

**MEMORANDUM TO NEW HAMPSHIRE SCHOOL DISTRICTS
REGARDING SPECIAL EDUCATION ISSUES
ARISING FROM THE STATEWIDE SCHOOL CLOSURE
TO COMBAT COVID-19**

March 16, 2020

I. The March 15, 2020 School Closure Order.

On March 15, 2020, New Hampshire's Governor issued the following Executive Order:

1. All public K-12 school districts within the state of New Hampshire shall transition to temporary remote instruction and support for a three week period beginning Monday, March 16th, 2020 and ending Friday, April 3rd, 2020.
2. Each school district shall develop a temporary remote instruction and support plan pursuant to emergency rule ED 306.18(a)(7).
3. Beginning on Monday, March 16, 2020, all public K-12 schools shall be closed to students to allow each school district to develop remote instruction and remote support capacity and transition to temporary remote instruction and support.
4. Each school district shall begin providing temporary remote instruction and support to all students no later than Monday, March 23rd, 2020, with such temporary remote instruction and support to continue through Friday, April 3rd, 2020.
5. The Department of Education shall, as necessary, provide assistance and guidance to school districts in the development and implementation of each school district's temporary remote instruction and support plan.¹

That same day, the Governor and Commissioner of Education held a joint press conference announcing the Order. They explained that, as April 3 approaches, they will decide whether to extend the Order and that an extension may possibly close schools for the rest of the current school year. The Governor seemed to say that individual school districts may choose to remain closed once the statewide shutdown concludes. They offered the State's help for districts to "deeply sanitize" their schools.

¹ This is the verbatim text of the Order with its formatting errors.

During this press conference and in a March 15, 2020 email to school leaders, the Commissioner made the following additional points:

- “Remote learning” consists of a combination of “remote instruction and remote support.” This can be digital, analog, or a hybrid.
- *For students on IEPs*, options include:
 - a. Remote learning.
 - b. Visiting the school in “small cohorts” of 1-5 students.
 - c. Compensatory education once schools reopen.

The Commissioner also said the closure Order applies to private schools, but that was apparently a misstatement. The Governor’s Order explicitly mentions only “public K-12 school districts.” At the moment, the State is allowing each private school to decide whether to close.

The Governor and Commissioner announced at the press conference that the State will relax eligibility criteria for unemployment insurance benefits (for parents who must stay home to care for their children) and child care licensing standards (to benefit parents who must work while their child-age children are home).

The Commissioner’s March 15, 2020 email to school leaders explains how he expects remote learning will be implemented.

In general students in 7th grade or older may be able to access remote instruction and support independent of adult supervision. These students are generally over 12 years of age and would legally be able to responsibly supervise younger children in a baby-sitting situation. Children from K-6th grade, however, will need adult supervision in a remote instruction and support environment. Ideally, this supervision would come from a parent, caregiver or trusted adult in the family.... Where this is not an option, we encourage (and are working with) local community support organizations (clubs, community libraries, etc.) to support families.

The Executive Order references an emergency rule the New Hampshire State Board of Education adopted on March 12, 2020, effective March 27, 2020. The new rule provides as follows:

Ed 306.18. School year.

- (a) Pursuant to RSA 189:1 and RSA 189:24, each school district shall maintain a school year as provided below:

(7) Each school district may conduct instruction remotely when the school has been closed due to inclement weather or other emergency. The district shall create a plan that shall include procedures for participation by *all* students. Academic work shall be equivalent in effort and rigor to typical classroom work. There shall be an assessment of all student work for the day. At least 80 percent of students shall participate for the day to count as a school day. [Emphasis added.] ²

The U.S. Department of Education foresaw the possibility of school closures such as these. In early March 2020, the Department issued a guidance memorandum on the COVID-19 virus and its implications for students who qualify as disabled under the special education laws or Section 504 of the Rehabilitation Act. ³ The memorandum addresses many scenarios, such as school closures for more than 10 days, shorter closures, and sending students home when they are ill.

This memorandum leaves many questions unanswered. It also overlooks the provisions in New Hampshire's special education laws that exceed the requirements of federal law...

Remote learning can take many forms. Examples include "blizzard bags" (which many districts have used when schools are closed for snow), online courses, video conferencing, and school staff members visiting students' homes. The New Hampshire Department of Education posted a webpage describing possibilities. ⁴

Given the diversity of children with disabilities, school districts face myriad challenges implementing the Governor's Order. If private schools that educate students with severe disabilities suspend operations, public schools will face even greater challenges.

We are available to consult with you to discuss the best course of action for each child or category of children. This memorandum paints with a broader brush by pointing out considerations that apply to all children with disabilities.

² Ed 306.18(a)(7) previously stated, "Each school district may submit a plan to the commissioner that will allow schools to conduct instruction remotely for up to 5 days per school year when the school has been closed due to inclement weather or other emergency. The plan shall include procedures for participation by all students. Academic work shall be equivalent in effort and rigor to typical classroom work. There shall be an assessment of all student work for the day. At least 80 percent of students shall participate for the day to count as a school day."

