Modern Issues in LRE: Does the Mandate Really Apply Equally in All Contexts?

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What is the Least Restrictive Environment?

- **20 U.S.C. §1412(a)(5)(A)**
- The educational setting within which the child can receive FAPE and have maximum exposure to nondisabled peers
- Also, the educational setting within which the child's IEP can be implemented that allows for maximum exposure to nondisabled peers
- Removal from regular classes not to take place unless FAPE there not possible with sp ed services

The Key LRE Requirements of the IDEA Regulations

- Sp. ed. students must be educated with non-disabled students to the maximum extent appropriate (34 CFR 300.114(a)(2)(i))
- A change of placement from regular class to a more restrictive setting can take place only after properly determining that a FAPE cannot be provided in the regular class, even with legitimate efforts at providing supplementary aids, services, and modifications (34 CFR 300.114(a)(2)(ii))

- School districts must maintain a continuum of placements for IDEA-eligible students (34 CFR 300.115)
- IEP teams must make placement decisions, and must do so at least annually (34 CFR 300.116(a)(1), (b)(1))
- IEP team placement decisions must be based on each student's IEP (34 CFR 300.116(b)(2))
- Unless the IEP requires some other arrangement, children should be placed in the school where they would attend if they were not disabled (34 CFR 300.116(c))

- The placement must be as close as possible to the student's home (34 CFR 300.116(b)(3))
- In making placement decisions, the IEP team must consider any potential harmful effect on the child or on the quality of required services (34 CFR 300.116(d))
- IDEA students must not be removed from regular classrooms solely because of the need for classroom modifications (34 CFR 300.116(e))

The LRE Analyses of the Circuit Courts

- ***Roncker* formulation** (6th Circuit—KY, MI, OH, TN)

  Can student benefit from mainstreaming?

  Would benefits of mainstreaming be outweighed by benefits gained in more restrictive setting?

  Could services be feasibly make FAPE possible in a mainstream setting? (Cost is a valid consideration).

  Is student a disruptive factor in regular class?

- ***Daniel R.R.* Analysis** (5th Circuit—LA, MS, TX, adopted by 3rd (DE, NJ, PA) and 11th (AL, FL, GA)) **(and 10th Circuit)**

1. **Can student be educated satisfactorily in regular classes with supplementary aids and services?** Six sub-factors help answer the question

   Has school attempted placement in regular classes?

   Were those efforts sufficient, and not mere token attempts?

- ***Daniel R.R.* Analysis**

  Will most of the teacher's time be devoted to the student or to modifying the curriculum?

  Can student receive educational benefit in the regular classroom?

  What has been the child's overall experience in regular classes?

  What is the child's effect on the classroom and other students' education?

- ***Daniel R.R.* Analysis**

2. **If the child cannot be educated in regular class, has the child been mainstreamed to the maximum extent appropriate?**

   Analysis envisions a gradual movement up the "ladder" of restrictiveness, if the child cannot be educated full-time in regular classes

- ***Rachel H.* Formulation** (9th Circuit— AK, AZ, CA, HI, ID, MT, NV, OR, WA)

  What are the educational benefits available to the student in regular class, with aids and services, as compared with a special ed class?

  What are the non-academic benefits of interaction with children who are not disabled?

  What is the effect of the student's presence on the teacher and other students in the regular classroom?

- ***Rachel H.* Formulation** (9th Circuit— AK, AZ, CA, HI, ID, MT, NV, OR, WA)

  What is the cost of mainstreaming the student into a regular classroom?

- ***What about the 7th Circuit?***

  Circuit has cited to both *Daniel R.R.* and *Roncker* cases

  But it has declined to adopt a multi-factor LRE analysis (See, e.g., *BOE of Township Sch. Dist. No. 211 v. Ross*, 47 IDELR 241 (7th Cir. 2007)

  Main Inquiry—Was education in mainstream environment satisfactory, or would reasonable measures have made it so?

- Hearing officers and federal courts will use the preceding analyses, depending on jurisdiction, to decide LRE cases
  - The analyses are variations on either a balancing test or a multi-factor test
  - The various questions in the legal analyses can help IEP team members in making placement decisions that comply with LRE
  - In fact, the analyses of the circuit courts can form decision-making rubrics for LRE-compliant IDEA placements

Challenging LRE Areas

- **Should or should not LRE apply equally in all areas?**
  - In practice LRE is not always treated in the same way, depending on the context
  - At times, the LRE requirement is applied strictly, exposing schools to continuous legal risk but at others, it seems a malleable mandate
  - In some areas, traditional LRE is simply a poor fit for new and innovative placement options

Preschool Programs

- The LRE difficulty in the preschool context is that an LEA may not have a regular pre-K program to provide for mainstreaming for 3-4-year IDEA-eligible students
- In such schools, there will be tendency toward offering services in PPCD settings, which may be appropriate for some, but not all students in that age range
- Is there any flexibility in the LRE requirement for preschool programs?

Preschool Programs

34 CFR 300.116 expressly applies LRE to preschool settings (see commentary at 71 Fed. Reg. 46589 (2006))

Letter to Neveldine, 24 IDELR 1042 (OSEP 1996)—LRE applies equally in preschool settings, even to preschool students eligible only for speech services

Dear Colleague Letter, 58 IDELR 290 (OSEP 2012)—LRE applies even if the district has no pre-K; schools can explore Head Start, paying for private preschool, other public schools, or home-based services (?...)

Preschool Programs

Even older cases follow this line—*Bd. of Educ. of Lagrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ.*, 30 IDELR 891 (7th Cir. 1999) (ordering reimbursement for $75/mo private preschool, since student could be mainstreamed but LEA offered no regular pre-K)

Preschool Programs

Letter to Anonymous, 53 IDELR 127 (OSEP 2009)—LRE and continuum of placements requirement applies equally to charter schools

How about the courts?...

