

# How the COVID-19 Global Pandemic Changed Special Education

LaRana J. Owens. Esquire  
Counsel  
[LOwens@sandsanderson.com](mailto:LOwens@sandsanderson.com)  
(804) 783-7250



# Agenda

1. The Individuals with Disabilities Education Act (“IDEA”)
2. U.S. Department of Education Guidance and Virginia Department of Education Guidance re: COVID-19
3. Free Appropriate Public Education (“FAPE”) Considerations
4. Significant Case Decisions
5. Questions

# Individuals with Disabilities Education Act ("IDEA")

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., is a law that makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children.

# IDEA

Infants and toddlers, birth through age 2, with disabilities and their families receive early intervention services under IDEA Part C.

Children and youth ages 3 through 21 receive special education and related services under IDEA Part B.

# IDEA

**The IDEA requires that school divisions provide a free appropriate public education (FAPE) to children with disabilities. 34 CFR 300.101; 34 CFR 300.109**

- IDEA requires schools to find and evaluate students suspected of having disabilities, at no cost to families. This is called “Child Find.” 34 CFR 300.102; 34 CFR 300.111.
- When students are found to have a qualifying disability, schools offer special education and related services to meet their unique needs.

# IDEA – Fourteen possible qualifying disabilities

- Autism
- Deaf-blindness
- Deafness
- Developmental Delay
- Emotional Disability
- Hearing impairment
- Intellectual disability
- Multiple disabilities
- Orthopedic impairment
- Other health impairment
- Specific Learning Disability
- Speech or language impairment
- Traumatic brain injury
- Visual impairment, including blindness

8 VAC 20-81-80

# Individualized Education Program (“IEP”)

An IEP is a statement for a child with a disability that is developed, reviewed, and revised in a team meeting.

The IEP specifies the individual educational needs of the child and what special education and related services are necessary to meet the child’s educational needs.

34 CFR 300.22.

# IEP Team

An IEP team means a group of individuals that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

34 CFR 300.321

# Free Appropriate Public Education

- Means special education and related services that—
    - (1) are provided at public expense, under public supervision and direction, and without charge;
    - (2) meet the standards of the State educational agency (SEA), including IDEA Part B requirements;
    - (3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
    - (4) are provided in conformity with an IEP that meets the requirements of 34 CFR §§300.320 through 300.324.
- 20 U.S.C. 1401(9); *see also* 8 VAC 20-81-10 - “Free appropriate public education” or “FAPE”

# Section 504 of the Rehabilitation Act of 1973

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . . 29 U.S.C. §794(a).

# U.S. Department of Education's Guidance

# Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (USDOE March 12, 2020)

- “The IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease.”
- “If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time.”
- “Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child’s individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504.”

# Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (USDOE March 12, 2020)

“In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.”

# Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment (OCR Sept. 28, 2020)

- “School districts should therefore continue to make individualized determinations as to whether students’ IEPs or Section 504 plans need to be revised to ensure students with disabilities are provided a FAPE, including by identifying how the special education or related aids and services called for by a student’s IEP or Section 504 plan may be provided through a variety of instructional methods and settings. School staff and parents are encouraged to work together to find ways to meet the needs of students with disabilities, notwithstanding challenges due to COVID-19.”

# Initial School Closure - Virginia

On March 13, 2020 Governor Northam ordered all Virginia K-12 Schools to close until March 27, 2020 at a minimum. The Governor's press release stated that "localities will maintain authority over specific staffing decisions to ensure students maintain continuity of services or learning, while protecting the public health of teachers and staff."

*Governor Northam Orders All Virginia K-12 Schools Closed for Minimum of Two Weeks, Governor of Virginia (March 13th, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-854442-en.html>.*



# Superintendent's Memorandum

On March 13, 2020 Dr. James Lane, the Superintendent of Public Instruction, released a memo addressing the Governor's order to temporarily close schools.

- “Should there be extended closures beyond the current order the VDOE encourages school divisions to consider options and ideas to engage students in reading, thinking and learning. Creating such opportunities should be done with careful consideration of providing equitable access and support for a variety of students. Due to the waivers that will be granted for school closures related to COVID-19, schools should not consider strategies for continuity of learning as make-up days.”

*Superintendent's Memos 2020*, Virginia Department of Education (March 13, 2020), [http://www.doe.virginia.gov/administrators/superintendents\\_memos/2020/index.shtml](http://www.doe.virginia.gov/administrators/superintendents_memos/2020/index.shtml) (follow “Updates Related to COVID-19 Following the Governor's Order to Close Schools for a Minimum of Two Weeks” hyperlink under “March 13th, 2020” subheading).

