

“Post”-COVID Special Education Considerations

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Topics Covered

- Rights of immunocompromised and/or medically fragile kids in school
- Compensatory education in the “post”-COVID era
- Impact of staffing shortages caused by COVID-related issues
- Increased mental health concerns resulting from the pandemic, and from remote learning in particular

Immunocompromised and Medically Fragile Students

- The USDOE and ISBE state that districts must provide access to services for kids with disabilities to the same extent as for kids without disabilities
- A school district can't offer in-person learning for kids in general education and exclude kids with disabilities
- To the contrary, the guidance is that vulnerable groups should get priority – school districts must maintain a remote option for kids at risk or at parent election

ISBE Guidance (from June 2020)

- Leaves decision up to Board of Education in each district
- “Student safety must be the primary consideration when determining how to meet the needs of students with disabilities who are medically-fragile or immunocompromised.”
- “IEP Teams should consider if the return to in-person instruction would place the student at higher risk of infection of severe illness. If it would, the IEP Team may consider how to address this risk to the student, including consideration of alternative placement options such as ... remote learning, a hybrid of virtual and in-person homebound instruction, and other appropriate...options.”
- <https://www.isbe.net/Documents/SpEd-FAQ-Return-to-InPerson-Instruction-2020630.pdf>

US DOE Guidance

- “IEP, placement, and Section 504 teams can address continuation of school-wide layered prevention strategies recommended by CDC to address the special circumstances of the student and ensure that the student with a disability can receive FAPE in the LRE.”
- Prohibits schools from segregating students with disabilities, including those at risk of severe outcomes from COVID-19, from peers without disabilities
- Warns schools to be cautious about segregating students with disabilities as the cause of any particular mitigating strategies “to avoid stigma and the risk of bullying”
- <https://www2.ed.gov/documents/coronavirus/letter-to-educators-and-parents-regarding-new-cdc-recommendations-03-24-2022.pdf>

US DOE Requires Schools to Individually Address Medically Fragile Student Needs

- Schools are required to take action to preserve safe in-person learning for students at high risk for COVID-19-related complications
- Includes reasonable modifications under Section 504 “to ensure equal access for their students with disabilities, absent a showing that the modifications would constitute a fundamental alteration or undue administrative burden to the program.”
- COVID-19 prevention and risk reduction measures are required for child with IEP to receive FAPE, and include prevention measures in IEP as special ed, related service or accommodation or in 504 Plan as accommodation

Practical considerations for immunocompromised/medically fragile students

- Importance of clear, highly prescriptive medical documentation to support individualized plan and need for either home bound or special in school protections
- Include a health plan in the IEP or 504 Plan that specifically outlines services and/or accommodations
- Make sure all providers have a copy of the plan, including regular and special education teachers, all service providers, and any other school staff responsible for implementing any aspect of the plan
- Include an option for remote learning or home-based instruction when warranted
- In reality, districts vary in how they manage these issues

Recovering education lost during the pandemic – compensatory education vs. recovery services

- Compensatory education:
 - Remedy for school district's failure to provide appropriate services
 - Intended to place a student in the position he or she would have been in had school district provided appropriate services in the first place
 - Compensatory education can be specific service(s) or, if a student needs more than a general education program can provide, it could be payment for placement in a private program (such as a therapeutic day school)
 - Recovery services:
 - “In order to address the learning loss [from pandemic-related losses], districts across the country implemented ‘recovery services’ to identify gaps in a student’s learning as a result of the pandemic and make a plan to catch them back up to where they would have been.”
 - Recovery services are generally not viewed by Districts as IEP services and are not seen as conveying IEP rights or safeguards.
 - <https://chicago.chalkbeat.org/2022/10/17/23407561/students-disabilities-iep-special-education-covid-learning-recovery>
- Districts may cry poor on all these services, but got huge extra federal funding due to pandemic.

