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## Equal Opportunity in Remote Learning

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# EQUAL OPPORTUNITY IN REMOTE LEARNING

**By: Teramie Hill\***

## ABSTRACT

Students with disabilities have always been a marginalized group. During the Covid-19 pandemic, this group was even more vulnerable to discrimination because many students simply could not receive services required to ensure equal opportunity in education. While Congress passed the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the Individuals with Disabilities in Education Act in order to ensure students with disabilities are fairly treated in the educational system, remote learning has created complications and more complex issues. Making this issue even more complex, many parents are demanding the end of remote learning while others are demanding it as a reasonable modification.

The ADA, Section 504, and IDEA always envisioned students learning in a brick and mortar building, and the goal has always been inclusion and a least restrictive environment in order to prevent students with disabilities from being locked away and forgotten; however, remote learning has changed the landscape of education, and, as a result, some of these goals of inclusion are thwarted by a technology that promotes isolation. Still, the main purposes of these laws are to ensure equal opportunity, promote student choice, and provide dignity for all students, regardless of status. Districts must reconcile new technologies with old statutes to promote student learning and avoid lawsuits until Congress provides more specific instruction. This article examines current case law and discusses policies that districts must address to ensure equal opportunity.

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## INTRODUCTION

COVID-19 altered society so quickly and dramatically that few aspects of daily life escaped its wrath. For elementary and secondary school districts, this has been even more apparent, and its effects may be long lasting or even permanent.<sup>1</sup> Many school districts were already underfunded and understaffed before COVID, but the pandemic added extra layers of complication that are quickly turning a teaching shortage into a teaching crisis. According to an EdWeek Research Center survey, a whopping fifty-four percent of teachers say they are somewhat or very likely to leave the profession in the next two years, an increase of twenty percent from what teachers reported feeling in the Fall of 2019.<sup>2</sup> Of those surveyed, eighty-four percent said that the pandemic had made teaching more stressful than previous years.<sup>3</sup>

Between the synchronous<sup>4</sup> and asynchronous<sup>5</sup> teaching requirements, redoing lesson plans to fit both remote and in-person

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<sup>1</sup> See at 4, Elizabeth D. Steiner & Ashley Woo, *Job-Related Stress Threatens the Teacher Supply: Key Findings from the 2021 State of the U.S. Teacher Survey*, RAND CORP. (2021), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RRA1100/RRA1108-1/RAND\\_RRA1108-1.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RRA1100/RRA1108-1/RAND_RRA1108-1.pdf); Associated Press, *School Year to Begin in South Dakota with Teacher Shortage*, U.S. NEWS (Aug. 4, 2021), <https://www.usnews.com/news/best-states/south-dakota/articles/2021-08-04/school-year-to-begin-in-south-dakota-with-teacher-shortage> (showing that Midwest schools have had similar ramifications from COVID, resulting in many teachers retiring early or resigning).

<sup>2</sup> Liona Loewus, *Why Teachers Leave—or Don't: A Look at the Numbers*, EDUC. WEEK (May 4, 2021), <https://www.edweek.org/teaching-learning/why-teachers-leave-or-dont-a-look-at-the-numbers/2021/05>.

<sup>3</sup> *Id.*

<sup>4</sup> Synchronous teaching means the instructor must teach both remote students and students in the classroom simultaneously in a live format. See *Asynchronous vs. Synchronous: What's The Difference?* DICTIONARY.COM (Sept. 9, 2020) <https://www.dictionary.com/e/asynchronous-vs-synchronous/>.

<sup>5</sup> Asynchronous teaching occurs when instructors post information and assignments through an online platform, allowing the student to learn individually at his/her own pace rather than in a live format. See *id.*

students, more daily emails than ever before, and constantly reminding students to wear their masks, more teachers than ever are saying they want to leave the profession.<sup>6</sup> Between September and October of 2021 alone, nearly 65,000 public education employees either retired or quit, creating a crisis that is so pervasive, it can no longer be ignored.<sup>7</sup> With a teaching shortage that is only worsening, many districts are attempting to reduce stresses by returning to a traditional learning environment.<sup>8</sup> However, just as many companies are seeing an increase in demand for remote working accommodations<sup>9</sup> and public agencies are seeing demands for remote engagement,<sup>10</sup> school districts may also see a demand for remote learning and online learning platforms.<sup>11</sup> In a world where it is clear both synchronous and asynchronous teaching modalities are possible, districts are deciding whether they will continue to offer a remote learning service that will both be costly and could completely alter the traditional public education system in the United States.

While making important policy decisions, administrators are usually most concerned about the district's budget, employee satisfaction, and community support; however, in the case of remote learning, administrators must understand policy implications for its most vulnerable and most legally protected group: students with

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<sup>6</sup> Steiner & Woo, *supra* note 1.

