



SYMPOSIUM BREAKOUT SESSION
TUESDAY, OCTOBER 26, 2021 | 1:15-2:15 PM ET

Empowering Online and Blended Programs to Customize Legally Sound Opportunities for Individuals with Disabilities, Especially in a Post-COVID-19 World

PRESENTERS:

- Kevin McKenna, McKenna Snyder LLC
- Nicole Snyder, McKenna Snyder LLC



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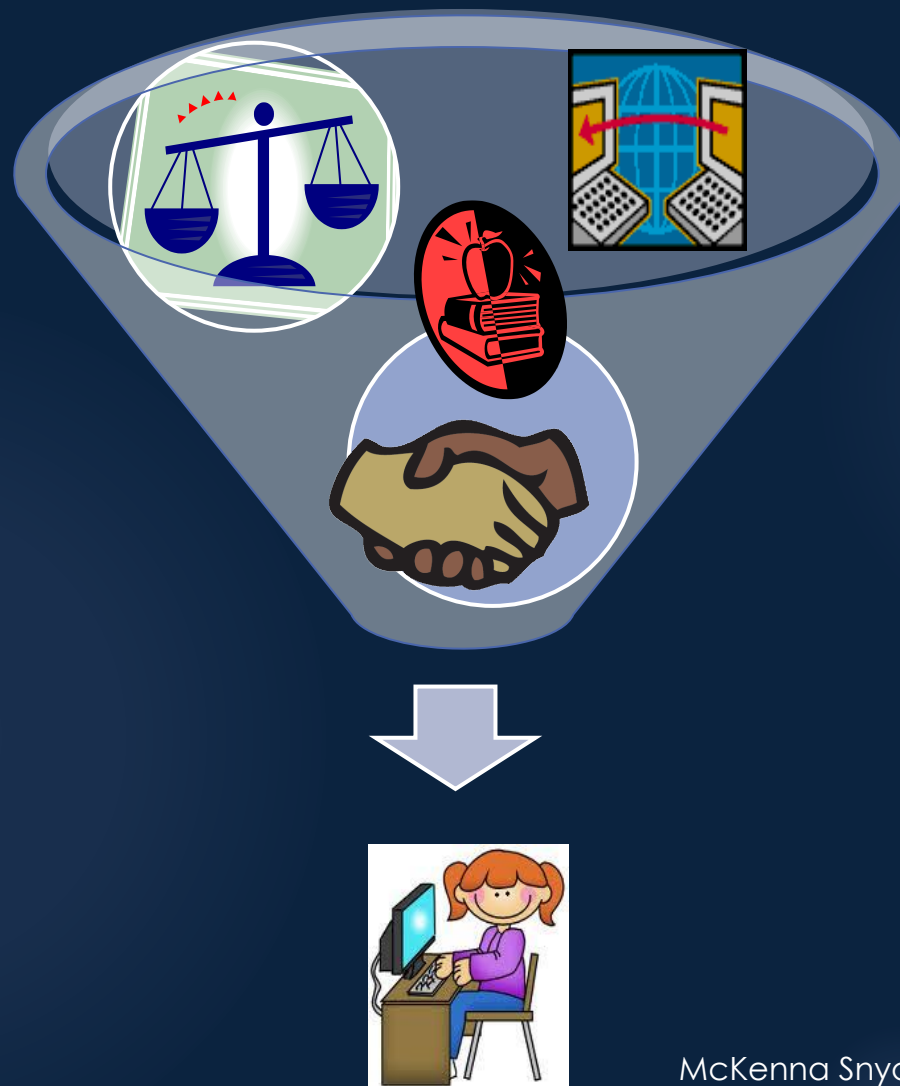
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WHY ARE WE HERE? . . .



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Session Objectives

- **U**NDERSTAND HOW LAWS & REGULATIONS RELATE TO ACTIVITIES RELEVANT TO YOUR SCHOOLS & PRACTICE
- **S**HARE KNOWLEDGE OF COMPLIANT POLICIES & PROCEDURES NEEDED TO SUPPORT YOUR SUCCESSFUL EFFORTS
- **E**NABLE YOU TO IDENTIFY AN APPROPRIATE FRAMEWORK FOR SPECIAL EDUCATION /SECTION 504 IMPLEMENTATION
- **I**NTEGRATE SOLUTIONS TO DILEMMAS IN ENSURING THAT INDIVIDUAL STUDENT NEEDS ARE MET IN A TIMELY, LEGAL & PRACTICAL MANNER
- **T**AKE AWAY STRATEGIES THAT CAN ENHANCE ACTIVITIES & EFFORTS REGARDING STUDENTS WITH DISABILITIES

USE IT 😊

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WELCOME AND INTRODUCTION

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NOW MORE IMPORTANTLY . . .

WHO ARE YOU?



WHAT IS ON YOUR AGENDA?



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Focus on what's really important and
accomplish more!

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Interesting Facts

CURRENT TRENDS AND TOPICS

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Effective Features of Virtual Programming

Jose L. Martin, Esq. from “Cyber School: Online/Virtual Schools and Special Education” 2011)

“ongoing feedback, self-pacing, and a higher potential for individualized instruction”

“greater opportunity for students to control their learning”

“multimodal presentation of content”

“social interaction via alternative means”

“lack of peer distractions or conflict”

“online archiving of student work for ease of assessment and progress monitoring”

“highly differentiated instruction capability”

“additional choices and flexibility for students and parents”

“availability of specialized instruction in rural or staff-shortage areas”

“lack of stigma associated with separate school settings”

“possible cost-savings”



CONSIDERATIONS FOR HIGH QUALITY ONLINE LEARNING

- ▶ What are you trying to teach?
- ▶ How will your students learn?
- ▶ What background knowledge will they need?
- ▶ What opportunities do they need to practice?
- ▶ How will they get feedback?
- ▶ What opportunities are there to extend their learning?
- ▶ How will it relate to their work?





BLENDED...

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THE BLEND

THE GOAL OF BLENDED LEARNING IS TO PROVIDE THE MOST EFFICIENT AND EFFECTIVE INSTRUCTION EXPERIENCE BY COMBINING DELIVERY MODALITIES.

BLENDED LEARNING AIMS TO JOIN THE BEST OF CLASSROOM TEACHING AND LEARNING WITH THE BEST OF ONLINE TEACHING AND LEARNING



“Navigating the Intersection of Complex Laws and Regulations”

- ▶ *“Educating students with disabilities in virtual schools entails not only molding state charter school laws to fit a specialized type of charter school, but also adapting federal and state special education guidelines aimed at providing special education in traditional brick and mortar settings.”*
- ▶ *“There are no federal education laws specifically addressing special education in virtual schools. Yet, as public schools, virtual charter schools are required to abide by all federal education statutes, including the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act (ADA) and the Fourteenth Amendment of the U.S. Constitution (Griffin, 2002; Rapp et al, 2006).”*

“Demystifying Special Education in Virtual Charter Schools” by: Lauren Morando Rhim and Julie Kowal, Public Impact, 2008, revised 2009.



Legal Requirements

SPECIAL EDUCATION LAW

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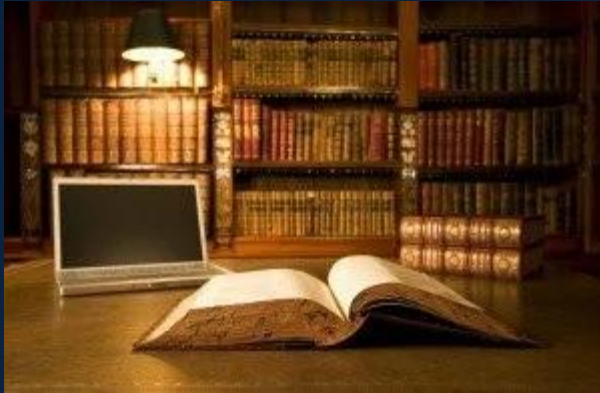
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Legal Requirements

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- ▶ Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”)
- ▶ Section 504 of the Rehabilitation Act (“Section 504”)
- ▶ The ADA Amendments Act (“ADAA”)
- ▶ State Statutes & Regulations
- ▶ Guidance
- ▶ Case Law
- ▶ Administrative Law Decisions
- ▶ FERPA

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INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

The purpose of 20 U.S.C.A. § 1400 is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; to ensure that the rights of children with disabilities and parents of such children are protected; and to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities . . .



It really is a good IDEA!

Individuals with Disabilities Education Act



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Section 504 and the IDEA



- Legislation designed to protect the rights of individuals with disabilities
 - Section 504 is a broad civil rights law
 - IDEA is a federal statute with the purpose of providing children with disabilities a free and appropriate education (FAPE)



Section 504



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- ▶ Section 504 of the Rehabilitation Act - Section 504 prohibits discrimination based on disability in federally funded and federally conducted programs or activities in the United States, including employment programs.
- ▶ No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . .



Section 504 Eligibility

A child is eligible under Sec. 504 as a student with a disability if he or she:

- ▶ 1) has a physical or mental impairment that substantially limits one or more of his major life activities,
- ▶ 2) has a record of such an impairment, or
- ▶ 3) is regarded as having such an impairment.



Section 504 Eligibility

- ▶ To determine whether an impairment substantially limits a major life activity, courts consider:
 - ▶ 1) the nature and severity of the impairment;
 - ▶ 2) the duration or expected duration of the impairment; and
 - ▶ 3) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.



Americans with Disabilities Act (ADA)



- ▶ The ADA prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.
- ▶ To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.



Title II and the ADA

Title II of the ADA prohibits discrimination
and ensures equal opportunity for persons with disabilities

- ADA regulations can impose greater obligations on schools than IDEA does. For example, 28 C.F.R. 35.160(a)(1) states: “A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” Further, a public entity must “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.” 28 C.F.R. 35.160(b)(1). “In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.”

