

Student Note

Evaluating the Impact of the COVID-19 Pandemic on Students with Disabilities

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I. INTRODUCTION

The COVID-19 pandemic has resulted in a quick shut down of schools across the country.¹ Congress tried to alleviate harm due to the pandemic by passing the CARES Act in March of 2020, allocating additional funding for schools to help them respond to this crisis.² Despite Congress's quick action, many students with disabilities stopped receiving their accommodations and related services specified in their Individualized Education Programs (IEPs) as schools closed their doors and moved to virtual learning.³

The Individuals with Disabilities Act (IDEA) requires school districts to ensure that all students with disabilities receive a Free Appropriate Public Education (FAPE), provided at public expense.⁴ This law was enacted in the 1970s to ensure that students with disabilities, like their neurotypical peers, have equal access to education.⁵ The IDEA purports that 40% of the cost of educating students with special needs will be paid by the federal government, but estimates show that the federal government funds about 13% of the cost increase of educating students with special needs.⁶ A team of

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1. Moriah Balingit & Laura Meckler, *Schools Close Over Coronavirus Threat, Raising Concerns About Disruption*, WASH. POST (Mar. 9, 2020), https://www.washingtonpost.com/local/education/schools-close-over-coronavirus-threat-raising-concerns-about-disruption/2020/03/09/ea74e528-622b-11ea-acca-80c22bbe96f_story.html.

2. Coronavirus Aid, Relief, and Economic Security Act (CARES Act) § 3511, Pub. L. No. 116-36, 134 Stat. 281 (2020).

3. *Elementary and Secondary School Emergency Relief Fund Tracker*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 23, 2021), <https://www.ncsl.org/ncsl-in-dc/standing-committees/education/cares-act-elementary-and-secondary-school-emergency-relief-fund-tracker.aspx>.

4. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (2018).

5. *About IDEA*, U.S. DEP'T OF EDUC., <https://sites.ed.gov/idea/about-idea/> (last visited Apr. 21, 2021).

6. *Special Education*, NAT'L EDUC. ASS'N, <https://www.nea.org/student-success/smart-just-policies/special-education> (last visited Apr. 21, 2021).

professionals from the child's school district may create an IEP for a student with disabilities to decide what accommodations or services the student needs to receive a FAPE.⁷ Schools are required to track student progress towards these annual goals.⁸ Despite the IDEA's progress monitoring requirement, the CARES Act allowed schools to waive standardized testing requirements for the 2019-2020 school year and thus limited the data that schools could use for progress monitoring.⁹

Additionally, the Department of Education (Department) has clarified that schools must continue to provide IEP accommodations to the greatest extent possible.¹⁰ The Department additionally stated that if schools provide educational opportunities to the general education population, the school must also provide appropriate opportunities for students with disabilities; but if schools do not provide educational opportunities to general education students, they are not required to provide accommodations for students with special needs.¹¹ Some school districts chose to close entirely because they could not provide accommodations for students with disabilities, which the Department condemned but provided no guidance on how to fix.¹²

Schools across the country are handling the pandemic very differently. In a Nevada school district, virtual learning is the only option for all students, including students with sight disabilities whose screen readers are not always compatible with their digital textbooks.¹³ Entirely virtual learning means that all accommodations and services must be provided virtually, even when it is impossible to do so. Some students with disabilities have IEPs that require hands-on learning that

7. IDEA, at § 1414(d)(1)(A), *supra* note 4.

8. U.S. DEP'T OF EDUC., IDEA REAUTHORIZED STATUTE (2004), <https://www2.ed.gov/policy/speced/guid/idea/tb-iep.pdf>.

9. CARES Act, *supra* note 2.

10. U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK (2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

11. *Id.*

12. *Id.*; see also Press Release, U.S. DEP'T OF EDUC., Urging States to Continue Educating Students with Disabilities, (Mar. 21, 2020), <https://sites.ed.gov/idea/new-resource-accessibility-distance-learning-options-students-with-disabilities/>.

13. Greta Anderson, *Accessibility Suffers During Pandemic*, INSIDE HIGHER ED (Apr. 6, 2020), <https://www.insidehighered.com/news/2020/04/06/remote-learning-shift-leaves-students-disabilities-behind>; Class Action Complaint at ¶ 7, C.M., individually and as parent to D.M., et al. v. Jara et al., No. 2:20-cv-01562-JCM-BNW (D. Nev. Aug. 21, 2020).

cannot be done through a computer.¹⁴ For example, some students have IEPs that provide related services like occupational or physical therapy, where a care provider needs some physical contact with the child to provide effective care.¹⁵

Students forced to go without appropriate accommodations are regressing in skills and behavior, including one student whose regression includes self-harming behaviors that have led to hospitalization.¹⁶ Students who are required to learn virtually also have difficulty developing social skills, such as creating and maintaining friendships.¹⁷

Closing schools effectively stopped appropriate accommodations or related services to certain students with disabilities during the Covid-19 pandemic. There are over seven million children in public schools with a disability served under IDEA, most of which saw their schools close due to the pandemic.¹⁸ By failing to provide appropriate accommodations or related services, schools are violating the IDEA and exacerbating existing inequalities that students with disabilities face. Schools must reopen and continue providing the accommodations and related services mandated by student IEPs or provide compensatory education to students with disabilities whose accommodations or related services cannot be provided virtually. Congress needs to act immediately with legislation to fully fund public schools and their reopening before students suffer irreparable damage.

This Note will begin in Part II by providing a background on COVID-19 and its impact on America's public schools. Part III will provide a background on the IDEA's requirements and how these

14. Jade Abdul-Malik, *Feeling Forgotten: Students with Special Needs Face Unique Challenges with Virtual Learning*, GA. PUB. BROAD. (Sept. 3, 2020), <https://www.gpb.org/news/2020/08/04/feeling-forgotten-students-special-needs-face-unique-challenges-virtual-learning>.

15. *Recommended Special Education Programs and Services*, N.Y. STATE EDUC. DEP'T, <http://www.p12.nysed.gov/specialed/publications/iepguidance/programs.htm>, (last modified Dec. 10, 2010).

16. Taylor Knopf, *Are Students with Disabilities Being Left Behind?* N.C. HEALTH NEWS (Sept. 16, 2020), <https://www.northcarolinahealthnews.org/2020/09/16/are-students-with-disabilities-being-left-behind-challenges-of-virtual-learning/>.

17. See *ADHD and School Changes*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 26, 2021), <https://www.cdc.gov/ncbddd/adhd/features/adhd-and-school-changes.html> (last reviewed Aug. 19, 2021).

18. *Digest of Education Statistics: 2019*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d19/tables/dt19_204.30.asp?referrer=re.asp (last visited Apr. 21, 2021).

requirements changed during the COVID-19 pandemic, including a description of the CARES Act, and how school closures and virtual learning impacted students with disabilities. Part IV will discuss how both schools and the law can change to accommodate students with disabilities and their needs during this crisis, including reopening schools safely, providing compensatory education, and urging Congress to fully fund the IDEA.