<sup>7</sup> Jillian Smith, *'They're exhausted': Burnout fuels nationwide teacher shortage*, KOMONNEWS (Nov. 15, 2021), <https://komonews.com/news/nation-world/theyre-exhausted-teacher-burnout-fuels-nationwide-educator-shortage>.

<sup>8</sup> Kalyn Belsha, *Cheers and questions as some states and big districts remove virtual learning option for fall*, CHALKBEAT NAT'L. (May 26, 2021, 1:54 pm), <https://www.chalkbeat.org/2021/5/26/22455236/no-remote-learning-virtual-option-fall>.

<sup>9</sup> Michelle Perez-Yanez, *Will Working from Home be a Reasonable Accommodation Post-Covid?* A.B.A. (Nov. 23, 2020), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2020/november-2020/will-working-home-be-reasonable-accommodation-post-covid/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2020/november-2020/will-working-home-be-reasonable-accommodation-post-covid/).

<sup>10</sup> *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 621-24 (W.D. La. 2020) (granting injunction in favor of disabled council member requesting virtual access to city council meetings); *Selene v. Legislature of Idaho*, 514 F. Supp. 3d 1243, 1256-57 (D. Idaho 2021) (granting injunction in favor of disabled citizen requiring remote access to legislative hearings and committee meetings).

<sup>11</sup> *See generally*, Order Granting Plaintiff's Motion for a Temporary Restraining Order, E. E. v. State of California, No. 21-cv-0785-SI (Nov. 4, 2021) (Ordering a temporary restraining order that resulted in the district providing remote learning to disabled students whose parents wanted the option but found roadblocks).

disabilities. Unfortunately, federal statutes regulating public education are complicated, and guidance on how to apply them in the remote learning context is just now emerging from federal agencies and the judiciary. Recent case law surrounding IDEA<sup>12</sup> and Section 504<sup>13</sup> complaints reveal the three biggest areas of litigation over remote learning: FAPE<sup>14</sup> violations in IEPs, Change of Placement procedural violations for IEPs,<sup>15</sup> and Section 504 civil suits. This article focuses mostly on the interpretation of these federal statutes in the remote learning realm to guide decision making on whether remote learning is wise or, in some cases, required.

### TYPES OF REMOTE LEARNING

Although most public schools are now offering students services in person,<sup>16</sup> remote learning will likely continue in a few different scenarios. The first use of remote learning would likely be in order to prevent a school from closing due to another disease outbreak or natural disaster. This forced remote learning<sup>17</sup> may be shorter than the closures experienced during the pandemic, but they will still affect students with disabilities in the same way. In these situations, an administrator will likely use remote learning facilitated by district teachers to continue education and avoid making up school days at the end of the year. Another scenario provides remote learning for individual students while they are out of school temporarily,

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<sup>12</sup> Individuals with Disabilities Education Act of 2004, 20 U.S.C. § 1400 (amended 2015).

<sup>13</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

<sup>14</sup> Free and Appropriate Education. *See* Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1412 (amended 2015).

<sup>15</sup> A key component in IDEA is that students, teachers, and parents will meet to develop an Individualized Education Plan (IEP) as a team. IEPs are considered legally binding documents once formalized with all parties' approval. *See* 20 U.S.C. §1400.

<sup>16</sup>*See Staying in School in-Person*, DEP'T OF EDUC., 3 (Jan 2022), [https://www2.ed.gov/pubs/COVID%20Guidance\\_Handout\\_Final\\_508.pdf](https://www2.ed.gov/pubs/COVID%20Guidance_Handout_Final_508.pdf) (According to the Department of Education, 99% of schools resumed in-person services in Dec 2021).

<sup>17</sup> I am calling this "forced remote learning" because students and parents do not have a choice. A district has decided to move online, and the parents cannot do anything about this decision.

perhaps due to a surgery, illness, or a traumatic event<sup>18</sup>. Those students also would likely be taught by district teachers who are also teaching a classroom full of students, meaning that districts are requiring students to engage in short term synchronous remote learning.<sup>19</sup> The third scenario would be for third party programs to provide online learning to registered students with the district paying the bill. This third-party platform<sup>20</sup> may be requested by the students or might even be considered by the district for students struggling with behavior or mental health issues. In all these situations, students with disabilities attending public schools have certain rights to ensure equal opportunity in education, and it is important to understand statutory requirements and court interpretations for each.

