


Stock and Leader
ATTORNEYS AT LAW
When Decisions Matter



“COVID Exposures”: FAPE-Focused Strategies for Post-Pandemic Educational Recovery

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Pennsylvania

Where “I” am coming from:
-Almost 1,000 due process complaints in 2019
-90 due process decisions in 2019

What motivates us?
-Avoiding litigation, large awards, and attorneys’ fees
-Proactive defense

Utah

Where you are coming from:
-3 due process complaints went to decision in 2019-2020
-18 due process requests, 1 due process decision in 2020-2021
-33 state complaints, in 2020-2021

What motivates you in UT:
-High levels of corrective action in state complaints and audits
-Robust monitoring systems
-Demands for improved postsecondary outcomes

Slide 2

A35 love this!

Author, 7/12/2021

Exposure Notification #1: Absenteeism demands strategic action.

*McCourt School of Public Policy, "Present Danger: Solving the Deepening Student Absenteeism Crisis," Georgetown University, Future Ed, Jordan, Phyllis W. (May 2021).

- Pre-Pandemic Attendance Issues:
 - 1/6 students were chronically absent
 - 10% or more of instruction was lost by chronic non-attenders
- Post-Pandemic Attendance Issues: Attendance gap
 - 7X increase in the number of students missing 50% or more
 - More elementary students are absent than previously.
 - There is greater disparity in attendance rates with low income, disabled.



Utah Stat: "There have also been corresponding decreases in the percentage of students reading at or above benchmark this school year in comparison to last year" on the Acadience Reading Assessment. "In terms of percent of students reading at or above benchmark, the data showed that the largest percentage point decrease occurred in first grade across all demographic and racial/ethnic groups."

Exposure Notification #1: Absenteeism demands strategic action.

Safe Assumptions (even without all the data):

- Assume "worse than believed."
- Assume greater impact on the student with a disability.
- Assume relationships fundamental to attendance are broken.
- Assume that without intervention, schools will see declines in reading and graduation rates.

Utah Stat: Reading declined by 3rd grade; high school graduation rates declined, when attendance was a concern. Utah Education Policy Center, "Research Brief: Chronic Absenteeism." University of Utah (July 2021). <https://dasy2hmf5a3.cloudfront.net/wp-content/uploads/sites/2/2017/05/23104652/ChronicAbsenteeismResearchBrief.pdf>

- Assume attendance issues will impact achievement negatively.
- Assume academics are not the only impacted area- functional, behavior, social, and psychological are impacted.

Exposure Notification #1: Absenteeism demands strategic action.

• Strategy: Meet Disengagement with Engagement

- Engage ARP/ESSER II Funds
- Engage learners who lost the most and those most vulnerable to loss
- Engage IEP teams in evidence-based interventions:
 - home visits
 - increase in intensity/access to counseling
 - "electronic nudges"
 - individualized instruction or mentorship (targeted)
 - transition services for return to school
 - shift focus from consequences to supportive compliance
 - intensify connection



Exposure Notification #1: Absenteeism demands strategic action.

- Strategy: Treat Attendance as a FAPE issue; not just a legal issue.
- Utah's Attendance Moratorium and R277-607 (proposed new language)
 - **R277-607-3. Absenteeism and Truancy Policy Requirements.**
 - (ii) ensures valid excused absences for mental health or behavioral health are not used to circumvent Free Appropriate Public Education (FAPE) requirements or other educational services requirement under federal law including the Individuals with Disabilities Education Act (IDEA); and
 - (iii) ensures that between March 17, 2021, and June 1, 2022, that no punitive action is taken against a student or student's parent for being truant.
 - **R277-607-2. Definitions.**
 - (2) "Behavioral health"
 - (3) "Mental health"

Exposure Notification #1: Absenteeism demands strategic action.

“THE STUDENT ALWAYS COMES FIRST.”

