**Protecting the Rights of Students with Disabilities During and After the COVID-19 Educational Disruption**

*Updated 08.17.2020*

Since March, Maine students with disabilities and their families have struggled with the impacts of COVID-19. Given the relative lack of federal and state guidance, there have been far more questions than answers. That is still the case. But as the 2020-2021 school year approaches, one thing is clear – the federally protected rights of students with disabilities have not changed.

Schools across Maine have begun to outline their plans for the current school year. Some were revised soon after they released, which is indicative of the type of change that families can expect. The mix of in person vs. remote instruction will vary from place to place and will change, likely abruptly at times, over the course of the year. But families can take some comfort in the fact that, as schools create plans and contingency plans, they must ensure that students with disabilities have full and equal access to the educational opportunities provided to all students. And they must ensure that students with disabilities receive a free and appropriate public education.

We tried to anticipate and answer some of the questions that will arise at the beginning of this school year. We hope students with disabilities and their families, as well as those working to advocate for them, find this guidance document helpful. Like everything else these days, it is subject to change. Expect an update later this fall.

DRM is available to support students with disabilities during this difficult time. Please do not hesitate to reach out for support - <https://drme.org/contact>.

**What does the red, yellow, green category system mean for my school district?**

Maine established a system to categorize the level of risk for each county for purposes of public schooling. Every two weeks, counties will be identified as red, yellow or green.

* Red suggests that the county has a high risk of COVID-19 spread and that in-person instruction is not advisable.
* Yellow suggests that the county has an elevated risk of COVID-19 spread and that schools may consider hybrid instructional models as a way to reduce the number of people in schools and classrooms at any one time.
* Green suggests that the county has a relatively low risk of COVID-19 spread and that schools may consider in-person instruction, as long as they are able to implement required health and safety measures.

All 16 of Maine’s counties were initially identified as green on July 31st and that status remained the same for the August 14th update. For Maine Department of Education’s posting of risk levels, visit: <https://www.maine.gov/doe/framework/part-I>

MDOE made clear that the “recommendations are advisory” and “Maine DHHS and Maine CDC will not review SAU-specific plans.” This means that in person instruction is neither prohibited when a county is categorized as red, nor required when it is green. These decisions have been left up to local school districts.

**What health and safety measures will be required for all schools?**

MDOE has established minimum health and safety guidelines for returning to school in the fall. These include:

1. Symptom Screening: Families must conduct self-checks for symptoms daily. Schools must provide clear and accessible guidance to support families in this effort.
2. Physical Distancing and Facilities: 6 feet of physical distancing is required, but 3 feet of distancing is acceptable between students when they are wearing masks.
3. Masks/Face Coverings: Adults are required to wear a mask/face covering. Students age five and above are required to wear a mask/face covering. Masks are recommended for children ages two to four. Face shields are an alternative for students with medical, behavioral, or other challenges who are unable to wear masks/face coverings.
4. Hand Hygiene: All students and staff must wash hands or use sanitizing gel upon entering the school, before and after eating, before and after donning or removing a face mask, after using the restroom, before and after use of playgrounds and shared equipment, and upon entering and exiting a school bus.
5. Protective Equipment: Any staff supporting students in close proximity must take additional precautions, including eye protection.
6. Return to School after Illness: Sick staff members and students must use home isolation until they meet criteria for returning to school.

\*For more information on MDOE health and safety guidance, visit: <https://www.maine.gov/doe/framework/part-I>

**Are there minimum standards for the hybrid and all-remote models?**

Schools across Maine are developing plans for the return to school. The vast majority of these plans can be described as hybrid models – a mix of in person and remote instruction. MDOE has outlined some basic expectations for hybrid and remote learning models, which include:

1. Instruction: Learning opportunities must be aligned with the Maine Learning Results and include forward movement along learning progressions or through grade level expectations as well as reinforcement of prior learning and necessary intervention.
2. Daily Schedule: The schedule should include live daily contact between teachers and students, direct instruction, independent student work, and opportunity for questions and feedback during teacher office hours.
3. Access and Student Support: Schools must provide students with necessary materials and resources to support engagement in lessons. Schools should plan to meet the needs of all students including identifying and addressing social/emotional, behavioral, and mental health concerns. Services and accommodations must be adapted for a remote learning environment.
4. Engagement: Schools must track attendance each day and develop a plan to address lack of attendance/engagement. Schools must have a plan for regular/ongoing assessment of student learning and engagement.
5. Grading and Achievement: Consider the uneven/inequitable conditions in which students will be accessing their educational experiences – including inequitable access to: supervision, technology, materials, quiet study space, adult support, and other basic needs.
6. Basic Needs: Schools should have plans to communicate with families and plans to provide access to school meals even when instruction is remote.

