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Special Education During Covid-19: Stretched Thin and Left Behind

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Biography

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Special Education During Covid-19: Stretched Thin and Left Behind

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Abstract

The Covid-19 pandemic has brought about public health harms that were barely imaginable just 16 months ago. In the face of over 600,000 deaths in the United States from Covid-19, no one would suggest opening schools incautiously. In many ways, Covid-19 has created a set of public crises that are utterly unlike any that have been faced before so it is perhaps unsurprising that school districts and teachers are floundering in the face of the unknown. Yet the problems for special education students wrought by Covid-19 are only too familiar: vital resources are denied to children with disabilities during public health emergencies and the needs of the general population are prioritized over the needs of children with disabilities. The Covid-19 pandemic has brought into relief social problems that have been long in the making and are long overdue for rectification. This paper explores the tension between keeping children safe from Covid-19 and providing the special educational supports children with impairments desperately need.

Keywords

Special Education Rights, Covid-19, FAPE Standards, IEP Standards, Distance Learning

Today, education is perhaps the most important function of state and local governments... [I]t is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

—*Brown v. Board of Education*, 347 U.S. 483, 491 (1954).

Shelter-in-place orders have resulted in most K-12 public schools closing and instruction delivered remotely.¹ Almost immediately after announcements for school closures were made, questions as to the feasibility of fulfilling FAPE requirements for

1. *Map: Where are Schools Closed?*, Educ. Wk. (Nov. 30, 2020), <https://www.edweek.org/ew/section/multimedia/map-covid-19-schools-open-closed.html>.

students with disabilities were raised by parents, teachers and school administrators. Not only do many special education services not translate to online instruction, but many teachers claimed they were unable to create an academic curriculum for an online delivery while meeting the requirements of IEPs.² The claim was that Covid-19 has imposed restrictions on educational curriculum no one anticipated when they designed IEPs.³ The question was raised as to whether or not the IEPs ought to be altered or even perhaps set aside entirely as long as schools were run remotely because of Covid-19.⁴

Receiving a public education means more than learning facts and earning a diploma. According to the American Academy of Pediatrics (AAP), a public education provides opportunities for social and emotional skill development, reliable nutrition, physical and speech and mental health therapy and opportunities for physical activities.⁵ Additionally, schools play a crucial role in addressing and mitigating racial and social inequities.⁶ The AAP warns that if families do not have full access to all the educational supports schools provide because of the school closings prompted by Covid-19, disparities will likely worsen.⁷ For a variety of reasons, virtual learning models are least suited to the needs of students most in need of educational supports.⁸

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2. Carolyn Jones, *Despite Assurances of flexibility, educators fear liability in online instruction of special edu students*, EdSOURCE (Mar. 24, 2020), <https://edsource.org/2020/despite-assurances-of-flexibility-educators-fear-liability-in-online-instruction-of-special-ed-students/626898>.
 3. Alina Tugend, *Teachers of Special-Needs Students Struggle With Feelings of Helplessness*, N.Y. TIMES (April 23, 2020), <https://www.nytimes.com/2020/04/23/education/learning/coronavirus-teachers-special-needs-students.html>.
 4. Carolyn Jones, *Disability Rights Groups, School Administrators Spar Over Possible Changes to Special Education Laws*, EdSOURCE (Apr. 7, 2020), <https://edsource.org/2020/disability-rights-groups-school-administrators-spar-over-possible-changes-to-special-education-laws/628376>.
 5. *Covid-19 Planning Considerations: Guidance for School Reentry*, AM. ACAD. OF PEDIATRICS para. 3 (Aug. 19, 2020), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>. (Schools provide “a safe, stimulating space for children to learn; opportunities for socialization; and access to school-based mental, physical, and nutritional health services.”)
 6. *Id.*
 7. *Id.*
 8. One in five high school students are unable to complete online homework because they lack access to a computer or internet service. See Brooke Auxier & Monica Anderson, *As schools close due to*

Children with disabilities are being hit particularly hard by the school closings.⁹ The longer schools remained closed the worse the educational disparities will become.¹⁰

The Covid-19 pandemic has brought about public health harms that were barely imaginable just 16 months ago. In the face of more than 600,000 deaths in the United States from Covid-19, no one would suggest opening schools incautiously. In many ways, Covid-19 has created a set of public crises that are utterly unlike any that have been faced before so it is perhaps unsurprising that school districts and teachers are floundering in the face of the unknown. Yet the problems for special education students wrought by Covid-19 are only too familiar: vital resources are denied to children with disabilities during public health emergencies and the needs of the general population are prioritized over the needs of children with disabilities. The Covid-19 pandemic has brought into relief social problems that have been long in the making and are long overdue for rectification. This paper explores the tension between keeping children safe from Covid-19 and providing the special educational supports children with impairments desperately need.

I: Special Education Rights and State Police Power

1. FAPE standards

The Individuals With Disabilities Act, 20 U.S.C. § 1400 (IDEA) provides funding to each state “to assist [it] to provide special education and related services to children with disabilities,”¹¹ provided that a “free and appropriate public education (FAPE) is available to all children with disabilities residing the state.”¹² The FAPE must be “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”¹³ IDEA did not explicitly address the standards by which a student’s FAPE would be measured.

the coronavirus, some U.S. students face a digital ‘homework gap’, PEW RSCH. CTR. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/>.

9. *Id.*

10. *Id.*

11. 20 U.S.C. § 1411(a)(1).

12. *Id.* § 1412(a)(1)(A).

13. *Id.* § 1401(29).

The Supreme Court directly addressed the issue of FAPE standards in *Rowley*.¹⁴ The majority opinion, written by Chief Justice Rehnquist, stated that Congress defined the term “free and appropriate public education” as “special education and related services...provided in conformity with the individualized education program required under section 1414(a)(5).”¹⁵ The Court defined “special education” as “specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.”¹⁶ The Court defined “related services” as “other supportive services...as may be required to assist a handicapped child to benefit from special education.”¹⁷ Although the Court described IDEA’s language as “cryptic” the Court was nonetheless confident that Congress’s intent was not to “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”¹⁸

Elaborating, the Court stated that to require that states provide equal educational opportunities for non-handicapped and handicapped students alike would

seem to present an entirely unworkable standard requiring impossible measurements and comparison. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of “free and appropriate public education”; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child’s potential is, we think, further than Congress intended to go. Thus to speak in terms of “equal” services in one instance gives less than what is required by the Act and in another instance more.¹⁹

Here the Court equates “equal” with “identical.” After pointing out the absurdity of providing the same education to nonhandicapped students, such as teaching Braille to children who are not visually impaired, the Court concludes that it would be likewise

14. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

15. *Id.* at 188.

16. *Id.*

17. *Id.*

18. *Id.* at 189-190.

