies, including promoting vaccination and universal and correct mask-wearing in schools. The Centers for Disease Control and Prevention (CDC) recommends that everyone in K through 12 schools wear a mask indoors, including teachers, staff, students, and visitors, regardless of vaccination status.[6]

CONTENTS

[4] ED COVID-19 Handbook Volume 1: Strategies for Safely Reopening Elementary and Secondary Schools.

[5] To increase readability, the Department has used the term "LEA" in place of "public agency." Public agency is defined in 34 C.F.R. § 300.33 to include the SEA, LEAs, educational services agencies (ESAs), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

[6] Under Federal disability laws, exceptions can be made on an individual basis for a person who cannot wear a mask or cannot safely wear a mask because of a disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.). *See* CDC's *Guidance for COVID-19 Prevention in K-12 Schools*, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html; *See also*, the Department's Vol. 1, *ED COVID-19 Handbook, Strategies for Safely Reopening Elementary and Secondary Schools*. https://www2.ed.gov/documents/coronavirus/reopening.pdf.

INTRODUCTION

The Department is committed to ensuring that children with disabilities receive the services and supports they are entitled to under IDEA so that they have successful educational experiences. For more than a year, educators across the country have provided services and supports to children with disabilities in ways never anticipated prior to the COVID-19 pandemic. The Department recognizes that SEAs and LEAs have worked hard to meet children's needs and provide required services, given the unprecedented educational disruptions and other challenges resulting from the pandemic.[7] Even with these efforts, some children with disabilities were unable to receive appropriate services to address their needs so that they could make progress toward achieving the functional and academic goals included in their individualized education programs (IEPs). Therefore, the Department repeats and emphasizes that, notwithstanding the challenges associated with the COVID-19 pandemic, families and children retained their rights to receive appropriate services under IDEA. 34 C.F.R. § 300.101. In this document, the Department highlights certain IDEA requirements related to the development and implementation of IEPs and other information that SEAs, LEAs, regular and special education teachers, related services providers, and parents should consider.

Parents who would like to request additional support in understanding IDEA's requirements may wish to contact their local regional parent training and information centers (PTIs) for direct assistance and referrals to other organizations and to gain skills to effectively participate in the education and development of their children. There are over 100 PTIs and Community Parent Resource Centers in the United States and Territories that provide training, resources, and support on a wide variety of topics. Parents can locate the appropriate PTI for their area at https://www.parentcenterhub.org/find-your-center/.[8]

Although it is beyond the scope of this document, recipients of Federal financial assistance from the Department (e.g., public agencies receiving IDEA funding) are reminded of their obligation

[7] States have reported that these difficulties include challenges with providing the equipment and technology, including Wi-Fi access, needed for children to participate in virtual learning; having adequate personnel to provide early intervention, special education, and related services due to COVID-related illness and employees' concerns for their safety and the safety of their families; and taking the necessary health and safety precautions required for public facilities to reopen.

[8] This document contains examples of resources that are provided for the user's convenience. The inclusion of these resources is not intended to reflect their importance, nor is it intended to endorse any views expressed, or products or services offered, by these entities. These resources may include materials that contain the views and recommendations of various subject-matter experts as well as hypertext links, contact addresses, and websites to information created and maintained by other public and private organizations. The opinions expressed in any of these materials do not necessarily reflect the positions or policies of the Department. The Department does not control or guarantee the accuracy, relevance, timeliness, or completeness of any outside information included in the materials that may be provided by these resources.

to comply with Section 504,[9] which prohibits discrimination on the basis of disability.[10] For example, in providing any aid, benefit, or service, a recipient may not, directly or through contractual, licensing, or other arrangements, deny a student with a disability an equal opportunity to participate in or benefit from the aid, benefit, or service. 34 C.F.R. § 104.4(b)(1). This is especially relevant where States or school districts, as a result of the pandemic, make available to all students additional educational programming or services, and choices for instructional delivery or program participation.

[9] Children with disabilities also have rights under two civil rights laws that prohibit discrimination on the basis of disability—Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; 34 C.F.R. Part 104 (Section 504) and Title II of the Americans with Disabilities Act 42 U.S.C. §§ 12131-12134; 28 C.F.R. Part 35 (Title II). Section 504 prohibits disability discrimination by recipients of Federal financial assistance, such as SEAs and LEAs. Title II prohibits discrimination by public entities, including SEAs and LEAs, regardless of receipt of Federal financial assistance. The Office for Civil Rights (OCR) in the U.S. Department of Education enforces Section 504 in public elementary and secondary schools. Also, in this context, OCR shares in the enforcement of Title II with the U.S. Department of Justice (DOJ). DOJ is responsible for interpreting and providing technical assistance about the requirements of Title II. More information about these laws is available at: www.ed.gov/ocr and www.ada.gov.

[10] See, *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment* https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf.

A. ENSURING IEPS ARE IN EFFECT AT THE START OF THE SCHOOL YEAR

The cornerstone of IDEA is the entitlement of each eligible child with a disability to FAPE that emphasizes special education and related services designed to meet the child's unique needs and that prepares the child for further education, employment, and independent living. Under IDEA, the vehicle for providing FAPE is through an appropriately developed IEP based on the individual needs of the child. An IEP must include a child's present levels of academic achievement and functional performance, and the impact of a child's disability on their involvement and progress in the general education curriculum. IEP goals must be aligned with grade-level content standards for all children with disabilities.[11] The child's IEP must be developed, reviewed, and revised in accordance with the requirements outlined in IDEA in 34 C.F.R. §§ 300.320 through 300.328.

No matter what primary instructional delivery approach[12] is used, SEAs and LEAs remain responsible for ensuring that FAPE is available to all children with disabilities. Therefore, before, during, and after the COVID-19 pandemic, the LEA must ensure that each child with a disability has access to educational opportunities, including all special education and related services, necessary to receive FAPE.

Question A-1: Must an LEA ensure each child with a disability has an IEP in effect at the start of each school year?

Answer: Yes. Under 34 C.F.R. § 300.323(a), at the beginning of each school year, each LEA must have an IEP in effect for each child with a disability within its jurisdiction. To ensure that an appropriate IEP is in place, the LEA may need to convene a meeting of the child's IEP Team prior to the start of the school year to determine whether any revisions to the IEP are needed.

34 C.F.R. § 300.324(b)(1). A parent may request, and an LEA may propose to conduct, IEP Team meetings at any time during the year. For example, if the LEA conducts the IEP Team meeting prior to the beginning of a school year, it must ensure that the child's IEP contains the necessary special education and related services and supplementary aids and services to ensure that the IEP can be appropriately implemented once the school year begins.

[11] States are permitted to define alternate academic achievement standards for children with the most significant cognitive disabilities, provided those standards are aligned with the State's academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible, in accordance with 34 C.F.R. § 200.1(d). 34 C.F.R. § 300.160(c)(2)(i).

[12] As used in this document, "service delivery approach," "instructional delivery approach," and "instructional methodology" include the provision of services to a child with a disability in-person, virtually, or a hybrid of in-person and virtual instruction.

Question A-2: Are LEAs required to convene an IEP Team meeting prior to the beginning of the school year to review the IEP of every child with a disability in its jurisdiction?

Answer: Generally, no. Under 34 C.F.R. § 300.324(b), each LEA must ensure that the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; the results of any reevaluation; information about the child provided to, or by the parents; the child's anticipated needs; or other matters. Therefore, if the child's IEP has been reviewed at least annually and neither the LEA nor the parent believes it is necessary to review those decisions prior to the start of the school year, the LEA would not need to convene another IEP Team meeting prior to the start of the school year.

However, it will be important for LEAs and parents to consider whether there are circumstances, such as an IEP that was developed that includes special education and related services to be delivered solely through virtual instruction, that cannot be modified to reflect in-person services for the upcoming school year. In these circumstances, the IEP Team would need to convene as soon as possible to determine what revisions to the child's IEP are necessary to ensure FAPE.[13]

Question A-3: When reviewing and revising a child's IEP, can the IEP Team also discuss how special education and related services could be provided if circumstances require a change in the service delivery approach, such as from in-person instruction to virtual learning or hybrid instruction?

Answer: Yes. To help ensure the continued provision of FAPE, IEP Teams can identify how the special education and related services included in a child's IEP can be provided if circumstances require a change from in-person learning. A proactive method that an IEP Team may implement as a strategy for preparedness in the event of future long-term school closures is developing a contingency plan.[14] As part of a child's annual IEP Team meeting, developing a contingency plan would address the provision of service delivery to account for virtual learning or hybrid instruction. It would also include a description of a child's specific services, frequency, type, and duration. Developing a contingency plan before circumstances require a change in the service-delivery approach also gives the

[13] Implementation of IDEA Part B Provision of Services in the Current COVID-19 Environment (Sept. 28, 2020).

