

COVID-19: The Legal Obligations and Ramifications of Hybrid and Distance Learning

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AGENDA

- ◆ Guidance from the U.S. Dept. of Education
- ◆ Guidance from CSDE
- ◆ Contingency Planning
- ◆ Compensatory Education
- ◆ COVID-19 Case Law

◆ *Disclaimer: The information in this handout and presentation is for the purpose of providing general information and is not intended to provide legal advice or substitute for the legal advice of counsel.*

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Guidance from the U.S. Dept. of Education



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USDOE OCR Fact Sheet
March 16, 2020

- ◆ Discretion of Local School Officials:
 - ◆ Districts have significant latitude and authority to take actions to protect the health, safety, and welfare of students and staff.
 - ◆ However, district officials should be mindful of the requirements of Section 504, Title II, and the IDEA.

United States Department of Education, Office for Civil Rights, Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students, March 16, 2020.

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USDOE OCR Fact Sheet
March 16, 2020

- ◆ Requirement to provide educational services during school closure:
 - ◆ If a school district closes its schools and does not provide any educational services to the general education student population, then a school would not be required to provide services to students with disabilities during that same period of time.
 - ◆ **Once school resumes**, the school must return to providing special education and related services to students with disabilities in accordance with the student's IEP or Section 504 plan.

United States Department of Education, Office for Civil Rights, Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students, March 16, 2020.

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USDOE OCR/OSERS Fact Sheet
March 21, 2020

- ◆ Compensatory Services:
 - ◆ Where there has been an inevitable delay in providing services, or even deciding how to provide services, due to school closures, the student's IEP team must make an individualized determination whether and to what extent compensatory services are needed when schools resume normal operations.

United States Department of Education, Office for Civil Rights & Office of Special Education and Rehabilitative Services, Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities, March 21, 2020.

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Dispute Resolution Timelines

- ◆ State Complaints:
 - ◆ The 60-day timeline for complaint resolution may be extended if "exceptional circumstances" exist, including staff unavailability during the pandemic.
- ◆ Due Process Hearings:
 - ◆ Parties may mutually agree to extend the 30-day timeline for resolution of a due process complaint. A hearing officer may extend the 45-day deadline for a hearing decision at the request of either party.

IDEA Part B Dispute Resolution Procedures (USDOE, June 22, 2020).

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Guidance from CSDE



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CSDE Guidance

- ◆ District must have meaningful consultation with parents as soon as possible to discuss how a given student's IEP services will be delivered if different than the manner of service delivery described in a student's IEP.
- ◆ After this collaboration and using input from the discussion with parents, the school district must document how FAPE will be delivered to each student, within the context of the current instructional delivery model.
 - ◆ The CSDE has developed The Learning Model IEP Implementation Plan form for districts to document the delivery of special education and related services that may be affected by the school district's response to the pandemic
- ◆ Then the district must provide that information to the parents along with written notification.

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CSDE Guidance

- ◆ Districts should prioritize students with disabilities for receiving in-school instruction even if schools are operating in a Hybrid or Remote model.
- ◆ Specific information regarding the impact on the student's special education and related services will need to be provided to families in a timely manner.

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CSDE Guidance: Conducting Evaluations

- ◆ Districts should prioritize initial evaluations as opposed to reevaluations, to ensure that eligible students begin to receive special education and related services.
- ◆ Districts should still make every effort to conduct in-person evaluations, even if the district is implementing a hybrid or full remote instructional delivery model, unless advised otherwise by state or local health officials.
- ◆ If a parent is not comfortable with in-person evaluations:
 - ◆ Discuss which assessments, if any, may be administered to the student remotely.
 - ◆ Ensure that there is comprehensive documentation regarding the family's decision.
 - ◆ Determine if the parent's refusal to make the student available for in-person assessment is a basis to extend the evaluation timeline or if it constitutes a revocation of consent.

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CSDE Guidance: Conducting Evaluations

- ◆ When deciding whether to conduct a specific assessment or parts of an assessment remotely, consider the following:
 - ◆ Referring to guidance of the relevant professional organization of the particular evaluator conducting the assessment at the state or national level.
 - ◆ Taking into consideration current knowledge and circumstances of the individual student
 - ◆ Reviewing standardization procedures to determine if validity and reliability have been established for remote administration.
 - ◆ Considering the use of alternative measures to assess all areas of the suspected disability.
 - ◆ Assessing the evaluator's competency level with remote administration of an assessment.
 - ◆ Consulting with the special education administrator.
- ◆ Evaluators should note in the evaluation report if any assessments were completed under nonstandard conditions (e.g., remotely, with masks, behind plastic barrier), or not completed at all because of the need for in-person administration.
- ◆ If adjustments to previously designed evaluations are required, evaluators should inform parents prior to administration.

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CSDE Guidance: Eligibility

- ◆ The PPT cannot pause the eligibility determination because it is unable to complete all the recommended assessments due to health and safety mandates.
- ◆ In these cases, the PPT should determine if it can make an eligibility determination based upon the available evaluation reports and existing data or consider whether a diagnostic placement would be appropriate as an alternative way of gathering information.