II. BACKGROUND

A. COVID-19 Pandemic

The United States had its first reported case of COVID-19 on January 21, 2020, in Washington state after the patient arrived home from a trip to Wuhan, China.¹⁹ The virus quickly spread through the United States, resulting in mass shutdowns that affected schools across the country.²⁰ The federal government passed the CARES Act on March 27, 2020, to help alleviate the economic impact of COVID-19.²¹ The CARES act also included emergency relief funding for elementary and secondary schools to ensure that they could better serve their students during the pandemic.²²

The South Carolina Department of Education chose to use a portion of their funding on, “technology capacity, access, and remote learning.”²³ This occurred after the Governor of South Carolina closed all schools through the end of March, without knowing how many students do not have access to internet.²⁴ Nationally, 4.4 million

19. Press Release, Ctrs. for Disease Control & Prevention, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

20. Balingit & Meckler, *supra* note 1.

21. CARES Act, *supra* note 2.

22. *Id.* at § 18003.

23. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 3.

24. Noah Feitt et al., *Gov. McMaster Closes All SC Public Schools Through March as Coronavirus Cases Rise*, THE STATE (Mar. 16, 2020), <https://www.thestate.com/news/coronavirus/article241209451.html>; *see also* Laurel Mallory, *S.C. Governor Closes All K-12 Schools Through April 30*, WIS NEWS (Mar. 24, 2020), <https://www.wistv.com/2020/03/24/sc-governor-closes-public-k-schools-through-april/>.

households sometimes, rarely, or never have access to a computer.²⁵ Similarly, 3.7 million households sometimes, rarely, or never had internet access.²⁶ This includes rural areas, where 18% of households with school-aged children do not have internet at home.²⁷ As school closures abruptly happened across the country, students with disabilities who had access to a computer and internet moved to virtual learning, which meant going without the accommodations and related services specified in their IEPs that cannot be provided virtually.²⁸

B. Nationwide School Closures

Most schools throughout the country experienced some form of closure for the 2019-2020 school year.²⁹ In March 2020, more than 124,000 school buildings closed, affecting more than fifty-five million students.³⁰ Nearly 19% of K-12 schools moved back to teaching in-person in the fall of 2020, reaching a peak 38.8% in February 2021.³¹ By June 2021, thirty-four states no longer mandated school closures.³²

Washington State's Superintendent of Public Instruction went so far as to issue guidance stating that, for most Washington schools and districts, it will "make more sense to cancel school" than to provide

25. 4.4 Million Households Don't Have Access to Computers, USAFACTS (Oct. 19, 2020), <https://usafacts.org/articles/internet-access-students-at-home/>.

26. *Id.*

27. *Id.*

28. Students with disabilities may have rights under other statutes, such as Section 504, but that discussion is beyond the scope of this Note. *See generally* Class Action Complaint *supra* note 13; *see also* Class Action Complaint, James et al. v. Wolf et al., Case 2:20-cv-02320 (E.D. Pa. May 18, 2020).

29. Holly Peele & Maya Riser-Kositsky, *Map: Coronavirus and School Closures in 2019-2020*, EDUC. WEEK (Sept. 16, 2020), <https://www.edweek.org/leadership/map-coronavirus-and-school-closures-in-2019-2020/2020/03>.

30. Benjamin Herold, *The Scramble to Move America's School's Online*, EDUC. WEEK (Mar. 27, 2020), <https://www.edweek.org/technology/the-scramble-to-move-americas-schools-online/2020/03>.

31. Erin Duffin, *Share of K-12 Schools in the United States Teaching In-Person Due to the COVID-19 Pandemic from September 2020 to February 2021*, STATISTA (Mar. 11, 2021), <https://www.statista.com/statistics/1220611/covid-19-share-k-12-schools-in-person-teaching-us/> (last visited Sept. 1, 2021).

32. Erin Duffin, *Number of States with School/District Closures Due to the Coronavirus (COVID-19) in the United States as of June 14, 2021, by Status*, STATISTA (Apr. 13, 2021), <https://www.statista.com/statistics/1103071/covid-19-school-closures-state-us/> (last visited Sept. 1, 2021).

virtual learning that is inaccessible to all students.³³ Not providing any instruction was a common problem in March 2020.³⁴ A study of eighty-two school districts, including many of the biggest school districts in the country, found that only 10% of those districts are providing any real curriculum or instruction.³⁵ Sixteen percent of teachers reported not interacting with their students at all.³⁶ Miami-Dade Public Schools, included in the study, were able to begin virtual learning more quickly than other districts because of hurricane preparations that had already planned for significant disruptions to in-person learning.³⁷

Some schools chose to alleviate the risk of spreading COVID-19 by utilizing a hybrid model of instruction that teaches students both online and in-person instead of moving to entirely virtual education. By September 2020, 18.2% of K-12 schools were teaching students using a hybrid method.³⁸ The number of K-12 schools utilizing hybrid instruction rose to 24.8% by February 2021.³⁹ Jefferson County Public Schools, which encompasses the greater Louisville area, originally chose not to move online due to equity concerns and instead made up missed days in-person.⁴⁰ As making up school days became increasingly impossible, the district moved solely online and implemented a hybrid schedule in March 2021.⁴¹ While implementing

33. Informational Bulletin from Chris Reykdal, Washington Superintendent of Pub. Instruction to Educ. Serv. Dist. Superintendents et al. 3 (Mar. 3, 2020), <https://www.k12.wa.us/sites/default/files/public/bulletinsmemos/bulletins2020/B014-20.pdf>.

34. Lauren Camera, *Many Schools Are Not Providing Any Instruction Amid Closures*, U.S. NEWS (Mar. 31, 2020), <https://www.usnews.com/news/education-news/articles/2020-03-31/many-schools-are-not-providing-any-instruction-amid-coronavirus-pandemic>.

35. *Id.*

36. *Id.*

37. *Id.*

38. Erin Duffin, *Share of K-12 Schools with Hybrid Teaching*, STATISTA (Mar. 11, 2021), <https://www.statista.com/statistics/1220607/covid-19-share-k-12-schools-hybrid-teaching-us/>.

39. *Id.*

40. Erin Richards, *Is Online School Illegal?*, USA TODAY (Mar. 19, 2020), <https://www.usatoday.com/story/news/education/2020/03/19/coronavirus-online-school-closing-special-education-teacher-distance-learning/2863503001/>.

