



QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING AN H1N1 OUTBREAK

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The H1N1 influenza virus has the potential to pose a serious risk to children, especially those with certain underlying conditions making them more susceptible to the flu. This guidance outlines states' responsibilities to these infants, toddlers, and children with disabilities and their families, and to the staff serving these children. During an outbreak of H1N1 influenza, local educational agencies (LEAs) and early intervention service (EIS) programs will need to collaborate with their state, Bureau of Indian Education (BIE), or local public health department to address questions about how, what, and when services should be provided. The U.S. Department of Education (Department) recently issued guidance addressing flexibility and waivers for state educational agencies (SEAs), LEAs, postsecondary institutions, and other grantee and program participants responding to pandemic influenza that can be found at: www.ed.gov/admins/lead/safety/emergencyplan/pandemic/index.html. This guidance includes a section addressing the obligations of, and best practices for, SEAs, LEAs, BIE, and schools with regard to the *Individuals with Disabilities Education Act (IDEA)*, section 504 of the *Rehabilitation Act (Section 504)*, and Title II of the *Americans with Disabilities Act (Title II)* when planning for a response to an H1N1 outbreak.

The Office of Special Education and Rehabilitative Services (OSERS) is issuing this Question and Answer (Q & A) document to respond to additional questions that states, SEAs, LEAs, BIE, BIE-funded schools, state lead agencies, and EIS programs and providers may have concerning the provision of special education and related services and early intervention services following child dismissal, school closure, or EIS program or provider closure due to an H1N1 outbreak¹. It does not create or confer any rights for

¹ This document does not address when to dismiss a child or close a school or Part C state lead agency because school officials should work with their local health departments to make those decisions. School personnel and Part C EIS programs and providers, however, may consult the Centers for Disease Control and Prevention's (CDC's) guidance for recommendations regarding social distancing and school closure. The CDC's Web site contains information addressing both state and local public health officials and school administrators for school (K-12) responses to influenza during the 2009-2010 school year and resources for child care and early childhood programs. These documents, along with other recommendations, may be accessed at www.cdc.gov/h1n1flu/schools.

or on any person. This Q & A document does not impose any additional requirements beyond those included in applicable law and regulations. The responses presented in this document generally constitute informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented here and are not legally binding. The Q & As in this document are not intended to be a replacement for careful study of the *IDEA*, Section 504, Title II, and their implementing regulations. The *IDEA*, its implementing regulations, and other important documents related to the *IDEA* and its implementing regulations can be found at <http://IDEA.ed.gov/explore/view/p/%2Croot%2Cregs%2C>. For more information on the requirements of Section 504 and Title II, please consult the Section 504 regulations at 34 CFR Part 104 at www.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html and the Title II regulations at 28 CFR Part 35 at www.ed.gov/policy/rights/reg/ocr/edlite-28cfr35.html.

If you are interested in commenting on this questions and answers guidance, please e-mail us your comment at OSERSguidancecomments@ed.gov (put the word H1N1 in the subject line of your e-mail) or write to us at the following address:

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A. Implementing Part B of the *IDEA* and Section 504 during an H1N1 outbreak

Question A-1: Must an LEA provide special education and related services to a child with a disability who is absent for an extended period of time because the child is infected with H1N1, while the schools remain open?

Answer: Yes. It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted. Further, if the IEP goals will remain the same and only the time in special education will change, then the IEP Team may add an amendment to the IEP stating specifically the amount of time to be spent in special education. If a child with a disability is absent for an extended period of time because of an H1N1 infection and the school remains open, then the IEP Team must determine whether the child is available for instruction and could benefit from homebound services such as instructional telephone calls, homework packets, Internet-based lessons, and other distance-based learning approaches, to the extent available. In so doing, school personnel should follow appropriate health guidelines to assess and address the risk of transmission in the provision of such services.

If a child does not receive services after an extended period of time, a subsequent individualized determination is required to decide whether a child with a disability requires compensatory education to make up for any skills that may have been lost because the child did not receive educational benefit.

Question A-2: What services must an LEA provide if a school for children with disabilities is selectively dismissed (i.e., closed) due to the possibility of severe complications from an H1N1 outbreak?

