

Department of Public Instruction Issues New Special Education Guidance and Notice of Proposed Emergency Rule Regarding Summer School Instruction

The Department of Public Instruction (“Department”) continues to update its guidance to assist school districts in complying with the law and serving the needs of all students during school closures. In addition to updated guidance, the Department also recently posted notice of a public hearing to consider an emergency administrative rule expanding school districts’ ability to utilize virtual instruction during summer school instruction. Both the updated guidance, located at <https://dpi.wi.gov/sped/covid-19-sped-updates-and-resources>, and the subject of the notice of public hearing, located at https://docs.legis.wisconsin.gov/code/scope_statements/all/019_20, will be of significant interest to districts and are summarized below.

CHILDREN TRANSITIONING FROM BIRTH TO THREE

Prior guidance from the Department noted that the requirement to refer and hold transition planning conferences for children transitioning from Birth to 3 programming continues to apply during the current school closures. Districts also must attempt to conduct evaluations of children referred by Birth to 3 agencies and complete those evaluations by the child’s third birthday. However, if the child is unavailable for evaluation due to the current school closures, districts may extend the evaluation timeline, communicate such extension to the parent, and complete the evaluation as soon as possible after the child is available.

The Department’s recent update advises that if a district is able to make an eligibility determination at this time, the district should proceed to develop an IEP “to address the student’s disability-related needs when school resumes” with an implementation date of the child’s third birthday. The district should also make “reasonable efforts” to provide the services set forth in the IEP once the parent has provided consent. If, due to the public health emergency, the District is precluded from providing those services, inform the parent that services cannot be provided but will be provided once the public health emergency ends.

GRADUATION OR REACHING THE MAXIMUM AGE OF ELIGIBILITY

The Department’s recent guidance emphasizes that districts should prioritize all procedural requirements and decision making associated with terminating a student’s eligibility for special education and related services by way of graduation or reaching the maximum age of eligibility. In particular, during school closures, districts must convene an IEP team meeting to review the student’s status and provide the parent or student, if 18 years of age or older, a Notice of Graduation (P-3) or Notice of Ending Services Due to Age (P-4). Districts must also provide “the child with a summary of the child’s academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child’s postsecondary goals.” (34 C.F.R. 300.305(e)(3)) If districts have already held an IEP team meeting to discuss graduation, districts should consider whether an IEP team meeting should be reconvened to discuss whether the student has been “significantly deprived . . . of special education and related services” and that deprivation warrants delaying awarding a regular education diploma. The Department’s guidance does not address the question of whether compensatory education will be due to a student who may have otherwise qualified for compensatory education but who has “aged out” of eligibility under normal circumstances. That remains an open question and further guidance on that question is anticipated. Finally, the

Department notes that if school boards amend district graduation requirements, as long as those requirements comply with Wisconsin high school graduation standards (Wis. Stat. 118.33), diplomas issued under those new requirements will be regular education diplomas.

PROGRESS REPORTS FOR STUDENTS WITH DISABILITIES

The Department's updated guidance makes clear that even during the current school closures districts should continue to measure student progress on IEP goals and objectives and issue IEP progress reports to parents. Progress reports should reflect the fact that the district could not assess progress or the student could not work on a specific goal due to the school closure. The Department notes that reports of progress "may be made via telephone or other electronic means." However, districts should ensure that any communication to parents regarding progress is documented in writing. Districts may subsequently use documentation of progress or lack of progress, and the reason for that lack of progress, to determine the amount of compensatory education provided to the student.