41. Taylor Weiter et al., *Jefferson County Board of Education Approves Amended Reopening Plan*, WHAS-TV (Feb. 25, 2021), <https://www.whas11.com/article/news/education/jcps-pollio-schools-return-march-april/417-bc1e2399-9256-499a-b5cf-16f71ee44083>.

virtual and hybrid education, the district had to provide 50,000 Chromebooks for students to use as they learn at home.⁴²

Even as some schools move towards re-opening, some are finding that increased COVID-19 cases in their area are requiring schools to shut down again.⁴³ As cases in Michigan skyrocketed at the end of 2020, Detroit Public Schools Community District moved their schools back online until January 2021.⁴⁴ Salt Lake County, Utah, also decided to move some of their schools back to virtual-only education as Utah's positivity rate exceeded 20% in November 2020.⁴⁵ The School District of Philadelphia was scheduled to move to a hybrid model in November 2020, opening school doors for the first time since March 2020 closures, but delayed this plan as cases failed to decrease.⁴⁶

III. ANALYSIS

A. What IDEA Requires

1. IDEA Requirements Generally

President Gerald Ford enacted the Individuals with Disabilities Education Act (IDEA) on November 29, 1975, to increase access to education for students with disabilities.⁴⁷ Prior to the enactment of IDEA, public schools only educated 20% of children with disabilities.⁴⁸ Two class action lawsuits sought to change this. *Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania* and *Mills v. Board of Education* were two lawsuits rooted in equal protection and due process arguments that recognized the state's obligation to educate children with disabilities.⁴⁹ After these cases and several others were decided in the early 1970s, several states sought federal legislation that

42. *Id.*

43. Theresa Waldrop, *Schools Go Back to Virtual Learning in Areas Hard Hit by Covid-19*, CNN (Nov. 12, 2020), <https://www.cnn.com/2020/11/12/us/schools-covid-19-return-to-online/index.html>.

44. *Id.*

45. *Id.*

46. *Id.*

47. U.S. DEP'T OF EDUC., *supra* note 5.

48. Cynthia L. Kelly, *Individuals with Disabilities Education Act - the Right 'IDEA' for All Children's Education*, 75 J. KAN. B. ASS'N 24, 25 (2006).

49. *Id.*

would offer both consistency within special education programs and subsidization of the costs associated with special education programs.⁵⁰ The Department states that one purpose of the IDEA is “[t]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.”⁵¹

The right to a FAPE for students with disabilities is a key tenet of the IDEA.⁵² The Supreme Court held in *Rowley* that a child “need only receive some educational benefit; maximization of potential is not required.”⁵³ The Supreme Court later held in *Endrew F.* that “to meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of a child’s circumstances.”⁵⁴ Students with disabilities are provided a FAPE that includes, “special education and related services that: are provided at public expense, under public supervision; meet state educational standards; approximate the grade levels used in regular education; and comport with the child’s IEP.”⁵⁵ The U.S. Department of Education clarifies that “appropriate” means that the “education must . . . meet the individual education needs of the student,” which are determined by “appropriate evaluation and placement procedures.”⁵⁶

Another key tenet of the IDEA is that children with disabilities must be taught in the least restrictive environment (LRE).⁵⁷ The LRE requirement stipulates that students with disabilities be educated with children who do not have disabilities to the maximum extent possible.⁵⁸

50. *Id.*

51. U.S. DEP’T OF EDUC., *supra* note 5.

52. *Id.*

53. Kelly, *supra* note 48, at 28.

54. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017); *see also Questions and Answers*, U.S. DEP’T OF EDUC. (Dec. 19, 2017), https://sites.ed.gov/idea/questions-and-answers-qa-on-u-s-supreme-court-case-decision-endrew-f-v-douglas-county-school-district-re-1/#citem_435b-fd48.

55. Kelly, *supra* note 48, at 27.

56. *Free Appropriate Public Education*, U.S. DEP’T OF EDUC. (Jan. 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/dis-issue03.html>.

57. *A Guide to the Individualized Education Program*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/parents/needs/spced/iepguide/index.html#process> (last modified Aug. 30, 2019).

58. *Id.*

Students with disabilities can only be removed from the general education classroom if the nature or severity of the child's disability does not allow the child to achieve satisfactory education in that classroom, even while using supplementary aids and services.⁵⁹ The Department states that placements can range from the least restrictive general education classroom; to a special education classroom, a special school, the child's home; or to the most restrictive, a hospital or institution.⁶⁰ While schools are allowed to consider the cost of the LRE for a child with special needs, "unless the cost is so high it substantially impairs the school's ability to provide educational services for all children, courts are generally unsympathetic to what may seem to be high costs for one student."⁶¹

The IDEA allows the student's IEP team, which consists of the student, parents or guardians, and teachers who have contact with the child and specialized training regarding students with disabilities, to create an IEP.⁶² This team determines the present level of academic achievement and functional performance (PLAAFP) for the student, with guidance from the student's test results and teacher's classroom observations, which helps the team create annual goals to address areas where the student has an identified educational need.⁶³ The PLAAFP statement must include information that,

describes the student's needs in an academic and/or functional skill area, states the impact of the student's disability on her involvement in the general education curriculum, documents the student's current levels of performance, [...] and informs the annual goals and the appropriate special education services and supports required to meet those goals.⁶⁴

The IEP contains the services and supports the school will provide for the child to help meet those goals, which are driven by an individualized assessment of the child's needs.⁶⁵

59. *Id.*

60. *Id.*

61. Kelly, *supra* note 48, at 32.

62. U.S. DEP'T OF EDUC., *supra* note 57.

63. *Id.*

64. *What Is Included in the IEP Document?*, IRIS CTR., <https://iris.peabody.vanderbilt.edu/module/iep01/cresource/q3/p06/> (last visited Apr. 21, 2021).

65. U.S. DEP'T OF EDUC., *supra* note 57.

Examples of accommodations include special seating charts and extra time to complete tests and assignments.⁶⁶ Related services include speech therapy and the assignment of a paraprofessional.⁶⁷ Occupational and physical therapy are related services that require a hands-on experience and cannot be adequately substituted online.⁶⁸ Paraprofessionals assigned to children with attention or behavioral accommodations cannot always provide supports that are compatible with virtual learning.⁶⁹

The IDEA also aims to protect children by requiring parent involvement in the development of IEPs.⁷⁰ Parental involvement can allow for increased advocacy on behalf of the child by someone who has an intimate understanding of the child.⁷¹ The child's parent must also give written consent before a school can provide a child with special education and related services.⁷² These procedural safeguards for parents allow them to influence the choices schools make regarding their child's education.⁷³

This law purports to authorize federal funding to pay for 40% of the increase in cost of educating children with special needs, yet for years federal funding failed to pay for even 10% of the cost increase.⁷⁴ The 2020-2021 school year saw a federal funding shortfall of 23.6 billion dollars, requiring states and districts to fund that imbalance.⁷⁵ While the IDEA claims to fund 40% of the cost of educating students with disabilities, in 2020 the federal share was only 13.2%, or a third of what

66. N.Y. STATE EDUC. DEP'T, *supra* note 15.

67. *See id.*

68. Susan Yellin, *Your Child's Educational Rights While Crisis Schooling*, ADDITUDE (June 21, 2021), <https://www.additudemag.com/iep-504-plan-crisis/>.

69. Michael F. Giangreco, *Remote Use of Paraprofessional Supports for Students with Disabilities*, UNIV. OF VT. CTR. ON DISABILITY & CMTY. INCLUSION (2020), <https://ed.sc.gov/districts-schools/special-education-services/information-about-covid-19-coronavirus/paraprofessional-planning-covid19/>.

