KANSAS STATE DEPARTMENT OF EDUCATION

GUIDANCE

FAQ on Students with Disabilities and Virtual Schools and Programs

Question 1. Can a school district choose not to enroll students with disabilities in its virtual school or program?

Answer 1. No. The Office of Special Education Programs (OSEP) has confirmed, in Letter to Barnes, 41 IDELR 35 (OSEP 2003) that the IDEA does not allow states to waive or relax the special education requirements for virtual schools. Therefore, all IDEA requirements apply to virtual schools, including conducting evaluations, developing and implementing IEPs which offer a FAPE, and providing procedural safeguards. Further, IDEA regulations at 34 C.F.R. § 300.110 state that students with disabilities must have the same variety of educational programs available to them as non-disabled students. Therefore, students with disabilities must be provided with the same opportunities to participate in virtual schooling as non-disabled students, and to receive a FAPE while in the virtual program.

The Office for Civil Rights (OCR) has also held that online school admission criteria which a) deny admission to a student with a disability solely because the student needs special education or related services, or b) place different requirements upon a student with a disability than students without a disability, are inconsistent with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, and are thus discriminatory. See Quillayute Valley (WA) Sch. Dist. No. 402, November 16, 2007 (108 LRP 17959, 49 IDELR 293)].

Question 2. Can a sponsoring school district choose to enroll special and general education students who reside within the district and only general education students who reside outside of the district?

Answer 2. No. If the district's virtual school or program chooses to enroll out-of-district students, then the district must allow all students, regardless of disability status, to enroll.

Question 3. If a school district offers alternative options to students for accessing the general education curriculum, such as onsite or virtual school, who decides on the alternative option in which a student with a disability will participate: the student's IEP Team, school administrators, or the parent?

Answer 3. If a school district offers alternative options for accessing the general education curriculum, the decision as to whether a child with a disability will participate in an alternative option (such as onsite or virtual school) belongs to the parent as long as the student meets any non-discriminatory admissions criteria that apply to all students. Section 504 of the Rehabilitation Act and the Individuals with Disabilities Education Act (see 34 C.F.R. § 300.110) both require a school district to give students with disabilities equal access to the same opportunities and programs that are offered to students without disabilities. If an IEP Team or a school administrator requires a child with a disability to participate in one particular option, but offers students without disabilities the opportunity to choose among several options or places different admissions criteria on the child with a

disability, that could be perceived as disparate treatment and discrimination.

Question 4. How should a school handle a situation where the parent wants their student with a disability to participate in a virtual school option offered by the school district, but school administrators or the other members of the IEP Team believe the student could or should attend school onsite in the brick and mortar building instead?

Answer 4. If a parent wishes for their child to participate in an alternative option for accessing the general education curriculum that the district is offering to all students, the child meets the non-discriminatory admissions criteria that applies to all students, and the other members of the child's IEP Team do not believe that the parent's choice will provide the child with FAPE in the LRE, then the offer of FAPE should be kept intact in the child's IEP. However, the IEP Team should also create a temporary plan for services and supports needed for the child to participate in the alternative option chosen by the parent. Here are some guidelines to consider when creating such a plan:

1. Categorical aid is only available for services that are listed within a child's IEP. With that in mind, the IEP Team may want to put the temporary plan within the IEP document, rather than in a PWN or another separate document.
2. This temporary plan should include language indicating that the IEP Team does not believe the child's participation in the parent's chosen alternative option provides the child with a FAPE. However, because the child meets the non-discriminatory admissions criteria that applies to all students, the child will participate in the alternative option at the parent's request.
3. The plan should also indicate that the change in services and supports articulated for the child's participation in the alternative option are temporary and will apply only until such time as the child leaves the alternative option, at which time the original set of services and supports in the IEP developed prior to the child's participation in the alternative option will resume automatically without any action of the IEP team and without any additional notice or parent consent.
4. If there are any services and supports that the IEP Team determines cannot reasonably be provided in the parent's chosen alternative option, the IEP Team should make that clear to the parent and state in the plan that those services and supports will be provided on site at the school building if the parent chooses to make their child available onsite. Note that this should not be an "all or nothing" offer, meaning that all of the services and supports that can be reasonably provided in the alternative option should be provided; then only the remaining services and supports that cannot be reasonably provided should be made available on site.
5. To the extent these temporary services and supports are a change from what is currently stated in the IEP, a PWN is needed; parent consent is also needed if the temporary services constitute a material change in services.
6. Making these temporary changes to the IEP can be accomplished by convening an IEP Team meeting (virtually, if needed) or by the parent and school agreeing to amend the IEP without a meeting.

