

Kansas State Department of Education Guidance on Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic

Questions and answers with an asterisk () indicate new material added since the previous version of this document.

The Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act require school districts to provide special education and related services to students with exceptionalities. The Kansas Department of Education Special Education and Title Services team created this document to compile questions we are receiving and provide answers in a uniform and consistent manner. As you all are aware, this is a rapidly changing situation and this document will be continually revised to provide the most up to date information.

Before we get into specific requirements and questions, when thinking about timelines and meetings that must occur, please first consider whether an activity to meet a timeline or a meeting can occur via phone or virtually. Many requirements can be met in this manner.

Special education timelines and requirements are set forth in statute, which was written and enacted by the United States Congress and the Kansas Legislature. **The Kansas State Department of Education (KSDE) does not have the authority to alter or waive these statutory requirements and timelines.**

This document is not intended to provide legal advice. For legal advice on your specific situation, please consult with the attorney representing your school district. Kansas State Department of Education staff are not permitted to provide legal advice.

A. Special Education Legal Questions

Question A-1. What special education and related services must be provided when a school is closed, but has chosen to provide educational opportunities to the general student population during the school closure?

Answer A-1. This is addressed in the answer to Question A-1 in the U.S. Department of Education's Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

Please note that "make every effort to fully implement a student's IEP" once school resumes in the answer to Question A-1, linked above, does not allow a district to decline all services to students with an IEP and only offer compensatory services at a later date.

Question A-2. What steps must be taken to serve a student with a child with an exceptionality once a school closure is over and school days are held under K.S.A. 72-3115 and K.A.R. 91-40-1(eee)?

Answer A-2. The student's IEP Team must make an individualized determination as to whether, and to what extent, it may be necessary to provide compensatory education.

Compensatory services may be necessary when there is a decline in the student's skills that occurred as a result of a student not receiving services during an extended school closure caused by the COVID-19 outbreak.

The student's IEP Team also must review the student's IEP and determine whether any other changes to the IEP are needed as a result of the extended absence from school. An IEP Team may consider using informal assessments or screenings to determine whether there have been changes in a student's performance.

Question A-3: Should all student IEPs be amended in response to special education and related services not being provided in accordance with a student's IEP during an extended school closure caused by the COVID-19 outbreak?

Answer A-3: No. IEP amendments must be individualized decisions, particular to the needs of each child. Missed services should be addressed as outlined in the answer to Question A-2.

Question A-4. What should a school do if it cannot meet the **60 school-day timeline for initial special education evaluations** due to school closure or student illness/absence because of COVID-19?

Answer A-4. K.A.R. 91-40-8(f) requires a school to complete an initial evaluation within 60 school days of the date the school receives written parental consent for evaluation of the child. There are three exceptions to this timeline: a. the school can obtain written parental consent to an extension of time (K.A.R. 91-40-8(f)); or b. the parent repeatedly fails or refuses to produce the child for the evaluation (K.A.R. 91-40-8(g)(1)); or c. the child enrolls in a different school before the evaluation is completed and the parent and new school agree to a specific date by which the evaluation will be completed (K.A.R. 91-40-8(g)(2)).

Note that this timeline is **60 school days**. School day is defined as "any day, including a partial day, that all children, including children with and without disabilities, are in attendance at school for instructional purposes" (K.A.R. 91-40-1(eee)). Thus, if a school is closed due to COVID-19, those days of closure are not counted in the 60-school-day timeline. However, if a school chooses to remain open via delivery of e-learning and tracks attendance to count e-

learning as compulsory attendance seat-time, those days of e-learning do count in the 60-school-day timeline.

If the school believes that it will not be able to meet the 60-school-day timeline for an individual student, the school should ask the parent for written consent to an extension of time (K.A.R. 91-40-8(f)). This request for consent to extend the time to complete an evaluation must be obtained on an individualized basis. It must not become a standard practice nor may standard language be inserted into every prior written notice provided to the parent when first asking for consent to evaluate. The consent must include a specific extension of time that can be calculated and is clear to all parties.

Question A-5. What should a school do if it is closed due to COVID-19 and cannot meet the obligation to have an IEP or an IFSP in effect for a **child transitioning from Part C to Part B** no later than the child's third birthday (Part C to Part B transition)?

Answer A-5. 34 C.F.R. §§ 300.101(b) and 300.124(b) require that an IEP or IFSP is developed and is being implemented by the third birthday of a child participating in Part C programs and who will participate in Part B preschool programs. There is no exception to this requirement. Either an IEP or IFSP must be developed and implemented by the child's third birthday. To accomplish this, teams may conduct meetings virtually via telephone or videoconference.