70. Kelly, *supra* note 48, at 25.

71. U.S. DEP'T OF EDUC., *supra* note 57.

72. *Id.*

73. Andrew M.I. Lee, *What is the Individuals with Disabilities Education Act (IDEA)?*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/individuals-with-disabilities-education-act-idea-what-you-need-to-know> (last visited Apr. 21, 2021).

74. Kelly, *supra* note 48, at 26.

75. NAT'L EDUC. ASS'N, *supra* note 6.

the IDEA promises.⁷⁶ Over seven million public school students, or 14%, receive special education services.⁷⁷

Additionally, schools are required to track students' progress toward meeting annual goals set forth in the child's IEP.⁷⁸ Student progress is most appropriately monitored by numerical data that can be frequently collected, rather than anecdotal data that can be unreliable.⁷⁹ *Andrew F.* changed the law from requiring only the minimalist interpretation of the IDEA set forth in *Rowley* and broadened it to include meaningful progress appropriate for the child.⁸⁰ Standardized testing is one way schools can track student progress from year-to-year, including showing how students with disabilities are performing compared to their neurotypical classmates.⁸¹

2. Department of Education IDEA Guidance for COVID-19

The Department released guidance for schools regarding the COVID-19 pandemic on March 12, 2020.⁸² If a school closes due to COVID-19 and does not provide any educational opportunities to any students, then they are not required to provide services to students with disabilities.⁸³ However, if a school continues to provide educational opportunities to general education students, then “the school must ensure that students with disabilities . . . have equal access to the same opportunities, including the [FAPE portion] of [IDEA].”⁸⁴ Schools must ensure they are following accommodations listed in students' IEPs “to the greatest extent possible.”⁸⁵ Additionally, if a student with disabilities does not receive services while their school is closed, the

76. *Id.*

77. *Id.*

78. U.S. DEP'T OF EDUC., *supra* note 8.

79. *What is Included in the IEP Document?*, IRIS CTR., <https://iris.peabody.vanderbilt.edu/module/iep01/cresource/q3/p09/> (last visited Apr. 21, 2021).

80. Joshua Dunn, *Special Education Standards*, EDUC. NEXT (Apr. 13, 2017), <https://www.educationnext.org/special-education-standards-supreme-court-raises-level-benefit-andrew-f-v-douglas-county/>.

81. FAMILY MATTERS, PROGRESS MONITORING (2014), <https://www.a-central.com/cms/lib/IL50000424/Centricity/Domain/81/Progress%20Monitoring.pdf>.

82. U.S. DEP'T OF EDUC., *supra* note 10.

83. *Id.* at 2.

84. *Id.*

85. *Id.*

Department states that the child’s IEP team must make an individualized determination about whether compensatory education is needed.⁸⁶

Betsy DeVos, former United States Secretary of Education, had to clarify on March 21, 2020, that schools should not decide to close or not provide virtual learning to avoid educating students with disabilities.⁸⁷ She stated that complying with the IDEA should not prevent schools from providing virtual instruction, yet failed to explain how accommodations can be given virtually, leaving the hard part for districts to figure out.⁸⁸ To “help schools provide distance learning in compliance with federal law,” the Department clarified that, “In instances where technology is not accessible or where educational materials are not available in an accessible format, educators may still meet their legal obligations by providing equally effective alternate access to the curriculum or services provided to other students.”⁸⁹ In other words, teachers must provide “equally effective”⁹⁰ — a phrase the Department does not define or clarify — access to virtual educational materials to students with disabilities, even when the technology itself is inaccessible to the student, without federal guidance on how to do so.

B. CARES Act Waivers

The Elementary and Secondary Education Act (ESEA), a law passed to help fund schools and shorten achievement gaps, requires schools to demonstrate their implementation of “high-quality student academic assessments in mathematics, reading or language arts, and science.”⁹¹ State and district-wide assessments must include students with disabilities.⁹² School closures due to COVID-19 have created extraordinary circumstances in which many schools could not feasibly administer ESEA-required assessments.⁹³ Thus, the CARES Act

86. *Id.* at 3.

87. U.S. DEP’T OF EDUC., *supra* note 12.

88. *Id.*

89. *Id.*

90. *Id.*

91. 20 U.S.C. § 6311(b)(i)(2)(A).

92. U.S. DEP’T OF EDUC., IMPACT OF COVID-19 ON ASSESSMENTS AND ACCOUNTABILITY (2020), <https://oese.ed.gov/files/2020/03/COVID-19-OESE-FINAL-3.12.20.pdf>.

93. U.S. DEP’T OF EDUC., KEY POLICY LETTERS SIGNED BY THE EDUCATION SECRETARY (2020), <https://www2.ed.gov/policy/gen/guid/secletter/200320.html>.

included provisions to allow schools to waive standardized assessment requirements for the 2019-2020 school year.⁹⁴ The CARES Act also waives requirements for statewide accountability systems, which report the progress of all students and each subgroup of students toward meeting long-term goals set by the state.⁹⁵

The IDEA continues to require consistent progress monitoring of students with disabilities. As schools are now able to waive standardized assessments, they must ensure that they are still acting in accordance with IDEA if they had previously chosen to use standardized testing to monitor student progress on IEP goals. One New York middle school teacher reports that, “It was hard to give [the IEP planning committee] a report on how [the students] progressed toward their goals, because we’re not tracking [students] the same way that we were in the classroom.”⁹⁶ Teachers and school districts are required to continue to monitor student progress,⁹⁷ and if standardized testing is waived, they must find another way to do so. Schools may ensure compliance by substituting an alternative assessment or continuing other progress monitoring measures currently in place.

C. How Schools Are Handling Accommodations

1. Requiring Screen-Based Learning

School districts are handling the COVID-19 pandemic in a variety of ways. Many school districts have moved to virtual-only education. About 93% of households with school-aged children report that their children have used some form of distance learning, with 80% using virtual learning and 20% using paper materials sent home by the school.⁹⁸ Fifty-two percent of students were scheduled to attend school

94. CARES Act, *supra* note 2.

95. *Id.*; 20 U.S.C. § 6311(h)(1)(C)(vii).

96. Matt Villano, *Students with Special Needs Face Virtual Learning Challenges*, CNN (Sept. 24, 2020), <https://www.cnn.com/2020/09/24/health/special-needs-students-online-learning-wellness/index.html>.

97. *See* 20 U.S.C. § 6311(b)(i)(2)(A).

