

POTENTIAL COVID-19 RELATED HEARING PROCESS MATTERS

NEW YORK STATE EDUCATION DEPARTMENT
IDEA IMPARTIAL HEARING OFFICER TRAINING

VIRTUAL PROGRAM

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Stay-put

The IDEA stay-put provision requires a school district to maintain a student in the then-current educational placement until litigation concludes. Its primary purpose is to maintain the student's "status quo" while a dispute over the student's services or placement is pending. Specifically, during the pendency of special education proceedings brought pursuant to the IDEA, unless the State or local agency and the parents of the child otherwise agree, federal law requires that the child remain in his or her then-current educational placement.¹ The application of the stay-put provision to matters concerning expedited hearings in the disciplinary context is governed by a different set of rules under the IDEA.²

Clearly, though stay-put is not location specific,³ maintaining a student in his/her then-current educational placement may be impractical, if not impossible, during

¹ See 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

² See 34 C.F.R. § 300.533.

³ Courts have explained that a child's educational placement "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ.*, 103 F.3d 545, 25 IDELR 132 (7th Cir. 1996). The term "then-current educational placement" enjoys varying, but related, interpretations among the circuits. See *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 (9th Cir. 2002); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990). It has been interpreted to mean typically the placement described in the student's most recently implemented IEP (Ninth Circuit paraphrasing the Sixth Circuit; Second Circuit) and the operative placement actually functioning at the time when the dispute arises (i.e., when the hearing complaint is filed) (Sixth Circuit, and adopted by the Third

mandated school closures resulting from the COVID-19 crisis. Should the parties not be able to reach agreement on what is the stay-put, or providing for the stay-put is impractical or impossible, the hearing officer can consider addressing stay-put in one of two ways:

1. By requiring the LEA, just as in the disciplinary context, to provide educational, remote services that enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's Individualized Education Program (IEP).⁴
2. Alternatively, the hearing officer can consider the matter similar to instances where the program/school is no longer available (e.g., school shuts/burns down; student asked to leave). Under unavailability of current placement case law, courts have required the LEA to place the student in a program that is materially and substantially similar to the former program.⁵ Under this circumstance, the LEA would have to present to the hearing officer a viable, comparable remote program.

Five recent stay put-related decisions involve situations arising from the COVID-19 crisis. The first decision enforces prior pendency orders for in-person services (to the extent they can be provided safely) due to the school district's failure to explain how the proposed program of remote instruction is a "satisfactory substitute" for the former in-person program. In deciding whether to provide remote instruction, the court cautioned that the school district may need to conduct appropriate assessments to determine whether the student's disability-related characteristics make remote instruction unfeasible.⁶

Circuit; Second Circuit). *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 (9th Cir. 2002); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 17 IDELR 113 (6th Cir. 1990); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996). *Cf. Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 386 F.3d 158, 42 IDELR 2 (2d Cir. 2004).

⁴ See 34 C.F.R. § 300.530 (d)(1)(i). See also *Brookings Sch. Dist.*, 77 IDELR 55 (SEA SD 2020) (where the school district successfully argued that, although it failed to provide all of the educational and related service minutes listed in the student's IEP through distance learning during the school closure, it nonetheless materially and substantially implemented the student's IEP annual goals, allowing the student to make progress).

⁵ *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 39 IDELR 154 (9th Cir. 2003); *John M. v. Bd. of Educ.*, 502 F.3d 708, 48 IDELR 177 (7th Cir. 2007); *Knight v. Dist. of Columbia*, 877 F.2d 1025, 441 IDELR 505 (D.C. Cir. 1989). See also *Tindell v. Evansville-Vanderburgh Sch. Corp.*, 54 IDELR 7 (S.D. Ind. 2010) (holding that a college internship program was comparable to the residential facility which was about to close); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

⁶ *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).