### FREE AND APPROPRIATE EDUCATION (FAPE) VIOLATIONS DURING FORCED REMOTE LEARNING

In order to serve students with disabilities and provide an equal education, public school systems must comply with Title II of the ADA,<sup>21</sup> IDEA,<sup>22</sup> and Section 504 of the Rehabilitation Act.<sup>23</sup> At the start of the pandemic, most parents struggled with remote learning,

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<sup>18</sup>See generally, Erin Snodgrass, *Uvalde schools may go virtual this fall as parents threaten to pull kids from the district in emotional forum*, INSIDER (July 18, 2022 7:43 PM) <https://www.insider.com/uvalde-schools-considering-virtual-option-in-the-fall-board-says-20227#:~:text=The%20Uvalde%20School%20District%20is,in%20the%20May%20mass%20shooting> (reporting that after the heartbreaking elementary shooting on May 24, 2022, at Robb Elementary in Uvalde Texas, the Uvalde Consolidated Independent School District is considering a remote option for traumatized students this fall).

<sup>19</sup> I am labeling this “short term synchronous remote learning” because it is a special situation where a teacher is preparing in-person lessons, but students are either allowed or required to attend a remote session, typically to keep a student from falling behind in the class. See *Best Practices for Temporary Remote Learning Options for the 2021-22 School Year*, COLO. DEP’T OF EDUC., (June 14, 2021) [https://www.cde.state.co.us/cdefinance/temporary\\_remote\\_learning\\_option\\_k12\\_covid\\_2122](https://www.cde.state.co.us/cdefinance/temporary_remote_learning_option_k12_covid_2122).

<sup>20</sup> I am labeling this type of online learning a “third party platform” because the online program is not run by district teachers but instead contracting with the district to provide an alternative education program. <https://thebestschools.org/resources/synchronous-vs-asynchronous-programs-courses/>

<sup>21</sup> Americans with Disabilities Act, 28 CFR Part 35 (1991) (defining the ADA for educational purposes as mainly used in defining disabilities and ensuring equal opportunity).

<sup>22</sup> Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1412 (amended 2015).

<sup>23</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

but parents of children with disabilities faced added burdens because their children could not receive services for which they qualified.<sup>24</sup> As a result, litigation will likely continue for years to remedy the loss these students experienced. Many parents paid for private educational services to help meet the IEP goals and requirements set by the educational teams in order for their children to receive a quality education.”<sup>25</sup> As a result, many parents and agencies have filed complaints on behalf of students on IEPs and 504 plans who never received their required services from public school districts and could not access distance learning due to their disabilities.<sup>26</sup> Some disability advocates even attempted to force doors open in areas of the country where they were closed indefinitely due to raging COVID cases.

Complaints surrounding IDEA typically involve a denial of a free and appropriate education (FAPE) or failure to implement a student’s individual education plan (IEP). There is a specific procedure for FAPE complaints under IDEA, and it depends on each state’s instructions for contesting school decisions on IEPs. Typically, if parents cannot work out the dispute with the school district, they must file a complaint with their state’s department of education, agreeing either to mediation or a due process hearing, where the state officials will investigate and rule on the complaint.<sup>27</sup> If a parent chooses a due process hearing, the state may require a dispute resolution meeting between the two parties, which can typically only be waived if both parties agree to the waiver or to mediation.<sup>28</sup> Depending on the state’s appeals process, if a complainant is unhappy with the hearing officer’s result, the next level would be a civil suit in federal court.

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<sup>24</sup> Amanda Morris, *Parents of Students with Disabilities Try to Make Up for Lost Year*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2021/09/17/nyregion/special-needs-children-coronavirus-pandemic.html>.

<sup>25</sup> Individuals with Disabilities Education Act, 20 U.S.C § 300.101 (entitling families to a “free appropriate public education”)

<sup>26</sup> Cory Turner, *After Months of Special Education Turmoil, Families Say Schools Owe Them*, NPR (June 16, 2021), <https://www.nytimes.com/2021/09/17/nyregion/special-needs-children-coronavirus-pandemic.html>.

<sup>27</sup> *Special Education Programs: Dispute Resolution*. S.D. DEP’T. OF EDUC., <https://doe.sd.gov/sped/complaints.aspx> (last visited Dec. 30, 2022 at 1:20pm).

<sup>28</sup> *Id.*



Since complainants in IDEA civil suits are required to exhaust the previous avenues with state education agencies (SEAs) before turning to the courts,<sup>29</sup> binding case law from the federal court system is lacking for current remote learning complaints; as a result, districts may find inconsistencies in the various SEA rulings and, therefore, fail to clearly understand their responsibilities. In the fall of 2020, SEAs around the US reported over 600 state complaints or requests for due process hearings.<sup>30</sup> Without clear legal precedent, decisions will inevitably lack consistency.