- ***E.G. v. Fair Lawn Bd. of Educ.*, 59 IDELR 65 (3rd Cir. 2012)**
  - School proposed an ASD classroom with 1:1 ABA for young girl with ASD
  - Modeling benefit was minimized because she neither noticed nor interacted with peers, and wandered aimlessly in regular pre-K
  - Student needed lots of 1:1 instruction, had made progress in ASD classroom, and had opportunities for interaction with typical peers through the school's "reverse inclusion" program

- ***E.G. v. Fair Lawn Bd. of Educ.*, 59 IDELR 65 (3rd Cir. 2012)**
  - But, despite its finding on the facts, court agrees that LRE applies with "equal force" in pre-school context

- ***N.B. v. Tuxedo Union FSD*, 60 IDELR 2 (2nd Cir. 2012)**
  - Parent challenged proposal to place PDD preschooler in a special ed class, wanted her in private regular pre-K
  - Student made good progress by modeling typical peers, and with 1:1 aide, in regular pre-K
  - School had no evidence that FAPE was not feasible in regular pre-K
  - Court held proposal was not LRE, awarded tuition reimbursement

- ***R.H. v. Plano Ind. SD*, 54 IDELR 211 (5th Cir. 2010)**
  - School proposed an inclusive pre-K program for 4-year-old with ASD and speech impairments
  - Parents wanted payment for private regular pre-K (teacher had no degree, was not certified)
  - School not sure IEP could be implemented in private pre-K without its "direct supervision"
  - School had no regular pre-K

- ***R.H. v. Plano Ind. SD*, 54 IDELR 211 (5th Cir. 2010)**
  - Court stated that "IDEA…makes removal to a private school placement the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system…."
  - Court held its LRE analysis "does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class."

- ***R.H. v. Plano Ind. SD*, 54 IDELR 211 (5th Cir. 2010)**
  - Thus, 5th Circuit does not read LRE mandate to require paying for regular private school when LEA has no pre-K
  - It sees private placement as an exceptional and limited circumstance, given IDEA's purpose to serve students in *public* schools
  - A definite conflict among circuits, owing to the realities of scarcity in regular pre-K programs—Does LRE require creation of regular placements or access to private options to satisfy IDEA?

- **Practical Realities**
  - Districts without Pre-K programs risk LRE claims from parents of preschool IDEA students that should receive some mainstreaming, although inclusion options may be limited or not really good options
  - But, districts are unlikely to self-fund Pre-K programs in States that do not support them with funding
  - Thus, the existing application of LRE to preschool programs exposes these schools to a continuous legal risk of LRE claims and limited options to avoid it

- **Practical Ideas**
  - Schools should *plan* to address the need for mainstreaming for certain preschool IDEA-eligible students, rather than hoping parents won't object to overly restrictive placements
  - Explore any and all alternatives available locally for mainstreaming (e.g., Head Start programs, other public schools, private options (if feasible))
  - Best option may be push-in or reverse inclusion programs, with guided interaction with nondisabled peers

- **Practical Ideas**
  - Reverse inclusion could use selected K students (could be made into a program akin to Partners in PE)
  - For 4-year-olds, mainstreaming with K class can be considered more plausibly

Extended School Year Services

- The LRE difficulty in the ESY context is that an LEA may have only sp ed settings to provide ESY services
- And, it is more likely that more severely impaired students will need ESY, and the specialized services of a sp ed setting, to prevent regression
- Thus, it makes sense for schools to focus funding on special ESY programs
- Is there any flexibility in the LRE requirement for ESY programs?

- ***T.M. v. Cornwall CSD*, 63 IDELR 31 (2nd Cir. 2014)**

  AU child is normally mainstreamed with supports during school year, but was offered sp ed class for ESY

  Court held LRE applies equally to ESY terms, even if the district does not offer regular summer programs

  Court stated that districts do not have to create regular summer programs for this purpose; they can contract with other public or private schools

- ***T.M. v. Cornwall CSD*, 63 IDELR 31 (2nd Cir. 2014)**

  "For ESY programs as for academic year programs, a child's LRE is primarily defined by the nature of the child's disabilities rather than by the placements that the school district chooses to offer."

  Question—Does a school have to offer the continuum of placements it normally offers during year?...Would that be cost-effective? Is that question irrelevant?

- ***T.M. v. Cornwall CSD*, 63 IDELR 31 (2nd Cir. 2014)**

  Case has problematic implications—Is contracting with a neighboring public school for regular Summer school mainstreaming really a feasible option?

  Are private summer school options available in rural areas?

  Schools that have regular summer school will have to consider integrating IDEA students for ESY whose IEPs call for mainstreaming during school year

Online or Virtual Educational Programs

- A program increasingly used by students with disabilities

  Good option for students confined to home, or who have immune system conditions

  Affords flexible hours and pacing

  Can be attractive to parents of students that have had problems in brick and mortars schools

Online or Virtual Educational Programs

- ***Dear Colleague Letter*, 68 IDELR 108 (OSERS/ OSEP 2016)**

  "The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools that are constituted as LEAs or are public schools of an LEA."

  Child-find applies in VPs, although it presents "unique challenges" in VP context

- ***Tacoma Sch. Dist.*, 116 LRP 50574 (SEA WA 2016)**
  - District expelled high-schooler with ADHD and ODD, due to risk of violence
  - After emergency expulsion term, school moved student to its VP (no IEP meeting)
  - But, student produced little work and was mostly off-task
  - HO—VP inappropriate for student's unique needs, and provided no social interaction

- ***Wayne-Westland Comm. Schs.*, 64 IDELR 176 (E.D.Mich. 2014)**
  - Court grants injunction removing large, aggressive student from school, and placing him in a VP
  - Note—Court does not comment on how the VP would be appropriate for a highly non-compliant student…

- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**
  - Student with severe migraines alleged VP was inappropriate, denied him FAPE
  - School had made numerous attempts to accommodate his condition, absences, tardies
  - He had previously been provided a hybrid VP with some school attendance, but he neither attended school, nor worked well on the VP
  - School finally fashioned a fully VP, fashioned on the VP parents preferred, but parents lost faith in the program after student did not perform

- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**

  Note that court sees a VP as "the most restrictive" placement, since it provides no exposure to nondisabled (or disabled) students

  In fact, no live exposure to teachers either…

- ***Fenton Area Public Schs.*, 73 IDELR 56 (SEA Michigan 2018)**

  12-year-old with ED and hearing impairments was moved to increasingly isolated settings due to behavior outbursts

  After he was moved to a classroom alone with a teacher and aide, the aggressive behavior persisted, and the school placed him on a Skype program

  Student did no work thru Skype, as he would turn off the computer and run around the room—staff could not redirect him remotely

- ***Does traditional LRE analysis really apply in the virtual context?***

  Does it matter that most programs are choice-based programs? Does the parent waive LRE if they choose the VP? Is that legally possible?...

  Or, must IEP teams limit admissions to VPs only to students who require the most restrictive environment in light of their needs?... This "traditional" application would minimize the VP option for students with disabilities (as much as the residential facility option?...)

- ***Does traditional LRE analysis really apply in VP context?***

  Are VPs causing widespread LRE violations? Or, does the virtual environment allow for *virtual* interaction with peers? Virtual LRE?