Question A-6. How does school closure due to COVID-19 affect the school's obligation to provide IEP services to **students who transfer within the state and from out of state**?

Answer A-6. Students with IEPs who transfer to a new school within Kansas or from out-of-state and enroll in the new school within the same school year must be provided with a free appropriate public education (FAPE) including services comparable to those described in the child's IEP from the previous school district until the new school district adopts the child's IEP from the previous school district, or develops a new IEP, or (in the case of an out-of-state student) conducts an evaluation (34 C.F.R. § 300.323(e), (f)). Schools should be careful to not introduce unreasonable logistical barriers on enrollment and keep in mind their obligation to provide FAPE to a student who has transferred into the school district.

If the school is closed due to COVID-19, and does not provide any educational services to the general student population, then the school would not be required to provide services to students with IEPs during that same period of time, including transfer students with IEPs. Once school resumes, the school must provide special education and related services comparable to those described in the child's IEP from the previous school district. In addition, an IEP Team would be required to make an individualized determination as to whether compensatory services are needed due to the missed services caused by the school closure.

Question A-7. What should a school do if it cannot meet the requirement to **review and revise each IEP at least annually** due to school closure or student illness/absence because of COVID-19?

Answer A-7. 34 C.F.R. § 300.324(b)(1)(i) requires each school district to ensure that the IEP team reviews the child's IEP not less than annually to determine whether the annual goals for the child are being achieved and to revise the IEP as appropriate to address any lack of expected progress toward the IEP goals and in the general education curriculum. There is no exception to this annual requirement. To accomplish this, teams may conduct meetings virtually via telephone or videoconference. Any required IEP team members that are unable to attend may be excused by written consent of the parent or written agreement between the parent and the school pursuant to the procedures outlined in 34 C.F.R. § 300.321(e).

***Question A-8.** As IEP Teams are meeting during COVID-19 closures and restrictions, what should the IEP include for the dates of services?

***Answer A-8.** 34 C.F.R. § 300.320(a)(7) requires that an IEP must include the **projected** date for the beginning of the special education and related services, and supplementary aids and services for the child, and program modifications or supports for school personnel. The IDEA does not define the term "projected," however, projected generally means proposed, predicted or estimated. Therefore, because the start date for services is projected and not exact, this regulation has some flexibility. Further, the projected start date does not have to be a specific number, such as March 23, 2020. A projected start date can be a description that can be calculated and is clear to all parties, such as "this service is projected to start on the first day when school resumes and all children are in attendance at school for instructional purposes." Note that data reporting requirements for SPEDPro are different than legal requirements for the contents of an IEP. For SPEDPro data reporting requirements, school districts must report actual dates that services are started and ended (see Question and Answer B-1 below).

***Question A-9.** As IEP Teams are meeting to complete annual IEP reviews and to create initial IEPs during COVID-19 closures and restrictions, should the IEP be written based on the options that will be available for service with Continuous Learning Plans that districts will be developing, or should the IEP be written based on what the IEP Team would have offered as FAPE as if schools were in operation as normal?

***Answer A-9.** An IEP must be written to reflect the services, modifications, supports and placement that are reasonably calculated to provide a FAPE to the individual child. An IEP must not be written to accommodate a temporary situation or based on administrative convenience or lack of time and resources. However, as described in Question and Answer A-5

<https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/#Q-A-5>) within the U.S. Department of Education document “Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak”, an IEP team may create a contingency distance learning plan for a child that could be triggered and implemented during closure due to COVID-19. Such contingent plan may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which services, if any, could be provided at the child’s home. If an IEP team chooses to create a contingency plan for an individual child, it is vitally important to specifically outline in the child’s IEP or a PWN the conditions that would trigger the use of the contingency plan and the conditions that would trigger the cessation/ending of the contingency plan. An IEP team could write the contingency plan in the child’s IEP or alternatively in a Prior Written Notice (PWN). Including the contingency plan in a PWN would eliminate the need to remove the contingency plan from the child’s IEP once it is no longer needed. The contingency plan, whether in the IEP or a PWN, should be time limited and clearly stated as such. In Kansas, parent consent is required to make a material change in service or a substantial change in placement, so if a contingency plan is not time limited, parent consent would be required to end the services and placement in the contingency plan.

Question A-10. What should a school do if it cannot meet the requirement to **reevaluate each child with an exceptionality at least once every 3 years** due to school closure or student illness/absence because of COVID-19?