*Excusals of absences for known mental/behavioral health reasons do not absolve a school of FAPE responsibilities and implicate additional Child Find concerns. Often, when non-attendance becomes legally excused, schools shift their focus away from these students. Instead, as suggested by the statutory revisions, attendance is not merely a measure of “duffs in seats” (or competencies gained) but instead a measure of exposure to instruction, response to instruction, response to intervention, and a check-in on well-being. **Non-attendance is a symptom of a larger FAPE and Child Find problem.**

Exposure Notification #1: Absenteeism demands strategic action.

- Strategy: Treat Attendance as a FAPE issue; not just a legal issue.
- Shift focus from legal consequences to educational consequences and meet with action.
 - Absenteeism as a FAPE-limiter
A.W. v. Middletown Area Sch. Dist., 68 IDELR 247 (M.D. Pa. 2016).
 - Absenteeism as a behavior
 - That demands IEP team reaction and responsibility
 - That demands formal and informal analysis

Attendance can be a strong indicator for behavioral analysis. It should be utilized the same way that data supporting a functional behavior assessment is used- not the “end” consideration, but a very important factor. Absenteeism is a behavior, such that it requires a review of the antecedents and consequences. Without a targeted attempt to understand the behavior and a targeted intervention that attempts to end the behavior and redeem educational deprivation, missed days exacerbate feelings that are at the root of non-attendance: disenfranchisement, avoidance, fear of return/transition, and even anxiety and depression. Like other data behavior, behavior left unmanaged will continue and increase.

Exposure Notification #1: Absenteeism demands strategic action.



- See, for example:
 - Independent Sch. Dist. No. 413 v. H.M.J.*, 66 IDELR 41 (D. Minn. 2015)
 - Dept. of Educ., State of Hawaii*, 212 LRP 3917 (HI SEA, 10/06/20)
 - Pocono Mountain Sch. District*, (SEA Pa 2014)
- Absenteeism as a Behavior:
 - That confronts social responsibilities – the “School to Prison Pipeline” is fueled by non-attendance/disengagement (among other factors we don’t have as much control over).

Exposure Notification #1: Absenteeism demands strategic action.

- Absenteeism as a Child Find-er (trigger)
 - For students currently IDEA identified with new needs (even prior to a triennial evaluation) OR
 - For students not currently identified AND
- WITH demonstrated
 - home concerns
 - medical concerns
 - private provider concerns
 - behavior concerns
 - or other disability-related reasons for nonattendance



Exposure Notification #1: Absenteeism demands strategic action.

- Consider the case of *A.P. v. Pasadena Unified Sch. Dist.*, 221 U.S. Dist. LEXIS 42440 (C.D. CA Jan. 26, 2021).

Question for Court: When was the district “on legal notice” that the child displayed symptoms of disability, including absenteeism and school refusal?

Holding: As of Fall 2017, District acquired “actual knowledge” that student has displayed symptoms of an emotional disturbance in the form of 2 psychologist reports (indicating that diagnoses of anxiety and depression were triggered by stress due to school pressure and resulted in school avoidance and inability to manage schoolwork”) and would likely suffer from them again. The district’s 504 plan also expressly recognized her disabilities as “substantially limiting” various major life activities.



Exposure Notification #1: Absenteeism demands strategic action.

- District was NOT entitled to wait for a "reasonable amount of time" after the 504-plan meeting to see "whether it worked," considering the severity of the student's history and patterns. The district should have reviewed the student's "one month" of academic success "in the context of other information they [knew] about the child."
- The argument that schools are not "mental health providers" or do not have an obligation to assess students who are having problems at home that are not believed to manifest at school, is unpersuasive, as the obligation to educate, includes an obligation to address emotions and behavior.
- Truancy/attendance notices to parents do not shift the child find obligation from school to parents, when the school is on notice of emotional disabilities that would result in attendance concerns (e.g., school refusal). There is no legal form of a 10 day "dis-enrollment" from special education because a student has stopped attending, regardless of pupil accounting requirements.
- Engagement with parents on attendance issues is active: asking for permission to exchange information, asking questions of the parents about the issue, scheduling IEP meetings, documenting interventions, and measuring results
 - Letter to Clark, 48 IDELR 77 (OSEP 2007): "it remains the Department's position that the term "educational performance" as used in the IDEA . . . is not limited to academic performance."