Question 5. If a parent and the other members of the IEP Team agree that a student with a disability could or should participate in a virtual school offered by the school district, how should the IEP Team document that decision?

Answer 5. In this instance, the IEP Team should determine whether any changes are needed to the services and supports in the IEP in order for the student to participate in the alternative option. These

changes should be stated in the IEP and clearly articulated as temporary provisions as described in Answer 4 above. This can be accomplished by convening an IEP Team meeting (virtually, if needed) or by the parent and school agreeing to amend the IEP without a meeting.

Question 6. Can a school district require students with disabilities to have administrator approval prior to enrolling in the district's virtual school or program?

Answer 6. Yes and no. The district's virtual school or program can require all students to have administrator approval prior to enrolling, but it cannot have a separate requirement just for students with disabilities.

Question 7. Can a school district require students with disabilities to have a letter of recommendation from their current IEP Team prior to enrolling?

Answer 7. No. A district's virtual school or program cannot have additional requirements for students with disabilities that creates a barrier to access that is not in place for general education students.

Question 8. Can the district establish an enrollment deadline for its virtual school or program for students with disabilities that is different than the enrollment deadline for general education students?

Answer 8. Yes and no. A district cannot set an enrollment deadline for students with disabilities that is earlier than the enrollment deadline for general education students, but a district can choose to extend the enrollment deadline for students with disabilities.

Question 9. Can a district ask the student to provide a copy of his/her IEP during enrollment in a virtual school?

Answer 9. A district can ask the student to provide a copy of his/her IEP as a part of the district's enrollment process.

Question 10. Can a district ask the parent to disclose the student's disability status during enrollment in a virtual school?

Answer 10. Yes. A district can, and should, ask the parent to disclose the student's disability status during the enrollment process.

Question 11. If the parent does not provide a copy of the IEP or disclose the student's disability status during the enrollment process for a virtual school, can that serve as grounds not to enroll the student?

Answer 11. No. While a district can ask the parent to provide a copy of the student's IEP and to disclose his/her disability status, the district cannot refuse to enroll the student if the parents do not comply with that request. Districts cannot have additional requirements for students with disabilities that creates a barrier to access that is not in place for general education students. If the parent of a student with disabilities fails to provide some other enrollment documentation, that is also required of parents of general education students, then yes, a district could choose not to enroll that student.

Question 12. Once a student with disabilities completes the application process for admission to a virtual school, whose responsibility is it to decide whether the student should be admitted?

Answer 12. The decision of whether to admit a student into a virtual school or virtual program is the responsibility of school administration. That decision must be based on neutral, non-discriminatory admission criteria that apply to all students. Once a student with disabilities applies for attendance at a virtual school and is accepted, an IEP Team meeting should be scheduled to determine whether any temporary changes in services are needed in order for the student to be successful in the virtual school option. If temporary changes to the IEP are necessary, the IEP Team should make those temporary changes, provide the parents with a prior written notice of the temporary changes, and obtain parent consent when the temporary changes require consent. The IEP in existence prior to the student's enrollment in the virtual school should be retained as the district's offer of FAPE, and the prior written notice of temporary changes should explain that the changes made to the IEP to meet the needs of the student in a virtual school are temporary and that, upon disenrollment from the virtual school, the student's temporary IEP services will end and the IEP services in existence prior to the student's enrollment in a virtual school will automatically resume, without a meeting and without any additional notice or consent.

Question 13. What are some examples of neutral, non-discriminatory admission criteria that apply to all students?

Answer 13.

- Residency in the school district where the virtual school is located
- Attending a virtual school informational session
- Signed assurance indicating understanding that a parent/guardian will fill a "learning coach" role for a certain number of hours per day
- Signed assurance to provide requested information (e.g., grades, transcripts, attendance records, IEP or 504 plan, etc.) to assist the virtual school staff in planning for the child's learning (note Question and Answer 11 for more information on document requests and impact on enrollment)
- Commitment to completing a virtual school orientation

Question 14. Can a district ask the parent to revoke consent for the student's IEP as a condition for enrollment in a virtual school?