38 C.F.R. 35.160(b)(2).



FEDERAL OVERSIGHT

- USDOE (United States Department of Education)
- OSEP (Office of Special Education and Rehabilitative Services)
- OCR (Office for Civil Rights)



OCR Guidance

- ❖ “Dear Colleague” letters are subject to change from one administration to another
- ❖ Institutions should stay up-to-speed on current developments and recognize that OCR guidance and perspectives are subject to change.



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Special Education

IN THE WAKE OF COVID-19

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Factoring the 'new environment' for at-home behaviors

Franklin County Sch. Dist. No. 31-0506, 77 IDELR 147
(SEA NE 2020)

No entitlement to IEE in areas outside child's suspected disability

- ❑ Underlying issue: Will schools see more requests for IEEs, Evaluations, and Evaluations, for "at-home" behaviors due to the pandemic? And how will schools view those requests when Student have IEPs and Section 504 Plans, or who are thought to be eligible?
- ❑ Ruling: Finding that a Nebraska school district appropriately evaluated a student in all areas of suspected disability using a variety of assessment tools and strategies, an independent hearing officer upheld the district's finding that the student was not eligible for special education services under the IDEA. The IHO denied the mother's request for a publicly funded independent education evaluation.



Education – is it changed forever with the COVID-19 pandemic?

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- Even before COVID-19, there was already high growth and adoption in education technology, with global ed-tech investments reaching US \$18.66 billion in 2019 and the overall market for online education projected to reach \$350 Billion by 2025.
- Whether it is language apps, virtual tutoring, video conferencing tools, or online learning software, there has been a significant surge in usage since COVID-19.
- Some school districts are forming unique partnerships, like the one between The Los Angeles Unified School District and PBS SoCal/KCET to offer local educational broadcasts, with separate channels focused on different ages, and a range of digital options.

Direct quotes in article “the COVID-19 pandemic has changed education forever”
Written by Cathy Li, Head of Media, Entertainment and Information Industries, World Economic Forum. Farah Lalani, Community Curator, Media, Entertainment and Information Industries, World Economic Forum. The views expressed in this article are those of the author alone and not the World Economic Forum.

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Least Restrictive Environment in the Wake of COVID-19: A Brief Word from National Association of State Directors of Special Education



- ▶ “As we look ahead to the 2020-2021 school year, school systems across the country will once again have to balance health and safety concerns with providing a free appropriate public education (FAPE) and will likely be considering various operational models for delivering services. As various operational models are considered, it is important that state directors of special education in collaboration with local special education directors provide leadership and guidance on how to preserve the principles of LRE and implement a student’s individual LRE in the non-traditional models brought about by the COVID-19 pandemic.”

https://www.nasdse.org/docs/NASDSE_LRE.pdf



Supporting Students During the COVID-19 Pandemic: Maximizing In-Person Learning and Implementing Effective Practices for Students in Quarantine and Isolation

- ▶ <https://www.ed.gov/coronavirus/supporting-students-during-covid-19-pandemic>

When students are temporarily unable to attend school in-person because of COVID-19 cases and remote learning is therefore temporarily implemented, **it is essential that states, school districts, and schools put in place policies to ensure that students continue to access high-quality and rigorous learning, that students' basic needs are addressed, and that their social, emotional, and mental health needs are met.** These policies should specifically address the specific needs of students most impacted by the pandemic—who are often the same students who have been underserved prior to COVID-19—and ensure that delivery of instruction and other critical services are as high-quality as they would be when delivered in person.

<https://www2.ed.gov/documents/coronavirus/reopening-2.pdf>

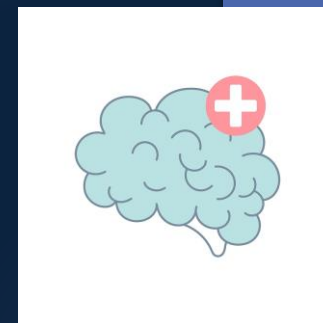


Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs Oct 2021

- ▶ <https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf>



Untreated Mental Disorders



- ▶ Untreated mental health disorders tend to become more severe, and their behavioral effects spiral, when compounded by years of the frustration of failing grades and negative feedback from family members, peers, and authority figures.
- ▶ As youth, and later as adults, those with mental, emotional, and behavioral disorders are more likely to use alcohol and drugs—both because they may be more biologically vulnerable to chemical dependence and more likely to want to alter their moods to blunt their distress.



Early Identification

- ▶ Early identification and detection are key to meeting the needs of students with disabilities!
- ▶ Early identification of social, emotional, mental health, executive functioning and behavioral issues is not an exception to this general premise.
- ▶ Positive Behavior Support
- ▶ Trauma Informed Care



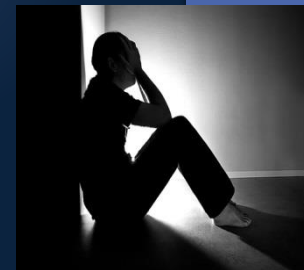
As the National Dissemination Center for Children with Disabilities (NICHCY) indicates,

"... beneath these umbrella terms, there is actually a wide range of specific conditions that differ from one another in their characteristics and treatment." These include (but are not limited to): anxiety disorders; bipolar disorder (sometimes called manic-depression); conduct disorders; eating disorders; obsessive-compulsive disorder (OCD); and psychotic disorders.

- ▶ Centers for Disease Control and Prevention, *Percentage of Children with Serious Emotional or Behavioral Difficulties*, Morbidity & Mortality Weekly Report (May 6, 2011), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6017a10.htm?s_cid=mm6017a10_w.
- ▶ National Dissemination Center for Children with Disabilities, *Emotional Disturbance*, NICHCY Disability Fact Sheet (June, 1010), available at <http://nichcy.org/disability/specific/emotionaldisturbance>
- ▶ National Dissemination Center for Children with Disabilities, *Emotional Disturbance*, NICHCY Disability Fact Sheet (June, 1010), available at <http://nichcy.org/disability/specific/emotionaldisturbance>
- ▶ National Dissemination Center for Children with Disabilities, *Emotional Disturbance*, NICHCY Disability Fact Sheet (June, 1010), available at <http://nichcy.org/disability/specific/emotionaldisturbance>
- ▶ Tessa Heller, *Mandatory School-Based Mental Health Services and the Prevention of School Violence*, 24 HEALTH MATRIX: J. OF LAW-MED. 279, 286 (2014).



Mental Illnesses



Children can struggle with many different mental illnesses including: anxiety, disruptive behavior, pervasive development, eating, elimination, affective, schizophrenic, and tic disorders.

Mental health problems and symptoms can range from “very mild to extremely severe” including instances when hospitalization is necessary to treat the most severe cases.

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Mental Illnesses cont.

General symptoms indicating that a child may be suffering from mental illness may include: changes in school performance, drug abuse, inability to cope, changes in sleeping, defying authority, frequent outbursts of anger and hyperactivity.

Serious symptoms can include: hearing voices, hallucinating, and aggressive behavior.

Some adverse childhood experiences can be indicators of mental health issues, such as child abuse, neglect, and growing up in extremely dysfunctional homes.



Diagnosis



Statistics have also highlighted that mental illness in children often remains undiscovered for far too long with an estimated one-third of mental illnesses in children undetected.

However, mental illnesses can be diagnosed or recognized during childhood with “half of all lifetime cases of mental illness recognizable by age 14 and three-quarters by age 24.”

- ▶ American Academy of Pediatrics Task Force on Mental Health, *The Case for Routine Mental Health Screening*, AM. ACAD. OF PEDIATRICS, 125, S133, S 133 (2010), available at http://pediatrics.aappublications.org/content/125/Supplement_3/S133.citation
- ▶ American Academy of Child & Adolescent Psychiatry, *2013 Appropriations* (April, 2012), available at http://www.aacap.org/App_Themes/AACAP/docs/Advocacy/federal_and_state_initiatives/psychiatric_medications_and_research/aacap_policy_summary_on_fy_2013_appropriations.pdf
- ▶ See also Ronald C. Kessler et. al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 593, 593 (2005) (“Median age of onset is much earlier for anxiety (11 years) and impulse control (11 years) disorders than for substance use (20 years) and mood (30 years) disorders.”).

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Collaboration

Children's mental health needs are addressed by a variety of providers and caregivers who work in a range of diverse and loosely organized public and private settings.

This patchwork of providers and services is typically categorized into components including:

- ✓ specialty mental health (e.g., psychiatrists, psychiatric nurses, psychologists, and social/behavioral health workers)
- ✓ primary care (e.g., pediatricians, family physicians, nurse practitioners)
- ✓ human services (e.g., social services; school based counseling services)

(4) voluntary support networks (e.g., self-help groups). In turn, these providers work within public and private service delivery systems.



COLLABORATION is Key!



In order for schools to effectively support students with complex mental health, behavioral and social/emotional needs, **meaningful collaboration** among schools and other stakeholders, including mental health professionals, behavioral health services, the medical community, families, related service providers, child welfare agencies, early intervention, and pre-school programs, where applicable, is key to providing a free and appropriate public education ("FAPE") to students with disabilities recognized under IDEA and/or Section 504.



Impact of Trauma on Students

- ▶ Physical symptoms such as headaches, stomachaches, poor appetite, and decline in self-care
- ▶ Intense feelings of fear, anxiety, and concern for their safety
- ▶ Difficulty identifying how they are feeling and controlling their emotional reactions



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Impact of Trauma on Students cont.

- ▶ Angry or aggressive outbursts
- ▶ A desire to withdraw from peers and adults
- ▶ A tendency to engage in risk-taking behaviors
- ▶ Trouble trusting adults and peers, reading social cues, and building relationships



Impact of Trauma on Students cont.

- Difficulty paying attention and learning
- More time out of the classroom
- Increased isolation
- School absences





- ▶ Supplementary Aids and Services
- ▶ Communication
- ▶ Parent Involvement
- ▶ Parent Training
- ▶ Communication

PARTICIPATION/ATTENDANCE

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Impact of Trauma on Students cont.

