



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 5, 2016

Dear Colleague:

Over the last decade, there has been a proliferation of educational models involving varying degrees of in-person and online instruction and practice. Many State educational agencies (SEAs) and local educational agencies (LEAs), including charter schools that operate as LEAs, provide a variety of Internet-based or online instruction to children, including children with disabilities under the Individuals with Disabilities Education Act (IDEA).¹ In addition, some LEAs have begun, or are considering, offering children the opportunity to attend virtual schools.²

In 2011, the U.S. Department of Education's (Department's) Office of Special Education Programs (OSEP) funded The Center for Online Learning and Students with Disabilities (Center) to research how online learning can be made more accessible. The Center also identifies promising practices for K-12 children with disabilities by investigating approaches that address variations in student learning styles within the range of online learning options.³ OSEP has received a number of questions from stakeholders, including State and school personnel and advocacy organizations, regarding the provision of a free appropriate public education (FAPE) to children with disabilities attending public virtual schools. Therefore, we are issuing this letter to clarify some of the critical requirements in Part B of IDEA that apply to virtual schools.⁴

The Department has determined that this letter is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007),

www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

Significant guidance is non-binding and does not create or impose new legal requirements. The Department is issuing this letter to provide SEAs, LEAs and other public agencies with information to assist them in meeting their obligations under the IDEA and implementing

¹ "Child with a disability" is a statutory term under IDEA and is defined in 20 U.S.C. 1401(3). See also 34 CFR §300.8.

² See *Keeping Pace with K-12 Online and Blended Learning: An Annual Report of Policy and Practice 2015*, Evergreen Education Group, available at <http://kpk12.com/reports/>.

³ In 2015, the Center published "Equity Matters: Digital and Online Learning for Students with Disabilities," which presents some emerging trends, outcomes, challenges, and promising practices in this developing field. This publication is available at: <http://centeronlinelearning.org/publications/annual-publication-2015>. Although this publication was funded under a grant from the Department, the conclusions are solely those of the authors. Reference to this document is not an endorsement by the Federal government or the Department of the authors' conclusions, and is provided for informational purposes only.

⁴ Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, and its implementing regulation at 34 CFR part 104) and Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12131–12134, and its implementing regulation at 28 CFR part 35) prohibit discrimination on the basis of disability and may impose additional requirements on SEAs and LEAs. The same nondiscrimination principles that apply to all schools under these laws also apply to virtual schools. Within the Department of Education, these laws are enforced by the Office for Civil Rights (OCR). This guidance does not address these laws; more information about these laws, however, is available on OCR's website at www.ed.gov/ocr, including a May 26, 2011 Dear Colleague Letter (with attached Frequently Asked Questions document) addressing the use of electronic book readers and other emerging technologies, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201105-ese.html>.

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The Department of Education's mission is to promote student achievement and preparedness for global competitiveness by fostering educational excellence and ensuring equal access.

regulations (34 CFR–part 300). This guidance also provides members of the public with information about their rights under the law and regulations. If you have questions or are interested in commenting on this guidance, please email us your comment at virtualschools@ed.gov or write to us at the following address:

U.S. Department of Education,
550 12th Street, S.W., Room 5122
Potomac Center Plaza
Washington, DC 20202-2641

For further information about the Department’s guidance processes, please visit www2.ed.gov/policy/gen/guid/significant-guidance.html

Background

In January 2014, the Department began collecting information from States on the status of virtual schools through the Annual Mandatory Collection of Elementary and Secondary Education Data, an *EDFacts* information collection, to enhance its knowledge of virtual education across the country.⁵ The *EDFacts* information collection defines “virtual school” as a public school that offers only virtual courses: instruction in which children and teachers are separated by time and/or location. In addition, interaction occurs via computers and/or telecommunications technologies, and the school generally does not have a physical facility that allows children to attend classes on-site. For the purpose of this letter, “virtual schools” refer to programs, consistent with the *EDFacts* definition, that are public schools of a traditional LEA or are public schools that operate as an LEA under State law.⁶ This letter does not address every IDEA requirement. Rather, it highlights issues that OSEP believes are likely to occur when certain key Part B requirements are implemented in a virtual school environment.

General Supervisory Responsibilities

The requirements of IDEA apply to SEAs and LEAs, regardless of whether a child is enrolled in a virtual school that is a public school of the LEA or a public school that is constituted as an LEA by the State.⁷ Each SEA must have policies and procedures in effect that are consistent with, and implement, IDEA requirements. In turn, each LEA, in providing for the education of children with disabilities within its jurisdiction, must have policies, procedures, and programs that are consistent with, or adopt, the SEA’s policies and procedures in order to establish its eligibility for a Part B subgrant from their SEA. 34 CFR-§§300.200–300.201.⁸ The SEA must

⁵ For more information on this information collection please see “Summary of Changes, Attachment C, EDFACTS” available at: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201302-1875-001.

