

Follow Up Questions from the LA/SES Webinar Ready, Set, Go! Providing FAPE this Fall

July 29, 2020

Revised August 4, 2020

CONTINGENCY LEARNING PLANS

1. Are you suggesting we have a Contingency Learning Plan ready to go for all students prior to the start of the school year, no matter what phase we are in when school starts?

The purpose of the Contingency Learning Plan (CLP) is to describe how FAPE will be modified when the IEP cannot be implemented as written. The starting point is always the current IEP. For example, if the IEP is written for full brick-and-mortar but cannot be implemented because schools are closed by order of the Governor, the Contingency Plan would identify the programs/services will be delivered during the closure.

From a practical perspective, it's logical that all CLPs would be developed and incorporated into IEPs before they need to be used. However, keep in mind that Contingency Learning Plans are not a requirement of IDEA or MARSE; therefore, there are no hard and fast timelines associated with CLPs, only suggested practices grounded in common sense. Having a CLP in place as early in the year as possible makes good sense, as there is no way to predict with any certainty if/when the public health situation may change and the plan will need to be implemented. Developing CLPs in advance will prevent the need to hold individual meetings in the midst of an emergency school closure and provide for a smoother transition for students.

2. For students who are not due for an IEP until spring 2021, should we develop new IEPs to address virtual vs. brick-and-mortar? Are we only addressing issues as students come due for their IEPs?

In the fall, each student needs to have in place an IEP that delivers FAPE. The following questions may be helpful when thinking about whether individual students need an IEP revision or Contingency Learning Plan:

- What is our district's delivery model upon opening in the fall of 2020?
- Is this delivery model temporary, or is it likely to last the entire school year?
- What delivery model might the district shift to later in the school year?
- Can this student's current IEP be implemented as written in the "opening of school" delivery model?
 - If yes, you may be good to go, at least for the moment.
 - If not, the IEP team should revise/amend the IEP or develop a Contingency Learning Plan to address FAPE in the "opening of school" situation.

- Can this student’s current IEP be implemented as written in the delivery model to which we might shift later in the year?
 - If yes, you are probably good to go.
 - If not, the IEP team should revise/amend the IEP or develop a Contingency Learning Plan to address FAPE if/when we shift to that other model later in the school year.

Managing the work of developing a large volume of IEPs/amendments/CLPs will present a challenge. Reviewing all IEPs and incorporating CLPs for all students is massive work which requires planning. Districts likely will want to map out a schedule for how this work will be accomplished. The goal would be to ensure that each student has some kind of contingency plan in place before the district shifts into a delivery model where the current IEP cannot be implemented.

3. If we did a contingency plan for a student last year, do we need to create a new one for this fall if we remain in phase 3 and are online? Can the old one carry over if the plan is the same for the fall? I thought the reactive CLPs done in the spring were considered to be null and void after June 2020?

The “reactive” Contingency Learning Plans developed in the spring of 2020 were an emergency provision that only remained in effect through the end of the 2020 school year. This fall, districts probably will want to be sure that each student with an IEP has a “proactive” Contingency Learning Plan that addresses the current school year. If the IEP team decides that the provisions in the spring 2020 reactive CLP are still appropriate for the fall 2020 proactive CLP, the IEP team could simply incorporate the concepts from the previous Contingency Learning Plan into the current IEP, perhaps by reference via an amendment.

4. Is it correct that IEP should be based on the instructional delivery model that we think will reflect the majority of the year and the CLP should reflect the “other” delivery model?

This response was revised on 8/4/2020.

While MDE/OSE has indicated that FAPE can only be delivered via an IEP that addresses services in a full time, brick-and-mortar setting, the special education attorneys who represent Michigan school districts do not agree about the answer to this question. Some believe the IEP should assume in-person brick-and-mortar. Others, that the IEP should be based on the delivery model in effect at the beginning of the year/for the majority of the year or the delivery model the parent has chosen. So, you should check with your district’s attorney.

