



## **Coining Terms like “COVID Slide” Does Not Change FAPE**

Over the last few months, to explain or predict the effect of COVID 19 on public education, educators and analysts have introduced new phrases, concepts, and applications of old terms in new ways. Educational professionals are trying to decipher the differences between cyber-schooling, remote instruction, and distance learning. Our emails and news alerts warn of ‘broadband inequality’, ‘opportunity gaps’, and permanent earning losses for high school graduates. I recommend that you do not get caught in the hype of new terms. Rather, my advice is to “get back to the basics” and simply ask, “What does the law say?”

The term ‘COVID slide’ was created to identify and track the learning loss for all students related to the COVID-19 national school closures. The term is comparable to the concept of ‘summer slide’ which refers to the amount of regression students experience during summer school closures. Coining the term ‘COVID slide’ allows analysts to track any differences in student performance and regressions caused by COVID-19 closures for all students. The term ‘COVID slide’, in and of itself is unrelated to special education.

Since the term ‘COVID slide’ is about regression, we can “get back to the basics” by considering regression as it pertains to special education. Let’s start with anti-discrimination under Section 504. In layman’s terms, the goal for Section 504 is to level the playing field and prevent discrimination based on a student’s disability. If we know that typically developing children are experiencing learning loss and regression due to COVID 19, then we would expect our special education students to also experience learning loss or regression. It is anticipated that both general education and special education students will experience an educational loss or regression due to COVID 19 school closures. A cursory analysis would suggest that if all students are subject to an

educational loss and regression, the playing field is leveled, and the loss suffered by special education students is not discrimination.

While the thought process behind a cursory analysis appears to be fair, the outcome of such an analysis is still likely to yield a finding of discrimination because special education students may experience greater educational loss and regression than their typically developing peers. Therefore, I recommend that your ARD committees make an individual determination regarding the effect, if any, that the school closure had on each special education student during their ARD committee and Section 504 meetings. Educators should be documenting the student's performance during the distance learning and when school resumes so that the ARD committee can determine if there are any differences in the amount of regression the student experienced compared to years past. If we have documented that the degree/amount of regression for a specific special education student is higher than the regression/educational loss for their typically developing peers and is higher than the student experienced during prior year(s), it is reasonable that an ARD committee could find that the school closure interfered with the student's ability to access their education at a higher rate than their typically developing peers, thus causing a discriminatory effect on the student.

For the IDEA, the question will be whether the student received a FAPE during the school closure through the distance learning modality. ARD committees should consider whether: 1) the student experienced an educational loss based on a failure to implement the IEP as written or otherwise provide FAPE; and, if so 2) what type and how much compensatory education is necessary to remedy that loss?

We will focus on the standard for compensatory education which is a form of equitable reimbursement when a school district fails to provide a FAPE, such as failing to offer the services offered in the IEP. The amount of reimbursement or compensatory education depends on the student but, the standard would be that the amount of compensatory education is determined by the amount necessary to place the student in the position that the student would be in had the school district provided the appropriate placement and services.

The U.S. Department of Education has opined that schools should consider whether compensatory education is necessary on a case-by-case basis once schools reopen. They specifically warn against offering compensatory education prior to school resuming because it may be based on inaccurate presumptions rather than on documentation of actual learning loss.

This is not the time to split hairs when we talk about educational regression or failure to provide FAPE. Some folks are asking questions about whether the regression was related to the student's disability or other circumstances such as a parent's decision not to allow their student to participate in distance learning. While those are good questions, for our purposes, they are irrelevant. The fact of the matter is, if the student had been physically in school, he/she would have received a specific program and services offered in the IEP. If we did not provide the offered program through the distance learning model and the student suffered a learning loss due to our inability or failure to implement the program, the student is entitled to compensatory education.

During our *Geneva's Guidance Webinar* a few weeks ago, I shared with you my prediction that the U.S. Department of Education would decline to waive the requirements of the IDEA and

Section 504 as it pertains to serving special education students. In the April 27, 2020 *Report to Congress of U.S. Secretary of Education Betsy DeVos*, the Secretary declined to make special education waivers due to COVID-19. The IDEA, originally enacted by Congress in 1975, and Section 504, which hails from the Rehabilitation Act of 1973, are well established federal laws that school districts will still need to follow.

We are in the midst of a media frenzy with new terms, fear-based ideologies, and an upsurge in folks capitalizing on the uncertainty in public education during the pandemic. Whether you call it COVID slide, regression, or the next new term, I encourage you to ask questions, focus on educating our students, and just “get back to the basics” of the IDEA and Section 504.