19. *Id.* at 199.

absurd to provide the same education to handicapped children that is provided to nonhandicapped children.

Rather than provide an *equal* education, the Court claimed that the Individual Educational Plan (IEP) developed for each child must be “reasonably calculated to enable the child to receive educational *benefits*.”²⁰ According to *Rowley*, the IDEA guarantees a “basic floor of opportunity.”²¹ This “basic floor” is merely intended to be “reasonably calculated to engage the child to achieve passing marks and advance from grade to grade.”²² So long as the child is moving from grade to grade, FAPE requirements are met even if the child is dramatically underperforming relative to her potential.²³

In his concurring judgement Justice Blackmun stated that the majority misdescribed Congress’s intent when enacting FAPE.²⁴ Blackmun claimed that Congress did not create “essentially meaningless language about what the [handicapped] deserve at the hands of state...authorities.”²⁵ According to Blackmun the “clarity of the legislative intent” reveals that the question is not, as the majority stated, whether or not an IEP is “reasonably calculated to enable [the student] to receive education benefits.”²⁶ Instead the question is whether the program offers the student an “opportunity to understand and participate in the classroom that [is] *substantially equal* to that given her nonhandicapped classmates. This is a standard predicated on equal education opportunity and equal access to the education process, rather than upon [the student’s] achievement of any particular educational outcome.”²⁷ Rejecting the majority’s notion of “equal education as identical education,” Blackmun is instead conceptualizing as equal education as one that is assessed in terms of *access* to education.

20. *Id.* at 198.

21. *Id.* at 201.

22. *Id.* at 204.

23. *Id.* at 203.

24. *Id.* at 210 (Blackmun, J., concurring).

25. *Id.* (quoting *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 32 (Blackmun, J., concurring)).

26. *Id.*

27. *Id.* at 211.

The plaintiff in *Rowley*, Amy Rowley, is Deaf.²⁸ She was an excellent lip reader but her parents, also Deaf, requested that her school provide a qualified sign-language interpreter for Amy in all her academic classes.²⁹ The majority in *Rowley* argued that because Amy was able to understand about half of what her teacher said without a translator, Amy benefitted from the services she was provided and so the requirements of her IEP had been met.³⁰ Interpreting IDEA to require Amy's school to provide her with a translator would go beyond what IDEA intended.

Rehnquist's "educational benefits model" set a low bar for FAPE. To borrow language from disability studies scholarship, Rehnquist's benefits standard for special education is founded on a medical model of disability. Tom Shakespeare explains the two models:

Medical model thinking is enshrined in the liberal term "people with disabilities," and in approaches that seek to count the numbers of people with impairment, or to reduce the complex problems of disabled people to issues of medical prevention, cure or rehabilitation. Social model thinking mandates barrier removal, anti-discrimination legislation, independent living and other responses to social oppression.³¹

On a medical model, the benefits an impaired individual is provided are designed so that the impairments are minimized or even eliminated and the child effectively becomes, in so far as is possible, normal. It is significant that Rehnquist assumed that a hearing aid, which is a device often preferred by individuals who are not part of the Deaf community, was sufficient for Amy because hearing aids are medical devices designed to normalize hearing impaired individuals.³² Moreover, designing an IEP on

28. *Id.* at 183 (majority opinion).

29. *Id.*

30. *Id.* at 210-211 (Blackmun, J., concurring) ("Evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade.").

31. Tom Shakespeare, *The Social Model of Disability*, in *THE DISABILITY STUDIES READER* 216 (Lennard J. Davis ed., 4th ed. 2013).

32. See H-Dirksen L. Bauman and Joseph J. Murry, *Deaf Studies in the 21st Century: "Deaf-Gains" and the Future of Human Diversity*, in *THE DISABILITY STUDIES READER* 216 (Lennard J. Davis ed., 4th ed. 2013); JOSEPH N. STRAUS, *Prodigious Hearing, Normal Hearing and Disablist Hearing*, in *EXTRAORDINARY*

the requirement that Deaf individuals wear hearing aids does not require the school to alter the delivery of the curriculum to adapt to the needs of children with impairments. Instead, the parameters of the classroom remain unchanged and the impaired child is expected to adjust themselves to the normalized standards.³³ In contrast to the medical model, the social model of disability requires that we look beyond the impairments of the students and instead cast a critical eye on the way classroom structures, curriculum design, even pedagogical approaches create barriers that prevent impaired students from realizing their full potential.³⁴

In his dissent in *Rowley*, Justice White writes that “the majority opinion contradicts itself, the language of the statute, and the legislative history.”³⁵ White states that the Congressional intent for FAPE is clear: an IEP must intend to “*eliminate the effects of the handicap*,” at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible.³⁶ According to White, a student’s special education must provide an equal educational opportunity such that it is as if the child were not handicapped at all.

White’s “eliminate effects” standard sets a higher standard than either Rehnquist’s benefits standard or Blackmun’s equal access standard, seemingly requiring that an IEP be designed so that each child can flourish as fully as she could had she no handicap

MEASURES: DISABILITY IN MUSIC (2011).

33. Blackmun’s “equal access” standard is also founded on a medicalized model of disability but sets a higher bar than does Rehnquist’s benefits standard for special education. On this model, special educational services should be designed such that the student has access to the educational opportunities afforded to her classmates. If, every time her teacher turns to face the chalkboard Amy can no longer lip-read what her teacher is saying, then Amy, but none of her classmates, is missing out on access to the educational opportunities the teacher is providing. It would seem to follow then that IDEA gives Amy a right to a translator. Yet Blackmun joined with the majority in concluding that IDEA did not give Amy a right to a translator. It seems that Blackmun, though setting the bar higher than Rehnquist, did not believe that the IDEA bar should be set so high that Amy has a right to *full* access as she’d enjoy if she had a translator. Perhaps the logic is that, because Amy is attaining modest success rather than only minimal success, she does not have a right to more.
34. Shakespeare is ambivalent about using the social model to analyze disability because it is “too blunt an instrument” that cannot completely explain the “complex interplay of the individual and environmental factors in the lives of disabled people” yet he does claim that “a social approach to disability is indispensable.” It certainly provides a valuable perspective from which to assess the shortcomings of FAPE standards. SHAKESPEARE, *supra* note 31, at 220.
35. *Rowley* 458 U.S. at 210-211.
36. *Id.* at 212 (emphasis added).

at all. And, unlike either Rehnquist's or Blackmun's standard, White's standard sounds very much like the social model of disability defined by Shakespeare above, which "mandates barrier removal." White's standard would seem to require that every child's IEP be designed, in so far as it is possible, to ensure that the handicapping educational structures are eliminated.