In the second decision, where an injunction was sought to enforce provision of the in-school services in the current IEP, the court saw the real issue as being whether a change in placement had occurred to trigger the stay put provision. To consider injunctive relief in the future, the court said plaintiffs would need to provide additional evidence to allow it to “balance the equities and the public interest,” presumably weighing the student’s need for in-person services against the safety concerns in doing so.⁷

In the third, the parent, invoking stay put, argued that the school district failed to fund certain school-related services, including special transportation and nursing services since the inception of the pandemic in March 2020. The student had been unilaterally placed in a private program for children with traumatic brain injury (i.e., iHope) and sought reimbursement for the 2017-18 school year. The hearing officer determined the iHope program to be appropriate and ordered reimbursement. Subsequently, for the following school year, 2018-19, the parent moved the student to a new program (i.e., iBrain) and filed a due process complaint seeking reimbursement. The parents sought a stay put order requiring the school district to fund the new placement because iBrain was substantially similar to the program available at iHope. The IHO granted the order. In the interim, while the case is pending, extending into the 2019-2020 school year, a dispute arose over payment and the parent sought to require the school district to reimburse certain costs. The parties agreed that the student’s placement was not at risk. The court determined that stay put did not apply and, rather, the parent had to meet the standard for a preliminary injunction because there was no imminent threat to the student’s educational services.⁸

The fourth case involved a situation where, prior to the pandemic, the parties entered into a stay put agreement, which called for the student, who has Down Syndrome, to receive a hybrid of special education instruction in the school and the public library. The agreement further provided that, if the public library became unavailable due to an extended closure, an emergency, or other circumstance beyond the control of the parties, the student would receive all his special education services in the student’s home, if the home is available. The agreement also stated that, if the public library were to close for more than 7 days and the home is unavailable, the parties would seek in good faith to identify another, alternative off-site location. When the library actually closed, the school district notified the parents that the student would receive daily services for a few hours in school and then be bussed from the school to his home, where he would receive in-person home instruction from a teacher three days per week and remote instruction from the same teacher two days per week. The parent objected to this arrangement because it would require a staff member to enter their home. In response, the school district offered to provide full-time remote instruction. The parent declined full-time remote instruction and demanded that

⁷ *J.C. v. Guam Dep’t of Educ.*, 77 IDELR 15 (D. Guam 2020).

⁸ *Abrams v. Carranza*, 77 IDELR 47 (S.D.N.Y. 2020)

the services either be provided in the school or the public library. After noting that “pendency placement and appropriate placement are separate and distinct concepts,” the court found that the IDEA’s stay put provision was not violated. The court went on to note that, even had the school district violated the stay put, the parents would not be entitled to emergency relief because the school district’s proposal complied with the agreement. The parents objected to in-home services because they both worked and did not wish to allow a staff member to enter their home during COVID. Given the options remaining – providing instruction in the (closed) public library or the school – the court considered the feasibility of providing services in school. First, the court noted that the student’s limitations with eating, toileting, and sanitation, among others, presented particular safety challenges for school staff during COVID. The parents’ desire to have the student taught in the school to accommodate their work schedule did not outweigh the safety concerns. Second, the court concluded that the parents had not demonstrated irreparable harm and, even if the parents were able to demonstrate that they would likely suffer irreparable harm, the public interest in stopping the spread of the COVID-19 virus would outweigh the parents’ interests.⁹

Finally, in the fifth case, the school district was ordered to fund the stay put placements of 13 unrelated students even though the parents allegedly failed to document that services were provided by the private school in which the students were enrolled. The school district had a policy prohibiting payment for stay put services until it received documentation that services had actually been provided. In upholding the 13 students’ right to funding under the IDEA stay put provision, the court declined the school district’s invitation to apply the traditional preliminary injunction factors. Specifically, court rejected the school district’s argument that the students did not face a meaningful threat to their educational stability and, by reason thereof, should not get the benefit of the IDEA’s stay put provision. The court reasoned, citing Second Circuit precedent, that the IDEA’s stay put provision is an “absolute rule in favor of the status quo,” which substitutes for the court’s discretionary consideration of the preliminary injunction factors. The court did deny payment requests for 15 other students who could not show that the private school was their stay put placement because it was the “operative placement” when the parents filed their due process complaints. Citing to *de Paulino v. New York City Dep’t of Educ.*, 959 F.3d 519 (2d Cir. 2020), the court said the parents of the 15 students could not unilaterally transfer their students and “subsequently initiate an IEP dispute to argue that the new school’s services must be funded on a pendency basis,’ because permitting pendency on such grounds ‘effectively renders the stay-put provision meaningless by denying any interest of a school district in resolving how the student’s agreed-upon educational program must be provided and funded.’”¹⁰

⁹ *Killoran v. Westhampton Beach Sch. Dist.*, 120 LRP 27565 (E.D.N.Y. 2020).

