



**2020  
SOUTH CAROLINA  
SCHOOL BOARDS ASSOCIATION  
VIRTUAL SCHOOL LAW CONFERENCE**

**COMPLYING WITH THE INDIVIDUALS WITH  
DISABILITIES EDUCATION ACT (IDEA)  
AND PROVIDING SPECIAL EDUCATION AND RELATED  
SERVICES DURING COVID-19**

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**UNITED STATES DEPARTMENT OF EDUCATION  
(USED) INITIAL GUIDANCE REGARDING THE  
PROVISION OF SERVICES**

- Letter to Education Leaders on Preventing and Addressing Potential Discrimination Associated with COVID-19 (March 4, 2020)
- Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak (March 12, 2020)
- Addressing the Risk of COVID-19 in Schools while Protecting the Civil Rights of Students (March 16, 2020)

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## ADDITIONAL GUIDANCE

- Providing Services to English Learners During the COVID-19 Outbreak (May 18, 2020)
- Supplemental Fact Sheet - Addressing Serving Children with Disabilities during COVID-19 National Emergency (March 21, 2020)
- FERPA & Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (March 30, 2020)

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## QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING A COVID-19 OUTBREAK (MARCH 12, 2020)

**Question A-1:** Is a local educational agency (LEA) required to continue providing a free appropriate public education (FAPE) to students with disabilities during a school closure caused by a COVID-19 outbreak?

**Answer:** If the LEA continues providing educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of a FAPE. (34 CFR §§ 104.4, 104.33 (Section 504 of the Rehabilitation Act of 1973 (Section 504)) and 28 CFR § 35.130 (Title II of the Americans with Disabilities Act (ADA))). State educational agencies (SEAs), LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's individualized education program (IEP) developed under the IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).

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## **WHAT IF STUDENTS WITH DISABILITIES WERE NOT PROVIDED SERVICES WHILE SCHOOLS WERE CLOSED?**

The USED, Office of Special Education and Rehabilitative Services (OSERS) stated:

“If a student does not receive services during a closure, a child’s IEP team (or appropriate personnel under Section 504) must make an individualized determination whether, and to what extent, compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that the student may have lost as a result of the lack of services.”

- Special education services
- Related Services
- Post-secondary transition services

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## **ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS (MARCH 16, 2020)**

- If the school is open and serving other students, the school must ensure students with disabilities continue receiving a FAPE, consistent with protecting the health and safety of the student and those providing that education to the student. If feasible, the student’s IEP team, or the personnel responsible for ensuring a FAPE to a student for the purposes of Section 504, can be utilized to assist with the effort to determine if some, or all, of the identified services can be provided through alternate or additional methods.
- Accessible technology may afford students, including students with disabilities, an opportunity to have access to high-quality educational instruction during an extended school closure, especially when continuing education must be provided through distance learning.

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## **SUPPLEMENTAL FACT SHEET - ADDRESSING SERVING CHILDREN WITH DISABILITIES DURING COVID-19 NATIONAL EMERGENCY (MARCH 21, 2020)**

- Compliance with the IDEA, Section 504, and Title II of the ADA should not prevent schools from offering educational programs through distance instruction.
- Although federal law requires distance instruction to be accessible to students with disabilities, it does not mandate specific methodologies. Where technology itself imposes a barrier to access, or where educational materials simply are not available in an accessible format, educators may still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students.

Examples:

- Reading documents to students over the telephone
- Providing students with an audio recording of a reading
- Supplementing virtual or online education with hands-on therapies when feasible and safe

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## **CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES Act)**

- The CARES Act, which was signed into law on March 27, 2020, provides flexibility with regard to a number of statutory and regulatory provisions otherwise mandated under the Every Student Succeeds Act (ESSA) and the Carl D. Perkins Career and Technical Education Act (Perkins Act) during the current pandemic.
- The CARES Act directed the USED Secretary, Betsy DeVos, to recommend to Congress additional limited flexibility to the ESSA, the IDEA, the Rehabilitation Act of 1973, and the Perkins Act, but prohibited the Secretary from waiving civil rights laws.