98. Kevin McElrath, *Schooling During the Covid-19 Pandemic*, U.S. CENSUS BUREAU (Aug. 26, 2020), <https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html>.

virtually only during the fall of 2020.⁹⁹ Nineteen percent of students were scheduled to attend a hybrid program.¹⁰⁰ Of the largest 200 school districts, two-thirds required virtual-only instruction.¹⁰¹

Virtual learning requirements are causing some students to struggle. Ruby, a student in Milwaukee, reported that her grades have dropped from As and Bs to Ds and Fs.¹⁰² Ruby's school, like many others, went virtual in March 2020 and remained that way through the fall.¹⁰³ Ruby stated that she does not know what her classmates look like, because no one turned on their cameras.¹⁰⁴ Some parents have reported that their students are failing every subject while they learn virtually.¹⁰⁵

Parents of students with disabilities in a Nevada school district are suing for an alleged failure to implement students' IEPs.¹⁰⁶ The parents allege that the Clark County School District (CCSD) has declared that they will not be implementing IEPs with one-on-one interaction components, despite their legal requirements to do so.¹⁰⁷ CCSD is allegedly instructing parents of students with disabilities that "their only course of educational relief is to use the same screen based, distance learning program as other children."¹⁰⁸

2. Screen-Based Learning Problems for Students with Disabilities

According to the National Center for Education Statistics (NCES), 14.1% of all public school students have some form of disability currently being served under the IDEA.¹⁰⁹ This includes 1.5% of students that have autism and 4.7% of students that have a "specific

99. Steve Liesman, *Half of U.S. Elementary and High School Students Will Study Virtually Only This Fall*, CNBC (Aug. 11, 2020), <https://www.cnbc.com/2020/08/11/half-of-us-elementary-and-high-school-students-will-study-virtually-only-this-fall-study-shows.html>.

100. *Id.*

101. *Id.*

102. Erin Richards, *Students Are Falling Behind in Online School*, USA TODAY NEWS (Dec. 17, 2020, 2:39 AM), <https://www.usatoday.com/in-depth/news/education/2020/12/13/covid-online-school-tutoring-plan/6334907002/>.

103. *Id.*

104. *Id.*

105. *Id.*

106. Class Action Complaint, *supra* note 13, at ¶ 5-6.

107. *Id.*

108. *Id.* at ¶ 7.

109. NAT'L CTR. FOR EDUC. STATS., *supra* note 18.

learning disability,”¹¹⁰ defined as, “a disorder in one of more of the basic psychological processes involved in understanding or using spoken or written language that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”¹¹¹ While ADHD is not considered to be a learning disability, it does inhibit a person’s ability to listen and think and therefore falls under the NCES’s specific learning disability category.¹¹² COVID-19 forced 55.1 million students out of their schools in the United States.¹¹³ Of the 50.8 million students enrolled in public school,¹¹⁴ over seven million have a disability served under IDEA.¹¹⁵

Strictly screen-based learning is problematic for students with disabilities, particularly those who have sight or hearing disabilities. Closed captioning is available on platforms like Zoom and Google Meet, but automated speech recognition (ASR) — essentially computer-generated captioning — has an accuracy rate of only 90%, when the goal should be closer to 99%.¹¹⁶ Blind students who rely on screen readers to listen to readings have reported that some digital textbooks are incompatible with their screen readers, leaving them unable to complete assignments.¹¹⁷ Screen readers can also struggle to process images instead of text; thus, teachers and school districts must ensure that electronic materials are in the correct format for accessibility.¹¹⁸ Programs such as ePub 3 have an increased reliability with screen readers and allow easy conversion from Microsoft Word documents and images.¹¹⁹

Less obvious than the problems for students with sight or hearing disabilities are the problems for students with learning disabilities,

110. *Id.*

111. *Students with Disabilities*, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/indicator_cgg.asp (last updated May 2021).

112. *Id.*; NAT’L CTR. FOR EDUC. STATS., *supra* note 18.

113. Peele & Riser-Kositsky, *supra* note 29.

114. Mike Kennedy, *Coronavirus Closings Leave Only 4 States with Any Public Schools Open*, AM. SCH. & UNIV. (Mar. 23, 2020) <https://www.asumag.com/safety-security/crisis-disaster-planning-management/article/21126823/coronavirus-closings-leave-only-4-states-with-any-public-schools-open>.

115. NAT’L CTR. FOR EDUC. STATS., *supra* note 18.

116. Anderson, *supra* note 13.

117. *Id.*

118. *Id.*

119. Elias Constantopedos et al., *Accessible Remote Learning During COVID-19*, UNICEF (Apr. 9, 2020), <https://www.accessibletextbooksforall.org/stories/accessible-remote-learning-during-covid-19>.

autism, or ADHD. Some students with autism are regressing; for instance, one student could no longer remember the letters of the alphabet.¹²⁰ Another student has regressed so far without in-person instruction that his attempts of self-harm have caused hospitalization.¹²¹ Yet another student with autism reported that he struggled for a month to learn how to unmute himself during live virtual lessons, leaving him unable to ask questions or even speak to his teacher.¹²² These students, and many like them across the country, have experienced impacts on their learning that do not directly correlate to their time out of the classroom. For example, instead of teaching a student how to read, teachers will now have to re-teach the alphabet to students who have regressed. This puts the child even further behind non-disabled peers who were able to benefit from virtual instruction.

The Centers for Disease Control and Prevention (CDC) acknowledges that children with ADHD can have specific challenges while virtual learning because ADHD symptoms include difficulties with regulating attention, hyperactivity, and impulsivity.¹²³ Virtual learning often includes long periods of time sitting in front of a computer, without the usual student movement from class to class.¹²⁴ Students with hyperactivity rely on physical activity to curb boredom and keep them engaged in their learning.¹²⁵ Students with ADHD also have more difficulty than their neurotypical peers at creating and maintaining social relationships, and solely-virtual learning does not allow for practice building these social skills.¹²⁶ Behavioral management plans are commonly found in IEPs of students with ADHD who struggle regulating their attention and impulses,¹²⁷ yet paraprofessionals who help implement these plans in the classroom cannot always provide the same services online.

The National Resource Center (NRC), funded by the CDC, created a list of resources and support for parents and teachers of children with

120. Knopf, *supra* note 16.

121. *Id.*

122. Richards, *supra* note 102.

123. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 17.

124. *Id.*

125. *Id.*

126. *Id.*

127. N.Y. STATE EDUC. DEP'T, *supra* note 15.

ADHD who are suddenly learning virtually.¹²⁸ These tips mostly include things like creating routines, maintaining structure, and staying calm while helping their child with ADHD learn virtually—but includes nothing about how to practice struggling social skills documented in behavioral management plans.¹²⁹

Neuroscientist John Foxxe stated, “For children with more severe learning and intellectual disabilities, though, online classes just don’t work. ‘For those kids, sitting at home is a disaster, an absolute disaster.’”¹³⁰ People like Dr. Foxxe, who have spent years studying the neurotypical brain and brains of those with ADHD, understand that the brain’s attention circuits are very different in those with ADHD, which makes using a computer for school rather than pleasure difficult for students.¹³¹ Dr. Foxxe understands that in-person learning is the only satisfactory option for students with learning and intellectual disabilities.¹³²

3. Students’ Experiences Learning Virtually

Kerriann Wilmot is the mother of a ten-year-old boy with ADHD.¹³³ She is also an occupational therapist with twenty years of experience specializing in treating children with ADHD.¹³⁴ Her son’s education was forced online due to COVID-19, and even she struggled with facilitating her son’s online learning, especially while working full time.¹³⁵ She describes her son becoming overwhelmed with online assignments and shutting his laptop out of frustration.¹³⁶ Her ten-year-old has every school assignment emailed to his Chromebook.¹³⁷ Wilmot is in a much better position than most parents to help her child with

128. *ADHD and COVID-19*, CHADD, <https://chadd.org/adhd-and-covid-19/> (last accessed Apr. 21, 2021).