¹⁰ *Araujo v. New York City Dep’t of Educ.*, 77 IDELR 127 (S.D.N.Y. 2020).

Obligation to Provide FAPE During School Closure

IDEA, Section 504 and the ADA do not specifically address a situation in which schools are closed for an extended period of time (greater than 10 days) due to exceptional circumstances such as a pandemic. If a school district closes its schools to slow or stop the spread of COVID-19 and does not provide any educational services to the general student population, then it would not be required to provide services to students with disabilities during the same period of time.¹¹

Once school resumes, whether in person or through remote learning, the school district “must make every effort” to provide special education and related services to a student in accordance with the student’s IEP, understanding there may be exceptional circumstances that could affect how a particular service is provided.¹² Where the school district is providing educational opportunities to the general student population, students with disabilities must be ensured “equal access.”¹³ School districts must ensure “to the greatest extent possible” each student can be provided the special education and related services identified in the student’s IEP.¹⁴

What constitutes “every effort” and “to the greatest extent possible” will be dependent on the specific facts and circumstances presented, including a consideration of whether the student’s IEP can be implemented as written, and if not, the reasonable alternative methods/approaches of delivering services/instruction which might appropriately meet the student’s needs and the

¹¹ See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (EDU 2020).

¹² *Id.* See also *Brookings Sch. Dist.*, 77 IDELR 55 (SEA SD 2020) (awarding the student compensatory education for the school district’s failure to provide the student with extended school year (ESY) services on the first day of ESY); *Beech Grove City Schs.*, 120 LRP 24255 (SEA IN 2020) (finding that the school district checking in on the student during virtual instruction does not excuse the school district’s obligation to provide the services outlined in the student’s IEP). Cf. *Blue Hills Regional Technical High School*, 77 IDELR 83 (SEA MA 2020) (in denying a school district motion to dismiss, where the school district ceased in-person reading instruction because of COVID and contended it had offered a virtual reading coach program and tutoring hours delivered by the parents preferred reading instructor, the ALJ found that a hearing was necessary to obtain additional evidence to determine whether the school district implemented the appropriate type of reading services outlined in the IEP).

¹³ See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (EDU 2020). See also 34 C.F.R. §§ 104.4, 104.33; 28 C.F.R. § 35.130.

¹⁴ See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77, Question A-1 (EDU 2020).

safety risks for both the student and providers with each option.¹⁵ If a school district is found to have denied a free appropriate public education (FAPE), whether the school district made “every effort” and ensured “to the greatest extent possible” that the student would be provided what the student’s IEP required, may be important factors in determining the appropriate equitable remedy, if any.¹⁶

While the COVID-19 crisis does not affect the obligation to provide FAPE,¹⁷ the appropriateness standard, as articulated in *Andrew F.*, requires the hearing officer / court to nonetheless determine whether the IEP is “reasonably calculated to enable a child to make progress appropriate in light of the *child’s circumstances*.”¹⁸ Emphasis on the “child’s circumstances” refocuses the inquiry on the individualized needs of the student and recognizes that there is a wide spectrum of disabled children whose circumstances are ever changing, e.g., new needs, needs that have been met, needs that require different interventions / supports, and life experiences that impact learning. Unclear is whether COVID-19 related circumstances, like a student’s compromised immune system or working parents who cannot afford to stay home while the student is home or a student who lives in a community with no access to the internet, are the type of considerations *Andrew F.* envisioned. Time, and perhaps litigation, will tell.

This said, *Andrew F.* warns that a school district is expected to “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”¹⁹ Perhaps, this would include evidence regarding whether a

¹⁵ *Los Angeles Unified School District*, 77 IDELR 116 (SEA CA 2020) (finding that, despite the school district’s contention it was “making every effort” and providing services “to the greatest extent possible,” the school district did not satisfy its FAPE obligation where it failed to provide hands-on vocational training and community-based instruction, which prevented the student from making meaningful progress; the use of the terms “making every effort” and “to the greatest extent possible” by the U.S. Department of Education does not relieve the school district from providing FAPE to the student).