In addition to these expectations, MDOE has encouraged schools to develop plans for transitioning between in-person and hybrid models and between hybrid and remote learning models, in order to provide continuity of education for all students.

\*For more information on MDOE expectations for hybrid and remote learning, visit: <https://www.maine.gov/doe/framework/part-IV>

**Our school district is asking us if we plan to keep our child home. They gave us the option of remote learning or home schooling – what is the difference?**

Generally, remote learning means that the school will provide your child with an education, just from a distance – see MDOE’s expectations for remote learning above. With homeschooling, your local school district has little to no obligation to provide an education or support your efforts to do so. You take the responsibility of providing an education from your local school district. MDOE explains that: “Parents take full responsibility for the child while providing home instruction—they legally direct the child’s education by choosing the curriculum, facilitating the process and determining academic needs. Home instruction is funded exclusively by the parent.”

Decisions about whether to home school a child should never be made under duress. If you have health and safety related concerns about your child returning to in person instruction, the best course would be to choose the remote learning option and work through the IEP team process to ensure that your child can continue to receive a free and appropriate public education in a remote setting. As discussed below, if a school is giving parents a choice between remote learning and in person instruction, this choice must be made available to parents of students with disabilities on equal terms.

**What is the impact on my child’s special education services if I choose to home school/instruction?**

Children who are home schooled do not have a right to receive a free appropriate public education (FAPE). They do not have access to the special education and related services that publicly enrolled students have. And they will no longer have an Individualized Education Program (IEP). Make sure you fully understand these impacts and have a plan to address your child’s needs before making the choice to homeschool.

If you have already indicated that you will be home schooling, and you have changed your mind, write to the school and indicate that you are reenrolling your child and asking for an IEP team meeting to discuss developing a plan to provide them with a free and appropriate public education.

**Our school district said that if we choose an all-remote learning plan, they will not be offering a free appropriate public education (FAPE). Is this OK?**

No. The school district must provide a FAPE for students with disabilities whether instruction is remote, hybrid, or in person. The IEP team should meet to design a plan that provides a FAPE. The methods used to deliver a FAPE may differ, but the rights of students with disabilities must not be diminished as a result of selecting an option generally available to all students.

At least one school district has informed parents that it plans to offer FAPE to all students with disabilities only through in person instruction, and if parents choose the remote option, that will be seen as declining the offer of a FAPE and so no special education services will need to be provided remotely. This approach is problematic. If your district is taking this approach, consider requesting an IEP team meeting. At this meeting, you should explain the reasons why you elected the remote or hybrid option presented to all families and request that the IEP team develop a plan to provide a FAPE using the selected model. If they refuse, consider reaching out to DRM for an intake appointment.

Under no circumstances should a school district ask you to sign a waiver as a condition of receiving a public education. If you are asked to sign a waiver in order for your child to receive educational services, ask the district to explain its proposal in a written notice and consider contacting DRM for an intake appointment.

**Our school said that they will continue to try to “meet the intent of the IEP” if the school is either remote or hybrid at any point in the year. Is that all they have to do?**

No. Schools are required to provide a free and appropriate public education. A FAPE is an education delivered in conformity with the IEP. The failure to implement an IEP as written will very often result in a denial of a FAPE. Some families may have heard last year that, during remote instruction, schools just had to meet the intent of the IEP. This language came from early guidance from the MDOE, which read: “For students with IEPs, SAUs must ensure that each student is provided the special education and related services sufficient to meet the intent of the student’s IEP developed pursuant to the IDEA, to the greatest extent possible, in light of the suspended classroom instruction impacting all our students.” This language is not found in the Individuals with Disabilities Education Act. And while we understand how this might have been a reasonable goal in March, as schools shut their doors without much time to plan, it is clearly an inappropriate standard today. Some schools have used this language to excuse minimal efforts to provide specialized instruction from March through the present. As indicated below, many students will be in need of compensatory education as a result.