⁶ This letter does not address children with disabilities placed in non-public virtual schools by their parents pursuant to 34 CFR §§300.130-300.144. However, under 34 CFR 300.146, children with disabilities placed in a private virtual school by a public agency, as a means of providing special education and related services, must be provided with FAPE as part of their public placement at the private virtual school.

⁷ Letter to Barnes, 41 IDELR 35 (December 18, 2003).

⁸ A virtual school that is constituted as an LEA under State law, consistent with the definition of LEA in 34 CFR §300.28, may receive a subgrant of Part B funds from the SEA if that LEA establishes its eligibility under section 613 of IDEA for use of those funds in accordance with Part B. 34 CFR §300.705(a). The LEA must submit a

exercise general supervision over all educational programs for children with disabilities administered within the State to ensure that the education standards of the SEA and the requirements of Part B are met. 34 CFR-§§300.149 and 300.600. Accordingly, the SEA is responsible for ensuring that all LEAs, including virtual schools that operate as LEAs, implement the requirements of IDEA. If a virtual school is a public school of an LEA, the LEA is the entity that would generally be responsible for ensuring that the requirements of Part B are met by that virtual school for children with disabilities participating in the virtual school’s program.

Many virtual schools are also public charter schools.⁹ If the virtual charter school operates as an LEA and has established its eligibility under section 613 of IDEA and receives a subgrant of Part B funds from the SEA under 34 CFR-§300.705, the virtual charter school LEA is responsible for ensuring that the requirements of Part B are met, unless State law assigns responsibility to some other entity. 34 CFR-§300.209(c). Likewise, if the virtual school is a public charter school of an LEA that receives funding under 34 CFR-§300.705 and includes other public schools, then the LEA of which the virtual charter school is a part is responsible for ensuring that the requirements of Part B are met, unless State law assigns that responsibility to some other entity. 34 CFR-§300.209(b)(2)(i). The SEA, however, retains ultimate responsibility for ensuring that the requirements of Part B are met in all educational programs for children with disabilities administered within the State. 34 CFR-§§300.149 and 300.600.

If a State has virtual schools, including virtual charter schools, that the State considers to be LEAs, the SEA should carefully review its policies and procedures to ensure that the policies and procedures address virtual schools. Likewise, where applicable, LEAs should carefully review their policies and procedures to ensure that they address public virtual schools of the LEA. In particular, SEAs and, if applicable, LEAs, should review their policies and procedures regarding:

1. monitoring to identify and correct noncompliance with Part B requirements, including the implementation of IDEA in virtual schools (34 CFR-§§300.149 and 300.600, and 20 U.S.C. 1232d(b)(3)(E));
2. timely collection and reporting of data under section 618, and data to report on the indicators in the State Performance Plan/Annual Performance Report, that are (a) valid and reliable and (b) reflect actual practice and performance, including collecting and reporting data about children with disabilities who attend virtual schools and receive special education and related services (34 CFR-§§300.157(c), 300.601(b), and 300.640 through 300.646);
3. establishing and maintaining qualifications to ensure that personnel necessary to carry out the purposes of IDEA, including personnel serving children with disabilities in virtual

plan to the SEA that provides assurances that the LEA meets each of the conditions in §§300.201 through 300.213. 34 CFR §300.200. Section 300.201 provides that the LEA, in providing for the education of children with disabilities within its jurisdiction, must have policies, procedures, and programs in effect that are consistent with the State policies and procedures established under §§300.101 through 300.163 and §§300.165 through 300.174.

⁹ According to the report cited here, charter schools make up less than 6 percent of total enrollment in the United States, but full-time charter school enrollment accounted for the large majority of full-time online students and 3.3 million course enrollments. Full-time virtual charter schools operated in 25 States during School Year 2014-15 and served about 275,000 students. See *Keeping Pace with K-12 Online and Blended Learning: An Annual Report of Policy and Practice 2015*, Evergreen Education Group, available at <http://kpk12.com/reports/>.

schools, are appropriately and adequately prepared and trained, and that those personnel have the content knowledge and skills to serve children with disabilities (34 CFR-§300.156(a));

4. the availability of dispute resolution procedures to implement IDEA procedural safeguards, including the mediation and due process hearing provisions in 34 CFR-§§300.506 through 300.518, the discipline provisions in 300.530 through 300.536, as well as the Part B State complaint procedures in 34 CFR-§§300.151–300.153; and
5. provisions to ensure the confidentiality of personally identifiable data, information, and records (34 CFR-§§300.611 through 300.626).¹⁰

Each SEA also must have policies and procedures that ensure that children with disabilities who attend virtual school LEAs and virtual schools that are part of LEAs are included in all general State and district-wide assessment programs, including assessments described in section 1111 of the Elementary and Secondary Education Act of 1965, with appropriate accommodations and alternate assessments, where necessary and as indicated in their respective individualized education programs (IEPs). 34 CFR-§300.160.