  A *continuum of virtual placements* exists, where some VPs allow for interaction with peers, others have some, others have none

  Is the law saying that virtual interaction is not the same, or as valuable as, physical interaction? It really has not addressed the issue…

- ***Ideas on VP placements?***

  Establish nondiscriminatory admission policies, since inherent nature of VP program will make it inappropriate for some students, too restrictive for others

  Discuss harmful effects of VP placement in IEP meetings

  VP will not be appropriate for students whose needs include social skills development

- ***What about robots, participation by Skype/ cameras?***

  Robots can enable some remote social interaction from the home—Where would that placement fit in the LRE continuum? Is it as restrictive as a traditional homebound program since there is no interaction in person? As restrictive as a virtual program? What about participation at home by Skype/Camera?

  Courts have not yet ruled on these emerging tech-assisted placements, but treatment of VPs would tell us that Courts are likely to also view these placements as highly restrictive, in a traditional LRE sense

- ***What about robots, participation by Skype/ cameras?***

  But, if technology allows for full participation in instruction, and some alternative means for social interaction (i.e., robot), then placement seems less restrictive than either homebound or VP programs

  Warren Hills Reg'l High BOE, 70 IDELR 57 (SEA NJ 2017)

  Provision of home instruction to 14-year-old with Marfan Syndrome was not LRE, as robot could have allowed for real-time interaction with teachers and peers

- ***What about robots, participation by Skype/ cameras?***

  Warren Hills Reg'l High BOE, 70 IDELR 57 (SEA NJ 2017)

  School's failure to investigate robot option before dismissing it was a violation of LRE

  ALJ sees robot interaction as a form of pro-LRE opportunity for interaction with nondisabled peers

  "In many areas of society, technological advances move at a pace that is often faster than the law can recognize and incorporate…."

- ***What about robots, participation by Skype/ cameras?***

  ***In re: Student with a Disability*, 117 IDELR 47550 (SEA NY 2013)**

  High-schooler with health and psychiatric issues claimed she could not breathe at school

  School offered a clean air room at school and a robot by which student could get instruction

  The student, however, did not attend, so the school moved the technology to her home, so she could attend by robot from home

- ***What about robots, participation by Skype/ cameras?***

  ***In re: Student with a Disability*, 117 IDELR 47550 (SEA NY 2013)**

  She claimed the robot was not working properly, but staff worked through all the issues

  Parents nixed the robot option to attempt home instruction, but they did not like the instructors

  ALJ found that District had attempted to meet the student's needs and did not violate the IDEA

- ***What about robots, participation by Skype/ cameras?***

  Southern York Cnty. SD, 55 IDELR 242 (SEA NJ 2017)

  Parents requested that a student with a genetic disorder receive educational services in the home by means of a webcam installed in his classroom

  District rejected the request, then finally offered the use of a private webcam room at school, from which he could watch his classroom

- ***What about robots, participation by Skype/ cameras?***

  Southern York Cnty. SD, 55 IDELR 242 (SEA NJ 2017)

  ALJ finds that offer violated LRE, holds that the placement at school was more restrictive (?) than the home program the parents requested

  District program fails to take into account that student is unable to attend school many days

  Homebound instruction was not working, as the student had too much work to perform independently

- ***What about robots, participation by Skype/cameras?***

  Southern York Cnty. SD, 55 IDELR 242 (SEA NJ 2017)

  "There is certainly an intersection here of the tides of LRE as a physical location with a technological decoupling of place due to the virtualization of teaching and learning through technology."

- ***What about robots, participation by Skype/ cameras?***

  Practical Ideas—Schools should explore use of webcam-based classroom participation from the home as an alternative, or in conjunction with, homebound instruction

  Technology can allow for full participation in instruction without great expense

  Given the availability of technology, it is likely that parents of students struggling with traditional homebound services will request cam-based participation more often

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Programs for Students Aged 18-21

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  High-functioning 21-year-old with Down's Syndrome was placed in a life skills transition-oriented placement (60% mainstreaming)

  Parents wanted a postsecondary transition program on a university campus

  District argued LRE did not require mainstreaming during transition ages

Programs for Students Aged 18-21

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (SEA PA 2018)**

  "Given the emphasis on transition services, as opposed to traditional academics, this Court finds no error in the HO's determination that this level of inclusion satisfies the LRE requirement."

  Question—Why is a restrictive environment needed for transition-oriented learning to a greater degree than for academic learning? This is what the school argued…

Programs for Students Aged 18-21

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  Question—Since the student will have to interact primarily with nondisabled persons in post-school environments, does it make sense to educate her with other disabled students?

  What is the rationale for the difference in LRE application for ages 3-4 and 18-21? Hopefully, the need for the student to work on transition skills not part of regular curriculum…

Programs for Students Aged 18-21

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  Practical Point—The issue is likely one of properly balancing need for instruction on transition skills with need for interaction with nondisabled peers (although with some difference in ages)

  In this age range, schools should still look to maximizing time spent with nondisabled peers in the school portion of the program (e.g., electives, PE)

Programs for Students Aged 18-21

- ***Geneviva v. Hampton Twp. SD*, 72 IDELR 57 (W.D.Pa. 2018)**

  Note—With the advent of postsecondary programs for students with disabilities, we are likely to see more of this type of case

More Restrictive Environment (MRE) Cases

- Despite the LRE mandate, at times, parents take legal action to seek highly restrictive placements
- E.g., ABA cases, private placement cases, therapeutic placements
- Or, to seek optimal progress (e.g., *Moradnejad v. District of Columbia*, 67 IDELR 261 (D.D.C. 2016))
- Question—Is the LRE analysis treated differently in such cases? If so, why?

MRE Cases

- ***S.M. v. Arlotto*, 73 IDELR 74 (D.Md. 2018)**

  Parents claim elementary student with ADHD and SLDs needs full-time sp ed setting, seek private SLD placement

  Court focuses only on student's performance (grade-level) and that he is easily redirected

  But, court engages in no LRE analysis to deny private placement

MRE Cases

- ***T.M. v. Quackertown CSD*, 69 IDELR 276 (E.D.Pa. 2017)**

  Parents seek 1:1 ABA services for 11-year-old with ASD/ID

  They assert that he cannot benefit from interaction with nondisabled student

  Court disagrees, notes that student's social skills have improved with mainstreaming

MRE Cases

- ***T.M. v. Quackertown CSD*, 69 IDELR 276 (E.D.Pa. 2017)**

  Again, court does not focus on LRE analysis, noting only in passing, that "one goal of mainstreaming is to provide the child with opportunities to develop social and communication skills."

  Question—Why not apply LRE analysis and simply hold that the parents' request violates the LRE mandate?