To be clear, some districts did provide special education and related services to the greatest extent possible following the March closures. But some provided no special education or related services at all. The FAPE standard was not altered following the emergency closures in March. And it has not been altered since. Schools must fully implement IEPs, and, when that is not possible, they must work with parents to develop IEPs that can be implemented and which also provide a FAPE.

**My child has not been able to access their education during the COVID-19 disruption because all-remote learning does not work for them. Can I request in-person services?**

Yes. The only way that some students will be able to receive a free and appropriate education is through in-person services. If your child was unable to access remote instruction, and your school plans to provide instruction through a hybrid or remote model to start the year, you should request an IEP team meeting to discuss developing a plan to provide a free and appropriate public education, which will include special education and related services provided in person.

Given that all of Maine’s counties are currently categorized as green for public education, there should be no school district that refuses to provide in person instruction to students who, due to the nature of their disabilities, cannot benefit from remote instruction. Even if schools are downgraded to yellow, or red, this should not prevent the provision of in person instruction to the students who need it to receive a FAPE. To be clear, very real health and safety concerns surround any in person interactions. But it is much easier to develop a plan to provide in person instruction to a small number of students safely than it is to develop a plan to return all students to school consistent with current health and safety guidelines. Schools and families should work together to develop a plan to provide in person instruction safely to students who will be effectively denied access to an education without it.

**My school district is using a hybrid model, and they say that students can only receive in person instruction two days each week. They want to change the IEP to reflect the new two day per week schedule. Is this OK?**

Many schools will be seeking to change IEPs to reflect the services they have decided they will provide to all students. This is not an appropriate approach. Parents should work to ensure that the IEP process remains individualized and is not driven by considerations unrelated to student needs.

Some students may be able to receive a FAPE through a hybrid model with two days per week of in person instruction and a robust remote learning component. Other students will need much more. The IEP team must determine how to deliver a free and appropriate public education through a hybrid model based on the individual needs of the student.

In cases where the IEP team reaches a determination that appears likely to provide a free and appropriate public education through a hybrid approach, then parents can certainly agree to the IEP changes that reflect that. But when parents are not confident that the proposed IEP will meet their child’s needs, and where consensus on an appropriate plan cannot be reached, parents should insist on prior written notice of the proposed change and should consider challenging the proposal through the dispute resolution procedures available through MDOE. While this dispute is being resolved, the school must implement the last agreed upon IEP – this is the stay-put IEP.

Another way to think about the need for “more” school days when a school is only offering two days of instruction, is through the lens of extended school year. Many families know ‘extended school year’ (ESY) as programming during the summer to address a student’s regression. But ESY is not limited to summer services. ESY services are special education and related services that are necessary to provide FAPE to a student and they take place outside of normal school hours. School districts cannot unilaterally limit the type, amount, or duration of ESY services. So if a student needs 4 days per week of in person instruction in order to receive FAPE and the normal school hours are 2 days per week, an additional 2 days per week could be added to the student’s IEP as ESY.

**My school district wants to include a contingency plan or ‘remote learning plan’ in the IEP in case we need to pivot to a remote or hybrid model. Is this OK?**

Yes, if this is done through the IEP team. It is very likely that some school districts will experience disruptions after a local outbreak during this school year. Planning for this eventuality is appropriate. Instead of drafting two IEPs, DRM believes that it would be appropriate to include this contingency planning within the IEP document itself. For example, the IEP team could develop a plan that would go into effect in the event that the county is categorized as red and the school moves to an all remote model. However, as indicated above, for the students who cannot receive a FAPE through remote means, a contingency plan to provide remote instruction would not be appropriate.

If IEP teams take this approach, DRM recommends that families insist that the contingency plan is clearly delineated in the IEP. It could be included in the accommodations section. Families should not agree to any plan that is unclear or to a proposal to develop a plan later, outside the IEP team process. To be clear, families and schools are able to reach agreements without holding an IEP team meeting. But those agreements still need to be documented in a written notice which identifies any proposed changes and the process used to develop the proposal.