- More suspensions or expulsions
- Higher referral rates to special education
- Poor test scores and an increased risk of failing grades



Impact of Trauma on Parents

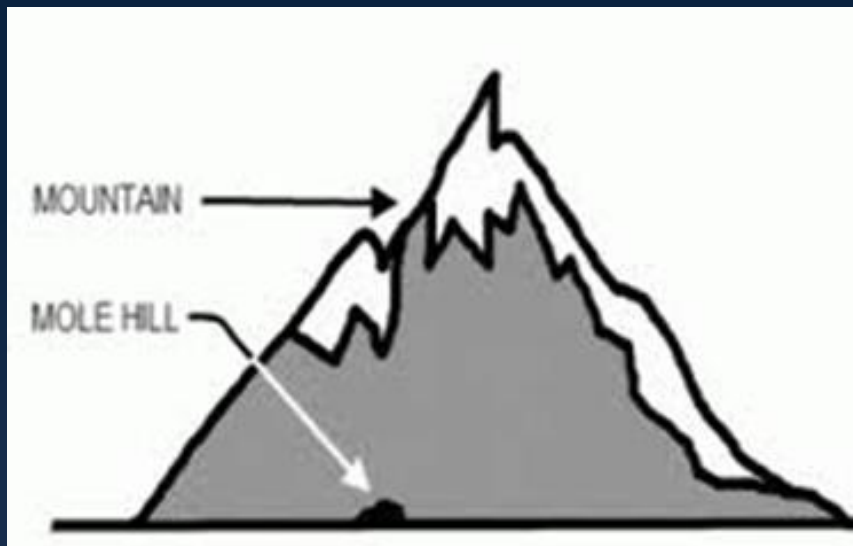
- Difficulty managing emotions and controlling behaviors when interacting with school staff
- Difficulty forming relationships
- Increased risk for substance abuse, depression, and PTSD that negatively impact parenting



Impact of Trauma on Parents cont.

- Trouble managing stress related to their child's difficult behaviors
- Feelings of embarrassment, shame, fear, or guilt about their child's behaviors or needs
- Difficulty helping their children cope





Parent Requests

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When to Consider Other Options?



- ▶ How to Have the Difficult Discussions
- ▶ When and How to Involve Others
- ▶ How to Advocate
- ▶ Communication Strategies



Impact of Trauma on Staff

- Increased anxiety
- Reduced energy and focus
- Trouble regulating emotions
- Difficulty managing responses to students and parents
- Diminished capacity to maintain positive teacher-student and teacher-parent relationships
- Poor attendance or work performance



Impact of Trauma on Staff cont.

Secondary traumatic stress: The presence of PTSD symptoms caused by indirect exposure to other people's traumatic experiences.

Vicarious trauma: The cumulative effect of working with traumatized students and their families that leads to negative changes in how staff view themselves, others, and the world.



Impact of Trauma On Schools

- Students more likely to escalate
- Adults more reactive, controlling, and punitive
- Negative impact on school safety and culture
- Increased risk for harm
- Decrease in academic achievement



TRAUMA-SENSITIVE SCHOOLS: A UNIVERSAL RESPONSE

- ▶ All school staff members recognize and understand student responses to trauma, and practices that support healing and resilience are embedded schoolwide.
- ▶ May require changes to mission, vision, practices, policies, and culture



Trauma Sensitive Schools

What is the importance for Schools?

All schools and educators who work with children who have experienced trauma, but you may not know who these students are. Schools have an important role to play in providing stability and a safe space for children and connecting them to caring adults. In addition to serving as a link to supportive services, schools can adapt curricula and behavioral interventions to better meet the educational needs of students who have experienced trauma



Trauma Sensitive Schools cont.

Trauma Informed Approaches:

Evidence-supported, trauma-informed models have been developed in other fields and can be implemented in schools

- ▶ This means being informed and sensitive to trauma
- ▶ Providing a safe, stable and understanding environment for students and staff
- ▶ Acknowledge trauma and its triggers
- ▶ Avoid stigmatizing and punishing students



Racial and ethnic makeup, and differences for gender

- About two-thirds of disabled students are male (67%), while 33% are female, according to data from the 2017-18 school year.
- Overall student enrollment is about evenly split between boys and girls, according to federal data for 2016-17, the most recent year for which NCES has published this data.

(Research has shown that inconsistencies exist by race and ethnicity when it comes to which students are recommended for special education, and that the socioeconomic makeup of a school and achievement markers, such as test scores, may factor in.)

Quote from 2020 Pew Research Center,
FACTANK News in the Numbers, April 23, 2020



OSEP Fast Facts: Race and Ethnicity of Children with Disabilities Served under IDEA Part B

<https://sites.ed.gov/idea/osep-fast-facts-race-and-ethnicity-of-children-with-disabilities-served-under-idea-part-b/>



District Cyber Programs –

reconciling pre-COVID case law with COVID requirements

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LRE

S.P., a minor, by his parents; J.A.P.; J.L.P., and on their own behalf v. Fairview School District, U.S. District Court, Western District of Pennsylvania (Sept. 30, 2014)

School District offered full-time “cyber school” program for access from home to teenager with refractory migraine headaches. District Court held restrictive placement was necessary to meet the student's unique needs, given his frequent absences, coupled with his documented need to remain in a quiet, dark room for 12-16 hours when he had a migraine.

Like the IDEA, Section 504 requires districts to educate students with disabilities alongside their nondisabled peers “to the maximum extent appropriate” based on their needs.

“Given the unique medical issues facing [the student], the School District has made extraordinary efforts to accommodate [him] in a regular education environment.” But, Student was unable to benefit from a school-based environment. In the cyber school program, the school district gave the student the opportunity to participate in extracurricular activities and allowed him to attend school-based classes when he felt well enough to do so. As such, the district fulfilled its obligation to educate the student in the least restrictive environment (LRE).

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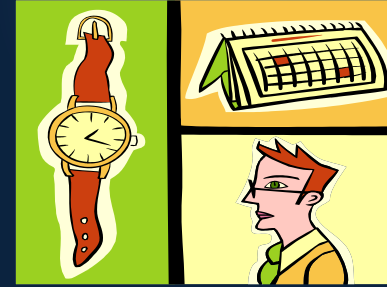
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Shortened School

Days– reconciling pre-COVID violations law with COVID requirements



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- Shortening a Student's school day may not be in the Student's best interest even if it appears to be a short-term or long-term solution to an issue the student is experiencing. Furthermore, unilaterally or inappropriately shortening a Student's school day may be considered a violation of state and/or federal laws and regulations protecting children with disabilities.
- The violation of such laws may subject a school/district to: parent complaints; due process proceedings and/or investigation by state and/or federal agencies such as the Office for Civil Rights ("OCR"); potential legal liability and claims for compensatory education and damages; Independent Educational Evaluation ("IEE") requests; and attorneys' fees demands together with the costs of defense and the time and resources that must be devoted to responding to and defending against such claims. Most importantly, shortening a disabled student's school day may result in inappropriate and discriminatory programming that impedes the student's academic and social-emotional growth.
- See *Helping to Ensure Equal Access To Education Report to the President and Secretary of Education Under Section 203(b)(1) of the Department of Education Organization Act FY 2009–12*, Office For Civil Rights (2012) available at: www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf



J.T., ET. AL. V. BILL DE BLASIO, ET. AL.

U.S. District Court, Southern District of New York

Will we see more litigation?

- ▶ July 27, 2020, two New York attorneys filed the first of what might be many COVID-19 special education class action lawsuits.
- ▶ Allegations state that every state education department and school district failed to provide a free, appropriate public education (“FAPE”) to students and discriminated against disabled students under the Individuals with Disabilities Education Act, (“IDEA”), Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and the Americans with Disabilities Act (“ADA”); and, that all defendants (schools) violated students’ rights under the Civil Rights Act.
- ▶ Plaintiffs allege that the nation-wide school closures due to the health pandemic in Spring 2019 resulted in violations of FAPE and noncompliance with both the procedural, and substantive requirements of the federal statutes.



COVID-19

- ▶ At its initial peak in Spring 2020, COVID-19 resulted in “a near-total shutdown of school buildings” and “an historic upheaval of K-12 schooling in the United States.”
- ▶ It is reported that the closures affected at least 55.1 million students in 124,000 U.S. public and private schools. Nearly every state & the District of Columbia either ordered or recommended that schools remain closed through the end of the 2019-20 school year.
- ▶ School entities, educators, parents of students with disabilities, special education students, and federal, state and local officials are charged with addressing these issues that continue to persist in the absence of a presently available vaccine.



The COVID-19 Pandemic Education Relief Act

- ▶ The COVID-19 Pandemic Education Relief Act of 2020, included as Title III-B of the CARES Act, provided for waivers primarily related to the Elementary and Secondary Education Act (ESEA).
- ▶ Section 3511 of the CARES Act allows the Secretary, upon request of a state educational agency (SEA), local educational agency (LEA), or Indian tribe, to grant waivers of various statutory or regulatory provisions if the Secretary determines that such a waiver is necessary and appropriate due to the coronavirus pandemic.



The COVID-19 Pandemic Education Relief Act

- ▶ The Department did not request waiver authority for any of the core tenets of the IDEA or Section 504 of the Rehabilitation Act of 1973, most notably a free appropriate public education (FAPE) in the least restrictive environment (LRE).



The COVID-19 Pandemic Education Relief Act

The Department's position is based on the principles that:

- ▶ Schools can, and must, provide education to all students, including children with disabilities;
- ▶ The health and safety of children, students, educators, and service providers must be the first consideration;
- ▶ The needs and best interests of the individual student, not any system, should guide decisions and expenditures;
- ▶ Parents or recipients of services must be informed of, and involved in, decisions relating to the provision of services;
- ▶ and Services typically provided in person may now need to be provided through alternative methods, requiring creative and innovative approaches.