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Temporarily Opting into Voluntary Remote Learning Due to COVID-19

CSDE Guidance Addendums



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CSDE Guidance: Proper Notification

- ◆ Districts should prioritize notification to families of the implications of the choice to opt into remote learning.
- ◆ The notification should include:
 - ◆ Limitations (what will not be provided for students and families under this option);
 - ◆ Expectations for the family to supervise and support student attendance and engagement;
 - ◆ The remote learning program may not match instructional hours 1:1 with an in-person learning model (identification of the anticipated active instructional time);
 - ◆ The specific model the district will employ (cooperative models within a region; those operated by another district or RESC; online program consistent with school curriculum, or ect.);
 - ◆ The temporary nature of the remote learning program;
 - ◆ Protocols regarding opting in and local procedures for requesting parents to provide notice of the students return to in-person classes;
 - ◆ Confirmation that this voluntary family choice be clearly differentiated from circumstances where classes are cancelled for a broader population, should public health data require it.

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CSDE Guidance: TIP

- ◆ While the curriculum and instructional practices are unique to each elective and extracurricular activity, some methods will be able to be delivered in remote, virtual settings.
- ◆ School districts should determine the level of availability and notify parents and students of these options when they make their choice to opt into remote learning.
- ◆ While allowing access to the mandatory aspects of public education cannot be restricted, school districts should consult with board counsel regarding proper notification and acknowledgement of families that when they opt into temporary remote educational programming, this may mean access to certain classes or activities is not possible from a health and safety and planning perspective.

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CSDE Guidance

- ◆ While a district must not exclude students from in-person classes if that is being offered to all students, it may require students to attend school in-person in order to participate in school extra-curricular activities that are not related to the core curriculum.
- ◆ Districts must ensure that families understand that Connecticut law continues to require children to engage in public school education unless they receive equivalent instruction elsewhere.

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CSDE Guidance: Temporary Nature of the Opt-In Remote Learning Program

- ◆ Districts must clearly inform families that the remote learning program is temporary and may not be available the full year.
- ◆ The CSDE policy directives may change to determine there is no longer a need for this option, if public health data supports such a change.
- ◆ Remote learning students are still expected to access statewide assessments in-person, unless the assessments are available remotely.
- ◆ Districts are not required to provide in-person instruction or services in the home when a parent opts into remote learning.
 - ◆ However, districts must continue to make good faith efforts to implement the student's IEP remotely to the greatest extent feasible.

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CSDE Guidance: Attendance

- ◆ Where the students remain enrolled and in attendance via remote learning program, they remain students of the district.
 - ◆ Includes students attending choice programs and opt to temporarily participate in remote learning through their choice program.
 - ◆ District must report attendance to the CSDE to ensure they are included in the count for funding and support purposes and accountability.
- ◆ Attendance should be tracked on a daily basis in all learning models for state reporting purposes.
- ◆ Districts may use a variety of approaches to track attendance:
 - ◆ student's presence in virtual meetings;
 - ◆ time documented in electronic systems;
 - ◆ extent of daily work completed; and
 - ◆ other approaches that meet the state reporting requirements.

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CSDE Guidance: Homebound and Home Instruction Differ From Remote Learning

- ◆ The requirements under state law for the provision of homebound and hospitalized instruction for special education students remain unchanged.
 - ◆ Districts are still required to provide homebound and hospitalized instruction to special education students who are unable to attend school due to a verified medical reason which may include mental health issues.
- ◆ Home instruction is different in that such placement would occur as the result of a PPT recommendation that instruction in the home provides the student with FAPE in the least restrictive environment and would be reflected in the student's IEP.

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Contingency Planning

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Why We Need Contingency Plans

- ◆ What happens when in person attendance is suspended due to the spread of COVID-19 or when parent choses to participate in virtual instruction?
- ◆ CSDE's expectation is that schools will remain open and providing instruction through some alternative model for 180 school days and 900 hours of instruction.
- ◆ Alternative model will include some type of virtual/remote instruction.

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IEP Team Considerations

- ◆ What special education and related services can you continue to provide to students through a remote/virtual model?
- ◆ What IEP goals can be targeted?
- ◆ What accommodations might be needed in a virtual learning environment that are not required in traditional setting?

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CSDE Guidance

- ◆ Every school district must determine how to best educate and provide IEP services to its special education students within the context of each instructional delivery model while adhering to current health and safety protocols.
- ◆ While numerous challenges exist, maintaining the health and safety of our staffs and students while providing educational access consistent with the law continues to be the top priority.
- ◆ When it is not possible to deliver specific IEP services as originally intended, creative solutions and adjustments to instructional delivery and/or the environment will be necessary.
- ◆ While weighing the options on how to best address these issues, the requirement that students with disabilities are educated in the least restrictive environment (LRE) must be considered.

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CSDE Guidance

- ◆ The Learning Model IEP Implementation Plan must be used to describe any differences in the delivery of IEP services and will serve as the required notice to parents.
- ◆ It is permissible but not required to discuss The Learning Model IEP Implementation Plan during a planning and placement team (PPT) meeting.
- ◆ A change in delivery of IEP services due to a transition to a different instructional delivery model alone does not constitute a change of placement.

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Agreement to Contingency Plan Without an IEP Meeting

- ◆ "In making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purpose of making changes, and may instead develop a written document to amend or modify the current IEP." *34 C.F.R. 300.324(a)(4)*
- ◆ If parents do not agree – convene an IEP meeting.