Disability studies scholars emphasize that radically restructuring public institutions, including public education, to eliminate the effects of handicaps not only benefits those with impairments, but benefits those without diagnosed impairments.³⁷ A diversified educational curriculum is more intellectually stimulating for all students and, as with any diverse experiences, it enriches a student's awareness of and appreciation for individuals with impairments.³⁸ In establishing the benefits model for FAPE requirements, the Court not only chose the lowest bar for FAPE standards but also reinforced the expectation that children with impairments bear the burden of conforming to institutional standards designed for non-impaired students.

Thirty five years later the Court revisited its *Rowley* decision in *Endrew*.³⁹ In *Endrew* the Court clarified the *Rowley* meant by "some educational benefit."⁴⁰ The Court stated that FAPE demands more than more than "merely *de minimis*".⁴¹ Quoting *Rowley*, the Court stated that "an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly...awaiting the time when they were old enough to 'drop out.'"⁴² The Court then stated, "The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light

37. DONNA RASHKE & JODI BRONSON, CREATIVE EDUCATORS AT WORK: ALL CHILDREN INCLUDING THOSE WITH DISABILITIES CAN PLAY TRADITIONAL CLASSROOM GAMES (1999), <http://www.uni.edu/coe/inclusion/philosophy/benefits.html>.

38. *Id.* (Having handicapped and non-handicapped students together in a classroom provides to non-handicapped students such benefits as "opportunities to experience diversity of society on a small scale in a classroom," the chance to develop "an appreciation that everyone has unique characteristics and abilities," develop "respect for others with diverse characteristics and sensitivity toward others' limitations" as well as develop "empathetic skills" to name a few.)

39. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017).

40. *Id.* at 997.

41. *Id.*

42. *Id.* at 1001.

of the child's circumstances."⁴³ The Court chose to not elaborate on what it means by "appropriate progress," other than to say that merely progressing through the grades was not what it meant.⁴⁴ Nor did the Court explain what it meant by the "child's circumstances" other than to mention that "for most children a FAPE will involve integration in the regular classroom."⁴⁵ Rather than address these matters directly the Court chose to defer to the "expertise and the exercise of judgment by school authorities."⁴⁶ Whatever the Court's intent, *Endrew* did not clarify the FAPE standards.

After *Endrew*, the Department of Education (DOE) published *Questions and Answers (Q&A) on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*.⁴⁷ The Q&A answered frequent questions from teachers, school officials and parents so they could apply *Endrew's* "appropriate progress" standards. However instead of clarifying the *Endrew* standard the DOE rephrased the language used by the *Endrew* opinion such as when it explained "appropriate progress" by stating that every child "should have the chance to meet challenging objectives."⁴⁸ To clarify the phrase "challenging objective" the DOE stated that each child's IEP "must be designed to enable the child to be involved in, and make progress in, the general education curriculum."⁴⁹ The DOE's analysis of *Endrew* provided little concrete guidance for teachers or parents. However, given that the Court in *Endrew* stressed that the decision was not a rejection of *Rowley* but a clarification, it seems likely that *Endrew*, too, assumes a medical model of special education. The DOE claim a "general education curriculum" is "the same curriculum as for nondisabled children" lends support to that supposition. That means that, as with *Rowley*, children with impairments are expected to conform to a general curriculum and mode of delivery that was established without their needs in mind.

43. *Id.*

44. *Id.* at 999. ("The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement").

45. *Id.* at 1000.

46. *Id.* at 1001.

47. *Questions and Answers (Q&A) on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*, DEP'T OF EDUC. (Dec. 7, 2017), <https://sites.ed.gov/idea/endrew-qa>.

48. *Endrew*, 137 S.Ct. at 1000.

49. DEP'T OF EDUC, *supra* note 47, at 7.

2. School Districts Close During Covid-19

In response to the escalating infection rates of Covid-19 many schools in the country closed in March and April 2020.⁵⁰ Some districts announced they would remain closed at least through the end of that school year with the hope of reopening at the start of the following school year.⁵¹ A number of schools announced their intention to remain closed until Covid was safely under control even if that meant schools were closed for a year or longer.⁵²

Although the logic of closing schools to slow the infection rate of Covid was not in dispute, the question of who had the authority to close schools and the exact nature of that authority was not obvious. James G. Hodge Jr. claimed that, while most states have “multiple legal avenues for ordering the closure of schools, either through state or local education and public health authorities, ... depending on whether a state of emergency had been declared,” nonetheless the issue of specific legal authority at the state level authorizes school closings is “ambiguous.”⁵³ In February 2020 the National School Boards Association (NSBA) created a legal guide for school communities to help them plan appropriate responses in the face of Covid.⁵⁴ The Centers for Disease Control and Prevention (CDC) issued “considerations” for school administrators to help them decide whether or not to close schools.⁵⁵ They were “intended to aid school administrators as they consider how to protect the health, safety, and wellbeing of

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50. Ashley Capoot & Christopher Chiciello, *When Will States Open? Here is a State-by-State List*, TODAY <https://www.today.com/parents/when-will-school-open-here-s-state-state-list-t179718> (Aug. 10, 2020 8:55 AM).
 51. *Id.* School district plans varied widely even within states and many schools announced plans to open only to change those plans a few days later
 52. *The Coronavirus Spring: The Historic Closing of U.S. Schools*, EDUC. WK. (July 1, 2020), <https://www.edweek.org/ew/section/multimedia/the-coronavirus-spring-the-historic-closing-of.html>.
 53. *Coronavirus and School Closings: What Are the Legal, Logistical Issues?*, EDUC. WK. (Nov. 6, 2020), <https://www.edweek.org/leadership/coronavirus-and-school-closures-what-are-the-legal-logistical-issues/2020/02>.
 54. NAT'L SCH. BDS. ASS'N, COVID-19: PREPARING FOR WIDESPREAD ILLNESS IN YOUR SCHOOL COMMUNITY (2020).
 55. *Operating Schools During Covid-19: CDC's Considerations*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> (Oct. 29, 2020).

students, teachers, staff, their families, and communities.”⁵⁶ Specifically, the CDC advised school administrators to make decisions that “promot[e] behaviors that reduce COVID-19’s spread.” However, the CDC stressed that “these considerations are meant to supplement—not replace—any Federal, state, local, territorial, or tribal health and safety laws, rules, and regulations with which schools must comply (e.g., IDEA).”⁵⁷

By March 25, 2020 all public school buildings had closed.⁵⁸ By May 6 2020 forty-eight states had ordered school closures for the rest of the academic year.⁵⁹ The start of the 2020-2021 academic year was fraught with uncertainty as Covid infection curve had not been “flattened” sufficiently and schools wrestled with the decision of whether to open and restore “normalcy” or to remain closed in order to minimize the spread of Covid and to protect the health of the students, teachers and staff.⁶⁰ As of November 3, 2020, Washington D.C. with 85,850 students (0.17% of students nationwide) had a district-ordered school closure.⁶¹ Eight states (Calif., Del., Hawaii, N.C., N.M., N.Y., Ore., W.V.) with 12,095,855 students (23.91% of students nationwide) had state-ordered regional school closures, required closures for certain grade levels, or allowed hybrid instruction only.⁶² Only four states (Ark., Fla., Iowa, Texas) with 9,180,918 students (18.15% of students nationwide) had state-ordered in-person instruction.⁶³ The remaining thirty-eight states with 29,225,236 students (57.77% of students nationwide) had reopening dates that varied by school or district.⁶⁴ Whether or not the school closings were legally authorized seemed largely beside the point given that the vast majority of schools were providing remote learning to tens of millions of students.