To help provide some guidance and predictability for FAPE complaints, the Department of Education issued guidance for schools in March of 2020, and called for flexibility with IDEA, suggesting that schools should allow “compensatory services”<sup>31</sup> for students who could not thrive under remote learning conditions to ensure some kind of online instruction could be offered rather than pausing millions of students’ education.<sup>32</sup> After extensive remote learning in some areas of the country, disability advocates have either filed complaints with the SEAs or filed civil suits for more specific answers from the judiciary. Most of these cases argue that remote learning is inadequate and does not fulfill IEP requirements if students have full time paraprofessionals assigned for behavior and physical

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<sup>29</sup> This policy is in place to prevent costly litigation to public schools and overly burdened state department agencies. By requiring parents to meet with the district and be heard by the school before the hearing, most resolutions can be resolved. It is important to mention that, in *Fry v. Napoleon Community Schools*, 137 S. Ct. 74 (2017), IDEA complaints require exhaustion at the state level only if FAPE claims are the most serious or main part of the claim.

<sup>30</sup> Natalie Jones & Perry A. Zirkel, *Preliminary Summary of Dispute Resolution Survey Results*, N. PUB. (Sept. 28, 2020), <https://perryzirkel.files.wordpress.com/2020/09/addendum-to-supplement-5.pdf>.

<sup>31</sup> These are “make up” services for students who did not have an opportunity to learn for a period of time. See Office for Civil Rights, *Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic*, U.S. DEP’T. OF EDUC. (February 2022) <https://www2.ed.gov/about/offices/list/ocr/docs/factsheet-504.html>.

<sup>32</sup> Anya Kamenetz, *Parents Of Special Education Students File Lawsuits Over Poor Remote Education*, ALL THINGS CONSIDERED (July 22, 2020), <https://www.npr.org/2020/07/22/894343514/parents-of-special-education-students-file-lawsuits-over-poor-remote-education>.

assistance, resulting in FAPE violations.<sup>33</sup> Although there is no clear precedent for remote learning, the United States Supreme Court decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*,<sup>34</sup> as well as a newer Ninth Circuit decision in *Van Duyn v. Baker*,<sup>35</sup> set forth the framework for FAPE violation analysis,<sup>36</sup> which is the guiding case law for all FAPE complaints, including those arising out of the remote learning context.

*Van Duyn* makes clear that, while a district does not have to follow every detail of the team's agreed upon learning, and 504s and IEPs are certainly not considered contractual, when there has been a material and significant breach, a FAPE denial has occurred and must be remedied.<sup>37</sup> This denial is known as "failure to implement."<sup>38</sup> The outcome depends on the facts of the case, which the court examines to determine whether the failure was material, whether compensatory services are necessary, and what amount parents are entitled to if districts were not compliant, even for a short period of time.<sup>39</sup> A significant rationale in this holding is that IDEA requires "a basic floor of opportunity" rather than the highest possible outcome.<sup>40</sup>

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<sup>33</sup> W.G. v. Kishimoto, 1:20-cv-00154 (D. Hawaii April 13, 2020)(asking a district court in Hawaii to articulate a specific process for the Hawaii DOE on handling students with IEPs and how to compensate students who could not be served during school closures. Plaintiffs, representing roughly 30,000 children with disabilities in the unified Hawaii public school system, asked the courts to "order defendant to develop an equitable means of remedying plaintiffs' and DRC members' lost educational opportunity").

<sup>34</sup> *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

<sup>35</sup> *Van Duyn v. Baker*, 502 F.3d 811 (9th Cir 2007).

<sup>36</sup> Individuals with Disabilities Education Act, 20 U.S.C § 300.101 (requiring that all children with disabilities between the ages of 3-21 receive a free and appropriate public education (FAPE). Prior to the enactment of IDEA, it was a regular practice to deny access or services to children with disabilities).

<sup>37</sup> David G. King, *Van Duyn v. Baker School District: A "Material" Improvement in Evaluating a School District's Failure to Implement Individualized Education Programs*, 4 NW. J. L. & SOC. POL'Y. 457, 463 (2009), <http://scholarlycommons.law.northwestern.edu/njls/vol4/iss2/6>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 472-78.

<sup>40</sup> *Van Duyn*, 502 F.3d at 821 (quoting *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 197, 201 (1982)).

**REMEDIES FOR FAPE VIOLATIONS IN REMOTE LEARNING UNDER IDEA**

Using the *Van Duhn* and *Rowley* reasoning and framework, State Educational Agencies (SEAs) are attempting to clarify remote learning responsibilities. The South Dakota Department of Education, for example, considered a complaint in which the parents alleged district violations during school closures.<sup>41</sup> The parents alleged a FAPE violation resulting from a disciplinary suspension and the COVID-19 school closure of Spring 2020, claiming failure to implement the IEP, change of placement without parent involvement, and transportation violations.<sup>42</sup> While the parents won on the issue of transportation and received compensatory services or financial reimbursement for the lack of transportation and instruction on the first day of remote learning, the parents lost on their claim that the district had changed placement or materially failed to implement the IEP during the statewide spring closure because the district was able to prove that the student did not fall behind through meticulous record keeping.<sup>43</sup> This is consistent with the United States Supreme Court's statement in *Andrew F. v. Douglas County School District* that IEPs should be "reasonably calculated to enable the child to make progress appropriate in light of his circumstances" in order to determine whether there has been a failure to implement.<sup>44</sup> Administrators should provide specific forms and train teachers to keep records for students on IEPs during remote learning quarantines and district

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<sup>41</sup> 2019-2020 Complaints (July 1 to June 30), S.D. DEP'T OF EDUC, (last visited Dec. 30 2022) <https://doe.sd.gov/sped/documents/1920-cmplog.pdf>.