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## **CARES Act**

- On April 27, 2020, Secretary DeVos recommended that Congress consider flexibility on administrative requirements, but not pass any waivers concerning the FAPE and least restrictive environment (LRE) requirements of the IDEA.

“The Secretary determined there is no reason that a student’s access to FAPE cannot continue online, through distance education or other alternative strategies.”

- Waivers were granted regarding accountability, assessment, and the period of availability for the use of certain federal funds, which includes an extension of the obligation of federal fiscal year (FFY) 2018 IDEA Part B grant award funds through September 30, 2021.

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## **COMPLIANCE WITH THE IDEA MANDATES IS IN FULL EFFECT DURING COVID-19**

- Neither Congress, nor Secretary DeVos waived the requirement under the IDEA to provide students with disabilities special education and related services.
- There is No Exception to the Requirement under the IDEA to Provide Students with Disabilities a FAPE.

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**Chicago Teachers Union v. Betsy DeVos, in her official capacity as the Secretary of the United States Department of Education; United States Department of Education; and Board of Education of the City of Chicago**

- The Chicago Board of Education advised public schools that to comply with the IDEA regulation at 34 C.F.R. § 300.324, personnel were required to revise approximately 56,000 to 60,000 IEPs by the end of the 2019 – 2020 school year.
- The Teachers Union stated, in addition to IEPs, personnel need to revise what was believed to be 10,000 accommodation plans under Section 504 with roughly six weeks left in the school year.

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**WHAT RELIEF DID THE PLAINTIFF REQUEST?**

- The Chicago Teachers Union requested an injunction barring the enforcement of the IDEA mandates.
- They requested that DeVos request a waiver of the IDEA requirements and argued even without a recommendation from DeVos, Congress could still approve a waiver of the provisions in the IDEA.

**Basis of Requests:**

- Aside from being impossible to accomplish, and threatening to interfere with the provision of the special education services needed by these children, redrafting roughly 70,000 plans is highly likely to increase the anxiety and emotional distress of parents or guardians and further complicate the revision of these plans.
- Teachers and staff in the Chicago public schools will suffer irreparable injury if forced to comply with the IDEA regulations.

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## **ADDITIONAL REMEDIES**

- Compensatory Education fund to pay for additional special education services for students with disabilities within the district because of the interruption to their education.
- Legal fees and costs under the Equal Access to Justice Act.

## **OUTCOME OF THE CASE**

The Chicago Teachers Union voluntarily dismissed their claim.

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## **HOW TO ADDRESS THE CONSEQUENCES OF LOST INSTRUCTION DURING THE SPRING**

### **Academic Recovery Services**

- The purpose of these services is based on the proposition that all students, including those with disabilities, were negatively impacted to some extent due to the emergency closure of schools and the extended disruptions in education caused by COVID-19.
- The intended consequence of the services is to help mitigate the negative effects of the school closures on all students.

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## Extended School Year (ESY) Services

The purpose of these services is to mitigate the consequences of breaks in education for students with disabilities that are substantially more significant than the negative consequences for their nondisabled peers. Decisions are based on data collected prior to the COVID-19 school closure. The criteria for eligibility are the same as during non-COVID-19 circumstances.

1. Has the student shown substantial regression and recoupment issues during breaks, such as summer and/or winter breaks?
2. Is there evidence of emerging skills that are often referred to as breakthrough skills?
3. Is there evidence of the nature and severity of the student's disability impacting the maintenance of attained skills?
4. Is there evidence of special circumstances, such as a large number of absences during the school year, that are relevant to the consideration of ESY services?

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## Supplemental School Closure Services

This is the term South Carolina uses to discuss services students may need related to the COVID-19 school closure, and the related extended learning change to the instructional environment. Critical components and questions include:

- How instruction was made available for all students, with and without disabilities
  - Did students with disabilities receive a version of special education services during the extended school closure that were comparable to services provided to students without disabilities?
  - Did the method of instruction provide the same level of access to students with and without disabilities?
- How the closure affected students without disabilities
  - Collect progress data when the student returns to school to consider the impact of the extended school closure.
  - Does the data collected indicate a similar or more significant impact than the student's general education peers?