[14] See also Question A-4 in Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak (Dec. 2009).

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 contingency plan and the contingency services that would be provided. As schools navigate virtual learning, a hybrid service delivery approach, or full reopening for in-person learning, they should prioritize equity, exercise flexibility, think creatively, collaborate with parents to respond to children's emerging needs, and must comply with applicable civil rights laws.[15] See also Q1 in Implementation of IDEA Part B Provision of Services in the Current COVID-19 Environment (Sept. 28, 2020).

Question A-4: How can LEAs ensure that children who have moved between jurisdictions in the same State during the school year continue to receive FAPE?

Answer: If a child with a disability who had an IEP in effect transfers to a new LEA in the same State and enrolls in a new school within the new LEA in the same school year, the new LEA, in consultation with the parents, must provide FAPE to the child. This includes providing services comparable to those described in the child's IEP from the previous LEA, until the new LEA either: (1) adopts the child's IEP from the previous LEA; or (2) develops, adopts, and implements a new IEP that meets the applicable requirements in 34 C.F.R. §§ 300.320 through 300.324. Thus, the new LEA must provide FAPE to the child with a disability when the child enrolls in the new LEA's school within the same school year and may not deny special education and related services to the child.

The new LEA in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous LEA in which the child was enrolled, pursuant to 34 C.F.R. § 99.31(a)(2); and the previous LEA in which the child was enrolled must take reasonable steps to promptly respond to the request from the new LEA. 34 C.F.R. § 300.323(g).

Question A-5: What is the LEA's obligation if a child with a disability moves into its jurisdiction from an LEA that is located outside of the State within the same school year?

Answer: In this circumstance, the new LEA (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous LEA) until the new LEA: (1) conducts an

[15] See the discussion on pages 3–4, including footnote 9, about Section 504 and Title II.

evaluation pursuant to 34 C.F.R. §§ 300.304 through 300.306 (if determined to be necessary by the new LEA); and (2) develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in 34 C.F.R. §§ 300.320 through 300.324. Thus, the new LEA must provide FAPE to the child with a disability when the child enrolls in the new LEA's school in the new State within the same school year and may not deny special education and related services to the child pending the development of a new IEP.

The new LEA in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous LEA in which the child was enrolled, pursuant to 34 C.F.R. § 99.31(a)(2); and the previous LEA in which the child was enrolled must take reasonable steps to promptly respond to the request from the LEA. 34 C.F.R. § 300.323(g). See also Question A-2, Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations (Sept. 2011).

Question A-6: What is the LEA's obligation if a child with a disability moves into its jurisdiction from another LEA between school years, i.e., during the summer break?

Answer: IDEA and its implementing regulations require that, at the beginning of each school year, each LEA must have an IEP in effect for each child with a disability. 34 C.F.R. § 300.323. Therefore, LEAs must ensure that an IEP is in effect at the beginning of the school year for children with disabilities who move into, and enroll in, a new LEA during the summer. How an LEA meets this requirement is a matter to be decided by each individual new LEA. The new LEA could decide to adopt and implement the IEP developed for the child by the previous LEA, unless the new LEA decides that an evaluation is needed. Otherwise, the newly designated IEP Team for the child in the new LEA could develop, adopt, and implement a new IEP for the child that meets the applicable requirements in 34 C.F.R. §§ 300.320 through 300.324. Analysis of Comments and Changes accompanying the final 2006 IDEA Part B regulations, 71 Fed. Reg. 46540, 46682 (Aug. 14, 2006).

If the parent requests that the new LEA convene the IEP Team prior to the start of the school year and the LEA refuses to do so, the LEA must provide written notice to the parent of the refusal. The prior written notice must include, among other content, an explanation of why the LEA determined that conducting the meeting prior to the beginning of the school year is not necessary to ensure the

provision of appropriate services to the child. 34 C.F.R. § 300.503. See also Analysis of Comments and Changes accompanying the final 1999 IDEA Part B regulations. 64 Fed. Reg. 12406, 12476-12477 (Mar. 12, 1999).

B. CONVENING THE IEP TEAM

IEP Teams[16] are required to meet periodically, but at least annually, to review and revise, as appropriate, a child's IEP, and address the results of any reevaluation or any other data that describes the child's needs. The Department understands that, during the COVID-19 pandemic, it is often difficult for IEP Teams to find effective ways to meet and obtain the information necessary to develop IEPs that fully addressed the unique needs of each child with a disability. Although in-person attendance at IEP Team meetings may be preferable, IDEA provides flexibility for participation using alternate methods, as well as permitting some members of the IEP Team to be excused under certain circumstances. Further, a parent and the LEA may agree to amend a child's IEP without convening the full IEP Team, but not as a substitute for the annual review.

Question B-1: Does IDEA require a child's IEP Team to meet more than one time each year?

Answer: It will depend on the child-specific circumstances and whether the parent and LEA agree to change the IEP without a meeting. Under 34 C.F.R. § 300.324(a)(5), to the extent possible, the LEA must encourage the consolidation of reevaluation meetings and other IEP Team meetings for the child. However, this should not be read to discourage an IEP Team from reconvening, if appropriate. An LEA must initiate and conduct meetings periodically, but at least once every twelve months, to review a child's IEP, in order to determine whether the annual goals for the child are being achieved, and to revise the IEP, as appropriate.[17] Although the LEA is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. If the LEA refuses the parent's request to reconvene the IEP Team, it must provide written notice to the parents of the refusal, including an explanation of why the LEA has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the child. 34 C.F.R. § 300.503. If a child's teacher feels that the child's IEP or educational placement is not appropriate for the child, the teacher should follow the LEA's procedures with respect to (1) calling or meeting with the parents; or (2) requesting that the LEA hold another IEP Team meeting to review the child's IEP.

[16] The requirements for participants at IEP Team meetings are found in 34 C.F.R. § 300.321.

[17] In accordance with 34 C.F.R. § 300.324(b), the IEP Team must meet periodically to review and revise the child's IEP, as appropriate, to address any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; the results of any reevaluation conducted under § 300.303; information about the child provided to, or by, the parents; the child's anticipated needs; or other matters.

IDEA also allows the parent of a child with a disability and the LEA to agree not to convene an IEP Team meeting for the purpose of making changes to the IEP after the annual IEP Team meeting for a school year, and instead develop a written document to amend or modify the child's current IEP. 34 C.F.R. § 300.324(a)(4). It is important to note that an amendment to an IEP cannot take the place of an annual IEP Team meeting. For more information about the IEP amendment process, see Q3 of Implementation of IDEA Part B Provision of Services in the Current COVID-19 Environment (Sept. 28, 2020), and Questions C-8 through C-10 in Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations (Sept. 2011).

Question B-2: Are all IEP Team members required to attend all IEP Team meetings in their entirety?

Answer: No. The IEP Team members referenced in 34 C.F.R. § 300.321(a) are generally required to participate in meetings to develop, review, and revise a child's IEP. The IEP Team includes, among other participants, the parents of the child; not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); and not less than one special education teacher of the child or, where appropriate, not less than one special education provider of the child. However, under 34 C.F.R. § 300.321(e), it is permissible for certain members to be excused from attending the IEP Team meeting, in whole or in part, if the parent of a child with a disability and the LEA agrees, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. If the IEP Team meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused from attending an IEP Team meeting, in whole or in part, if the parent, in writing, and the LEA consent to the excusal; and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. There is nothing in IDEA or its implementing regulations that would limit the number of IEP Team members who may be excused from attending an IEP Team meeting, so long as the LEA meets the requirements of 34 C.F.R. § 300.321(e) that govern when IEP Team members can be excused from attending IEP Team meetings in whole or in part. See Analysis of Comments and Changes accompanying the final IDEA Part B regulations. 71 Fed. Reg. 46650, 46675 (Aug. 14, 2006).

For more information about the excusal of IEP Team members from IEP Team meetings, see Q2 of Implementation of IDEA Part B Provision of Services in the Current COVID-19 Environment (Sept. 28, 2020), and Questions C-1

through C-5 in Questions and Answers on Individualized Education Programs, Evaluations, and Reevaluations (Sept. 2011).

Question B-3: May LEAs continue to hold IEP Team meetings virtually after school buildings reopen for in-person instruction or must these meetings be conducted face-to-face?

