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Growth and Benefits of Virtual Programs

- The data that exists, is indicative of significant increase in enrollment in virtual programs.
- Data on level of participation of students with disabilities remains unclear

Potential benefits:

Self-pacing

Greater student control of learning

Lack of peer distractions/conflicts

Option for students with health issues

Allows for instruction in remote rural areas

Growth and Benefits of Virtual Programs

Possible cost savings (?)

Potential benefits:

Highly differentiated instruction
On-going feedback on progress
Flexible scheduling of work
Multimodal presentation of content

Challenges to Special Education in Virtual Programs

- A number of challenges, some more complex than others
- Major problem—the present IDEA legal framework is based on group instruction in brick-and-mortar public schools
- Another is that the inherent nature of virtual programs is such that they will not be able to meet the needs of some students with disabilities

Types of Programs

- Virtual/Online—Asynchronous, requires student initiative, communication with teacher only by email/phone
- Remote—Likely synchronous, teacher provides instruction in classroom, remote students participate by camera/mic
- Live Online—ZOOM-based instruction, peers appear on platform from their homes, assignments turned in electronically

Equity and Access Issues

- Non-discrimination mandate under §504 means that virtual programs cannot categorically or arbitrarily deny or exclude students with disabilities.
- A key issue will be virtual programs' admission or screening policies, which must be designed to avoid arbitrary discrimination.

Quillayute Valley (WA) SD, 108 LRP 17959 (OCR 2007)

Contract virtual program that is part of a Washington district

Written criteria precluded modified curriculum, counseling, aide support, more than 40 mins/wk of sp ed services, some tech devices

Unwritten criteria did not allow admission if reading/writing ability below 6th grade or if student lacked ability to work independently

Quillayute Valley (WA) SD, 108 LRP 17959 (OCR 2007)

OCR found admission criteria discriminatory and not "reasonably necessary to achieve the mission and goals of the education program."

Criteria that are applied only to students with disabilities are likely to be seen as discriminatory

Note—But, there are ways of incorporating some of the programs' valid concerns in ways that do not violate §504 (more later...)

Open Enrollment Virtual Programs

 Model exacerbates problem of lack of fit of VP for certain students

States must decide which LEA has the FAPE responsibility (Dear Colleague Letter (OSERS/OSEP 2016))—Likely, the open enrollment VP, if it is its own LEA

Dilemma—Open enrollment VPs may get students impossible to serve virtually, and expose VP to liability

Open Enrollment Virtual Programs

• Commonwealth Connections Academy Charter Sch. (SEA Pennsylvania 2016)

8th-grader with ADHD (OHI) transferred from regular district to the VP charter

Prior school's IEP had direct sp ed instruction in social skills, organizational skills, and math

VP provided software programs, live lectures, recordings of lectures

Commonwealth Connections Academy Charter Sch. (SEA Pennsylvania 2016)

VP also provided "virtual support" from a "learning support teacher"

Student did not take advantage of help, and started falling behind and failing

VP put him in "supplemental support program" but without IEP meeting

Then, parent rejected additional 1:1 support in the home

Commonwealth Connections Academy Charter Sch. (SEA Pennsylvania 2016)

HO found school failed to provide services comparable to prior IEP

HO—"Soon after enrolling it became apparent, the Student's attention and organizational deficits would interfere with online learning."

Also, procedural violations

HO awarded 1000 hrs of comp ed

Cincinnati Learning Sch. (SEA OH 2016)

Teenager enrolled in online charter that offered resource room to supplement VP

IEP did not state an amount of resource time, and student often did not attend

Lots of missing work, logging in inconsistently

SEA found violation, as IEP did not state specific amount of services or face-to-face classes, leaving it up to the student

Cincinnati Learning Sch. (SEA OH 2016)

Despite escalating problems, school did not hold an IEP meeting

Note—If the VP places a high degree of responsibility on the student as a matter of policy, is that contrary to the IDEA?

But, in open enrollment situations, there are no criteria for admission

And, services must be stated on IEP (could be "minimum of...")

• In re: Student with a Disability (SEA Pennsylvania 2016)

Student with SLDs and ED enrolled in VP

But, student had a history of school avoidance, so he started not participating, and failed many classes

HO found denial of FAPE—VP did not reevaluate situation or amend IEP

"Charter continued to apply its online model to Student, a model which relies upon the child to access instruction."

Open Enrollment VP Problems:

Truant students enrolled by parents as an alternative to attendance

Students with off-task tendencies, low capacity for independent work, low motivation, school resistant

Parents not willing/able to function as learning coaches

Students that need significant hands-on instruction

Compliance with Legal Norms in Virtual Context

- Virtual programs must assume all IDEA and §504 requirements apply to them (e.g., IEP progress reports under IDEA)
- But, those laws envision group instruction in brick-and-mortar schools.
- Some emerging cases show how the legal requirements might apply:

Dear Colleague Letter (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

Virtual Community Sch. of Ohio, 62 IDELR 124 (OCR 2013)

Fully virtual program not affiliated with a public school district

§504 plans developed informally by a §504 Coordinator after discussion with parent, sometimes after talking with prior school, but without §504 evaluation/meeting

Parents at times were asked to go to doctors to substantiate their children's disabilities

Virtual Community Sch. of Ohio, 62 IDELR 124 (OCR 2013)

No child-find process, no reevaluations, spotty notice of parent rights

§504 plans not examined "even though many plans would not have previously provided for placement of the student in an on-line educational environment."