56. *Id.*

57. *Id.*

58. *Educ. Wk.*, *supra* note 52.

59. *Map: Coronavirus and School Closures in 2019-2020*, *Educ. Wk.* <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> (Sept. 16, 2020). Only Wyoming and Montana did not close their schools for the rest of the 2019-2020 academic year.

60. *Id.*

61. *Id.*

62. *School Reopenings in the 2020-2021 Academic Year After the Coronavirus (Covid-19) pandemic*, *BALLOTPEDIA* (Nov. 3, 2020). [https://ballotpedia.org/School_reopenings_in_the_2020-2021_academic_year_after_the_coronavirus_\(COVID-19\)_pandemic](https://ballotpedia.org/School_reopenings_in_the_2020-2021_academic_year_after_the_coronavirus_(COVID-19)_pandemic)

63. *Id.*

64. *Id.*

II: March 2020: USDOE Guidelines

In March 2020 the US Department of Education (USDOE) provided informal guidance arising from its interpretation of federal special education law in light of the ongoing Covid-19 pandemic.⁶⁵ The USDOE stated:

If a [local education agency, typically a school district (LEA)] continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§104.4, 104.33 (Section 504) and 28 CFE § 35.130 (Title II of the ADA)). [State Educational Agencies (SEAs)], LEAs, and schools must ensure that, *to the greatest extent possible*, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504.⁶⁶

If schools were closed and were providing no instruction to the general student population, then the schools were not required to provide special education and services to student with IEPs. If schools were providing educational services to the general population, even if entirely remotely, then schools were required to provide special education and services to the children with IEPs. The question unaddressed in the USDOE Q&A concerned what *standard* of special education and services schools were required to provide. It is generally acknowledged that remote general education is a poor substitute for face to face general education. If schools were to provide comparably inferior special education and services remotely, would doing so violate FAPE standards set by *Endrew*?

Teachers and school administrators found the USDOE guidelines unhelpful and responses varied. Some kept special education student classes open long after general education instruction had gone online opting to increase the risk of exposing those students to Covid-19 infection rather than risk violating IDEA requirements.⁶⁷ Some

65. U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK (2020).

66. *Id.* at 2.

67. Carolyn Jones, *Disability Rights Groups, School Administrators Spar Over Possible Changes to Special Education Laws*, EDSOURCE (Apr. 7, 2020), <https://edsource.org/2020/disability-rights-groups-school->

schools suspended all special education services, claiming it was impossible to fulfill the IDEA requirements online.⁶⁸

On March 27, 2020 the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted by President Trump. The CARES Act was a \$2.2 trillion economic stimulus bill created in response to the economic fallout of the COVID-19 pandemic.⁶⁹ One set of provisions in the CARES Act instructed the USDOE to grant waivers “necessary to be enacted into law to provide flexibility to States and local educational agencies to meet the needs of students.”⁷⁰ The Association of California School Administrators (ACSA), representing over 17,000 superintendents, principals and other administrators, lobbied for explicit waivers of provisions of the IDEA.⁷¹ The ACSA was one of dozens of administrator and school board organizations that lobbied for temporary adjustments to special education laws while schools were closed.⁷²

The Council of Administrators of Special Education and the National Association of State Directors of Special Education requested “limited waivers” to allow for “flexibility” in meeting student needs.⁷³ The organizations emphasized the absence of legal or doctrinal guidance necessary for schools to “implement a law that was not built for this situation.”⁷⁴ These petitioners sought waivers of certain substantive requirements of the IDEA, including the scope of FAPE. The Director of Advocacy for the National Superintendents’ Association requested waivers because “meeting all the requirements in the IDEA would be impossible.”⁷⁵ The rhetoric of these waivers played on concerns that IDEA granted unfair entitlements to a minority of students most of whom had

[administrators-spar-over-possible-changes-to-special-education-laws/628376](#).

68. Angela Nelson, *How Covid-19 Has Affected Special Education Students*, TUFTS NOW (Sept. 29, 2020), <https://now.tufts.edu/articles/how-covid-19-has-affected-special-education-students>.

69. *The CARES Act Works for All Americans*, U.S. DEP’T OF THE TREASURY (2020), <https://home.treasury.gov/policy-issues/cares>.

70. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136. 134 Stat. 281.

71. Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 40.

72. *Id.*

73. *Id.*

74. *Id.* at 41.

75. *Id.*

“only mild” impairments.⁷⁶ The argument was that leaving IDEA requirements intact in the middle of a pandemic would not only unduly burden school staff and faculty who are already “stretched thin,” it would be unfair to protect quality education for students with IEPs all while letting the quality of general education drop.⁷⁷

In addition to requesting waivers to suspend IDEA requirements, schools requested “amnesty from litigation.”⁷⁸ Again citing the unprecedented nature of the pandemic, the National School Boards Association (NSBA), School Superintendents Association (AASA), and the Association of Educational Services Agencies (AESA) all claimed that “FAPE comes with tremendous costs to budgets and additional burden on personnel that challenge school districts *trying their best* under the circumstances to meet the requirements.”⁷⁹ Citing a national survey of school administrators, the NSBA, AASA and AESA claimed that 75% of all school districts found that the most onerous service to provide during Covid-19 closures was fulfilling FAPE requirements.⁸⁰

Disability activist groups claimed that even temporary waivers and litigation amnesties could lead to broad and permanent changes to the IDEA that would dramatically weaken disability rights. They also questioned the claim that schools have no legal direction to guide them through long-term school closings. Jasmine Harris argued that, while the *scope* of the Covid-19 pandemic is unprecedented, the questions prompted by the pandemic concerning IDEA requirements during school closures are not new.⁸¹ Harris stated:

Hurricanes Harvey, Irma, and Maria displaced students and disrupted school instruction for tens of thousands of students, including students receiving special education services...Hurricanes Katrina and Rita displaced over 50,000 students with disabilities....the suggestion

76. Miriam Kurtzig Freedman, *Special Education in the time of Coronavirus: DeVos and Congress Need to Act!*, THOMAS B. FORDHAM INST. (Apr. 14, 2020), <https://fordhaminstitute.org/national/commentary/special-education-time-coronavirus-devos-and-congress-need-act>.