MRE Cases

- ***T.M. v. Quackertown CSD*, 69 IDELR 276 (E.D.Pa. 2017)**

  Note—See also, *J.G. v. State of Hawaii DOE*, 72 IDELR 219 (D.Hawaii 2018) for a case where parent argued that being exposed to neurotypical peers was actually harmful to their child

MRE Cases

- ***A.R. v. Santa Monica Malibu SD*, 66 IDELR 269 (9th Cir. 2016)**

  School proposed preschool collaborative placement for 4-year-old with ASD

  When parents complained of the focus on play-based learning, school proposed another pre-K class focusing on pre-academics and more typical peer models

- ***A.R. v. Santa Monica Malibu SD*, 66 IDELR 269 (9th Cir. 2016)**

  Parents sued for private specialized program for students with disabilities, *while asserting that the public school program violated LRE*

  Court denied relief on LRE grounds (without noting the contradictory nature of the parents' claim)

- ***A.R. v. Santa Monica Malibu SD*, 66 IDELR 269 (9th Cir. 2016)**

  Not a one-off case, see *M.M. v. Seattle SD*, 68 IDELR 165 (W.D.Wa. 2016)(parents sued for full-time regular placement for child with ASD on LRE grounds, but sought placement in private program for ASD children)

- ***K.K.R. v. Missoula Cty. Pub. Schs.*, 68 IDELR 68 (D.Mt. 2016), aff'd 71 IDELR 181 (9th Cir. 2017)**

  Parents of a 9th grader with Asperger and ED sought continuation of private therapeutic placement

  Parents declined all options other than private placement

  "Nothing in the IDEA or corresponding regulations require a school to start the process with the most restrictive placement if it can adequately serve the student in a less restrictive placement…."

- ***K.K.R. v. Missoula Cty. Pub. Schs.*, 68 IDELR 68 (D.Mt. 2016), aff'd 71 IDELR 181 (9th Cir. 2017)**

  Note—An analysis more observant of the LRE mandate

  (See, similarly, *B.M. v. Encinitas USD*, 60 IDELR 188 (S.D.Cal. 2013)(using *Rachel H.* analysis to hold that parents' preferred 1:1 ABA home program was not the LRE for the student, and denying reimbursement))

- ***Nathan M.. v. Harrison SD No.* 2, 73 IDELR 148 (D.Co. 2018)**
  - School proposed transitioning student from a private ABA program to public school
  - Challenge to school program failed because "the prime difference between Alpine and Otero. There are no nondisabled children among the 27 or so children at Alpine."
  - Thus, "there is no opportunity for him to interact with children making normal progress."

- ***Nathan M.. v. Harrison SD No.* 2, 73 IDELR 148 (D.Co. 2018)**
  - Moreover, private school focused only on behavior, but it had no certified teachers, and student made little academic progress
    - ***Note***—Why no discussion of lack of access to regular curriculum in the private school? Is there not a "curricular LRE" component to IDEA that emphasizes participation in regular curriculum standards?

- **Contrast with Analysis in Traditional Placement Challenges**
  - ***C.D. v. Natick Pub. SD*, 70 IDELR 120, 72 IDELR 148 (D.Mass. 2018)**
    - LRE analysis front and center when parents challenged school proposal for placement in sp ed classes for 10-year-old with ASD/ID
    - Court held student could be mainstreamed "especially with a para-professional providing in-class support"

- **Contrast with Analysis in Traditional Placement Challenges**

  It's difficult not to conclude that the focus on LRE compliance decreases when parents are not seeking to enforce the mandate (i.e., LRE less effective "defense" than "offense")

  Is placement in LRE a student right? If so, can it be waived? Is it, rather, a fundamental independent IDEA standard that cannot be waived?...

  Practical Point—If parents seek a specialized placement, school should document precisely how the student could receive a FAPE in a less restrictive environment

LRE in *Burlington* Reimbursement Cases

- In its 1985 *Burlington* opinion, Supreme Court held that parents could place their child unilaterally in a private school setting and get reimbursement from their public school if they showed that:
  1. Public school program was inappropriate, and
  2. Private school is appropriate

See *Burlington Sch. Committee v. Massachusetts DOE*, 556 IDELR 389 (1985)

LRE in *Burlington* Reimbursement Cases

- In its follow-up *Florence* opinion, Supreme Court held that the parents' chosen private placement need not be approved by SEA or meet all normally-applied FAPE requirements in order for reimbursement to be possible

See *Florence Cty. Sch. Dist. 4 v. Carter*, 20 IDELR 532 (1993)

LRE in *Burlington* Reimbursement Cases

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See *Florence Cty. Sch. Dist. 4 v. Carter*, 20 IDELR 532 (1993)

LRE in *Burlington* Reimbursement Cases

- And, circuit courts have interpreted Florence as not requiring full LRE compliance in private placement reimbursement cases, holding LRE is only a "factor" in determining appropriateness of the private program

See, e.g., *M.S. v. BOE of the City Sch. Dist. of Yonkers*, 33 IDELR 183 (2nd Cir. 2000); *Warren G. v. Cumberland Cnty. Sch. Dist.*, 31 IDELR 27 (3rd Cir. 1999); *Cleveland-Heights-University Heights CSD v. Boss*, 28 IDELR 32 (6th Cir. 1998)

LRE in *Burlington* Reimbursement Cases

- Indeed, some courts plainly state that LRE is a prohibitionary mandate intended to prevent schools from improperly segregating students, but not equally applicable to parental private placement

See, e.g., *Carter v. Florence Cnty. Sch. Dist.,* 18 IDELR 350 (4th Cir. 1991)("the Act's preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body" and not to restrict parental options in unilateral placement situations)

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Parents unilaterally placed a 4th grader with ADHD and SLDs in a private special school for students with disabilities and sought reimbursement from the District

  Since parents' options may be limited to special schools, "inflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in *Burlington*."

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Thus, the high restrictiveness of a private school is not dispositive of whether the placement is appropriate for *Burlington* reimbursement, but it is a "factor" to consider

  But, the Court overrules the lower court's finding that the private program was way too restrictive for the student's needs, without further consideration of the LRE issue, and despite the student's prior progress in regular classes

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Questions—To what degree does LRE remain a factor in examining the appropriateness of the private school? Are the student's needs irrelevant to the inquiry?

  Would prospective funding of the private school be appropriate, or would LRE require courts to order the appropriate services be provided to the student in the public school setting?

