



When Decisions Matter

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

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Where have we been laid bare? What have we learned from a school year of online, remote, or otherwise altered learning in a global pandemic? This session will examine the legal themes arising out of the last school year and strategize on how we can address head-on the now known complications of re-engaging student populations. Attendees will learn how to address factors like absenteeism and learning loss in completing evaluation eligibility determinations. We will hit head-on the distinctions between meeting student needs (legal and educational) with compensatory education/services, recovery services, ESY, and summer services. Attendees will learn how to utilize lessons learned from failures/successes in remote learning to build a proactive defense in their current IEPs, evaluations, and FAPE-offerings.

- *Absenteeism – including considerations related to eligibility determination*
 - *Child find*
 - *Eligibility/Evaluations*
 - *FAPE*
- *Strategies in Compensatory Education vs. ESY vs. Recovery Services*
- *Learning loss vs. Learning Disability*

I. 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).

<https://www.future-ed.org/present-danger-solving-the-deepening-student-absenteeism-crisis/>

A. Pre-Pandemic Attendance Issues:

1. 1/6 students were chronically absent
2. 10% or more of instruction was lost by chronic non-attenders

B. Post-Pandemic Attendance Issues: Attendance gap

1. Statistics
 - a. 7X increase in the number of students missing 50% or more
 - b. More elementary students are absent than previously.
 - c. 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."

2. Safe Assumptions (even without all the data):
 - a. Assume "worse than believed."
 - b. Assume greater impact on the student with disability.
 - c. Assume relationships fundamental to attendance are broken.
 - d. 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://daqy2hvnfszx3.cloudfront.net/wp-content/uploads/sites/2/2017/05/23104652/ChronicAbsenteeismResearchBrief.pdf>

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

C. Strategy: Meet Disengagement with Engagement

1. Engage ARP/ESSER II Funds
2. Engage learners who lost the most and those most vulnerable to loss
3. Engage IEP teams in evidence-based interventions:

- a. home visits
- b. increase in intensity/access to counseling
- c. “electronic nudges”
- d. individualized instruction or mentorship (targeted)
- e. transition services for return to school
- f. shift from consequences to supportive compliance
- g. intensify connection

D. Strategy: Treat Attendance as a FAPE issue; not just a legal issue.

- 1. Utah’s Attendance Moratorium and R277-607 (proposed new language)

R277-607-3. Absenteeism and Truancy Policy Requirements.

(1) An LEA shall:

(a) develop an absenteeism and truancy policy that:

(i) encourages regular, punctual attendance of students, consistent with Section 53G-8-211 and Title 53G Public Education System -- Local Administration, Chapter 6 Participation in Public Schools, Part 2 Compulsory Education;[and]

(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” means the impact a student’s actions can have on a student’s physical or mental health and includes conditions in which services provided by social workers, counselors, psychiatrists, neurologists, behavior analyst, psychologists, and physicians would be appropriate.

(3) “Mental health” means the same as that term is defined in Subsection R277-22 625-2(2).

*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.

2. Shift focus from legal consequences to educational consequences and meet with action.

a. Absenteeism as a FAPE-limiter

A.W. v. Middletown Area Sch. Dist., 68 IDELR 247 (M.D. Pa. 2016). (chronic non-attender with anxiety, social phobia, depressive disorder, and ODD, awarded extraordinary amounts of compensatory education as a result of compounding effect of student's avoidance behaviors, unaddressed by district).

b. Absenteeism as a behavior

- i. That demands IEP team reaction and responsibility
- ii. 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. Similar to other data behavior, behavior left unmanaged will continue and increase.

iii. See, for example:

Independent Sch. Dist. No. 413 v. H.M.J., 66 IDELR 41 (D. Minn. 2015) (district evaluation noted several mental health diagnoses and medical conditions, along with excessive absences, but failed to explain the reasons for the absences or consider them in relationship to the diagnoses or condition, resulted in finding against the district, including that it should have completed a medical evaluation).

Depart. Of Educ., State of Hawaii, 212 LRP 3917 (HI SEA, 10/06/20) (IEP met *Andrew F.* standards where excessive school absences and homebound instruction impacted data collection, and district took reasonable steps to try to gain more information about needs by contacting private providers, and using the information available to revise the IEP).