Answer: The U.S. Department of Health and Human Services' Centers for Disease Control and Prevention recently issued guidance regarding selective dismissal of schools for children who are considered at high risk of severe complications from H1N1:

Although there are not many schools where all or most children are at high risk (for example, a school for medically fragile children) a community might decide to dismiss such a school to better protect these high-risk children. The decision to selectively dismiss a school should be made locally and should balance the risks of keeping the children in school with the social disruption that school dismissal can cause. School officials should work closely and directly with their local and state public health officials when deciding whether or not to selectively dismiss a school or schools. Selective school dismissals are not likely to have a significant effect on community-wide transmission. Instead, this strategy aims to protect children and staff at high risk of severe illness and death.

See www.cdc.gov/h1n1flu/schools. If a school for children with disabilities is closed solely because the children are at high risk of severe illness and death, the LEA must determine whether each dismissed child could benefit from instructional telephone calls, homework packets, internet-based lessons, and other distance-based learning approaches, to the extent available. In so doing, school personnel should follow appropriate health guidelines to assess and address the risk of transmission in the provision of such services.

If a child does not receive services during a closure, a child's IEP team (or appropriate personnel under Section 504) must make a subsequent individualized determination to decide whether a child with a disability requires compensatory education to make up for any skills that may have been lost because the child did not receive educational benefit.

Question A-3: If a child with a disability at high risk of severe flu complications is excluded from school during an outbreak of H1N1, is the exclusion considered a change in educational placement subject to the protections of 34 CFR §§300.115 and 300.116?

Answer: If the exclusion is a temporary emergency measure (generally 10 consecutive school days or less), the provision of services such as instructional telephone calls, homework packets, Internet-based lessons, and other available distance-based learning approaches is not considered a change in placement. During this time period, a child's parent or other IEP team member may request an IEP meeting to discuss the potential need for services if the exclusion is likely to be of

long duration (generally more than 10 consecutive school days). For long-term exclusions, an LEA must consider placement decisions under the *IDEA*'s procedural protections of 34 CFR §§300.115 – 300.116, regarding the continuum of alternative placements and the determination of placements.

Under 34 CFR §300.116, a change in placement must be made by a group of persons, including the parents and other persons knowledgeable about the child and the placement options. If the placement group determines that the child meets established high-risk criteria and, due to safety and health concerns, the child's needs could be met through homebound instruction, then under 34 CFR §300.503(a)(1), the public agency must issue a prior written notice proposing the change in placement. A parent who disagrees with this prior written notice retains all of the due process rights included in 34 CFR §§300.500-300.520.

For children with disabilities protected by Section 504 who are dismissed from school during an outbreak of H1N1 because they are at high risk for flu complications, compliance with the procedures described above and completion of any necessary evaluations of the child satisfy the evaluation, placement and procedural requirements of 34 CFR §§104.35 and 104.36. The decision to dismiss a child based on his or her high risk for influenza complications must be based on the individual needs of the child and not on perceptions of the child's needs based merely on stereotypes or generalizations regarding his or her disability.

Question A-4: May an IEP Team include a distance learning plan in a child's IEP as a contingency plan in the event of an H1N1 outbreak that requires the school's closure?

Answer: Yes. IEP teams may, but are not required to, include distance learning plans in a child's IEP that could be triggered and implemented during a selective dismissal due to an H1N1 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of instructional telephone calls, homework packets, Internet-based lessons, and other available distance-based learning approaches, and may identify which special education and related services, if any, could be provided at the child's home.

Creating a contingency plan before an H1N1 outbreak occurs gives the child's service providers and the child's parents an opportunity to reach agreement as to what circumstances would trigger the use of the child's distance learning plan and the services that would be provided during the dismissal.

Question A-5: What activities other than special education and related services may and may not be provided with *IDEA* Part B funds both prior to and during a potential H1N1 outbreak?