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CSDE Guidance

- ◆ Conditions may change throughout the school year, so PPTs should attempt to develop annual goals and short-term objectives in such a manner that the goals and objectives can be addressed in each of the three instructional delivery models.
- ◆ School districts must balance the need to hold meetings and revise IEPs with the need to re-engage with students, while assessing the students' current academic and functional performance in order to inform the development of appropriate IEPs, taking into consideration data and reports from parents and staff who worked with the student during the spring school closure.

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Components for Contingency Plans

- ◆ Make a clear distinction that the plan is only effective during suspension of the option for in person attendance or the parent has chosen remote instruction.
- ◆ Outline the IEP goals to be targeted during the applicable time period.
- ◆ Outline the special education and related services to be provided during the applicable time period.
- ◆ Outline the accommodations, modifications, and supplementary aids and services needed for implementation of the services and goals.

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CSDE Guidance Document Learning Model IEP Implementation Plans

- ◆ Development
 - ◆ Develop and design IEPs as if “school was in session and under normal health conditions”
 - ◆ If IEPs cannot be implemented as written, then districts should develop “Learning Model IEP Implementation Plans,” which should:
 - ◆ Describe the manner the IEP will be implemented in one of three learning models (In-person, Hybrid, Remote);
 - ◆ Describe any differences in the delivery of IEP services as districts move from one learning model to another.
 - ◆ A Learning Model IEP Implementation Plan is only needed for students whose IEP services will be delivered differently than the current IEP indicates.

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CSDE Guidance Document Learning Model IEP Implementation Plans

- ◆ In-Person Model
 - ◆ Best aligned for providing services as written.
 - ◆ May need to adjust implementation of supports or services due to school or classroom reconfiguration and how other mitigating measures affect learning.
 - ◆ This must be documented in the Learning Model IEP implementation Plan as well as any other adjustment.
- ◆ Remote Model
 - ◆ Developing a Learning Model IEP Implementation Plan will likely be necessary for the majority of students in this model.
 - ◆ Districts are still required to consider providing in-school services to high need students under this model.

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CSDE Guidance Document Learning Model IEP Implementation Plans

◆ Hybrid Model

- ◆ Districts must consider providing in-person services in school to high need students full time, where it is consistent with public health and safety protocols.
- ◆ If not possible then providing in-person services to the maximum frequency possible.
 - ◆ This may amount to more days per week than what the Hybrid Model schedule allows for the full school population.

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CSDE Guidance: LRE

- ◆ Districts should examine how physical distancing requirements and cohorting might impact a student's LRE and how to best balance the implementation of these mitigating measures while preserving the principles of LRE.
- ◆ In cases where it is not possible to maintain an individual student's LRE while also implementing physical distancing requirements and cohorting:
 - ◆ Districts must justify the change in location of the service in The Learning Model IEP Implementation Plan.
- ◆ Given the fluid nature of the COVID-19 pandemic, districts should also continually review these cases to determine if the LRE for these students could be adjusted given improved conditions and relaxed health and safety requirements.

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CSDE Guidance: LRE

- ◆ When determining the LRE for a particular student, the following should be considered:
 - ◆ Given possible reduced class sizes, review IEPs to determine if pull-out services could be appropriately changed to push-in services to limit the mixing of cohorts.
 - ◆ Special education teachers and related service providers could provide services remotely from within the school building via video conference instead of coming in the classroom to provide push-in services.
 - ◆ This practice would help minimize foot traffic in and out of classrooms while providing access to services that support the inclusion of students with disabilities.
 - ◆ Think creatively about how to maintain opportunities for the inclusion of students with disabilities.
 - ◆ Districts may be able to use technology to provide inclusive groupings of students.
 - ◆ Avoid special education only cohorts unless the student's IEP requires a substantially separate setting or out of district placement.
 - ◆ Although districts cannot base cohorts on disability category, districts can consider placing students in cohorts based on the type of intervention or related services.
 - ◆ For example, a district may be able to place all the students receiving pull-out occupational therapy services in one cohort to reduce mixing of cohorts when pulling these students for services.

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CSDE Guidance: Transition Services

- ◆ It is highly recommended that in-person transition services resume as soon as it is safe to do so with the proper health and safety measures in place.
- ◆ If in-person participation in community-based learning opportunities become limited due to public health mandates, school districts should document any changes to the delivery of transition services in The Learning Model IEP Implementation Plan.

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Making Data Based Decisions

Present
Levels

Goals

Progress
Monitoring

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Data Collection Considerations

- ◆ What is the goal for the student?
 - ◆ Increased Fluency?
 - ◆ Ex. Timed Reading Probe
 - ◆ Increased Accuracy?
 - ◆ Ex. Percentage correct on Math probe
- ◆ Increased Frequency?
 - ◆ Ex. Increased number of requests
- ◆ Increased Consistency?
 - ◆ Ex. Occurs over multiple sessions
- ◆ Increased Skill Level?
 - ◆ Ex. Improve instructional level of reading skills by meeting certain criteria

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Making Data Based Decisions

- ◆ When reviewing data/providing progress reports on IEP goals, consider:
 - ◆ What was the child's present levels and where is the child now?
 - ◆ Is the child making growth? Is the child closing the gap with peers?
Making larger gains than the past?
 - ◆ If no or slow progress, then consider whether IEP team needs to meet again to address amending goals and/or IEP services.