Note—OCR understands that IEPs and §504 plans will have to be adapted to "fit" into an online education setting

Virtual Community Sch. of Ohio, 62 IDELR 124 (OCR 2013)

Discussion—School website stated it was an "ideal scenario" for students with disabilities, including "students removed from school due to disciplinary reasons"

Might this be oversell? Can VPs be appropriate for any student?...

Any VP must have §504 policies/procedures



Application of stay-put—School argued move to regular school from a VP was not a change in placement, as IEP not changed

Court—"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."

Question—Does this analysis apply in the COVID pandemic situation, where all students had to go home to receive services?...

Tacoma Sch. Dist. (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...

Least Restrictive Environment (LRE)

- LRE speaks to students' being educated alongside nondisabled peers—clearly based on group instruction in brick-and-mortar schools and physical exposure to peers
- LRE regulations require placement in campuses where the student would attend were they nondisabled, unless IEP requires another arrangement (in which case, they require placement in the school next closest to the home)—34 CFR 300.116

Least Restrictive Environment (LRE)

- So how does LRE work in virtual settings?
 Some cases have applied the mandate traditionally:
- 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

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

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

Expert for parents raised LRE, arguing VP was a highly restrictive placement

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

Expert argued VP did not allow learning of behavior and social interaction with peers

Court—Student's condition made him incapable of attending program other than VP

It applied traditional LRE analysis, finding that school had made "extraordinary" efforts to accommodate student prior to determining "the most restrictive option" was needed

Hernandez v. Grisham, 78 IDELR 12 (D.N.M. 2020)

Parents of IDEA students brought claim challenging state rule limiting in-person instruction in districts with high COVID numbers

Rule did not violate due process, as it was necessary to protect public's health and safety

Court noted that "there is no general right to an in-person education under the Constitution."

Hernandez v. Grisham, 78 IDELR 12 (D.N.M. 2020)

Responding to the claim that at-home instruction violated LRE, the Court held that since *all* students are educated at home, that becomes the mainstream setting for purposes of the LRE analysis.

Note—The court takes the unusual position that COVID closures change what the regular setting is. But is not LRE ultimately about the degree to which a student with a disability is exposed to nondisabled peers?

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 private school?...

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



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 as valuable as physical interaction? It really has not addressed the issue...

Appropriateness Disputes Involving VPs

- As VPs enter the arena of placements, they will also enter the world of FAPE litigation, which may focus on some of the unique aspects of VPs
- Benson Unified Sch. Dist., 56 IDELR 244 (SEA Arizona 2011)

Parents of a student with multiple chemical sensitivities disputed the District's proposal to change her from homebound services to VP

Benson Unified Sch. Dist., 56 IDELR 244 (SEA Arizona 2011)

School argued the VP offered a superior curriculum; parent argued the VP offered too little one-to-one instruction, that neither parent was able to serve as "learning coach," and that student would be exposed to print chemicals

Benson Unified Sch. Dist., 56 IDELR 244 (SEA Arizona 2011)

Student's treating psychologist testified she lacked the ability to "self-motivate"

HO found for school—HB teacher indicated student was responsible and requiring more independent work would be beneficial

And, program would be print-free and a paraprofessional could serve the function of "learning coach" (implications?...)

School Dist. of Pittsburgh v. C.M.C.(W.D.Pa. 2016)

Teen with Asperger's and anxiety had fear of school after an altercation

District proposed a mostly VP

Court found student was not a good candidate for a VP, as she was obsessed with computers and the internet

And, the VP offered no social interaction

Virtual Community Sch. of Ohio, 43 IDELR 239 (SEA Ohio 2005)

Parents of a low-functioning child with Down's alleged that a VP failed to provide an appropriate IEP or confer a FAPE, and sought reimbursement for private placement

Parents had sought out VP after disputes with a regular school

VP required parents to play significant role

Virtual Community Sch. of Ohio, 43 IDELR 239 (SEA Ohio 2005)

After a time, VP team felt that student required more intensive instruction and hands-on assistance, and sought a change in placement to another regular school

Then, parents argued lack of staff training, inappropriate IEP, failure to provide and maintain technology

Parent stopped participating, student stopped completing any of the VP work

Virtual Community Sch. of Ohio, 43 IDELR 239 (SEA Ohio 2005)

HO found for VP—"When parents elect to enroll their children in a virtual school they assume the responsibility of their new role as education facilitator and eyes and ears for the teacher."

HO found all tech issues were promptly addressed, and denied reimbursement (equitable grounds?...)

Virtual Community Sch. of Ohio, 43
 IDELR 239 (SEA Ohio 2005)

Discussion Point—What should a school do if a parent opts for at-home instruction, but despite best efforts, it's just not working for the student?

DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012)

Student with cognitive, hearing, health impairments, and behavior problems was placed in a District-operated charter school that offered a hybrid VP and bricks-and-mortar program (main portion of instruction took place online)

Parents serve as "learning coaches," but get training and assistance in that function

Quickly, problems developed in both parts of program

DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012)

Student did almost no VP work, and was frequently absent or tardy to school portion

Program made various attempts to provide additional assistance and services to both parent and student, with little results

Team concluded student needed the structure and face-to-face services of a regular campus program and proposed a change in placement

DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012)

HO found for school—Student needed highly structured and consistent program, and his behaviors "posed too great of a challenge for the parent as a 'learning coach.'"