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Exposure Notification #2: Heed the Intersection of Attendance Concerns and Child Find/Eligibility

• What is the impact of attendance in child find, intervention, and evaluation?

- Attendance is a behavior to be investigated via the Child Find obligation, in intervention and evaluation.
- A lack of attendance can rarely completely excuse Child Find, intervention, and evaluation obligations.
- In a multi-tiered system of support (MTSS) structure for interventions, attendance can be one factor to be addressed in either or both a behavior or academic-based intervention.



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Exposure Notification #2: The Intersection of Attendance Concerns and Child Find/Eligibility

• **Consider:** *Mountain West Montessori Academy*, Utah Hearing Officer Decision (2019)(finding a Child Find violation, but without demonstrated harm).

"A disability is suspected when the school is put on notice that symptoms of the disability are displayed by the child. See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121. **The duty is triggered by a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. . . . A "suspicion" requires a "difficult and sensitive" analysis**

. . . The Child Find obligation matures, and the school may not delay an initial evaluation, when the school suspects a disability and the need for special education. *Memorandum to State Directors of Special Educ.*, 67 IDELR 272 (OSEP 2016)."

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Exposure Notification #2: The Intersection of Attendance Concerns and Child Find/Eligibility



- What is the impact of attendance on IDEA eligibility in an evaluation?
- Except for the ability to secure the presence of a child for evaluation, attendance can rarely, in and of itself, excuse a finding that a student is IDEA ineligible. With the ability to complete home-based and virtual evaluations, teams have more ways than before to evaluate students with school attendance concerns.
- *Indep. Sch. Dist. v. E.M.D.H., (8th Cir. 2020).*



Exposure Notification #2: The Intersection of Attendance Concerns and Child Find/Eligibility

- Learning Loss v. Learning Disability
- IDEA identification is a two (2) pronged approach: (1) determination of whether the child has a qualifying disability and (2) determination of the need for specially designed instruction and related services ("special education").
- The eligibility determination must also consider whether, "with appropriate instruction and learning experiences, the child achieves adequately 34 C.F.R. §300.309(a)(1). Moreover, a student must not be determined to be a student with a disability: If the determinant factor for that determination is: (1) Lack of appropriate instruction in reading, including the essential components of reading instruction (phonemic awareness, alphabetic principle, vocabulary, comprehension, and fluency); (2) Lack of appropriate instruction in mathematics; or (3) Limited English proficiency; and b. If the student does not otherwise meet the eligibility criteria. 34 C.F.R. § 300.306 (Determination of Eligibility).
- If there is a lack of appropriate instruction, the need for services may be found to not be "by reason of disability" but rather "by reason of inappropriate instruction."



Exposure Notification #2: The Intersection of Attendance Concerns and Child Find/Eligibility

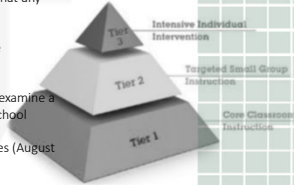
• Lack of appropriate instruction v. Loss of instruction: a loss of instruction due to attendance concerns does not = lack of appropriate instruction, a potential determining factor to "rule out" disability.

- The focus is on a determination that some factor outside of the child's intellect is to blame and the primary factor for their current concerns. That is pretty rare.
- Lack of participation is not the same as lack of appropriate instruction; a child's disengagement from learning in the classroom does not make determining factor in eligibility.
- Lack of engagement/attendance should not foreclose identification. Non-participation and non-attendance are interfering behaviors but would have to be proven to be a determining factor in a pattern of failure to be a strong consideration weighing against eligibility.



