

PERRY A. ZIRKEL

University Professor Emeritus of Education and Law at Lehigh University

Special Supplement: COVID-19 and K-12 Students with Disabilities: Initial Guidance

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The COVID-19 pandemic and its legal implications for students with disabilities are subject to not only changes from day to day but variance among both the states and the school districts within them. Thus far the U.S. Department of Education (USDE) has issued various guidance documents (see <https://www.ed.gov/coronavirus> (<https://www.ed.gov/coronavirus>)), which include the Office of Special Education Programs (OSEP) interpretations regarding the IDEA and the Office for Civil Rights (OCR) interpretations regarding § 504/ADA. In addition, some state education agencies (SEAs) have issued their own guidance, which in some cases extends beyond the federal guidance for students with disabilities in elementary and secondary schools.¹

In response to stakeholder requests for my feedback, I offer my following initial impressions from an outside and impartial perspective. For legal advice, however, interested individuals should consult with an attorney in their state.

First, the most recent guidance from USDE,² the more recent OCR guidance,³ and any SEA guidance are all just that—guidance, or interpretations by the agencies responsible for administering the IDEA, § 504/ADA, and corollary state laws, respectively. None of these documents has the force of law; whether courts will find them persuasive is an “it depends” matter.⁴

Second, my impression is that the OCR guidance does not conflict with the USDE guidance, instead extending more broadly based on OCR’s responsibility for not only §504/ADA (for discrimination based on disability) but other federal civil rights laws, such as Title VI (for discrimination based on race or national origin).

Third, the cumulative federal guidance understandably addresses three typical alternative situations:

- (a) schools are open but a student with an IEP or 504 plan is absent for an extended period of time per public health authorities or physician directive
- (b) schools are closed but continue to offer services via remote technology
- (c) schools are closed with no services to students in the general population

For the first and last situations, the guidance is rather clear and persuasive as far as it goes: (a) FAPE follows the IDEA child, thus invoking the same sort of obligation that would apply to a student with an IEP who requires instruction in the home⁵; and (c) neither the child with an IEP nor the child with a 504

plan is entitled to FAPE. Although these two situations raise more limited and nuanced questions, including the extent of any compensatory education obligation, they are not the major issue right now.

To me, the priority issue at present is situation (b), especially in light of the current focus of many school systems on providing online instruction. For this situation, USDE's interpretation is as follows:

If 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.⁶

This interpretation is based primarily on § 504/ADA and it adds the subsequent and significant qualifier – “to the greatest extent possible.”⁷ Even with this feasibility-based qualifier, practical implementation is bound to be a daunting challenge particularly in relation to students with disabilities that are severe, those with particular communication needs, and/or those requiring related services, such as physical or occupational therapy. However, as a legal matter, despite OCR interpretations, the courts have generally adopted the standard of *reasonable* accommodations, with the prevailing ultimate prerequisite of gross misjudgment, bad faith, or deliberate indifference.⁸ Correspondingly, under the IDEA the ultimate FAPE standard is being “*reasonably calculated* to enable [the] child to make progress appropriate *in light of the child's circumstances.*”⁹

Finally, in light of a declared national emergency with public health/safety being the overriding priority, more USDE guidance is imminent, Congressional action is being considered, and courts ultimately will take into account the practical limits of compliance with the IDEA and §504/ADA. The imminent guidance will address many other questions, such as the timelines for evaluation, the procedures for IEP reviews, and the implementation of alternate ESSA assessments. Congressional action may extend to adjustments or waivers of the regulatory requirement. And courts will continue to formulate and apply standards that consider the applicable circumstances and that are generally lower than professional norms. For example, the prevailing judicial standard for FAPE implementation is already notably less than 100%.¹⁰

In these trying times, school district special education leaders need to apply common-sense proactive measures, as is their admirable norm and as our government is advocating for dealing more generally with COVID-19. Rather than fixating on perceived mixed messages, focusing on overly nuanced questions, or confusing well-intended guidance with binding legal requirements, local special education leaders should continue to use their particular forte in being creative, constructive, and collaborative, with due consultation with local legal counsel where needed. Rather than emotion-laden legalism, the key factors during this unusual crisis start with health/safety and, within this overriding consideration, what is essential and what is practicable.

¹ E.g., Guidance for Iowa AEAs and School Districts for IDEA during COVID-19 Outbreak (Mar. 17, 2020), <https://www.educateiowa.gov/article/2020/03/18/guidance-response-covid-19> (<https://www.educateiowa.gov/article/2020/03/18/guidance-response-covid-19>); Corona Virus (COVID-19) Frequently Asked Questions (FAQ) for Ohio Schools and Districts (Mar. 19, 2020), <http://education.ohio.gov/Topics/Student-Supports/Coronavirus/Frequently-Asked-Questions-Governor-DeWine%e2%80%99s-Scho> (<http://education.ohio.gov/Topics/Student-Supports/Coronavirus/Frequently-Asked-Questions-Governor-DeWine%e2%80%99s-Scho>)

² Questions and Answers on Providing Services to Children with Disabilities during the Corona Virus Disease 2019 Outbreak (March 12, 2020), <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/> (<https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>) (and also at <https://www.ed.gov/coronavirus> (<https://www.ed.gov/coronavirus>)).

³ Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students (March 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/newsroom.html> (<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>) (and also at <https://www.ed.gov/coronavirus> (<https://www.ed.gov/coronavirus>)).

⁴ E.g., Perry A. Zirkel, *The Courts' Use of OCR Policy Interpretations in Section 504/ADA K-12 Student Education Cases*, 349 Educ. L. Rep. 7 (2017), <https://perryzirkel.files.wordpress.com/2018/02/the-courts-use-of-ocr-policy-interpretations-in-section-504ada-student-k-12-edu1.pdf> (<https://perryzirkel.files.wordpress.com/2018/02/the-courts-use-of-ocr-policy-interpretations-in-section-504ada-student-k-12-edu1.pdf>); Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 Educ. L. Rep. 671 (2017), <https://perryzirkel.files.wordpress.com/2013/08/zirkel-2017-article-on-osep-letters.pdf> (<https://perryzirkel.files.wordpress.com/2013/08/zirkel-2017-article-on-osep-letters.pdf>).

⁵ E.g., 34 C.F.R. § 300.115(b)(1) (“home instruction” – cross referring to the IDEA regulation defining special education as including “instruction ... in the home”). This IDEA placement is not to be confused with home schooling or homebound instruction under state law.

⁶ *Supra* note 1, at item A-1.

⁷ *Id.*

⁸ E.g., Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students' Section 504 and ADA Claims Against School Districts?* 47 J.L. & Educ. 109 (2018), https://perryzirkel.files.wordpress.com/2018/03/zirkel-504_ada-article-in-jle-2018.pdf (https://perryzirkel.files.wordpress.com/2018/03/zirkel-504_ada-article-in-jle-2018.pdf).

⁹ *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 & 1001 (2017) (emphasis added).

¹⁰ E.g., Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. Nat'l Ass'n Admin. L. Judiciary 409 (2016); see also Perry A. Zirkel, *An Adjudicative Checklist of the Four Criteria for FAPE under the IDEA*, 346 Educ. L. Rep. 18 (2017), <https://perryzirkel.files.wordpress.com/2017/04/zirkel-bauer-article.pdf> (<https://perryzirkel.files.wordpress.com/2017/04/zirkel-bauer-article.pdf>).