129. *Id.*

130. Jon Hamilton, *Remote Learning’s Distractions Put Extra Pressure on Students with ADHD*, NPR (Sept. 1, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/09/01/907995034/remote-learnings-distractions-put-extra-pressure-on-students-with-adhd>.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

ADHD learn virtually, and she still struggles.¹³⁸ Families who cannot provide this level of care during the workday, or even a dedicated learning space for the child, are surely being harmed by virtual learning. Virtual learning for students with ADHD is creating new obstacles to education that their IEPs have not yet addressed, and cannot address, until the student can have a meeting to update his or her IEP.

One mother of a child with severe autism reports that her son Jack has hardly slept since his high school closed in March because changes to his routine cause him severe turmoil.¹³⁹ His school closed March through September, and Jack was supposed to have virtual instruction.¹⁴⁰ Jack previously received his education in a self-contained special education classroom with five other students, two paraprofessionals, and one special education teacher, where learning was hands-on.¹⁴¹ Once his school closed in March, this changed to virtual learning with his mother at home.¹⁴² She stated, “If we’re all being honest with ourselves, we all know Jack is not going to learn virtually. And to lay that on our laps, it’s not fair to Jack and it’s not fair to us.”¹⁴³

The COVID-19 guidance from the Georgia Department of Education does nothing to address situations for students like Jack — who rely on and whose IEP guarantees — hand-over-hand learning with the assistance of a paraprofessional that can only be done in person.¹⁴⁴ These students are regressing and going without their legal right to an appropriate public education, yet the Department was silent on their issues.

In Georgia, where Jack lives,¹⁴⁵ the base salary for a teacher in 2020 is \$37,052.¹⁴⁶ The Secretary of Education’s base salary as of January

138. *Id.*

139. Abdul-Malik, *supra* note 14.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. GA. DEP’T OF EDUC., STATE SALARY SCHEDULE (2019), <https://www.gadoe.org/Finance-and-Business-Operations/Budget-Services/Documents/FY20-TeacherSalaryScheduleReport.pdf>.

2021 is \$219,200,¹⁴⁷ and the Office of Special Education and Rehabilitation Service employs 199 people whose salaries averaged \$119,475 in 2018.¹⁴⁸ None of the 199 people in the Department's own Office of Special Education and Rehabilitation Service issued guidance on accommodations when virtual options are impossible. Not even the Secretary herself could give schools and school districts guidance on how to provide these accommodations that the federal government continues to require. But, somewhere in Georgia, a first-year teacher who makes less than 17% of what Betsy DeVos makes is required to figure out how to provide students like Jack with these impossible virtual accommodations and related services that comport with their IEPs, opening that teacher's district up to legal liability when the teacher ultimately fails.

Virtual learning simply cannot be a solution for all students. Jack needs — and his IEP requires — interactive, hands-on learning that his mother is ill-equipped to provide.¹⁴⁹ Jack's mother notes that he is regressing with certain behaviors like biting and grabbing due to his lack of an in-person education.¹⁵⁰

Students with autism are regressing, students with ADHD cannot concentrate on virtual learning, and blind students do not even have accessible materials to learn with. Seven million students with disabilities saw their schools close and had their accommodations that cannot be provided virtually stop altogether.

IV. SOLUTIONS

A. How Schools Can Change

1. *Opening Schools Safely*

Schools must provide alternatives to virtual instruction for students with disabilities. For some students with disabilities, there is no adequate substitute to in-person education. Schools must fulfill IEP

147. 5 U.S.C. § 5312; 4 U.S.C. § 5332.

148. *Office of Special Education and Rehabilitation Service Salaries of 2018*, FED. PAY, <https://www.federalpay.org/employees/off-of-spec-ed-and-rehab-serv> (last accessed Apr. 21, 2021) (citing Off. of Pers. Mgmt. Enter. Hum. Res. Integration dataset).

149. Abdul-Malik, *supra* note 14.

150. *Id.*

requirements, even if that increases the costs. Despite the ongoing COVID-19 pandemic, the CDC stated guidelines for safely reopening schools. Teaching adequate handwashing and correct mask-wearing techniques can reduce the spread of COVID-19.¹⁵¹ Schools should ensure that ventilations systems are operating properly and increase circulation in classrooms by opening windows.¹⁵² Desks should be placed six feet apart and in the same direction to ensure social distancing.¹⁵³ Physical partitions, such as plexiglass, can also be installed where space is limited, such as bathroom sinks.¹⁵⁴ Because eating must be done without a mask, children should also be spaced six feet apart in cafeterias where outdoor dining is not feasible.¹⁵⁵

Another strategy that could be effective for students with disabilities is the implementation of a pod system. Teachers could divide students into small groups that have limited interaction with other students.¹⁵⁶ By limiting exposure to large groups of people, exposure to COVID-19 declines as well.¹⁵⁷ Because students with disabilities must be educated in the LRE, teachers must be mindful that students with disabilities should be with their non-disabled peers whenever possible when creating their pod.

An essential part of reopening schools is ensuring that students or faculty with COVID-19 symptoms do not attend class.¹⁵⁸ Schools should consider screenings upon entry such as temperature checks and asking if the student or staff member has any symptoms associated with the virus or if they have been in close contact with someone who has

151. *Operational Strategy for K-12 Schools through Phased Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> (citing Nat'l Ctr. for Immunization and Respiratory Diseases, Div. of Viral Diseases).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

tested positive.¹⁵⁹ Those who are sick must stay home to avoid risk of transmission of the virus to others.¹⁶⁰

As schools begin the reopening process, many are finding that teachers and fellow students are considered “close contacts” and are required to quarantine from school due to exposure to a person positive with COVID-19.¹⁶¹ This is leading to further teacher and other staffing shortages in schools.¹⁶² One way to prevent these shortages is to implement a school or district-wide COVID-19 testing program.¹⁶³ Rapid antigen testing offers results in as little as fifteen minutes.¹⁶⁴

New York City Public Schools are requiring staff and students to receive mandatory testing for COVID-19 as a condition for reopening.¹⁶⁵ Staff and students are selected at random for weekly testing, with about 20% of the school body being tested each month.¹⁶⁶ The district’s positivity rate was .57%, lower than New York City’s 6.74% positivity rate.¹⁶⁷

Some Maryland and Massachusetts districts opted for pooled testing, where a group of students swab their noses and combine the swabs and that entire batch is tested together as one sample.¹⁶⁸ The premise is that if the group test result is negative, the entire group is negative; this procedure only uses one test for the group instead of a test for each person, which saves valuable resources.¹⁶⁹ If the group result is positive, each person then needs to be tested individually.¹⁷⁰ The CDC

159. *CDC Facilities COVID-19 Screening*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 12, 2020), <https://www.cdc.gov/screening/index.html> (citing Off. of Safety, Sec., and Mgmt.); *CDC Facilities COVID-19 Screening*, CTRS. FOR DISEASE CONTROL & PREVENTION (2021), <https://www.cdc.gov/screening/paper-version.pdf>.