Exposure Notification #2: The Intersection of Attendance Concerns and Child Find/Eligibility

- SLD identification methods are designed to combat over-reliance on 1 determining factor, such that attendance should also not be an over-riding factor in that or any other eligibility analysis. Parents should not leave an evaluation meeting with the thought that any one factor decided their child's "fate":
 - RTI (demonstrating insufficient progress to meet state standards)
 - Combination -RTI + Severe Discrepancy
 - Alternative Method (research-based procedures that examine a pattern of strengths and weakness approved by the school board)
 - Utah State Board of Education: Special Education Rules (August 2020)
- (Specific Learning Disabilities), 34 CFR § 300.8(C)(10).



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Exposure Notification #3: Recovery Services did not cover it all; Implement Proactive Measures

- Evaluate global and individual short comings in the implementation of FAPE in the Spring of 2020 and 2020-2021 school year and provide Compensatory Services.
 - Federal Guidance supporting compensatory services for pandemic-based deprivations.
 - U.S. Department of Education Guidance and Policy Letters A. COVID-19 Related Issues-Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (EDU 2020).
 - "Compensatory services should be discussed in the context of students who are absent for an extended period while schools remain open and students who do not receive services during closures."
 - Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities, 76 IDELR 104 (OSERS/OCR 2020)
 - Where there was delay in providing services, IEP teams must make an individualized determination whether and to what extent make up services may be needed [when school resumes].



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Exposure Notification #3: Recovery Services did not cover it all; Implement Proactive Measures

- ESSERS/American Recovery Plan (ARP) Money targeted at learning losses.
- USBE State Education Agency's Guidance Supporting COVID Recovery Services: individually determined service to place the student in the position the student would have been had the LEA provided appropriate services during the pandemic; a remedy to address denials of FAPE that resulted from COVID restrictions.
 - Identification of those who are eligible based upon: services offered, progress, data, meeting *Endrew F.* definition of FAPE, parent concerns.
 - Determination of amount and nature; not a blanket remedy.
 - No time-limiter on when can be provided; just not supplanting current IEP services.
 - Prioritize those with greatest known deprivations, or students falling under LEA-wide limitations.

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Exposure Notification #3: Recovery Services did not cover it all; Implement Proactive Measures

- Evaluate FAPE-based deprivations that occurred after a return to normal instruction in the 2020-2021 school year because of quarantine, school closures, required transitions to virtual or alternative education, or individual disability-related absences and offer compensatory services
 - Compensatory Education v. Recovery Services
 - **Compensatory Education (CE)**—An equitable remedy for the substantive deprivation of FAPE (failure to provide FAPE as defined by *Andrew F.*), implying fault; a form of compensation for a past deprivation of educational opportunity, normally crafted by a court. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 116 (10th Cir. 2008); *M.S. v. Utah Sch. For the Deaf & Blind*, 822 F.3d 1128, 1135-6 (10th Cir. 2016).
 - **Recovery Services**—a proactive remedy for the substantive deprivation of FAPE of a type and duration to be determined by and implemented by the IEP team as a result of the pandemic.

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Exposure Notification #3: Recovery Services did not cover it all; Implement Proactive Measures

- Good-faith “ownership” of FAPE deprivations is the best proactive defense.

PROACTIVE



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Exposure Notification #3: Recovery Services did not cover it all; Implement Proactive Measures



- Evaluate data from the 2020-2021 school year utilized to provide Recovery Services and to bolster your ESY analysis.
 - COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services, (OSEP 2020):

“IEP determinations regarding ESY services are prospective and not intended to make up for past denials of FAPE” (and not intended to progress on new goals).

But consider: *Elizabeth B. v. El Paso Cty. Sch. Dist.*, 11, 841 Fed Appx. 40,44 (10th Cir. 2020) (reiterating the *Johnson* standard to examine whether an IEP without ESY would “jeopardize the student’s progress” and to conduct a needs-based analysis).

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Exposure Notification #3: Recovery Services did not cover it all; Implement Proactive Measures

- 34 C.F.R. 300.105(b). ESY is: Special education and related services that are provided to a child with a disability;
 - beyond the normal school year;
 - in accordance with the child's IEP;
 - at no cost to the parents; and
 - in conformance with SEA standards.
- ***No standard for determining is set forth in IDEA regulations**
- 2012 Extended School Year Services, Technical Assistance, Utah State Office of Education; R277-751 (ESY Rule)
 - ESY's purpose is to maintain skills on current IEP goals to ensure a FAPE.
 - ESY eligibility is determined by a retrospective and predictive analysis of a student's risk of significant regression in skills and individualized need for FAPE.