Pocono Mountain Sch. District, ODR No. 14325-13-14-AS, (SEA Pa, Culleton, 2014) (Kindergarten student absent regularly for medical reasons, no reason, and alleged safety, was met with a district who “address[ed] student’s absenteeism early and often, demonstrating its decision to design its educational services specifically for Student, in order to make school as safe and attractive as possible.” The appropriate actions taken included an evaluation, developing an attendance plan, convening meetings, revising the IEP, and monitoring for behavior concerns reported at home).

iv. That confront social responsibilities- the “School to Prison Pipeline” is fueled by non-attendance/disengagement (among other factors we do not have as much control over).

c. 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

- i. home concerns
- ii. medical concerns
- iii. private provider concerns
- iv. behavior concerns or
- v. other disability-related reasons for nonattendance.

d. 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?

Facts: Student entered Public High School as 10th grade, after attending private schools, one which requested she leave after exhibiting severe perfectionist anxiety, depression, and school refusal. Student did not receive special education services. At a 504-meeting held in Fall of 10th grade, after one month of school, student had excellent grades and attendance, but the district was well aware of the prior pattern she fell into as a high-achieving/gifted student. Shortly after, Student’s attendance deteriorated (absent and tardy).

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 school work”) and would likely suffer from them again. The district’s 504 plan also expressly recognized her disabilities as “substantially limiting” various major life activities.

- Thus, the 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 past 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 emotional, psychological, and behavior issues.

-Truancy/attendance notices to parents do not shift the child find obligation from school to parents, when the district 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.

- e. *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.”

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

- A. What is the impact of attendance in child find, intervention, and evaluation?
 1. Attendance is a behavior to be investigated via the Child Find obligation, in intervention and evaluation.
 2. A lack of attendance can rarely completely excuse Child Find, intervention, and evaluation obligations,
 3. 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 and academic-based intervention.

4. Consider: *Mountain West Montessori Academy*, Utah Hearing Officer Decision (2019)(finding a child find violation, but without demonstrated harm): <https://www.schools.utah.gov/file/ddbf50ed-285d-4b7e-9e1f-74a40f31d1ec>

“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. See *Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). **A "suspicion" requires a "difficult and sensitive" analysis.** *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 4 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150, 162 (1st Cir. 2004). 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).”

“During the Student's third-grade year, prior to the development of his IEP, the Student performed very well academically. Moreover, the Petitioner's expert witness, and the Respondent's expert witness both testified that the **Student's many absences from school likely contributed to the Student's negative behaviors at school.**”

B. What is the impact of attendance on IDEA eligibility in an evaluation?

1. 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.
 - a. *Independent School District v. E.M.D.H.*, 960 F.3d 1073 (8th Cir. 2020) (gifted student with variety of mental health disorders, increasing absences in 8th grade led to psychiatric placement, with a similar pattern for grades 9 and 10. In 10th grade, Parents asked for a special education evaluation, because school personnel

removed her honors classes. In Grade 11, the District's evaluation found her not eligible. In addition to a Child Find violation dating back to 8th grade, the court observed that the district had made no effort at all to comply with required observations for behavior assessment, and rejected any excuses: "We acknowledge that while the Student's absences might have made a comprehensive evaluation more difficult, the evidence does not support the conclusion that task was impossible to undertake."

2. Learning Loss v. Learning Disability

- a. 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").
- b. The eligibility determination must also take into account whether, "with appropriate instruction and learning experiences, the child achieves adequately to meet state approved grade level standards in the areas of oral expression, listening comprehension, basic reading skill, reading fluency and comprehension, math calculation and math problem-solving." 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).
- c. 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."
- d. Lack of appropriate instruction v. Loss of instruction: a loss of instruction due to attendance concerns does not equate to a lack of appropriate instruction, that would become determining factor that would rule out disability.

- i. The focus is on a determination that some factor outside of the child’s intellect is to blame and the determining (primary) factor for their current concerns. That is pretty rare.
- ii. Lack of participation in instruction is not the same as lack of appropriate instruction, such that we would never say that a child’s disengagement from learning in the classroom is a determining factor in the eligibility analysis.
- iii. 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.