77. *Id.*

78. Harris, *supra* note 71, at 44.

79. NAT’L SCH. BDS. ASS’N, THE SCH. SUPERINTENDENTS ASS’N, & ASS’N OF EDUC. SERV. AGENCIES, SCHOOL LEADER VOICES: CONCERNS AND CHALLENGES TO PROVIDING MEANINGFUL IDEA-RELATED SERVICES DURING COVID-19 7 (2020) (emphasis added).

80. Harris, *supra* note 71, at 42.

81. *Id.* at 43.

that school district could not possible figure out how to meaningfully serve students with disabilities as grounds for waivers of substantial provisions of the IDEA is hyperbolic at best.⁸²

According to Harris, the Covid pandemic “laid bare” the discriminatory assumptions accepted by those who take advantage of such disasters to resist fulfilling important federal requirements protecting disability rights.⁸³

In April 2020 the USDOE announced that all schools must comply with IDEA requirements. Betsy DeVos, secretary of the USDOE, stated that “the Department is not requesting waiver authority for any of the core tenets of the IDEA.”⁸⁴ To clarify, DeVos stated that “[s]ervices typically provided in person may now need to be provided through alternative methods, requiring creative and innovative approaches.”⁸⁵ DeVos explained that “there is no reason for Congress to waive any provision to keep students learning. With ingenuity, innovation and grit, I know this nation’s educators and schools can continue to faithfully educate every one of its students.”⁸⁶ While this announcement came as a relief to disability activists and parents of students with disabilities, it did not bring much needed guidance or clarity to school teachers and administrators who still struggled to fulfill IEP requirements while schools were closed.

III: May 2020: *Chicago Teachers Union v. DeVos*

Three weeks after the USDOE’s announcement that all schools must fulfill all IDEA requirements during the Covid pandemic, the Chicago Teachers Union (CTU) brought suit against the USDOE.⁸⁷ CTU claimed that the USDOE violated the Administrative Procedures Act (APA) by not asking Congress for authority to waive documentation requirements relating to special education and services for children.⁸⁸ Specifically, CTU

82. *Id.*

83. *Id.* at 32.

84. Carolyn Jones, *Federal Special Education Law Must Stay Intact During School Closures, DeVos Says*, ED SOURCE (Apr. 27, 2020), <https://edsources.org/2020/federal-special-education-law-must-stay-intact-during-school-closures-devos-says/630298>.

85. *Id.*

86. *Id.*

87. *Chi. Tchrs. Union v. DeVos*, 468 F. Supp. 3d 974 (N.D. Ill. 2020).

88. *Id.* at 1.

objected to being required to redraft IEPs into Remote Learning Plans (RLPs).⁸⁹ By failing to waive these requirements, CTU claimed that the USDOE has “acted arbitrarily and capriciously and caused CTU’s members to be diverted by a massive bureaucratic distraction” because fulfilling these requirements of the IDEA provisions was nothing more than “useless paperwork.”⁹⁰ The court decided that the balance of harms weighed against ordering an injunction for such a waiver.⁹¹

The court began its opinion by expressing sympathy for the plight CTU teachers found themselves in. Describing the task of providing special education as “challenging” in the best of times, the court acknowledged that the coronavirus pandemic had dramatically increased those challenges.⁹² Waxing Biblical, the court closed its argument by expressing deep gratitude for the efforts of CTU teachers in these trying times. The court determined:

Like a thief in the night, the novel coronavirus has crept upon our Nation and wreaked widespread havoc...CTU’s members—the case managers, teachers, clinicians, and others who provide daily instruction to children with special education needs—are striving to meet the challenges of providing instruction under unique and trying circumstances....[T]hese public servants are the boots on the ground, so to speak, in the effort to ensure that our more vulnerable students continue to receive the education to which they are entitled. They too deserve the recognition—and gratitude—of society.⁹³

When evaluating CTU’s claims, the court signaled that special education entitlements created heroic burdens for schools. It also signaled that CTU’s characterization of the work created by IDEA as “useless busywork” was not false. Although CTU’s request for an injunction was denied, the rhetoric employed by the court in its decision is an example of how fragile disability rights are in an emergency when it is accepted

89. *Id.*

90. *Id.* (Internal quotations marks removed).

91. *Id.* at 11.

92. *Id.* at 1.

93. *Id.* at 11-12.

without question that respecting such rights is a burden and those whose work fulfills such rights is heroic.⁹⁴

IV: August 2020: Parents Respond to Remote Special Education Services

Stories of frazzled parents and anxious students were commonplace at the start of the 2020-2021 academic year. Here are a few of those stories:

Since March, Melissa and her husband have gutted their savings on child care and speech therapy for the daughter Nora who is five years old and on the autism spectrum. “She’s starting to become more self-aware of other kids not liking her, so she’s not even willing to practice those skills anymore, so that’s a little heartbreaking,” said Nora’s mother, Melissa.⁹⁵

Javyyn, a 12 year old who has been diagnosed as autistic, was struggling to read his lessons on a computer. “Jayvyn did not last 10 minutes,” his mother Qualina Cooper said. “There were too many distractions on the screen for him to focus. He kept saying, ‘School tomorrow?’ He cried and became frustrated with the whole process.”⁹⁶

Vanessa Ince’s daughter Alexis has a rare chromosomal abnormality as well as autism. Since Alexis’s school closed, Alexis has regressed. Vanessa said, “She was previously, I would say, 95% potty-trained. And she started wetting herself and - oh, it’s devastating.” Alexis missed her classmates and went back to crawling instead of walking and refuses to use her communication device. “She wouldn’t sit still

94. Harris, *supra* note 71, at 45. (“[T]he ways in which disability norms have evolved have made disability rights less stable and, thus, more susceptible to negotiation rather than enforcement.”).

95. Stacy Fernandez, *Special Education Students Lost Crucial Help When the Pandemic Hit. Texas Schools Are Still Struggling to Restore It*, TEX. TRIBUNE (Aug. 28, 2020), <https://www.texastribune.org/2020/08/28/texas-schools-special-education/>.