Answer: LEAs may continue to hold IEP Team meetings virtually after school buildings reopen if the parent agrees to a virtual meeting or if continued COVID-19 prevention practices necessitate it. Parents and schools are encouraged to work collaboratively, to find solutions to meeting IEP Team requirements. LEAs must take steps to ensure that one or both parents attend, or are afforded the opportunity to participate in, an IEP Team meeting by notifying them of the meeting early enough to ensure that they can attend and by scheduling the meeting at a mutually agreed upon time and place. Moreover, the parents and the LEA can agree to participate in IEP Team meetings through alternate means such as telephone conference calls or video conferences for any reason. 34 C.F.R. § 300.328. Therefore, LEAs may continue to convene IEP Team meetings virtually, as appropriate.

Question B-4: Is it permissible for the LEA to hold an IEP Team meeting without the child's parent?

Answer: In most cases, no. IDEA and its implementing regulations require that IEP Team meetings be scheduled at a mutually agreed on time and place. 34 C.F.R. § 300.322(a)(2). IDEA does not address the specific times when LEAs can schedule IEP Team meetings. LEAs should be flexible in scheduling IEP Team meetings to accommodate reasonable requests from parents. Where LEAs and parents cannot schedule meetings to accommodate their respective scheduling needs, LEAs must take other steps to ensure parent participation, consistent with 34 C.F.R. § 300.322(c). These steps could include individual or conference telephone calls or videoconferencing, consistent with 34 C.F.R. § 300.328 (see Question B-3 above, regarding alternative means of participating in IEP meetings).

IDEA does permit an IEP Team meeting to be conducted without a parent in attendance if the LEA is unable to convince the parents that they should attend. In this case, the LEA must keep a record of its attempts to arrange a mutually agreed on time and place. 34 C.F.R. § 300.322(d). This practice is permissible only if the LEA is unable to convince the parents that they should attend an IEP Team meeting for their child regardless of the LEA's efforts to schedule the meeting at a mutually convenient time and place.

C. CONSIDERATION OF SPECIAL FACTORS

When developing, reviewing, or revising a child's IEP, the IEP Team must consider a variety of special factors, including, but not limited to, the communication needs of the child and whether the child needs assistive technology devices and services. 34 C.F.R. § 300.324(a)(2)(iv) and (v). For a child with behaviors that interfere with the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). In addition to the required factors that must be considered under 34 C.F.R. § 300.324(a)(2), as a result of the COVID-19 pandemic, many children have experienced increased stress, anxiety, depression, fear, and physical isolation. Some children have contracted COVID-19 and experience post-COVID conditions.[18] Some were displaced from their homes when a parent lost employment and even lost family members and friends to COVID-19. These circumstances can impact a child's ability to engage in their education, develop and re-establish social connections with peers and school personnel, and adapt to the structure of in-person learning. IEP Teams should carefully discuss these difficult issues with a child's parents, when appropriate, gather updated information as necessary, and address any new or changed needs to ensure FAPE to the child.

- **Considering the Assistive Technology Needs of a Child with a Disability**

When developing, reviewing, or revising a child's IEP, the IEP Team must consider whether the child needs assistive technology devices and services. 34 C.F.R. § 300.324(a)(2)(v). As a result of the COVID-19 pandemic, some children with disabilities and their families may have, for the first time, used assistive technology devices and services as part of the child's access to FAPE. Challenges with ensuring equitable access to technology and Wi-Fi connectivity during this time may have affected whether and how the child received appropriate services to support skill development and progress toward attaining the child's IEP annual goals.

Question C-1: For LEAs that provided laptops or other technology devices or services to some or all children to facilitate virtual instruction, must they continue to provide such devices or services for a child with a disability who is returning to school for in-person instruction?

Answer: It will depend on the child's needs. As noted above, each child's IEP Team must consider whether the child needs assistive technology devices and services as part of the determination of special education, related services, and supplementary aids and services that are needed to enable the child to receive FAPE. 34 C.F.R. § 300.324(a)(2)(v). For some children with disabilities, the

[18] See Long COVID under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, Schools, Service Providers, and Families. (July 2021).

continued provision of these devices or services will be appropriate to ensure the provision of FAPE.

Under IDEA, an assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. 34 C.F.R. § 300.5. In this circumstance, the IEP Team should review the child's use of the laptop computer or other such device that was provided for virtual instruction, along with information provided by the parent and others, including the child, as appropriate. If the IEP Team determines that the laptop or other technology device is an assistive technology device that the child requires in order to receive FAPE, the LEA must provide the necessary assistive technology device. The IEP Team has discretion in determining the type of assistive technology that the child needs in order to receive meaningful educational benefit. In addition, the IEP Team may consider the need for other devices that were not previously provided, if they are needed to ensure FAPE.

The IEP Team also must consider whether the child requires assistive technology services as defined under 34 C.F.R. § 300.6. Generally, the assistive technology service directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.

This could include evaluating the child's needs, including a functional evaluation of the child in the child's customary environment; purchasing, leasing, or otherwise providing the necessary assistive technology device(s); selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices; and coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs. One component of assistive technology services is training or technical assistance for a child with a disability or, if appropriate, that child's family. The IEP Team could also consider whether parent counseling and training should be provided as a related service under IDEA to help the child's parent acquire the necessary skills that will allow them to support the implementation of the IEP, including the assistive technology device. 34 C.F.R. § 300.34(c)(8).

Question C-2: What steps can SEA and LEA leaders take to ensure equitable access to assistive technology devices, services, and connectivity to Wi-Fi to support the learning of children with disabilities?

Answer: Circumstances related to the COVID-19 pandemic exacerbated existing difficulties with equitable access to technology and digital learning for all learners. Barriers to access include factors such as the price of procuring services and devices privately (e.g., home internet service and mobile data); lack of broadband access in rural areas; and lack of parent understanding and familiarity with use of technology, including assistive technology to support their child's learning.

With the recent influx of Federal funds, particularly those under the American Rescue Plan Act of 2021 (ARP Act), Congress specifically authorizes SEAs and LEAs to purchase educational technology (including hardware, software, and connectivity) for children who are served by the LEA that aids in regular and substantive educational interaction between children and their classroom instructors, including low-income children and children with disabilities, which may include assistive technology or adaptive equipment. Section 2001(e)(2)(K) of the ARP Act. See also Question C-19 of the Department's Frequently Asked Questions on the Elementary and Secondary School Emergency Relief (ESSER) Programs and Governor's Emergency Education Relief (GEER) Programs (May 2021 FAQ). Additionally, under Section 2014(a) of the ARP Act, Congress provided supplemental IDEA Part B and Part C funds for Fiscal Year 2021 to States and LEAs. These funds may also be used to address technology needs of children with disabilities.[19]

- **Addressing the Social, Emotional, Behavioral, and Mental Health Needs of Children with Disabilities**

Many children have been exposed to trauma, disruptions in learning, physical isolation, and disengagement from school and peers, negatively affecting their mental health. Children learn, take academic risks, and achieve at higher levels in safe and supportive learning environments and in the care of responsive adults they can trust. However, the ongoing impact of the COVID-19 pandemic has contributed to child experiences that are far from universal — with underserved children experiencing a disproportionate burden of the pandemic. As a result, many children might require additional support and interventions to take risks in their learning to achieve at higher levels.

[19] See IDEA American Rescue Plan Funds.

A child whose behavior impedes their learning may need new or increased services and supports for the child to receive FAPE. These increased services and supports may include new or adjusted specially designed instruction, academic supports, positive behavioral interventions, and other supports such as counseling, psychological services, school health services, and social work services.

IEP Teams are encouraged to review the pre-pandemic services required to provide FAPE to the child and determine if the child did or did not receive them during the school closure and other disruptions in service. IEP Teams are also encouraged to make general observations about the child's attendance, engagement, attention, behavior, progress, and home experience during the COVID-19 pandemic.

Question C-3: When should social, emotional, behavioral, or mental health supports be included in a child's IEP?

Answer: As with other special education and related services, the IEP Team makes the determination of whether, and if so which, social, emotional, behavioral, or mental health supports specific to conditions arising from COVID-19 or other situations should be included in a child's IEP. The child's need for such services may be detected during an initial evaluation or reevaluation process through the use of technically sound assessment instruments to assess the relative contribution of cognitive and behavioral factors towards educational performance (and other information provided by the child, parents, caregivers, educators, and related service providers (e.g., observations, informal assessment)). 34 C.F.R. § 300.304(b)(3). For a child already eligible under IDEA, these concerns can be addressed by reconvening the IEP Team to determine whether the current IEP requires revision to include specific social, emotional, behavioral, or mental health supports to ensure FAPE to the child. As part of their programs of FAPE, mental health-related services, such as counseling services, psychological services, and social work services in schools, could be included in a child's IEP, as appropriate.[20] See the response to Question C-5, below, for additional examples. Schools should avoid routinely using discipline to address a child's behaviors that may arise when students return to school and consider developing or revising, or ensuring the provision of, positive behavioral interventions and supports and other strategies, as appropriate.[21]

[20] See also ED COVID-19 Handbook Roadmap to Reopening Safely and Meeting All Students' Needs (Apr. 2021).