HO held student required a structured placement on a regular campus

Note—A potentially typical VP dispute scenario, after a difficult student is initially accepted, but then problems develop...

 DOE State of Hawaii, I 12 LRP 3 1884 (SEA Hawaii 2012)

Discussion Question—Disputes over proposed placements in a VP or proposed changes in placement *out* of a VP—which will be more common?...

Degree of Individualization

- VPs must be prepared to offer a high degree of individualization to students, based on their IEPs and evaluation data
- Changes to the IEPs must be made to reflect the accommodations, services, aids, and supports that the student will need to work in the VP
- Lack of proper individualization may lead to FAPE disputes, and equity-based challenges
- A word on amounts of online instruction vs. amounts on prior IEPs

The Fit of the Current Legal Framework

- The current legal framework envisions brickand-mortar schools and group learning
- Legislation tends to lag behind innovation, and plays catch-up, after period of confusion
- Next IDEA reauthorization must address VPs (LRE application, LRE in parent choice placements in VPs, higher expectations on parents, factors relevant in making determinations of appropriateness for VPs, among others)

Related Services in VPs

- Services necessary for student to benefit from their special education (34 CFR 300.34)
- Some services will "come with the territory" of VPs—parent training, technology training, tech setup, tech monitoring, consultation with parents
- Some may be provided virtually or by videoconferencing—Speech therapy, counseling

Related Services

 Could admission criteria include requirement that student not need any hands-on related services? Unlikely

Behavior, Social, or Motivational Issues

- VPs give students greater flexibility and control over their learning experience, but also place greater responsibility on students
- Thus, VPs may not be appropriate for younger students or other students who are dependent learners and have difficulties assuming the responsibilities of VPs.
- This factor plays into admission decisions (and later disputes)

Behavior, Social, or Motivational Issues

- VPs may have to include tech safeguards to address off-task behavior, work completion
- VPs must plan for interventions that make sense in a virtual context, such as increased monitoring of students, increased contacts with parents, training of parents on tech and supervisory role
- **Social skills issues**—Most challenging to address in VPs, may signal need for non-VP

Factors Relevant to Appropriateness of Virtual Program

- Attendance problems or school avoidance
- Ability to remain on task with minimum prompts
- Social skills deficits requiring live interaction with other students
- Need for significant hands-on instruction
- Need for life-skills instruction
- Ability to work independently
- Previous performance in virtual programs

Factors Relevant to Appropriateness of Virtual Program

- Ability and willingness of parents to play expected role
- Need for alternate schedule
- Compliance problems
- Emotional problems
- Academic ability
- Ability to work with technology (with training and support)

Potential Cons of Online Programs

- If student is not motivated to participate, teacher has limited options to keep student on-task
- Parent involvement needed to ensure student logs into system
- Online programs may be less reinforcing than live attendance, creating off-task behaviors
- Limited options to deal with students that resist online instruction
- Limited BIP options
- Limited social interaction with peers

Potential Cons of Online Programs

 May not be a good option for all types of students (those that need hand-over-hand, have limited response, significant cognitive impairments

Addressing the Increased Role of Parents

• Parents in many VPs assume new roles as monitors and facilitators of their child's educational programs when they agree to participate in the online program (Virtual Comm. Sch. of Ohio (OCR 2005)).

 Ability and willingness of parents to play this role, with assistance, is a factor in whether the VP will be appropriate for the student

Addressing the Increased Role of Parents

- Role must be clear in written policies
- Needs Assessments can help identify whether parents, with training, can master the tech and monitoring roles
- If parents are failing in their roles, IEP team should meet, and propose more supports
- If even with more support, parents cannot perform minimum role, VP may not be proper

VP Written Policy Ideas (See Materials)

- Mission and Goals provision (see OCR decisions)
- Equity and Access Statement
- Provision on IEPs and 504 Plans, and need to determine whether VP is appropriate for student, reevaluations of appropriateness
- Factors relevant to appropriateness
- Related services
- Parent Roles and Needs Assessments
- Accessibility
- Equipment

First OSEP COVID 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-I).

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

Federal courts have addressed this factor in various comp services cases over the years

Deciding the COVID comp questions will require addressing some complicating factors

On situations where parents are not responding to communications to initiate or continue with athome educational services:

Generally, state agency guidance will advise documenting communications and responses between staff and parents, and trying multiple communication channels (email, phone, text, letters)

Deciding the COVID comp questions will require addressing complicating factors

Generally, states also advise documenting how the school attempted to address any barriers or obstacles to at-home services (e.g., tech tutorials, tips on motivating the student, setting up structure)

But, does the obligation to offer FAPE mean students and parents that have simply refused virtual services during COVID closures are entitled to full COVID comp?... Federal courts have generally taken parent/student refusal into consideration in determining comp awards

Another complicating factor...

Some students with behavioral issues, severe AU, severe ID, social skills deficits, or multiple disabilities might not be good candidates for online learning inherently. 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 most

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

 Crucial Initial Question—Can the student realistically be provided a FAPE with virtual/remote services?

If the data indicates the student cannot realistically receive a FAPE remotely, the IEP team should indicate so, and consider offering a live instructional program as the offer of FAPE

If State allows parents to choose remote learning anyway, develop a remote program, with the caveat that it may not yield appropriate progress

 Can the student realistically be provided the necessary IEP services?

