

A FRAMEWORK TO CONSIDER THE NEED FOR COVID-19 IMPACT SERVICES

NEW YORK STATE EDUCATION DEPARTMENT
IDEA IMPARTIAL HEARING OFFICER TRAINING

VIRTUAL PROGRAM

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I. INTRODUCTION

- A. The Individuals with Disabilities Education Act (IDEA)¹ mandates that states provide special education and related services to students with disabilities.² Doing so, however, during the COVID-19 national emergency has been, and likely will continue to be into foreseeable future, a challenge. The strain on the resources, time, emotions and stamina of school district personnel and parents, as well as on the routines and daily life of students, has been and will continue to be substantial. Yet, despite these significant challenges for both school districts and parents, the obligations, rights and responsibilities of both communities have not diminished. School districts were required to provide a free appropriate public education (FAPE) to students with disabilities during school closures caused by COVID-19 if educational services were provided to the general student population.³

¹ In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”).

² *See, generally*, 34 C.F.R. §§ 300.17, 300.111.

³ *See Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, 120 LRP 10623 (OSERS/OCR March 21, 2020) (hereinafter, “Supplemental Fact Sheet”).

- B. Providing special education programs and services effectively in normal times requires the collaboration of school district personnel and the students' parents. With the quick and dramatic impact the pandemic had on our educational system, the provision of special education and related services was compromised despite the good faith efforts of the vast majority of school districts and parents to do their best under the circumstances. In many cases, the collaborative relationship between school district personnel and parents has been understandably disrupted. Inevitably, despite efforts to work collaboratively to resolve disagreements resulting from COVID-19 related complications in the provision of services to students with disabilities, disputes will arise and school districts and parents will avail themselves of the IDEA's due process mechanisms.⁴ In fact, we are just beginning to see COVID-19 related state complaints / litigation.⁵

⁴ The IDEA provides for three distinct dispute resolution mechanisms, each with its own set of procedures. A parent or local educational agency (LEA) must be afforded the opportunity to resolve disputes arising under federal and state laws and regulations through either a due process complaint (*see* 34 C.F.R. § 300.507), mediation (*see* 34 C.F.R. § 300.506), State complaint (*see* 34 C.F.R. § 300.151), or a combination thereof.

⁵ *See, e.g., L.V. v. New York City Dep't. of Educ.*, 77 IDELR 13 (S.D.N.Y. 2020), *adopting* 76 IDELR 279 (S.D.N.Y. 2020) (mandating in-person services under stay-put, to the extent the services can be provided safely); *J.C. v. Guam Dep't of Educ.*, 77 IDELR 15 (D. Guam 2020) (denying the parent's request for an injunction mandating in-person services but leaving open the possibility that in-person services may be required after balancing the equities and the public interest); *Jacksonville North Pulaski Sch. Dist. v. D.M.*, 76 IDELR 238 (E.D. Ark. 2020) (denying the grandparents request for an injunction to require the school district to evaluate the student over the summer, but suggesting that, if the school district can safely perform the evaluation before school commences, it consider the option); *In re: Student with a Disability*, 77 IDELR 25 (SEA KS 2020) (finding that it was incumbent of the school district to either provide the student with accommodations and modifications in the student's continuous learning program consistent with the student's IEP or give the parent prior written notice of the change); *Perry Twp. Schs.*, 120 LRP 24253 (SEA IN 2020) (declining to order corrective action over the failure to provide the parent with educational records of the student given the circumstances caused by school closures and the school district's continued efforts to provide the records beyond the required timeline). *See also J.T. v. de Blasio*, No. 20 Civ. 5878 (S.D.N.Y. July 28, 2020) (complaint filed) (class action against every LEA and state in the country arising from coronavirus-related school closures and the alleged failure to provide FAPE to students with disabilities); *James v. Pennsylvania Dep't of Educ.*, No. 20-cv-02320 (E.D. Pa. May 18, 2020) (complaint filed) (class action against the Pennsylvania Department of Education seeking compensatory damages for the failure to provide appropriate education to nonverbal and partially verbal students who receive augmented or alternative communication supports in public schools in the state); *W.G. v. Hawaii Dep't of Educ.*, 20-cv-00154 (D. Haw. April 13, 2020) (complaint filed) (class action alleging that, because the Hawaii Department of Education created

- C. The purpose of this document is to provide a framework for hearing officers to consider, on a case by case basis, to what extent, if any, the pandemic impacted the delivery of special education and related services to students with disabilities, whether that impact adversely affected each student's progress, and if so, what COVID-19 impact services would be appropriate to address the loss.