Answer 14. No. Parents have a right to revoke consent for all special education services and may be advised of that right. However, under no circumstances should the parent be required or asked to revoke consent for their child's IEP.

Question 15. May a district establish admission criteria for its virtual school that excludes admission to a child with a disability who is: (a) functioning below grade level in math, reading, or other academic areas; (b) behind same age peers in attaining high school credits; not with his/her original cohort?

Answer 15. No. The suggested conditions may be applied to general education students but may not be applied to a child with a disability, under either Section 504 or the IDEA. A "child with a disability" is defined in the IDEA regulations, in part, as a child who has a disability that adversely affects the child's educational performance. Accordingly, children with disabilities are inherently more likely to be functioning on a lower educational performance level than general education students. Therefore, excluding the participation of children with disabilities at a virtual school based on deficits in educational

performance adversely impacts the right of such children under Section 504 and the IDEA to have an equal opportunity to participate in the educational programs of a public school.

Question 16. May a district deny admission of a child with a disability to its virtual school when the district believes it does not have the ability to modify curriculum in the manner described in a child's IEP?

Answer 16. No. When a public school sponsors a virtual school, the virtual school is a public school. As such, the virtual school has a legal obligation to comply with all provisions in federal and state law regarding children with disabilities. That includes the duty to adopt admission requirements that do not place a burden on a child with a disability that is not equally placed on general education students. Excluding children with disabilities from attendance at a virtual school because of the content of an IEP is impermissible because it is a condition that never applies to a general child but always applies only to children with disabilities.

Question 17. May a district establish admission criteria for its virtual school that excludes admission to a child with a disability to its virtual school who does not have sufficient self-motivation and independent work skills needed to be successful in a virtual school?

Answer 17. No. The suggested condition may be applied to general education students but may not be applied to a child with a disability, under either Section 504 or the IDEA. This suggested condition is problematic because self-motivation and independent work skills can be, and often are, adversely affected by a disability. Students with attention deficit disorder, for one example, may lack independent work skills because of their disability, and may need additional supports in order to have an equal opportunity to participate in an activity such as a virtual school that requires some independent work. Those students are legally entitled to be provided with accommodations and other supports they need to work independently and be successful in a virtual program. They should not be automatically excluded from participation in a public school program because they have a disability that adversely affects their ability to work independently.

Accordingly, the district could have a criterion for admission that requires that the parent provide written assurance that the child has sufficient self-motivation and independent work skills needed to be successful in a virtual education setting. However that assurance requirement would need to state that If the child has a disability that adversely affects these specified skills, the district the assurance would need to specify an alternative assurance asking the parent to assure that the disability is documented in an existing IEP or Section 504 Plan and that the child could demonstrate the sufficient self-motivation and independent work skills needed to be successful in a virtual education setting, with the use of supplementary aids and services that are in, or may be added to, an IEP or Section 504 Plan.

Question 18. When a parent enrolls their child with an exceptionality into a virtual school, is that considered a change of placement, a change in physical location, or a change in instructional methodology that would trigger the notice and consent requirements of special education law?

Answer 18. In most circumstances, the answer is "None of the above." Enrollment of a child with an exceptionality into a virtual school is usually a unilateral choice of a parent. A virtual school is typically an operational model offered by the school district for accessing the general education curriculum. When a district offers a virtual school as an option to all students for accessing the general education curriculum, the enrollment is not a change in placement because the enrollment in a virtual school is not made by an IEP Team in consideration of least restrictive environment requirements. It is not a change in physical location (as that term is used in special education) because the student is not assigned to the virtual

school by school administration. It is not a change in instructional methodology because, although instructional methods are likely to be significantly different in a virtual school than in a traditional school, the difference in instructional method is due to the parent's unilateral enrollment of the student in the virtual school and not due to educational decisions made by an IEP Team or school personnel.