Other Important Issues

- ▶ Procedural Safeguards Notices
- ▶ Prior Written Notice/NOREPs
- ▶ Board Approved Policies
- ▶ Annual Notifications
- ▶ Anti-Discrimination Statements and Notices
- ▶ Special Education Procedures
- ▶ Understanding Statute of Limitation Issues
- ▶ Insurance Considerations
- ▶ Compensatory Education, Damages, Attorney's Fees
- ▶ Intersection with Other Laws (i.e. Title IX, Section 1983, English Learners, Homeless Students, Surrogate Parents, ADA Accessibility, Mandatory Reporting...)



Issues Relevant to Distance Learning

- ▶ The closure of schools across the country has changed the face of education and has provided a unique set of circumstances and challenges for educators and students.
- ▶ Most teachers are doing the best they can to continue providing educational opportunities and to navigate this situation in creative ways.



Issues Relevant to Distance Learning

- ▶ For special education teachers, the situation is much more stressful for a number of reasons.
- ▶ First of all, remote education is extremely difficult, if not impossible for some students with disabilities.
- ▶ Second, there are very strict laws when it comes to special education and this is uncharted territory.
- ▶ So, even if special education teachers are trying to do the best that they can, many are worried about consequences in the future; legal, academic, and social



Compensatory Services/ Compensatory Education -1

- ▶ A particular area of concern could be compensatory education or “compensatory services” (CCS – COVID COMPENSATORY SERVICES)
- ▶ For students who miss school as a result of the coronavirus outbreak, IEP and Section 504 teams must make an individualized determination, once the student returns, as to whether he or she requires “compensatory education” according to the U.S. Education Department.



Compensatory Services/ Compensatory Education - 2

- ▶ In a Questions and Answers document addressing the provision of services to students with disabilities impacted, Department of Education also stated that if a school provides educational opportunities to the general student population during a school closure, it must ensure students with disabilities have equal access to the same opportunities.
- ▶ IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which a school is closed for an extended period because of a disease outbreak.



Compensatory Services/ Compensatory Education - 3

- ▶ However, in general, if a school closes its doors to stop COVID spreading and the district isn't providing educational services to the student population in general, then "the [local educational agency] would not be required to provide services to students with disabilities during the same period of time."



Compensatory Services/ Compensatory Education - 4

- ▶ Once school resumes, the district would be obligated to "make every effort" to fully implement a student's IEP or 504 plan.
- ▶ In addition, the IEP or 504 team, as appropriate to the specific student, would be required to decide on an individualized basis whether the student needs compensatory services due to the impact of the closure.



Compensatory Services/ Compensatory Education - 5

- ▶ While IEP teams are not required to include distance-learning plans in a child's IEP, doing so might be a prudent step in view of the potential for future school closures.
- ▶ "Creating a contingency plan before outbreak occurs gives the child's service providers and the child's parents an opportunity to reach agreement as to what circumstances would trigger the use of the child's distance-learning plan and the services that would be provided during the dismissal"



Compensatory Services/ Compensatory Education - 6

- ▶ Compensatory education is a remedy applied by a hearing officer or court requiring a district to pay for or otherwise provide services it should have been providing all along.
- ▶ It serves as a way to compensate a student for past deficient education programs.
- ▶ Thus, the term carries with it the assumption that the district is at fault. But much of what has occurred during COVID-19 to deprive students of services, is out of districts' control.



Compensatory Services/ Compensatory Education - 7

- ▶ Often, districts have made every effort to provide services to the extent that it was possible and safe to do so during the pandemic.
- ▶ Calling post-COVID services 'comp ed' could be divisive.



Compensatory Services/ Compensatory Education - 8

- ▶ "Such a term ignores the tireless efforts of our school districts across the nation to do everything reasonably possible to provide appropriate services to students with disabilities, despite inevitable obstacles caused by this public health crisis."
- ▶ Using a more positive designation could foster better relationships.



Compensatory Services/ Compensatory Education - 9

- ▶ Not every district needs to start planning for the provision of compensatory education now.
- ▶ In fact, planning so far ahead could mean the proposed services will be deemed inappropriate when schools begin to reopen.



Compensatory Services/ Compensatory Education - 10

- ▶ In the meantime, take these steps during the pandemic
 - (1) seek feedback from parents,
 - (2) document your response to that information, and
 - (3) promote patience.
- ▶ Recognizing the importance of an individualized determination for the reopening process.



Future Implications

- ▶ FERPA
- ▶ LRE rules
- ▶ Resuming evaluations
- ▶ Anti-Bullying
- ▶ Health and Safety
- ▶ Local guidance on social distancing



Future Implications, cont.

- ▶ Placement considerations
- ▶ Regression
- ▶ Requests for Extended Online Services
- ▶ Refusal of Online Services
- ▶ Social/Emotional and Counseling and Mental Health Needs
- ▶ Handling Litigation related to special education services and interruptions in services



OSEP Q&A

- ▶ On September 28, 2020, the US Dept. of Education's Office of Special Education Programs ("OSEP") published a Q&A letter as to implementing Part B of the IDEA in the COVID-19 environment.
- ▶ It reminds us that while state and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, SEAs, LEAs, and IEP Teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA.



OSEP Q&A

- ▶ More specifically, in accordance with 34 CFR §300.323(a), schools must continue to have an IEP in place for the beginning of the school year which is tailored to meet the needs of the individual student in the virtual or hybrid environment in which the School's Board has determined is appropriate pursuant to its approved Health & Safety Plan.
- ▶ Requirements of who must participate in an IEP Team Meeting from the School remains as stated in 34 CFR §300.321(a) and how a school IEP Team member may be excused pursuant to 34 CFR §300.321(e).



ESY - 1

- ▶ As many Extended School Year (“ESY”) services were unable to be provided during the summer due to the COVID-19 pandemic, Schools must still make FAPE available to children with disabilities who require such ESY services pursuant to 34 C.F.R. § 300.106.
- ▶ It is important to remember that IEP Team determinations regarding ESY services are prospective and not intended to make up for past denials of FAPE.



ESY - 2

- ▶ Schools should consider providing ESY services to the student during the normal school year, during school breaks or vacations where appropriate to the student's needs and consistent with applicable standards.



Evaluation - 1

- ▶ A major issue arose with students who needed an initial evaluation during the COVID –19 closure last school year and now during virtual or hybrid programming for many students in this new school year.
- ▶ Pursuant to 34 C.F.R. § 300.301(c)(1), this initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation, or if the State has established a timeframe within which the evaluation must be conducted, within that timeframe.



Evaluation - 2

- ▶ The exceptions to the initial evaluation timeframe are set forth in 34 C.F.R. § 300.301(d) and provide the flexibility to establish additional exceptions through State regulation or policy for situations such as this current pandemic.



Evaluation - 3

- ▶ In the absence of such additional exceptions, OSEP recommends issuing a PWN/NOREP with language that notifies parents/guardians of the School Team's intent to perform a timely initial evaluation but that there may need to be an extension if required in-person observations and/or testing is not possible due to the pandemic during this initial time period.



Evaluation - 4

- ▶ Within 30 days of determining that a student needs special education and related services, an IEP must be developed for the child in accordance with 34 C.F.R. §§ 300.320 through 300.324, 34 C.F.R. §§ 300.306(c)(2) and 300.323(c)(1).
- ▶ In addition, under 34 C.F.R. § 300.324(b)(1)(i), each child's IEP must be reviewed periodically, but not less than annually to determine whether the annual goals are being achieved.



Evaluation - 5

- ▶ If face-to-face meetings are not feasible or practicable, the Department encourages the use of the flexibility included in 34 C.F.R. § 300.328 which allows Schools to conduct initial and annual IEP Team meetings through alternate means.
- ▶ Such alternate means could include a telephone or video conference call (if feasible and consistent with privacy standards) if acceptable to the parents and other IEP Team meeting participants.



Part B of IDEA

- ▶ Lastly, under Part B of IDEA, a reevaluation must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2).
- ▶ Given that, as with initial evaluations, it may not be possible to do all or parts of tests within the allotted time period that require the tester and student to be in-person pursuant to test protocols.



Part B of IDEA

- ▶ Schools should investigate all appropriate assessment instruments and tools to determine if some can be administered or completed remotely, provided that evaluation of the child is based on personal observation (whether in person or through videoconferencing).
- ▶ Schools should also work with the developers of their current assessment instruments to determine if the instruments can be administered or completed remotely, without significantly impacting the validity and reliability of the results.
<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf>.



Earlier Guidance

- ▶ On June 30, 2020, OSEP issued an earlier Q&A document concerning implementation of the IDEA Part B procedural safeguards in the current COVID-19 environment.
- ▶ One such safeguard includes acceptance of an electronic or digital signature to indicate that the parent/guardian consents to their child's initial evaluation, reevaluation, or the initial provision of special education and related services to their child.



Consent

- ▶ Such consent must be voluntary on the part of the parent, meaning that the parent has been fully informed of, and agrees in writing to the activity for which his or her consent has been requested.
- ▶ Because of social distancing and other restrictions during the pandemic, it may not be possible to obtain a parent's signed, written consent in-person.



Consent

- ▶ A “signed and dated written consent” may include a record and signature in electronic form that identifies and authenticates a particular person as the source of the consent and indicates such person’s approval of the information contained in the electronic consent.
- ▶ These safeguards also should include a statement that indicates that the parent has been fully informed of the relevant activity and that the consent is voluntary on the part of the parent consistent with the IDEA definition of “consent” in 34 C.F.R. § 300.9.



Written Notice

- ▶ Another issue concerns the continued duty of the School to provide parents/guardians with written notice within a reasonable time before it proposes or refuses to initiate or change the identification, evaluation, educational placement of the child, or the provision of a free appropriate public education (FAPE) to the child. 34 C.F.R. § 300.503.



Written Notice

- ▶ If the parent has previously agreed, or agrees during the pandemic, the prior written notice can be provided through electronic mail (email). 34 C.F.R. § 300.505.
- ▶ The term, “reasonable time” is not defined in the regulation.
- ▶ The Department believes that it would be appropriate to consider factors such as the closure of public and school buildings and facilities, social distancing, and other health-related orders during the pandemic in determining what constitutes a reasonable time for this purpose.