Whether developed at an IEP team meeting or as part of an agreement outside an IEP meeting, families should insist on a clear plan because otherwise it is impossible to provide informed consent or participate meaningfully in the process. Phrases such as “as needed” or “as available” or “to be provided at a frequency to be determined later” should be avoided in these contingency plans. Families should also ensure that the contingency plan is clearly identified as temporary. And finally, there should be a trigger to bring the IEP team back together in the event the plan is in place for longer than an agreed upon amount of time, perhaps 30 calendar days, to address the continued provision of a FAPE.

**My school district said they cannot provide in person instruction to my child because that would not be the least restrictive environment. Is that true?**

DRM has learned that some schools have said they cannot provide in person instruction because that would violate the mandate to educate students in the least restrictive environment. This seems to be a response to parents who are pushing for in person instruction for a child with a disability when the school has yet to resume in person instruction for all students. This is a misapplication of the LRE mandate, which is designed to ensure that students with disabilities are educated with their peers to the maximum extent appropriate.

As indicated above, for students who have been unable to benefit from remote instruction or students for whom the continuation of remote only instruction will result in the denial of a FAPE, then in person instruction should be provided. If the school district is still in a remote only model, providing necessary in person services to a student with a disability does not violate the LRE mandate. That student would be at home with no actual contact with peers in a remote model. During in person instruction, they would still have no actual contact with peers. And there may be ways in which, with adult support and specially designed instruction, students who were unable to participate meaningfully without these supports, may be able to do so, leading to increased virtual interaction with peers.

**My school district has said that my child will not be able to attend classes in the general education setting because the students must be in pods or cohorts. Have requirements for the least restrictive environment changed?**

No. LRE requirements have not changed. Schools should consider the use of push in services to address the need to comply with health and safety recommendations to keep student groups together as much as possible. The best way to address any LRE concerns when creating pods/cohorts for a hybrid instruction model is to ensure that no students with disabilities are in segregated student groups or cohorts. Specialized instruction can be pushed into the general education setting when necessary to support access to the general education curriculum. If your school district is using pods/cohorts in a way that moves your child to a more restrictive setting, you should think about using the dispute resolution process with the MDOE to trigger stay put protections and you should consider calling DRM for an intake appointment.

**I have tried for months to get an IEP meeting with my child’s school, but they have not scheduled a meeting. What can I do?**

While the vast majority of IEP meetings will continue to be held virtually for the foreseeable future, the IEP team process, including annual IEP meetings, should continue. In addition, most IEP teams will need to meet early this school year to discuss the impacts of the educational disruptions to date and develop a plan to address them.

If you think an IEP meeting is necessary, make that request in writing and explain the reasons for your request, indicating you recognize that while school buildings remain closed, IEP meetings will be held by phone or through other remote means. Requesting a meeting requires the school to either: a) hold the meeting as requested; or b) issue a Written Notice explaining why they are refusing to hold an IEP meeting. This decision must be individualized.

If your request for a meeting is denied, especially if you feel that you are not able to participate as a member of the IEP team and/or your child’s program will not provide them with FAPE without holding an IEP meeting to address concerns, you should consider using the dispute resolution mechanisms through MDOE.

**My child is unable to wear a mask and the school has indicated that if children do not wear masks then they cannot come to school. What should I do?**

Mask wearing is an important health and safety measure. But there are some children who are unable to wear masks due to the nature of their disabilities. CDC guidelines indicate that those who cannot take a mask off on their own, for example, should not wear a mask. In Maine, clear face shields are identified as an alternative for students who cannot wear a mask. If there is a disability related reason that a student cannot wear a mask or a clear face shield, it may be important to obtain medical documentation that outlines those limitations. In these circumstances, the IEP team should work to determine how best to provide accommodations that will ensure that the student can continue to have equal access to their education and receive a FAPE.

Also, schools should be aware of the difficulty that face masks present for students who are Deaf or hard of hearing and must take steps to address any barriers to effective communication through the use of clear facemasks, face shields, or other means.

Finally, schools should be developing plans to teach students about the use of face masks. Complying with this new expectation is a skill and for many students it will need to be explicitly taught and regularly reinforced. Some students will need social stories to prepare them for many aspects of the return to school, including what to expect around the use of face masks. Hopefully schools find ways to make this fun and exciting – maybe students can decorate their own masks, or choose their favorite superhero? Schools should also be working with families before school begins to teach these expectations and support students who may have difficulty complying with this new requirement.