Answer: *IDEA* Part B funds may be used for activities that directly relate to providing, and ensuring the continuity of, special education and related services to children with disabilities. For example, an LEA may use *IDEA* Part B funds to disseminate health and H1N1 information that is specifically related to children with disabilities, to develop emergency plans for children with disabilities, or to provide other information (e.g., guidance on coordination of the provision of services in alternate locations as described in Question A-4) to parties who may need such information, including school staff responsible for implementing IEPs, parents of eligible children, and staff in alternate locations where special education and related services may be provided. LEAs, however, may not use *IDEA* Part B funds to develop or distribute general H1N1 guidance or to carry out activities that are not specific to children with disabilities (e.g., general H1N1 activities for all children and staff). Additionally, LEAs may not use *IDEA* Part B funds to administer the H1N1 vaccination to any children, including children with disabilities.

B. IDEA Part C and H1N1

Question B-1: Must a state lead agency continue to provide early intervention services to infants and toddlers with disabilities during an H1N1 outbreak if the offices are closed?

Answer: If the offices of the state lead agency or the EIS program or provider are closed, then Part C services would not need to be provided to infants and toddlers with disabilities and their families during that period of time. If the lead agency's offices are open but the offices of the EIS program or provider in a specific geographical area are closed due to public health and safety concerns as a result of an H1N1 outbreak in that area, the EIS program or provider would not be required to provide services during the closure. If the offices remain open, but Part C services cannot be provided in a particular location (such as in the child's home), by a particular EIS provider, or to a particular child who is infected with H1N1, then the lead agency must ensure the continuity of services by, for example, providing services in an alternate location, by using a different EIS provider, or through alternate means, such as consultative services to the parent.

Additionally, once the offices re-open, the service coordinator and EIS providers for each child must determine if the child's service needs have changed and determine whether the individualized family service plan (IFSP) team needs to meet to review the child's IFSP to determine whether any changes are needed. If offices are closed for an extended period and services are not provided for an extended period, the IFSP team must meet under 34 CFR §303.342(b)(1) to determine if changes are needed to the IFSP and to determine whether compensatory services are needed to address the infant or toddler's developmental delay.

Question B-2: What should a state lead agency or EIS program provider do if its offices are open but it cannot provide services in accordance with an infant's or toddler's IFSP during an H1N1 outbreak?

Answer: If the offices remain open, but Part C services cannot be provided in a particular location (such as in the child's home), by a particular EIS provider, or to a particular child who is infected with H1N1, then the lead agency must ensure the continuity of services by, for example,

providing services in an alternate location, by using a different EIS provider, or through alternate means, such as consultative service to the parent. Once services are resumed, the service coordinator and EIS providers for each child must assess the child to determine if the child's service needs have changed and to determine whether the IFSP Team needs to meet to review the child's IFSP to identify whether changes to the IFSP are needed. If the offices are closed and services are not provided for an extended period, the IFSP Team must meet under 34 CFR §303.342(b)(1) to determine if changes are needed to the IFSP and to determine whether compensatory services are needed.

If an EIS provider cannot provide Part C services in the child's home during an H1N1 outbreak, but the EIS program or provider determines that it is safe to provide face-to-face Part C services in another environment such as a hospital or medical clinic, then the child could receive temporary services at the hospital or clinic. Additionally, if the lead agency or EIS provider determines that face-to-face Part C services should not be provided for a period of time, then the EIS provider or service coordinator may consult with the parent through a teleconference or other alternative method (such as e-mail), consistent with privacy interests, to provide consultative services, guidance, and advice as needed. However, determining how to provide Part C services in a manner that is consistent with then-available public health and safety guidance is left to the discretion of the lead agency and the EIS program and provider serving a particular child and family.

Question B-3: What activities other than service provision may and may not be provided with *IDEA* Part C funds both prior to and during a potential H1N1 outbreak?

Answer: *IDEA* Part C funds may be used for activities that directly relate to providing, and ensuring the continuity of, Part C services to eligible children and their families. The state may use *IDEA* Part C funds to disseminate health and H1N1 information, develop emergency plans, or provide other information (e.g., how the lead agency staff or EIS programs or providers may provide alternate services or services in alternate locations as described in Question B-2) to parties who need this information. These parties may include parents of eligible children, child care centers, staff in other locations where early intervention

services are provided, EIS programs and providers, and primary referral sources. Other activities that relate to service provision, including the provision of service coordination, evaluations, and assessments, may also be funded. The state may not, however, use *IDEA* Part C funds to administer the H1N1 vaccination as it is a medical service under 34 CFR §303.13(c)(3).