Our view at LA Special Education Services is the latter, assuming that FAPE can be delivered to the student. However, there are some cautions to consider. The most important consideration is that the IEP must be developed to provide a FAPE. If a FAPE can be provided in the model the district has adopted for the start of school/majority of the year, then the CLP would address modified service delivery when that model shifts. However, if the district has adopted an instructional

delivery model for (either by design or in response to an emergency school closure) and FAPE cannot be delivered in that model, the IEP should be written for FAPE in an appropriate model, and the CLP would address the alternate model in which the district currently finds itself.

5. If we are in Phase 4 at the start of the school year and we are doing a hybrid schedule, would it be acceptable to offer more face-to-face access to students with IEPs? Meaning, could our students who need one-on-one instruction per their IEP come into school on a more regular basis than other students?

Yes. Individualized considerations are central to IDEA. Therefore, if in-person instruction is permitted (as in Phase 4) it is possible for the IEP team to determine that, in order to receive a FAPE, a student with an IEP requires more in-person instruction than is provided to the overall population. This determination should be based on the student's unique, disability-related needs as identified in the PLAAFP.

6. Couldn't the IEP include information to cover all phases rather than doing both a new IEP and contingency plan?

If an IEP team thinks about all the alternatives and writes a carefully worded IEP with lots of detail, this might theoretically be possible but probably is not advisable. It is important that the IEP be clear about what's required to provide FAPE. This is in contrast to what will be provided "to the extent practicable" as an alternative (CLP) when FAPE cannot be delivered in accordance with the IEP. Writing an IEP that attempts to describe service delivery in all phases likely would be problematic in terms of clarity. A Contingency Learning Plan probably is the clearer way to communicate the alternative plan for when the IEP cannot be implemented as written.

7. What if a parent doesn't want a Contingency Learning Plan and refuses to participate in the planning process?

Contingency Learning Plans are recommended but not required. A district may decide that Contingency Learning Plans developed by the IEP team are the vehicle the district will use to plan for changes in the instructional delivery model due to the pandemic. As members of the IEP team, parents should be invited to participate in the development of a Contingency Learning Plan. If the parent refuses to participate, the district may proceed to develop the plan without the parent, in the same way that an IEP meeting may proceed without the parent. Multiple efforts to involve the parent should be documented. Upon completion of the Contingency Learning Plan by the IEP team, the parent should be provided with a copy of the plan, including prior written notice of the district's intent to implement the plan. Districts may wish to consult with legal counsel should this issue arise.

8. Is there a suggested template available for the Contingency Plans? Should districts plan on developing their own Contingency Plans or will

the electronic system we use (such as TieNet) be creating a more standardized form?

Some ISDs and/or vendors may be developing their own forms for Contingency Learning Plans. Local districts are advised to check with their ISDs regarding this question.

9. How will changes in programs/services under a Contingency Learning Plan be accounted for by Pupil Accounting?

Many districts rely on their electronic data system to capture special education program/service times from the IEP and report that information as FTE in MSDS. When a Contingency Learning Plan is triggered it's likely that the automatic data pull will still reflect the IEP rather than the CLP, because the CLP is not created with fillable fields in the electronic IEP form. The significant time/resources required to reprogram entire electronic systems for an optional (and hopefully temporary) process like the CLP make it unlikely that such reprogramming will occur.

Little guidance is available yet on this topic, but we anticipate that MDE may address overarching data collection issues relative to school closures and alternative delivery models in the fall Pupil Accounting manual and related training. Local district special education administrators should work closely with their ISDs and with local pupil accounting officials to determine if/when manual data entry or student record maintenance may be necessary to ensure that data submitted in MSDS are timely, valid, and meet requirements.

RECOVERY SERVICES

10. Can you delineate the difference among recovery services, compensatory services, and compensatory education?

Compensatory Education is identified in IDEA as a legal remedy or consequence for failing to deliver FAPE. Compensatory Education typically is ordered by a state complaint investigator or administrative law judge (hearing officer.) It also could be required as the result of a finding of noncompliance during a monitoring visit. The state compliant investigator, hearing officer, or state monitor typically tells a district how much Compensatory Education is required and may direct the IEP team to develop a plan for how/when it will be delivered. When it is ordered, districts do not have a choice about providing (or not providing) Compensatory Education. Follow up documentation and verification are required in the Catamaran system.