Answer A-10. K.S.A. 72-3428(h) and 34 C.F.R. § 300.303(b)(2) requires school districts to ensure that a reevaluation of each child with an exceptionality occurs at least once every 3 years, unless the parent and the school district agree that a reevaluation is unnecessary. There is no provision that allows for an extension of time. Further, it would be inappropriate and inconsistent with the law for the parent and school district to agree not to conduct a 3-year reevaluation because of administrative convenience or lack of time and resources. A school district would not be required to conduct a 3-year reevaluation only if one of the following occur: a. the parent refuses to provide consent for the reevaluation, or b. the parent and school district agree that the reevaluation is unnecessary. Whether a 3-year reevaluation would be unnecessary is an individualized determination and must be made based on the needs and unique circumstances of the child.

***Question A-11.** Must reevaluations be completed within 60 school days like initial evaluations?

***Answer A-11.** The 60 school-day time frame applies to initial evaluations. 34 C.F.R. § 300.301(c)(1)(i)-(ii) states “**the initial evaluation** must be conducted within 60 days of receiving parent consent for the evaluation; or **if the state establishes a timeframe** within which the evaluation must be conducted, **within that timeframe.**” In Kansas, our initial evaluation timeline is 60 school days rather than 60 days because the state regulation establishes a 60 school-day timeline at K.A.R. 91-40-8(f).

Both the IDEA and the Kansas Special Education for Exceptional Children Act are silent on a required timeline for completing re-evaluations, except that re-evaluations must occur at least once every 3 years (with parent consent) unless the parent and school agree that a reevaluation is unnecessary (34 C.F.R. § 300.303(b)(2)). This means that the child’s reevaluation must occur within 3 years from the date that the child’s last evaluation was completed, provided that the parent gives consent for the re-evaluation. KSDE’s guidance for the number of days a re-evaluation should take is that it should be a reasonable amount of time, and KSDE has traditionally adopted the 60 school-day timeline as a reasonable time for a reevaluation, unless there are unusual circumstances. **Regardless of the number of days that it takes to complete the re-evaluation, it must occur, with parent consent, within 3 years from the date of the child’s last evaluation unless the parent and school agree that it is unnecessary.** Whether a 3-year reevaluation would be unnecessary is an individualized determination and must be made based on the needs and unique circumstances of the child.

***Question A-12.** Can parents and schools request special education mediation during a school closure caused by COVID-19?

***Question A-12.** Parents and schools can mutually agree to special education mediation and request a mediator from KSDE at any time. Due to COVID-19, beginning March 23, 2020, KSDE SETS staff will be working from home and cannot receive mail or deliveries at the KSDE office building. Any mediation requests mailed or hand-delivered to the KSDE office building during this time will be received processed when KSDE staff resume working in the office building. In order to continue processing mediation requests during this time, KSDE is temporarily allowing mediation forms to be sent via email. Please note that any request for mediation must include completion of all three mediation forms, with signatures of both parties on any of the forms containing a signature line. Once operations resume as normal and KSDE staff are working in the office building, the normal mediation request procedure requiring mediation forms to be mailed or hand-delivered will resume.

***Question A-13.** Can individuals and organizations still send special education formal complaints to KSDE during a school closure caused by COVID-19?

***Answer A-13.** Individuals and organizations (complainants) can send special education formal complaints to KSDE at any time. However, formal complaints are officially filed when they are received by KSDE staff on the Special Education and Title Services Team (SETS). Investigations are opened on the day the complaints are filed. Due to COVID-19, beginning March 23, 2020, KSDE SETS staff will be working from home and cannot receive mail or deliveries at the KSDE office building. Any formal complaints mailed or hand-delivered to the KSDE office building during this time will be officially filed and processed when KSDE staff resume working in the office building. In order to continue processing formal complaints during this time, KSDE is temporarily allowing complainants to send complaints via email. Emailed complaints will be filed and processed when KSDE staff open the email. Once operations resume as normal and KSDE staff are working in the office building, the normal complaint filing procedure requiring complaints to be mailed or hand-delivered will resume.

***Question A-14.** What happens with pending special education formal complaint investigations that started before school closures caused by COVID-19 but are not yet completed?

***Answer A-14.** Complaint investigations that are currently ongoing will continue and investigators will issue complaint reports as usual. Complaint investigators are in current communication with special education directors involved in open investigations in order to gather information about their district's closure, their level of access to documentation, and whether staff are available for interviews. With that information, KSDE will determine whether to permit an extension of the regulatory time limit for completing the complaint investigation due to exceptional circumstances with respect to each particular complaint pursuant to 34 C.F.R. § 300.152(b)(1)(i). If an extension of time is permitted to complete the investigation, both the school district and complainant will be notified.