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## Compensatory Services

These are services awarded to students with disabilities to make up for services that the LEA did not provide, resulting in the denial of the provision of a FAPE.

- Was the student provided access to the same instruction that nondisabled students received during the school closure?
  - No, the format of the instruction was not accessible to the student and the student did not make progress – discuss compensatory services in needed areas.
  - Yes, the student was able to access instruction during the closure and was affected in the same manner as students without disabilities progress - discuss supplemental services if appropriate.
- Was the service necessary during the school closure?
- With the exception of perhaps transportation and nursing services, would all services still be necessary even if the method of how the needs are addressed are different?
- Based on the meeting the criteria for each, it is possible for a student to qualify for both supplemental school closure and compensatory services.

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**MOVING FORWARD**

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## **CHILD FIND**

- LEAs must complete screenings and the implementation of interventions.
- LEAs must clear any backlogs and complete initial evaluations.
- LEAs must complete reevaluations.

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## **PROVIDING SERVICES TO STUDENTS WITH DISABILITIES DURING THE NEW NORMAL OF THE 2020 – 2021 SCHOOL YEAR**

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## **THE ROLE AND IMPORTANCE OF IEP TEAMS**

- IEP teams must meet to determine the individual student’s performance prior to the COVID-19 school closure, review the student's current academic and functional performance, and determine the appropriate services that are necessary moving forward.
- IEP teams must collect and review data, determine whether students need supplemental school closure services and/or compensatory services.
- IEP teams must determine the amount, type, and frequency of services students with disabilities need to receive a FAPE during the 2020 – 2021 school year.

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## **IEP MEETINGS**

- Options for Conducting IEP meetings:
  - In-person
  - Virtual
  - Via Telephone
- LEAs must ensure meaningful parental participation regardless of the way they conduct IEP meetings. LEAs must take steps to find mutually-agreed upon dates and times for meetings.
- It does not matter how LEAs conduct meetings, LEAs must still provide parents and legal guardians notice of meetings a reasonable time before the meeting occurs.
- Whether in-person, virtual, or via telephone, LEAs must ensure that the required members of the IEP teams participate in meetings.
- Do not forget to obtain an interpreter prior to the meeting, if applicable.

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## **METHOD OF DELIVERY OF INSTRUCTION**

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### **WHAT IF THE IEP TEAM BELIEVES A STUDENT NEEDS A SERVICE-DELIVERY MODEL THAT IS DIFFERENT THAN THE OPTIONS CURRENTLY OFFERED BY THE LEA?**

- THE IEP TEAM RULES!
- The IEP team has the responsibility and authority to determine that the student needs a service-delivery model that is different from what is offered to other students if the current options will not provide the student a FAPE.

#### **Example**

The LEA is currently offering two options, a hybrid A/B schedule or a total virtual program. The IEP team determines a student cannot access instruction through a totally virtual program and needs face-to-face instruction four days per week to receive a FAPE. The IEP team has the ability to determine how to safely provide the student a FAPE.

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**WHAT IF THE PARENT INSISTS ON A VIRTUAL OPTION, BUT THE IEP TEAM DETERMINES A TOTAL VIRTUAL OPTION IS NOT APPROPRIATE FOR THE STUDENT?**

**WHAT IF THE SCHOOL DISTRICT IS CURRENTLY OPENING WITH AN ALL VIRTUAL OPTION, BUT THE PARENT IS AN EMPLOYEE OF THE SCHOOL DISTRICT WHO IS EXPECTED TO PROVIDE SERVICES TO OTHER STUDENTS DURING THE SCHOOL DAY?**

**WHAT IF A STUDENT'S IEP STATES THE STUDENT NEEDS A ONE-ON-ONE ADULT EDUCATION ASSISTANT DURING INSTRUCTION?**

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## **THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND VIRTUAL LEARNING DURING COVID-19**

The USED, Student Privacy Office states:

- As a best practice, educational agencies and institutions should discourage non-students from observing virtual classrooms in the event that personally-identifiable information (PII) from a student's education record is disclosed in such virtual classrooms.
- Schools may wish to include instructions for students participating in the virtual classroom regarding not sharing or recording any PII from education records that may be disclosed in the virtual classroom or to obtain prior written consent to permit any such sharing of PII from education records.