Team must try to duplicate the special education services in a virtual format

As we'll see in the cases, hearing officers and courts tend to want to see the same amounts of time and frequency of services as in the live IEP

Think of options for providing inclusion assistance virtually

 Can the student realistically be provided the necessary IEP services?

Remember that a viable remote learning option is camming into the actual live classroom, with 2-way audio and video capabilities

Note—This option addresses concerns over equality of instructional times, full school day, and is probably preferable from a social standpoint

 Can the student realistically be provided the necessary IEP services?

The amount of virtual sp ed instruction provided must be sufficient to afford appropriate progress (i.e., meet IEP goals), as with the live services

Note—IEP teams must realize that some students may require more sp ed instruction in the virtual setting due to the difference in instructional model

 Can the student be provided the necessary related services?

Most related services can be provided on a teletherapy basis (speech, OT, PT, counseling, etc)

Amounts and frequency should be the same

Note—Teletherapy may require providers to obtain an additional parental consent to teletherapy...

 Can the student be provided the necessary related services?

For some students, some parent training may be necessary as a related service for the virtual program

Parents may need training on accessing the technology, logging on, strategies to keep student on task and motivated, maintaining a private quiet learning space at home

 Can the student be provided the necessary accommodations?

The IEP team must review the accommodations normally provided in the classroom and see if they are applicable in the virtual setting

Some accommodations may need to be redesigned to "fit" or make sense in the virtual setting (e.g., "make notes from peers available" may change to "copy of teacher notes," "reteach difficult concepts" may change to "point to helpful online resources")

 Can the student be provided the necessary behavioral interventions?

> Behavioral interventions must be considered if the student exhibits behavior that impedes their learning or that of others. See 34 CFR 300.324(a)(2)(i).

Some students may engage in different behaviors in the virtual setting than in the classroom, and the BIP must so reflect

Discipline in Virtual Setting

Initial Question—Do the IDEA discipline rules apply equally to at-home misbehavior during online/virtual instruction?

I.e., is there any waiver of the IDEA discipline rules during COVID?

Discipline in Virtual Setting

The recent Congressional stimulus bill (CARES Act) included a provision requiring Secretary DeVos to report to Congress about any need for waivers or flexibility in implementing IDEA

In her report, DeVos said no waivers were necessary with respect to FAPE or LRE, and that schools could provide access to FAPE with various at-home services.

Note—This would seem to indicate that the discipline regulations, which are related to FAPE, are fully applicable during COVID

What is a "removal" in the virtual context?

Likely, a removal or exclusion from virtual or online services

Thus, 3 days of exclusion from virtual services should be interpreted as equal to 3 days of at-home suspension

And, the limit of 10 "safe" removal days per school year would also apply

What is a "removal" in the virtual context?

But, this form of suspension would be available for behavior that creates a serious disruption to the online educational environment

Note—Schools may want to consider additional Code of Conduct provisions applicable in the unique context of the online/distance learning environment.

What is a "disciplinary change of placement" in the virtual context?

Likely, a removal or exclusion from virtual or online services of more than 10 consecutive school days

Or, a series of short-term removals that are more than 10 days total and create a "pattern" (due to total amount, proximity of removals to one another, size of each removal, and similarity of underlying behaviors).

What is a "disciplinary change of placement" in the virtual context?

Disciplinary changes in placement would require prior MDR IEP meeting and finding of "no-link"

What if a student starts displaying inappropriate behavior in the virtual context for the first time?

Recurring misbehavior would give rise for the need to conduct an FBA and develop a behavior plan for virtual setting

And, for some students, the continued virtual setting can generate new stresses and behaviors

How to go about developing behavior interventions for virtual setting?

A different format for behavioral intervention...

Positive reinforcers can be applied virtually

Referrals to campus administrators can happen virtually

How to go about developing behavior interventions for virtual setting?

Consequences might be more difficult to apply (could be loss of privileges, if possible), private discussion, silencing of microphone, demerits that can lead to grade reductions or loss of privileges, emails to parents)

 Does the Code of Conduct apply equally at home?

Perhaps not—Some behaviors, such as possession of inappropriate items that appear in the background of the screen, should not be viewed as if the student possessed the item at school

E.g., media case of student whose BB gun was in the background in his room during an online lesson

Does the Code of Conduct apply equally at home?

If online programming will continue, or parents have the option of home programming, school boards will want to consider adding "virtual" behaviors to the Code of Conduct

Misuse of platform, sharing of inappropriate material on platform, leaving the screen during instruction, disrupting instruction electronically, virtual dress expectations, etc...

What about parental behavior during virtual instruction?

School should set forth commonsense ground rules:

Private area for instruction, avoiding interruptions, assisting with timeliness of login, refraining from having family members viewing, not communicating with teachers during lessons (set up virtual teacher-parent conferences instead), assisting in ensuring proper student behavior and participation during lessons

What about serious misbehavior?

Since student is already in an interim alternative setting and cannot attend a live IAES, such a removal may have to wait until school reopens to live instruction

Or, schools could create a virtual disciplinary alternative program (placements of >10 consecutive school days would require MDR)

COVID-Related Cases

The cases provide lessons on what was and is expected legally during COVID virtual learning to comply with IDEA

They also show us how COVID comp services will work, in terms of calculation

Also, how procedural requirements were expected to work

Open question—whether the situations will be analyzed differently for parents that insist on virtual learning even if the school has opened...