# Full Closure: March 23, 2020 - End of School Year VIRGINIA

On March 23<sup>rd</sup>, Governor Northam ordered all K-12 schools to remain closed until the end of the academic year. The release noted:

- “VDOE will issue guidance to help divisions execute plans to continue instruction, while ensuring students are served equitably, regardless of income level, access to technology, English learner status, or special needs.”

*Governor Northam Orders Statewide Closure of Certain Non-Essential Businesses, K-12 Schools, Governor of Virginia (March 23rd, 2020)*  
<https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-855292-en.html>

# March 23, 2020 Superintendent's Memorandum

On March 23rd, the Superintendent released a memo:

- “Providing instruction during the extended closure;
  - *The provision of instruction should be done with careful consideration of providing equitable access and support for a variety of students.*
  - *Accessible technology may afford students, including students with disabilities, an opportunity to have access to high-quality instruction.*
  - *After the extended closure, divisions are responsible for reviewing how the closure impacted the delivery of services to students with disabilities and English learners. OR;*
- For certain students who were not able to receive instruction during the closure, school divisions may choose offering instruction to those students during the summer of 2020; OR
- Providing instruction by adjusting the 2019-2020 or 2020-2021 calendars; OR
- Incorporating learning modules into the courses students take during the 2020-2021 school year schedule.”

*Superintendent's Memos 2020*, Virginia Dept. of Education (March 23rd, 2020),  
[http://www.doe.virginia.gov/administrators/superintendents\\_memos/2020/index.shtml](http://www.doe.virginia.gov/administrators/superintendents_memos/2020/index.shtml)

(Follow “Guidance on Graduation Requirements, Awarding of Credits, and Continuity of Learning” hyperlink under “March 23rd, 2020” subheading).

# On March 24, 2020, VDOE released “COVID-19: A Parent Guide for School-Aged Children”

The document included guidance regarding students with disabilities, such as:

- “If a school closure causes educational services for all students to pause within a school or division, then the school/division is generally not required to provide services to the affected students eligible for special education services during that same period of time. If a school division does begin to offer instructional services by alternative means (e.g. e-learning, distance learning), the division will remain responsible for the free appropriate public education (FAPE) of its students eligible for special education services with an individualized education program (IEP). The division should ensure that the provision of services are inclusive of both special education and related services[.]”

*COVID-19: A Parent Guide for School-Aged Children*, Virginia Dept. of Education (March 24, 2020)  
[http://www.doe.virginia.gov/support/health\\_medical/office/covid-19-parent-guide.shtml](http://www.doe.virginia.gov/support/health_medical/office/covid-19-parent-guide.shtml).

# March 24, 2020 VDOE Guidance

“Once school resumes, the school must return to providing special education and related services to students with disabilities in accordance with the student’s IEP, or for students entitled to FAPE under [Section 504 of the Rehabilitation Act of 1973], consistent with any plan developed to meet the requirements of Section 504. Additionally, after an extended closure, divisions are responsible for reviewing how the closure impacted the delivery of special education and related services to students eligible for special education services. Additional specific guidance will be provided to division-level special education directors.”

[http://www.doe.virginia.gov/support/health\\_medical/office/covid-19-parent-guide.shtml](http://www.doe.virginia.gov/support/health_medical/office/covid-19-parent-guide.shtml).

# On March 24, 2020 VDOE Guidance

“As stated in the Office of Special Education and Rehabilitative Services/Office for Civil Rights (OSERS/OCR) guidance, the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction that is provided virtually, online, or telephonically. Many disability- related modifications may be effectively provided online, such as extensions of time for assignments, videos with captioning or embedded sign language interpreting, accessible reading materials, or speech/language services through video conferencing.”

*VDOE Special Education and Student Services Frequently Asked Questions*, Virginia Dept. of Education (updated May 20, 2020)  
[http://www.doe.virginia.gov/support/health\\_medical/office/covid-19-sess-faq.shtml#content](http://www.doe.virginia.gov/support/health_medical/office/covid-19-sess-faq.shtml#content).

# VDOE Guidance

“If a school division does begin to offer general education instructional services by alternative means (e.g., e-learning, distance learning), the division will remain responsible for the provision of FAPE of its students eligible for special education services with an individualized education program (IEP).”