LRE in *Burlington* Reimbursement Cases

- ***C.L. v. Scarsdale Union Free SD*, 63 IDELR 1 (2nd Cir. 2014)**

  Note—Definitely a context where the importance of the LRE mandate is diluted and does not apply with "equal force"… More like a "waivable" right to LRE

  And, is LRE really only a prohibition on schools? Some courts view LRE as a student right; a right to socially interact and associate with nondisabled children…

  (See, e.g., *A.K. v. Gwinnett Cnty. SD*, 62 IDELR 253 (11th Cir. 2014); *Teague Ind. SD v. Todd L.*, 20 IDELR 259 (5th Cir. 1993))

IDEA Legal Issues in COVID School Closures: FAPE, Comp Services, Other Issues

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First OSEP Guidance (March 12, 2020)

- Nothing in IDEA or §504 addresses whether schools can discontinue services during a disease outbreak
- If a school ceases services for all students, "the LEA would **not** be required to provide services to students with disabilities during that same period of time." (Question A-1).

Note—Could a school then provide no services whatsoever to IDEA students during a COVID closure?... (See further guidance).

First OSEP Guidance (March 12, 2020)

Note—OSEP's position restates USDOE's 2017 guidance on flexibility recipients of federal funds required as a result of federally declared disasters. See *Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters*, 117 LRP 41207 at Question C-1, p. 13 (USDOE—September 25, 2017).

Generally, significant portions of the March 2020 guidance draw from the 2017 document cited above.

First OSEP Guidance (March 12, 2020)

- If, however, schools provide "any educational services" to the general student population during a closure, students with disabilities must have equal access to such services (Question A-1).

  Note—This is a natural interpretation, required by the nondiscrimination obligations of §504 (which also apply to IDEA-eligible students).

First OSEP Guidance (March 12, 2020)

- An implication of this guidance is that if a school is providing direct online instruction for a certain grade level (e.g., high school seniors), then direct online instruction must be provided to IDEA/§504 high school seniors as well.

  Note—Otherwise, there could be potential discrimination claims with respect to all IDEA/§504 students.

First OSEP Guidance (March 12, 2020)

- **What quality of services must be provided during closure?**

  Schools "must ensure that, *to the greatest extent possible*, each student with a disability can be provided special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504." (Question A-1).

- **What quality of services must be provided during closure?**

  Note—Guidance envisions that schools might not be able to implement all services included in IEPs in the at-home context.

  Also, the implication of the guidance is that provision of alternative at-home services might not be as effective as in-person services in the structured school setting (likely a more common situation).

  Answer appears to undercut notion that a school might be able to provide no services to IDEA students during COVID closures.

- **What quality of services must be provided during closure?**

  "While certain aspects of a student's special education, related services, or supplementary aids and services might need to be adjusted due to the practical differences between in-person and virtual education delivery techniques (i.e. frequency or duration of service), the student's educational needs, annual goals, and the service providers' expectations must not change. **There must be no negative impact on a student's receipt of educational benefit as a result of shifting from school to virtual education."** Wyoming Department of Education, *Special Education COVID-19 Update* (August 2020), At p. 3.

- ***Brookings Sch. Dist.*, 120 LRP 24079 (SEA South Dakota 2020)**

  Parent of IDEA high-schooler filed a state complaint alleging that the school unilaterally changed student's placement to at-home services when schools closed due to COVID.

  Also alleged that the school failed to provide the sp ed services called for in the IEP during the school closure.

  District developed a "Special Education Distance Learning Plan" for the student, but parents rejected the plan and demanded in-person services.

- ***Brookings Sch. Dist.*, 120 LRP 24079 (SEA South Dakota 2020)**

  Instruction was provided through Read 180 software, with accommodations and a laptop with headset, while sp ed was provided through ZOOM and video lessons, and staff communicated daily with parent.

  Not all minutes of speech therapy were provided per the terms of the IEP, and minutes of sp ed instruction were also fewer while at home.

  SEA noted that the data indicated the student made progress on his IEP goals.

- ***Brookings Sch. Dist.*, 120 LRP 24079 (SEA South Dakota 2020)**

  Parents insisted distance learning was not effective and required much assistance from them.

  SEA agreed with District that in-person services were not possible during the period of COVID closure, which was based on Governor's orders.

  SEA finds that the move to at-home services was not a change in placement (without explanation).

  Discrepancies from the IEP were "minor" and did not impede student from making progress.

- ***Brookings Sch. Dist.*, 120 LRP 24079 (SEA South Dakota 2020)**

  Notes—Here, the SEA did not address the parents' allegations that they were forced to provide substantial assistance to the student during the closure because there was no documentation of such efforts.

  What if the parents had kept daily logs of the assistance? Is this a valid factor in determining the adequacy of at-home services?

  See ***Breanne C. v. Southern York County Sch. Dist.*, 55 IDELR 3 (M.D.Pa. 2010)**(parents spent up to 3 hrs/day helping student with work, which masked her true academic deficits and was validly considered).

First OSEP Guidance (March 12, 2020)

- **What if a child is infected or ill with COVID and school remains open?**

  Schools must provide services to students who qualify for homebound instruction due to medical conditions."

  Note—But, in-person homebound services might not be possible to provide safely in areas where rates of community transmission of COVID is high.

  IEP team could determine whether student could benefit from online services, virtual instruction, or instructional telephone calls, and other activities. (Question A-2).

First OSEP Guidance (March 12, 2020)

- **If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is the action a change in placement?**

  Yes, if the exclusion will be longer than 10 consecutive school days

  Change of placement procedures through the IEP team (or placement team under 34 C.F.R. §300.166) must be undertaken, and prior written notice issued. (Question A-4).

- **If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is the action a change in placement?**

  Parents retain all rights to challenge change in placement.

  For §504 students, the change in placement must be in accordance with §504 regulations (504 committee reevaluation meeting, parent notice, parent procedural safeguards). (Question A-4).

Are Changes to At-Home Services Changes in Placement?

"If the exclusion is a temporary emergency measure (generally 10 consecutive school days or less), the provision of services such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available, is not considered a change in placement. During this time period, a child's parent or other IEP team member may request an IEP meeting to discuss the potential need for services if the exclusion is likely to be of long duration (generally more than 10 consecutive school days). **For long-term exclusions, an LEA must consider placement decisions under the *IDEA*'s procedural protections of 34 CFR §§300.115–300.116, regarding the continuum of alternative placements and the determination of placements**." Question A-4 (USDOE March 2020).

Are Changes to At-Home Services Changes in Placement?

***Eley v. District of Columbia*, 63 IDELR 165 (D.D.C. 2014)**("Clearly, shifting from what is essentially a completely individualized instructional setting separate from other students to a more traditional school setting does constitute a change in the plaintiff's 'then-current educational placement.")

Note—If the change from online instruction to classroom instruction at school is a change in placement, the reverse must be true

Are Changes to At-Home Services Changes in Placement?

***S.P. v. Fairview Sch. Dist*., 64 IDELR 99 (W.D.Pa. 2014)**

Court not only saw change to at-home program as a change in placement, but also added that "in-home cyber school is certainly the most restrictive option.