[21] See Center on Positive Behavioral Interventions and Supports.

Question C-4: Who can provide social, emotional, behavioral, or mental health supports to a child when the services are included in the child's IEP?

Answer: IDEA requires States and LEAs to ensure that all personnel necessary to carry out the purposes of Part B of IDEA are appropriately and adequately prepared and trained to provide the necessary support. 34 C.F.R. §§ 300.156(a) and 300.207. Related services, which include social, emotional, behavioral, and mental health supports, must be carried out by a qualified professional who holds State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services. 34 C.F.R. § 300.156(b)(2)(i). This responsibility includes ensuring that teachers and other school personnel have the training and experience necessary to provide required social, emotional, behavioral, and mental health supports to children with disabilities that meet the State's standards.[22] Paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, can assist in the provision of special education and related services to children with disabilities. 34 C.F.R. § 300.156(b)(2)(iii).

Question C-5: What are some examples of social, emotional, behavioral, and mental health supports related to the COVID-19 pandemic that could be included in a child's IEP?

Answer: The IEP Team may address the child's social, emotional, behavioral, or mental health needs, through special education and related services, supplementary aids and services provided to the child, and/or program modifications or supports for school personnel.

Special education and related services are provided to assist the child to make appropriate progress toward attaining the annual goals specified in the IEP and to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities. 34 C.F.R. § 300.320(a)(4)(i) and (ii). These services and supports may include counseling services for mental health needs (e.g., anxiety, depression, etc.), social skill instruction, explicit reinforcement of positive behavior, and explicit instruction in stress, anxiety, and depression management.

[22] Ibid.

Supplementary aids and services are defined to include aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with 34 C.F.R. §§ 300.114 through 300.116. Supplementary aids and services may include consultation with a professional with expertise in behavioral interventions to create a positive behavioral support plan, access to counselors, and access to targeted strategies supported by peer-reviewed research to support social, emotional, behavioral, or mental health needs (e.g., anxiety scaling, mindfulness exercises).

Program modifications or supports for school personnel provided on behalf of the child, may also be necessary to support the child's involvement and progress in the general education curriculum, appropriate advancement toward attaining the annual goals specified in the IEP, and participation in extracurricular and other nonacademic activities. 34 C.F.R. §§ 300.320(a)(4)(i)–(ii) and 300.324(a)(3)(ii). Usually, a modification means a change in what is being taught to or expected from the student.[23] Program modifications could include adapting a homework assignment or adjusting a reading passage to reflect the child's reading comprehension level, while supports for school personnel may include training on additional positive behavioral supports and universal design for learning and access to consultation with related service providers and others with specialized expertise.

Question C-6: What steps should the IEP Team take when considering behavioral supports for children with disabilities as they return to in-person instruction?

Answer: Children who return to school, including those with disabilities and those who demonstrate challenges that were not evident before the school closure, may have new disability-related needs, regression of skills or a lack of expected progress toward attaining the child's annual IEP goals, or social, emotional, behavioral, or mental health needs due to the impact of the COVID-19 pandemic. If new or different social, emotional, behavioral, or mental health needs arise after a child has been determined to be eligible for special education and related services and an IEP has been developed, the IEP Team must reconvene to consider these needs, including whether there is a need for additional related services and positive behavioral interventions and supports to

[23] See Center for Parent Information and Resources: Supports, Modifications, and Accommodations for Students (Mar. 2020) available at: https://www.parentcenterhub.org/accommodations/.

ensure the child's access to FAPE. In the alternative, the parent and the LEA may agree in writing to amend the IEP to address the child's needs through the addition of such interventions and supports. 34 C.F.R. § 300.324(a)(2) and (a)(4)(i). The LEA also may conduct or update a functional behavioral assessment (FBA). Although IDEA and its implementing regulations do not prescribe the components of an FBA, an FBA is generally understood as the process to identify the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child behaves is directly helpful to the IEP Team in developing a behavioral intervention plan that will reduce or eliminate the behavior.[24] The process generally involves qualified school personnel and the child's parent, and/or the IEP Team (including the child's parent), systematically analyzing a wide range of child-specific factors. The results of the FBA generally are used to guide the development of a behavioral intervention plan to reinforce positive behaviors and prevent behavior that interferes with the child's learning and that of others. Resources are available to provide training for school personnel to conduct systematic FBAs and behavioral intervention plans[25] and ensure FAPE by providing appropriate behavioral supports to children with disabilities.[26] School personnel and IEP Teams are encouraged to use evidence-based decision-making to select, implement, and closely monitor the effectiveness of behavioral and academic intervention.[27, 28]

- **Addressing the School-Related Health Needs of Children with Disabilities with Underlying Medical Conditions**

Some children with disabilities have underlying medical conditions, such as genetic, neurologic, or metabolic conditions, or congenital heart disease, that place them at increased risk of severe illness if they contract COVID-19.[29] Parents have raised questions about whether and how IEP Teams should consider school-related health or medical information for children with disabilities. This is especially the case in States or local jurisdictions that have enacted State or local laws, rules, regulations, or policies that are inconsistent with CDC's COVID-19 prevention and risk reduction strategies. Therefore, in the questions and answers below, the Department reaffirms IDEA's requirements that IEP Teams are responsible for identifying the services,

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[24] See Question E-4 Questions and Answers On Discipline Procedures (Jun. 2009).

[25] For more information see: Iris Center FBA Module, Autism Focused Intervention and Resource Modules FBA.

[26] Yell, M. L., Bateman, D., & Shriner, J. (2020). Developing and Implementing Educationally Meaningful and Legally Sound IEPs: Bringing It All Together. Teaching Exceptional Children, 52(5), 344-347.

[27] Torres, C., Farley, C. A., & Cook, B. G. (2014). A special educator's guide to successfully implementing evidence-based practices. Teaching Exceptional Children, 47(2), 85-93.

[28] For more information see: IRIS Center EBP Module, National Clearinghouse on Autism Evidence and Practice, National Center on Intensive Intervention.

[29] See CDC web site on People with Certain Medical Conditions and their risk of contracting COVID-19.

supports, and program modifications that are necessary to provide a child with a disability FAPE in the least restrictive environment (LRE). Likewise, the group of knowledgeable persons making the placement decision is responsible for proposing an appropriate educational placement in the LRE that meets the child's school-related health needs.

Question C-7: Who should be included on a child's IEP Team when a child with a disability has one or more underlying medical conditions that puts them at increased risk of severe illness if they contract COVID-19?

Answer: In such situations, the IEP Team should include a team member who knows about the health needs of the child, including whether COVID-19 prevention and risk reduction strategies may be needed. As with other children with disabilities, the IEP is developed at a meeting of the IEP Team, which includes the child's parents and relevant school officials, including related service providers and, whenever appropriate, the child. 34 C.F.R § 300.321(a). The IEP Team could include, at the discretion of the parent or the LEA, individuals such as school health service staff, school nurses, and the child's health care professional, as appropriate, if the party inviting them determines that they have knowledge or special expertise regarding the child. See 34 C.F.R. § 300.321(a)(6) and (c). Such individuals can also be part of the group of knowledgeable persons making decisions about the child's educational placement. [30]

Question C-8: Are the child's IEP Team and the group of knowledgeable persons making educational placement decisions responsible for addressing the school-related health needs of a child with a disability in the context of COVID-19?

Answer: Yes. As set out by the U.S. Supreme Court in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), eligible children with disabilities who need school-related health services are entitled to them as part of FAPE. Accordingly, LEAs must address the school-related health needs of eligible children with disabilities who are at increased risk of severe illness from COVID-19 infection.

Current evidence suggests that children with medical complexity, genetic, neurologic, or metabolic conditions, or with congenital heart disease can be at increased risk for severe illness from COVID-19. Similar to adults, children

[30] Under 34 C.F.R. § 300.116(a), in determining the educational placement of a child with a disability, including a preschool child with a disability, each LEA must ensure that the placement decision is made by a group of persons that includes the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and is made in conformity with the "least restrictive environment" provisions, including 34 C.F.R. §§ 300.114 through 300.118.

with obesity, diabetes, asthma or chronic lung disease, sickle cell disease, or immunosuppression can also be at increased risk for severe illness from COVID-19.[31] If a parent or other member of the IEP Team believes that COVID-19 prevention strategies are necessary for the provision of FAPE to the child, the IEP Team must consider whether and to what extent such measures are necessary, based on child-specific information, which may include medical or health records, diagnostic or other evaluative data, or information documented by medical or health professionals.[32] If the IEP Team determines that COVID-19 prevention and risk reduction measures are necessary in order for a child with a disability to receive FAPE — where the prevention measures constitute special education, related services, supplementary aids and services,[33] or program modifications and supports for school personnel — the Team must include these in the child's IEP consistent with 34 C.F.R. § 300.320(a)(4).