*VDOE Special Education And Student Services Frequently Asked Questions*, Virginia Dept. of Education (Updated May 20, 2020)  
[http://www.doe.virginia.gov/support/health\\_medical/office/covid-19-sess-faq.shtml#content](http://www.doe.virginia.gov/support/health_medical/office/covid-19-sess-faq.shtml#content) (follow “Provision of FAPE” hyperlink under “Page Contents” subheading)

# VDOE Guidance

- “Once school resumes, the school must return to providing special education and related services to students with disabilities in accordance with the student’s IEP...Additionally, after an extended closure, divisions are responsible for reviewing how the closure impacted the delivery of special education and related services to students eligible for special education services.”
- “If there are services, accommodations, and modifications required by the student’s IEP that cannot be provided during this time, the student’s IEP Team must determine which services it can provide to meet the student’s needs and any needed changes in services, accommodations, and modifications can be made through the IEP amendment process.”

*VDOE Special Education And Student Services Frequently Asked Questions*, Virginia Dept. of Education (Updated May 20, 2020)  
[http://www.doe.virginia.gov/support/health\\_medical/office/covid-19-sess-faq.shtml#content](http://www.doe.virginia.gov/support/health_medical/office/covid-19-sess-faq.shtml#content)

(follow “Provision of FAPE” hyperlink under “Page Contents” subheading)

# VDOE Guidance

- “What constitutes FAPE for each child with a disability is determined by the child's IEP Team. As such, so long as the IEP Team considers other proposed options as presented by the parent or other members of the IEP Team, provides the parent with prior written notice of all proposed and refused actions during the meeting, and the parent provides informed consent for the proposed special education and related services, then the services proposed by the IEP Team, no matter what they are, may be implemented.”
- “School divisions will be called upon to determine what, if any, compensatory services are necessary once schools reopen. This will require consideration of the student’s baseline performance at the time of the school closure, any progress or lack thereof during distance learning, and the student’s performance after school reopens.”

*VDOE Special Education And Student Services Frequently Asked Questions*, Virginia Dept. of Education (Updated May 20, 2020)  
[http://www.doe.virginia.gov/support/health\\_medical/office/covid-19-sess-faq.shtml#content](http://www.doe.virginia.gov/support/health_medical/office/covid-19-sess-faq.shtml#content) (follow “Provision of FAPE” hyperlink under “Page Contents” subheading)

# Free Appropriate Public Education (FAPE)

# ***COVID-19***

## **Free Appropriate Public Education**

- *Endrew F. ex. rel. Joseph F. v. Douglas Co. Sch. Dist. RE-1, 137 S. Ct. 988 (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.*” (Emphasis added)

# Andrew F.

## “PROGRESS APPROPRIATE IN LIGHT OF THE CHILD’S CIRCUMSTANCES”:

- The degree of progress contemplated by the IEP must be appropriate in light of the child’s circumstances.
- Does this require that school divisions consider the child’s circumstances in a public health emergency/global pandemic?
- Does this require that school divisions consider child’s circumstances if the child is attending school less than five days per week?
- Does this require that school divisions consider the child’s circumstances if the child is not able to attend school due to health or medical reasons?

# ***COVID-19***

## **Free Appropriate Public Education**

- **Does this FAPE standard apply when schools are closed due to a global pandemic?**
- **U.S. DOE, April 27, 2020 press release:**
  - “U.S. Secretary of Education Betsy DeVos today reaffirmed her long-held position that individualized education must take place for all students, including students with disabilities. As a result, the Secretary is not recommending Congress pass any additional waiver authority concerning the Free Appropriate Public Education (FAPE) and Least Restrictive Environment (LRE) requirements of the Individuals with Disabilities Education Act (IDEA), reiterating that learning must continue for all students during the COVID-19 national emergency.”

# ***COVID-19***

## **Free Appropriate Public Education**

- **Does this FAPE standard apply when schools are closed due to pandemic?**
- **VDOE, May 2020 Guidance:**
  - “...positive proactive strategies to continue engagement in learning are not a form of instruction/instructional day and may not trigger the requirement to provide a free and appropriate public education (FAPE) to students with disabilities...”
  - “If a school division does begin to offer general education instructional services by alternative means (e.g., e-learning, distance learning), the division will remain responsible for the provision of FAPE of its students eligible for special education services with an individualized education program (IEP).”