Exposure Notification #3: Recovery Services did not cover it all; Implement Proactive Measures

• Per *Johnson v. Independent School District of Bixby*, 921 F.2d 1022 (10th Circuit, 1990), regression data alone is not sufficient basis for ESY decisions, but rather should be based on a multifaceted inquiry by the IEP team as to:

- **Retrospective data**-showing concerns with regression and recoupment.
- **Predictive data**, such as;
 - The degree and nature of the student's disability
 - The student's rate of progress on IEP goals
 - Any physical or behavioral concerns regarding the student
 - The areas of the student's curriculum that need continuous attention
 - Emerging skills
 - The student's vocational and transition needs
- **Circumstantial considerations** based on information about unique situations in the student's home, neighborhood, or community, including those such as;
 - The availability of alternative resources (including parent ability to provide the requested structure at home).
 - The ability of the student to interact with nondisabled students.
 - Whether the requested service is extraordinary to the child's condition.
- **Anecdotal reports** from teachers, parents, caregivers, and related service providers.
- **Data from measures of daily performance** such as state-wide assessment data, norm-referenced test data, checklists, work samples, and others

Compensatory Services v. Recovery Services v. ESY

WHAT	Compensatory Education (CE)	COVID Recovery Services	ESY
HOW	Individual determination	Individual determination	Individual Determination
WHO	Hearing Officer, State Investigator, mediator, IEP team	IEP team/Admin.	IEP Team
WHY	Litigation; deprivation of FAPE (substantive)	FAPE denied due to COVID ed.; see questions pointing to concern in SpEDometer October 2020; Proactive Defense; remedy for deprivation; problems in virtual/hybrid education; slow recovery; blatantly missed services; global deprivations for particular subgroups; valid parent criticism	Needed for FAPE, multiple factors, not just regression/recoupment; *not compensatory education or because of FAPE deprivation
WHEN	When so ordered by Hearing Officer; State Complaint investigation, mediation offer; as a proactive measure	After pandemic education; supplanting IEP services; When you have a WHY	Summer, outside of IEP services in regular school day

Exposure Notification #4: “Virtual IEPs” do not reduce FAPE obligations.

[Utah Code 53G-9-210](#) requires all LEAs (other than online charter LEAs) to provide 4 days of in-person instruction per week (with some exception if various governmental leaders approve a virtual option due to case thresholds), for the 2021-2022 school year.

As of Spring 2021, this was the in-person/hybrid breakdown of Utah Schools:

Mode of Instruction
 The number of schools in the State that are offering fully remote or online only instruction, both remote/in-person and in-person instruction (hybrid models) and/or full-time in-person instruction.

- WDE released data on the modes of instruction from all Utah schools in April 2021. Additional data will be collected in the future to track how the modes have changed throughout 2021-2022 schools.
- For the 2021-2022 school year, except for an online only charter school, LEAs are required to provide at least 4 days of in-person instruction per [Utah Code Section 53G-9-210](#). For Summer 2022, various modes of instruction, remote/hybrid/in-person, will exist based on school capacity/line of things.

Utah School Reporting for Instructional Modes

Number of Schools	All Schools	Offered to all Students	Offered to Some Students	Not Offered
Remote or online only	255	72	0	183
School buildings open with both remote/in-person and in-person instruction (hybrid)	255	60	0	45
School buildings open with full-time in-person instruction	255	191	0	70

Exposure Notification #4: “Virtual IEPs” do not reduce FAPE obligations.

