

The Coalition for Citizens with Disabilities  
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# Advocating for Appropriate Progress: Covid-19 and the Special Education Legal Rights of Children with Disabilities

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# Disclaimer

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This presentation is for informational purposes only. Information shared in this session is not legal advice and does not form the basis of an attorney-client relationship. If you need legal advice, you may wish to engage an attorney who is licensed to practice in your state.

# First Things First

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# Where to find the laws governing special education

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The Individuals with Disabilities Education Act (IDEA) is the federal law guaranteeing children with disabilities the right to a free appropriate public education (FAPE). The federal IDEA regulations can be found here: <https://sites.ed.gov/idea/regs/b>

The Mississippi special education regulations, State Board Policy Chapter 74, Rule 74.19, can be found here: <https://www.sos.ms.gov/adminsearch/ACCode/00000427c.pdf>

# What must a school district provide to a child with a verified disability?

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The school district must provide FAPE. This is the central guarantee of the IDEA.

**Free appropriate public education**, or FAPE, means special education and related services that are provided at public expense, meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP) that meets certain legal requirements. 34 C.F.R. § 300.17; 7-34 Miss. Code R. § 300.17

# Get familiar with definitions.

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**Special education** means “specially designed instruction, at no cost to the parent, to meet the unique needs of a child with a verified disability, including classroom instruction, home instruction, instruction in hospitals and institutions and in other settings and instruction in physical education.” 34 C.F.R. § 300.39(a)(1); 7-34 Miss. Code R. § 300.39

An **Individualized Education Program (IEP)** is “a written statement for each child with a disability that is developed, reviewed, and revised in a meeting...” 34 C.F.R. § 300.320; 7-34 Miss. Code R. § 300.22

# Bookmark the definition for *specially designed instruction*.

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“**Specially designed instruction** means adapting, as appropriate to the needs of an eligible child under this part, **the content, methodology, or delivery of instruction** -

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” 34 C.F.R. § 300.39; 7-34 Miss. Code R. § 300.39(b)(3)

# Tip: Look up the Academic Standards in your State.

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The Mississippi College- and Career- Readiness Standards can be found here: <https://www.mdek12.org/OAE/college-and-career-readiness-standards>

This site includes links to various subject areas for each grade level. You can also find the Alternate Academic Standards on this site.

# What are related services?

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**“Related services** means transportation and such developmental, corrective, and other supportive services as are **required to assist a child with a disability to benefit from special education**, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.” 34 C.F.R. § 300.34; 7-34 Miss. Code R. § 300.34

# FAPE and the Law

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# The *Endrew F.* Case

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In 2017, the United States Supreme Court issued a new ruling about what FAPE entails.

The *Endrew F.* ruling states that “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make **progress appropriate** in light of the child’s circumstances.”

The court also stated that a child’s “educational program must be **appropriately ambitious** in light of his circumstances.”

*Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_, 137 S. Ct. 988 (2017).

# Your child's IEP should be driven by data.

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# What kind of data?

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Your child's IEP should be driven by baseline data relevant to his or her *current* disability-related needs.

For example:

- Does your child have a specific learning disability in the area of reading? The school should be collecting specific data in areas such as decoding, fluency, vocabulary, and comprehension, etc. (as applicable).
- Does your child have autism? The school should be collecting data in areas such as behaviors and social communication, etc. (as applicable).
- Does your child have attention deficit disorder (and an IEP via the verification category of Other Health Impairment)? The school should be collecting data in areas such as executive functioning skills, ability to complete assignments, etc. (as applicable).

# What are some common sources of data?

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- MDT evaluation report(s)
- Report cards
- State and district test scores
- IEP progress reports
- Daily behavioral charts
- Documentation, diagnoses, etc. from your child's medical and/or therapy providers

# Additional Data

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Bring additional useful paperwork to your child's IEP meetings:

- Is your child experiencing difficulties in math that you believe show the need for additional support?
- Bring in actual work samples: tests, worksheets, etc.
- Are you getting reports of challenging behavior from your child's teachers?
  - Print out and bring in emails from the teachers.
- Are you concerned about your child's reading level?
  - Ahead of your child's next IEP meeting, ask your child's case manager for *all* reading assessments that have been completed for your child.

# Covid-19 and IEP data

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Has the pandemic made relevant data about your child's learning more accessible to you?

The Covid-19 pandemic gave many parents a front-row seat to their children's learning process. Consider how to *document* any difficulties that arose—**whether in the form of loss of skills or in the inability to make appropriate progress.**

# Gather documentation based on your observations.

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- Are there behavioral issues that **arose** during school closure/remote learning? Are there behavioral issues that **worsened** during remote learning?
- Many parents were able to observe their children during remote classes. You may have some documentation of issues, such as emails with teachers, or your own observation of assignments that your child could not complete.
- Pull whatever documentation you have from the remote learning period, and/or make notes about your observations.

# Consider... Which part of your child's IEP do you spend the most time focusing on?

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# Key: What are your child's Present Levels of Academic and Functional Performance?