96. Emily Hays, *Special Ed Parents: Remote Education Fails*, NEW HAVEN INDEP. (Sept. 11, 2020), https://www.newhavenindependent.org/index.php/archives/entry/special_education_remote_school/.

for more than 15 seconds. She wandered around the house aimlessly. You know, she just looked flat and empty.”⁹⁷

Dissatisfaction with how the 2019-2020 academic year ended coupled with the lack of clarity as to how the 2020-2021 would be better fueled demands from parents for assurances that the educational services provided in 2020-2021 would have a higher quality than what was delivered at the end of the previous year. Many parents of children with IEPs claimed that the quality of education and services that schools provided for their children was *so low* that it violated their child’s IEP.⁹⁸

Since courts are just beginning to address claims brought by parents on behalf of their children who have experienced very low quality or a complete lack of special education and services since schools closed in March 2020, it is difficult at this point to anticipate how these legal questions will ultimately play out. Two cases, *Brach v. Newsom* and *Hernandez v. Grisham*, illustrate the concerns raised by parents, the arguments made by school districts and the legal issues that must be considered when deciding these cases.⁹⁹

1. *Brach v. Newsom*

In *Brach* fourteen plaintiff’s filed an application for a temporary restraining order (TRO) against California officials, seeking to enjoin the enforcement of California’s “COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year” (Framework), which prohibits in-person education in counties on a statewide Covid-19 monitoring list.¹⁰⁰ Five of the plaintiffs asserted that the Framework’s restrictions on in-person learning violated their rights under

97. Anya Kamenetz, *Parents of Special Education Students File Lawsuits Over Poor Remote Education*, NAT’L PUB. RADIO (July 22, 2020), <https://www.npr.org/2020/07/22/894343514/parents-of-special-education-students-file-lawsuits-over-poor-remote-education>.

98. Anya Kamenetz, *Families of Children With Special Needs Are Suing in Several States. Here’s Why.*, NAT’L PUB. RADIO (July 23, 2020), <https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why>.

99. *Brach v. Newsom*, No. 220CV06472SVWAFM (C.D. Cal. Aug. 21, 2020); *Hernandez v. Grisham*, 107 Fed. R. Serv. 3d (West) 1986 (D.N.M. Oct. 14, 2020).

100. *Brach*, slip op. at 7.

IDEA.¹⁰¹ Four of those plaintiffs are parents of a child with a disability and the fifth plaintiff is Z.R., a minor with a disability.¹⁰²

Z.R. is 15 years old and is autistic. Prior to his school closing March 16, 2020 he had “an entire team of special needs educated, credentialed staff working hands on with him during the entire day” pursuant to his IEP.¹⁰³ From March 16, 2020 to the time his complaint was filed in July 2020 Z.R. had received no services at all.¹⁰⁴ Z.R.’s mother hired an educational tutor to work with her son.¹⁰⁵ Z.R.’s complaint was that the quality of special educational services he and others with disabilities has received failed to fulfill standards set by FAPE.¹⁰⁶ Despite California receiving \$1.2 billion federal dollars for special education every year, many parents of special needs children in California have reported that their children received “none, or nearly none, of the individualized instruction guaranteed by law.”¹⁰⁷ Teachers “gave up” when faced with the task of transferring special education services to remote delivery, and made “zero provision for delivering these federally mandated services to children, despite the federal funding provided to them.”¹⁰⁸

In *Brach* the court began its analysis of whether to grant injunctive relief against local government action in response to the Covid-19 pandemic by looking to *Jacobson*.¹⁰⁹ In *Jacobson*, the Supreme Court established a narrow scope of judicial authority when reviewing emergency measures. The Court stated that “if there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can *only* be when ...a statute purporting to have been enacted to protect the public health...*has no real or substantial relation to those objects, or is,*

101. *Id.* at 7.

102. *Id.*

103. Complaint at 7, *Brach v. Newsom*, No. 220CV06472SVWAFM (C.D. Cal. Aug. 21, 2020).

104. *Id.*

105. *Id.* at 7-8.

106. *Brach*, slip op. at 1.

107. *Id.*

108. *Id.*

109. *Brach*, slip op. at 2; *see Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905); *see also In re Abbott*, 956 F.3d 696, 704 (5th Cir. 2020); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, CJ., concurring).

beyond all question, *a plain, palpable invasion of rights secured by the fundamental law.*"¹¹⁰ *Jacobson* established a two prong test for evaluating emergency measures established by a state: the first, a "substantial relation" test, and the second, the "plain, palpable" invasion of rights secured by fundamental law test. When applying these two tests, *Jacobson* established that a court "should apply an especially strong presumption of constitutionality" to the emergency measures.¹¹¹

As to the first prong, *Brach* found the Framework had a "substantial relation" to preventing the spread of Covid-19.¹¹² The California Department of Public Health (CDPH) defended restrictions on in-person learning were a part of a "broader set of recommendations" designed to reduce the spread of Covid-19.¹¹³ Moreover, CDPH stated that the "movement and mixing" that are an inevitable part of in-person learning in schools would "introduce substantial new risks" for transmission and new infection of Covid-19.¹¹⁴ The plaintiffs presented evidence that the risk that children will become ill or transmit the virus was negligible. Thus, plaintiffs argued, the school districts closed the schools overly cautiously to the detriment of the children's education.¹¹⁵

The court characterized the disagreement between the plaintiffs and defendants as being "over the level of risk created by opening K-12 schools for in-person instruction."¹¹⁶ The court stated that "even if it was utterly irrational for Defendants to act on the belief that gatherings of children alone posed a risk of transmitting disease, restrictions on in-person learning in the state's worst-affected counties is rationally related to the distinct goals of protecting teachers, staff, and the broader community."¹¹⁷ Further, the court stated that the Plaintiff's scientific experts' opinions, which stressed the low risk Covid presents to children, had "little bearing" on the

110. *Brach*, slip op. at 3.

111. *Jacobson*, 197 U.S. at 28.

112. *Brach*, slip op. at 1.

113. *Id.* at 3.

114. *Id.*

115. *Id.* at 7.

116. *Id.* at 6.

117. *Id.*

question at hand.¹¹⁸ A rational-basis review permits decisions “based on rational speculation unsupported by evidence or empirical data.”¹¹⁹

As to the “plain and palpable” invasion of rights prong which concerned Z.R.’s claim that the quality of the remote learning he was provided was so low that it violated his rights under IDEA, the court claimed that the plaintiffs’ claim must fail because they had not exhausted administrative remedies as required by 20 U.S.C. § 1415(i)(2)(A), § 1415(1).¹²⁰ As to the plaintiffs’ claim that an irreparable injury is likely in the absence of an injunction, the court concluded that the plaintiffs “have not shown that it is likely that schools will be closed for in-person learning for long enough to cause irreparable damage.”¹²¹ Finally, the court concluded that the public interests weighed against granting a TRO.¹²² According to the court, the defendants restrictions on in-person learning was intended to be temporary and limited to only those regions where Covid-19 posed the greatest threat. Moreover, the “uncertainties” surrounding both the “course of the virus” and the “duration and quality of remote learning” are simply too great.¹²³ For all these reasons *Brach* concluded that “public interest favors unending the state’s plan to address this ongoing public health crisis.”¹²⁴

Brach is not denying that Z.R. has suffered harm from having all his special education services replaced with brief videos. Rather, *Brach* is stating that the harm had not yet risen to the level of being “plain and palpable.”¹²⁵ While *Brach* acknowledged the seriousness of “regression,” the harm that results from accumulated lost opportunities suffered by children with disabilities who go without special education

118. *Id.*

119. *Id.* at 6 (citing *U.S. v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015)).