<sup>42</sup> Class Act: Updates in Education Law, *Covid Case Law Round Up*, APPLE PODCASTS (Dec. 31, 2020), <https://podcasts.apple.com/us/podcast/season-4-episode-11-covid-case-law-round-up/id1175892606?i=1000503935199>. Please note that I am citing a well-known educational podcast created by three attorneys who specialize in educational law rather than the actual SEA investigation complaint because South Dakota does not publish its SEA complaint investigation decisions. Instead, South Dakota publishes a complaint log to inform the public when districts are out of compliance. While this case, listed as 2020-6 on the South Dakota Department of Education's complaint log, is published through a third party and readily available on the Internet, the SDDOE does not verify its contents. As a result, I am citing the podcast discussion rather than the decision itself.

<sup>43</sup> *Id.*

<sup>44</sup> *Andrew F. v. Douglas County School District* RE-1, 137 S. Ct. 988 (2017).

flips in order to avoid unnecessary litigation, especially in situations where the student doesn't log in or refuses to use educational services.

One complaint, in which "lack of progress" impacted the outcome for a student's "failure to implement" claim, occurred in Nevada. The district did not provide typical services to a severely disabled student due to both COVID closures and local wildfires.<sup>45</sup> Because the student's IEP required so much direct contact, it was impossible to provide the services fully or track the progress remotely.<sup>46</sup> The school conceded its inability to fully track progress, and the court recognized the difficulty of such demands, explaining, "It is recognized that given the mandatory closure of school buildings for all students and the alternative delivery method of distance learning, the evaluation procedures set forth in the student's IEP were difficult, at best, to implement."<sup>47</sup> Nevertheless, the investigator concluded, "WCSD remained responsible for complying with the IDEA and NAC, Chapter 388, and did not in this regard. Therefore, the WCSD failed to comply with the IDEA and NAC, Chapter 388 with regard to providing quarterly progress reports as set forth in the student's IEP."<sup>48</sup> The Nevada Department of Education investigator awarded compensatory services as a result.

In situations where students with disabilities must learn from home, even during short flips to online learning,<sup>49</sup> it is important to review the IEP or 504 requirements to determine if students require 1-1 assistance in care to avoid FAPE violations. If the IEP calls for 1-1 services, disabled students who are expected to learn remotely must receive that assistance, which may be virtual or in person, or they will be entitled to receive compensatory services to make up for

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<sup>45</sup> See *Complaint Investigation Washoe County School District. #WA111320 Report*, NEV. DEPT. OF EDUC. (Jan. 8, 2021) [https://doe.nv.gov/uploadedFiles/ndedoenvgov/content/Inclusive\\_Education/ComplaintReports/2021/WA111320.pdf](https://doe.nv.gov/uploadedFiles/ndedoenvgov/content/Inclusive_Education/ComplaintReports/2021/WA111320.pdf).

<sup>46</sup> *Id.* at 10-11.

<sup>47</sup> *Id.* at 13.

<sup>48</sup> *Id.*

<sup>49</sup> Kate Cray & Morgan Ome, *Snow Days May Never Be the Same*, ATLANTIC (March 8, 2021), <https://www.theatlantic.com/family/archive/2021/03/snow-days-are-endangered-remote-learning/618216/> (referring to a district going remote for a short period of time, perhaps due to Covid, a natural disaster, or even for a snow day).

the material deviation in the IEP.<sup>50</sup> The New York City Department of Education recently ruled that a district either had to find staff willing to provide the necessary 1-1 services in the IEP for a severely disabled student or pay for compensatory private services, with the provider chosen by the parents.<sup>51</sup> Private services could be significantly more expensive than paying an aid at a public school, and although paying those compensatory services may be possible for larger districts, multiple claims could sink smaller schools in rural America. As a result, districts switching to remote learning must be diligent about providing services during the remote learning time period, spelling out specific staff requirements and length of time with each student.