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## **IS IT PERMISSIBLE TO RECORD CLASSES AND SHARE RECORDINGS OF VIRTUAL CLASSES TO STUDENTS WHO ARE UNABLE TO ATTEND?**

The USED, Student Privacy Office states:

- Yes - assuming the video recording does not disclose PII from student education records during a virtual classroom lesson or appropriate written consent is obtained if PII from the education record will be disclosed. The FERPA does not prohibit the teacher from making a recording of the lesson available to students enrolled in the class.
- Video recordings of virtual classroom lessons may qualify as education records under the FERPA's nondisclosure provisions if the video recording contains PII from student education records.

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## **MAINTENANCE AND STORAGE OF RECORDS FROM VIRTUAL INSTRUCTION AND TELEHEALTH SERVICES**

Considerations from the USED, Student Privacy Office:

- Look at your current vendor agreements to determine whether video recordings of virtual classroom lessons are, or will be, maintained as education records beyond the period of instruction, and if so – how, and by whom? How will the records be destroyed when determined no longer necessary to provide students instruction and for auditing and monitoring purposes?
- If personnel take documents home with PII, how will personnel secure the documents while the records are in their home? Does your LEA have a written policy?

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## OTHER SERVICES

IEP Teams Must Continue Addressing Students' Needs in the Areas of:

- Social-emotional learning (SEL) - To access the SCDE's SEL web portal, please visit [sel.ed.sc.gov](http://sel.ed.sc.gov).
- Behavioral interventions and strategies
- Accommodations and modifications
- Post-secondary transition
- English-language proficiency
- Orientation and mobility

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## TELEHEALTH SERVICES

- As a result of COVID-19, the South Carolina Department of Health and Human Services (SCDHHS) announced temporary modifications to policies related to telephonic and telehealth coverage.
- During the current pandemic, the SCDHHS will provide reimbursement for telehealth services provided by physical therapists, occupational therapists, and speech language pathologists and therapists.
- The SCDHHS will also provide reimbursement for telephonic and telehealth behavioral health services.
- The effective date of this change was March 27, 2020.

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## **SCDHHS BULLETIN - TEMPORARY TELEPHONIC AND TELEHEALTH SERVICES UPDATES - MB20-014**

- Providers delivering telehealth services are required to ensure that the quality of care is the same as if engaging the beneficiary in a face-to-face format.
- Beneficiaries who are unable to self-direct or engage with a telephone or audio-visual device without a provider's presence may require face-to-face interactions to receive the therapeutic effect of services.
- Only individual school-based services are eligible for Medicaid reimbursement.

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## **MEDICAID REIMBURSEMENT AND EVALUATIONS**

- Evaluations are not currently eligible for reimbursement when conducted via a telehealth.
- To claim Medicaid reimbursement, evaluations must be completed face-to-face.

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## **TELEHEALTH CONFIDENTIALITY REQUIREMENTS**

- The USED advised LEAs to work with their information security officers and attorneys to review the systems that they have in place, security requirements, and terms of service.
- The USED policy regarding specific applications and virtual platforms requires compliance with the FERPA, but does not recommend or prohibit any specific applications or virtual platforms, such as Zoom.
- Facebook Live, Twitch, TikTok, and similar video communication applications that utilize public-facing should not be used in the provision of telehealth.

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## **HEALTH INSURANCE AND PORTABILITY ACCOUNTABILITY ACT (HIPAA) - BILLING MEDICAID**

Under the notice provided by the United States Department of Health and Human Services, the Office for Civil Rights (OCR) will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA rules against covered care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency.