Thoughts on Emerging COVID Cases

HOs seem to demand that schools provide the same frequency/amount of IEP services during online periods

Schools have to demonstrate their efforts to get resistant students to participate, including contacts with parents, IEPT meetings

IEPT must be willing to adjust services to address struggling students during online periods

Thoughts on Emerging COVID Cases

Schools should inform parents that it will address potential need for comp services when school and student returns to face-to-face instruction

Prepare a protocol for considering COVIDrelated comp services (data points, process, IEPT meeting)

Challenges to Services During COVID Closures

L.V. v. New York City Dept. of Educ., 77
 IDELR 13 (S.D.N.Y. 2020)

A September 2019 pendency order required the school provide a 5-year-old with inperson ABA, OT, PT and a dedicated aide.

School provided student a tablet device, which the student could not sit long enough to use, and computer-based services (but home did not have reliable wifi)

Challenges to Services During COVID Closure

 L.V. v. New York City Dept. of Educ., 77 IDELR 13 (S.D.N.Y. 2020)

"[The district] has not adequately explained how its computer-based services are a satisfactory substitute for [the child] during the COVID-19 pandemic, nor conducted an evaluation of how remote services can be delivered to [the child] to meet his individual needs."

Court held there was a failure to take student's unique circumstances into account in offering services (which were what was offered thousands of students).

L.V. v. New York City Dept. of Educ., 77 IDELR 13 (S.D.N.Y. 2020)

So court orders in-person services "to the extent that they can be performed safely in light of the current COVID-19 pandemic, in compliance with guidance from health authorities."

Court also orders an AT IEE, in case certain services cannot be provided in-person

Note—How does one conduct an AT evaluation if in-person assessments and observations are not feasible safely?...

• L.V. v. New York City Dept. of Educ., 77 IDELR 13 (S.D.N.Y. 2020)

Moreover, parent gets to pick private providers willing to provide in-person services at District expense (in case District staff are not willing).

Court also orders an AT IEE, in case certain services cannot be provided in-person

Court declines to create a fund for parents to use for private services

District of Columbia Pub. Schs., 78 IDELR 26 (SEA DC 2020)

Student with OHI missed some OT and specialized instruction during COVID closure

HO found school made services available, but student could not access a computer of hot spot

Parent could show no authority indicating school had an obligation to provide the student with a laptop or wifi hotspot during the pandemic

District of Columbia Pub. Schs., 78 IDELR 26 (SEA DC 2020)

Moreover, missing OT services were consultative only

Note—Although many school districts decided to provide laptops to students that had no access to one, HOs have not ruled that LEAs had a legal obligation to provide them. See also, District of Columbia Pub. Schs., 77 IDELR 82 (SEA DC 2020) (no authority for HO to order laptop be furnished to student)

AT devices under the IDEA are those that "increase, maintain, or improve the functional capabilities of a child." 34 C.F.R. §300.5.

Lenape Reg. High Sch. Bd. of Educ., 77 IDELR 268 (SEA NJ 2020)

Parent that chose home instruction due to COVID requested that LEA provide one-to-one nurse, as required by the IEP at school.

18-year-old student had diabetes and seizure disorder, was provided a 1:1 nurse at school to monitor seizures and glucose levels.

HO noted that IEP required 1:1 nurse not to access learning, but to maintain health and safety

Lenape Reg. High Sch. Bd. of Educ., 77 IDELR 268 (SEA NJ 2020)

Note—Of course, the nurse was required in the IEP only while the student was at school. The decision does not explain why the parent would not have been able to access public assistance or insurance coverage for health services in the home.

Lenape Reg. High Sch. Bd. of Educ., 77 IDELR 268 (SEA NJ 2020)

And, parent indicated that she wanted the nurse so she could sleep during the day, so she could take care of medical needs at night

HO found that parent was not entitled to an emergency order, as risk of harm to student was speculative

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.

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.

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.

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) (evidence that parents were spending up to 3 hrs/day helping student with work masked her academic deficits and was validly considered).

More on Parent Assistance—Cases addressing voluntary placement in virtual programs have acknowledged that parents are reasonably expected to play a role in ensuring student participates. Is this expectation reasonable in the situation of non-voluntary moves to virtual instruction in the home due to COVID?

Wayne Township Bd. of Educ., I21 LRP I713 (SEA NJ 2020)

Parents of 8th-grader with AU challenged virtual instruction plan and enrolled him in an out-of-district full-time virtual AU and ABA program

They sought emergency relief from HO

HO held parents were unable to show irreparable harm (necessary for emergency relief)

Wayne Township Bd. of Educ., I21 LRP I713 (SEA NJ 2020)

Note—The LEA, however, was only offering 2 hrs/day of virtual instruction, which the parents asserted the student was unable to access due to his disability. Is there evidence that the abbreviated instruction provided sufficient structured programming for progress?

The decision might be different in a regular DP hearing, rather than in an emergency request situation

Failure to Adjust At-Home Services

 District of Columbia Pub. Schs., I 20 LRP 33834 (SEA DC 2020)

Although the IEPT had agreed in April 2020 that behavior support services (BSS) were needed for a student (ADHD, SLD), they were not added to the IEP in the form of a BIP until June, when BSS were also added

Meanwhile, during the COVID closure, the student had experienced significant problems with distance learning, missing many assignments and exhibiting extreme problems keeping on-task and self-initiating.