Procedural Safeguards

- ▶ A third issue discussed involves how a copy of the procedural safeguards, in accordance with 34 C.F.R. § 300.504(a), can be provided to Parents/Guardians during this time of social distancing.
- ▶ The School can provide a parent an electronic copy of the procedural safeguards notice (e.g., through email) instead of a paper copy, if the parent has previously agreed, or agrees to receive an electronic copy during the pandemic.



Procedural Safeguards

- ▶ The public agency must provide the parents a copy of the procedural safeguards available to the parents of a child with a disability only one time a school year, except that the notice also must be provided to parents in the circumstances specified in 34 C.F.R. § 300.504(a).



Student Records

- ▶ This document addresses how Schools can comply with the time and access requirements to student records pursuant to FERPA.
- ▶ Parents and Schools may identify a mutually agreeable timeframe and method to provide access to the child's education records.
- ▶ If the parent asks to inspect and review specific documents from the child's education records while school buildings are closed during the pandemic, the school and parent should work together to identify mutually agreeable options for access to the education records.



Student Records

- ▶ For example, the school could provide the parent with the requested information from the child's records via email, a secure on-line portal or postal mail until school reopens.
- ▶ Note though, the public agency must use reasonable methods when transmitting PII in education records through email or an online portal.
- ▶ <https://sites.ed.gov/idea/files/qa-procedural-safeguards-idea-part-b-06-30-2020.pdf>.



Dispute Resolution Procedures

- ▶ A State educational agency (SEA) is permitted to extend the 60-day time limit for resolving a State complaint due to circumstances related to the pandemic case-by-case basis.
- ▶ The regulations currently specify two allowable reasons for extending the 60-day time limit: (1) if exceptional circumstances exist with respect to a particular complaint; or (2) if the parent (or individual or organization, if mediation or other alternative means of dispute resolution are available to the individual or organization under State procedures) and the public agency involved agree to extend the time to engage in mediation or other alternative means of dispute resolution, if available in the State. 34 C.F.R. § 300.152(b)(1).



Dispute Resolution Procedures

- ▶ An SEA may not categorically determine that it will not undertake complaint resolutions during the pandemic based solely on its assumption that COVID-19 is an exceptional circumstance that would warrant an extension of the 60-day complaint resolution timeline for all complaints.



Dispute Resolution Procedures and the Pandemic

- ▶ Although the Department has previously concluded that unavailability of SEA staff generally is not an exceptional circumstance that would warrant an extension of the 60-day complaint resolution timeline, conditions related to the pandemic could be deemed an exceptional circumstance with respect to a particular complaint if, for example, a large number of SEA staff are unavailable or absent for an extended period of time as a result of the pandemic, or where the SEA cannot access specific information from school/agency staff or the child's education records needed to resolve the complaint due to conditions related to the pandemic.



Revising and Implementing IEPs in a Virtual Environment - 1

- ▶ In the Special Considerations section of the IEP, the School Team must consider if there are barriers to learning when Personal Protective Equipment is in use by the teacher and the student and/or if the student requires closed captioning to participate in and benefit from instruction and/or social interaction in the virtual or blended school environment.



Revising and Implementing IEPs in a Virtual Environment - 2

- ▶ In the Special Considerations section of the IEP, for students with communication needs, the School IEP Team must consider how service requirements are to be met, ie., teletherapy, in-person, etc., and if student has access to required Assistive Technology devices in all instructional environments.



Revising and Implementing IEPs in a Virtual Environment - 3

- ▶ For students requiring behavioral supports in the brick and mortar environment, determine if current supports are relevant to the virtual environment and how these will be implemented in the virtual or blended learning environment.



Revising and Implementing IEPs in a Virtual Environment - 4

- ▶ In determining how to measure present levels of academic and functional achievement in a student's IEP, the School Team must consider concerns by primary caregivers of student as manifested in remote or blended learning environments and include statements from them about student progress and from student's teachers about student progress during instruction in remote/blended educational setting with or without modifications, adaptations or support services.



Revising and Implementing IEPs in a Virtual Environment - 5

- ▶ The School Team must determine how to continue providing Transition programming pursuant to a Student's IEP by way of academic and functional skills and also if it is possible to replicate community settings in a virtual environment as part of Transition.



Revising and Implementing IEPs in a Virtual Environment - 6

- ▶ There have not been any waivers by the federal government with regard to the LEA's duty to continue to provide FAPE for IDEA eligible students so progress monitoring of students' IEP Goals must continue and this requires the School Team to consider possible changes or adjustments to the IEP Goal itself and the methods by which data may be obtained and progress measured in a timely manner in the virtual or blended learning settings.



Revising and Implementing IEPs in a Virtual Environment - 7

- ▶ The School Team must consider whether existing Modifications and SDIs are applicable in virtual or blended environment or may require adjustment.
- ▶ Specially Designed Instruction, or SDI, is “adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum...” 34 CFR §300.39(b)(3).



Revising and Implementing IEPs in a Virtual Environment - 8

- ▶ The School Team must consider how provision of related services will occur in virtual or blended environments and to note this information in the “location” column, as to where services are being provided.
- ▶ The School Team must consider in the Supports for School Personnel section of the IEP, supports such as training personnel how to use virtual learning platform(s), curricular materials and instructional strategies in order to fully implement a Student’s IEP.



Revising and Implementing IEPs in a Virtual Environment - 9

- ▶ For the Extended School Year (“ESY”) determination, the School Team must consider data collected prior to the mandatory school closure in March 2020, data collected during closure and after the 2020-21 winter break for ESY 2021 in order to allow for recoupment to take place in the beginning of 2020-21.



Revising and Implementing IEPs in a Virtual Environment - 10

- ▶ The School Team must consider what the virtual or blended regular education classroom looks like in order to determine what supplementary aids and services should be included that may not have been present in the brick and mortar environment.



Revising and Implementing IEPs in a Virtual Environment - 11

- ▶ The School Team must consider attempts to maintain student's time inside the regular education classroom regardless of whether instruction is virtual or blended as any change would be considered a change in placement and therefore, requires a whole IEP Team decision and agreement by Parent/Guardian via a NOREP.



High Tech Options

- ▶ When general and special educators have a set time to meet with the whole class and present information, explain an activity, answer questions and engage all students.
- ▶ Most students will use the chat area of the distance learning platform to ask teachers private questions or receive additional instruction or feedback in the moment.



High Tech Options

- ▶ Some students will need a smaller group experience after the whole group instruction, which could be provided by breaking the class into two or three smaller groups.
- ▶ Each of the educators could facilitate a group, while one group works independently with check-ins from teachers. Remember both general and special educators are able to provide SDI. Keep these groups flexible for each week or activity.



High Tech Options

- ▶ The special education teacher can direct a paraeducator on specific instructional strategies, prompts, or modeling that can be used.
- ▶ The paraeducator could provide this support through chat boxes or visual reminders during whole group instruction to support the student with the most significant disabilities.
- ▶ For example, within a shared online document, the paraprofessional could use chat to implement a behavioral reminder of paying attention.



High Tech Options

- ▶ A few students will need more intensive support, in which case, the general or special educator can follow up with individuals to provide the SDI needed.
- ▶ “Office hours” where students reach the teacher by phone, email, or a live chat to receive supplemental instruction or feedback.



High Tech Options

- ▶ Additional instructional activities that align with or provide access to the general education content and lesson, such as scaffolded instruction and providing background knowledge.
- ▶ Pre-teaching of a skill, concept, or how to use a support or strategy, such as a graphic organizer, before the whole class has the lesson or the student with the IEP is expected to engage with the lesson.



Low Tech Options

- ▶ To provide SDI in a low/no-tech way through distance learning, the key is for educators to know their students well enough to anticipate their needs since they will not be available in the moment during class to provide support.



Low Tech Options

- ▶ Using the packet for the general education class, provide scaffolded written directions or picture supports to prompt the student on specific skills.
- ▶ Scaffolding refers to the educational technique of delivering content gradually by unfolding new material slowly and building numerous supports into their teaching.
- ▶ The goal of scaffolding is to meet students at their ability level and guide them to grow one step at a time. This learning follows logical patterns of progression and keeps supports in place until students are able to demonstrate proficiency without them.)



Low Tech Options

- ▶ Add additional materials to the general education packets that allow for the use of symbol systems (e.g., Boardmaker and other comparable tools), tactile supports, or direct instruction on how to use the associated graphic organizers, materials, or prompts.
- ▶ Provide written instructions on how to use a calming strategy (e.g., five finger breathing) and have the student practice.



Low Tech Options

- ▶ Provide additional instructional activities in the packet that align with the general education content and lesson but provide scaffolded instruction or background knowledge needed to complete the assignments assigned to all of the students. Taub, D. (2020).
- ▶ Effectively specially designed instruction (SDI) within the distance learning environment: What in the world does that look like? (DL #3). TIES Center



IEP Team Meetings

- ▶ There are no waivers of federal IDEA duties so LEAs must still hold IEP Team Meetings during periods of virtual programming.
- ▶ Keep good records of attempts to schedule such Meetings with the student's Parent/Guardian and offer to hold meetings by alternative means through a telephone call or a virtual platform.
- ▶ The School Team must ensure that the Parent/Guardian has been provided a copy of the draft IEP prior to the Meeting and is able to access a copy on the date of the Meeting.



IEP Team Meetings

- ▶ Access means equally for a disabled Parent/Guardian (ie., hearing or sight impaired) and for a Parent/Guardian requiring translation in a language other than English.
- ▶ Attendance at the IEP Team Meeting should be noted on the Attendance Page and the method by which each Team member participated, ie., phone, videoconferencing, etc.



FERPA

The Family Educational Rights and Privacy Act (**FERPA**) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records.