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Data Collection & Contingency Plans

- ◆ When developing contingency plans for closure of in-person instruction, consider how you are going to collect data on IEP goals.
 - ◆ Can you continue with data collection as established in the current IEP?
 - ◆ Do adjustments need made to the form of data collection and/or the goals (measurement)?

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Data Collection & Contingency Plans

- ◆ Clearly set forth changes to progress monitoring, if needed, as to what circumstances would trigger a contingency plan and what changes in data collection will occur during implementation of the contingency plan.

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How much Data can Reasonably be Collected?

- ◆ Make sure IEP doesn't require more data collection than what is possible.
 - ◆ If IEP says daily data collection (which can only be collected in-person), that will need to be adjusted on the contingency plan.
- ◆ May need to reduce the number of goals in a contingency plan due to the nature of instruction during hybrid learning (which would also require less data collection).
- ◆ May need to seek alternative forms of data collection that can occur remotely.
- ◆ May need to reduce data collection to allow for more time for meaningful instruction when in-person.
 - ◆ If you reduce data make sure you have enough to show progress during reporting period.

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Evaluations and Timelines During Remote Instruction

- ◆ What can readily be obtained?
 - ◆ Online progress monitoring tools
 - ◆ Pre/Post tests for online curricular materials
 - ◆ Progress monitoring using live visual audio platform
 - ◆ Observations of student behavior
 - ◆ Classroom performance
 - ◆ Checklists and rating scales for student behavior and functional skills

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Compensatory Education



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USDOE OCR Fact Sheet
March 16, 2020

- ◆ Compensatory Services:
 - ◆ If a student does not receive services after an extended period of time, the student's IEP team or 504 team must make an individualized determination whether and to what extent compensatory services are needed including how to make up for any skills that may have been lost.

United States Department of Education, Office for Civil Rights, Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students, March 16, 2020.

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Compensatory Education under IDEA

- ◆ Not specifically identified in IDEA.
- ◆ Courts have authority under the IDEA to “grant any such relief as the court determines appropriate.” 20 U.S.C. 1415 (i)(2)(c)(iii) and 34 C.F.R. 300.516(c)(3).
 - ◆ An appropriate remedy when a student has been denied FAPE in the past.
 - ◆ Generally defined as educational services beyond what is normally due a student.

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OSEP on Comp Ed

- ◆ Recognized as a permissible remedy under IDEA.
- ◆ A major purpose of the IDEA is to ensure that children are provided FAPE. Comp ed effectuates this purpose by providing FAPE which the child was originally entitled to receive.
- ◆ Hearing officers have the authority to grant relief they deem necessary at the administrative level, including comp ed.
- ◆ The scope of compensatory education must be consistent with a child's entitlement to FAPE but should not impose obligations that go beyond that entitlement.
- ◆ Letter to Kohn, 17 IDELR 522 (1991).

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Free Appropriate Public Education

◆ What is a free appropriate public education (FAPE)?

- ◆ *Rowley Standard*: For a student who is fully integrated into the regular education setting, the student's IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).
- ◆ *Endrew F. Standard*: For a student who is not fully integrated into the regular education setting, the student's IEP should be "appropriately ambitious" and give the student a "chance to meet challenging objectives" – goals must be "appropriately ambitious in light of [the child's] circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

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FAPE Under *Endrew F.*

◆ **Endrew F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174, 137 S.Ct. 988 (2017).**

- ◆ A school must offer an IEP that is reasonably calculated to enable a child to make progress "appropriate in light of the child's circumstances."
- ◆ When a child is "fully integrated" into a regular classroom, providing FAPE that meets the unique needs of a child with a disability typically means providing a level of instruction reasonably calculated to permit advancement through the general curriculum (*Rowley Standard*)
- ◆ If progressing smoothly through the general curriculum is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement but must be "appropriately ambitious in light of his circumstances."
- ◆ This standard is markedly more demanding than a 'merely more than de minimis' test for educational benefit.

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What Is Progress That Is "Appropriate to the Child's Circumstances?"

◆ The degree of progress contemplated by the IEP must be 'appropriate in light of the child's circumstances.'

◆ **Issue:** What does "appropriate in light of the child's circumstances" mean?

- ◆ Potential?
- ◆ PLEP/PLOP Measures?
- ◆ IQ/Achievement/Other Academic Testing?
- ◆ Social/Emotional Deficits?
- ◆ Medical Conditions?
- ◆ Disability Category?
- ◆ Other???

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What are the Child's Circumstances?

◆ Court considered...

- ◆ Student's intellectual potential, proven academic success, and ADHD related weaknesses. *Jack J. v. Coatesville Area Sch. Dist.*, 118 LRP 29498 (E.D. Penn. July 12, 2018).
- ◆ Student's trivial progress, 3-4 grade levels behind in reading, struggling in math when IEP contained minimal changes. *R.N. and A.N. ex rel. R.N. v. Board of Educ. for the Iroquois Cent. Sch. Dist.*, 119 LRP 20443 (W.D.N.Y. May 20, 2019).
- ◆ Student's hearing impairment, slow progress, ability to communicate, ability to understand and comprehend spoken or signed language, and the parent's resistance to the educational program. *Johnson v. Boston Pub. Schs. et. al.*, 73 IDELR 31 (1st Cir. Oct. 12, 2018).
- ◆ Student's educational progress in 4th grade despite anxiety regarding certain assignments when considering the 5th and 6th grade IEPs. *C.B. v. Smith*, 119 LRP 26315 (D.Md. July 9, 2019).