II. KEEP YOUR BRITCHES ON

- A. The U.S. Department of Education's Office of Special Education Programs (OSEP) has issued limited guidance addressing the obligations of school districts to provide make-up / additional services for students with disabilities who were adversely impacted as a result of school closures and remote learning. The guidance, in general, provides, where due to the closure of schools as a result of the pandemic there has been an interruption in providing IEP services, or a change in how to do so, IEP teams must make an individualized, student-focused determination whether, and to what extent, if any, compensatory services may be needed to make up for any skills that the student may have lost.⁶ This determination is to be made as an additional activity of the IEP team after it has developed the student's normal annual IEP.⁷
- B. Though the guidance speaks in terms of "compensatory services,"⁸ the general process described in the guidance to determine whether a student should receive impact services differs in an important way from the legal processes in IDEA which can give rise to a student receiving compensatory educational services.

Under the IDEA, either the state complaint or hearing process can result in a student receiving compensatory educational services, but only if the school district has been legally found to have denied the student a free appropriate public education (FAPE).⁹ And generally, said denial must be more than *de minimis* or minor.¹⁰ In other words, the aspects of the IEP

disproportionate access to education for students with disabilities during school closures resulting from the pandemic, it should be compelled to create a process to determine compensatory services for said students for when they return to in-person classes).

⁶ See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (EDU 2020).

⁷ *Id.*

⁸ *Id.*

⁹ See, e.g., *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

¹⁰ *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 75, 47 IDELR 223 (D.D.C. 2007) (court found no evidence that the handful of missed speech therapy sessions added up to a denial of FAPE) quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d

that were not followed must have been “substantial or significant” or “material” to get compensatory educational services under the IDEA.¹¹ While there may be instances in which the school district failed to provide any services whatever, or failed to provide services as prescribed in the student’s IEP, as a direct result of COVID-19 related school closures, said failure may be attributable to the impossibility of, or at least the very challenging deficits to overcome in, complying with the student’s IEP for a variety of reasons, including –

1. the student was not available to learn because of the nature of his/her disability made it difficult to engage the student remotely;
2. the student was not available to learn because during the time for remote learning, the student was with an adult who could appropriately assist/support the student;
3. the lack of a family’s adequate access to necessary and compatible computer, mobile, or tablet devices;
4. the lack of reliable internet service, if online services were offered;
5. the lack of adequate number of providers available to provide remote learning;
6. health risks associated with providing in-person services in school could not be adequately addressed; and,
7. health risks associated with providing in-person services in the home could not be adequately addressed.

Stated differently, not all failures to provide any services whatever or as prescribed were deliberate. And, though impossibility is, as of the moment absent any Congressional waiver to FAPE and the least restrictive environment (LRE) requirements, no defense,¹² haphazardly using the

341, 348 – 349, 31 IDELR 185 (5th Cir. 2000), *cert. denied*, 531 U.S. 817, 111 LRP 30885 (2000).

¹¹ *Banks v. District of Columbia*, 720 F. Supp. 2d 83, 54 IDELR 282 (D.D.C. 2010); 583 F. Supp. 2d 169; *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007).

¹² See DeVos, Betsy, U.S. Department of Education, *Report to Congress of U.S. Secretary of Education Betsy DeVos on Recommended Waiver Authority under Section 3511(d)(4) of Division A of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)*, April 27, 2020, <https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf> (last visited September 17, 2020). See also *Schiff v. Dist. of Columbia*, 75 IDELR 156 (D.D.C. 2019) (rejecting the defense of impossibility where the

term compensatory educational services, a term associated with wrongdoing, may inflame an already volatile situation making it harder to preserve the IDEA's intended collaborative relationship between school district personnel and parents.

- C. For this reason, rather than using the legal term "compensatory educational services," or something similar, the term "COVID-19 impact services" may be more apt in the presence of COVID-19 related mitigating circumstances. This is not to say that all COVID-19 related failures did not result from malfeasance. Rather, the term acknowledges that, in the absence of deliberate misconduct, the school district may very well still be on the proverbial hook and held to account for the loss of educational opportunity resulting from school closures, but not as a result of wrongdoing.
- D. This said, the process to determine compensatory educational services is instructive. Like in compensatory educational services cases, in COVID-19 impact services determinations, data may, of necessity, need to be extrapolated and some equitable factors weighed in defining impact services.

III. CONSIDERATIONS TO DETERMINE COVID-19 IMPACT SERVICES

- A. It should go without saying, that school districts should take the initial lead to work collaboratively with parents to determine to what extent, if any, a school's closure adversely affected the student's progress in meeting his/her IEP goals and to ensure access to the general education curriculum. For a student's IEP team to determine whether, and to what extent, if any, COVID-19 impact services are needed to make up for any lost skills, both the parent and the school district members of the IEP team must gather academic and functional data and other documentation regarding the other factors noted below that the team believes should be considered in making the determination. Preferably, this information should be shared with IEP team members, including the parent, prior to the IEP team meeting at which the determination will be made so that it can be carefully reviewed and thoughtfully considered by all team members.

Accordingly, the steps set forth below are equally instructive to IEP teams.