For example, the provision of FAPE in the LRE for some children with disabilities may require that the IEP address, and educational placement include, appropriate preventative and risk-reducing strategies, such as wearing masks or other personal protective equipment, and sanitizing; or, when necessary, avoiding shared use of personal and educational items, such as markers, rulers, and classroom materials. See 34 C.F.R. § 300.116(d). As with eligible children with disabilities who have severe food allergies, health plans may be included as part of the child's IEP to ensure that the health and safety of the child in the school environment is properly addressed. When health plans are included in the child's IEP, it is especially important that the IEP be accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation, consistent with IDEA requirements. Further, LEA staff responsible for implementing the IEP must be informed of the specific accommodations, modifications, and supports to be provided for the child in accordance with the child's IEP.
34 C.F.R. § 300.323(d).

State or local laws, rules, regulations, or policies relating to IDEA and its regulations must allow IEP Teams and the group of knowledgeable persons making educational placement decisions to make individualized determinations under IDEA by ensuring that each eligible child with a disability has available FAPE in the LRE. Therefore, State or local laws, rules, regulations, or policies that have the effect of improperly limiting the ability of the IEP Team to address

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[31] See CDC web site on People with Certain Medical Conditions and their risk of contracting COVID-19.

[32] See Pages 2 and 4 of OSERS' Dear Colleague Letter on Children in Nursing Homes, April 26, 2016.

[33] Supplementary aids and services mean aids, services, and other supports that are provided in regular education classrooms, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116. 34 § C.F.R. 300.42.

the school-related health needs of a child with a disability, or the ability of the group of knowledgeable persons to propose an appropriate placement in the least restrictive environment for children with disabilities who have school-related health needs, would be a violation of IDEA. See IDEA Section 608(a)(1), 613(a)(1), 34 C.F.R. §§ 300.199, and 300.201.

Question C-9: What steps could a parent of a child with a disability take if the IEP Team, or if the group of knowledgeable persons making a placement decision, is unable or unwilling to address the health and safety of their child due to State or local prohibitions on the use of masks, personal protective equipment, or other COVID-19 prevention and risk reduction measures?

Answer: Consistent with 34 C.F.R. § 300.503, before an LEA proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE, the LEA must provide the child's parents with prior written notice, which includes an explanation of why the LEA is proposing or refusing to take the action. If the IEP Team or group of knowledgeable persons making a placement decision is unable or unwilling to address the school-related health needs of an eligible child with a disability who is at increased risk of severe illness from COVID-19, the parent may utilize IDEA's dispute resolution procedures and mechanisms as discussed in Question H-1 below.

Question C-10: Could a State or local law, regulation, rule, or policy that prohibits or limits COVID-19 prevention and risk reduction strategies in the regular education classroom or other settings where the child with a disability could interact with nondisabled peers be inconsistent with IDEA's requirement to ensure a continuum of educational placements related to placement in the LRE in 34 C.F.R. § 300.115?

Answer: Yes. Congress specifically enacted IDEA in part to rectify the exclusion of children with disabilities from public school classrooms. See section 601(c)(2) of IDEA (P.L. 108-446).

Under 34 C.F.R. § 300.115, LEAs must make available a continuum of alternative placements to meet the needs of children with disabilities consistent with their IEPs. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. Likewise, the regulation requires that the continuum include supplementary services (e.g., school-related health services) provided in conjunction with the regular class placement. As noted above, State or local

laws, regulations, rules, or policies related to IDEA must conform to its purposes. Therefore, they may not result in the exclusion of, or prevention of, an eligible child with a disability from being educated in the regular classroom with appropriate supplementary services and with their nondisabled peers when such educational placement is appropriate to that child's individual needs. State or local laws, regulations, rules, or policies that prevent or improperly limit the IEP Team or the group of knowledgeable persons that decide a child's educational placement from making individualized decisions under IDEA or that effectively prohibit the provision of needed supplementary aids and services generally would not conform to the purposes of IDEA. That is, IEP Teams and the group deciding the educational placement must be able to appropriately address the in-person school-related health needs of a child with a disability with underlying medical conditions, including using COVID-19 prevention and risk reduction strategies. Otherwise, the child's parent is left with two equally unacceptable choices. The first, an in-person educational placement that puts their child at increased risk of severe illness, and the second, the exclusion of their child from school. In such scenarios, some children with disabilities for whom an in-person regular classroom setting with appropriate supplementary services is appropriate to their needs would be effectively precluded from receiving FAPE in their LRE.

Question C-11: In what ways can the Department ensure that children with disabilities who require school-related health services receive them in the LRE?

Answer: Under its monitoring authority, the Department intends to review publicly available information and stakeholder input, including concerns shared by parents and other stakeholders, and based on this may conduct additional monitoring to determine whether specific States are complying with IDEA in addressing the school-related health care needs of children with disabilities during the COVID-19 pandemic. The Department will provide technical assistance where needed. In situations where the Department finds noncompliance and voluntary compliance cannot be readily achieved, the Department will consider all its enforcement options, including a referral to the United States Department of Justice. See, e.g., IDEA Section 616(e) and 34 C.F.R. § 300.604.

D. DETERMINING APPROPRIATE MEASURABLE ANNUAL GOALS & CONSIDERING THE CHILD'S NEED FOR COMPENSATORY SERVICES

Each child's IEP must include a statement of measurable annual goals, including academic and functional goals designed to (1) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (2) meet each of the child's other educational needs that result from the child's disability. For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, the IEP must also include a description of benchmarks or short-term objectives.

During the COVID-19 pandemic, some LEAs report having difficulty consistently providing the services determined necessary to meet the child's needs and address each of the goals in a child's IEP. As a result, some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals. It will be critically important for IEP Teams to make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services.

Overall, the Department encourages IEP Teams to focus on the individual needs of the child, whether the child received appropriate services, and how additional services may support the child to make progress in light of the child's unique circumstances. This includes ensuring that the instructional methodology for delivery (e.g., in-person, virtual, hybrid), timing, frequency, service setting, and location of such services, including any necessary transportation services, appropriately support the child with a disability under Part B of IDEA in achieving the functional and academic goals set out in the child's IEP.

Question D-1: How should an IEP Team address the adverse impact of educational disruptions caused by the COVID-19 pandemic when developing, reviewing, or revising a child's IEP for the 2021–2022 school year?

Answer: With so many children receiving special education and related services through a variety of modalities during the 2020–2021 school year, it is critically important that the IEP Team also consider any adverse impacts of the COVID-19 pandemic on each child with a disability. This includes a discussion of whether the child may have new or different needs than had been determined prior to the pandemic. Other considerations could include, but are not limited to, revising the IEP to address (1) lost skills or a lack of expected progress toward attaining the child's annual IEP goals and in the general curriculum at the end of

the 2020–2021 school year; (2) updated data (e.g., information gathered from formal and informal assessments, parent input) that reflect the child's present levels of academic achievement and functional performance following the extended time without face-to-face, in-person special education and related services; (3) all areas of need, whether or not commonly related to the child's disability category, or if the child may require different or other services to address new areas of need (e.g., behavioral, social, emotional, and mental health needs, needs that arose during the pandemic); and (4) implementing COVID-19 prevention measures such as wearing a face covering/mask or practicing social distancing to provide a safe and healthy school environment and safe participation in the community.

Question D-2: May an IEP Team revise the measurable annual IEP goals to reflect a decline in the child's knowledge and skills resulting from the disruption in instruction as a result of the COVID-19 pandemic?

Answer: Yes. When developing, reviewing, and revising the child's IEP, the IEP Team, which includes the child's parents, must give "careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. 988, 999 (2017) (citing 20 U.S.C. 1414(d)(1)(A)(i)(I)–(IV) and (d)(3)(A)(i)–(iv)). See also Questions and Answers on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1 (Dec. 7, 2017). The essential function of an IEP is to provide meaningful opportunities for appropriate academic and functional progress, and to enable the child to make progress appropriate in light of the child's circumstances. Each child's IEP must include, among other information, an accurate statement of the child's present levels of academic achievement and functional performance and measurable annual goals, including academic and functional goals. The IEP Team's effectiveness in gathering and interpreting this information will ensure that, in establishing IEP goals, the IEP Team has appropriately determined the individualized needs of the child and that it can develop measurable IEP goals that provide the child with the opportunity to meet challenging objectives.