¹⁶ Compensatory education is fairness-based remedy. The conduct of the parties can be considered to determine whether and how much to award. *See, e.g., Parents of Student W.* 31 F.3d at 1497, 21 IDELR 723 (9th Cir. 1994).

¹⁷ *See Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (EDU 2020). *See also* 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 8, 2020).

¹⁸ *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 69 IDELR 174 (U.S. 2017) (emphasis added).

¹⁹ *Id* at 1001.

district made “every effort” and “ensured to the greatest extent possible” that the student would be provided what the student’s IEP required.

Distance Learning/Contingency Plan

To avoid interruption to a student’s IEP services in the event of a COVID-19 outbreak requiring school closures, a student’s IEP team may include a distance learning plan in the student’s existing IEP to provide special education and related services at some other location or in the home utilizing online or some other alternate mode of instructional delivery as a contingency plan.²⁰ But, doing so, does not relieve the school district of its obligation to provide accommodations and modifications the student needs to access the general education curriculum.²¹ If the plan results in a “change of placement,”²² a real possibility considering least restrictive environment (LRE), setting, type of service, amount of service and service delivery model are significantly different with at home services, prior written notice and an amendment of the IEP would be required.²³ The amendment of the IEP, adding the distance learning/contingency plan components, could be done through a written agreement.²⁴

²⁰ See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77, Question A-6 (EDU 2020).

²¹ *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).

²² In order for the change to qualify as a change in educational placement, a fundamental change in, or elimination of a basic element of the education program, must be identified. *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 556 IDELR 270 (D.C. Cir. 1984). [T]he ‘touchstone’ is whether the modification ‘is likely to affect in some significant way the child’s learning experience.’” *J.R. v. Mars Area Sch. Dist.*, 318 F. App’x 113, 52 IDELR 91 (3d Cir. 2009) citing *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 556 IDELR 260 (3d Cir. 1984). See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77, Question A-4 (EDU 2020).

²³ Amending the IEP to remote learning could have the additional implication of affecting the student’s stay put. For example, when schools reopen, parents filing a due process complaint notice to oppose returning to the in-person school environment could claim their student’s stay put is now remote learning.

²⁴ 34 C.F.R. § 300.324(a)(4).

Home Instruction versus Homebound Services

Most placements for students with disabilities are school-based placements. IDEA, however, contemplates that a school district may need to provide services in a student's home in some circumstances.²⁵ IDEA, however, does not define the term home instruction other than to say that it is one of many alternative educational placements that an IEP team can consider to meet the student's unique needs.²⁶ It is a very restrictive placement on the LRE continuum.²⁷

Homebound services are those provided to any student, disabled or not, who will be absent from school for a period of time due to injury or illness.

Remote learning resulting from COVID-19 does not fit into either of these categories since it was prompted by school closures unrelated to the student's medical condition or educational needs. This said, students with disabilities on homebound services must be provided with services as effective as those provided to nondisabled peers.²⁸ If the exclusion was temporary, which the U.S. Department of Education defines as 10 consecutive days or less,²⁹ but, as a result COVID-19 school closures exceeded more than 10 consecutive school days, an IEP team meeting would have been necessary to change the student's placement and modify the contents of the IEP, if warranted.³⁰

Parent Request For In-Home Services

As schools grappled with opening in the fall, many gave parents the option to participate in voluntary distance learning. Given that this option was available to all students, regardless of disability, a school district would be required to provide students with disabilities who opted for this option with FAPE. If a parent of a student who is participating in voluntary distance learning requested related services be provided in the home, a host of considerations would have come into play, including whether the student needed the related service to receive FAPE when the student is learning remotely at home (e.g., an aide to stay on task) and whether and how any safety and health concerns could be addressed (e.g., masks and social distancing and logistically how it would work, i.e., needed

²⁵ See 34 C.F.R. § 300.115(b)(1).

²⁶ See 34 C.F.R. §§ 300.39, 300.115.

²⁷ See, e.g., *Brado v. Weast*, 53 IDELR 316 (D. Md. 2010) (finding that a student with chronic pain could be accommodated in school by providing accommodations).

²⁸ See 34 C.F.R. §§ 104.4, 104.33; 28 C.F.R. § 35.130.

²⁹ See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77, Question A-4 (EDU 2020).

³⁰ See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77, Questions A-2, 4 (EDU 2020). See also *Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009).

equipment, doing it outside possibly, and would other family members be present).