Court simply acknowledges that at-home services eliminate or significantly reduce exposure to nondisabled (or disabled) peers, at least in the traditional physical sense.

Are Changes to At-Home Services Changes in Placement?

***Lunceford v. District of Columbia Bd.* of Educ., 556 IDELR 270 (D.C.Cir. 1984)**

"Parents must demonstrate at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement."

Are Changes to At-Home Services Changes in Placement?

***Lamont X v. Quisenberry*, 556 IDELR 437 (S.D. Ohio 1984)**—"By any measure, taking a child from the classroom and instead providing home-based tutoring constitutes a change in placement."

- **If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is action change in placement?**

  See *Letter to Riesel*, 211 IDELR 403 (OSEP 1986) (components of "placement" include (1) program or setting option, (2) program of services, and (3) school or facility).

  See *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (change of placement must "substantially or materially alter the child's educational program," including level of restrictiveness, setting, and access to nonacademic/extracurricular activities)

- **If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is the action a change in placement?**

  But, the question in the guidance is framed from the perspective of *individual* exclusions of students—Is the guidance applicable to general COVID school closures?

  Given that the USDOE guidance does not clarify that it does not apply to school closures, a straightforward interpretation would be that USDOE interprets the changes to at-home services and vice-versa to be changes in placement

- **If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is the action a change in placement?**

  Questions—Otherwise, why would USDOE not indicate what procedures would have to be followed in case of school closures?

  If the shifts to at-home services are not changes in placement, what level of parental participation must be afforded? Is any required?

- **If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is action change in placement?**

  Probable Best Practice—Have IEP team meetings or use IEP Amendment forms to move students from at-home services back to school and vice-versa

- ***In re: Student with a Disability*, 120 LRP 22907 (SEA Kansas 2020)**

  State complaint involving "Continuous Learning Plan" (CLP) during COVID closure (120 mins/wk online sp ed instruction, work packets, access to remote instruction, speech, OT) for 7th grader with ID

  CLP indicated accommodations would be provided, but the area specifying the mods was left blank

- ***In re: Student with a Disability*, 120 LRP 22907 (SEA Kansas 2020)**

  IEP called for assignments to modified to be at student's "independent level" (1st grade)

  Some work provided during closure was at 6th, 7th, 10th, 11th, and 12th grade levels, some math work was actually too low

  SEA interpreted the CLP as leaving the IEP mods in place, as it did not specify otherwise

  Staff "went over" CLP with parent, but did not afford meaningful opportunity to participate

- ***In re: Student with a Disability*, 120 LRP 22907 (SEA Kansas 2020)**

  SEA takes the position that the change to at-home services due to COVID closure is not a change in placement, as the LEA did not act to place the student in that environment.

  "Because the decision to close school buildings was not the district's decision, any contingency learning plan developed for a student does not constitute a material change in services or a substantial change in placement."

- ***In re: Student with a Disability*, 120 LRP 22907 (SEA Kansas 2020)**

  Questions—Although an emergency created the need to send students home, must not the district act within the IDEA framework in deciding the services to be provided to each student? And, is there not a material change in the services?...

  Can changes in placement not be occasioned by happenings outside the district's control?

- ***In re: Student with a Disability*, 120 LRP 22907 (SEA Kansas 2020)**

  Questions—How does the development of a CLP fit within the procedural framework of IDEA that affords parents meaningful opportunity to participate? Or, is it not intended to fit?...

- **Aside—Prior Written Notice**

  Although opinions can differ on change of placement, the change from in-school to at-home services and vice-versa are changes in "provision of FAPE" that trigger the PWN requirement.

  PWN must be given to the parents "a reasonable time before the public agency—(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child *or the provision of FAPE* to the child." 34 C.F.R. §300.503(a)(1)

- **Aside—Prior Written Notice**

  "Prior Written Notice (PWN) must be issued any time there is a change in the student's educational environment. If a student with a disability moves from in-person instruction to virtual education or virtual education to in-person instruction, Prior Written Notice must be issued, and the start date of the service(s) must be noted on the appropriate IEP services page."

  Wyoming Department of Education, *Special Education COVID-19 Update* (August 2020), at p. 4.

- **Could schools prepare for COVID closure by including contingency plans in IEPs for distance learning?**

  Yes, schools can include a contingency plan for providing services on a remote basis in case of a COVID-related closure. This would allow parents and schools to reach agreement on what circumstances would trigger the contingency. (Question A-5).

  Note—This guidance encourages schools to consider contingency at-home educational services *as part of IEPs and 504 Plans* to address potential future school closures.

- **Could schools prepare for COVID closure by including contingency plans in IEPs for distance learning?**

  Note—Probably a good idea, since school reopenings in states with high numbers (cases, positivity rates, hospitalizations, deaths), outbreaks are likely, and will lead to exclusions, campus closures, or further district closures.

  This planning could save schools IDEA process steps in case of post-reopening exclusions and closures

- **What if schools are forced to miss services or instruction required under IEPs or 504 plans?**

  At various points, the guidance indicates that IEP teams and 504 committees will need to consider students' potential need for **compensatory services** if services are missed. (Questions A-1, A-2, A-3).

- **What if schools are forced to miss services or instruction required under IEPs or 504 plans?**

  Note—Thus, USDOE recognizes that it might not be possible to provide a full FAPE to students during a school closure, but schools can "make up" FAPE shortfalls when school reopens.

  Thus, a *contingent FAPE obligation*—implementation of IEP to greatest extent possible, plus later comp services to address any full or partial to implement specific services when school reopens.

- **What *are* compensatory services?**

  "Compensatory education is an appropriate means for providing a FAPE to a child with disabilities who has previously been denied FAPE." ***Letter to Anonymous*, 21 IDELR 1061 (OSEP 1994)**.

  In COVID context, the reason for school closure is beyond districts' control, so we can call this "COVID Comp" to distinguish it from denials of FAPE where districts are at fault.

  Some states and districts are giving this remedy a different name altogether…

- **What *are* compensatory services?**

  Some are concerned that the use of the term "compensatory services" is divisive or adversarial, since in its traditional form it is required due to school failures to provide FAPE.

  For example, WA OSPI uses the term "**recovery services**" in its COVID guidance.

  The terminology used is probably less important than the soundness of the IEP teams' COVID comp determinations.

  Disputes over the offers of COVID comp made by the districts are more likely than over the services provided during the closure.