Question D-3: What are compensatory services?

Answer: Under IDEA, courts have recognized compensatory services as an equitable remedy to prospectively address the past failure or inability of the LEA to provide appropriate services, including those that were identified on the child's

IEP.[34] That is, courts have ordered such services to address the child's needs after a failure or inability to provide FAPE over a given period of time.[35] Likewise, the State complaint procedures provide for compensatory services as an available remedy when the SEA has found a failure or inability to provide appropriate services under IDEA in order to address the needs of the child. 34 C.F.R. § 300.151(b)(1).

Question D-4: Who should make the determination as to whether and to what extent compensatory services are needed?

Answer: Neither IDEA nor its implementing regulations expressly address who must make the determination of whether—and if so, what—compensatory services are necessary. The Department notes, however, that case law or other judicially established criteria (e.g., consent decrees) may be applicable. Therefore, LEAs may need to consult with their attorneys and should be transparent about the relevant legal standards that IEP Teams must use to determine a child's need for, and the extent of, compensatory services (see question D-5, below, for guidance on how to use relevant data about a child to inform these decisions). It is the Department's position that, generally, many of the same types of individualized and child-centered deliberations that are appropriate for an IEP Team meeting discussing the child's IEP, would be appropriate when considering the need for, and extent of, compensatory services. The Department also encourages IEP Teams to consider input from, or encourage participation by, previous teachers and service providers, as appropriate, so that the other IEP Team members can benefit from their knowledge of the child's skills and progress levels before the onset of, or during, the pandemic. Further, IEP Teams should consider how any additional services determined necessary can be delivered in a manner that does not diminish the child's opportunities to interact with nondisabled peers to the maximum extent appropriate, and to participate in extracurricular and other nonacademic activities.

Question D-5: How can the IEP Team use available data about the child to inform decisions about compensatory services?

Answer: In the absence of controlling Federal or State law, including case law, or specific SEA or LEA guidance, IEP Teams could consider the following factors, among others:[36] (1) the child's present levels of academic achievement and functional

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[34] See, for example, *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005) (holding that compensatory services to remedy a previous denial of FAPE may be an appropriate equitable award).

[35] See, for example, *G ex rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

[36] Adapted from Washington's Roadmap to Special Education Recovery Services: 2021 & Beyond.

performance; (2) the child's previous rate of progress toward IEP goals; and (3) documented frequency and duration of special education and related services provided to the child prior to the service disruptions caused by the COVID-19 pandemic.

The child's present levels of academic achievement and functional performance can include concerns raised by parents, the child, and outside service providers, as well as reviewing present levels of performance in light of the anticipated levels of performance without service disruption due to the COVID-19 pandemic.[37]

Previous rates of progress may be determined by considering if the child's progress toward IEP goals has slowed or decreased and projecting if the child's current rate of progress will allow the child to attain their goals.

Frequency and duration of special education and related services may be determined by reviewing the previously agreed upon IEP compared with the actual services provided while the IEP was in effect.

These considerations could guide IEP Team decisions on whether, how, and when the child will access individualized compensatory services, including the time, location, and format of the services needed to achieve the appropriate level of progress. Further, the IEP Team could determine the appropriate timeline for the child to achieve the expected progress toward IEP goals addressed through the provision of compensatory services.

Question D-6: What are some situations in which it may be necessary to provide compensatory services to a child with a disability?

Answer: A child's IEP Team may determine that compensatory services are necessary to mitigate the impact of disruptions and delays in providing appropriate services to the child. Some examples of situations that might require consideration of whether, and what, compensatory services are necessary include: (1) if the initial evaluation, eligibility determination, and identification, development and implementation of the IEP for an eligible child were delayed; (2) if the special education and related services that were provided during the pandemic through virtual, hybrid, or in-person instruction were not appropriate to meet the child's needs; (3) if some or all of the child's IEP could not be implemented using the methods of service delivery available during the pandemic (for example, if the

[37] Goran, L., Harkins Monaco, E. A., Yell, M. L., Shriner, J., & Bateman, D. (2020). Pursuing academic and functional advancement: Goals, services, and measuring progress. Teaching Exceptional Children, 52(5), 333–343.

physical therapy and behavioral intervention strategies included in the child's IEP could not be provided through virtual means); and (4) if meaningful services to facilitate the transition from secondary school to activities such as postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation were not provided due to the pandemic. These examples are not meant to be exhaustive and are provided to illustrate various situations that could require consideration of whether, and to what extent, compensatory services are needed to address the child's needs and mitigate the adverse impact of the COVID-19 pandemic.

Question D-7: Must States ensure that compensatory services are available for all IDEA-eligible children who need them because they did not receive appropriate services under Part B of IDEA due to pandemic-related closures and other service disruptions?

Answer: Generally, yes. States must ensure FAPE is available to all children residing in the State between the ages of 3 and 21,[38] inclusive, including children with disabilities who have been suspended or expelled from school. 34 C.F.R. § 300.101.

The Department's longstanding position has been that IEP Teams are the appropriate vehicle for addressing the need for, and extent of, compensatory services to address the child's needs based on any failure or inability to provide appropriate services due to circumstances such as teacher strikes, natural disasters, and pandemics.[39] The Department believes that IEP Teams are already empowered under IDEA to make individualized determinations regarding the special education and related services that a child needs.[40] The consideration of compensatory services is just one subset of the IEP Team's responsibility to address the child's needs and would arise, for example, due to the impact of the pandemic.[41] A determination of compensatory services by the child's IEP Team is an appropriate proactive mitigating measure intended to address the needs of the child due to the LEA's failure or inability to provide appropriate services.

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[38] Based on State law governing the education of all children, some States do not provide public education to children through age 21. IDEA does not require the provision of FAPE to children with disabilities aged 3, 4, 5, 18, 19, 20, or 21 to the extent those ages are outside the public education age limit under State law or practice, or the order of any court. See 34 C.F.R. § 300.102(a)(1).

[39] See, for example, OSEP's *Letter to Pergament* (Dec. 20, 2013); *Questions and Answers on Providing Services to Children with Disabilities During an H1N1* Outbreak (Dec. 2009); *Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters* (Sept. 2017).

[40] See Questions and Answers on IDEA Part B Dispute Resolution Procedures, Question B-8 (Jul. 23, 2013).

[41] See Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak: "If a child does not receive services during a closure, a child's IEP team (or appropriate personnel under Section 504) 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. Question A-3 (Mar. 12, 2020).

If challenged, such determinations may receive deference from a court if arrived at consistent with IDEA requirements and based on the expertise of, and the exercise of judgment by, school authorities.[42]

Question D-8: Does the SEA have a role in ensuring that compensatory services needs are considered and addressed?

Answer: Yes. Although decisions about compensatory services generally should be made by each child's IEP Team, the SEA, through its general supervisory responsibilities, must ensure that its LEAs take appropriate action to mitigate the adverse impact of any failure to provide appropriate services, such as lost skills and lack of progress, for children with disabilities. 34 C.F.R. §§ 300.149 and 300.600. To ensure appropriate individualized determinations of the need for, and extent of, compensatory services are made, SEAs can provide guidance to support LEAs and IEP Teams in determining the frequency, location, and duration of services that may be appropriate to address the unique needs of each child with a disability. Likewise, if there is applicable case law or a consent decree that impacts how compensatory services are identified and determined, the SEA can ensure that IEP Teams are appropriately aware of those requirements. Any such guidance could assist LEAs and IEP Teams to identify the types of information they may need to assess the impact of service disruptions on individual children and should emphasize the IEP Team's responsibility to make individualized determinations based on the individual facts and circumstances for each child.

Question D-9: Some States are using terms such as "recovery services" or "COVID mitigation services." Are these terms synonymous with compensatory services as defined by the Department?

Answer: It will depend on how these terms are defined, determined, and implemented. The Department acknowledges that some States are using the terms "recovery services" or "COVID-19 mitigation services" as a broad category of educational and support services intended to mitigate or address the negative impact of pandemic-related limitations. Some States are offering these services to all children (i.e., not based on individualized determinations), while others focus primarily on children with disabilities or at-risk children with other specific needs. For States and LEAs that do not utilize a process identified under IDEA for making individualized determinations about these services based on each

[42] See, *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. 988 (2017).

child's unique needs and circumstances, such services likely would not be considered compensatory services.

Question D-10: Can compensatory services be provided to children who have graduated with a regular high school diploma or exceeded the age of eligibility for IDEA services?