Failure to Adjust At-Home Services

 District of Columbia Pub. Schs., I 20 LRP 33834 (SEA DC 2020)

HO found that the delay in incorporating the needed services during the closure amounted to a denial of FAPE, which warranted comp services

Acknowledging the difficulty in ascertaining the needed comp services based on lack of BSS, HO ordered independent tutoring (150 hrs) and counseling (20 hrs) in the school setting

7-year-old with AU and speech-language impairments was provided access to FAPE by means of "material packets" and checks with parents during COVID closure

After the student refused to participate in the "material packets," school did not attempt any direct instruction thru videoconferencing or other options, as staff assumed student would be averse to such services

For about 2 months, no services were provided beyond the packets

HO found that LEA could have collaborated with the parents to find ways to provide direct instruction, including providing parent training, but LEA did not hold an IEP meeting

HO ordered comp speech (40 hrs), tutoring (77 hrs), and behavior services (49 hrs) by qualified providers chosen by the parents

Procedure Note—Although HO holds, citing 9th Circuit's Hawaii DOE decision, that the change to at-home services did not constitute a change in placement, it faulted the LEA for not providing the parent with prior written notice (PWN) when it moved the student to at-home services, as it constituted a change in the "provision of FAPE." See 34 C.F.R. §300.503(a)(1).

(In should be noted that not all states were in consensus that the PWN requirement applied to the move to at-home services at the time of COVID school closures).

Example—In the case of Newport-Mesa Unified Sch. Dist., I 20 LRP 26588 (SEA California 2020), the HO held that the PWN requirement did not apply under the circumstances of the COVID pandemic, since "the statute contemplates notice of decisions particular to a student, not decisions that are systemwide."

(In should be noted that not all states were in consensus that the PWN requirement applied to the move to at-home services at the time of COVID school closures...)

East Windsor Bd. of Educ., 121 LRP 2530 (SEA Connecticut 2020)

5th-grader with AU was provided limited direct instruction during COVID closure, in part because he resisted learning and non-preferred activities

From March to May 2020, parent argued about suggested strategies and it was challenging for her to assist the student at home, given his resistance

But, HO noted that the LEA did not convene the IEP team to address the student's behaviors or offer alternatives

East Windsor Bd. of Educ., 121 LRP 2530 (SEA Connecticut 2020)

HO noted that behavior improved after a June 2020 IEP revision, which was indicative that revising the program in the Spring 2020 semester might have made a difference

Note—Although the HO found that there was a denial of FAPE from March to June of 2020, she did not order comp, instead ordering an IEP team review or IEP amendment, if needed

The team appeared to rely on the parent to provide significant assistance to the student in the home even though she had other kids to care for. To what degree can schools expect parents to assist with remote learning during a closure?

Failure to Provide Services "to the Greatest Extent Possible"

 Long Beach Unified Sch. Dist., I 20 LRP 33840 (SEA California 2020)

16-year-old with ID was provided 4 hrs/day remote academic instruction, rather than the 5 hrs/day set forth in IEP

District pointed to difficulties arranging for services during the period of COVID closure

HO noted that while the circumstances were "unavoidable," comp services were warranted

Failure to Provide Services "to the Greatest Extent Possible"

 Long Beach Unified Sch. Dist., I 20 LRP 33840 (SEA California 2020)

HO ordered 45 hrs of private speech services and up to 10 wks of private reading instruction

Note—Of course, it is difficult to argue that a reduction of 20% of specialized services is not a material implementation lapse. Here, however, the parties held a 9-day DP hearing to litigate the issue.

Waterton Bd. of Educ., 77 IDELR 298 (SEA Connecticut 2020)

During a 6-month COVID closure, LEA provided 13-year-old with AU some self-guided services and occasional virtual sessions

School argued it was relieved of responsibility to provide the full panoply of sp ed and related services during the COVID outbreak

HO noted, however, that while FAPE could be provided differently during the closure, the FAPE duty itself was not reduced

Waterton Bd. of Educ., 77 IDELR 298 (SEA Connecticut 2020)

HO noted that student was particularly susceptible to interruptions in his education, making sporadic services like no services at all for him

HO found that staff attempted to provide what they could, and did not deserve the "vitriolic" attacks from the mother

HO awarded 40 hrs of speech and 8 hrs of music therapy as COVID comp

Waterton Bd. of Educ., 77 IDELR 298 (SEA Connecticut 2020)

Procedure Note—This HO also takes the position that the LEA's move to remote instruction upon the COVID closure did not require PWN "because all students are receiving an alternate mode of instructional delivery of the general education curriculum."

The divergence of opinions on the PWN issue demonstrates that the application of IDEA procedural requirements to general school closures related to a pandemic remains hopelessly unclear...

In re: Student with a Disability, 121 LRP 1638 (SEA Wisconsin 2020)

8th-grader with Down Syndrome was placed in a private therapeutic school before COVID, and when the pandemic hit, the school provided synchronous remote instruction in small groups, with peer interaction and staff support

Parents wanted her to receive virtual instruction from the District, although it offered a primarily asynchronous virtual program without as many supports

In re: Student with a Disability, 121 LRP 1638 (SEA Wisconsin 2020)

HO found that the LEA's chosen private program was appropriate, as it provided synchronous services with opportunity for interaction and staff support/feedback

The parents' LRE argument was no help, as the IEPT had properly concluded, prior to COVID, that the student required a more specialized program than the LEA could provide

In re: Student with a Disability, 121 LRP 1638 (SEA Wisconsin 2020)

Note—Another way to look at the LRE argument might have been to point out that the private program allowed for at least *virtual* peer interaction, while the LEA's asynchronous program provided none at all.