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## **CONSENT REQUIREMENTS FOR BILLING MEDICAID FOR TELEHEALTH SERVICES**

According to the Medicaid Telehealth Consent Guidelines – (April 15, 2020):

- The student must have a signed general Medicaid consent form and the annual notification must be provided to the parent or legal guardian.
- Service providers must obtain permission from the parent, legal guardian, or age-eligible student before rendering telehealth services. The service provider must document permission in the clinical service notes.
- The LEA must follow the FERPA and the IDEA consent requirements.
- The LEA must keep a list of licensed practitioners of the healing arts (LPHAs), such as speech language pathologists, rendering telehealth services.
- When the service provider is not a direct employee of the LEA, the service provider or organization and its affiliates, must have a contract with the LEA.

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## **REQUIREMENTS WHEN THE LEA CHOOSES NOT TO BILL MEDICAID FOR TELEHEALTH SERVICES**

- As with traditional practice, service providers utilizing telehealth must be licensed in the state in which the client receives the services. The Department of Labor, Licensing, and Regulation (LLR) expects practitioners utilizing telehealth to be mindful of supervision and other requirements under the applicable Practice Act.
- Advise the parent, legal guardian, or age-eligible student:
  - How telehealth works;
  - That sessions may be recorded and how recordings will be stored;
  - That he or she has the right to withhold or withdraw consent;
  - That information may be shared with others, what type information may be shared with others, and what confidentiality requirements apply to PII collected or maintained on the student;
  - That technical difficulties may occur with equipment; and
  - That there are benefits, risks, and possible consequences associated with the use of telehealth.

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## CONTINGENCY PLANS

IEP teams should develop contingency plans to notify parents, students, teachers, service providers, and other relevant personnel regarding any changes to how the student will receive services in the event of another emergency school closure or circumstances that mandate a change in the amount and type of the student's services.

### Examples

- The student currently receives face-to-face instruction through either a full-week or hybrid schedule. In the event of an emergency closure, the student will receive continued learning opportunities through a virtual format.
- The student currently receives face-to-face related services. In the event of an emergency closure, the student will receive occupational therapy through telehealth.

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## ATTENDANCE

- When students with disabilities are not attending school, regardless of whether its through an onsite, hybrid, or virtual instructional delivery model, the LEA must address the failure to attend school and participate in instruction and not simply drop the student from enrollment. The LEA must follow up with parents and legal guardians and involve the students' IEP teams in the review process.
- On August 4, 2020, the SCDE issued a memorandum – Guidance for Confirming and Documenting Attendance.
- To reduce the possibility of students being unaccounted for over an extended period of time, educators must reconcile attendance at least weekly. LEAs can access procedural guidance for confirming and documenting virtual attendance in PowerSchool in the guidance document [SC Virtual Attendance](#).
- LEAs are required to track both student and educator attendance during the Learn, Evaluate, Analyze, and Prepare (LEAP) period using the templates provided by the SCDE.

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## FACE COVERINGS/MASKS

- The SCDE is requiring face coverings be worn on school buses and within public school facilities. Face coverings must be worn upon entering a school building, moving through hallways, during carpool/bus drop off or pickup, and when social distancing is not possible or optimal. Student face coverings may be removed upon teacher or administrator direction while in the classroom or during special activities outside the classroom.
- Students who should NOT be required to wear face coverings:
  - Those younger than two years old;
  - Those who have trouble breathing;
  - Those unable to remove the covering without assistance; and/or
  - Those with special healthcare or educational needs, as described in an IEP, 504 accommodations plan, or an individual healthcare plan, or as determined by a medical doctor.

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## CLEAR FACE COVERINGS

- Consider the use of clear face coverings that cover the nose and wrap securely for teachers and staff who:
  - Interact with students or staff who are deaf or hard of hearing,
  - Teach young students learning to read,
  - Teach English learners, and
  - Teach or provide related services, such as speech and language services, to certain students with disabilities.
- Additional information regarding the face covering mandate is posted on the SCDE's Website at [Face Covering Guidelines for K-12 Public Schools](#).