- **What *are* compensatory services?**

  "New baselines may need to be established and additional educational supports may be needed to address any unfinished learning and ensure a successful start to the new school year. ***Recovery services*** is a term used to describe educational services offered to students as a result of missed or disrupted services during the COVID-19 school building closures. Due to the COVID-19 school closures and resulting need to adjust in-person instructional models, districts must determine whether and to what extent recovery services are necessary, in the event that the district was unable to provide appropriate IEP services during the school closure." Wyoming Department of Education, *Special Education COVID-19 Update* (August 2020), at p. 1

- **What *are* compensatory services?**

  Moreover, schools may not want to take COVID comp fully outside of the legal context of compensatory services, as that area of law contains doctrines that may prove helpful should disputes arise over the remedy.

  E.g., the doctrine of consideration of parents' conduct as an equitable factor in comp services decisions, the qualitative approach to calculating comp services, and natural recoupment (a subset of the qualitative approach).

Issues in COVID Comp Services

- **Deciding the COVID comp questions will require addressing complicating factors**

  One complicating factor will be parents who have failed to take advantage of online services, and whether that should weigh against providing compensatory services

- **Complicating factors**

  What to do in situations where parents are not responding to communications to initiate or continue with at-home educational services?

  Schools would be wise to document communications and responses between staff and parents, and trying multiple communication channels (email, phone, text, letters)

  Try to identify why parents are not accessing the virtual services offered

  See, e.g., WA OSPI *Q & A Provision of Services to Students with Disabilities During COVID-19*, at p. 5.

- **Deciding the COVID comp questions will require addressing complicating factors**

  Might the parent need tech tutorials, tips on motivating the student, ideas on setting up a structure for the virtual school day.

  The legal question is whether families' failure to avail themselves of at-home services is a valid factor to be considered in making COVID-comp determinations.

- **Deciding the COVID comp questions will require addressing complicating factors**

  To Federal Courts, since comp services is an equitable (fairness-based) remedy, a parent's conduct, such as refusing services, is relevant in determining comp services.

  See, e.g., ***Parents of Student W. v. Puyallup Sch. Dist. #3,* 32 F.3d 489 (9th Cir. 1994)** (Parent's rejection of eligibility, refusal to allow behavior specialist, rejection of summer services in two years, influenced comp services calculation.)

- **Deciding the COVID comp questions will require addressing complicating factors**

  See, e.g., ***Garcia v. Board of Educ. of Albuquerque Pub. Schs.,* 49 IDELR 241 (10th Cir. 2008)**—Despite FAPE violation, Court declined to award comp services because student had failed to take advantage of services previously offered and parent avoided meetings to develop IEPs.

  Court: "the limited resources devoted to providing education benefits for disabled children are not effectively allocated where schools expend resources on students who not only fail to use the educational opportunities provided them but also affirmatively avoid attending school altogether."

- **Deciding the COVID comp questions will require addressing complicating factors**

  See also, ***T.B. v. Prince George's County Bd. Of Educ.,* 72 IDELR 171 (4th Cir. 2018)**—Despite failure to timely evaluate, comp services denied since student was unwilling to attend school under any circumstances.

  See also, *C.H. v. Cape Henlopen Sch. Dist.*, 54 IDELR 212 (3rd Cir. 2010)(lack of parental cooperation); *M.M. v. School Dist. of Greenville Cnty.*, 37 IDELR 183 (4th Cir. 2002)(parents would have refused any FAPE offer)

- **Another complicating factor**…

  Some students with behavioral issues, severe AU, severe ID, social skills deficits, or multiple disabilities might simply not be good candidates for online learning. Should they be penalized for not participating?...

  These students might prove to be the ones that benefit least from online-based instruction, and who may need the most COVID comp

    Generally, online instruction demands high degree of on-task attention, independent work, self-motivation, some tech ability, self-redirection, self-structure

- **A Qualitative vs. Quantitative Analysis**

  A quantitative analysis mathematically calculates the missed amount of services and provides that amount of comp services

  A qualitative approach looks at lost skills or progress and provides the services necessary to place the student where they should be in terms of performance if there had been no interruption in FAPE

- **Qualitative vs. Quantitative Analysis**

  The qualitative analysis is more popular with federal courts, who are required to fashion appropriate relief for IDEA litigants.

  See, e.g., ***Somberg v. Utica Comm. Schs.*, 118 LRP 45495 (6th Cir. 2018)**(reduced comp services award since student made some progress despite denial of FAPE)

- **Qualitative vs. Quantitative Analysis**

  A qualitative analysis rejects a standardized calculation of comp services as not a sufficiently individualized form of remedy

  ***Branham v. District of Columbia*, 44 IDELR 149 (D.C.Cir. 2005)**—Applying qualitiative analysis, noting that a quantitative "cookie-cutter approach" could "not be squared with IDEA's conferral of equitable authority to 'grant such relief as the district court determines is appropriate.'"

- **Qualitative vs. Quantitative Analysis**

  ***Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.2d 1489 (9th Cir. 1994)**—"There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA."

- **Potential Natural Recoupment**

  What if a student quickly regains educational losses after school reopens?

  One would think that natural recoupment, if present, should impact the COVID comp determination.

  But, some weeks of return to school instruction might be necessary before IEP teams can ascertain if any losses can be naturally recouped. Will that be legally tolerable?

- **Caselaw Example on Point**

  ***Smith v. Cheyenne Mountain Sch. Dist. 12*, 72 IDELR 173 (D. Colo. 2018)**. Although the child had some deficits when he first returned to school after a two-month absence, test results showed that he regained those lost skills within days. Those test results, along with teacher testimony and the child's above-average grades on report cards, showed that the child had no need for compensatory education.

- **What if schools provided some virtual services at home, but they were only partially beneficial?**

  A likely common situation—The difficulty will lie where some alternate services were provided, but not to the same level or quality as in-person services.

  In these situations, full compensatory services would seem not to be warranted.

  But, there may be data showing lack of expected progress, so some COVID comp may be needed.

- **Who makes COVID comp decisions?**

  The federal guidance envisions that IEP teams and §504 teams make the COVID comp determinations

  COVID comp is compensating for full or partial loss of FAPE, and decisions on provision of FAPE must be made by IEP teams that afford parents a meaningful opportunity to participate in the decisions.

  (Under §504, a "lighter" parent participation requirement (notice, right to local complaint, right to §504 DP hearing)).

  See, e.g., WA OSPI *Q & A Provision of Services to Students with Disabilities During COVID-19 in Summer and Fall 2020*, at p. 9 (Updated 7/10/20)

- **Will IEP meetings to address COVID comp be needed for all sp ed students?**

  Even if a student performed well on the virtual program and made all expected progress, that is a data-based decision involving FAPE (without IEPT meeting there could be claims of failure to afford parents a meaningful opportunity to participate)

  A conservative approach would be to have IEPT meetings on ***all*** sp ed students to examine their progress during the school closure, determine if they need comp, and if so, make an offer of COVID comp services.