Another example of how the present-day LRE provisions and framework are a poor "fit" for online/virtual programs...

Blue Hills Reg'l Technical Sch., 120 LRP 21862 (SEA Massachusetts 2020)

Case involves an 18-year-old senior with SLDs.

Parent is disputing graduation, arguing that appropriate reading services were not provided during the school's COVID closure (parent asserts district provided only one ZOOM session with a reading interventionist not trained in program).

District argues it provided access to a sp ed "virtual reading coach" and offered compensatory reading services (by parent's preferred instructor) for those hours missed (16.5 hrs)).

Blue Hills Reg'l Technical Sch., I 20 LRP 2 I 862 (SEA Massachusetts 2020)

District moved to have case dismissed.

HO notes that parent is alleging a denial of FAPE during the school closure, in that services consistent with the IEP were not provided at home, and that dismissal without a hearing would be inappropriate.

Note—One would think that the HO will assess the denial of FAPE claim taking into account the District's offer of COVID comp services.

Note—Yet, graduation may be validly delayed.

Blue Hills Reg'l Technical Sch., I 20 LRP 2 I 862 (SEA Massachusetts 2020)

Note—Is there a duty to implement all IEP services per the terms of the IEP during a period of COVID closure? Does not USDOE guidance envision that might not be possible, and that comp services may be necessary at a later time to remedy the shortfall?...

Parent/Student Refusal to Cooperate with At-Home Services

Department of Education, State of Hawaii, 77
 IDELR 300 (SEA Hawaii 2020)

Upon COVID closure, school officials sought an appropriate program to meet the needs of a student with multiple disabilities and complex needs

The parent, however, refused to cooperate, rejected meetings, cancelled scheduled meetings, refused to work with certain service providers, failed to respond to emails, and failed to provide necessary consents

Parent/Student Refusal to Cooperate with At-Home Services

Department of Education, State of Hawaii,
 77 IDELR 300 (SEA Hawaii 2020)

HO noted that the school was unable to get outside agencies involved without the parent's consent

"Respondent's failure to implement student's IEP-2/5/20 was caused primarily by Parent I's refusal to attend team meetings and sign consents for Student to enter the programs proposed by the DOE."

Parent/Student Refusal to Cooperate with At-Home Services

Department of Education, State of Hawaii,
 77 IDELR 300 (SEA Hawaii 2020)

Parent asked HO to order the home program she was implementing informally, but he held that she had failed to prove it was appropriate for the student's many needs

The HO thus declined to provide relief and dismissed the parent's complaint,

District of Columbia Pub. Schs., 77 IDELR 82 (SEA DC 2020)

LEA offered student with SLDs and speech impairments virtual services to implement his IEP during COVID closure

After student missed a number of sessions, the school offered makeup speech sessions

HO noted that student missed sessions although he was provided a laptop

District of Columbia Pub. Schs., 77 IDELR 82 (SEA DC 2020)

"Petitioner did not present any authority to support the view that a hearing officer should penalize a school district for a student's absence in this context."

Note—The offer of makeup sessions, despite questionable reasons for absences, saved the school from liability on this point.

 Lake Stevens Sch. Dist., 77 IDELR 208 (SEA Washington 2020)

Parent of an II-year-old student with ID, AU, ADHD, Anxiety, Mood Disorder, and speech delay sought an order of compensatory services

LEA agreed that student was not provided a FAPE during the pandemic and needed a residential placement, but none was presently available due to COVID

Lake Stevens Sch. Dist., 77 IDELR 208 (SEA Washington 2020)

HO held that an award of comp services, at the present time (August 2020), would be speculative

"It is simply impossible at this time to reasonably estimate when the Student might be able to return to an appropriate educational placement. Accordingly, it is concluded that awarding the Parents what amounts to an open-ended compensatory award going forward is not reasonable or supported under the law."

 Lake Stevens Sch. Dist., 77 IDELR 208 (SEA Washington 2020)

HO finds that comp services must be determined "once the student returns to school."

He thus ordered the IEP team to address comp services within 20 days after the student returns to an educational placement able to implement his IEP.

 Lake Stevens Sch. Dist., 77 IDELR 208 (SEA Washington 2020)

Note—This type of remedy may simply lead to another piece of litigation if the parties disagree on the amount/type of comp services to be provided.

Moreover, other HOs have not been so reluctant to award comp services prior to school reopening...

Initial COVID Comp Cases

 Georgetown ISD, 121 LRP 3995 (SEATX 2020)

District closed due to COVID on 3/23/2020

Although the District initially offered the parent the option of teletherapy speech, only one session was provided

Thereafter, teletherapy speech was discontinued for "ethical and equity reasons"

Speech was delivered only through online activities, and progress could not be measured

During the COVID closure, dyslexia services were provided through a different computer-based program (Nessy), but he was incorrectly placed at a lower level in the program for a month

During that month, student only accessed the Nessy program 140 mins and there was no measurement of progress on English goals

Initially, inclusion, social skills, and "behavior communication support" were provided through synchronous online services

In April, District proposed an IEP Amendment offering reduced online social skills services, 60 mins/wk online dyslexia services, 7 indirect speech consult sessions per 9-wk grading period, 30 mins/week inclusion support through Google Hangout

HO noted that "the District prepared the Amendment without input from student's mother," who disagreed with Amendment

At a subsequent ARD, parent wanted dyslexia services 4X/wk, objected to the Nessy program, requested weekly direct speech therapy, but the ARDC declined

HO found that in March, the District "modified Student's IEP and special education services without Student's mother's consent."