120. *Id.* at 9.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 11; *see also* Killoran *ex rel.* A.K. v. Westhampton Beach Sch. Dist., No. 18-CV-3389 (JS)(SIL) (E.D.N.Y. Feb. 12, 2020) (“The Court has weighed Plaintiff’s desire for a change in A.K.’s currency pendency placement to ease the burden of home instruction on Plaintiff and his wife against the safety of all others in the district. The Court is sympathetic to Plaintiff’s concerns, as well as the struggles of every working family trying to balance childcare needs during these times. However, the balance of hardships does not tip in Plaintiff’s favor.”).

125. *Id.* at 7-8.

services for extended periods, Brach did not clearly establish at what point a child's regression reaches a level of harm that is a plain and palpable violation of rights. Given that at the time of writing Covid infection rates are beginning to rise and schools are expected to remain closed for many more months if not at least another year, it seems that courts will have to revisit the issue of regression resulting from inferior special education services in future cases.

2. *Hernandez v. Grisham*

In *Hernandez v. Grisham* Shannon Woodworth, the mother of a five year old child with disabilities, claimed that since schools closed in March 2020, her daughter "has not been provided with many" of her IEP services.¹²⁶ Woodworth claimed that without her special education services her daughter has "regressed" and is failing all her courses.¹²⁷ Woodward requested a TRO to "prohibit the Defendants from denying in person learning" to her daughter.¹²⁸

As in *Brach* the *Hernandez* turned to *Jacobson* for guidance in deciding whether to grant the injunctive relief requested against the New Mexico state government action during the Covid-19 pandemic.¹²⁹ In doing so, *Hernandez* acknowledged that "the law permits greater intrusions into civil liberties in times of greater communal need."¹³⁰ As to the substantial rationality prong, *Hernandez* acknowledged that the Defendants have a legitimate interest in reducing the risk of spreading Covid-19 transmissions and had rationally designed the New Mexico Public Education Department Reentry Guidance (Reentry Guidance) in pursuance of that goal.¹³¹ The court stated that "[t]he Defendants' Reentry Guidance thus rationally relates to its legitimate purpose of protecting the health and lives of its citizens by preventing the spread of Covid-19."¹³²

126. *Hernandez*, 107 Fed. R. Serv. 3d (West) at 2.

127. *Id.*

128. *Id.* at 17.

129. *Id.* at 54.

130. *Id.* at 55.

131. *Id.* at 64.

132. *Id.* at 66.

When considering the plain and palpable prong, the court in *Hernandez* stated that IDEA confers an “enforceable substantive right to a public education.”¹³³ The court stated that a while student’s right to a free and appropriate public education would not be violated merely by a school requiring students to enroll in online courses instead of attending classes in person, the court concluded that Woodworth’s daughter was nonetheless entitled to a TRO.¹³⁴ Citing *Endrew*, the court claimed that severe learning loss “like the loss Woodworth’s daughter has experienced” is an irreparable harm under the IDEA, which requires schools provide a FAPE that “enables a child to progress.”¹³⁵ The court then stated that Woodworth’s daughter’s threatened injuries “outweigh possible damage to the Defendants.”¹³⁶ Finally, the court stated that a TRO ensuring that Woodworth’s daughter is provided a FAPE under the IDEA “would not be adverse to the public interest.”¹³⁷

Why the different conclusions in *Brach* and *Hernandez*? On the face of it, it looks that is was simply about different levels of risk assessment: *Brach* was more risk averse than *Hernandez* when weighing up the possible dangers to staff and students posed by Covid. Yet, both courts acknowledged that the school closing plans were rational and that the risks of Covid infection were significant. Neither court accepted the claims made by both plaintiffs that, because children are at a significantly lower risk of becoming sick from Covid, there was insufficient reason to require all learning be delivered remotely. A better explanation for the different decisions is in the different value ascribed to a special education by the two courts and how much weight each gave to harms of regression. Finally, it is important to note that *Hernandez* did not argue that Woodworth’d daughter had an inviolate right to in person learning. Instead, *Hernandez* stated that IDEA grants her a right to a certain *quality* of education that her school had failed to deliver. Because Woodworth had evidence that her daughter was failing all her courses, she was able to prove that her daughter’s special education services had not met the “some benefit” standard set in *Endrew*.

133. *Id.* at 36.

134. *Id.* at 63.

135. *Id.* at 67.

136. *Id.* (“Because the threatened injuries to Woodworth’s daughter are severe, and the possible damage to the Defendants is minimal, the Court concludes that this element has been met.”).

137. *Id.* “The Court acknowledges Covid-19 pandemic’s seriousness. Nonetheless, the Court concludes that children likely have a lower risk of spreading and contracting Covid-19 than adults.”

V: September 2020: USDOE Update: Schools May Open for Special Education Services

On September 28, 2020 The USDOE issued a Q&A document “in response to inquiries concerning implementation of the Individuals with Disabilities Education Act (IDEA) Part B provision of services in the current Covid-19 environment.”¹³⁸ The Q&A began with an acknowledgement of the “new and unexpected challenges in providing meaningful instruction to children, including children with disabilities” and stressed that the “Covid-19 pandemic has impacted various parts of the nation in different ways... ultimately, the health and safety of children, families, and the school community is most important.”¹³⁹ As to the questions of how to deliver special education services, the Q&A recommended that administrators, educators and parents “consider multiple options for delivering instruction, including special education and related services to children with disabilities.”¹⁴⁰ These options “include remote/distance instruction and in-person attendance (hybrid model).”¹⁴¹ The September Q&A restated what had been stated in the April Q&A, which is that an IEP must ensure that a free and appropriate public education is provided to all children with disabilities. Thus, according to the USDOE, schools may consider but were not required to offer in-person special education services to students with IEPs even if all general education is delivered remotely.

After the September USDOE announcement, many schools resumed in person special education courses only, despite concerns for the safety of staff, teachers and students.¹⁴² In California, classes may meet as long as strict health protocols are followed.¹⁴³ These protocols include limiting classes to fourteen students and two adults.¹⁴⁴ The courses are limited to occupational and speech therapy and other services

138. U.S. DEP’T OF EDUC., OSEP QA 20-21 1 (2020).

139. *Id.*

140. *Id.* at 1-2.

141. *Id.*

142. Carolyn Jones, *Some Schools Now Open for Small Special Education Classes*, EDSOURCE (Sept. 29, 2020), <https://piedmontexedra.com/2020/09/some-schools-now-open-for-small-special-education-classes>.