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FERPA

- ▶ The United States (US) Department of Education (DOE) issues Frequently Asked Questions (FAQs) regarding FERPA and the coronavirus disease 2019, abbreviated as “COVID-19” and more commonly referred to as “coronavirus.”
- ▶ This guidance does not have the force and effect of law and is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.



FERPA Q&A during COVID-19

- ▶ US DOE's Student Privacy Policy Office (SPPO) administers FERPA and prepared the FAQs below to assist school officials working with public health officials in managing public health issues related to COVID-19, while protecting the privacy of students' education records. See <https://studentprivacy.ed.gov> and <https://www.ed.gov/coronavirus>.



FERPA – Question One

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How does the health or safety emergency exception to FERPA's consent requirement permit an educational agency or institution to disclose PII from the education records of affected students and how does health and safety exception allow disclosure without such consent?



- ▶ It is permitted if knowledge of that information is necessary to protect the health or safety of a student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36.
- ▶ This “health or safety emergency” exception to FERPA’s general consent requirement is limited in time to the period of the emergency and generally does not allow for a blanket release of PII from student education records.
- ▶ Typically, law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom PII from education records may be disclosed under this FERPA exception.



- ▶ The emergency must be based on an imminent significant threat with likely occurrence to meet the health or safety emergency exception to consent by Parent/eligible student.
- ▶ If local public health authorities determine that a public health emergency, such as COVID-19, is a significant threat to students or other individuals in the community, an educational agency or institution in that community may determine that an emergency exists as well.



- ▶ An educational agency or institution is responsible for making a determination, on a case-by-case basis, whether to disclose PII from education records, and it may take into account the totality of the circumstances pertaining to the threat.
- ▶ Within a reasonable period of time after a disclosure is made under a health or safety emergency exception, an educational agency or institution must record in the student's education records the articulable and significant threat that formed the basis for the disclosure and the parties to whom information was disclosed.



FERPA – Question Two

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Are public health departments entities to which student PII may be disclosed if the educational agency or institution believes that the virus that causes COVID-19 poses a serious risk to the health or safety of an individual student in attendance at the educational agency or institution?



- ▶ Yes. If the appropriate officials at a public health department need the information to protect the health or safety of the student (or another individual).
- ▶ Public health department officials may be considered “appropriate parties” by an educational agency or institution under FERPA’s health or safety emergency exception, even in the absence of a formally declared health emergency.
- ▶ Trained medical personnel are also usually considered appropriate parties.



FERPA – Question Three

134

If an educational agency or institution learns that student(s) in attendance at the school are out sick due to COVID-19, may it disclose information about the student's illness under FERPA to other students and their parents in the school community without prior written parental or eligible student consent?



- ▶ It depends, but generally yes, but only if that information is in a non-personally identifiable form.
- ▶ Specifically, the educational agency or institution must make a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. See 34 C.F.R. § 99.31(b)(1).



- ▶ For example, if an educational agency or institution releases the fact that individuals are absent due to COVID-19 (but does not disclose their identities), this would generally not be considered personally identifiable to the absent students under FERPA as long as there are other individuals at the educational agency or institution who are absent for other reasons.



FERPA – Question Four

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May educational agencies and institutions disclose without consent the names, addresses, and phone numbers of absent students to the public health department so that the health department may contact their parents in order to assess the students' illnesses?



- ▶ While FERPA generally permits the nonconsensual disclosure of properly designated “directory information” (e.g., name, address, phone number, grade level) when parents or eligible students have not opted out of such a disclosure, it does not permit an educational agency or institution to disclose “directory information” on students that is linked to non-directory information (such as information regarding a student’s illness).



- ▶ For instance, an educational agency or institution may not disclose directory information on all students who are receiving special education services or those who have been absent from school.
- ▶ Therefore, unless a specific FERPA exception applies, educational agencies and institutions should prepare consent forms for parents and eligible students to sign to allow the potential sharing of this type of information if they create, or intend to create, a tracking or monitoring system to identify an outbreak before an emergency is recognized.



OCR & ADHD



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- ▶ OCR has received 16,000 complaints over the last five years that allege discrimination on the basis of disability in public schools. Of those complaints, approximately 2,000 involved complaints involving allegations of discrimination against a student with ADHD.
- ▶ The Letter from OCR stresses the importance of the need to provide the correct services to students with ADHD, because the failure to do so can result in social, emotional, and educational harm to those students.
- ▶ It can also unnecessarily drain a school's and family resources through failed interventions or disciplinary consequences that will not be productive for a child with ADHD.



OCR & ADHD

- ▶ The United States Department of Education, Office for Civil Rights has been actively pursuing school compliance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act with regard to students with ADHD. The department recently released a “Dear Colleague” letter to address some of the issues it has been seeing in public schools related to students with ADHD. More information can be found at:



“Dear Colleague” Letter, May 14, 2014 US Dep’t of Educ., Office for Civil Rights

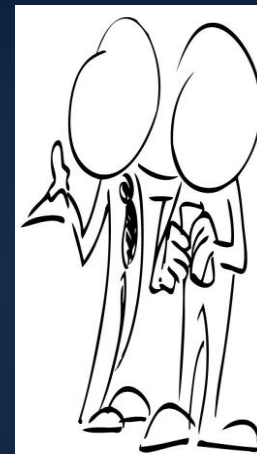
Available at:

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>

One of the fastest-growing areas of school reform is the creation of public schools through a chartering process. Since first appearing in the early 1990s, many charter schools have provided students with additional meaningful opportunities to receive a high-quality education. In communities throughout the nation, numerous charter schools are developing unique learning environments, spurring innovation, engaging parents and other stakeholders, and improving educational opportunities for students. The U.S. Department of Education (Department) is committed to supporting the establishment of high-quality public charter schools from which all students can benefit.

...

It is essential that charter school officials and staff be knowledgeable about Federal civil rights laws. These laws extend to all operations of a charter school, including recruiting, admissions, academics, educational services and testing, school climate (including prevention of harassment), disciplinary measures (including suspensions and expulsions), athletics and other non-academic and extracurricular services and activities, and accessible buildings and technology.



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OSERS AND ADHD

- ▶ The U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued guidance in the form of a Dear Colleague Letter (DCL) that emphasizes the requirement that schools provide positive behavioral supports to students with disabilities who need them. It also clarifies that the repeated use of disciplinary actions may suggest that children with disabilities may not be receiving appropriate behavioral interventions and supports. When schools fail to consider and provide for needed behavioral supports through the Individualized Education Program (IEP), it is likely to result in children not receiving the free appropriate public education to which they are entitled under federal law.



OCR & Disability-Based Harassment

“Dear Colleague” Letter October 21, 2014

Schools have Obligations to Address Disability-Based Harassment

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REMEMBER: Bullying on any basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied under Section 504.

When investigating disability-based harassment, OCR considers several factors, including, but not limited to:

- ☐ Was a student with a disability bullied by one or more students based on the student's disability?
- ☐ Was the bullying conduct sufficiently serious to create a hostile environment?
- ☐ Did the school know or should it have known of the conduct?
- ☐ Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?



20 U.S.C. § 1413(g) *DIRECT SERVICES BY THE SEA*

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(1) IN GENERAL. An SEA shall use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that LEA, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency, as the case may be

(A) has not provided the information needed to establish the eligibility of such LEA or State agency under this section;

(B) is unable to establish and maintain programs of FAPE that meet the requirements of subsection (a);

(C) is unable or unwilling to be consolidated with 1 or more LEAs in order to establish and maintain such programs; or

(D) has 1 or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children.

(2) MANNER AND LOCATION OF EDUCATION AND SERVICES The SEA may provide special education and related services under paragraph (1) in such manner and at such locations (including regional or State centers) as the SEA considers appropriate. Such education and services shall be provided in accordance with this subchapter.



RELEVANT CASES



Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley

- ▶ Appropriate educational programs under IDEA do not mean the absolute best or potential maximizing services for the child
- ▶ Student has to be provided with a “meaningful educational benefit”

458 U.S. 176 (1982)



Endrew F. v. Douglas County

137 S.Ct. 988 (2017)

Unanimous Supreme Court Ruling



Question: What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA)?

On March 22, 2017, Supreme Court ruled for the first time since Rowley, on what a Free Appropriate Public Education (FAPE) under IDEA requires. In Endrew F., the Court held that to offer a FAPE, “a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”



US Supreme Court, *Endrew F. (cont.)*

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- ▶ The U.S. Supreme Court ruled in a unanimous decision that an IEP must be reasonably calculated to enable a child to make progress that is appropriate in light of his circumstances. The Court's ruling arose out of a dispute over the IEPs developed for an elementary school student with autism. In holding that the student received FAPE despite his escalating behavioral problems, the 10th Circuit observed that the IEP team's modifications to the student's short-term objectives for second, third, and fourth grade showed he had received "some educational benefit."
- ▶ The Supreme Court disagreed. The Court recognized that its prior decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (1982), had used the phrase "some educational benefit." However, it pointed out that the *Rowley* court had expressly declined to adopt a test for determining the substantive adequacy of the educational benefits provided under a given IEP. "It would not have been 'difficult' for us to say when educational benefits are sufficient if we had just said that any educational benefit was enough," Chief Justice John G. Roberts Jr. wrote in reference to the *Rowley* Court's statement that determining the appropriate standard of FAPE for an IDEA-eligible student not participating in the general education setting posed a more difficult question.



US Supreme Court

Andrew F. cont.

- ▶ The Supreme Court also rejected the parents' argument that FAPE amounts to "opportunities to achieve academic success, attain self-sufficiency, and contribute to society" equal to those available to nondisabled students.
- ▶ It pointed out that the Rowley Court had rejected that interpretation. Given that the IDEA's definition of FAPE had not changed in the interim, the Court declined to adopt the parents' more expansive view. The Court vacated the 10th Circuit's ruling at 66 IDELR 31 that the district had offered the student FAPE and remanded the case for further proceedings.



US Supreme Court

Endrew F. cont.

