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Continuing Challenges – COVID 19 and the IDEA

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INTRODUCTION

It has been nearly three years since COVID-19 disrupted the world and the education system in Texas and across the United States. School districts across the nation responded the best they could and attempted to provide instruction through creative and innovative means. In the spring of 2020, Texas school districts were mandated to close down for the rest of the school year.¹ Districts across the state grappled with problems of how to provide remote instruction, how to get computers into students' hands, how to provide Internet access to students, and even how to feed students, so many of whom depended on school meals for nourishment each weekday. The problems of providing remote instruction in general were compounded by particular issues presented by remote instruction for students with disabilities whose needs ranged from those able to participate as a general education student would participate, to those for whom remote instruction presented significant problems regarding access and the ability to learn through such a means of instruction.

NO COVID RELIEF FROM IDEA REQUIREMENTS

While the pandemic has significantly affected all students and school staff, the impact on students with disabilities and the staff who educate them has been unique and challenging. School districts quickly learned that despite the pandemic, schools were still required to comply with the IDEA and all of its Part B regulations. This meant that a district was not relieved of its duty to implement the services outlined in a student's Individualized Education Plan ("IEP"). If a district closed its campuses but provided instruction virtually, the district had to find a way to ensure that students with disabilities continued to receive a free appropriate public education ("FAPE"). In deciding how to provide a student's special education services remotely during the pandemic, districts were required to address whether the method of delivering instruction would enable the child to receive FAPE, a particularly difficult task when the child's disability-related characteristics appeared to make the effectiveness of remote instruction doubtful.

When school districts closed in the spring of 2020, one of the first issues regarding IDEA compliance was whether remote learning was a change of placement requiring ARD Committee action. There was some historical precedent that such a system-wide change would not trigger the stay put provisions of the IDEA if challenged by a parent. When the school system in Hawaii closed on Fridays because of a fiscal crisis, a student who filed a due process hearing could not invoke stay put. The court held that Congress did not intend for the IDEA to apply to system-wide administrative decisions. To allow the parent of a student with a disability to invoke stay put, would give veto power over the state's decisions regarding the management of its schools. *N.D. v. Hawaii Dept. of Educ.*, 600 F.3d 1104 (9th Cir. 2010). The 5th Circuit had issued a similar holding in 1991 when a school a student attended was closed and the student was moved to another campus. The court held that if the change was necessitated by the closure of a facility for reasons beyond the control of the public agency, the stay put provision did not apply. *Weil v. Bd. of Elem.*

¹ On March 13, 2020, Texas Governor Greg Abbott declared all Texas counties to be in a state of disaster as a result of the COVID-19 pandemic. In late March, the Governor ordered schools statewide to shut down until at least May 4, 2020. In April 2020, the Governor announced that public and private schools would remain closed for the remainder of the school year.

and Second. Educ., 931 F.2d 1069 (5th Cir. 1991). However, the facts showed the student received the same educational program at the new school which was not analogous to going from in-person to remote instruction. Many districts prepared remote instruction contingency plans and sought parent agreement as an IEP amendment in place only while instruction was remote, and provided a prior written notice of the change.

EARLY CASES CHALLENGING REMOTE LEARNING

In 2020, cases were filed around the United States challenging decisions to educate remotely and demanding in-person instruction with varying outcomes. In New Mexico, the court held that the governor and education secretary did not violate a parent's procedural due process rights by enacting state policy guidance requiring remote instruction and limited in-person instruction in districts with higher rates of COVID-19. The court held there is no general right to an in-person education under the Constitution. *Hernandez v. Lujan Grisham*, 120 LRP 40165 (D.N.M. Dec. 18, 2020). In New Jersey, a hearing officer ordered the district to implement the May 2020 IEP as written pending the outcome of the due process hearing, even while acknowledging there was no way it could have been implemented in May 2020. The decision was issued in January 2021 when the district was opening up for in-person instruction. *Verona Borough Bd. of Educ.*, 121 LRP 7005 (SEA NJ Jan. 28, 2021). These disputes were taking place against a backdrop of letters and Question and Answer documents from the U.S. Department of Education stating that there were no exceptions to Child Find requirements, evaluation timelines, and the duty to provide FAPE, such as the Question and Answer document issued September 28, 2020 that stated schools must make "every effort" to continue to provide children with disabilities with the special education and related services appropriate to their needs.

A hearing officer in Texas ruled a school district did not make "every effort" to implement the IEP during the time school districts were closed. The district argued that the services provided substantially implemented the student's IEP and that they complied with TEA Guidance, such as that TEA considered LEAs to be offering instruction in Spring 2020 without requiring the typical amount of instructional minutes per day based on instructional continuity attestations. *Closed, but Committed to Providing Instruction* (TEA 6/24/2020). The hearing officer disagreed and ordered compensatory services and reimbursement for dyslexia tutoring services. *T.M. v. Georgetown Ind. Sch. Dist.*, Dkt. No. 265-SE-0520 (SEA TX Nov. 18, 2020). This case emphasized the uncertainty regarding the issue of compensatory services. Were compensatory services owed simply because all school campuses closed in Spring 2020? School districts devised plans to gather data about a student's levels of performance and progress on the IEP at the time of closure, gather data about the student's performance and progress during remote learning, and gather data about the student's present levels of academic and functional performance after returning to school to begin to make case by case decisions about what services might be needed to make up for learning that was lost during school closure.

2021 STATE LEGISLATION

In 2021, the Texas Legislature passed some pieces of legislation aimed at mitigating the effects of COVID on educational performance. One was SB 89, which requires the ARD Committee to conduct an individualized review for special education compensatory services due to the pandemic and school closures related to COVID-19. By May 1, 2022, school districts were to add COVID-

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