The term *Compensatory Services* does not appear in IDEA/MARSE and is used specifically to distinguish these services from *Compensatory Education*. *Compensatory Services* is a "softer" term used by OSEP and MDE/OSE to describe services that are needed because a student experienced a loss of learning as a result of the spring 2020 emergency school closure. Districts are directed by OSEP guidance to "consider" the need for *Compensatory Services* once normal school operations resume.

The term "Recovery Services" also does not appear in IDEA/MARSE. MDE/OSE uses the term "Recovery Services" to refer to voluntary, supportive services that a district might provide in order to help students get back on track after the emergency school closure. Recovery Services may be very similar to *Compensatory Services*, but the term is used in an effort to reduce confusion with *Compensatory Education*. There is no requirement that districts consider or provide Recovery Services; however, if a district chooses to provide them, MDE/OSE recommends that they be included in the student's IEP. Districts are reminded that anything included in an IEP is subject to the dispute resolution options in IDEA (state complaint, due process, etc.)

11. Can Compensatory Education be provided within the framework of Recovery Services?

Compensatory Education and Recovery Services are two distinctly different constructs. They address two different issues and are initiated in two different ways so they must be considered differently.

Compensatory Education is ordered by an outside party (state complaint investigator, hearing officer, state monitor.) Recovery Services are voluntarily determined by the local IEP team.

Compensatory Education must be delivered outside the regular school day/year. Recovery Services may be delivered within the context of regular instruction during the regular school day/year, (but also could be delivered outside the regular school day, depending on the needs of the student.)

A district might provide Recovery Services in an effort to pre-empt a state complaint or due process request that could result in a finding of noncompliance for which Compensatory Education is ordered. This may be a wise and helpful strategy.

If the district is ordered to provide Compensatory Education as a result of a finding of noncompliance or denial of FAPE, that process will no longer be a voluntary, supportive process initiated by the district (i.e., it will not be "Recovery Services.") Like other matters of noncompliance, Compensatory Education will be overseen by the ISD and MDE/OSE and will have documentation and verification requirements attached in Catamaran.

12. As I understand it, Recovery Services must be considered for services that were not delivered between March 13 and the adoption of our Continuity of Learning Plan. However, if we did not deliver full IEP services after April should we also be considering what volume of services were missed between April & June?

Recovery Services are voluntary on the part of the district and show an intent to support the student in getting back on track once school resumes. If the district is

aware that the student experienced learning loss/lack of opportunity as a result of the COVID-19 pandemic during *any* period of time, providing Recovery Services shows a true commitment to doing what's right for the student. Keep in mind that Recovery Services are not necessarily about minute-by-minute make up for missed services in the spring of 2020; rather, they are services to support the student in getting back on track once school resumes. Alternatively, the district may characterize these services as Compensatory Services.

PROVISION OF FAPE

13. If a parent/student chooses full-time, online instruction when the district is also offering in-person instruction, and the school members of the IEP team do not believe that FAPE can be provided in a full-time, online environment, how would that be reflected in the notice?

If the district offers all families the option of choosing among in-person, distance learning and/or a hybrid model, parents of students with disabilities must be afforded the same consideration.

If the parent's request not to return to school is based on a doctor's advice, homebound instruction may be considered. This assumes the doctor has confined the student to the home for medical reasons, such as an underlying health condition that creates heightened vulnerability to the virus.

In this time of heightened concern and heightened risk, due deference should be given to parental concerns for health and safety. An IEP team meeting should be convened to discuss the provision of a FAPE, including in the model proposed by the parent. The discussion should explore areas such as:

- The student's response to instruction in both brick-and-mortar and virtual environments.
- A review of data regarding the student's progress in the general curriculum and progress on IEP goals before, during, and after the spring 2020 school closure, including data regarding the student's status upon return to school in the fall.
- The student's behavioral and social-emotional status before, during, and after the spring 2020 school closure.
- Any health/medical issues that may impact decision-making.
- The parent's reasons for proposing a non-brick-and-mortar delivery model.
- Strategies/supports that might mitigate the parent's concerns about brick-and-mortar.