If districts are serious about using remote learning for temporary alternatives to closing a building, they need to train staff who provide services to students with disabilities and provide materials that enable home learning. Failure to establish such plans may result in the district paying for expensive private services outside of the district's budget or in a costly lawsuit. In *Charles H. v. District of Columbia*,<sup>52</sup> the district was held accountable for not providing disabled students, even some in jail, with workable devices and 1-1 teacher instruction.<sup>53</sup> This decision makes clear that FAPE is required regardless of the circumstances or student motivation, so even if students with disabilities make little attempt during remote learning, it is still the school's responsibility to make its full attempt to provide every material part of an IEP.<sup>54</sup> While IDEA has never met its full promise

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<sup>50</sup> *Return to School Roadmap: Development & Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act*, U.S. DEP'T. OF EDUC., 38-39 (Sept 30, 2021), <https://sites.ed.gov/idea/files/rts-iep-09-30-2021.pdf>.

<sup>51</sup> *L.V. v. New York City Dept. of Educ.*, 77 IDELR 13 (S.D.N. Y. 2020).

<sup>52</sup> *Charles H. v. D.C.*, 2021 U.S. Dist. LEXIS 132383, 2021 WL 2946127 (D.C. Cir. 2021).

<sup>53</sup> *Id.* (noting that prisoners on IEPs still must receive services to the fullest extent. The district failed to implement the IEP by giving students old devices with spotty WIFI and by failing to provide 1-1 personalized instruction, both from the teacher and from behavior and speech specialists).

<sup>54</sup> *See id.*

of funding,<sup>55</sup> the current influx of relief money from Covid should be used for training employees on remote learning, especially aids who are most likely to assist Special Education students but, due to a funding formula that never came to fruition, are typically minimum wage employees without an education degree.<sup>56</sup>

Since many districts have opted to use remote learning regularly for a variety of reasons, including “snow days” in Northern climates, training teachers and aids to implement remote learning services is crucial to some IEPs and 504 plans. When students cannot physically be present in the building, administrators might decide to hold classes online with little to no notice. A recent study by *Education Weekly*, for example, revealed that, for around forty percent of school districts, “snow days” will be something of the nostalgic past.<sup>57</sup> Unfortunately, just as longer-term remote learning proved problematic for students with disabilities, short term remote learning can also create situations where they lack the support listed in their IEPs. Students with disabilities will likely not have paras available for 1-1 home learning assistance in temporary school closing situations. As a result, students with severe learning or physical disabilities may not even be able to operate technology effectively without that help. Districts must understand that these students are owed compensatory services in the form of money to pay for private tutoring, or in the form of extra days in the classroom at the end of the school year to compensate for the time missed.<sup>58</sup> Therefore, districts may have to find teachers and paraprofessionals willing to work extra days and come up with money to pay that staff. While the district may have kept students learning for that short period of time, they likely just incurred an unexpected cost, one that could have been avoided by

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<sup>55</sup> Megan Smith, *The 2020 Case for Fully Funding IDEA: A Pandemic & a Political Window*, GEORGETOWN L. (Aug. 18, 2020), <https://www.law.georgetown.edu/poverty-journal/blog/the-2020-case-for-fully-funding-the-idea-a-pandemic-and-a-political-window/>.

<sup>56</sup> Moriah Balingit, *‘They are so underpaid’: School support staff scrape by on meager earnings*, WASH. POST (April 25, 2018), [https://www.washingtonpost.com/local/education/they-are-so-underpaid-school-support-staff-scrape-by-on-meager-earnings/2018/04/24/e5df4710-3cd5-11e8-974f-aacd97698cef\\_story.html](https://www.washingtonpost.com/local/education/they-are-so-underpaid-school-support-staff-scrape-by-on-meager-earnings/2018/04/24/e5df4710-3cd5-11e8-974f-aacd97698cef_story.html).

<sup>57</sup> Cray et al, *supra* note 49.

<sup>58</sup> *Starting Well 2020*, S.D. DEP’T. OF EDUC., 4 (July 29, 2020), <https://doe.sd.gov/coronavirus/documents/SPED-Guidance.pdf>.

making the snow day up at the end of the year.

### CHANGE OF PLACEMENT VIOLATIONS AND INJUNCTIVE RELIEF

In addition to “failure to implement” violations under IDEA, districts must also be concerned about complaints alleging “change of placement.” While the courts and state investigation officials reviewing IDEA complaints have awarded compensatory damages for “failure to implement” violations in remote learning, they have been much less likely to side with parents for injunctive relief<sup>59</sup> for claims that would impact district decision making. Instead of asking for future services to mitigate the damages of COVID-19, these complaints attempt to force physical or virtual school doors open, alleging that a) a change in the place a child learns is a change of placement that b) will result in “irreparable harm” unless the court enforced the “stay put” rule of IDEA, which would allow the child to receive the same placement and services until all litigation and proceedings ended.<sup>60</sup> Before Covid, this was a straightforward complaint since it typically involved procedural violations where the school didn’t involve the parent in the decision to change the educational setting of the child. Injunctive relief would allow the child to “stay put” until a hearing officer could determine whether the change of placement was in violation of the IEP. Since remote learning forced students with disabilities from a school setting to a home setting without parental involvement, parents during the pandemic hoped courts would force school districts to open doors for disabled students through the “stay put” provision. The courts have required complainants to prove “irreparable harm” in these Covid cases, and none

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<sup>59</sup> Anna Limoges, *Injunctive Relief 101: Immediate Remedies When Money Does Not Cut It*, ABA (2020), <https://www.americanbar.org/groups/litigation/committees/solo-small-firm/practice/2020/immediate-remedies-when-money-does-not-cut-it/> (referring to injunctive relief as a procedural safeguard that allows a court to restrain or force someone to do something before the actual legal proceedings have concluded).