Child Find Responsibilities

Each SEA must have child find policies and procedures in effect to ensure that all children with disabilities residing in the State, including those who attend virtual schools, who are in need of special education and related services, regardless of the severity of their disability, are identified, located, and evaluated. 34 CFR-§300.111(a). LEAs also must have child find policies and procedures in effect that are consistent with the State’s policies and procedures.

34 CFR-§§300.200-300.201. Therefore LEAs, including virtual schools that operate as LEAs, should review the State’s child find policies and procedures as well as their own implementing policies, procedures, and practices to ensure that children with disabilities who attend virtual schools are identified, located, and evaluated. See also 34 CFR-§§300.300–300.311.

We recognize that there are some children with IEPs who may transfer to virtual schools, while other children with disabilities may enroll in virtual schools before being identified as having a disability under IDEA. For children who have IEPs and have been determined eligible for special education and related services prior to their enrollment in the virtual school, child find responsibilities also include ensuring that periodic reevaluations are conducted.

34 CFR-§300.303. Because children who attend virtual schools generally may not have the same degree of face-to-face interactions and in-person contacts with a teacher or other school staff as children who attend brick and mortar schools, child find for children attending virtual schools may present unique challenges.

It is not uncommon for the child’s teacher to be the first person to suspect that the child may have a disability and to be the person to refer that child for an evaluation. Where the practices of the virtual school, whether it is an LEA or operated by an LEA, limit or prevent the teacher’s interaction and contacts with a child, the SEA’s child find policies should suggest additional

¹⁰ Students with disabilities attending public virtual schools and their parents are also protected by the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. 1232g and 34 CFR part 99. More information about FERPA is available at: www.ed.gov/fpc0

ways that LEAs can meet this IDEA responsibility for children attending virtual schools (e.g., screenings to identify children who might need to be referred for an evaluation and questionnaires filled out by virtual school teachers and staff and children’s parents). In general, reliance on referrals by parents should not be the primary vehicle for meeting IDEA’s child find requirements.

Ensuring the Provision of a Free Appropriate Public Education

Some stakeholders report that there is confusion in the field regarding which entity is responsible for providing FAPE to children with disabilities attending virtual schools. Generally, States assign responsibility for making FAPE available—that is for ensuring that the requirements of Part B are met for a particular child—to the LEA of his or her parent’s residence. Where a virtual school is a public school operated by the LEA in which the parent resides, that LEA generally would be responsible for making FAPE available to an eligible child with a disability. LEAs retain this responsibility even if they choose to contract with virtual schools to provide educational services to children with disabilities. In situations where the State designates a virtual school as its own LEA, consistent with 34 CFR-§300.28, and the child attends that virtual school LEA, but the child’s family resides in a different LEA in the State, the State has the discretion to determine which LEA is responsible for ensuring that the requirements of Part B are met with respect to the child, so long as the State designates one LEA that is responsible for ensuring the provision of FAPE to the child.¹¹ Similarly, if the virtual school is a public charter school that operates as an LEA under State law and receives funding under 34 CFR-§300.705, the virtual charter school LEA is responsible for ensuring that the requirements of Part B are met, unless State law has assigned responsibility to some other entity for ensuring that the requirements of Part B are met. 34 CFR-§300.209(c). This could include assignment to another LEA in the State.

In addition to the requirements discussed above, we highlight below some particular requirements under IDEA that responsible LEAs must meet in order to ensure the provision of FAPE to children with disabilities in virtual schools. These LEA responsibilities include, but are not limited to:

1. ensuring that each eligible child with a disability has FAPE available to him or her in accordance with 34 CFR-§§300.101 and 300.17
2. implementing the evaluation and eligibility requirements in 34 CFR-§§300.300-300.311;
3. carrying out the IEP requirements in 34 CFR-§§300.320 through 300.324, including those governing IEP content, IEP Team participants, parent participation, when IEPs must be in effect, consideration of special factors, the development, review, and revision of IEPs, secondary transition services and participation in State and districtwide assessment programs; and
4. implementing the requirements in 34 CFR-§§300.114 through 300.117, regarding education in the least restrictive environment, including ensuring the availability of a continuum of alternative placements to provide special education and related services.

¹¹ Letter to Lutjeharms, 16 IDELR 554 (Mar. 5, 1990).

Conclusion

The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools that are constituted as LEAs or are public schools of an LEA. This letter addresses the general responsibilities of SEAs and LEAs with regard to children with disabilities attending virtual schools, and we intend to issue additional guidance addressing more specific questions regarding this topic in the future. If you have questions or comments on this issue, please email them to virtuelschools@ed.gov. Thank you for your continued interest in improving results for children with disabilities.

Sincerely,

/s/
Sue Swenson
Acting Assistant Secretary

/s/
Ruth E. Ryder
Acting Director
Office of Special Education Programs