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## TRANSPORTATION

- Preventive and Predictive Maintenance - School closures provided school bus garage employees with extra time to check on buses in a way that they normally would not be able to.
- Cleaning Protocols - Everyone plays a part in cleaning school buses.
  - When buses are brought in for maintenance, they are disinfected before they are returned.
  - LEA staff will sanitize buses a minimum of twice a day with electrostatic sprayers purchased by the SCDE.
  - The SCDE will provide cleaning products for sprayers through the month of December 2020.
  - In between trips, bus drivers will wipe down high contact areas, such as handrails.

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## TRANSPORTATION

- Masks and Gloves
  - Drivers and students must wear face coverings consistent with the SCDE guidelines
  - Drivers may wear disposable gloves, but they should be optional and are not routinely recommended unless cleaning and disinfecting.
- Hand Sanitizer
 

Most LEAs agree not to allow hand sanitizer on buses because the negatives outweigh the benefits. School will start without allowing bulk containers of hand sanitizer.

  - Where should the hand sanitizer be mounted on the bus?
  - How will hand sanitizer use be controlled on the bus?
  - What if hand sanitizer spills on the floor?
- Physical Barriers
 

South Carolina has opted not to use physical barriers. The SCDE will allow the student transportation industry to dictate what will happen in the future.

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## **OTHER CONSIDERATIONS**

Other adjustments to transportation may be necessary to allow for student safety, social distancing, and transportation for each student who needs to ride the bus.

### **Examples**

- Extra routes
- Earlier departures in the morning, or later arrivals in the morning
- Longer hours for services and maintenance
- Further adjustments according to how we progress

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## **MEDICAL HOMEBOUND INSTRUCTION**

- Yes, students may still require medical homebound placements and instruction.
- Who qualifies?
- Consider eligibility for Section 504 and the IDEA.
- What if the student needs in-person instruction?

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## **IN THE COURTS**

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## **HAWAII CLASS ACTION**

- On April 13, 2020, a class action lawsuit was filed against the Hawaii Department of Education on behalf of four named students and thousands of other students with disabilities in Hawaii.
- Out of 179,000 students in Hawaii's public schools, roughly 12 percent are students with disabilities.

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## WHO ARE THE NAMED PARTIES?

- Plaintiffs
  - Three students with IEPs
    - Student H.S.
    - Student A.G.
    - Student S.K.
  - One student with a Section 504 Plan
    - Student T.K.
  - All other similarly-situated
- Defendants
  - Christina Kishimoto, the Superintendent of Education for the State of Hawaii
  - Hawaii Department of Education

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## THE PLAINTIFFS' CLAIMS

- Students H.S., A.G., and S.K.
  - IEPs have not been implemented since March 2020.
  - As a result, the students have experienced behavior, academic, and educational regression. Each of these is an area of concern addressed in the students' IEPs.
  - The failure to implement Section 504 modification plans to create a level of parity in services for students with disabilities with their nondisabled peers.
  - The failure to provide ESY services during school closures.
- Student T.K.
  - The failure to provide the student accommodations since March 2020.
  - As a result, the student experienced academic and educational regression in the areas of concern addressed in the student's modification plan.

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## **BASIS OF THE CLAIMS**

- The main argument is that schools in Hawaii failed to implement IEPs, provide ESY services, and a FAPE to thousands of students with disabilities due to school closures during the Coronavirus outbreak.
- There was a violation of the Plaintiffs' civil rights under Section 504 by utilizing criteria and methods of administration of educational services that subject them to discriminatory effect.
- As a result, there was a material failure to implement modification plan services and supports.
  - No reasonable accommodations provided to students
  - Denial of meaningful access to public benefit
  - Access to educational services impacted students with disabilities more significantly than their non-disabled peers, resulting in disproportionate access to education and a violation of equal protection requirements

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## **WHAT RELIEF ARE THE PLAINTIFFS SEEKING**

- A declaratory judgment that the Hawaii Department of Education denied these students a FAPE.
- An order that requires the Hawaii Department of Education to develop a process with parameters for determining compensatory services for students with disabilities.
  - Timeframes for reviewing IEPs
  - A formula for evaluating the level of support needed for students with more intensive needs
- Attorney fees, costs, and expenses.