- [While schools will be required to reopen for the 2021-2022 school year with a minimum # of days of in-person instruction, virtual options are still available in nearly every public school](#)
- Additionally, Utah’s “[Resolution Supporting Individual Health Decisions in Utah Schools](#)” furthers the concept that as pandemic unknowns continue (variants, masking, vaccinations), Utah plans to provide to offer the highest level of accommodation to Parent rights to choose an educational option based upon their health-care beliefs/needs: “Therefore, be it resolved that, the Utah State Board of Education supports individuals—including educators, administrators, school staff, and parents—in exercising their full rights to make important health related decisions for themselves and families, free from direct or indirect coercion, undue burden and inducement including incentives.”

Exposure Notification #4: “Virtual IEPs” do not reduce FAPE obligations.



- LEAs need to be prepared to respond to FAPE-related obligations and student needs in the context of the issues discussed in this resolution, including instruction in the home or virtual options selected pursuant to these recognized rights.
- Federal guidance during the pandemic set the stage for creative supportive for disabled students to have access to FAPE.

Exposure Notification #4: "Virtual IEPs" do not reduce FAPE obligations.

- COVID-19 Questions and Answers: Implementation of IDEA Part B Provision of Services, 77 IDELR 138 (OSEP 2020):
 - Schools who choose to provide a virtual option for 2021-2022 or have students who require accommodation of their disability in the form of remote or alternative instruction, must not discriminate against disabled students in their offerings as well as their implementation.



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Exposure Notification #4: "Virtual IEPs" do not reduce FAPE obligations.



- Can Parent Choice of virtual education override a school's obligation to provide FAPE?
 - Section 504 nondiscrimination principles require that disabled students be provided equal access and opportunity in public education.
 - There are no "location" limits to the FAPE standard. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct 988, 998 (2017) (setting the modern FAPE standard of an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.");
 - Parent choice should be met with IEP team expertise to attempt appropriate modifications and alterations to virtual education to meet the individual FAPE required for a student and provide legal NOTICE when, even with reasonable modifications, FAPE will be limited.

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Exposure Notification #4: "Virtual IEPs" do not reduce FAPE obligations.

- Can schools offer only "craft" virtual services? "This is what virtual FAPE looks like for your IEP."
 - Consider: *In the Matter of Student v. Clark County School. Dist., Nevada State Bd. of Review.* (Review Officer Decision, P. Zirkel, Dec. 18, 2020).
 - District started 20-21 school year with distance education, both synchronous and asynchronous. No other modalities of instruction were considered for the student, including in-person instruction by private contractors.
 - About a month into virtual instruction, the District revised the related services of the IEP to reduce the minutes of services, lowering special education time from 49 to 32%.
 - Reductions were based upon the District's "across-the-board" limits for distance learning, not the individualized needs of the student (and over parent's protests)
 - In finding a denial of FAPE (and ordering reimbursement of privately services), the Review Officer opined that the "cross-the-board reduction of specially designed instruction in all four areas of the Students' identified needs cannot be said to be 'reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.'" The global move did not demonstrate "every effort" to meet school obligations, including virtually any "problem-solving.



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Exposure Notification #4: “Virtual IEPs” do not reduce FAPE obligations.

- There is no virtual “FAPE-lite.”
- If virtual education is not an appropriate mode of instruction for the student, and the school cannot provide FAPE through virtual supports, and disability-related reasons do not require such services, Parents should be noticed of that disagreement and denied that type of support, based upon the Student’s individual needs.



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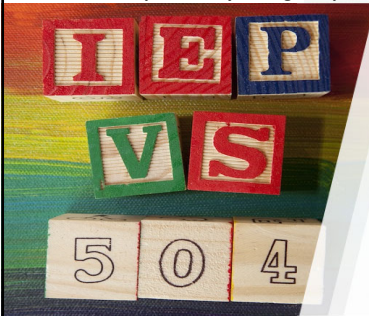
Exposure Notification #5: Identify/Meet mental health needs that have arisen or increased exponentially during and post-pandemic.