OCR Guidance on Compensatory Education due to COVID

- If a student did not receive appropriate evaluations or services during the pandemic, including those that the student previously determined he or she was entitled to, the school must convene a team of people with knowledge of the student to individually determine whether and to what extent compensatory services are needed.
- Compensatory education should not be seen as questioning the school's good faith; rather, "[i]t is a remedy that recognizes that students experience injury when they do not receive timely initial evaluations, re-evaluations, or services, ... regardless of the reason."
- <https://www2.ed.gov/about/offices/list/ocr/docs/factsheet-504.html>

OCR - Factors for Team to Consider regarding Compensatory Education

- Frequency and duration of missed instruction and related services
- Whether special education/related services provided during pandemic were appropriate based on student's needs
- Student's present level of performance
- Student's previous rates of progress
- Updated evaluations
- Whether evaluations were delayed
- Any other relevant information.
- <https://www2.ed.gov/about/offices/list/ocr/docs/factsheet-504.html>

ISBE's position is contradictory...

- Compensatory education may be appropriate, however, if 1) the school district did not make good faith, reasonable effort to provide FAPE during the school closure to the greatest extent possible, and/or 2) the school district does not make good faith, reasonable efforts to appropriately address educational impact and provide FAPE **when in-person learning resumes** and COVID-19-related restrictions are no longer in place.
- If there is an instance where a district or other serving entity has denied access to FAPE, compensatory education may be an appropriate remedy under the Individuals with Disabilities Education Act. (August 14 Guidance, p. 4).

Contrast Compensatory Education with Recovery Services – the CPS Example

- CPS implemented a “recovery plan” in spring 2022 but only kicks in if school can provide data that shows a student regressed during remote learning – actual loss of skill required
 - Some parents argue that this standard is impossible – kids learned nothing during pandemic so can’t have regressed
 - And regression hard to prove – it was harder to collect data on student skills during pandemic so it is now hard to show how they regressed
 - Problematic – incoming third graders who don’t know their letters but under CPS guidelines they don’t qualify for recovery services. CPS’s rationale is that, because these students had never retained letters (prior to pandemic), they didn’t regress due to the pandemic.
 - But absence of data may make it hard for school to prove adequate progress. Also gives more basis for giving credence to parents’ observations of difficulties
- <https://chicago.chalkbeat.org/2022/10/17/23407561/students-disabilities-iep-special-education-covid-learning-recovery>

Bottom Line on Compensatory Education and Recovery Services

- School districts vary in the provision of comp ed and recovery services
- Regardless of school district's fault, a child that has not received FAPE is entitled to compensatory education if it caused a meaningful loss of progress
- Consider including recovery plans in IEPs, but be mindful of district requirements to obtain them

Staffing Shortages

- Many districts are experiencing COVID-related staffing shortages, including:
 - Lack of transportation (bus drivers)
 - Lack of 1:1 or shared aides
 - Lack of special education teachers or other professional personnel
 - Inability to provide in-person instruction for homebound students
 - Insufficient therapeutic schools due to staff shortages
 - District budgetary problems (offset by infusion of federal COVID funds)

School Districts Required to Provide Services Regardless of Reason for Staffing Shortages

- When a student is not receiving special education, related services, and/or accommodations due to staffing shortages, the fact that the shortage is COVID-related is irrelevant.
- However, some hearing officers and courts may view the staff shortages as a force majeure and decide schools should not be held responsible.
- Use the same analysis as with remote learning-related compensatory education claims: if the school made decisions that resulted in a loss of FAPE, then compensatory education should be provided.
- Arguably, should be provided regardless of the reason for the loss.

Shortages are an Explanation, Not an Excuse

- Child's right to FAPE is not diminished by inability to staff or implement agreed-upon program or service
- Prior case law indicates that cost should not be factor in determining what services a child should receive
- For example, a district can't focus solely on **cost** when determining the type of vehicle it will use to transport a student with a disability. 107 LRP 6032 (OCR 06/19/06). That said, a district may choose the less expensive of two equally appropriate transportation options. See, e.g., 39 IDELR 223 (SEA CA 2003).

Strategies for Addressing Absence of Services/Staff

- Request IEP meeting to demand services
- Send a demand letter
- File an SEA complaint, OCR complaint, or request for due process under IDEA or Section 504
- Federal court action seeking writ of mandamus or injunction on the grounds of emergency
- Send unilateral placement letter and arrange private services
- Demand compensatory education to make up for services missed
- Seek reimbursement for actual out-of-pocket expenses