EVALUATING FOR SPECIFIC LEARNING DISABILITIES

Under current law, districts evaluating a student for specific learning disabilities ("SLD") must implement at least two scientific, research-based interventions (SRBIs) and monitor the student's response to those interventions. The Department's recent guidance notes that very few SRBIs can be implemented virtually. Even if an SRBI can be implemented virtually, the district must consider whether district staff are trained to implement the SRBI virtually and whether implementing virtual SRBIs will prevent the district from observing the student, monitoring fidelity and administering probes during the intervention. If the district is unable to implement an SRBI, the IEP team should determine "a timeline to extend the evaluation." The district may document the agreement to extend the timeline on DPI Form M-3 and note the reasons for extending the timeline which include, the public health emergency, the resulting school closures, and the district's inability to implement SRBIs with fidelity.

If a student was receiving SRBIs at the time of the school closures, the IEP team must consider whether it has sufficient data to determine if the student has a SLD. If sufficient data is available, the team should proceed to determine eligibility. If not, the Department notes that the parent and the district may agree to extend the timeline for the evaluation and document that agreement on DPI Form M-3. If the parent does not agree to an extension of the timeline, the district may still extend the timeline "because the student is not available due to the public school closure," and document that extension in a prior written notice sent to the parent.

On April 16, 2020, the Wisconsin Department of Health Services issued Emergency Order #28. That Order directed all schools to "remain closed for the remainder of the 2019-2020 school year." Consequently, when extending timelines for special education evaluations, districts should take into consideration that students may not be available for the remainder of the school year and extensions will most likely need to extend through the end of the 2019-2020 school year. The Department also notes that "[i]t is likely that extensions to complete the evaluation will go into the next school year." However, as evidenced by the Governor's Badger Bounce Back Plan announced April 20, 2020, the situation remains fluid, and districts should keep track of changes in districts' ability to provide services under changing state orders.

BILLING MEDICAID FOR TELEHEALTH

The Department recently provided updated guidance on teleservices and telehealth. The guidance states that districts may now "temporarily" bill Medicaid for school-based services provided by telehealth during the public health emergency. Districts may bill for services that are "currently covered services" and are provided "using real-time technology as long as the service can be delivered with functional equivalence to the face-to face service." This includes audio-only phone communication. Services that can be provided by way of verbal or visual cueing are appropriate for telehealth. In addition, telehealth may be appropriate if the individual receiving services is able to stay near the device being used to provide services and participate in therapeutic or supportive activities. However, services that require physical interaction, hands-on support or physical prompting may not be provided through telehealth. (See guidance locate here: <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/covid-teleservice-considerations.pdf>)

PUBLIC HEARING REGARDING VIRTUAL SUMMER SCHOOL INSTRUCTION

²Under current administrative rule PI 17, a district may only count a student attending online summer session

classes for aid membership if that student is in the seventh, eighth or high school grades and the course meets the criteria set forth in Wis. Stat. 121.02(8)(b). The Department has proposed an emergency rule revising PI 17 and allowing a district to receive state aid for a student in any grade level who is receiving online virtual instruction during summer classes that are necessary for academic purposes.

At this time, no one can predict how long schools will remain closed and whether school buildings will be open for instructional purposes during the summer months. The proposed emergency rule will provide much needed flexibility if schools are closed or if limitations on the size of gatherings will make conducting summer school in traditional brick and mortar schools impracticable. Even if schools are open and summer school can be held, the flexibility to reach a larger group of students via online virtual instruction and receive state aid for that instruction will likely be a beneficial change for districts. If districts wish to comment on the newly proposed emergency rule, the Department is holding a virtual hearing on Thursday, April 23, 2020 from 10:00 a.m. to 11:00 a.m. Call in information may be found here: https://docs.legis.wisconsin.gov/code/register/2020/772A2/register/ss_notices/ss_019_20_notice_of_hearing/ss_019_20_notice_of_hearing. Districts may also submit written comments online at <https://docs.legis.wisconsin.gov/feedback/agencyform?cite=scope/019-20>.

Districts are encouraged to visit the Department’s COVID-19 [webpage](#) to review the numerous resources and frequent updates posted at that site. The Boardman & Clark School Law Team will also continue to provide updates on new guidance, rules and legislation impacting districts.

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