The hearing officer should be mindful that, for some children, either because of a medical condition or their disability, the in-school environment where the services would be provided cannot be made safe and, therefore, parents are left with no option but to opt for distance learning. The failure to accommodate said students can be a denial of FAPE.³¹

Child Care Services in the Public Schools

School districts throughout the country opened in the fall either providing in-person instruction, remote instruction, or a hybrid of the two. In some cities who adopted full-time remote instruction or a hybrid program, in response to parent frustration with lack of child care, the school district offered, for a fee or free, child care services in the public schools.³² In some instances, the students would be permitted to complete their remote learning in the public school under the supervision of adult monitors.

In a school district that has adopted this child care option in the public schools, it would seem that such program would undercut said school district's assertion that it cannot provide FAPE safely to some students with disabilities on a full-time basis in-person in the public schools, particularly where remote learning fails short of what a student's IEP requires, including meeting the least restrictive environment mandate.

³¹ *Lillbask v. State of Connecticut Dep't of Educ.*, 397 F.3d 77, 42 IDELR 230 (2d Cir. 2005).

³² See, e.g., Cullotta, Karen Ann. "Remote Learning, In School? Some Suburban Public Schools Closed By COVID-19 Have Reopened For E-learning Supervision – At A Price To Taxpaying Parents." *Chicago Tribune*, 17 Sept. 2020. *Chicago Tribune (Online)*, <https://www.chicagotribune.com/coronavirus/ct-covid-19-schools-remote-learning-supervision-20200917-jysvva4kczctlfwxqy5rccj2q-story.html> (last visited October 17, 2020); Wamsley, Laurel. "What To Do About Part-Time School? NYC Announces Free Child Care For 100,000 Students." *NPR*, 16 July 2020. *NPR (Online)*, <https://www.npr.org/sections/coronavirus-live-updates/2020/07/16/892043766/what-to-do-about-part-time-school-nyc-announces-free-child-care-for-100-000-stud#:~:text=NYC%20Announces%20Free%20Child%20Care%20For%20100%2C000%20Students,-Facebook&text=Franklin%20II%2FAP-.New%20York%20City%20Mayor%20Bill%20de%20Blasio%20announced%20that%20the,in%2Dperson%20instruction%20in%20September.&text=Students%20will%20take%20classes%20remotely%20on%20the%20other%20days> (last visited October 17, 2020).

Discipline Procedures

While the same discipline procedures apply to students learning remotely, the focus in doing so may need to be adjusted. More focus may need to be placed on addressing behaviors than punishment since even a student removed from her/his current placement must receive services that help the student participate in the general education curriculum and to make progress toward her/his goals.³³ Moreover, implementing behavioral interventions will be far more difficult for staff in a virtual setting. Thus, the involvement of parents in planning may need to also consider the related service of parent training and counseling to assist in implementation in the remote learning environment.³⁴

Incarcerated Students

All IDEA rights apply to students with disabilities who are incarcerated in non-federal correction facilities, save a few express exceptions.³⁵ But, delivering services to these students during this crisis can be very problematic. The entry of teachers and other staff to some facilities may be limited or totally prohibited, to obtain social distancing classroom availability may be limited and access to assistive technology devices and the internet may be lacking or restricted in some facilities.

School District's Placement of Student in a Private School

This situation presents a host of potential issues. Since the school district remains ultimately responsible for the provision of FAPE under IDEA, any shortcomings in the private school's response to the COVID-19 crisis in terms of providing FAPE, depending on the school district's contract with the private school, if any, may be the responsibility of the school district. The school district, not the private school, would be responsible for any compensatory education due to the student. Also, should the private school close and the student return home, the resident school district will be responsible for the provision of FAPE.

³³ See 34 C.F.R. § 300.530 (d)(1)(i). For an example of disproportionate discipline of students with disabilities during remote learning, see Cohen, Jodi S. "A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention." *ProPublica Illinois*, 14 July 2020. *ProPublica Illinois (Online)*, <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention> (last visited October 17, 2020);

³⁴ See 34 C.F.R. § 300.34(c)(8).

³⁵ *Dear Colleague Letter*, 64 IDELR 249 (OSEP/OSERS 2014).