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## **HAWAII STATE TEACHERS ASSOCIATION (HSTA)**

- The teachers union filed a complaint with the Hawaii Labor Relations Board on August 13, 2020, asking the Hawaii Labor Relations Board to stop the state from requiring public school teachers to report to campus with students, saying it will be hazardous to their health.
- The legal filing alleges that the state engaged in a prohibited practice by directing teachers to report to work “with an unknown number of students” and for refusing to bargain in good faith over changing work conditions caused by the rapid rise and spread of the coronavirus.

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## **PENNSYLVANIA CLASS ACTION**

On May 18, 2020, a complaint was filed against the Pennsylvania Department of Education in the U.S. District Court, Eastern District of Pennsylvania.

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## **PARTIES**

- **Plaintiffs**
  - James, a nonverbal student with Autism who attends school in the Central Bucks School District and relies on augmentative/alternative communication (AAC)
  - Brennan, a partially-verbal student with Autism who also Central Bucks School District and relies on AAC
  - All other similarly-situated students
- **Defendants**
  - Tom Wolf, the Governor of the Commonwealth of Pennsylvania
  - Pedro Rivera, the Secretary of Education
  - Pennsylvania Department of Education

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## **WHO ARE THE PLAINTIFFS?**

- Since September 2018, James has primarily been in support class for children with Autism. The class has a head teacher, four personal care assistants, and one educational assistant. Each student has a one-on-one aide.
- Pre-COVID-19, he was in school for the equivalent of six hours and thirty minutes a day, or thirty-two and a half hours per week. His IEP requires two hours of one-on-one instruction per day to reach his IEP goals.
- His online education is only one hour and fifteen minutes each week, with no one-on-one instruction.
- James has “reverted to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors” as a result of the school closure, lack of hand-over- hand instruction, and no aide by his side to help with tasks.

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## WHO ARE THE PLAINTIFFS?

- Since September 2018, Brennan has also primarily been in support class for children with Autism. Brennan’s IEP requires hand-over-hand instruction and a one-on-one instruction.
- Pre-COVID-19 he was also in school for the equivalent to six hours and thirty minutes a day, or thirty-two and a half hours per week. His online education is only one hour and fifteen minutes each week
- Similar to James, Brennan’s trained one-on-one aide was removed during online education.
- The lawsuit alleged in an online setting, Brennan cannot fulfill the goals in his IEP and experienced regression in the areas addressed in this IEP, which include:
  - Following two-step directions in the classroom
  - Sharing and taking turns with games with adults and peers
  - Building sight word vocabulary through reading guided readers

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## BACKGROUND INFORMATION

- On March 16, 2020, public and private schools were deemed not “life-sustaining” and were shut down.
- Businesses were allowed to apply for waivers to keep their workplace open if they were among the industries that were not considered to be life-sustaining.
- Examples of businesses that were considered life-sustaining:
  - Wolf Home Products: a cabinet and building supply company formerly owned by Governor Wolf
  - Dan Smith Candy Company
  - The construction of a casino
  - Keystone Tobacco
  - Bugden’s Total Hair Replacement
  - Jake’s Fireworks
  - ITC Cigars

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## **BASIS OF THE CLAIM**

- The complaint states that the Pennsylvania Department of Education “intentionally and/or with deliberate indifference failed to ensure that the students in the Plaintiff Class received a FAPE and were free from discrimination on the basis of their disabilities.”
- The teachers and therapists in the Central Bucks School District made “heroic efforts” to support their students during their online learning when in-person instruction ended on March 16, 2020, due to Coronavirus, but both students suffered a reduction in their services when they transitioned to online learning.

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## **PLAINTIFFS’ ARGUMENT**

- In-person learning is a life-sustaining activity. Online learning is especially difficult for nonverbal and partially-verbal children with Autism. Children with autism rely on AAC to communicate because they cannot communicate their wants and needs verbally.
  - Education must be facilitated by a parent/guardian
  - Nonverbal and partially-verbal children with Autism require intensive, in-person education to learn, which includes hand-over-hand assistance
  - Many times these students do not transfer the skills they learn in the classroom to the home environment, which makes online learning incompatible
- Consequently, online learning for nonverbal and partially verbal children with Autism who rely on an assisted communication device deprives them of their rights to a FAPE and violates both the IDEA and Section 504.