160. *See supra* note 151.

161. *See* Erin Richards & Ken Alltucker, *Schools Already Testing Students and Staff for Coronavirus Say It’s Crucial to In-person Class: ‘It’s Worth It,’* USA TODAY (Mar. 21, 2021, 8:08 PM), <https://www.usatoday.com/story/news/education/2021/03/20/covid-19-testing-schools-growing/4751983001/>.

162. *See id.*

163. *See id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

recommends that pooled testing is best suited for when the expected number of positive cases is very low.¹⁷¹

COVID-19 vaccination is the next logical step, but because children were not involved in the vaccine clinical trials, we do not yet know if the vaccine is safe for them to receive.¹⁷² On April 9, 2020, Pfizer requested the FDA expand their vaccine's emergency use authorization to include children between ages twelve and fifteen, which could take several weeks.¹⁷³ Experts are hopeful that the Pfizer and Moderna vaccines will soon be available for children as young as six months by the start of the 2021-22 school year.¹⁷⁴ The Biden Administration announced in March of 2021 that teachers and other school staff were prioritized for vaccine distribution and received vaccinations at the end of the month.¹⁷⁵ The CDC released guidance stating that after an individual is fully vaccinated (two weeks after the last vaccine dose), most individuals no longer need to quarantine or get tested after a known COVID-19 exposure if they are asymptomatic and follow their recommended protocols.¹⁷⁶ This would allow a fully vaccinated teacher who is exposed to a person with COVID-19 to remain teaching without having to spend valuable classroom time quarantining or getting tested for the virus. Fully vaccinating adults in schools provides significant protection against transmission of COVID-19.¹⁷⁷

171. *Id.*

172. *Are We One Step Closer to a Covid-19 Vaccine for Kids?*, CLEVELAND CLINIC (Apr. 5, 2021), <https://health.clevelandclinic.org/are-we-one-step-closer-to-a-covid-19-vaccine-for-kids/>. Vaccine availability is constantly evolving. The following data was effective April 5, 2021, but has likely changed. For current information on vaccine availability, please see *Vaccines for COVID-19*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/> (last visited Oct. 24, 2021).

173. Sara G. Miller, *Pfizer Requests FDA Clearance for Vaccine in Kids Ages 12 to 15*, NBC NEWS (Apr. 9, 2021, 4:59 PM), <https://www.nbcnews.com/health/health-news/pfizer-requests-fda-clearance-vaccine-kids-ages-12-15-n1263649>.

174. CLEVELAND CLINIC, *supra* note 172.

175. Madeline Will, *Vaccine Access Speeds Up for Teachers After Biden's Declaration*, EDUC. WEEK (Mar. 3, 2021), <https://www.edweek.org/policy-politics/vaccine-access-speeds-up-for-teachers-after-bidens-declaration/2021/03>.

176. *Interim Public Health Recommendations for Fully Vaccinated People*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 28, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.

177. Eliza Shapiro & Shawn Hubler, *If Teachers Get the Vaccine Quickly, Can Students Get Back to School?*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/15/us/teachers-vaccine-school.html>.

Re-opening schools safely is critical for students with disabilities to receive their appropriate accommodations and related services that cannot be implemented virtually. Schools should prioritize moving back to in-person instruction for students with disabilities, but they must re-open safely and follow the CDC's protocols to help prevent the transmission of COVID-19 to faculty, staff, students, and families.

2. *Compensatory Education*

Opening schools safely may not be possible in all districts, due to staff shortages, COVID-19 outbreaks, or hesitancy of parents to allow their children to return to school. Schools must provide services by other, non-virtual means if it is not attainable to re-open. Compensatory education is a viable option in this scenario. Compensatory education was created to mend educational and functional deficits a child suffers as a result of being denied a FAPE by providing additional educational services outside of school.¹⁷⁸ The goal is essentially to put the student into the place they would be in if the school had been providing these services.¹⁷⁹ Services can range from accessible transportation and physical therapy appointments to additional tutoring in a struggling area.¹⁸⁰

Schools without in-person instruction should prepare to offer compensatory education to students with disabilities if the school cannot provide the accommodations or related services listed in the student's IEP. If a student's IEP requires hand-over-hand learning, physical or occupational therapy, or use of a paraprofessional, those accommodations are not possible virtually. Therefore, the school needs to provide the student with compensatory education to make up for this learning deficit. Some states have already issued guidance on how to implement compensatory education due to services lost during COVID-19.

The New Jersey Department of Education (NJDOE) issued guidance for compensatory education that can be implemented as a result of

178. *Special Education & COVID-19 FAQs*, COLO. DEP'T OF EDUC., https://www.cde.state.co.us/cdesped/special_education_faqs (last updated July 2021).

179. *See id.*

180. Lisa Lightner, *IEP Compensatory Education (Comp Ed): What Is It? How Do I Get It?*, A DAY IN OUR SHOES (June 21, 2019), <https://adayinourshoes.com/comp-ed-compensatory-education/>.

COVID-19.¹⁸¹ NJDOE advises that compensatory education could be appropriate for a student with disabilities if the student missed services during the pandemic and that lack of services denied the student a FAPE.¹⁸² The student’s IEP team, “consist[ing] of the student, the student’s parent(s)/guardian(s), the student’s teachers, related service providers and other representatives from the student’s school district,” must decide if compensatory education is appropriate on an individual basis.¹⁸³ This team determines “the need, type, amount, frequency, duration, and location of compensatory education necessary to address lack of progress toward IEP goals and objectives resulting from missed services.”¹⁸⁴

NJDOE suggests that the IEP team first review formative and summative assessments, including formal and informal assessment data, of students with disrupted services to ascertain “student progress toward IEP goals and objectives” during virtual or hybrid instruction.¹⁸⁵ Next, “the IEP team should determine what services were missed and what goals and objectives the student was expected to achieve but did not achieve due to the absence of services.”¹⁸⁶ Finally, the IEP team should decide if compensatory education is required to allow the student to achieve those goals and objectives.¹⁸⁷ Funding for compensatory education is available from the CARES Act, in addition to the individual district’s federal IDEA funding.¹⁸⁸

The Massachusetts Department of Elementary and Secondary Education (MADESE) also issued guidance on providing compensatory education to students with disabilities for services lost during the

181. Memorandum from Peggy McDonald, Ed.D., Assistant Comm’r, Div. of Student Servs., N.J. Dep’t. of Educ., to the Chief Sch. Adm’rs, Charter Sch. & Renaissance Sch. Project Leads, Adm’rs of Approved Priv. Schs. for Students with Disabilities, Guidance Regarding Compensatory Education Determinations for Students with Disabilities as a Result of COVID-19 (Mar. 3, 2021), <https://www.nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminin gCompensatoryEducationforStudentswithDisabilities.pdf>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