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The New FAPE Standard is "More Demanding" that "Merely *De Minimis*"

- ◆ "This standard is more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit. It cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom but is satisfied with barely more than *de minimis* progress for children who are not." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 137 S.Ct. 988 (2017).
- ◆ Thus, students in special education classrooms must make more than "*de minimis*" educational progress.

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Calculating Comp Ed

◆ Qualitative vs. Quantitative Approach:

- ◆ An award of comp ed is equitable relief and requires consideration of all relevant factors and uses a flexible approach to address the individual child's needs with a qualitative, rather than quantitative focus. *Florence County Sch. Dist. v. Carter*, 103 LRP 44107 (1993), 510 U.S. 7 (1993).
- ◆ No obligation to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 21 IDELR 723 (9th Cir. 1994).
- ◆ An award of comp ed must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services that should have been provided. *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005).

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Calculating Comp Ed

- ◆ Comp ed is an equitable remedy and requires a fact specific inquiry.
- ◆ Just as IEPs focus on individual needs, awards of comp ed for past violations must rely on individualized assessments.
- ◆ Some students may require only short, intensive compensatory programs targeted at specific deficiencies and others may need extended programs. *Reid v. Dist. of Columbia*, 43 IDELR 32 (D.C. Cir. 2005).

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Student Specific Data Collection

- ◆ Prior to the IEP meeting, school personnel should obtain the following information:
- ◆ Present levels of performance (PLOPs) on all IEP goals
 - ◆ How does the child's skills (PLOPs) compare to same age peers based on universal screeners, normed assessments, or other grade level expectations (when such data is available)?
 - ◆ Did the gap increase during school closure or during virtual instruction?
- ◆ What was the child's rate of improvement (ROI) on IEP goals? How does this compare to the child's ROI prior to school closure?
 - ◆ Is the ROI greater after school closure and/or period of virtual instruction?

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Designing Comp Ed

- ◆ What questions should the team consider in designing a comp ed plan?
 - ◆ What IEP goals will be addressed through comp ed?
 - ◆ How many hours of comp ed will be provided?
 - ◆ In what type of setting (1:1, small group, sped, gen ed.) will the comp ed be provided?
 - ◆ Over what period of time is it reasonable to provide the comp ed?
 - ◆ When will the comp ed be provided?
 - ◆ Will the child require transportation to receive the comp ed?

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USDOE Guidance on H1N1
September 29, 2009

- ◆ Number of Ways to Provide Compensatory Services:
 - ◆ Extended school year services.
 - ◆ Extending the school day.
 - ◆ Tutoring before and after school.
 - ◆ Providing additional services during regular school hours.

United States Department of Education, Guidance on Flexibility and Waivers for SEAs, LEAs, Postsecondary Institutions, and Other Grantee and Program Participants in Responding to Pandemic Influenza (H1N1 Virus), Sept. 29, 2009.

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COVID-19 Case Law



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Services Provided During COVID-19
School Closure

- ◆ **Student v. Watertown Bd. of Ed., 77 IDELR 298 (Conn. Educ. Agency, Oct. 8, 2020).**
 - ◆ On February 13, 2020, the PPT met for a triennial review, at which point it added several goals and objectives.
 - ◆ This IEP required the district to provide the Student ESY services for the 2019-2020 year.
 - ◆ Regular school stopped on March 12, 2020, as a result of the Governor's order concerning the COVID-19 outbreak, and for two weeks no educational services were offered to any students.
 - ◆ During the outbreak, there were no PPT meetings held for student.
 - ◆ On March 30, 2020, the Board provided virtual learning, which was made available to Student.
 - ◆ The SLP was required to design a plan for Student's speech language program during COVID-19.
 - ◆ The school physically opened for in person instruction for ten students during the second ESY session in August, but Student was not one of those ten.

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A 10-Day Delay in Convening a PPT was not Unreasonable Under the Circumstances

- ◆ **Student v. Watertown Bd. of Ed., 77 IDELR 298 (Conn. Educ. Agency, Oct. 8, 2020), Cont.**
- ◆ Parent claimed the Board failed to provide her with the procedural protections of the IDEA by not convening a PPT meeting by March 13, 2020.
- ◆ The Hearing Officer found that the Board “was not required to have convened a PPT by March 13, 2020, (under the circumstances a ten-day delay was not unreasonable)—but the Board should have conducted some kind of meeting with the Parent, (by either telephone conference call, or video conference), to discuss the proposed implementation of the Student’s IEP by May 1, 2020.”
- ◆ The Hearing Officer noted that “problems in delivery of speech/language therapy were ongoing well into June 2020,” and explained that “this was a period where the Board should have initiated a conference with the Parent.”

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Impossibility of Full Implementation of the IEP is Not a Defense

- ◆ **Student v. Watertown Bd. of Ed., 77 IDELR 298 (Conn. Educ. Agency, Oct. 8, 2020), Cont.**
- ◆ When looking at the Districts failure to implement the IEP, the Hearing Officer explained that the “guidance to districts that they should ‘do their best in adhering to IDEA requirements to the maximum extent possible,’ and ensure implementation of IEPs ‘to the greatest extent possible,’ were simply goals.”
- ◆ He further explained, “the relevant inquiry in this case remains whether the District adequately implemented the Student’s IEP and provided him with FAPE under the pre-COVID-19 standards.”
- ◆ The impossibility of full implementation of a student’s IEP is not a defense that relieves the District of its obligation to provide the Student FAPE, even with the unforeseeable emergence of the COVID-19 pandemic.

