

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

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Know the Basics

- **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
- **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
- “**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)
- In 2017, the United States Supreme Court concluded 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).

The Importance of Data in IEP Advocacy

- Traditional sources of data include the following:
 - MDT evaluation report(s)
 - Report cards
 - State and district test scores
 - IEP progress reports
 - Documentation, diagnoses, etc. from medical and/or therapy providers

- Additional useful documentation includes the following:
 - Work samples such as tests, worksheets, handwriting samples, etc.
 - Daily behavior charts and emails from teachers
 - Reading assessments, etc.
- Covid-related data may include the following:
 - Documentation of behavioral issues that arose or worsened during remote learning/school closures
 - Assignments that your child was unable to complete
 - Notes about your own observations during remote learning
 - Documentation that you have created during remote learning, such as videos of your child reading, etc.
 - **Any other documentation that shows that your child experienced a loss of skills or the inability to make appropriate progress**

IEP Collaboration

- Use the documentation and data you collect to inform the IEP team of your child's *current needs*, beyond what his or her needs may have been pre-pandemic.
- Brainstorm with the team to come up with positive behavioral supports for your child. Consider what **incentives** and **positive reinforcements** your child will 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.
- Urge your child's IEP team to be proactive, based on data and documentation that you have shared with them. Remind the team that your child has specific **disability-related needs** that require specific IEP supports.
- A school must create a behavioral intervention plan (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.

Compensatory Education

- Compensatory education may be an appropriate remedy 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**.

- Many children with disabilities may have experienced educational loss due to the Covid pandemic and remote learning, school closures, frequent quarantines, etc. It is not necessary to show that the school district is “at fault” as you advocate for compensatory services in the wake of the pandemic.
- Compensatory education may include the following:
 - 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;
 - Additional services during a period of Extended School Year (ESY)

Covid-Era Special Education Legal Decisions

The special education legal rights of children with disabilities and their parents have remained in place throughout the Covid-19 pandemic. State complaint decisions and administrative due process decisions have made clear that students with IEPs are entitled to compensatory education services when they have experienced educational loss due to the pandemic. Note, however, that state complaint decisions and administrative due process decisions are not binding legal precedent like federal and state court decisions are—but they do provide a sense of the evolving legal situation in the wake of the pandemic.

Below are brief summaries of a few relevant Covid-era decisions.

- California administrative due process decision issued April 22, 2021 in California: The family prevailed with their FAPE denial claims, and the hearing officer awarded 428 hours of compensatory education. The dispute arose from the 2019-2020 and 2020-2021 school years, as well as the extended school year period in the summer of 2020. The hearing officer found that the school district predetermined the child’s services, failed to implement the child’s IEP via distance learning, and did not provide the full service minutes in the child’s IEP. The district also failed to evaluate the child in all areas of suspected disability, and the district was ordered to fund an independent educational evaluation (IEE).

Student v. Orcutt Union School District, California OAH Case No. 2020100618

- Pennsylvania administrative due process decision issued March 14, 2021: The school closure in the spring of 2020 led to the district delaying the child’s reevaluation. The child’s subsequent IEP was therefore not adequate given the child’s then-current needs, and the parents placed the child in a private school. The hearing officer found that the child was not provided FAPE and awarded partial tuition reimbursement to the child’s parents.

Student v. Downingtown Area School District, Pennsylvania ODR File Number 23835-1920KE

- Indiana state complaint decision issued November 10, 2020:

A child's IEP for the fall of 2020 required remote speech and language services (in addition to two hours per day of in-person instruction). Because the child was hospitalized frequently and had numerous medical appointments—and because the child was unable, due to his disability, to log on to the computer for the remote sessions by himself when his parent was at work—the family was not able to attend the remote sessions on a fixed weekly schedule.

The parent requested make-up sessions, and the district argued that a set weekly schedule was necessary for school staffing purposes, and that a therapist had been logged on for scheduled times and that the student had failed to attend.

The state education agency reached a conclusion favorable to the family, ordering that a "therapy schedule must be collaboratively developed that meets the unique needs of the Student and gives the School the ability to provide a consistent SLP [speech language pathologist] to the Student." The state ordered the district to provide compensatory services that would make up the full minutes of missed speech therapy services.

Perry Township Schools, Indiana CP-029-2021

- South Dakota state complaint decision issued August 7, 2020:

A parent of a child with a disability filed a state complaint alleging, among several other issues, that the school district had unilaterally changed her child's placement when its school closed in March 2020 following a state closure order due to the Covid-19 pandemic. The parent argued that the lack of in-person services offered during the spring and the extended school year period during the summer violated the IDEA. (The district provided services remotely during those times.)

The state educational agency concluded that the district's provision of only remote services during the school closure period did not constitute a unilateral change of placement.

During the course of the complaint investigation, the district argued that the student made progress toward his IEP goals during the remote learning period and that his IEP was therefore appropriately implemented. The parent said that she had helped her child with his distance learning assignments and that he would not have made progress without her assistance. However, the state explained that there was no evidence to support the parent's assertions.

Brookings Sch. Dist., South Dakota Case 2020-06

Disclaimer: This outline is for informational purposes only. This information does not constitute 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.