

# DOE Provides Additional Guidance and DPI Streamlines Waiver Process, Provides Guidance

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Posted By: Ryan P. Heiden

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## **The Department of Education Provides Additional Guidance for Educating Students with Disabilities**

### **DPI Streamlines Waiver Process for Hours of Instruction and Provides Guidance as to the Waiver Process for Hours of Instruction**

#### **Department of Education Update**

On March 21, 2020, the Department of Education's Office of Civil Rights ("OCR") and Office for Special Education and Rehabilitative Services ("OSERS") issued guidance to address concerns how local school districts can provide virtual and online instruction while ensuring compliance with the IDEA, Section 504, and Title II of the ADA.

Specifically, the OCR and OSERS noted that, even in these unprecedented times, FAPE must still be provided; however, federal disability law provides local institutions flexibility in determining how to provide FAPE, and federal agencies understand that the provision of FAPE may look different in present times than pre-pandemic times. With these principles in mind, the OCR and OSERS indicated that creativity at the local level may be required to ensure maximum compliance with federal disability law, including through the provision of online or virtual learning services.

For example, the OCR and OSERS indicated technological barriers to FAPE can be overcome in untraditional ways, such as providing a single assignment to all students in a particular class and following-up with special education students on an individualized basis to assist with access to and understanding of the assignment (e.g., reading a non-Braille assignment out loud to a blind student to allow the student to access an otherwise inaccessible assignment). The OCR and OSERS also noted that many disability-related modifications and services can be effectively provided online, such as extensions of time for assignments, videos with accurate captioning or embedded sign language, accessible reading materials, and many speech or language services via video conferencing. Additional online resources that were identified include teletherapy, tele-intervention, online data tracking and documentation, and virtual meetings. To the extent use of these virtual and online services do not provide all required services in a timely fashion, local school districts must make individualized determinations whether and to what extent compensatory services may be needed when schools resume normal operations.

Nonetheless, schools must be diligent in continuing to provide educational services to all students, including special education students, even if those services are solely provided virtually or online. While certain services may be delayed or unable to be provided, the vast array of online and virtual resources, when coupled with creative approaches, permits local school districts to substantially comply with federal disability law.

Our clients should heed this guidance and take all measures necessary to the best of their ability to continue providing services to all of their students, including school districts that may have opted not to provide any services during this closure due to the misbelief that virtual and online services are incompatible with federal disability law. Complying with the OCR's and OSERS's guidance is likely to lessen the need for compensatory services, lessen the likelihood of legal challenges, and lessen the overall burden school districts may otherwise face upon normal school operations resuming.

In keeping with the guidance provided by OCR and OSERS, school districts should maintain communication and collaboration with parents and continue to document compliance with IEPs or deviations from specific programming and services. School districts must remember that communications with parents, to the extent the school district is unable to provide services, should include the Procedural Safeguards Notice and prior written notice. School districts should also engage in progress monitoring to document progress toward goals and progression in curriculum offered through virtual instruction.

### **Wisconsin Department of Public Instruction Update**

On March 21, 2020, Governor Tony Evers issued Emergency Order #10 directed at suspending certain Department of Public Instruction ("DPI") administrative rules.

Importantly, with respect to the hours of instruction requirements, Emergency Order #10 indefinitely suspended the procedural steps required by both school districts and the DPI under the waiver process for hours of instruction for public schools. Following Emergency Order #10, local school districts must now only provide information required by the DPI at the time of submission as opposed to the detailed information and documentation typically required by the Wisconsin Administrative Code (e.g., a record of a public hearing indicating the response from the community to the waiver request, a description of the actions of the school board to make up the hours of instruction, etc.). School districts seeking such a waiver should contact the DPI when determining what information, if any, must be submitted as part of the waiver process. Emergency Order #10 also permits the DPI to grant waivers for hours of instruction to public schools utilizing factors other than those set forth by the Wisconsin Administrative Code. The goal of these exceptions is to streamline the waiver process for both public school districts and the DPI.

Per state law, all school districts must still individually request a waiver of the instructional hours requirement, but the DPI has confirmed it will waive the hour requirement for any district that requests such a waiver due to the ongoing COVID-19 public health emergency.

To begin the expedited waiver process, districts can access the waiver form on the DPI's website, available [here](#).

In order to complete the waiver form, school districts are required under Wis. Stat. § 118.38(1)(b) to hold a public hearing regarding the waiver request. The date of the public hearing must be documented in the waiver form.

The statutory requirement that a school board hold a "public hearing" on the waiver can be fulfilled by holding a board meeting where one of the agenda items is the school board's consideration of whether to request such a waiver from the DPI. The board meeting can be a regularly scheduled board meeting, or a special board meeting can be called if needed. A quorum of board members must be present in order for the board to vote on whether to request the instructional hours waiver.

As many school districts are moving to virtual board meetings, the DPI has specifically advised that a board meeting where the public hearing of the waiver occurs may be virtual or teleconferenced, so long as the meeting is properly noticed under Open Meetings Law, which includes ensuring the notice contains proper instructions to enable the public to access the board meeting.

We continue to monitor guidance provided by the DOE, OSERS, and DPI, as well as activity by the Legislature that may provide further clarification to schools and will continue to bring any notable guidance to your attention.

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