143. *Id.*

144. *Special Education Guidance for Covid-19*, CAL. DEP’T OF EDUC. (Sept. 30, 2020), <https://www.cde.ca.gov/ls/he/hn/specialedcovid19guidance.asp>.

that cannot be delivered online.¹⁴⁵ Students and teachers must wear masks, wash their hands, and stay six feet apart at all times. Reaction to this offering in person special education classes while Covid-19 infection rates continue to rise has been mixed. Mary Jane Burke, superintendent of the Marin County Office of Education, had resumed in person special education courses in Spring of 2020, long before the state had issued its guidelines.¹⁴⁶ Los Angeles Unified, the largest district in the state, announced that it was open to resuming in person classes but lacked the resources to guarantee safe conditions.¹⁴⁷ The California Teachers Association has been consistently opposed to resuming any in person instruction because the schools are failing to enforce adequate safety protocols.¹⁴⁸ As of writing, with Covid-19 infection rates dramatically increasing, it is not clear how much longer any special education classes will continue to be offered in person or, if the return to online how long they will again remain online only.

VI: Recommendations

While it is to be hoped that we will never again experience the disruption and despair caused by Covid-19, it would be naïve and irresponsible to move forward without plan that anticipates future disruptions, whether they be caused by natural disasters, disease or civil unrest. In light of the problems caused by Covid-19, states are discussing legislation intended to provide direction for future generations if they ever face long-term schools closures again. California has created a pair of policies to provide guidance during possible future long term school closings. California Senate Bill 98 and California's Learning Continuity Attendance Plan (LCAP), Education Code Section 43509.

On June 29, 2020, the California Senate Bill 98 (SB 98) was enacted.¹⁴⁹ SB 98 establishes three new requirements for special education in California. The first is that all IEPs must now include a description of the means by which the IEP will be provided during emergency conditions when instruction or services have to be provided to the

145. *Id.*

146. Jones, *supra* note 142.

147. *Id.*

148. *Reopening Schools*, CAL TCHRS. ASS'N, <https://www.cta.org/for-educators/covid19/where-we-stand-on-reopening-schools-and-community-colleges> (last visited Dec. 9, 2020).

149. *2020 Budget Act and Special Education*, CAL DEP'T OF EDUC. (July 15, 2020), <https://www.cde.ca.gov/sp/se/lr/om071520.asp>.

student either at school or in-person for more than 10 school days.¹⁵⁰ The second requirement is that the new IEP description must be added to all initial IEPs, and to all continuing IEP at their regularly scheduled IEP meetings if they do not have the required description already.¹⁵¹ Finally, the third requirement is that the new IEP description should also take into account public health orders.¹⁵²

SB 98 is an important first step for it acknowledges the importance of providing special education services during extraordinary circumstances such as pandemic and natural disasters. SB 98 does not, however, address the most persistent complaint made by parents of children with impairments, which is that special education services cannot be offered remotely at a level of quality that meets FAPE standards. Unless the schools remain closed for only a short duration, then regression occurs and a student's right to FAPE is violated, as was the case in *Hernandez*. SB 98 would be far more effective if it initiated a protocol to investigate alternative methods of offering special education services that avoided the pitfalls of remote learning styles.

By September 30, 2020 every school district or educational agency in California must have had in place a learning continuity and attendance plan (LCAP) for the 2020-2021 year.¹⁵³ Each LCAP was to address learning loss that results from Covid-19 during the 2019-2020 and 2020-2021 years. Moreover, the LCAP must explain specifically "actions and strategies" the agency will use to address learning loss and to accelerate learning progress needed for students with disabilities.¹⁵⁴

California's LCAP may motivate much needed effort to address the worst effects of long term school closures, regression. It is too early at this point of the Covid-19 pandemic to fully appreciate the full impact Covid-19 will have on students who need special education services. Honest and thorough LCAPs will provide vital insight for future planning, allowing school districts to anticipate which needs were not met, and which future harms can be anticipated and mitigated if there are long term school closures in the future.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Learning Continuity and Attendance Plan*, CAL. DEP'T OF EDUC. (July 31, 2020), <https://www.cde.ca.gov/re/lc/learningcontattendplan.asp>.

154. *Id.*

Statutes such as SB 98 and regulations such as California's LCAP policy are by themselves inadequate and additional work needs to be done. Four such recommendations to address such limitations are (1) clarity regarding the FAPE standards; (2) state level legislation that explicitly outlines protocols to follow during long-term school closures; (3) a USDOE led effort to collect and catalog educational strategies for teaching special education during long-term school closures; and (4) a USDOE public service announcement (PSA) campaign addressing the wide-spread accepted beliefs that special education is a waste of scarce resources and unfairly advantages students with IEPs.

1. Clarity regarding FAPE standards: The USDOE needs to clarify FAPE standards, especially during long-term school closures. Advising schools to rely on "grit" does not provide concrete guidance and leaves teachers and school districts feeling unsupported.
2. State protocols for handling special education and services during long-term school closures: All states need to follow California's example with SB 98 and their LCAP regulations. While California has taken a step in the right direction, SB 98 could be better and demand special education services remain in person even when general education has switched to remote learning, if at all practicable. States also need to generate honest and thorough LCAP reports so that the full impacts of long-term school closures is available to educators and school districts so that the real costs of ending in person special education is fully understood.
3. USDOE bank of special education remote learning resources: The USDOE needs to create a bank of practical, useful and varied educational strategies addressing the question of how to deliver special education services during long-term school closings. During the Covid-19 closures, individual teachers designed created and effective education projects for their students. These valuable resources need to be collected and preserved for future emergency (and non-emergency) situation in a vast information sharing project. Rather than expect teachers to bear the brunt

of not only creating but distributing these resources, the USDOE needs to coordinate, fund and store these valuable resources.

4. USDOE needs to begin PSAs addressing the degrading stereotypes that special education programs are a “waste of time” and “unreasonable burden.” Most importantly the USDOE needs to launch an effective nation-wide educational campaign addressing the degrading and dangerous beliefs that special education is a waste of valuable resources and time, and that students who receive special education services are benefitted at the cost of the general education population. Educational resources are not a zero sum game: all students have a right to an education, including students who need special education services, and meeting those rights need not come at the cost of any other social services. Special education not only benefits the students and their family who directly receive those benefits, but everyone who lives alongside of those individuals in this society.

As has been stated many times since March 2020, Covid-19 is a wakeup call. It has made palpably clear that existing laws and regulations do not adequately safeguard the rights of those most vulnerable. But that call has not been the first. There have been many calls before Covid-19 that were not heeded. It is to be hoped that this wakeup call was loud enough and persistent enough that the failings in our political and legal structures get the attention that are warranted.