- **What if parents decline COVID comp?**

  Best practice would be to (1) make a determination as to whether COVID comp is needed, and if so, (2) make a written offer of COVID comp services

  This accomplishes the following:

  1. Protects the district in case parents later disagree and take legal action,
  2. Makes clear the district's commitment to COVID comp services, and
  3. Leaves the comp services on the table in case parents change their mind.

- **What if schools are forced to miss services or instruction required under IEPs or 504 plans?**

  Some comp service options:

  - Summer services programs or ESYS
  - Afterschool services
  - Increased dyslexia services during school day
  - Increased related services sessions
  - Increased level of inclusion assistance

- **Are related services still required?**

  Yes, if the IEP contains related services, the school is responsible for providing them, "to the greatest extent possible," per OSEP guidance.

  Some services can be provided through teletherapy, such as speech therapy, counseling (even OT and PT)

  See HHS/OCR's *Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency* (March 30, 2020)(although public schools are not generally considered "covered health providers" under HIPAA).

- **Are related services still required?**

  Practical Note—Schools should determine which related services might be able to be provided remotely (e.g, speech, counseling, psych services), and which would require face-to-face implementation

  If a service cannot feasibly be provided remotely, keep a close accounting of all missed sessions, and inform the affected parents of the services that cannot be provided during a closure.

- **Are related services still required?**

  Licensing Issues—For speech therapists, ASHA recommends that therapists get consent prior to change tele-services

  Such a consent not required under IDEA/ §504 (only consent to initial placement and services required), so therapists need to consider whether a formal separate written consent is needed

  Could not the consent be implied by parent agreeing to services as part of an IEP amendment? Probably.

- **Are related services still required?**

  Moreover, the ASHA website guidance on consent is pre-COVID, as it assumes a parent can simply decline teletherapy and request in-person services, which is not the case presently.

- **On pending evaluations, do timelines still apply?**

  Yes, but parents can agree to extend the timelines due to the pandemic, or schools can document the delay made necessary by inability to safely conduct face-to-face evaluations.

  Schools should note the process and documentation that will be required by their respective SEAs to support that the delays in assessments were valid.

- **On pending evaluations, do timelines still apply?**

  Note—The 2017 guidance on federally declared disasters plainly states that "if an evaluation of a student with a disability requires a face-to-face meeting or observation, the evaluation would need to be delayed until school reopens." *2017 Guidance*, at Question C-4, p. 14.

- **Making Progress on Pending Evals**

  Schools can and should complete portions of evals that can be done during a closure (BASC questionnaires, parent-reported measures, other inventory-based assessments).

  Note—For initial evaluations that are delayed, schools will want to implement general ed interventions to assist these students with the at-home services, and at the beginning of school reopenings while assessments are completed.

- **Mask Issues**

  As schools reopen, many are likely to impose mandatory mask requirements on students, which will raise disability-related questions for schools to address:

  1. **Should mask policies include exceptions for students with disabilities?**

     Probably yes, in light of CDC guidance on masks at school.

- **Mask Issues**

  CDC indicates that masks might not be feasible for the some students:

  1. Severe asthma or breathing problems,
  2. "Early elementary" (PreK and K?);
  3. "Mental health conditions,"
  4. ID or developmental disabilities, and
  5. Sensory or tactile issues.

  CDC *Guidance for K-12 Administrators on the Use of Cloth Face Coverings in Schools* (July 23, 2020); CDC *Masks in Schools* (August 11, 2020).

- **Mask Issues**

  Districts' mask policies should probably be aligned to the terms of CDC guidelines.

  Policies could require that requests for exemptions based on medical or mental conditions be documented by a physician (unless that information is already in district's records).

  See *Fact Sheet: Addressing the Risk of Measles in Schools While Protecting the Civil Rights of Students with Disabilities* (OCR 2019)("Treating individuals consistent with the CDC's recommendations should not raise civil rights concerns under [§504, ADA or Title VI]").

- **Mask Issues**

  2. **If IDEA/504 students are not eligible for an exemption from the mask requirement under the regular district policy, can they petition their IEP or 504 team?**

     Probably, so IEP or 504 team can consider whether wearing a mask at school precludes the student from receiving FAPE in the LRE.

- **Mask Issues**

  3. **If IDEA/504 students violate mask or social distancing requirements repeatedly despite behavioral interventions, can they be excluded from live instruction and sent to distance learning?**

     Probably so, but the question is whether such an action is akin to a disciplinary change in placement to an IAES.

     What do we think?

- **Mask Issues**

  On its face, the student is being removed long-term (>10 consecutive school days) from the campus due to behavior or violation of district policy.

  If these removals are seen as disciplinary changes in placement under 34 C.F.R. §300.536, then notice and MDR is required prior to the change under both IDEA and §504.

- **Mask Issues**

  Likely answer is one that views protections for students expansively, and thus, that these removals should be viewed within the framework of the IDEA's discipline protections.

- **Medically-Fragile Students**

  The dilemma with medically fragile students is that they:

  1. Have multiple conditions that place them at higher risk of serious complications if infected with COVID, and
  2. Neither masks nor social distancing may be feasible in instructional settings.

  See Centers for Disease Control (CDC): *Information for Pediatric Healthcare Providers* (May 29, 2020); *COVID-19: Frequently Asked Questions* (July 3, 2020); *COVID-19: People of Any Age with Underlying Health Conditions* (June 25, 2020).

- **Medically-Fragile Students**

  Problematically, there is also no established consensus on what constitutes a "medically fragile" child in the pediatric medicine field.

  States, however, might have definitions for school purposes…

  See, e.g., *Children with Medical Complexity: An Emerging Population for Clinical and Research Initiatives*, Cohen, et al, OFFICIAL JOURNAL OF THE AMERICAN ACADEMY OF PEDIATRICS (March 2011).

- **Medically-Fragile Students**

  WA OSPI—" IEP teams should meet prior to the fall 2020 school year beginning, including the parents and the school staff responsible for providing/ supporting medical care and other related services (e.g., school nurse, 1:1 nurse, paraeducator), to consider the continuum of alternative placements available, including the Least Restrictive Environment (LRE) of the student. If not already available, districts may want to request permission from parents to maintain two-way communication with a medically fragile student's treating physician to discuss student-specific needs and safety considerations in the school context."

- **Medically-Fragile Students**

  The LRE mandate wants these students in campus settings, health and safety priorities want these students at home, FAPE priorities want these students at school…

  IEP teams will have to make difficult placement decisions based on individualized data, physician's recommendations, parents' input, ability to implement safety measures at school, students' ability to benefit from online instruction, local rates of community transmission of COVID.