- B. The need for data and other documentation is no less for the hearing officer, should the hearing officer be tasked with the responsibility of crafting an award of either compensatory educational services or COVID-

school district was not able to identify a private school for the student, as no private school accepted the student); *Dist. of Columbia Pub. Schs.*, 120 LRP 8116 (SEA 2020) (same).

19 impact services. The hearing officer, therefore, should seek to have the parties establish in the hearing record the following information:¹³

1. Establish the student's progress in the general education curriculum and towards meeting IEP goals and objectives just prior to school closure.
2. Estimate the student's rate of progress in the general education curriculum and towards meeting IEP goals and objectives during the school year prior to school closure to help estimate where the student would have been but for the school closure.
3. Establish the student's progress in the general education curriculum and towards meeting IEP goals and objectives during the period of remote learning to the end of the school year, including extended school year (ESY), if the student was eligible for ESY and participated.
4. Compare the special education and related services provided to the student pre-COVID-19 closure with post-COVID-19 remote learning.
5. Assess whether the student's progress in the general education curriculum and towards meeting IEP goals and objectives were

¹³ A challenge most hearing officers face in fulfilling their role and responsibilities is ensuring a complete record from which the hearing officer can make an informed decision regarding the presented issue(s) and, when necessary, craft an appropriate award. Views among hearing officers vary as to whether there is an obligation or responsibility on the part of the hearing officer to develop at least the minimal record necessary to determine the presented issue(s) and, when necessary, craft an appropriate award, regardless of whether either party is represented by an attorney. If the primary goal of the IDEA hearing process is to ensure that the educational rights of a child with a disability are upheld (*see* 34 C.F.R. § 300.1), then to what extent, if any, does a hearing officer have a responsibility to take some steps to mitigate the potential adverse effect the lack of a complete record may have on the process while also achieving the IDEA's primary goal? And, if the hearing officer has a responsibility to ensure that the educational rights of a child with a disability are upheld, is an affirmative duty to develop /complete the record created? If a hearing officer agrees that the very nature of the IDEA hearing process places upon him or her the responsibility to take some steps, the concern often then is how to balance maintaining impartiality while participating in the development / completion of the hearing record. But, the two dimensions are not mutually exclusive. Rather, hearing officers must strike a balance between them by determining the extent, if any, each step will assist in making a factual record for the hearing officer to render an informed decision on the presented issue(s) and, when necessary, craft an appropriate award.

impacted during the period of remote learning.

6. Estimate the student's *gross* educational deficits, if any, that accrued during the period remote learning.
7. Review the student's typical regression/recoupment history over the summer break and estimate the student's *net* educational deficits, if any, that accrued during the period of remote learning (which would be through the end of the normal school year, unless the student has ESY).
8. Consider the cause of the net educational deficits:
 - a. Student focused:
 1. absences (i.e., not accessing pre-recorded lessons; not participating in live, virtual classes);
 2. extended illness;
 3. emotional crisis;
 4. remote learning resistance/refusal despite school district's good faith efforts to assess and address
 - b. Family/home focused:
 1. parental conduct (e.g., did not make student available to participate in the services offered despite access to technology and internet or make good faith efforts);
 2. Lack of access to technology and internet
 - c. IEP focused:
 1. failure to [timely] establish remote learning program;
 2. lack of adequate number of personnel to deliver necessary services;
 3. failure to provide necessary technology and adequate access to internet despite school district's remote learning program relying on same
9. Determine whether impact services are justified.

10. Identify the specific COVID-19 impact services reasonably calculated to provide the educational benefits needed to correct the identified net educational deficits. Consideration should also be given to the following:
 - a. The form and amount of the COVID-19 impact services, including, but not limited to, tutoring, summer school, camps, aides, assistive technology, private services, postsecondary education/prospective tuition, reimbursement to parents for out-of-pocket educational service expenses and escrow accounts.
 - b. When the COVID-19 impact services are to be provided (e.g., to the student in/after school, during the weekends or summer), where (i.e., in school, local library, the home) and by whom (e.g., school personnel or private provider).
 - c. The qualifications of the provider(s).
 - d. Consultation and/or coordination between school district staff, provider(s) and parent as well as periodic progress reports from provider to staff and parent.
 - e. A reasonable timeline by when the services are to be completed, taking into consideration the student's age, graduation status, and continued eligibility.
 - f. Whether transportation is required to allow the student to access the services.
11. Establish whether any other factors are present that may result in a reduction of services, including whether the student participated in a summer instructional program or parent-funded, private services (which the school district is willing to reimburse); whether the IEP for the new school year takes into account, in part, the educational deficits that accrued during remote learning; whether the student's total educational activities, including the student's normal school day, and COVID-19 impact services and any private services, would unfairly predominate the student's daily life; and, whether, because of the student's disability and unique circumstances, the student is able to catch-up within a reasonable time without the need for impact services.

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