<sup>60</sup> *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 2020 U.S. Dist. LEXIS 212663 (S.D.N.Y. Nov. 13, 2020), <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:618Y-JMV1-JB7K-22XC-00000-00&context=1516831> (dismissing complaint without prejudice due to lack of jurisdiction).

have currently met that high burden.<sup>61</sup>

Although most U.S. school districts opened their doors in the fall of 2021, many students chose to remain remote. A report from the South Dakota Department of Education states that one third of South Dakota schools had full time remote learners with disabilities during the pandemic, and over half of the schools reported students with disabilities participating in some kind of remote learning experience.<sup>62</sup> As a result, these students probably have a remote placement written into the IEP, causing issues for districts who want to bring all students back into the building to ensure success and lower the costs associated with remote learning.<sup>63</sup> Parents who disagree with district decisions and options may try to argue that the districts are changing placement if they force disabled remote students back into the building.

Though in recent cases in front of state and federal courts, parents were petitioning the courts to force school doors open, the legal reasoning should remain the same when parents are using “change of placement” to keep their students learning remotely.<sup>64</sup> Pre-pandemic cases favored parents if the school unilaterally decided to change an educational setting without parent consent or involvement, and the courts would order the district to keep the placement

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<sup>61</sup> Individuals with Disabilities Education Act, 20 U.S.C. §300.518 (requiring that “during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.” In cases where parents and schools disagree about placement, courts will order the child to revert back to the agreed upon setting in the last IEP if complainants can show “irreparable harm” in failing to do so).

<sup>62</sup> *Understanding the Impact of the Covid Pandemic*, S.D. DEP.’T OF EDUC., 14 (July 2021), <https://doe.sd.gov/publications/documents/CovidReport.pdf>.

<sup>63</sup> Anya Kamenetz, *Parents Of Special Education Students File Lawsuits Over Poor Remote Education*, ALL THINGS CONSIDERED (July 22, 2020), <https://www.npr.org/2020/07/22/894343514/parents-of-special-education-students-file-lawsuits-over-poor-remote-education>.

<sup>64</sup> Valerie Strauss, *Schools of more than 90 percent of the world’s students closed during this pandemic*, WASH. POST (April 6, 2020), <https://www.washingtonpost.com/education/2020/04/06/schools-more-than-90-percent-worlds-students-closed-during-this-pandemic-this-graphic-shows-how-fast-it-happened/>.



until a hearing was held.<sup>65</sup> During the Covid-19 closures, however, the courts were hesitant to allow “change of placement” to shape district-wide policies. Citing jurisdictional issues or plaintiff’s failure to establish “irreparable harm,” the courts have avoided forcing doors open or shut under this provision of IDEA. Instead, several opinions discuss a common theme of “systemic decisions” and how individuals cannot force districts to meet unreasonable and impossible demands when they are applied to the entire system.

In *J.C. v. Fernandez*,<sup>66</sup> for example, the court relied on a 2010 case from the Fourth Circuit, which said that the state of Hawaii did not violate student IEPs by eliminating school on seventeen Fridays in order to meet budget requirements.<sup>67</sup> In denying the preliminary injunction in *Fernandez*, the Court cited the Fourth Circuit’s reasoning in the Hawaii case: “When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions.”<sup>68</sup> This was echoed in *J.T. v. DeBlasio*,<sup>69</sup> which also relied on the Fourth Circuit’s reasoning when denying a preliminary injunction to force school districts offline during the pandemic.<sup>70</sup> The courts have been generally unwilling to make policy decisions for districts, deferring to elected local or state officials for remedies instead.

While the current precedent involves complaints made about forced remote learning, courts will also likely use these holdings in the opposite situation where a parent wants the remote learning option, and the school district is unwilling or unable to offer it. Across the nation, some parents do not want their children to return to the classroom and are considering legal action to force the remote option.<sup>71</sup> The question for these cases will likely turn on whether the

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<sup>65</sup> See e.g., *Honig v. Doe*, 484 U.S. 305 (1988).

<sup>66</sup> *J.C. v. Fernandez*, 77 IDELR 15 (D. Guam 2020).

