

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

*2<sup>nd</sup> Edition*

*Maine Parent Federation Online Training*

*8/17/2020*



*Advancing the Rights of People with Disabilities Since 1977*

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DISCLAIMER: This presentation and any accompanying materials are intended as an introduction to the legal rights of students in Maine. Nothing in this presentation should be considered legal advice. No attorney client relationship is created through this presentation.

# Where are we now?

- Since March, Maine students with disabilities and their families have struggled with the impacts of COVID-19 on their education.
- Plans are coming out now across the state: hybrid, remote, reduced school weeks, etc.
- Not a lot of federal or state guidance regarding the education of students with disabilities, but one thing is clear – the federally protected rights of students with disabilities have not changed.

# Overview

1. Walking through the 8/17/2020 DRM Guidance
2. General slides on students' rights
3. Q and A and Discussion

## DRM Guidance from August 17, 2020

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

For a copy of the Guidance, visit [DRME.ORG](https://drme.org) and click the 'COVID-19' link.

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

- Counties will be identified as either red, yellow or green. And the list will be updated every 2 weeks.

Red = high risk of COVID-19 spread and that in-person instruction is not advisable.

Yellow = elevated risk of COVID-19 spread and that schools may consider hybrid instructional models.

Green = 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.

## *What does the red, yellow, green category system mean for my school district? (cont.)*

- All 16 counties were initially identified as green on July 31st (same for 8/14)
- MDOE: “recommendations are advisory” and “Maine DHHS and Maine CDC will not review SAU-specific plans.”
- So...in person instruction is neither prohibited when a county is categorized as red, nor required when it is green. These decisions are being left up to local school districts.

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

- Symptom Screening
- Physical Distancing and Facilities
- Masks/Face Coverings
- Hand Hygiene
- Protective Equipment
- Return to School after Illness

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

- Instruction:
  - aligned with the Maine Learning Results
- Daily Schedule:
  - live daily contact between teachers and students,
  - direct instruction,
  - independent student work, and
  - opportunity for questions and feedback during teacher office hours.

## *Are there minimum standards for the hybrid and all-remote models? (cont.)*

- Access and Student Support:
  - necessary materials and resources to support engagement in lessons.
  - identifying and addressing social/emotional, behavioral, and mental health concerns.
- Engagement:
  - track attendance each day and develop a plan to address lack of attendance/engagement.
  - have a plan for regular/ongoing assessment of student learning and engagement.

## *Are there minimum standards for the hybrid and all-remote models? (cont.)*

- Grading and Achievement:

“This plan should take into consideration 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.”

- Basic Needs:

- Communication plans
- plans to provide access to school meals

*Are there minimum standards for the hybrid and all-remote models? (cont.)*

The unexpected is expected.

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.

*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
- With homeschooling, you take the responsibility of providing an education from your local school district.
- MDOE: “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.”

*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? (cont.)*

- 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 FAPE in a remote setting.

## *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).

*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.

*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? (cont.)*

- 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 be provided remotely.
- This approach is highly problematic.

## *No FAPE in remote learning? (cont.)*

- 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 the IEP as written will very often result in a denial of a FAPE.

## *...meet the intent of the IEP (cont.)*

- 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.”
- The FAPE standard was not altered following the emergency closures in March. And it has not been altered since.

*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 FAPE is through in-person services.
- 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.

## *...in-person services (cont.)*

- All Maine counties are “green” so there should be no school district that refuses to provide in person instruction to students who 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.

*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.
- Parents should work to ensure that the IEP process remains individualized and is not driven by considerations unrelated to student needs.
- The IEP Team must determine how to deliver a FAPE through a hybrid model based on the individual needs of the student.

## *...hybrid model (cont.)*

- 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.

## *ESY in September?*

- 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 done through the IEP team process.
- Planning for likely disruptions is appropriate.
- Instead of drafting two IEPs, DRM believes that it would be appropriate to include this contingency planning within the IEP document itself.

## *...contingency plan (cont.)*

- contingency plan is clearly incorporated into the IEP. It could be included in the accommodations section.
- insist on a clear plan that is clearly identified as temporary
- 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.
- consider 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

*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?*

- 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.
- 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.

*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? (cont.)*

- 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.
- And there may be ways in which, with adult support, students can actually participate meaningfully in the remote instruction being offered, gaining at least virtual contact 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.
- 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.
- It would be best to avoid any segregated student groups or pods/cohorts in hybrid models.

## *LRE and pods/cohorts (cont.)*

- 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 proposing to use 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

*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?*

- IEP meetings will continue to be held virtually for the foreseeable future.
- IEP team process, including annual IEP meetings, should continue.
- 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.

## *IEP meetings (cont.)*

- If you think an IEP meeting is necessary, make that request in writing and explain the reasons for your request
- 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. And can be challenged.

*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.

## *...masks (cont.)*

- If there is some 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.

## *...masks (cont.)*

- 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.

## *...masks (cont.)*

- Schools should be developing plans to teach students about the use of face masks.
- Complying with this new expectation is a skill that for many students it will need to be explicitly taught and regularly reinforced.
- Some students will need social stories and other pre-teaching to prepare them for many aspects of the return to school, including what to expect around the use of face masks.

*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?*

- At a minimum, assessments should be conducted to establish the student's present levels of performance with regard to the 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.

## *Compensatory education (or COVID impact services) (cont.)*

- If the student needs remediation, 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.

## *Compensatory education (or COVID impact services) (cont.)*

- USDOE stated that schools must make an individualized determination whether and to what extent compensatory services may be needed
- The goal of compensatory education is to put the student in the place they would have been had FAPE been provided.