- National Statistics and Trends
- As of 2019, 20% of students have a debilitating mental health disorder (National Institute of Mental Health). That is up from 13% in 2012, when the Centers for Disease Control and Prevention reported diagnosable mental health disorders for children ages 8 to 15.
- More than half of children who receive mental health treatment receive such treatment in the school setting. (Journal of the American Academy of Child and Adolescent Psychiatry, March 2018, available at, www.jaacap.org). The study concluded that school-based services delivered by teachers and other school-based professionals were an important means to reduce mental health problems in elementary-aged children.
- <https://www.nap.edu/catalog/26262/school-based-strategies-for-health-and-well-being-of-youth-in-the-wake-of-covid-19>



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Exposure Notification #5: Identify/Meet mental health needs that have arisen or increased exponentially during and post-pandemic.



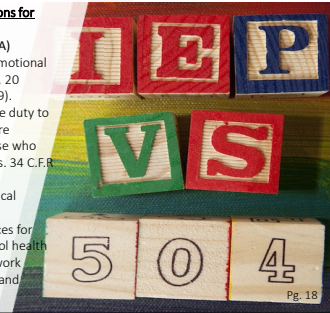
- Sources of School District Child Find and FAPE Obligations for Students with Mental Illness
- Section 504 of the Rehabilitation Act
 - **Definition of a disability:** physical or mental impairment that substantially limits a major life activity, a record of such impairment, or being regarded as having such an impairment. 29 U.S.C. §794; 34 C.F.R. § 104.3(j)(2)(i)
 - While no “conditions” automatically qualify as a Section 504 disability certain “psychological disorders,” such as bipolar disorder, major depressive disorder, or PTSD will almost always qualify. *Office of Civil Rights, Dear Colleague Letter* (Jan. 19, 2012).

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Exposure Notification #5: Identify/Meet mental health needs that have arisen or increased exponentially during and post-pandemic.

Sources of School District Child Find and FAPE Obligations for Students with Mental Illness

- Individuals with Disabilities Education Act (IDEA)
 - Enumerated list of disabilities, including, Emotional Disturbance and Other Health Impairment. 20 U.S.C. § 1401(3)(a); 34 C.F.R. § 300.8(c)(4, 9).
 - Child Find obligations impose an affirmative duty to identify, locate, and assess students who are suspected of being disabled, including those who present with probable mental health issues. 34 C.F.R. § 300.111.
 - IDEA's Related Services include "psychological services . . . counseling services, including rehabilitation counseling . . . medical services for diagnostic or evaluation purposes . . . school health services and school nurse services, social work services in schools, and parent counseling and training." 34 C.F.R. § 300.34(a).



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Exposure Notification #5: Identify/Meet mental health needs that have arisen or increased exponentially during and post-pandemic.

An *Andrew F.* FAPE requires evaluating academic, functional, behavioral, social, and mental health needs that are present and programming to meet those needs

- *Andrew F. v. Douglas County School District*, 137 S. Ct. 988 (March 22, 2017) ("To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.")
- *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 798 F. Supp. 2d 1177 (D. Colo. 2011) (recognizing that in some situations, mental health, behavioral, and academic issues are intertwined).
- *Jana. K. v. Annville-Cleona School Dist.*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (Child Find violation where student expressed suicidal ideations, was increasingly absent, experienced bullying, and was close to failing all of her classes, but district failed to evaluate her).
- *Weidow v. Scranton Sch. Dist.*, 460 F. App'x 181 (3d Cir. 2012) (Bipolar did not substantially limit major life activity under Section 504 as student had friends and socialized, could interact with others).
- *A.W. ex rel. H.W. Middletown Area Sch. Dist.*, 2015 WL 390864 (M.D. Pa. Jan. 29, 2015) (Anxiety, absenteeism, school avoidance, and failing grades were "red flags" and parent refusal to consent to psychiatric evaluation did not absolve district entirely).



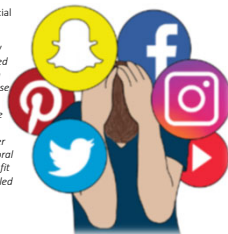
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Exposure Notification #5: Identify/Meet mental health needs that have arisen or increased exponentially during and post-pandemic.