# ***COVID-19***

## **Free Appropriate Public Education**

- **Does this FAPE standard apply when schools are closed due to pandemic?**
- **VDOE Guidance:**
  - “There is a construct that draws a bright line between schools being open and schools being closed. If participation is compulsory, then school is open. If participation is voluntary, then schools are closed, and the only right retained by the student with a disability is the right to access under Section 504.” *Virginia Department of Education, Considerations for COVID Recovery Services for Students with Disabilities (2020), available at [https://www.doe.virginia.gov/support/health\\_medical/covid-19/guidance\\_on\\_recovery\\_services.docx](https://www.doe.virginia.gov/support/health_medical/covid-19/guidance_on_recovery_services.docx)*

# ***COVID-19***

## **Free Appropriate Public Education**

- **Does the FAPE standard apply as schools re-open virtually or with limited capacity?**
- **“...a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. ex. rel. Joseph F. v. Douglas Co. Sch. Dist. RE-1, 137 S. Ct. 988 (2017)***

# COVID Recovery Services vs. Compensatory Services

- Compensatory services are offered, “...to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student.” *G v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2002).
- The compensatory services offered by Virginia school divisions to address a loss of services due to COVID-19 should be referred to as “COVID recovery services.”
  - Particularly relevant for the time period when schools were closed, and students were provided voluntary continuity of learning opportunities.

Virginia Department of Education, Considerations for COVID Recovery Services for Students with Disabilities (2020), available at [https://www.doe.virginia.gov/support/health\\_medical/covid-19/guidance\\_on\\_recovery\\_services.docx](https://www.doe.virginia.gov/support/health_medical/covid-19/guidance_on_recovery_services.docx)

# Significant Court Decisions

# ***J.C. v. Fernandez*, No. 20-00024, 2020 U.S. Dist. LEXIS 125951 (D. Guam July 15, 2020)**

- On July 15, 2020, a U.S. federal district court denied a preliminary injunction seeking to require the Guam Department of Education to implement IEPs for five students with disabilities during mandated school closures due to the COVID-19 pandemic.

# ***J.C. v. Fernandez*, No. 20-00024, 2020 U.S. Dist. LEXIS 125951 (D. Guam July 15, 2020)**

- The court cited a 2010 ruling by the Ninth Circuit Court of Appeals, stating that “Congress did not intend for the IDEA to apply to system wide administrative decisions.” In *N.D. v. State of Hawaii, Dept. of Educ.*, 54 IDELR 111 (9th Cir. 2010), the Ninth Circuit Court of Appeals addressed challenges regarding Hawaii’s decision to eliminate 17 Fridays from its school calendar during a statewide fiscal crisis.
  - The Court concluded that “Hawaii's teacher furloughs and concurrent shut down of public schools is not a change in the educational placement of disabled children.... The educational setting of the disabled children remains the same post-furloughs. When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions. Hawaii's furloughs affect all public schools and all students, disabled and non-disabled alike. An across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out [emphasis added].”

# ***J.C. v. Fernandez*, No. 20-00024, 2020 U.S. Dist. LEXIS 125951 (D. Guam July 15, 2020)**

Finally, the Court stated that to “allow the stay-put provisions to apply in this instance would be essentially to give the parents of disabled children veto power over a state's decisions regarding the management of its schools. The IDEA did not intend to strip administrative powers away from local school boards and give them to parents of individual children, and we do not read it as doing so” [emphases added].

# ***E.M.C. v. Ventura Unified Sch. Dist., No. 2:20-cv-09024-SVW-PD, 2020 U.S. Dist. LEXIS 232006 (C.D. Cal. Oct. 14, 2020)***

- On October 1, 2020, a U.S. federal district court denied a temporary restraining order requiring that the school district provide an in-person aide to assist a student with distance learning during the mandated school closures due to the COVID-19 pandemic.
  - The student was an eighth grader with Autism and a Specific Learning Disability.
  - The student's IEP included one-on-one behavioral support throughout the school day.

# ***E.M.C. v. Ventura Unified Sch. Dist., No. 2:20-cv-09024-SVW-PD, 2020 U.S. Dist. LEXIS 232006 (C.D. Cal. Oct. 14, 2020)***

- The Court stated that the IEP does not explicitly require in-person individualized services, but even if it did, the “Plaintiff's educational program has been modified by statewide public health restrictions prohibiting in-person education in Ventura County while it remains on the statewide monitoring list.”
- [The] School District is operating under a statewide directive to provide online education until the COVID-19 outbreak improves in Ventura County... These closures protect the health and safety not only of students but also of teachers, staff, families and anyone at risk of serious illness or death as a result of a school-based outbreak. While California Department of Education regulations permit in person services under ‘exceptional circumstances,’ there is a strong public health interest in maintaining uniform adherence to policies and in limiting the use of the exception.”