For example: Consider a student repeating 9th grade for the 3rd time after the pandemic school closures. The student admits to having a year of virtual “non-participation.” But, we know he has had other years of “appropriate instruction” when he had some in-person attendance. His 3rd 9th grade is not an anomaly. It has happened before. It happened in 6th grade. In the broader historical pattern, his most recent non-attendance does not disqualify him from being disabled. Instead, the pattern of failures and retention suggest that the problem exists outside of his engagement in virtual instruction, and his behavior should be considered relative to Emotional Disturbance, Other Health Impairment, and SDL areas of disability. An appropriate evaluation process would evaluate how the student performs when he is engaged in appropriate instruction. With appropriate instruction the scores a student yields may be more valid relative to whether there truly is a qualifying discrepancy. Overall, a comparison of progress in years in which he is educationally engaged will be informative relative to years when he is not. It may be that the pattern of failure exists even when he attends school.

- e. SLD identification methods are designed to combat over-reliance on one (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”:
 - i. RTI (demonstrating insufficient progress to meet state standards)
 - ii. Combination: RTI + Severe Discrepancy

- iii. Alternative Method (research-based procedures that examine a pattern of strengths and weakness approved by the school board)
 - iv. Utah State Board of Education: Special Education Rules (August 2020).
- f. (Specific Learning Disabilities). 34 CFR § 300.8(C)(10). A disorder in one (1) or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia, that affects a student’s educational performance . . . does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of intellectual disability; of emotional disturbance; or of environmental, cultural, or economic disadvantage.

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

- A. 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.
- 1. Federal Guidance supporting compensatory services for pandemic-based deprivations.
 - a. *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).
 - i. “If educational opportunities are available to all students, then special education students must receive equal access and FAPE, to the greatest extent possible.”
 - ii. “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.”

- iii. No specific guidance on whether “compensatory services” are required for students who receive services during school closures.
 - b. *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)
 - i. While “exceptional circumstances” may have affected how special education is provided; flexibility should have been offered, where possible.
 - ii. 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].
 - 2. ESSERS/American Recovery Plan (ARP) Money targeted at learning losses: 20% of funds must be spent on disadvantaged / special population students such as students with disabilities, EL students, low income, homeless, foster care students, marginalized, and students of color.
 - 3. 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.
 - a. Identification of those who are eligible based upon: services offered, progress, data, meeting *Andrew F.* definition of FAPE, parent concerns.
 - b. Determination of amount and nature; not a blanket remedy.
 - c. No time-limiter on when can be provided; just not supplanting current IEP services.
 - d. Prioritize those with greatest known deprivations, or students falling under LEA-wide limitations.
- B.** 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.

1. Compensatory Education v. Recovery Services
 - a. **Compensatory Education (CE)**– An equitable remedy for the substantive deprivation of FAPE (failure to provide FAPE as defined by *Endrew 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).
 - b. **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.
2. Good-faith ownership of FAPE deprivations is the best proactive defense.

C. Evaluate data from the 2020-2021 school year utilized to provide Recovery Services and to bolster your ESY analysis.

1. 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).

2. 34 C.F.R. 300.105(b). ESY is: Special education and related services that are provided to a child with a disability:
 - a. beyond the normal school year;
 - b. in accordance with the child’s IEP;
 - c. at no cost to the parents; and
 - d. in conformance with SEA standards.

*No standard for determining is set forth in IDEA regulations

3. 2012 Extended School Year Services, Technical Assistance, Utah State Office of Education; R277-751 (ESY Rule).
 - a. ESY’s purpose is to maintain skills on current IEP goals to ensure a FAPE.

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

| | | | |
|------|---|---|--|
| 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* ⁿ of compensatory education or because of FAPE deprivation |
| WHEN | When so ordered by Hearing officer; State Complaint investigation, mediation offer; as a proactive measure; when you have a WHY | After pandemic education; supplanting IEP services | Summer, outside of IEP services in regular school day |

IV. 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 four (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/online and in-person instruction (hybrid model); and/or full-time in-person instruction.

- USBE collected 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 Utah's 1,055 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 (see [Utah Code Section 53G-9-210](#)). For Summer 2021, various modes of instruction, remote/hybrid/in-person, will exist based on school capabilities/offering.