- ▶ *Endrew F. cont.*
- ▶ Rather than adopting a bright-line rule for determining the substantive adequacy of any given IEP, the Court ruled that a child's program must be "appropriately ambitious" in light of his unique circumstances.
- ▶ This means that districts must develop sufficiently challenging programs for all IDEA-eligible students, regardless of the severity of their disabilities. The parents here argued that the district included almost identical goals in the student's second-, third-, and fourth-grade IEPs. Although the Court did not decide whether those similarities indicated a lack of appropriate progress, it did hold that the student's case required a second look.

LRP Special Ed. Connect



Post *Endrew F.*

- ▶ Courts are interpreting the impact of the Supreme Court's decision on standards in place within federal courts.



K.D. v. Downingtown Area School Dist., Docket No. 17-3065 (3d. Cir. 2018).

- ▶ ***Amicus*** Brief on behalf of several charter schools in an important special education case that was recently decided by the United States Court of Appeals for the Third Circuit. The charter schools filed their Brief to support the position of the Downingtown Area School District ("District") with respect to a claim filed against it by a former student and her parents. The Third Circuit has ruled in the District's favor.



K.D. v. Downingtown Area School Dist., Docket No. 17-3065 (3d. Cir. 2018).

- ▶ The former student and her parents filed a claim against the District alleging that the District had failed to provide the Third Circuit rejected the argument of the former student and her parents and sided with the District and its *Amici*. It held that nothing in *Endrew F.* required overturning the meaningful educational benefit standard and that an IEP must be reasonable, but need not be ideal. The Third Circuit also held that the District had met this requirement and the student's IEPs were reasonably calculated to enable her to make appropriate progress. The Third Circuit rejected the idea that *Endrew F.* required the progress of the former student to be measured against her grade-level peers given that she was receiving supplemental learning support. The Court also held that the District had met the meaningful educational benefit standard because it had reviewed and revised the former student's IEPs to keep them appropriately rigorous.



Statute of Limitations

G.L. v. Ligonier Valley School District
No. 14-1387 (3d Cir. 2015)



or



Absent certain statutory exceptions, parents have two years from the date they knew or should have known (KOSHK) of a violation of the IDEA to request a due process hearing through the filing of an administrative complaint, or they will be forever time-barred.

If a complaint is timely filed, and liability is proven, the student whose rights were violated may be entitled to compensatory education and other equitable relief for the entire “period of deprivation.” There is no two-year cap on the period of redress.



Differing Methods of Compensatory Education Calculation



A.W. v. Middletown Area School District
No. 1:13-CV-2379 (M.D. Pa. Oct. 25, 2016)

Reid-style compensatory education award in excess of the hours of special education programming allegedly missed as a result of a “child-find” violation.

Reid v District of Columbia, from 2005 (U.S. Court of Appeals, District of Columbia): We reject, however, appellants’ equally mechanical hour-per-hour calculation and instead adopt a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.





Special Education Training and Best Practices



34 CFR 300.11(a) Child Find



(a) General

(1) The State must have in effect policies and procedures to ensure that—

- ▶ (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and
- ▶ (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.



Child Find



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§ 711.21. Child find states:

- ▶ (a) To enable the Commonwealth to meet its obligations under 34 CFR 300.111 (relating to child find), each charter school and cyber charter school shall establish written policies and procedures to ensure that all children with disabilities *who are enrolled in the charter school or cyber charter school*, and who are in need of special education and related services, are identified, located and evaluated.
- ▶ (b) Each charter school's or cyber charter school's written policy must include:
 - (1) Public awareness activities sufficient to inform parents of children applying to or enrolled in the charter school or cyber charter school of available special education services and programs and how to request those services and programs. Written information shall be published in the charter school or cyber charter school handbook and web site.
 - (2) Systematic screening activities that lead to the identification, location and evaluation of children with disabilities enrolled in the charter school or cyber charter school.



Child Find

Education Plus Acad. Cyber Charter Sch.
113 LRP 39293 (SEA PA 08/23/13)



Cyber charter also operates brick and mortar “learning centers” where students received online instruction with teachers present. Student enrolled in the Learning Center. Initially, Parent requested supports from the learning center’s director, and later requested an evaluation. The Charter Director testified - he did not know the CCP Learning Center was affiliated with the Charter, delaying FAPE to the student for four months. The Hearing Officer recognized the lack of resources when the Charter began operating, but held that did NOT excuse the school's four-month failure to refer a second-grader with autism.



ENROLLMENT



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Issues

- Delayed Enrollment

Legal Aspects

- Non-discrimination in Admissions Policies and Practices
- Section 504
- IDEA

Practical Aspects

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STUDENT RECORDS



REQUEST!

FOLLOW-UP ON REQUEST IN WRITING!

OBTAIN! FROM LEA! (FROM PARENT TOO)

MAINTAIN!

RESPECT CONFIDENTIALITY!

TRANSFER UPON APPROPRIATE REQUEST!

DOCUMENT! REMEMBER THAT RECORDS CAN ALSO INCLUDE E-MAILS, NOTES, IMs, TEXTS . . .

CONSENT TO EXCHANGE AND RELEASE



PROGRAM AND PLACEMENT DECISIONS

- Child Find Obligations
- Implement or Develop?
- Limited or Full Evaluations/Reevaluations?
- Assistive Technology?
- Assessments?



Your Map

The Evaluation Report, the Reevaluation Report, the IEE, etc.

What Else Does the Parent provide? Withhold?

The Power of Observation

The IEP and Present Levels– The more things stay the same . . .



Your Toolkit

First, Make Sure You have the Right Map!

Chart it Out! Needs → Goals and SDIs

Request! Collect! Review! Share!

Keep Going! e.g. Quarter → Quarter → Year → Year →

FERPA note – Discovery/Records Requests



IEP GOALS



SMART IEP goals are:

- Specific
- Measurable
- Use Action words
- Realistic
- Time-limited



See PaTTAN.net

Writing Effective Individualized Education Plan (IEP) Goals, Revised January 2019)



Progress Monitoring

Progress Monitoring is a scientifically based practice used to assess performance and to evaluate the effectiveness of instruction.

- ▶ Data driven. Variety of useable formats.
- ▶ Measure on regular basis (weekly, monthly).
- ▶ Report progress to parent.



Implementing the Instructional Plan and Progress Monitoring

DK v. Abington Sch. Dist., No. 10-2189
(3d. Cir. Oct. 2012)

- District consistently:
- **Monitored, documented** and **responded** to student's individual educational needs in this case plus
- **Developed** behavioral implementation systems with **parent cooperation** and **offered** special attention and testing accommodations.
- That was enough to justify no child find or FAPE violations under 504 or IDEA.
- (Case also considered scope of exceptions to statute of limitations)



SPECIALLY DESIGNED INSTRUCTION (SDIs)

Review Existing SDIs, if any.

Be creative in “how to” morph the brick-and-mortar approach into a virtual one

- Don't overcomplicate the issue - Specially Designed Instruction should answer the basic question, regardless of the location of delivery of the service.

The Question Remains – What does the teacher do to present the information to this student in a way that is different from what other students receive?



A word about Behavior Support

- Behavior support programs and plans should be based on a **functional assessment of behavior and utilize positive behavior techniques.**
- When an intervention is needed to address problem behavior, the types of intervention chosen for a particular student or eligible young child must be the least intrusive necessary.
- The use of restraints is considered a measure of last resort, only to be used after other less restrictive measures, including de-escalation techniques.



CONTINUUM OF SERVICES



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Transfers and Impact of Environment

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New Environment/New Services?

Jana K. v. Annville-Cleland Sch. Dist.,

2014 U.S. Dist. LEXIS 114414 (M.D. Pa. Aug. 18, 2014).

The district court noted that the type and amount of services necessary for FAPE in a Cyber Charter School may differ from services necessary for a brick and mortar school.

- ▶ The student transferred from her home district to a cyber charter school due to lack of progress. The Hearing Officer concluded, and the district court agreed, that the resident school district had committed a child find violation thereby depriving Jana of a FAPE.
- ▶ The Hearing Officer used the related services in the Cyber Charter School IEP to determine compensatory education owed for the child find violation. The district court did not affirm that award, finding that the charter school presented fewer behavioral and emotional challenges and Jana would require far more support in a public-school setting. The court went on to award full days of compensatory education: “in a situation such as this, where the overall effect of the school district’s deficiencies resulted in a widespread loss of educational benefit for the student, it would be futile to attempt to parse out the precise number of hours that the student was denied a FAPE.” 2014 U.S. Dist. LEXIS 114414, at 63.



TIMOTHY F. V. ANTIETAM SCH. DIST., CIV.A. 12-2719, 2014 WL 1301955 (E.D. Pa. Mar. 31, 2014)

TRANSFERS BETWEEN LEAs

Cautionary tales regarding students who transfer between and among school entities.

- ▶ Student left his resident school district brick and mortar school which had determined through its evaluation that Student did not require SDI for his Math disability and so provided him with a Section 504 Plan for academic support and other accommodations for a medical Asperger's diagnosis. He was enrolled in a cyber charter school which reevaluated him and concluded that he was eligible under the IDEA for an IEP for a primary disability of autism and secondary disabilities related to speech and language impairment, ADHD, and cerebral palsy.
- ▶ The Hearing Officer did not thoroughly consider the later cyber charter school evaluation but did offer the perspective that poor results in the cyber charter evaluation were consistent with Parents' negative behavior ratings, suggesting, as did other evidence, that the structure of the regular classroom environment encouraged greater focus and lessened Student's difficulties as compared with the home environment. The District Court affirmed the Hearing Officer's finding that Student exhibits more appropriate behavior in the structured classroom environment than at home, and that is a logical explanation which supports the proper finding by the school district of ineligibility after the first evaluation.