HO also noted that "the District has yet to meet to determine whether the student needs compensatory services..."

He noted that the District was waiting on a full grading period after return to school before deciding on comp services

At the start of 2020-21, the District provided direct online speech and dyslexia services

HO held that the District had the ability to provide direct speech teletherapy, but chose not to do so, and thus did not make every effort to provide the IEP services

Dyslexia services during the closure were inappropriate, as they were entirely computer-based, contrary to the Dyslexia Handbook (and the program was incorrectly set for the student)

HO similarly held the District had the capacity to provide direct dyslexia instruction through Google Hangouts, but chose not to do so

Lastly, the fact that the District could not measure the student's progress in reading and speech was indicative that he did not make progress during the period of closure

HO stated that the proposed IEP amendment "was a unilateral proposal made without parental input."

HO grants compensatory education

Procedure Note—Where in the IEP amendment regulation is parental input required prior to the LEA proposing the amendment? Isn't the procedure one where the District may unilaterally proposs an amendment and the parent may agree or disagree? See 34 C.F.R. §300.324(a)(4)

Georgetown ISD (SEATX HO Steve Elliot—I I/18/20)

Here, the district proposed an amendment, the parent disagreed, so an ARDC meeting was held—all within a month of closure

Despite the SEA's qualitative comp guidance, the HO offers hour-for-hour comp

Note—Is it inappropriate for Districts to wait until some time after students return to make an appropriate qualitative comp determination? The HO here seems to fault the District for following that method... Does not the HO's approach force the disfavored quantitative approach to comp determinations?

Thoughts on Emerging COVID Cases

HOs seem to demand that schools provide the same frequency/amount of IEP services during online periods

Schools have to demonstrate their efforts to get resistant students to participate, including contacts with parents, ARDC meetings

IEP teams must be willing to adjust services to address struggling students during online periods

Thoughts on Emerging COVID Cases

Schools should inform parents that it will address potential need for comp services when school returns to face-to-face

Prepare a protocol for considering COVIDrelated comp services (data points, process, ARDC meeting)

Los Angeles Unified Sch. Dist., 77 IDELR II6 (SEA California 2020)

The IEP of a 22-year-old high school senior with Autism contained a variety of transition services, including hands-on instruction in vocational, social, and community skills, job training, community-based instruction, and volunteer activities in the community.

When COVID hit, student was unable to engage in community volunteer and work training activities.

Los Angeles Unified Sch. Dist., 77 IDELR 116 (SEA California 2020)

IEP team met, made no changes to the IEP, and indicated that student "will continue to receive educational services by participating in distance learning until July 31, 2020."

Although student made "minimal" progress on her vocational, social skills, or community skills goals, the IEP team made no determination of comp services, and planned to have her age out of the program.

Los Angeles Unified Sch. Dist., 77 IDELR II6 (SEA California 2020)

HO noted that her in-person community instruction and vocational training during the closure was none, as she received 30 mins/wk of non-interactive virtual community instruction ("visiting interesting places online").

The online program, overall, provided less than half of the instructional minutes per week, and none of the services most important for successful transition.

Los Angeles Unified Sch. Dist., 77 IDELR II6 (SEA California 2020)

HO ordered compensatory transition counseling services, which could be provided remotely during the pandemic.

"There is no evidence when hands-on training will again be available, and Student has demonstrated a need for an immediate remedy."

Porter Township Sch. Corp., 120 LRP 29261 (SEA Indiana 2020)

Note—Despite the federal courts' preference for a qualitative approach to comp services, some hearing officers still fall back to the quantitative hour-for-hour formulation

Here, a student's IEP normally required 30 mins/wk of speech therapy (ST) services.

During the COVID closure, no actual services were provided.

Porter Township Sch. Corp., 120 LRP 29261 (SEA Indiana 2020)

Therapist uploaded assignments, materials, conversation and speech tasks that student could access through school's online portal

The student did not respond, and completed no tasks (despite school's contacts with the parents).

SEA found violation, required hour-for-hour comp for missed ST sessions (270 mins comp ST).

Porter Township Sch. Corp., I 20 LRP 2926 I (SEA Indiana 2020)

Note—The SEA did not comment on the fact that the student failed to do any of the tasks that the therapist assigned (and therapist called parents) Is that not a valid consideration in making the COVID comp determination?...

And, other courts and States lean toward a qualitative approach, as the more individualized method for determining the comp remedy

Denver Pub. Schs., I 20 LRP 29273 (SEA Colorado 2020)

3rd grade sp ed student (SLD, OHI, Speech) did not receive the 40 mins/wk of "direct specialized literacy instruction" required in IEP during the COVID closure.

Although student missed 260 mins of the specialized instruction, the student progressed well.

Denver Pub. Schs., I 20 LRP 29273 (SEA Colorado 2020)

Applying a qualitative analysis, the SEA concluded that the lapse in services was "only a short gap in services, during the weight of the COVID-19 pandemic, which did not impact the student's ability to benefit from his special education program given the demonstrated educational progress."

Thus, it found no denial of FAPE.

Denver Pub. Schs., I 20 LRP 29273 (SEA Colorado 2020)

Note—The amount of missing specialized services was almost the same as in the Indiana SEA case, but the exact opposite approach and result.

Was this a "minor discrepancy"? No, but student did work and progressed