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## **REMEDIES**

- Classify in-person education for members of the class action lawsuit who are similarly-situated to James and Brennan, and need ACC to communicate, as a “life-sustaining” service.
- Attorney fees and costs.

## **OUTCOME OF THE CASE**

On June 10, 2020, an Order was filed which dismissed the case.

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## **RECENT DEVELOPMENT**

“Lawsuit claims every district, state failed to provide FAPE during school closures.”

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## ***J.T. v. de Blasio, No. 20 Civ. 5878 (S.D.N.Y. July 28, 2020)***

- A 350 page class-action complaint was filed by several parents on behalf of their students with disabilities
- 104 identified student Plaintiffs
- The complaint names every school district and department of education, in every state as Defendants.
- The Defendants in the caption are:
  - Bill de Blasio, the Mayor of New York City
  - Richard Carranza, the Chancellor of New York City Department of Education
  - New York City Department of Education

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## **HOW DOES THIS AFFECT SOUTH CAROLINA?**

Based on its size, the lawsuit names the Greenville County School District and includes two named Plaintiffs from South Carolina

### **Plaintiff # 101**

- Student Z.J.
- Student enrolled in the Charleston County School District

### **Plaintiff # 102**

- Student A.F.
- Student enrolled in the Horry County School District

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## WHAT IS THE BASIS OF THE LAWSUIT?

- The complaint states that due to school closures in response to the Coronavirus outbreak, students with disabilities were not able to receive the services outlined in their IEPs.
- Patrick Donohue, the lead attorney in this case, stated that due to the school closures, “schools violated the [Individuals with Disabilities Education Act] IDEA’s stay-put provision” by being closed for more than 10 school days. As a result, “schools did not maintain the status quo of the last agreed upon [Individualized Education Program] IEP.”

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## THE PLAINTIFFS CLAIM

- Violation of 42 U.S.C. § 1983
  - Failure to maintain the IEPs
  - Violation of due process under the IDEA
- Failure to comply with the procedural requirements of the IDEA
  - Failure to provide notice of changes in educational program and placement
  - Failure to provide the guaranteed right to parental participation and due process
  - Unilateral, substantial and material modification of the students’ educational programs and placement by substituting remote services for the programs and placements in the students’ IEPs
- Failure to provide an educational program and placement that maintained the Plaintiff-Students’ educational program and placement during the pendency of the due process complaint
- Failure to provide a FAPE
- Violation of Section 504
- Violation of Title II of the ADA
- Violation of State Constitutions and Statutes

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## WHAT ARE THE PLAINTIFFS SEEKING?

- An order for a Preliminary Injunction and mandate to reopen schools  
The Plaintiffs argue that to satisfy the stay-put provision during the resolution of the dispute, schools need to reopen.
- Monetary damages (Compensatory and Punitive)  
Due to the Defendants' intentional and willful failure to provide the Plaintiff-Students with a FAPE, the Plaintiff-Parents and Plaintiff-Students were injured in fact.
  - Loss of employment or income: "Plaintiff-Parents lost their employment so as to be able to provide said services or supervision to their children for 'remote' services."
  - Out-of-pocket expenses.
  - To hire professionals to carry out elements of their child's IEP.
- The issuance of pendency vouchers to maintain services at the levels required prior to school closures.

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## ADDITIONAL REMEDIES

- Independent evaluations for each student to determine the extent of regression and loss of competencies.
- An order for Preliminary Injunction declaring that the Defendants violated:
  - The Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution;
  - The IDEA;
  - Title II of the ADA;
  - Section 504; and
  - State Constitutions and Statutes.

## NEXT STEPS

As of August 7, 2020, an electronic summons was issued to all school districts in the United States.

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**NEXT STEPS?**

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**QUESTIONS**

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