COVID-19 pandemic.¹⁸⁹ MADESE limits “COVID-19 Compensatory Services” to only those services needed to remedy skills or knowledge that were lost due to the emergency suspension of in-person education and services.¹⁹⁰ MADESE recommends that students with disabilities who did not or were unable to receive any special education services should be prioritized and that compensatory education determinations should be made as soon as possible, but no later than four months after the guidance was issued.¹⁹¹

Like NJDOE, MADESE also encourages schools to use assessments to track student progress toward IEP goals.¹⁹² However, MADESE also suggests gathering data from students’ families and caretakers, because those individuals have spent the most time with the student in the preceding months.¹⁹³ Families and caretakers are encouraged to provide information about the student’s engagement, behavior, and how the student is handling the pandemic generally, including any barriers to remote learning.¹⁹⁴ MADESE also proposes using student data from previous years to determine the student’s ability to recover lost skills, such as student progress after the extended break during summer.¹⁹⁵ Again, the student’s IEP team is ultimately responsible for using this data to decide on an individual basis if a student with disabilities requires compensatory services.¹⁹⁶

MADESE also clarifies that if a student has moved schools or districts since the 2019-2020 school year, the current school where the student is enrolled is responsible for determining if the student needs compensatory education.¹⁹⁷ However, the former school is financially responsible for providing compensatory education.¹⁹⁸ Funding is again available from the IDEA and CARES Acts, but MADESE also suggests

189. Memorandum from Russell Johnston, Senior Assoc. Comm’r, Mass. Dep’t of Elementary & Secondary Educ. to Superintendents, Adm’r of Special Educ., Exec. Dirs. of Collaboratives, Leaders of Approved Special Educ. Schools, Other Educ. Pers., and Other Interested Parties, Coronavirus (COVID-19) Special Educ. Tech. Assistance Advisory 2021-1: COVID-19 Compensatory Servs. and Recovery Support for Students with IEPs (Aug. 17, 2020).

190. *Id.* at 3.

191. *Id.* at 4-5.

192. *Id.* at 5.

193. *Id.*

194. *Id.*

195. *Id.* at 13.

196. *Id.* at 12.

197. *Id.* at 10.

198. *Id.*

that districts consider allocating funding recovered from the School-Based Medicaid program.¹⁹⁹

While the United States Department of Education needs to issue guidance on how schools are required to provide compensatory education, New Jersey and Massachusetts offer other states insight into how they are proceeding. Individualized determinations from IEP teams are necessary to figure out what type of compensatory services are needed and for how long. If a student with disabilities is not receiving a FAPE, their school is legally required to provide compensatory services to make up for the progress the student should be making. Massachusetts's quick timeline for identifying potential students with disabilities who may require compensatory education and determining the extent of services should be something all states prioritize as they move forward.

B. How the Law Can Change

1. Fully Funding the IDEA

The most effective way to ensure students with disabilities have their accommodations and related services provided is to fully fund the IDEA. If schools saw an increase in federal revenue that comported with the 40% of funding that IDEA is supposed to provide, compensatory education would be possible for an increasing number of students. Surely a free, appropriate public education that guarantees a child the right to an IEP also ensures that the child's school be fiscally able to provide it. Congress needs to enact legislation that fully funds the IDEA instead of forcing state and local governments to compensate for the federal government's shortcomings.

For example, while the CARES Act included \$13.5 billion in funding for school districts, in California the money is distributed according to family income levels, which means the funding can range roughly from \$0-\$5,000 per student.²⁰⁰ With such a wide variety of

199. *Id.* at 11.

200. Daniel J. Willis, *How Much Will California School Districts Get in Coronavirus Funds?*, EDSOURCE (May 5, 2020), <https://edsource.org/2020/searchable-database-how-much-will-california-school-districts-get-in-emergency-stimulus-funds/630684>.

funding distributed to districts, some schools will be unable to provide additional compensatory services for students with disabilities. This discrepancy does not help students who rely on in-person services and will only exacerbate any regression that is occurring because districts cannot afford the services that students need. Congress needs to ensure that schools have the necessary funding to re-open safely and pay for appropriate compensatory services for students who require it.

The federal government should be concerned with what is best for each student with disabilities. During the COVID-19 pandemic, it was surely best for some students to have their schools physically closed and operating remotely to prevent the transmission of the virus. However, this left some students with disabilities without the accommodations they are entitled to, and those students are suffering. No child should have to go without compensatory education or an in-person education because the federal government does not consider the money required to pay for those services to be worth it. Congress must ensure that any school trying to open has the resources they require. Congress must also ensure that any student entitled to compensatory education is able to receive it by allocating enough funding to each school district.

Because the CARES Act also allowed for waivers of standardized testing requirements,²⁰¹ teachers lost those test results as a way to monitor student progress. While there were certainly logistical problems with implementing state-wide testing during a pandemic, the CARES Act provided no alternative for teachers who rely on those results. Congress should not have created *another* problem for teachers to have to address, without guidance from the Department, during a pandemic.

V. CONCLUSION

COVID-19 has forced all Americans to change the way they live their everyday lives. Most people are now able to put on their mask, maintain social distancing, and resume most of their usual activities again. But, for students with disabilities, many have lost skills that will take months to re-learn, putting them further behind than they were at the start of the pandemic. Schools should prioritize re-opening safely to help get those students back into their classrooms and back to making progress on their IEP goals. When re-opening schools is not possible, or

201. CARES Act, *supra* note 2.

once schools that failed to effectively implement students' IEPs in a virtual setting re-open, those schools must provide compensatory education to make up for the FAPE that students with disabilities were denied while they were required to learn virtually. The federal government, and specifically the Department, need to look at states like New Jersey and Massachusetts for examples on how to provide compensatory education in a way that is both expedited and fiscally responsible.²⁰²

The government has a responsibility to ensure that states can actually follow laws passed by Congress by fully funding the IDEA and the compensatory education required after schools closed due to COVID-19. The current President, and all future presidents, have a moral and ethical responsibility to appoint competent leaders for the Department who will advocate tirelessly for students with disabilities, with the hope of ensuring that the next global event does not harm students with disabilities to this extent again. Our students deserve someone who will champion their unique issues.

Many students harmed by solely virtual instruction could be harmed irreparably — think of the students with autism who have regressed so far in their behavior that they are now self-harming and hospitalized.²⁰³ While their neurotypical peers were able to continue their learning virtually, albeit still with immense change and difficulty, students with disabilities lost their physical and occupational therapy services. The lack of those related services hindered progress towards annual goals listed in IEPs. Further, they lost their access to peers to practice struggling social skills mentioned in behavior plans. We must ensure that these students receive the compensatory education necessary to put them back on track.

Should the federal government refuse to fully fund the IDEA, the safe re-opening of schools, or the compensatory education required for students with disabilities whose schools failed to effectively implement students' IEPs in a virtual setting, we risk irreparable harm to our most vulnerable children.

202. McDonald, *supra* note 181; *see also* Johnston, *supra* note 189.

203. Knopf, *supra* note 16.