Utah School Reporting for Instructional Models

| Number of Schools | All Schools | Offered to all Students | Offered to Some Students | Not Offered |
|--|-------------|-------------------------|--------------------------|-------------|
| Remote or online only | 1055 | 70 | 0 | 985 |
| School buildings open with both remote/online and in-person instruction (hybrid) | 1055 | 650 | 0 | 405 |
| School buildings open with full-time in-person instruction | 1055 | 335 | 0 | 720 |

A. 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.

1. 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.”
2. 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.
3. Federal guidance during the pandemic set the stage for creative supportive for disabled students to have access to FAPE.

B. *COVID-19 Questions and Answers: Implementation of IDEA Part B Provision of Services, 77 IDELR 138 (OSEP 2020):*

1. Citing the “unpredictability of the COVID-19 pandemic,” OSEP advised IEP teams to identify multiple means and different settings for providing a student’s special education services during SY 2020-21.
2. Pointing to the importance of considering **alternate methodologies and methods of delivering special education and related services, such as**

through online instruction, teleconference, direct instruction via telephone or videoconferencing, and consultative services.

3. Sticking to its position that the FAPE obligation was unaltered during the pandemic: “For example, IEP Teams can discuss how a child’s IEP will be implemented with traditional in-person instruction and how services also could be provided through remote/distance instruction if circumstances require a change to distance learning or a hybrid model.”

C. *Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment*, 120 LRP 29373 (OCR 2020) (reminding District that the COVID-19 pandemic does not relieve them of their obligations under Section 504 and the ADA).

D. Schools who choose to provide a virtual option for 2021-2022 or 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.

1. Can Parent Choice of virtual education override a District’s obligation to provide FAPE?
 - a. Section 504 nondiscrimination principles require that disabled students be provided equal access and opportunity in public education.
 - b. 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.”).
 - c. 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.
2. Can public schools offer only “craft” virtual services? i.e. “This is what FAPE looks like for your child’s IEP in virtual programming.”
 - a. Consider: *In the Matter of Student v. Clark County School. Dist., Nevada Dept. of Educ.*, (Review Officer Decision, P. Zirkel, Dec. 18, 2020).

- i. 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.
 - ii. 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%.
 - iii. 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).
 - b. In finding a denial of FAPE (and ordering reimbursement of privately contracted services), the Review Officer cited 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 district’s global move did not demonstrate that the district made “every effort” to meet its obligations, despite the pandemic, including virtually any effort for “problem-solving.
3. 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, 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.

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

A. National Statistics and Trends

1. 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.

2. 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.

3. National Academies of Sciences, Engineering, and Medicine 2021. *School-Based Strategies for Addressing the Mental Health and Well-Being of Youth in the Wake of COVID-19*. Washington, D.C.: The National Academies Press.
<https://www.nap.edu/catalog/26262/school-based-strategies-for-addressing-the-mental-health-and-well-being-of-youth-in-the-wake-of-covid-19>

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

1. Section 504 of the Rehabilitation Act of 1973
 - a. 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)
 - b. 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).
2. Individuals with Disabilities Education Act (IDEA)
 - a. 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).
 - b. 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.
 - c. 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).

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

1. *Endrew 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.”)
2. *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).

3. *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).
4. *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).
5. *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).
6. *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).
 - a. *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.
 - b. *Holding*: Reimbursement awarded for Child Find and FAPE violation.
 - i. 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.
 - ii. By receiving instruction outside of the regular classroom, and for the most part 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 and discuss the academics being taught in the regular class setting.

iii. 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.

iv. School districts must prepare students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. 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.

D. Mental health or behavioral health needs must manifest in school to create a legal obligation.

1. Carefully evaluate claims of needs arising in virtual or hybrid and balance with observed in-person concerns when school re-starts.

a. *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).

b. *St. Joseph-Ogden Community High School v. Janet W.*, 2008 WL 170693 (C.D. Ill. January 17, 2008) (Although student had two suicide attempts and two suspensions for behavioral incidents, student did not meet criteria for emotional disturbance because a psychiatrist testified his depression was in remission, he no longer had suicidal ideations, and his mental health was not adversely affecting his educational performance).

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

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

a. 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).

- b. 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.