***Question A-15.** If a school district with a closure caused by COVID-19 has been ordered to complete corrective action as the result of a special education formal complaint investigation, within what timeframe must the corrective action be completed?

***Answer A-15.** Each complaint report that finds a violation of special education law includes required corrective action with specific due dates. Complaint investigators will be mindful of the current COVID-19 restrictions when setting due dates during this uncertain time. In addition, K.A.R. 91-40-51(e)(1)(B) provides that a school district can submit to SETS within 10 days of the date of the complaint report a written request for an extension of time to complete one or more of the corrective actions specified in the complaint report, together with

justification for the request. Some school districts have outstanding corrective action required by complaint reports that were already issued prior to the current COVID-19 restrictions. For those school districts, the KSDE Dispute Resolution Coordinator will continue to monitor the completion of corrective action by their respective due dates. If it is apparent that any particular corrective action cannot be completed by the ordered due date, and the school district requests an extension of time, the KSDE Dispute Resolution Coordinator will work with the school district to permit a reasonable extension of time.

***Question A-16.** Can parents still file notice of special education due process during a school closure caused by COVID-19?

***Answer A-16.** A parent's notice of special education due process against a school district is filed when the school district **receives** the notice (34 CFR §§ 300.508(a)(1), (e), (f); 300.510(a),(b); K.A.R. 91-40-28(c), (d)(2); 91-40-30(a), (d)(1)). If a school district is closed and no staff are present, it is reasonable to conclude that the notice is not filed until such time when staff are present to receive the notice. The timelines for holding a resolution session and appointing a hearing officer would begin when school district staff receive the notice.

***Question A-17.** If a school district receives a notice of special education due process during a school closure caused by COVID-19, how would timelines for holding a resolution session and appointing a hearing officer be affected?

***Answer A-17.** The timelines for holding a resolution session and appointing a hearing officer would begin when school district staff receive the notice (for more on this see Answer A-15). Those timelines are set forth in K.A.R. 91-40-28 for non-expedited due process and in K.A.R. 91-40-30 for expedited due process. Note that "day" means "a calendar day unless otherwise indicated as business day or school day" (K.A.R. 91-40-1(n)). "Business day" is defined as "Monday through Friday, except for federal and state holidays" (K.A.R. 91-40-1(i)). "School day" is defined as "any day, including a partial day, that all children, including children with and without disabilities, are in attendance at school for instructional purposes" (K.A.R. 91-40-1(eee)).

B. Special Education Data Reporting Questions

Question B-1. How should data be reported in the SPEDPro web application to reflect changes based on a school closure caused by a COVID-19 outbreak?

Answer B-1. Reporting actual services delivered to the student in the current school year is still required.

1. End service end dates on the day services cease due to school closings.
2. Resume service start dates on the day schools reopen.
3. Mark "Allow Gap" on those IEPs that result in a gap in service due to school closure.
4. Modify service frequency to reflect additional daily services provided, in cases when additional service days were added to account for missed school days.
5. After schools reopen, modify the school calendars to account for the days closed.
6. Resubmit the student records in the SPEDPro web application.

C. Special Education Fiscal Questions

***Question C-1.** Will there be any waivers or additional exceptions for Maintenance of Effort (MOE) due to school closures?

***Answer C-1.** IDEA does not provide exceptions to IDEA Maintenance of Effort beyond those in specified in 34 C.F.R. § 300.204. Neither KSDE, nor the United State Department of Education have the authority to waive those requirements, but KSDE will closely monitor the situation and notify local education agencies (LEAs) if Congress acts to provide relief to this requirement.

***Question C-2.** Will LEAs receive full categorical aid reimbursement for classified staff if they are unable to reach the full 1,116 hours due to an ordered school closure?

***Answer C-2.** KSDE's School Finance Team will provide districts additional details on how to request a waiver for the 1,116-hour requirement.

***Question C-3.** We use federal aid for some staff wages, including monies earmarked for special education services. Can we still use these federal monies if the services are not rendered?

***Answer C-3.** Federal funds may be used to pay for staff leave, including extraordinary leave, so long as the LEA applies leave policy and decisions consistently, without regard to funding source. (2 C.F.R. §§ 200.430, 200.431)

***Question C-4.** School closures will prevent the LEA from obligating federal funds within the 27-month obligation period. Can we request a no-cost extension for these funds?

***Answer C-4.** KSDE will seek approval from the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) to grant no-cost extensions to Kansas LEAs. LEA requests for a no-cost extension should be submitted to Christy Weiler at cweiler@ksde.org.