Answer: Yes. Because the purpose of compensatory services is to remedy a failure to provide FAPE in order to address the needs of the child, for children who are beyond the period of eligibility for IDEA services, compensatory services could take the form of an additional period of eligibility. In fact, some Federal courts have expressly addressed this issue. See generally, *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ.*, 79 F.3d 654, 660 (7th Cir. 1996) (noting "[c]ompensatory education is a benefit that can extend beyond the age of 21 [the terminating FAPE age in Illinois]"); *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186 (lst Cir. 1994) (affirming award of two years of compensatory education to former student after student had reached the [otherwise terminating-FAPE] age of 21 given finding that FAPE had been denied to student), cert. denied, 115 S.Ct. 484 (1994); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184 (1st Cir. 1993) (noting that, if the former student "can prove that the school district denied him his right to an appropriate education under the IDEA during the challenged period, he could claim relief in the form of compensatory education, notwithstanding the fact that he is now twenty-seven years old"); and *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991) (finding that the student was entitled to 30 months of compensatory education because of the district's failure to provide an appropriate educational placement for that period of time). See also, *School Comm. of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369–70, 105 S.Ct. 1996, 2002–03 (1985).

Question D-11: What funds can be used to pay for compensatory services?

Answer: IDEA Part B funds (both the regular IDEA Part B funds and the additional IDEA Part B funds appropriated under section 2014 of the ARP Act), as well as funds provided to States and LEAs through the ESSER Fund and the GEER Fund, may be used for compensatory services. See Question C-5 of the Frequently Asked Questions on the Elementary and Secondary School Emergency Relief (ESSER) Programs and Governor's Emergency Education Relief (GEER) Programs (May 2021) (May 2021 FAQ). However, if an LEA uses ESSER, GEER, or IDEA Part B funds (either the regular IDEA Part B funds or the additional IDEA Part B funds appropriated under section 2014 of the ARP Act) to replace State and/or local funding for the education of children with disabilities, this may result in a failure of the LEA to meet the budget and/or expenditure requirements for LEA maintenance of effort (MOE) under IDEA Part B. See Question E-12 of the May 2021 ESSER GEER FAQs. In addition, if an LEA elects to use State and/or local funds for compensatory services, the LEA should consider the impact this may have on the LEA's required level of effort to meet the MOE requirement under IDEA Part B in future years. See 34 C.F.R. § 300.203; and Q2 of the Question and Answer Document on Flexibility on IDEA Part B Fiscal Requirements (Jun. 26, 2020).

E. MAKING EXTENDED SCHOOL YEAR (ESY) SERVICES DETERMINATIONS

A child's entitlement to ESY services needed for FAPE continues to apply even if schools do not provide other educational services during school breaks. 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. The specific analysis and standards that an IEP Team may use to determine whether a child requires ESY services in order to receive FAPE are left to States to determine. However, the determination must be based on the individual needs of the child, and not on the category of the child's disability. See Question 4 in Implementation of IDEA Part B Provision of Services in the Current COVID-19 Environment *(Sept. 28, 2020).*

Question E-1: If an LEA provides additional services for all students during the summer to address lost instruction due to the pandemic, do IEP Teams need to consider ESY services?

Answer: Yes. ESY services are defined as special education and related services that are: (1) provided to a child with a disability beyond the normal school year of the LEA; (2) provided in accordance with the child's IEP; (3) provided at no cost to the parents of the child; and (4) meet the standards of the SEA. Each LEA must ensure that ESY services are available as necessary to provide FAPE to a child with a disability. 34 C.F.R. § 300.106. Individualized determinations about the need of each child with a disability for ESY services are made through the IEP process and must be made annually. The IEP Team could determine that a child's ESY service needs could be met through participation, with appropriate supports, in some or all of the additional services the LEA provides to all students.

Typically, ESY services are provided during the summer months. However, there is nothing that limits the ability of an LEA to provide ESY services to a child with a disability during times other than the summer, such as during school breaks or vacations, where appropriate to the child's needs and consistent with applicable standards.

Question E-2: Could a child be eligible for both ESY and compensatory services?

Answer: Yes. These services have different standards and purposes and are not mutually exclusive. ESY services are: (1) provided to a child with a disability beyond the normal school year of the LEA; (2) provided in accordance with the child's IEP; (3) provided at no cost to the parents of the child; and (4) meet the standards of the SEA. 34 C.F.R. § 300.106.

Compensatory services are additional special education and related services to address the needs of the child that are intended to remedy a failure or inability to provide appropriate services. These would generally be additional services to those that the child would be receiving during the child's school attendance (including ESY services) or as an additional period of eligibility for IDEA services. See Question D-10, above. Therefore, a child who requires ESY services could also receive compensatory services.

F. CONSIDERING SECONDARY TRANSITION SERVICES

Due to the circumstances of the COVID-19 pandemic, some children with disabilities did not receive appropriate or meaningful services to facilitate transition from secondary school to activities such as postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. As students return to school for the 2021–2022 school year and States and LEAs consider options for delivering quality transition services, they must ensure that children with disabilities receive the appropriate services, supports, and opportunities to achieve their desired post-school education and career goals. In the provision of services to children with disabilities remotely, in-person, or through a hybrid option, SEAs, LEAs, and IEP Teams remain responsible for ensuring that all children with disabilities receive transition services necessary for FAPE in accordance with 34 C.F.R. § 300.320(b). The Department recognizes that some children with disabilities, including children of color and those living in less-resourced or rural communities, face greater and more complex challenges during the COVID-19 pandemic. Providing the necessary services and supports so that these children can transition to the next step in their lives will benefit them, their families, and the communities in which they live and work.

Question F-1: What should IEP Teams consider for a child with a disability whose transition services or pre-employment transition services may have been disrupted by the COVID-19 pandemic?

Answer: Following the return to school and reconvening the IEP Team meeting, the IEP Team must consider whether the child's transition needs have changed, taking into account the child's strengths, preferences, and interests; and develop measurable goals that are focused on the child's life after high school, specifying the transition services needed to help the child reach those goals. The IEP Team should discuss transition services and pre-employment transition services in light of the child's unique circumstances and experiences during the pandemic. IEP Teams should address any need for compensatory services related to school closure or an inability to fully implement a child's transition plan. If the child is not making expected progress toward their annual transition goals in order to meet their post-school goals, the IEP Team should revise, as appropriate, the IEP to address the lack of progress.

Pre-employment transition services are available only to "students with disabilities," as defined in Section 7(37) of the Rehabilitation Act of 1973, as

amended (Rehabilitation Act), and 34 C.F.R. § 361.5(c)(51).[43] So long as a student who was slated to graduate from secondary school at the end of the 2019–2020 or 2020–2021 school year continues to participate in an educational program, including postsecondary education or another recognized educational program, that student would be able to continue receiving pre-employment transition services. Under the unprecedented circumstances caused by the COVID-19 pandemic, many students with disabilities, including those who were slated to graduate at the end of the 2019–2020 or 2020–2021 school year, were participating in a variety of recognized educational programs, such as remote learning and home schooling. Participation in any of these educational programs would qualify for the receipt of pre-employment transition services. A graduating student with a disability who took summer school classes would still be participating in an educational program. As such, the student would be able to receive any pre-employment transition services provided while participating in summer school classes, through virtual and other remote strategies or in-person pre-employment transition services, to the extent available. The same would be true for a graduating student with a disability who enrolled in a postsecondary education program that started in the fall or later as part of a "gap-year" program. For more information, see Question 14 of the Rehabilitation Services Administration's (RSA) Questions and Answers (Oct. 16, 2020).

Question F-2: May pre-employment transition services be repeated for a student with a disability in the event the provision of those services was interrupted?

Answer: Vocational rehabilitation (VR) agencies must continue to make good faith and reasonable efforts to provide pre-employment transition services to each student with a disability based on the student's needs, and consistent with the health, safety, and welfare of both individuals with disabilities and those providing services. This means that a VR agency may need to repeat the provision of pre-employment transition services to a student with a disability in the event the provision of those services was interrupted, if doing so is necessary to meet the

[43] "Student with a disability" in the Rehabilitation Act means, in general, an individual with a disability in a secondary, postsecondary, or other recognized education program who—

(A)(*1*) Is not younger than the earliest age for the provision of transition services under Section 614(d)(1)(A)(i)(VIII) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(1)(A)(i)(VIII)); or

(*2*) If the State involved elects to use a lower minimum age for receipt of pre-employment transition services under this Act, is not younger than that minimum age; and

(B)(*1*) Is not older than 21 years of age; or

(*2*) If the State law for the State provides for a higher maximum age for receipt of services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*), is not older than that maximum age; and

(C)(*1*) Is eligible for, and receiving, special education or related services under Part B of the Individuals with Disabilities Education Act (20 U.S.C. 1411 *et seq.*); or

(*2*) Is a student who is an individual with a disability, for purposes of Section 504.

needs of the student. This would be true whether the interruption is due to the COVID-19 pandemic, a student's illness, or another reason. Pursuant to Section 113(a) of the Rehabilitation Act and 34 C.F.R. § 361.48(a), VR agencies, in coordination with LEAs, must provide, or arrange for the provision of, pre-employment transition services to all students with disabilities in need of such services. Neither the Rehabilitation Act nor its implementing regulations impose any limitations on the number or frequency of these services; however, the VR agency should make the determination to repeat services that have been disrupted on a case-by-case basis, considering the resources of the VR agency allocated for this purpose and the reasonable expenditure of funds. See Question 7 of RSA's Questions and Answers (May 14, 2020).