**During the COVID disruption from March until now, my child missed out on many hours of instruction and related services that are in her IEP. What can I do?**

There are many ways to approach this issue. At a minimum, assessments should be conducted to establish the student’s present levels of performance with regard to progress in the general education curriculum and their IEP goals. And the IEP team should meet to review the results of these assessments, as well as information provided by the parent, to begin to understand the impact of the COVID-19 educational disruption on the student. If the student needs remediation and/or the team is worried that the student will continue to regress, the IEP team will need to develop a plan to address the learning gaps that have emerged. This could be through additional special education and related services in the IEP, through ESY to be provided during the school year, or described as compensatory education or COVID-19 impact services. It does not really matter what IEP teams call it – what matters is that a meaningful plan is developed to address any lack of progress in the general education curriculum and/or toward IEP goals.

To address the disruption to students’ services and the need to make up for that loss, USDOE provided guidance on compensatory education in March. USDOE stated that schools must make an individualized determination whether and to what extent compensatory services may be needed – MDOE has provided the same guidance since. The goal of compensatory education is to put the student in the place they would have been had FAPE been provided.

Some students with disabilities are going to need a lot of services and detailed planning and coordination of supports across settings just to prepare them to return to a school building. But other students with disabilities may not need much more than equal access to the whole-school approaches developed to support all students when they return from this educational disruption. Some students will need significant services targeted to recoup skills they have lost. Other students may have been able to maintain skills. The approach to compensatory services will need to be individualized and designed to address each student’s specific needs.

**Our school district said that they will be delaying evaluations under the IDEA until these activities can be conducted in person. Is this appropriate?**

No. The evaluation requirements under the IDEA have not changed. And schools will need to proceed with initial evaluations and reevaluations. Given that many schools stopped these activities in March, there will be a significant backlog of evaluations that are past due and an incentive for schools to push off new requests and delay important child find activities. There will also be many students who are presenting with new needs that may have arisen since March. And there will be students who need targeted evaluations, such as functional behavioral assessments and OT evaluations, to support a return to school in a very different environment.

When these new circumstances are considered in light of existing resource limitations in some areas of the state, it is clear that it is going to be very difficult for many school districts to meet their obligations related to evaluations under the IDEA. But adequate and timely evaluations are the foundation upon which an appropriate IEP sits and so these activities must continue. That said, there are going to be limitations on how some aspects of evaluations are conducted. And good evaluation reports will note any limitations and the relative impact on the evaluation, and potentially recommend that follow up activities are conducted in the future.

**Note on other laws protecting students with disabilities:**

The focus of this guidance document is on the Individuals with Disabilities Education Act and its guarantee of a free appropriate public education in the least restrictive environment, with a particular focus on the start of the 2020-2021 school year. It is important to note that Section 504 of the Rehabilitation Act of 1973 also requires school districts to provide a free and appropriate public education to eligible students with disabilities. While the procedural protections under Section 504 are more limited, some of the information provided above could apply generally to a student on a Section 504 plan. In addition, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, as well as the Maine Human Rights Act, prevent schools from discriminating against children with disabilities and require schools to ensure that students with disabilities have an equal opportunity to participate in and benefit from all programs and activities. Subsequent guidance will address these important civil rights protections in more detail.

**State and Federal COVID-19 Guidance**

MDOE: “Framework for Returning to Classroom Instruction,” updated 8/14/2020, available at: <https://www.maine.gov/doe/framework>

MDOE: Office of Special Services guidance, available at: <https://www.maine.gov/doe/learning/specialed/director>

USDOE: “Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak,” (March 2020), available at: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

**Additional Links and Resources**

Disability Rights Maine:

<https://drme.org/news/2020/covid-19-resources-for-pwd>

Maine Association of Family Organizations (MAFO):

<https://www.maine.gov/dhhs/ocfs/cbhs/family/mafo/index.shtml>

United States Department of Education:

<https://www.ed.gov/coronavirus>

Maine Department of Education:

<https://www.maine.gov/doe/covid-19>

<https://www.maine.gov/doe/schools/schoolops/homeinstruction>

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