## *Compensatory education (or COVID impact services) (cont.)*

- Some students 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.
- Other students with disabilities may not need much more than equal access to the whole-school approaches developed to support all students
- 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.
- There will be a significant backlog of evaluations
- Many students will be 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.

## *Evaluations (cont.)*

- 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.

## *Other laws protecting students with disabilities*

- Focus of this guidance and this presentation is on IDEA
- But section 504 also has a FAPE requirement
- Section 504 and the Americans with Disabilities 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.

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## The Individuals with Disabilities Education Act *in 1 slide...*

**IDENTIFY** children suspected of having a disability and needing services

**EVALUATE** them in all areas of suspected disability to determine if they need special education

**SERVE** students by providing FAPE in the LRE.

### *Free Appropriate Public Education*

Provided in conformity with Individualized Education Program (IEP) and “reasonably calculated to enable a child to make progress appropriate in light of their circumstances”

### *Least Restrictive Environment*

Students must be educated, to the maximum extent appropriate, with non-disabled peers.

**COMPLY** with procedural safeguards

# Free Appropriate Public Education

*Rowley - 458 U.S. 176 (1982):*

Not required to maximize potential. Must provide a program based on the Student's unique needs and reasonably calculated to provide some educational benefit.

*Endrew F. - 137 S. Ct. 988 (2017):*

1) FAPE typically means providing services “reasonably calculated to permit advancement through the general curriculum”;

2) If that is not reasonable for a student, FAPE = “reasonably calculated to enable a child to make progress appropriate in light of their circumstances”

\*but must be “appropriately ambitious,” and designed to help students meet “challenging objectives.”

# Least Restrictive Environment

- Schools must ensure that “to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled.”
- Schools may only remove children with disabilities from regular education environments if “education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”.

# Individualized Education Program

Written statement developed, reviewed and revised by a required, team process, includes (among many other things):

- Statement of present levels of performance
- Statement of measurable annual goals
- Explanation of LRE
- List of special education and related services
- Description of accommodations, modifications, supplementary aids and services
- Transition planning for high school students

# Individualized Education Program (cont.)

- Developed through a team process
  - Parent (or surrogate parent)
  - Student
  - Teachers (including regular ed.)
  - Administrator (someone knowledgeable about program options and that can commit resources)
  - Other individuals as determined by school or parent
  
- Revised at least annually
  
- Team must consider (among other things)...
  - Strengths of the child
  - Parental concerns
  - Academic, developmental and functional needs
  - Need for positive behavior interventions and supports

# Specially Designed Instruction

- Specially designed instruction: means adapting, as appropriate to the needs of the child, “the content, methodology, or delivery of instruction” in order to:
  - Address the unique disability related needs of the child

AND

- “To ensure access of the child to the general curriculum, so that the child can meet the educational standards...that apply to all children”.

# Related Services

- Related services: transportation and other supportive services as are required to assist a child with a disability to benefit from special education
- Includes the following services: speech language pathology, audiology, interpreting, psychological, physical therapy, occupational therapy, recreation (and therapeutic recreation), counseling, rehabilitation counseling, orientation and mobility, medical services for diagnostic or evaluation purposes, school health, nurse and social work, parent counseling and training, and transportation.

## Supplementary Aids and Services

- Supplementary Aids and Services: Aids, services, and other supports that are provided in regular education, education related and in extracurricular and nonacademic settings “to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate”

# IEP Meeting

“The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions...”

IEP team “should work toward consensus, but the [district] has the ultimate responsibility to ensure” that the child is provided an appropriate IEP

If the team cannot reach consensus, then the district must provide written notice of the proposals and refusals.

# Procedural Safeguards

- Opportunity to examine all educational records
- Participate in meetings related to identification, evaluation, and educational placement
- Prior written notice whenever the District:
  - **Proposes** a significant change
  - **Refuses** to initiate a change requested
  - Regarding evaluation, educational placement or provision of a FAPE

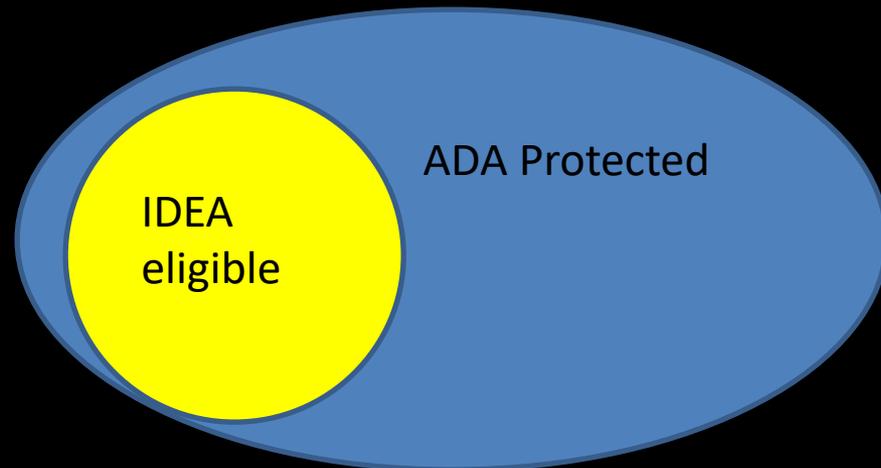
# Procedural Safeguards

Prior written notice must include:

- A description of the action proposed or refused
- An explanation of the above
- Notice of procedural safeguards
- Description of other options considered
- Description of factors relevant to the decision

# Americans with Disabilities Act of 1990

- No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.
- RA and equal access
- Olmstead and most integrated setting



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