G. MAKING EDUCATIONAL PLACEMENT DECISIONS

After the child's IEP has been developed, the placement in which the IEP will be implemented is determined. The LEA must ensure that the placement decision for each child is made by a group of persons, including the parents, who are knowledgeable about the child, the meaning of the evaluation data, and the placement options; and that placement is decided in conformity with the least restrictive environment (LRE) provisions in 34 C.F.R. §§ 300.114 through 300.118. The child's placement must be based on the child's IEP and determined at least annually. 34 C.F.R. § 300.116(b)(1) and (2).

Each LEA must ensure that— (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114(a)(2). The LEA responsible for providing FAPE to a child with a disability must make available the full continuum of alternative placements, including instruction in regular classes, including accelerated classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, to meet the needs of all children with disabilities for special education and related services. 34 C.F.R. § 300.115. In selecting the LRE, consideration also must be given to any potential harmful effect on the child or on the quality of services that the child needs. 34 C.F.R. § 300.116(d). As a result of disruptions arising from the COVID-19 pandemic and many children receiving instruction through hybrid or virtual approaches, LEAs and parents will likely need to review the appropriateness of the child's current educational placement for the 2021–2022 school year.

Question G-1: What is the State's obligation to ensure that its LEAs meet IDEA's LRE requirements?

Answer: IDEA requires that SEAs have in effect policies and procedures to ensure that LEAs in the State meet the LRE requirements. 34 C.F.R. § 300.114(a)(1). To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114(a)(2). SEAs are required to: (1) carry out activities to ensure that teachers and administrators in all LEAs are fully informed about their responsibilities for implementing the LRE

requirements cited above; (2) provide technical assistance and training necessary to assist LEAs in meeting the LRE requirements; and (3) monitor LEAs for their compliance with the LRE requirements. 34 C.F.R. §§ 300.119–300.120. As a result of the changes in instructional delivery approaches for children with disabilities caused by the COVID-19 pandemic and the potential impact on ensuring LRE, the Department recommends that SEAs review their existing policies, technical assistance activities, and procedures for monitoring their LEAs' compliance with IDEA's LRE requirements to ensure they are sufficient in scope and include information on instructional delivery approaches that were not typically contemplated prior to the COVID-19 pandemic and the potential impact on providing FAPE in the LRE.

Question G-2: Under IDEA, is an LEA obligated to provide special education and related services through virtual instruction upon the parent's request?

Answer: It will depend on whether virtual instruction, in-person attendance, or a hybrid approach are available to all students. These decisions are made by State and local education leaders.[44] If virtual instruction is available to all students in an LEA, the LEA must ensure that a child with a disability whose needs can be met through virtual learning has an IEP implemented that provides all the services and supports necessary for the child to receive FAPE through such service delivery. IDEA also includes "home instruction" in the continuum of alternative placements an LEA must make available to ensure FAPE is available to children with disabilities. 34 C.F.R. § 300.115(b). Home instruction also could be delivered through a virtual, in-person, or hybrid approach. For more information about online instruction for children with disabilities, see OSERS' Dear Colleague Letter on Virtual Schools (Aug. 5, 2016).

Question G-3: How does the Department view virtual instruction under the IDEA's continuum of educational placements for children with disabilities?

Answer: Congress has previously expressed concerns about children with disabilities being excluded entirely from the public school system and about not being able to participate in the general curriculum with their nondisabled peers. Section 601(b)(4) of the Education for All Handicapped Children Act of 1975 (P.L. 94-142); Section 601(c)(2) of IDEA (P.L. 108-446). IDEA has continually reflected a strong preference for educating children with disabilities in regular classes with appropriate aids and supports. See Section 601(c)(5) of IDEA

[44] State and local leaders must make these decisions consistent with Section 504 and Title II. See the discussion in the response to Question A-3 above.

(P.L. 108-446). Specifically, 34 C.F.R. § 300.114 provides that States must have in effect policies and procedures ensuring that LEAs meet the LRE requirements of IDEA by ensuring, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Prior to the COVID-19 pandemic, for schools that did not offer virtual instruction to all children, special education and related services provided virtually in the child's home was generally considered one of the most restrictive environments, as it typically provided little or no opportunity for the child to be educated with nondisabled peers. Virtual learning provided during the pandemic may be deemed less restrictive if it is available to all children and provides the child with a disability, meaningful opportunities to be educated and interact with nondisabled peers in the regular education environment.

H. RESOLVING DISAGREEMENTS REGARDING A CHILD'S EDUCATIONAL PROGRAM

The Department encourages parents and LEAs to work collaboratively, in the best interests of children, to resolve any disagreements that may occur when working to provide a positive educational experience for all children, including children with disabilities, especially in light of the COVID-19 pandemic. To this end, IDEA and its implementing regulations provide specific options for resolving disputes between parents and public agencies, which can be used in a manner consistent with our shared goals of improving results and achieving better outcomes for children with disabilities. Part B of IDEA provides parents with the following options for resolving disagreements about their child's education program: State complaints, mediation, and due process complaints. Any individual or organization, including one from another State, may file a State complaint to resolve allegations that an LEA or SEA has violated a requirement of Part B of IDEA.

Question H-1: If a parent disagrees with the IEP Team's decision regarding compensatory services, can they still file a due process complaint or State complaint?

Answer: Generally, yes. Although the use of IEP Teams to reach decisions regarding compensatory services is intended to remedy the failure to provide appropriate services in order to address the needs of the child and to mitigate the need for additional dispute resolution procedures, like any other IEP Team decision or proposal, the parent has a right to disagree with the IEP Team's decision and to use IDEA's dispute resolution procedures. These include the State complaint procedures pursuant to 34 C.F.R. §§ 300.151 through 300.153; mediation procedures pursuant to 34 C.F.R. § 300.506; and the due process complaint and due process hearing procedures under 34 C.F.R. §§ 300.507 through 300.516.[45] IDEA establishes specific timelines, or permits States to establish timelines, for filing a due process complaint to request a due process hearing or for filing a State complaint. It is important that parents review the State's procedural safeguards notice to ensure they understand the applicable timelines for using these dispute resolution procedures.

[45] Also, see Questions and Answers on IDEA Part B Dispute Resolution Procedures (July 2013). The Center for Appropriate Dispute Resolution in Special Education (CADRE), an OSEP-funded technical assistance center, has developed a series of guides and companion videos to assist parents in understanding IDEA's dispute resolution procedures. These materials are available on CADRE's web site.

Question H-2: May States continue to convene mediation sessions, resolution meetings, and due process hearings virtually, even when schools return to in-person, face-to-face instruction?

Answer: While a face-to-face meeting may be preferable when attempting to resolve disputes that may arise regarding the education of a child with a disability, IDEA and its implementing regulations permit alternative means of participation, upon agreement by the parties. 34 C.F.R. § 300.328. Thus, a State may continue to conduct mediation sessions, subject to the parties' agreement, through alternative means, such as video conferences or conference calls, if the State's procedures do not prohibit mediations from occurring in this manner. Similarly, an LEA may continue to offer to use alternative means for the parties' participation in a resolution meeting, such as video conferences or conference calls, subject to the parties' agreement. With respect to due process hearings on due process complaints, a State could continue to allow video conferences or conference calls to be used, if a hearing officer concludes that such procedures are consistent with legal practice in the State. 34 C.F.R. § 300.511(c)(1)(iii). A hearing conducted virtually must ensure a parent's right to an impartial due process hearing consistent with all requirements in 34 C.F.R. §§ 300.511 through 300.515. This includes the parent's right to open the hearing to the public consistent with 34 C.F.R. § 300.512(c)(2). If applicable, a State-level review of a hearing decision can continue to be conducted virtually if consistent with State procedures. See IDEA Part B Dispute Resolution in COVID-19 Environment (June 22, 2020).