³ U.S Dept. Educ., *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

⁴ <https://www.education.nh.gov/who-we-are/division-of-educator-and-analytic-resources/bureau-of-educational-opportunities/public-school-approval-office/remote-instruction>

II. General principles regarding the duty to provide a FAPE during New Hampshire's school closure.

The special education laws generally require that a school district provide a free appropriate public education (FAPE) to every IDEA-eligible child during the regular school year. Thus, if a school year is shortened for non-disabled students due to an epidemic, one could argue that the same shortened school year applies to IDEA-eligible students, other than those whom the IEP team has determined qualify for extended school year services.

However, New Hampshire's school closure order does not shorten the school year. It alters how services are provided. It relies primarily on remote learning.

Remote learning may deprive a student of a FAPE by contradicting what an IEP promises. It may also deprive a student of a FAPE by failing to provide services reasonably calculated to confer meaningful educational benefit. Lastly, remote learning may deprive a student with disabilities of the right to be educated with nondisabled students to the maximum extent appropriate.

The special education laws and the U.S. Department of Education's guidance memorandum recognize that a departure from the IEP for *up to* 10 school days may not amount to a change in placement requiring consultation with or approval from a student's parents.⁵ However, the Governor's Order closes schools statewide for *more than* 10 school days.

One option the Commissioner suggested is to have children who cannot receive a FAPE via remote learning visit their school in "small cohorts" to receive special education and related services. The rationale is that a small group is less likely to spread infection.

This possibility presents challenges must be considered carefully. First, schools would want to consider the cohort in question and whether staff would be able to ensure "social distancing." If not, it would seem the option should be avoided for that cohort.

Schools should also consider the "optics" of sending some disabled children in to mingle with each other when, at the same time, the school has concluded that it would be unsafe to have other, nondisabled, children mingling with each other. One could imagine claims of disability discrimination, particularly if one of the children in the cohort becomes sick afterwards.

We can also imagine that this approach may run into objections by local teacher associations on behalf of faculty members who are required to staff the gatherings.

We consequently recommend that school districts give careful thought before

⁵ See U.S. Dept. Educ., *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, at Question A-1

insisting that children with disabilities visit their school during the closure period.

III. Our initial advice for complying with the IDEA.

As others have observed, we are now building an airplane while flying it. What follows are our initial thoughts concerning the most common scenarios.

First, when possible, secure parental consent to amend a student's IEP to reflect the services actually provided during the school closure.

The special education laws expect the services a school delivers to coincide with services promised in the student's IEP. Deviations from the IEP invite claims for compensatory education.

The IDEA allows an LEA representative and a student's parent to amend an annual IEP without conducting a team meeting, so long as the IEP team meets at least once annually.⁶ Thus, if possible, amend the IEP to reflect services that will be provided during the school closure.

If the parent agrees to the IEP amendment, issue a written prior notice confirming the agreement. In the final section of the written prior notice, which describes "other factors," note that this is a temporary amendment for the duration of the school closure and that this amendment is not intended to be "stay-put" if a disagreement over the student's next placement arises once schools reopen.⁷

Second, protect student privacy.

One school district has proposed to conduct small classes and group speech/language therapy sessions via audio-video conferences. Each student in the group will participate in the session via real time while sitting at his or her computer. What if a parent is tempted to record the session? What if a parent observing the session at home deduces that children appearing on the computer screen qualify for special education?

Susan Merrell, special education director for the Governor Wentworth Regional School District, has kindly allowed us to share with you a notice we helped her draft. It's in the Appendix to this memorandum. If you send it to parents before their children participate in real-time online group sessions, you will probably be protected from claims that these sessions violate FERPA

⁶ 34 C.F.R. 300.324(a)(4).

⁷ The "stay-put" provisions in the special education laws require that a child remain in his or her last agreed-upon program while a dispute over the IEP or placement is pending. Case law holds that stay-put cannot be used to extend an agreed-upon placement that was temporary from the outset. *Verhoeven v. Brunswick School Committee*, 207 F.3d 1 (1st Cir. 1999). However, parents may want that assurance in a written prior notice before agreeing to a temporary IEP.

Third, to the extent possible, comply with deadlines set by the special education laws.

The New Hampshire Board of Education’s special education rules set many deadlines. Most of those deadlines are measured in calendar days, not school days. Those clocks tick regardless of whether school is in session.

Perhaps we can persuade the State Board of Education to adopt an emergency rule relaxing those deadlines.

In the meantime, remember that the law allows IEP team members (including parents) to participate remotely via video or conference calls, provided parents consent to that arrangement.⁸

Fourth, to the extent possible, comply with the New Hampshire’s rule governing home-based special education.

Ed 1111.04 governs home instruction for special education students between the ages of 6 and 21. Such instruction must include at least: (a) 10 hours per week of “instruction, including special education as specified in the child’s IEP”; and (2) “related services as specified in the child’s IEP.”

The rule reflects a more universal truth: that one hour of direct one-on-one instruction is typically worth two or three hours of group instruction. This truth may be relevant when negotiating temporary revisions to students’ IEPs or claims for compensatory education.

