



### **Special Education Guidance for Closed Schools: No Services During Emergency Closure** **Geneva Taylor**

While neither the United States Department of Education (“USDOE”), nor Texas Education Agency (“TEA”) has yet to provide specific guidance for public school district on providing educational services to students with disabilities during school closure, the following guidance is based upon federal and state law and best practices. PYT attorneys are available 24/7 during this crisis to answer any questions, prepare the below recommended written notices and waivers, and provide guidance specific to your school district. As always, we will continue to disseminate information and advice as soon as it becomes available.

#### **Closing Schools and Not Providing Education During Closure**

If a school district closes to prevent the spread of the COVID-19 Coronavirus (“Coronavirus”) and does not provide any educational services to the general education student population, then the school district is not required to provide services to students with disabilities during that time. If no education is provided during emergency closure, we recommend:

- The no service school district should provide Prior Written Notice (“PWN”) letters to the parents of all students who are eligible and receive special education of the school’s closure and suspension of the student’s placement, programming, and services during closure. **The**

**PWN must meet the legal requirements at 34 C.F.R. 300.503.** A copy of the student's procedural safeguards should be included in the notice.

- Unless a waiver is provided by USDOE or TEA: No service school districts should determine which students are scheduled to receive initial or reevaluations during the closure. Such districts should provide parents written notice of their obligation to complete evaluations during statutory timelines, notify the parents of any difficulties caused by the closure (such as the obligation to conduct in school observations or utilize in-person evaluation instruments), and seek written parental consent to extend the timeline for completion of the evaluation. A copy of the student's procedural safeguards should be included in the notice.
- Unless a waiver is provided by USDOE or TEA: No service school districts should determine which student are scheduled for or due for ARD meetings during the closure. Such districts should provide parents written notice of the statutory deadline, and offer the parents with an opportunity to meet telephonically/remotely, allow the district members of the ARD committee to conduct a non-meeting amendment (where appropriate), waive parental attendance and allow the district members of the ARD committee to conduct the ARD, or seek written parental consent to extend the timeline to complete the ARD. A copy of the student's procedural safeguards should be included in the notice.
- After schools re-open, no service school districts should schedule ARD meetings and Section 504 meeting to determine if any additional testing or evaluations are necessary as a result of changes in the student's ability resulting from the closure; determine if any compensatory education is necessary; discuss any changes to the student's goals and IEP as a result of the closure; and discuss with the parents any relevant changes in the home during the closure such as medications, private services, or environmental changes.

### **Special Education Guidance for Closed Schools: Providing Education During Closure**

If a school district closes and chooses to provide educational services to the general education student population, then the school district must provide services to students with disabilities during that time. The school district **must** ensure and document that comparable educational access and services are provided to students with disabilities. This will require an individual review of every student's IEP (and Section 504 plan) to determine what programming, services, technology, devices, and supports are required to provide the special education student with comparable educational access.

The USDOE's **QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING A COVID-19 OUTBREAK** states, "[i]f an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE."

TEA's March 12, 2020 publication *The Planning for Instructional Continuity During High Absenteeism and School Closures* further states, "[s]chools that close campuses and establish

virtual learning environments or other alternative educational delivery methods, must ensure that planning addresses the provision of all services required in each student's Individualized Education Program (IEP), including both instructional and related services.”

While TEA's position that districts must ensure that the planning addresses the provision of all services required in the IEP, for the safety of students during school closure, this may not be sound or feasible. School districts are allowed to offer compensatory education including services which were not provided during this crisis. We recommend:

- School districts should provide Prior Written Notice (“PWN”) letters to the parents of all students who are eligible and receive special education services during the school's closure; the nature of the alternative educational programming being provided to their student; and if necessary, the suspension of the student's placement and specific services which will not be provided during the closure. The PWN should include the school district's plan to consider and provide compensatory education. **The PWN must meet the legal requirements at 34 C.F.R. 300.503.** A copy of the student's procedural safeguards should be included in the notice.
- Unless a waiver is provided by USDOE or TEA: School districts should carefully review their board's decision to ensure that the board “closed” the school. If the school is “closed” the school district may avail itself of extended timelines for completion of evaluations. Without guidance from USDOE or TEA, schools are left in the dark on their obligations. However, it is reasonable for schools that are “closed” be allowed to offer students an opportunity to access to educational instruction during a school closure. It is reasonable to argue that offering opportunities for access to educational instruction does cause the school to be open, thereby requiring adherence to all special education timelines. In an abundance of caution, we recommend that school districts determine which students are scheduled to receive initial or reevaluations during the closure. Districts should provide parents written notice of their obligation to complete evaluations during statutory timelines, notify the parents of any difficulties caused by the closure (such as the obligation to conduct in school observations or utilize in-person evaluation instruments), and seek written parental consent to extend the timeline for completion of the evaluation. A copy of the student's procedural safeguards should be included in the notice.
- Unless a waiver is provided by USDOE or TEA: As stated above, school districts that close may reasonably argue that providing access to education instruction during the closure does not negate the closure. School districts should determine which students are scheduled for or due for ARD meetings during the closure. Districts should provide parents written notice of the statutory deadline, and offer the parents with an opportunity to meet telephonically/remotely, allow the district members of the ARD committee to conduct a non-meeting amendment (where appropriate), waive parental attendance and allow the district members of the ARD committee to conduct the ARD, or seek written parental consent to extend the timeline to complete the ARD. A copy of the student's procedural safeguards should be included in the notice.

- After schools re-open, the school districts should schedule ARD meetings and Section 504 meetings to determine if any additional testing or evaluations are necessary as a result of changes in the student's ability resulting from the closure; determine if any compensatory education is necessary; discuss any changes to the student's goals and IEP as a result of the closure; and discuss with the parents any relevant changes in the home during the closure such as medications, private services, or environmental changes.

### **Words of Caution**

Absent substantive guidance at the federal or state level Texas schools are forced to make urgent decisions during this crisis without clear insight. The above guidance is based on what we know today and through years of special education legal experience. It is imperative that our school districts do what they believe is best for the students and communities we serve.

1. Consider the potential liability and community perspective before offering special education students to receive services during the emergency school closure at a school site that has been ordered closed for health-related concerns.
2. Consider establishing Alternative Dispute Resolution ("ADR") processes during the closure to address potential claims relating to the provision of FAPE during the closure. For those unfamiliar with ADR, the federal law encourages ADR as a less expensive and collaborative approach to resolving disputes. PYT is likely the only Texas school law firm with extensive experience in developing ADR process for school districts.
3. Remember that changes to a student's IEP can only be made during a valid ARD meeting and based on data and evaluations to support such changes. Before conducting ARD meetings to change the placement and services for students during this temporary closure, consider whether the ARD committee possesses sufficient documentation to prove that the change was required to provide the student with a FAPE.
4. For schools who choose to provide instruction during the closure, the USDOE has made clear that students are entitled to a FAPE during the closure. Parents retain their rights to due process and discrimination litigation under Section 504 and the Americans with Disability Act, even if the school district offers compensatory education.
5. If you have complicated student situations, it is better to seek guidance in advance. Call us. We are here 24/7 during this crisis.

If your school district requires assistance in preparing any of the documents discussed herein, have questions, or if we can be of any assistance, we encourage you to contact us.