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## COVID-19 and K-12 Students with Disabilities: A Second Legal Look

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The COVID-19 pandemic and its legal implications for students with disabilities continues to be subject to not only changes from day to day but also variance among both the states and the school districts within them. And due to the literally and legally “unprecedented” situation, many unknowns still loom large.

Since my [first supplement](#), dated March 20, the U.S. Department of Education (USDE) has issued one more guidance document specific to students with disabilities in P-12 schools, which addresses the “serious misunderstanding” that “federal disability law presents insurmountable barriers to distance education.” This guidance counsels school personnel to engage in creative collaboration with parents to deliver IEP services technologically with the understanding that effective individualization is often feasible (e.g., “extensions of time for assignments, videos with accurate captioning or embedded sign language interpreting, accessible reading materials, and many speech or language services through video conferencing”), even though not extending to some services (e.g., “hands-on occupational therapy, physical therapy, or tactile sign language educational services”). As an overall matter, the guidance advises that FAPE in these circumstances allows for flexibility both substantively and procedurally rather than being an all-or-nothing approach.<sup>1</sup>

The other federal legal development since my earlier supplement was Congress's first stimulus package, the CARES Act, which the President signed on March 27. It not only reinforces the USDE authority to grant certain ESSA waivers,<sup>2</sup> but also requires USDE to submit a report to Congress within 30 days with requested waivers under the IDEA and Section 504.<sup>3</sup> It also allows for flexibility in use of existing federal funding for technology infrastructure and distance education.<sup>4</sup>

Finally, at the state level, in addition to continuing state education agency guidance and governors’ orders, new laws have started to appear. For example, Arizona passed emergency legislation providing that “[d]uring the 2019-2020 school year, public schools may deviate from the [state] statutory requirements relating to special education programs.”<sup>5</sup> Similarly, New Jersey has modified its regulations to allow for delivery of related services “through the use of electronic communications, virtual remote or online platforms.”<sup>6</sup>

Thus, intervening developments reinforce my earlier impression that the key for the immediately foreseeable future is to focus on flexibility that puts the priority on creative and collaborative delivery of substantive services. The business-as-usual compliance orientation on strict proceduralism and over-documented formalism is neither feasible nor fruitful at this time of limited resources and pressing demands.

Finally, in my view, various nuanced legal questions are far from the current priority. Here are a few examples: Even if a school district stopped offering services to any student during COVID-19 closure, thus not violating Section 504, does it nevertheless violate the IDEA obligation to provide services to eligible students depending on the individual nature and severity of their disabilities? Does the legal obligation of ESY change as a result of the pandemic? Does failure to completely adhere to the regulatory timelines for due process hearings and complaint procedures investigations result in SEA or LEA liability?

Perhaps the foremost example of a premature concern is the question of compensatory education. First, it is unclear what Congress may do about the scope of the FAPE requirement for the pandemic period. Second, even without any statutory adjustment, the remedy of compensatory education requires a substantive denial of FAPE. As pointed out in my prior supplement, the standard under the IDEA is reasonable calculation to enable the child to make “progress appropriate in light of the child’s circumstances,” and under Section 504 it amounts to reasonable accommodations and good faith professional judgment.<sup>8</sup> Third, even in cases of denial of FAPE, states are likely to develop post-pandemic policies that provide for procedures and criteria for the systemic compensatory relief, which will be subsequently subject to individual dispute resolution to the extent necessary. Thus, although three weeks have passed since my first supplement, my bottom-line conclusion remains the same, with emphasis on the professionalism of special educators<sup>9</sup> rather than the proceduralism of law<sup>10</sup>: *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.*<sup>11</sup>

<sup>1</sup> Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Students with Disabilities (Mar. 20, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

<sup>2</sup> For the waiver process, see, e.g., Dear Chief State School Officers Letter, <https://www2.ed.gov/policy/gen/guid/secletter/200320.html>

<sup>3</sup> Interested individuals and organizations should take this immediate opportunity to provide grassroots feedback. For an example of a prompt organizational response, see [https://cec.sped.org/news/CEC-Response-CARES-Act?\\_zs=UXedWj&\\_zl=q3Me6](https://cec.sped.org/news/CEC-Response-CARES-Act?_zs=UXedWj&_zl=q3Me6)

<sup>4</sup> For the USDE’s April 6 press release, see <https://www.ed.gov/news/press-releases/secretary-education-betsy-devos-authorizes-new-funding-flexibilities-support-continued-learning-during-covid-19-national-emergency>

<sup>5</sup> <https://www.azleg.gov/legtext/54leg/2r/laws/0047.htm> (see section 7).

<sup>6</sup> <https://www.nj.gov/education/sboe/meetings/agenda/2020/April.shtml> (5d – item D).

<sup>7</sup> *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 & 1001 (2017) (emphasis added). Similarly, the prevailing judicial standard for denial of FAPE based on failure to implement the IEP is already notably less than 100%. 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) <https://perryzirkel.files.wordpress.com/2017/04/zirkel-bauer-article.pdf>

<sup>8</sup> 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)

<sup>9</sup> One of the particular fortés of special educators is focusing on the whole child, including physical and mental health. E.g., <https://www.pbis.org/resource/responding-to-the-novel-coronavirus-covid-19-outbreak-through-pbis>

<sup>10</sup> For example, if a parent requests cessation of services, rather than focusing on documenting informed consent, why not explore with the parent the reasons for the request and how to resolve them together for the child’s benefit?

<sup>11</sup> The applicable factors during this unusual crisis start with health/safety and, within this overriding consideration, what is essential and what is practicable.

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