# ***Killoran v. Westhampton Beach Sch. Dist., No. 20-CV-4121(JS)(SIL), 2020 U.S. Dist. LEXIS 166005 (E.D.N.Y. Sep. 10, 2020)***

- Prior to COVID, a school district agreed to provide a student's special education services at a local public library.
- The agreement stipulated that should the library become unavailable due to an emergency, the instruction was to take place in the student's home. If the student's home was unavailable, the parties were to seek alternative off-site placement location.
- Following COVID, the public library became unavailable. The school offered to provide the student's services at the family home, but the family would not agree to allow any services in the home.
- Parents filed an action requesting a court require the school district to provide the student with services either at the public library or within the school.

# ***Killoran v. Westhampton Beach Sch. Dist., No. 20-CV-4121(JS)(SIL), 2020 U.S. Dist. LEXIS 166005 (E.D.N.Y. Sep. 10, 2020)***

- Court denied parent's request because:
  - It recognized that school divisions are facing significant challenges with providing in-person instruction during COVID.
  - With regard to this Student and his limitations with toileting, eating, and sanitation, among others, provide particular challenges during COVID.

# ***Killoran v. Westhampton Beach Sch. Dist., No. 20-CV-4121(JS)(SIL), 2020 U.S. Dist. LEXIS 166005 (E.D.N.Y. Sep. 10, 2020)***

- “The Court has weighed Plaintiff's desire for a change in A.K.'s current pendency placement to ease the burden of home instruction on Plaintiff and his wife against the safety of all others in the district. The Court is sympathetic to Plaintiff's concerns, as well as the struggles of every working family trying to balance childcare needs during these times. However, the balance of hardships does not tip in Plaintiff's favor.”
- “Plaintiff has not demonstrated irreparable harm. He contends that unless this Court issues an order mandating Defendants to find physical space in the school for A.K.'s instruction, A.K. and the ‘family at large will suffer immediate and irreparable harm and injury’ and that A.K. risks suffering ‘irredeemable regression.’ Again, all students nationwide are grappling with modified learning right now. Further, even if Plaintiff had ‘demonstrated that they will likely suffer irreparable harm in the absence of injunctive relief, a careful balancing of the equities nevertheless favors Defendant.’”

# ***J.T. v. de Blasio*, 2020 U.S. Dist. LEXIS 212663 (S.D.N.Y. Nov. 13, 2020)**

- The case purports to be brought against every school district in the United States. The Plaintiffs asserted that all public schools are (or have) violated the IDEA by closing schools.
- The District Court dismissed the Plaintiffs' IDEA, Section 504, ADA, and 14th Amendment claims. Although the parents of several unrelated students with disabilities could file IDEA due process complaints to seek relief for alleged denials of FAPE during the COVID-19 pandemic, they could not sue every school division in the country for moving to remote instruction during the extended school closures.

# ***Hernandez v. Grisham*, No. CIV 20-0942 JB\GBW, 2020 U.S. Dist. LEXIS 238477 (D.N.M. Dec. 18, 2020)**

- The Court denied the Plaintiff’s request to enter an order enjoining the school division from generally prohibiting in-person education of pre-K through 12th grade students.
  - “Under the Reentry Guidance, public schools may operate in three reentry categories: (i) remote; (ii) hybrid; and (iii) full reentry[.] Schools in the remote category may, “[i]f feasible, ... remain open for a limited set of students and staff in order to continue in-person educational services for students in PreK-3rd grade and students with special needs at a maximum 5:1 student to teacher ratio.”
  - Schools could start the hybrid re-entry category if the County in which the school is located had “fewer than eight cases per 100,000 per day and test positivity under five percent.”

# ***Hernandez v. Grisham*, No. CIV 20-0942 JB\GBW, 2020 U.S. Dist. LEXIS 238477 (D.N.M. Dec. 18, 2020)**

- The Court stated that the Defendants did not “violate the Plaintiffs’ procedural due process rights because summary administrative action is justified in emergency situations to protect public health and safety, and the re-entry guidance is quasi-legislative.”
- “Moreover, a temporary prohibition of in-person learning during the pendency of a pandemic does not rise to the level of total exclusion from the educational system[.]”
- The Court further stated that “the Defendants’ provision of remote instruction for the duration of a nationwide pandemic. . . is not a per se breach of any theoretical right to education, and Plaintiffs cite no contrary[.]”

# Questions?

Thank you for your time!



LaRana J. Owens  
[LOWens@sandsanderson.com](mailto:LOWens@sandsanderson.com)  
(804) 783-7250

Sands Anderson PC  
1111 E. Main Street, Suite 2400  
Richmond, VA 23219