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Impossibility of Full Implementation of the IEP is Not a Defense

- ◆ **Student v. Watertown Bd. of Ed., 77 IDELR 298 (Conn. Educ. Agency, Oct. 8, 2020), Cont.**
- ◆ The hearing Officer held the “two 20 minute on-line sessions with a speech therapist, access to Google Meet (without the benefit of a Behavioral Therapist), limited virtual ESY sessions, and a deck of “Boom” cards—over nearly six months—is simply not an acceptable substitute for the comprehensive program of special education specified in the Student’s IEP.
- ◆ The Hearing Officer recognized that “the substitution of virtual learning [may be] adequate for many, if not most, other students entitled to FAPE, but this Student fits into a category of disability where it was not possible for him to receive meaningful educational benefit from the limited services that were offered.”
- ◆ In making this determination the Hearing Officer considered the student’s vulnerability to interruptions, history of elopement, significant anxiety, difficulty with self-regulation, and lack of impulse control.

60

Denying a Student Full Implementation of ESY was Found to be an Egregious Determination

- ◆ **Student v. Watertown Bd. of Ed., 77 IDELR 298 (Conn. Educ. Agency, Oct. 8, 2020), Cont.**
- ◆ Because the student had already been found eligible and entitled to ESY under his current IEP, the Hearing Officer found such a denial of ESY services to be egregious, despite the COVID-19 outbreak.
- ◆ The Board argued that it was relieved of its responsibility to provide the full panoply of special education and related services as a result of the COVID-19 outbreak.
- ◆ The Hearing Officer explained, "nothing in the IDEA to suggest that the State has the authority to suspend its obligation to provide special education to students with qualifying disabilities during a pandemic."

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Hearing Officer Awarded Comp. Ed. Due to Failure to Implement IEP During COVID-19

- ◆ **Student v. Watertown Bd. of Ed., 77 IDELR 298 (Conn. Educ. Agency, Oct. 8, 2020), Cont.**
- ◆ The Hearing Officer found that "the denial of FAPE in this matter, while not in bad faith, was nonetheless a gross denial of the Student's IEP, and thus a gross deprivation of FAPE."
- ◆ The Hearing Officer considered the difficulties that the COVID-19 outbreak caused in providing all aspects of the IEP as well as whether the parent obstructed or was uncooperative in the district's efforts to meet its IDEA obligations.
- ◆ The Hearing Officer noted that the parent did make it difficult for the district to implement the student's IEP to the greatest extent possible, "but the services offered by the Board were nevertheless not sufficient given his unique needs."
- ◆ Thus, the student was awarded 40 hours of speech language therapy and 8 hours of individual music therapy.

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A Pandemic Does Not Relieve a District of Its Duty to Provide a FAPE

- ◆ **Student v. East Windsor Bd. of Ed., 121 LRP 2530 (Conn. Educ. Agency, Nov. 18, 2020).**
- ◆ Student's January 2020 IEP remained in effect during the COVID-19 shut down and student continued to receive special education and related services during distance learning.
- ◆ During the shut down and distance learning the "BOE reduced the amount of teacher-led time that Student received special education classes during distance learning."
 - ◆ But "did not change the amount of time that Student received related services during distance learning."
- ◆ BOE used alternative delivery methods to continue Student's services, including videoconference sessions, instructional packets with directions and guidance for implementing throughout Student's distance learning day, feedback, and parent consults.

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A Pandemic Does Not Relieve a District of Its Duty to Provide a FAPE

◆ **Student v. East Windsor Bd. of Ed., 121 LRP 2530 (Conn. Educ. Agency, Nov. 18, 2020), Cont.**

- ◆ While the student's mother was active in the student's distance learning plan, she was not always able to get the student to the computer or a worktable for her sessions due to meltdowns and behavioral issues.
- ◆ BOE staff provided behavioral supports and direction.
- ◆ The Hearing Officer found that the "BOE offered Student a distance learning plan that provided a significant and material portion of her IEP's academic/cognitive and social/behavioral program," but failed to meet "its burden of proving that this portion of Student's offered program was significantly or materially implemented during distance learning."

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A Pandemic Does Not Relieve a District of Its Duty to Provide a FAPE

◆ **Student v. East Windsor Bd. of Ed., 121 LRP 2530 (Conn. Educ. Agency, Nov. 18, 2020), Cont.**

- ◆ Mother reduced the frequency and duration of the student's distance learning sessions and discontinued TouchMath due other challenges at home.
- ◆ The Hearing Officer noted that BOE did not convene the PPT to consider other alternatives, changes in Student's program or delivery method or to develop a BIP to address those behaviors.
- ◆ Despite a lack of consistency in distance learning, Mother testified that she was seeing improvements.
- ◆ However, Student's progress report provides minimal information about Student's progress or activities during that period of distance learning.
- ◆ Therefore, the Hearing Officer found that the BOE failed to provide the student with a FAPE from March 16 to June 18, 2020 during distance learning.