The key to analyzing this question is to determine whether the student's participation in the virtual school is the result of a parent's or a student's choice, or whether it is the result of a decision made by school personnel. If the student is attending a virtual school because the student or parent has chosen that option, it is not a change in placement, a change in physical location or a change in instructional methodology, that would trigger the prior written notice and consent requirements of law. Thus, an exception to this analysis occurs when a child with an exceptionality is placed in a virtual school by an IEP Team. That action is a change in placement that is subject to the notice and consent requirements of special education. Another exception could occur when a district sets up its virtual school for a specific purpose, and it is not intended to be an option to all students for accessing the general education curriculum. One example of this might be a virtual program that applies only to high school juniors and above focused on credit recovery. If a student qualifies for this program and is attending this virtual program because the parent or student has elected to attend the program, it is not a change that would require a prior written notice or parent consent. Another example of an exception to this analysis might be a virtual version of a special day school or an alternative school, where a child with an exceptionality is assigned to the virtual day school or alternative school by an IEP Team, or by school administration as part of a disciplinary action. That kind of change triggers the special education notice and consent requirements.

Question 19. Who is responsible for providing special education services to students with an exceptionality in a virtual school or program sponsored by a school district? What if the district sponsoring district contracts with a service center or outside vendor to administer its virtual school/program?

Answer 19. The public school district that sponsors the virtual school is responsible for providing a FAPE for students with an exceptionality who enroll in its virtual school or program. Therefore, the district that sponsors the virtual school or program is responsible for providing special education services to its students with exceptionalities regardless of whether that district contracts with a service center or outside vendor to administer its virtual school/program. This is also true regardless of the student's school district of residence. If the district that sponsors the virtual school enrolls a student with an exceptionality that resides outside of the district, the district that enrolled the student in its virtual school or program is responsible for providing FAPE, not the student's district of residence.

Question 20. Can a school district require the student who enrolls in the district's virtual school to receive special education services in their resident district?

Answer 20. No. It is the responsibility of the district that sponsors the virtual school or program to provide special education services. The district can coordinate with the resident district to provide services, but the resident district is under no obligation to agree.

Question 21. What if the sponsoring district participates in a special education cooperative or interlocal that has decided not to provide special education services to virtual students?

Answer 21. Unless the cooperative or interlocal agreement specifies otherwise, the responsibility to provide special education services still rests with the district that sponsors the virtual school or program.

The district would need to make other arrangements to provide students with their needed special education services.

Question 22. What if the student needs a particular special education service to be successful in the virtual school that cannot be provided virtually?

Answer 22. Every reasonable effort should be made to provide special education services and accommodations virtually. If the service cannot be provided virtually, then the district must make other arrangements to provide the service, such as to make the service available onsite within the district where the virtual school is located or to contract with an agency closer to the student's residence to provide the service onsite.

Question 23. Can a sponsoring district require the student to come onsite for all of his/her special education services?

Answer 23. No. Every reasonable effort should be made to provide special education services and accommodations virtually. Only those services that are not reasonably capable of being provided virtually should require onsite participation. This onsite participation could be offered in the district where the virtual school is located or the district could contract with an agency closer to the student's residence.

Question 24. What if the parent refuses to permit the student to come onsite for a particular service that has been outlined in the student's IEP?

Answer 24. If the district has made available an onsite special education service (that was outlined in the student's IEP) and the parent refuses to permit the student to come onsite, then the parent has three options.: (1) the parent can choose to revoke consent for all special education services; (2) the parent can enroll the student in another school or program; or (3) the parent can notify the district that the parent will provide the services specified in the IEP privately. When parents do not notify the district that they are choosing one of these options, the district may be required to provide the parent with written notice that a truancy report will be made.

*The parent also has the option to ask the IEP Team to remove the service that requires onsite participation from the IEP, but the IEP Team would then have to certify in writing that this service is no longer needed for the child to receive a free appropriate public education. See K.A.R. 91-40-1(l)(3)(C), 91-40-27(k). Considering that it was the IEP Team that decided the service was necessary in the first place, this is unlikely.

Question 25. If a student with an IEP is participating in a virtual school option and is not making appropriate progress in the general education curriculum or toward meeting his/her IEP goals, what should the school do?

Answer 25. In any instance when a student is not making appropriate progress, the IEP Team would need to meet and discuss what changes can be made to the services and supports to address the lack of progress (34 C.F.R. 300.324(b)(1)(ii)(A)). This can be accomplished by convening an IEP Team meeting (virtually, if needed) or by the parent and school agreeing to amend the IEP without a meeting.

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