- *V.W. v. West York Area School District*, ODR No. 17572-16-16-KE (July 25, 2016) (Culleton) (Education must address basic developmental needs in the emotional, behavioral, and social domains, even if the child is a high achiever in traditional academics).

Facts: Student was high-achieving, but as a result of a failed relationship and derogatory comments made on social media, he developed depression, suicidal ideations, and related emotional needs. He was voluntarily admitted into an inpatient facility. Parents met with the district and requested reintegration. Inpatient recommended home schooling, because of anxiety related to school placement. District provided homebound and parents were happy. The following year the district made sure the student avoided students who made him feel uncomfortable and his teachers reduced his assignments to reduce his anxiety. However, the district did not offer to evaluate him. District officials saw no reason to offer additional supports and accommodations. District felt the student's disability was temporal or situational and not impairing his ability to learn. They also did not feel he would have fit into an emotional support class because he was a high academic achiever. Parents enrolled student in neighboring school district and paid the \$10,000 tuition for an out-of-district student.

Holding: Reimbursement awarded for Child Find and FAPE violation.



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- District was obligated to evaluate student when they learned of his hospitalization and diagnosis of depression. At this point, the District was reasonably on notice that Student was experiencing an inability to maintain satisfactory interpersonal relationships both for purposes of social growth and for purposes of collaborative learning.
- By receiving instruction outside of the regular classroom, and outside of the regular school day, Student was deprived of the educational benefits of social relationships and the opportunity to learn and practice the social skills needed to collaborate with the academics being taught in the regular class.
- The student's high grades were not determinative of his eligibility under IDEA. Given the student's high cognitive abilities, he could overcome the effects of his emotional deterioration sufficiently to maintain high grades. His normal participation in general education was disrupted, affecting both academic participation and social growth.
- "School districts must prepare students for adult life by attending to their intellectual and developmental needs . . . Public education prepares students to become self-directed, life-long learners and responsible, involved citizens. Public education is intended to provide opportunities for students to: (1) acquire knowledge and skills; (2) develop integrity; (3) process information; (4) think critically; (5) work independently; (6) collaborate with others; and (7) adapt to change."

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- Mental health or behavioral health needs must manifest in school to create a legal obligation.
- Carefully evaluate claims of needs arising in virtual/hybrid and balance with observed in-person concerns when school re-starts.
- *N.M. ex rel. W.M. v. Central Bucks School Dist., 992 F.Supp.2d 452 (E.D. Pa. 2014)* (Student had reported suicidal ideations and parents removed him to homeschooling and then a private placement based on a psychiatrist's recommendation; however, the district observed limited social, emotional, or bullying issues and addressed the issues it observed; ultimately, the student's social needs and the bullying were not school-based and thus the district did not deny student FAPE).

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- Recognize "red flags" or triggers for Child Find or FAPE-revision.

Reasonable period of time for intervention + relevant factor(s)= Child Find

-  **Slow Triggers (Yellow)**- chronic academic failure, low achievement in specific areas, below basic PSSAs/Keystone, distraction/disengagement from learning, chronic school avoidance, chronic attendance concerns, hospitalizations for non-school incidents, pattern of discipline, evidence of pattern of recognized emotional, social, or behavioral concerns (depression, anxiety, intent to harm, severely lacking social skills).
-  **Fast Triggers (Red)**- across-the-board academic decline, steep academic decline, retention or failing to meet grade standards, hospitalization for school behavior, suspension over 15, persistent behavior that represents a threat to self, health, or safety, court order for evaluation, parent request for evaluation.

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“COVID Exposures” : FAPE-Focused Strategies for Post-Pandemic Educational Recovery

1. Absenteeism demands strategic action.
2. Heed the Intersection of Attendance Concerns and Child Find/Eligibility.
3. Recovery Services did not cover it all; Implement Proactive Measures.
4. “Virtual IEPs” do not reduce FAPE obligations.
5. Identify/Meet mental health needs that have arisen and/or increased exponentially during and post-pandemic.

SUMMARY



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Questions?

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