Conducting Evaluations

The timeline for conducting an evaluation will vary depending upon the type of evaluation and the surrounding circumstances. If a hearing officer is ordering an evaluation during this COVID-19 crisis, s/he will probably need to consider some additional equitable factors not typically present in determining a deadline by when the evaluation must be conducted, where it is conducted, and if the needed types of assessments can be conducted safely. One recent court denied injunctive relief where the parent withheld consent for months until after school had been closed and whether the assessments could now be performed safely was in dispute.³⁶

In another case, an administrative law judge (ALJ), in considering whether a parent was entitled to an independent evaluation at public expense, found the school district's evaluation to be appropriate. In doing so, the ALJ discounted the testimony of the parent's in-home applied behavior analysis (ABA) specialist and his independent functional behavioral assessment (FBA), for among other reasons, he did not observe the student at school, focused solely on in-home behaviors, and performed his assessment after the student had been distance learning for two-and-a-half months due to school closures.³⁷

Assistive Technology (AT) Devices and Services

As a result of the COVID-19 crisis, school districts rushed to provide millions of devices to students. Issues that were always present to some extent will now be magnified. When the devices are not returned, lost or damaged, and a school district seeks reimbursement and/or refuses to provide another device, parents may claim a denial of FAPE. In addition, many parents may need AT services to be able to assist and support their child learning through virtual instruction.

Also, with instruction now often being provided virtually, new AT devices (or other accommodations) may be required to appropriately address a student's needs. For example, while preferential seating may have met the needs of a student with ADHD who is easily distracted, in instances where the student is remote learning, said accommodation is not possible. The student's inability to focus, nonetheless, is an educational need that may require accommodating in the remote learning environment. Consideration for AT devices to substitute for services that were provided by an adult may be necessary (e.g., use of noise cancelling headphones for the student with ADHD).

³⁶ *Jacksonville North Pulaski Sch. Dist. v. D.M.*, 76 IDELR 238 (E.D. Ark. 2020).

³⁷ *Westminster Sch. Dist.*, 120 LRP 22869 (SEA CA 2020).

Transition Services and Post-Secondary Goals

Students with disabilities with transition goals in their IEPs who are learning remotely will need, to the extent applicable, virtual training activities to engage in, among other things, career exploration, work-based learning experiences, workplace readiness, self-advocacy, resume writing and doing interviews. Providing these experiences remotely may be a challenge for some school districts.

Transportation

Where transportation is provided to a student as a related service, the COVID-19 crisis can present a host of potential issues, including parents transporting their children to and from school for safety reasons (e.g., compromised immune system or not being able to follow safety procedures) and, as a result, seeking reimbursement of expenses. And, where such students are on the school bus or other mode of transportation, questions may arise as to what accommodations/modifications, if any, are required in the student's IEP to transport the student safely (e.g., providing appropriate masks; adult supervision to maintain required social distancing or mask use; supply of hand sanitizers/masks for the adults who provide supervision to the student; appropriate ventilation for students with compromised immune systems; adaptations for students who cannot understand or follow safety procedures).

Keep in mind that shortening the school day for a student with a disability to accommodate bus scheduling or for the convenience of the school district, may be a denial of FAPE.³⁸

Providing School Records

School districts may encounter difficulty in providing the school records parents have requested in accordance with IDEA's timelines during school closures. Determining what remedy, if any, is appropriate under the unusual circumstances may include a consideration of the schools being closed and the good faith efforts of the school district to comply, such as exploring alternative ways for parents to review records by email, a secure online portal, or regular mail.³⁹ Failure to accommodate parents, however, can be a violation of the IDEA.⁴⁰

³⁸ See, e.g., *Bay Village (OH) City Sch. Dist.*, 65 IDELR 275 (OCR 2014).

³⁹ *Perry Township Schools*, 120 LRP 24253 (SEA IN 2020). See also *Questions and Answers on Implementing IDEA Part B Procedural Safeguards During COVID-19*, 76 IDELR 301 (OSEP 2020).

⁴⁰ See, e.g., *Mountain Bd. of Coop. Educ. Serv.*, 120 LRP 29269 (SEA CO 2020) (finding that the school district had violated the IDEA by asking the parent to make an appointment to inspect and review the records in person rather than arranging to email or otherwise provide the parent the records).

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