

October 16, 2020

Keith Posley, PhD, Superintendent
Milwaukee Public Schools
P.O. Box 2181
Milwaukee, WI 53201-2181

Dear Dr. Posley:

I am writing to clarify the requirements under state and federal special education law. These requirements have not been waived due to the public health emergency, and the department expects that they are followed.

Under the Individuals with Disabilities Education Act (IDEA) and its implementing regulations, and Chapter 115 of the Wisconsin Statutes, school districts must provide each eligible student with a free appropriate public education (FAPE) by providing specially designed instruction and related services, as determined and documented by the student's Individualized Education Program (IEP) team. (34 CFR §§ 300.320-300.324; Wis. Stat. § 115.78[2]). There is no lesser version of FAPE.

What is FAPE for one student might look very different from what is FAPE for another. Decisions made by the IEP team are individualized and based on the unique, disability related needs of the student. IEPs must be reasonably calculated to allow each student to make appropriate progress both in the general education curriculum and toward their IEP goals, which for the majority of students with disabilities, means progressing from grade to grade. However, some students with disabilities are not able to progress from grade to grade. In those circumstances, the IEP must enable the student to make appropriate progress in light of the student's circumstances. (34 CFR §§ 300.320-300.324; Wis. Stat. § 115.78[2]; *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017)).

While most students are able to receive FAPE effectively through distance learning options, some students with disabilities are not. These students are simply not able to make the required progress solely through distance learning. Consequently, some students with disabilities require in-person instruction and/or related services in order to receive FAPE as required by both state and federal law.

The department is aware there is currently no public health order that would prohibit MPS from providing the in-person services necessary to comply with state and federal law. It is the department's expectation that MPS meets their responsibility to provide FAPE to every student with a disability, and that in-person instruction and services are

delivered to those students either individually or in small groups who require it in order to receive FAPE in a manner that follows health and safety protocols.

In order to provide services, the department has reviewed the funds available that could support special education instruction. In addition to state general aid and reimbursements provided under state special education categorical aids, federal dollars are available under the Individuals with Disabilities Education Act (IDEA) and Coronavirus Aid, Relief, and Economic Security (CARES) Act.

- MPS is eligible to receive \$25,405,902 in IDEA formula and \$1,163,729 in IDEA PreSchool funds for the 2020-2021 school year to cover a portion of the excess costs related to ensuring the provision of FAPE for students with IEPs.
- MPS is eligible to receive \$55,995,150 through the CARES Act under the Elementary and Secondary School Emergency Relief Fund. There are permissible [uses of funds](#) that are specific to special education, including:
 - Activities to address the unique outreach and service delivery needs of students with disabilities (CARES Act, §18003 [d][4])
 - Planning for and coordinating during long-term closures, including providing guidance for carrying out requirements under IDEA and ensuring other educational services can continue to be provided consistent with all Federal, State, and local requirements. (CARES Act, §18003 [d][8])
 - Purchase of educational technology (including hardware, software, and connectivity) for students who are served by the LEA that supports regular and substantive education interaction between students and their classroom instructors, including low-income students and students with disabilities (which may include assistive technology or adaptive equipment). (CARES Act, §18003 [d][9])
 - Providing mental health services and supports. (CARES Act, §18003 [d][10])
 - Planning and implementing activities related to summer learning and supplemental after-school programs, including providing classroom instruction or online learning during the summer. (CARES Act, §18003 [d][11])
 - Other activities that are necessary to maintain the operation of and continuity of services in LEAs and continuing to employ existing staff of the LEA. (CARES Act, §18003 [d][12])
- MPS is eligible to receive \$10,823,618 through the CARES Act under the Governor's Emergency Education Relief (GEER) Fund. There are permissible uses of funds that are specific to special education, including:
 - Health & Safety
 - Infrastructure & Schedule Modifications
 - Remote & Distance Learning

The department is available to provide technical assistance and share practices to support MPS in the provision of FAPE. The department will also continue to hold networking opportunities with special education leadership of the largest districts in Wisconsin.

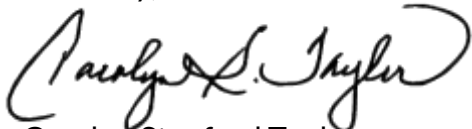
As MPS considers the services that need to be provided in person or how services can be provided virtually for each individual student, IEPs will need to be reviewed. The IEP team is responsible for determining on an individual basis the unique needs of each child and will need to determine if FAPE can be delivered in a virtual environment. When a student with an IEP is unable to access specially designed instruction and related services virtually, districts must explore options. Examples of options available include:

- According to the U.S. Department of Education Office of Special Education Programs, options include remote/distance instruction, in person attendance, or a combination of both remote/distance instruction and in person attendance (hybrid model)
- Create term of employment to serve students; Volunteers; Contract with outside agencies
- Utilize educational assistants to assist students in accessing instruction provided virtually by licensed special ed or general ed teachers
- Use of teleservice

MPS' failure to meet these requirements under state and federal special education law may result in the withholding of payments, recovery of funds, and/or reduction or elimination of special education aid to MPS. 20 U.S.C. § 1416(e); 34 C.F.R. § 300.604; Wis. Stat. § 115.90(2).

Please contact Dr. Barbara Van Haren, Assistant State Superintendent, at barbara.vanharen@dpi.wi.gov or (608) 266-1649 if you have questions or need additional information.

Sincerely,



Carolyn Stanford Taylor
State Superintendent

CST:sh

c: Jennifer Mims Howell, Senior Director of Specialized Services, Milwaukee Public Schools
Jeremiah Holiday, Interim Chief Academic Officer, Milwaukee Public Schools