DISTRICTS CAN BE LIABLE for FAILURES IN ONLINE PROGRAMS

- ▶ A Washington school district's failure to monitor the admissions procedures of an online high school caused OCR to determine that the school violated Section 504 and the ADA
- ▶ The district, as the school's operator, also was liable for discrimination - *Quillayute Valley (WA) Sch. Dist.*, 49 IDELR 293 (OCR 2007)
- ▶ The school's written admissions criteria stated that it would not provide certain accommodations to students with disabilities
- ▶ The school also excluded students who had a "documented inability" to complete assignments independently or who were unable to read and write at a sixth-grade level
- ▶ It did not apply the same criteria to nondisabled students. Districts could face claims under Section 504 and IDEA for failures in accessibility and the provision of FAPE in online programs
- ▶ There are also unique LRE considerations likely on the horizon related to district online programs



Damages

- ▶ Monetary damages may be available for a denial of FAPE under Section 504.
- ▶ IDEA authorizes courts to grant appropriate relief. This provision has been interpreted as permitting awards of compensatory education and reimbursement for private services. See, *Forest Grove Sch. Dist. v. T.A.* (U.S. 2009).



PARTICIPATION/ATTENDANCE

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- ▶ Supplementary Aids and Services
- ▶ Communication
- ▶ Parent Involvement
- ▶ Parent Training
- ▶ Communication



The Team

- Supplementary Aids and Services?
- PCA/Paraprofessionals?
- Positive Behavior Support Plan?
- Student Assistance Program?
- What can we do?
- What can we offer?
- What can we document?



Secondary Transition



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The term “transition services” means a coordinated set of activities for a child with a disability that:

- Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment); continuing and adult education, adult services, independent living, or community participation;
- Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and
- Includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation.

[34 CFR 300.43 (a)] [20 U.S.C. 1401 (34)]



Transition Services/Assessments/FAPE



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Transition Services



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Procedural and Substantive Requirements

- ❖ For information about postsecondary transition planning and for more examples of measurable post school goals, visit the National Secondary Transition Technical Assistance Center website at <http://www.nsttac.org> or <http://www.transitionta.org>
- ❖ For an example of an Annotated IEP, regarding transition services, see PaTTAN.net pp. 17-21, Revised February 2020.





TRANSITION SERVICES –

This is required for students age 14 or younger if determined appropriate by the IEP team. If the student does not attend the IEP meeting, the school must take other steps to ensure that the student's preferences and interests are considered. Transition services are a coordinated set of activities for a student with a disability that is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation that is based on the individual student's needs taking into account the student's strengths, preferences, and interests.





POST SCHOOL GOALS:

Based on age appropriate assessment, define and project the appropriate measurable postsecondary goals that address education and training, employment, and as needed, independent living. Under each area, list the services/activities and courses of study that support that goal. Include for each service/activity the location, frequency, projected beginning date, anticipated duration, and person/agency responsible.



SKILLS and RESOURCES

- ▶ See State Vocational Rehabilitation Services Program, 81 Fed. Reg. 55,687 (August 19, 2016) (Preamble).
- ▶ U.S. Department of Education, Office for Civil Rights. (Rev. 2011). Transition of Students With Disabilities to Postsecondary Education: A Guide for High School Educators. Washington, DC: Author. Retrieved from www.2.ed.gov/about/offices/list/ocr/transitionguide.html



Students Misusing Technology: What Schools Can & Can't Do

SPECIAL EDUCATION AND
REGULAR EDUCATION

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Technology Use among K-12 Students

- ▶ There are two main areas of concern and risk related to technology use among K-12 students: Cyber Safety and Data Safety.
- ▶ A. Cyber Safety
- ▶ B. Data Safety



Cyber Safety

- ▶ Cyber Safety risks relate to threats, predatory behavior, cyberbullying, or obscene or sexually explicit materials that may be communicated to students via the Internet. Cyberbullying is defined as “bullying that takes place using electronic technology” including Internet sites, smartphone devices, computers, text messages, emails, social networking sites, videos, blogs, websites, etc.



Children's Internet Protection Act ("CIPA")

- ▶ The Federal Children's Internet Protection Act ("CIPA") mandates that schools that receive discounts for telecommunications, Internet access, or internal connections through the E-rate program (Universal Service Program for Schools and Libraries) must develop and implement measures and policies to prevent access to visual depictions that are determined to be "obscene", "child pornography", or "harmful to minors".



Technology Protection Measures

- ▶ Specific technology that blocks or filters Internet access, including
 - ▶ Technical blocking: Blocking access to Webpages, domains or IP addresses
 - ▶ Search result removal: Omitting websites from search results
 - ▶ Installing filtering software: Restricts computers ability to access certain sites on an institutional-level or on individual computers



Neighborhood Children's Internet Protection Act ("N-CIPA"),

- ▶ Additionally, the Neighborhood Children's Internet Protection Act ("N-CIPA"), which was adopted as part of CIPA, requires schools receiving E-rate discounts to adopt and enforce an Internet Safety Policy ("ISP") that addresses harmful or inappropriate online activities.



Internet Safety Policy

- ▶ The ISP should address:
 1. Access by minors to inappropriate matter on the Internet and World Wide Web;
 2. The safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;
 3. Unauthorized access, including so-called “hacking,” and other unlawful activities by minors online;
 4. Unauthorized disclosure, use, and dissemination of personal information regarding minors; and
 5. Measures designed to restrict minors’ access to materials harmful to minors.



Monitoring & Limiting On-Campus Activity (1)

- ▶ Student conduct, including inappropriate use of technology, may be subject to discipline in the school setting, including during activities or events to which the school controls or sponsors the forum.
- ▶ Accordingly, inappropriate use of technology “on-campus”, especially if the technology used is the property of the school, may be monitored or limited.

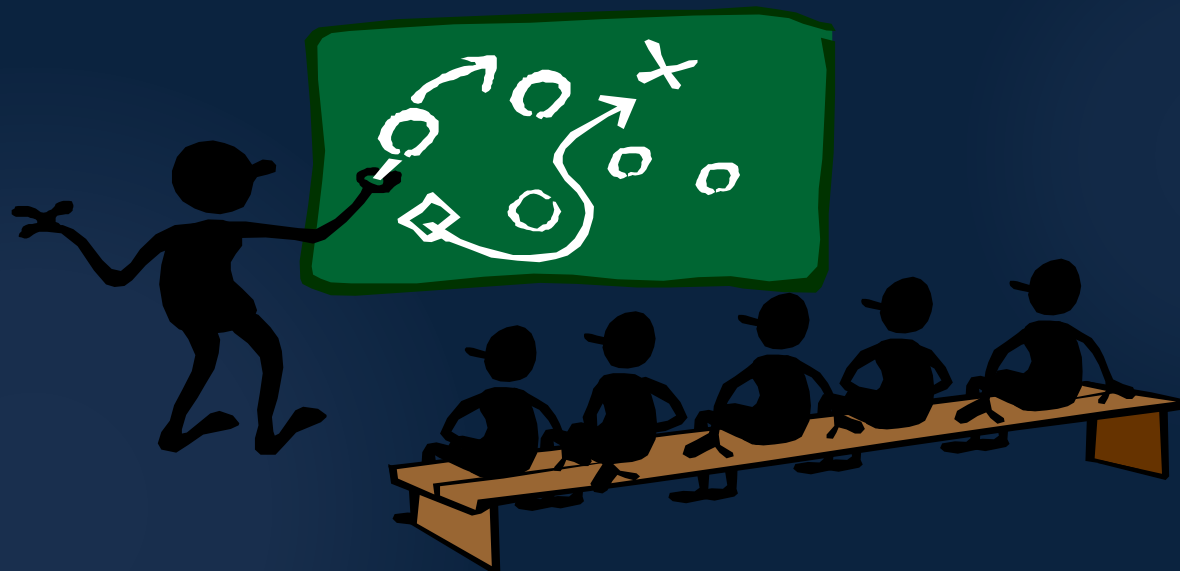


Monitoring & Limiting On-Campus Activity (2)

- ▶ School should establish a policy setting the expectations that
 - ▶ the user will act in a responsible, ethical, and legal manner,
 - ▶ providing examples of prohibited uses of technology, and
 - ▶ articulating the consequences of violating such policy.

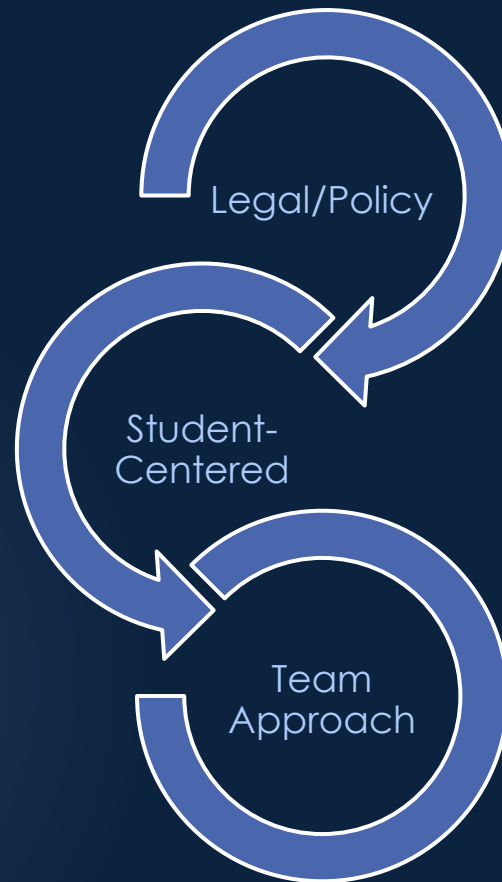


Summary and Strategies to Minimize Unnecessary Litigation and Liability



Take Away

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Questions?

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The logo for the Aurora Institute Symposium. It features the word "AURORA" in a large, white, serif font. Above the "A" is a stylized white arc with an arrowhead pointing upwards. The letter "O" is replaced by a white eight-pointed star. Below "AURORA" is the word "INSTITUTE" in a smaller, white, sans-serif font. Below "INSTITUTE" is the word "Symposium" in a white, script font. A thin white horizontal line is positioned below "Symposium".

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