We think that the Governor’s Order supersedes Ed 1111.04(f). This rule says that an IEP placing a student in home instruction must ordinarily comply with RSA 186-C:15 regarding the length of the school day and school year. RSA 186-C:15 states:

I. The length of the school year and school day for a child with a disability shall be the same as that provided by the local school district for a child without a disability of the same age or grade, except that the local school district shall provide an approved program for an extended period when the child's individualized education program team determines that such services are necessary to provide the child with a free appropriate public education.

II. The length of the school year and school day for a preschool child with a disability shall be determined by the child's individualized education program team and shall not be governed by the school district's school calendar. A free appropriate public education shall be provided to a preschool child with a disability as of the child's third

⁸ 34 C.F.R. §§ 300.322(c), 300.328.

birthday and when the child's individualized education program team determines that services are necessary to provide a free appropriate public education to the child.

Ed 1111.04(f) creates an exception to that general rule, allowing the local school superintendent and the student's parents to agree on a number of hours per week that is less than five full school days.

It seems to us that the Governor's Order essentially shortens the school day and school year for *all* students, making Ed 1111.04(f) superfluous during the statewide school closure. However, once the dust settles, IEP teams may conclude that some students who did not qualify for extended school year services before the Governor's Order now qualify for such services this coming summer.

Fifth, remember that not all deviations from the IEP automatically trigger a right to equivalent compensatory education.

Many courts have held that, to warrant compensatory education, deviations from the IEP must be "material," not trivial. When considering whether the shortfall in services was "material," one factor is whether the student made appropriate progress despite the shortfall.

Your school district may reduce its exposure for compensatory education by measuring a student's current levels of performance at the start of the school closure and promptly after the closure ends. If this evidence shows the student made progress during the closure period, any claim for compensatory education may be weaker

Courts have also held that compensatory education is a "discretionary" or "equitable" remedy, to be awarded only when just. Relevant factors include the parents' and school district's relative good faith. The fact that the *State* imposed the school closure order, and that school was closed for *all* students due to a *health emergency*, may be relevant when judging whether to award compensatory services and how much compensatory education a student should receive.

On the other hand, in complaint investigations under Ed 1121, the New Hampshire Department of Education has recently concluded that any shortfall in services warrants an award of compensatory education. As corrective action, the Department ordered the IEP team to meet with the student's parents to decide what the compensatory services should be. This implies that the compensatory services need not mirror services the student missed.

If a parent files a complaint under Ed 1121 seeking compensatory education based on the *State's* school closure order, one could argue that the *State* should provide or fund the compensatory services. The IDEA imposes ultimate responsibility on the State Department of Education to ensure the provision of a FAPE. Part 1, Article 28-a of the

New Hampshire Constitution prohibits the state from imposing new unfunded mandates on school districts that increase local costs.

IV. Helpful resources.

U.S. Department of Education

- *COVID-19 (“Coronavirus”) Information and Resources for Schools and School Personnel*
<https://www.ed.gov/coronavirus>
- *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020)*
<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>
- *Protecting Student Privacy, FERPA and Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions (FAQs)*
https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa%20and%20coronavirus%20frequently%20asked%20questions.pdf

New Hampshire Department of Education

- *Covid-19 (coronavirus) Resources for Schools*
<https://www.education.nh.gov/who-we-are/commissioner/covid-19>
- *Guidance for Remote Instruction*
<https://www.education.nh.gov/who-we-are/division-of-educator-and-analytic-resources/bureau-of-educational-opportunities/public-school-approval-office/remote-instruction>

APPENDIX

_____ School District
Group Services and Online Learning

Dear Parents:

You are receiving this notification because your child's Individual Education Program (IEP) Team determined that the needs of your child were best met through group services. Your child may have group sessions for speech, occupational therapy, physical therapy, counseling, or an academic subject. Groups are configured based on the unique needs of your child as well as other children. Frequently, groups contain students with IEPs and those who do not have IEPs.

We are prepared to continue group services in an online format with the service provider in an effort to honor those group services in the IEP during the school closure. Your child will be able to see the service provider and the service provider will be able to see your child. It is possible, that a parent is home at the time of the service. As a result, the parent of one child in the group may be able to see another child in the group. We ask that you respect the privacy and maintain confidentiality. If you are concerned about this, please reach out to your DPT. The list of DPTs at each school is attached.

The group session will occur in real time. It is illegal in New Hampshire to make a recording without the explicit consent of each party involved. As a result, no recordings can be made of these online sessions.

Please respond to this email to indicate whether you select OPTION 1 or 2 below.

If you respond via email, please include in your email message your full name, your student's full name, and whether you are selecting OPTION 1 or 2.

Your email will be printed and attached to this notification. It will then be placed in your child's special education file. It will be considered an electronic signature.

If returning by U.S. postal mail, please print this email, circle either OPTION 1 or 2, print your child's name, print your name, sign your name, and write beside your signature the date you signed the document.

- **OPTION 1:** You consent to your child participating in the online group sessions during the school closure and further agree that no one in your household will record these sessions.
- **OPTION 2:** You do not agree to your child participating in online group sessions during the school closure.

If you do not respond, the School District will reluctantly assume you prefer OPTION 2.