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Review your child's most recent IEP. Take a look specifically at the

- **Present Levels of Academic and Functional Performance, and**
- **Goals**

**Where is your child, right now, in comparison to the Present Levels in his or her most recent IEP? Consider what paperwork you can share with the IEP team that will demonstrate the impact of Covid on your child's learning.**

# Present Levels

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For example,

- Can your child do some of the things that are listed in his or her academic goals? (For example, can he or she complete certain types of math problems? Or type a certain number of words per minute? Or read a book at a certain level?)
- Gather records that show how your child is doing currently (or at the end of this past school year). For example, look for sample math worksheets that your child has done during remote learning, or use your phone to take a video of your child reading or engaging in other learning activities.

# Consider Covid-specific data that you can bring to the IEP table.

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For example, has your child had difficulties wearing a mask?

Is this due to sensory issues? Are there problems with frustration due to being told to put the mask back on repeatedly?

Document this information as data for the school team. (Make notes about what you're experiencing at home or in the community.)

Brainstorm with the team to come up with positive behavioral supports for your child. What **incentives** and **positive reinforcements** will your child need to be able to adhere to in-school Covid safety measures so that he or she can access the curriculum, make appropriate progress toward his or her IEP goals, and *stay safe* during the pandemic? **Ask for those positive supports to be put in the IEP.**

Urge your child's IEP team to be proactive, based on data and documentation that you've shared with them.

# Remember: The IDEA addresses both academic and behavioral concerns.

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# Consider behavioral concerns and goals.

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Bringing data to the IEP team will help inform them of your child's *current needs* (beyond what his or her needs may have been pre-pandemic).

Work with your child's team to put positive behavioral supports and interventions in place now in order to

- help your child access the curriculum and
- reduce the possibility of challenging behaviors that may result in exclusionary school discipline.

# What does the IDEA say about positive behavioral supports?

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“A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of **appropriate positive behavioral interventions and supports**, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel....”

20 U.S.C. 1414(d)(3)(c); 7-34 Miss. Code R. § 300.324(a)(3)(i)

# What does the IDEA say about positive behavioral supports?

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“The IEP Team shall—(i)in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of **positive behavioral interventions and supports**, and other strategies, to address that behavior.”

14 U.S.C. 1414(d)(3)(B)(i); 7-34 Miss. Code R. § 300.

# Behavioral Intervention Plans (BIPs)

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A school must create a BIP in certain situations involving conduct violations, but if your child is experiencing behavioral challenges, you can and should talk to your child's team about conducting a functional behavioral assessment (FBA) and putting a BIP in place *before* any conduct violations have occurred.

What problematic behaviors are you seeing? Can you and/or the IEP team collect data about *why* and *when* the behavior is occurring? Ask for the team's help in creating a BIP that can help reduce negative behaviors and replace them with appropriate behaviors.

Bring your data to the table (whether you're meeting in-person or via Zoom)—especially any data that you've taken with the help of the team—to help craft an appropriate BIP.

If you request an FBA and BIP and the team declines, be sure to document this; ask for prior written notice.

# What is a Manifestation Determination Review?

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Congress wanted to be sure that children are not punished for their disabilities.

Before a school changes your child's placement due to violations of the school code of conduct—in other words, before a child is suspended for more than ten days in one school year, either in a row or in a pattern of removals—the IEP team must determine if your child's behavior was caused by or substantially related to his or her disability.

If the behavior was caused by or substantially related to his or her disability (or caused by the school's failure to implement the IEP), **the school *must* conduct a functional behavioral assessment (FBA) and create a behavioral intervention plan (BPA).**

Also, if the behavior was a manifestation of the child's disability (or due to the school's failure to implement the IEP), the school must return the child to the placement from which he or she was removed. Exceptions apply for serious violations.

34 C.F.R. 300.530; 7-34 Miss. Code R. § 300.530(e)

# Mississippi's behavior plan rules

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“Research indicates that the most effective response to school violence is to establish a school culture that emphasizes prevention, early identification, teaching, reinforcement of appropriate behavior and continuous data-based problem solving. One primary method is to structure the environment using a non-aversive effective behavioral system, such as Positive Behavior Interventions and Supports (PBIS). Effective positive behavioral systems are comprehensive, in that they are comprised of a framework or approach for assisting school personnel in adopting and organizing evidence-based behavioral interventions into an integrated continuum that enhances academic and social behavioral outcomes for all students.”

Mississippi Rule 38.13, Restraint and Seclusion,  
<https://www.sos.ms.gov/adminsearch/ACCode/00000382c.pdf>

See also MS Code 37-11-18.1, “Expulsion of habitually disruptive students aged 13 or older upon third occurrence of disruptive behavior within school year.”

# What is compensatory education?

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# What happens when a child does not receive a FAPE?

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Courts have devised the remedy of **compensatory education**. This remedy may be appropriate when a child has experienced an educational loss due to not receiving a FAPE. This educational loss can take the form of regression (loss of skills) or the failure to make **appropriate progress**.

The key is to consider what would constitute **appropriate progress** for a particular child. Look to the goals in your child's IEP. (Note, however, that the same goals repeated from year to year could also be a sign that your child has not received FAPE.)

# Covid and compensatory education

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The remedy of compensatory education is often associated with a school's failure to provide FAPE. However, the Covid pandemic has caused a loss of FAPE for some children with disabilities. Therefore, it is not a requirement that a parent can show that the school is "at fault" for a child's regression or inability to make progress.

# Examples of compensatory education

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- Additional or more intensive supports and services during the school day to help your child regain skills and/or make appropriate progress;
- Additional services after school; or
- Additional services during a period of Extended School Year (ESY)



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# Questions?