65

A Districts Failure to Prove Proper Implementation Resulted in a Favorable Decision for the Parent

◆ **Student v. East Windsor Bd. of Ed., 121 LRP 2530 (Conn. Educ. Agency, Nov. 18, 2020), Cont.**

- ◆ The Hearing Officer found that the BOE's denial of FAPE was not in bad faith or a gross denial of Student's IEP; and Mother's resistance was not in bad faith but due to a disagreement as to strategy.
- ◆ In light of the facts and circumstances the Hearing Officer ordered the BOE to convene a PPT to review Student's distance learning plan and determine whether an amendment to her IEP and/or distance learning plan is appropriate, if it had not already done so by the time the Order was issued.

66

A Pandemic Does Not Relieve a District of Its Duty to Provide a FAPE

- ◆ **Hernandez v. Lujan Grisham, 120 LRP 31613 (D.C. N.M., Oct. 14, 2020)**
- ◆ District Court held that a student with learning disabilities was entitled to an IEP that reflected her need for in person learning even though the state argued that the district developed the IEP based on state health regulations issued during the pandemic.
- ◆ Court indicated the state's re-entry guidance permitted in person instruction for special needs students and the state had misinterpreted the guidance as forbidding in-person attendance.

67

Parent Referrals

- ◆ **Jacksonville North Pulaski School District v. D.M., Parent of A.B., et al., 76 IDELR 238 (E.D. Arkansas, June 12, 2020).**
- ◆ Several IEP meetings were held in February 2020 seeking consent for evaluation to determine eligibility for kindergarten student with ADHD and sensory processing disorder.
- ◆ Guardians did not provide consent until late March 2020 after schools were closed due to COVID-19.
- ◆ Subsequently filed due process hearing request alleging evaluation was unreasonably delayed. Hearing officer held in favor of guardian and district appealed.
- ◆ The District Court found that guardian's own actions suggested the evaluation was not as urgent as claimed because the parents waited until districts were shutdown due to COVID-19 to consent to the evaluation.
- ◆ District court also noted that per guidance issued by the state's department of education testing was not required to resume until schools had reopened.

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IEP Implementation During COVID-19

- ◆ **L.V. ex rel. J.V.2 v. New York City Dep't. of Educ., 120 LRP 20667 (S.D. N.Y., July 8, 2020).**
- ◆ Plaintiffs filed suit in federal district court alleging the district failed to comply with the services set forth in an order issued by an IHO which included ABA therapy, OT, S/L therapy, PT, and door to door transportation services.
- ◆ District was not providing in-person services due to COVID-19 school closure. District provided tablets and hot spots to students so they could participate in remote learning opportunities.
- ◆ Court required the district to provide the applied behavioral analysis, occupational therapy, physical therapy, and speech-language therapy set forth in a September 2019 IHO order to the extent it can do so safely.
- ◆ Although the order did not expressly require the district to deliver those services in person, the Court noted that it included transportation and a qualified aide – both of which suggested face-to-face delivery of services.
- ◆ The Court explained that the district's use of tablets to provide IDEA services to "thousands" of other students with IEPs did not prove that its reliance on technology was appropriate in this case.

69

Stay-Put During Pandemic

- ◆ **Araujo v. New York City Dep't. of Educ., 120 LRP 29007 (S.D.N.Y. Sept. 24, 2020).**
- ◆ 13 students with TBI had been placed at a private school during the 2019-2020 school year either by the district or by court orders. Parents sought continued placement at the private school for the 2020-2021 school year through due process hearing requests.
- ◆ The district refused to pay for 13 students' private school services until it received supporting documentation regarding tuition fees and all other services provided.
- ◆ The District Court found that the private school placement was the "stay put" placement for each of the 13 students- "IDEA's stay-put provision requires a district to maintain a student's current educational placement while an administrative or judicial proceeding about her identification, evaluation, placement, or services is pending. [and] applies automatically."
- ◆ This means "the district's payment obligation arises as soon as the parents file a due process complaint."

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Stay-Put During Pandemic

- ◆ **Killoran ex rel. A.K. v. Westhampton Beach Sch. Dist., 120 LRP 27565 (E.D. N.Y., Sept. 10, 2020).**
- ◆ Stay put agreement drafted prior to the pandemic called for services to be provided at public library for middle school student with Down Syndrome. Agreement included a provision for services to be provided in home if pandemic caused extended closing of the public library.
- ◆ The Court acknowledged parent's work schedules prevented them from staying home during school days and that they did not want instructors in their home during the pandemic; however, it explained that she had to consider the district's need to protect student and staff safety.
- ◆ Judge noted that the student's difficulties with eating, toileting, and sanitation created particular challenges for school employees attempting to enforce social distancing and other safety protocols.
- ◆ While the Court was sympathetic to parents' concerns and struggles of working families, the balance of hardship did not tip in their favor.
- ◆ Home instruction became the "stay put" placement upon closure of the library.

71

Progress at Private School Supports Amounted to FAPE

- ◆ **M.C. et. al. v. Mamaroneck Union Free Sch. Dist., 73 IDELR 48 (S.D.N.Y. Sept. 28, 2018).**
- ◆ The progress reports from the student's private school placement supported the district's decision to offer the student an IEP placing the student in a co-teaching classroom with daily resource instruction.
- ◆ The parents argued that the student's progress was due to the small, highly structured classes at the private school.
- ◆ However, the Court held that due to the student's improvements, the IEP offered FAPE.