These items should be discussed and documented so that all team members share a common understanding and all team members (including the parent) have the information they need to make an informed decision. A clearly articulated PLAAFP statement regarding the student's strengths and needs in both virtual and in-person settings will serve as the foundation for decision-making around goals, programs, related services, and other supports.

A FAPE is about services that are reasonable and appropriate in light of the student's circumstances, and current circumstances are indeed unprecedented. If a FAPE can be provided in the delivery model preferred by the parent, it should be considered a viable option *even if it does not maximize a student's progress*. However, if the IEP team cannot reach consensus about the provision of a FAPE, the district has the following options:

- A. Request IEP facilitation or mediation to attempt to find agreement.
- B. Make an offer of a FAPE under a delivery model not preferred by the parent and be prepared to defend that offer in a state complaint or due process hearing.
 - Use the Prior Written Notice page (options considered/not selected and other relevant factors) to:
 - Describe the parent's preferred model and reasons for preferring it.
 - Provide a "clear and cogent explanation" of the reasons the district did not defer to the parent's request.
- C. In deference to the parent during this time of heightened health and safety concerns, develop an IEP to provide services under the delivery model preferred by the parent, knowing that this decision could leave the district vulnerable to a state complaint or due process complaint if the IEP does not deliver a FAPE.
 - Use the Prior Written Notice page (options considered/not selected or other relevant factors) to:
 - Describe the delivery model/services that were suggested by district team members but not selected, including the reasons team members believe their proposed model would better meet the student's needs.
 - Describe the parent's rationale for not wanting the child to return to school, including specific reasons that they disagreed with the model proposed by district staff.
 - Describe strategies/supports that were suggested to mitigate the parent's concerns about return to school and the reasons the parent rejected those suggestions.
 - Describe any opportunities/benefits that are not available under the parent's preferred model.
 - Provide a "clear and cogent explanation" of the reasons the district is deferring to the parent's preference at this time.

14. For in-person instruction and for students in self-contained programs, how can we (or should we) revise their IEPs to reduce their time in general education to avoid the mixing of students from multiple classrooms? How does this impact FAPE and the legal requirement of providing them exposure to general education peers?

The MI Safe Schools Roadmap suggests placing students in “cohorts” so that groups of students do not intermingle and increase the potential for spread of the virus. This “cohorting” is not a requirement. If students at the K-5 level are placed in cohorts during Phase 4, face coverings for students are not required in the classroom as long as students remain with their class throughout the school day and do not come into close contact with students from other classes. Once the cohort is “broken” (i.e., students mingle with other classes) face coverings for students are required.

Corhorting (or the desire to avoid face coverings for all students) never should be a reason to compromise a student’s access to the least restrictive environment or to justify a failure to implement a student’s IEP. The IEP and related LRE considerations may be changed only if the school district and parent reach agreement during an IEP meeting or through the amendment process.

It’s sometimes been said that “special education is not a place” and the use of cohorts suggests that districts may want to live into that old adage more intentionally in 2020-21. Like all teachers, special education teachers are permitted to move from classroom to classroom even when movement by students is limited. Districts may consider more “push-in” services by special education teachers and paraprofessionals in order to minimize student travel in the building.

Clustering a small group of special education students with similar needs into one general education group/class has always been a strategy for managing push-in services. Clustering continues to be a viable option under a COVID-driven, cohort model. Clustering means that the special education teacher would visit fewer classrooms during the day, thereby minimizing contacts with different groups of students and potential cross-contamination.

MISC. ISSUES

15. Is it a HIPAA violation to provide group OT in a virtual setting?

To the extent that students are served in small groups when school is in session, students may be served in small groups via a virtual platform.

During COVID-19 the Office of Civil Rights has provided some flexibility in this area. Guidance indicates that HIPAA-covered health care providers may, in good faith, provide telehealth services to patients using remote communication technologies such as FaceTime, Facebook Messenger, Google Hangouts, Zoom, or Skype, even if the application does not fully comply with HIPAA rules.

However, providers should not use any platforms that are “public-facing” to provide telehealth. This would include platforms such as Facebook Live, Twitch, and TikTok which might be accessible to the general public.