72

District Provided FAPE Despite Lack of Formal BIP

◆ **S.W. v. Abington Sch. Dist., 73 IDELR 179 (E.D. Penn. Dec. 17, 2018).**

- ◆ Because a district's IEP included behavioral interventions that reduced the student's serious disciplinary incidents, the district overcame a claim that it violated FAPE by failing to conduct an FBA and implement a formal BIP
- ◆ The district appropriately considered the use of positive behavioral interventions by providing the student individualized behavioral management systems, daily check-in/check-outs, social skills training, and positive behavior motivators.
- ◆ The student made significant behavioral and academic progress with such services so the student's IEP was appropriate in light of the child's circumstances.

73

Student's Inability to meet All IEP Goals Not Denial of FAPE

◆ **D.F. v. Smith, 74 IDELR 75 (D.Md. Mar. 28, 2019).**

- ◆ A parent was unable to obtain reimbursement for her child's private school when her child made incremental progress over three years, even though he did not meet all his IEP goals.
- ◆ The student was able to achieve smaller objectives of the IEP goals for written language, social and emotional development, occupational therapy, reading, speech-language, self-help, and classroom behavior in addition to meeting his math goal.
- ◆ "Students with autism may not progress linearly or consistently; the nature of their disability suggests that any academic and social progress...may be intermittently."

74

Appropriate in Light of Student's Circumstances Does Not Mean Maximum Potential

◆ **A.A. ex rel. K.K. v. Northside Indep. Sch. Dist., 120 LRP 9212 (5th Circ. March 6, 2020).**

- ◆ Here, the parent filed suit against the district alleging denial of FAPE due to academic regression.
- ◆ However, the Court noted that the IEP team appropriately revised the student's IEP goals to account for progress and the student made progress in fine motor skills.
- ◆ The Court explained that the standard is not to provide opportunity for maximum potential or to "insulate a child from experiencing hardships."
- ◆ The Court noted that despite being absent 46 days in one school year, the student made notable gains academically and socially.
- ◆ Thus, the Court found that the district took the necessary steps to ensure the students success and upheld the District Court's finding that student's progress was appropriate in light of his circumstances.

75

Repeated IEP Goals with Little Progress Denied FAPE

- ◆ **Preciado v. Board of Educ. of Clovis Mun. Schs., 120 LRP 9731 (D.C. N.M., March 11, 2020).**
- ◆ The District Court found that the evidence showed that the district offered "extremely similar goals and recommendations" on the student's IEP for three years and the district failed to provide adequate instruction in reading and writing.
- ◆ The Court also noted that the special education teacher incorrectly believed that simple repetition taught students how to read.
- ◆ Finally, the District Court held that for those reasons coupled with the fact that the student made little progress in three years the district denied the student FAPE and upheld the IHO's decision ordering the district to pay compensatory education.

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Failure to Make Behavioral Progress Denied FAPE

- ◆ **Colonial Sch. Dist. v. N.S., 76 IDELR 127 (E.D. Penn. March 27, 2020).**
- ◆ IDEA requires an IEP team to consider positive behavioral interventions and supports for a student whose behaviors impede her own learning or the learning of others.
- ◆ The district attempted to employ several "informal behavioral initiatives" which included the use of a behavioral chart tallying points for good behavior and the student's participation in a "lunch bunch" social skills group.
 - ◆ However, these initiatives did not meet that standard because they "were never modified, even after the district expressed continued or new concerns over the student's behavior."
- ◆ Because an elementary school student with disabilities made little to no behavioral progress under the "motivational behavioral plan," the district erred in continuing that plan the following school year.
- ◆ Thus, the Court held the district's failure to develop a BIP to address the student's ongoing difficulties with focus, aggression, and sexually inappropriate conduct amounted to a denial of FAPE.

77

Trivial Progress Results in Payment of Private Placement

- ◆ **A.D. v. Creative Minds Int'l Pub. Charter Sch., 77 IDELR 163 (D.C. Sept. 28, 2020).**
- ◆ The district reduced the student's specialized instruction in written expression by 30 minutes a week despite the student's repeated failure to meet her IEP goals.
- ◆ The Court found that the district failed to provide a FAPE because the IEP failed to include any goals relating to math and because it reduced her specialized instruction in written expression.
- ◆ The Court order the district to reimburse the parents for the the student's unilateral placements.
- ◆ The Court explained that "trivial progress is not enough to satisfy the IDEA's FAPE requirement" regarding the appropriateness of the IEP.

78

IEP Failed to Enable Progress

◆ **Downingtown Area Sch. Dist. v. G.W., 77 IDELR 155 (E.D. Penn, Oct. 8, 2020).**

- ◆ The District Court held that due to the "student's progress stagnating during the second half of the 2016-17 school year [and] his district's approach to addressing his needs" the district denied the student a FAPE.
- ◆ The denial of FAPE was a result of "repeating many of his IEP goals, failing to substantially change his programming, and failing to reevaluate him before developing a new IEP," which was not "reasonably calculated to enable a child to make progress appropriate in light of his circumstances."
- ◆ To avoid this type of suit, the IEP "team should have either changed the five goals it repeated, adjusted the student's programming to reverse his stagnation, or both, or at least explained in the IEP why it wasn't changing the goals."

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Thank you!

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