<sup>67</sup> *N. D. v. State Dep’t of Educ.*, 600 F.3d 1104, 2010 U.S. App. LEXIS 6979 (9th Cir. April 5, 2010).

<sup>68</sup> *Id.* at 1116.

<sup>69</sup> *J.T.*, 500 F. Supp. 3d at 137.

<sup>70</sup> *Id.* at 148 (explaining that the denial of the DeBlasio injunction was also due to several jurisdictional issues since plaintiff sued *all* US school districts, many of which the Court did not have jurisdiction over, as well as general issues with the complaint that failed to establish grounds for an injunction).

<sup>71</sup> Belsha, *supra* note 8; see also Kamenetz, *supra* note 62.

courts are making policy decisions for a district or merely enforcing a pre-existing IEP that was created to benefit the child. Though the case *Eley v. District of Columbia* occurred long before the pandemic, the court's holding that switching a student from online to in person learning was a change of placement<sup>72</sup> could serve as precedent for parents of severely disabled students who are fighting for remote learning options in public schools.

In *Eley*, a student with severe disabilities was registered in a virtual platform.<sup>73</sup> When the district attempted to unilaterally switch the student's placement to an in-person classroom with other disabled students, the student's mother filed suit for the fourth time against the district.<sup>74</sup> The court reasoned, "[c]learly, 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."<sup>75</sup> Since the online placement was established with the individual student's success in mind, and the student's mother was not involved in the placement change process, the school district could not change the child's placement from the virtual platform to the in-person platform. Of course, this was a situation where a parent wanted to be involved and was excluded. There will be instances, certainly, where a student is not performing well, not logging in, not thriving, and parents are unresponsive to the school district, resulting in truancy. Districts have been held equally responsible for failing to act when students fall behind.<sup>76</sup> This can leave administrators without clear direction on how to shape remote learning policies in a way that supports students and complies with federal law, especially when the student requests online instruction, but the district does not believe it is in the child's best interest or cannot afford to provide it.

The main difference between *Eley's* change-of-placement ruling

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<sup>72</sup> *Eley v. Dist. of Columbia*, 47 F. Supp. 3d 1 (D.D.C. 2014).

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* at 3.

<sup>75</sup> *Id.* at 15.

<sup>76</sup> *Graystone Acad. Charter Sch. v. Coatesville Area Sch. Dist.*, 99 A.3d 125 (Pa. Commw. Ct. 2014).

and change-of-placement denials in pandemic cases is the idea of systemic policy. A court will likely favor parents who want remote options in post-pandemic cases if they can show that virtual learning was used as a tool to meet the child's needs and make the child more successful than learning in person, and that denying the student remote learning reduces educational opportunities in comparison with his/her peers. If districts, however, can show that the end of remote learning is due to budget needs, like that of *N.D.* and *JT Blasio*, and that a child's needs are met equally in person, the district will likely succeed because courts have declined to allow change-of-placement claims to shape district policy.<sup>77</sup> Districts can avoid change-of-placement claims altogether by involving parents in any changes from virtual to in-person learning, following all IDEA notice requirements.

#### REMOTE LEARNING AS A REASONABLE MODIFICATION OR ACCOMMODATION

In cases where districts have involved parents and they disagree on placement, the next question is whether IDEA or Section 504 could require remote learning placement as a reasonable modification. While the federal courts have not yet considered this in the educational realm, they have considered whether remote work is a reasonable accommodation in the employment realm. In the 1995

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<sup>77</sup> See *N.D. v. State Dep't of Educ.*, 600 F.3d 1104, 2010 U.S. App. LEXIS 6979 (United States Court of Appeals for the Ninth Circuit April 5, 2010, Filed), available at <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y5M-GSF0-YB0V-P0M3-00000-00&context=1516831>. "An across-the-board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out. In comparison to cases in which a child is singled out in relation to her peers, the furlough days do not remove the plaintiffs from the regular classroom setting anymore than they do the other children. Disabled children are not singled out for furlough days. To the extent possible under the new school calendar, the disabled children are still 'mainstreamed' with regular children at school. To allow the stay-put provisions to apply in this instance would be essentially to give the parents of disabled children veto power over a state's decisions regarding the management of its schools. The IDEA did not intend to strip administrative powers away from local school boards and give them to parents of individual children, and we do not read it as doing so."

decision *Vande Zande v. State of Wis. Dept. of Admin.*,<sup>78</sup> the U.S. Seventh Circuit of Appeals held that employers were not required to grant accommodation requests to work from home. The court reasoned that most jobs require some means of interaction and supervision, and remote work would result in loss of productivity, creating an undue hardship for the company to grant the accommodation.<sup>79</sup> A recent, post-pandemic case, however, filed by the Equal Opportunity Employment Commission (EEOC) in a Georgia district court challenges these old assumptions of productivity loss due to new technology.<sup>80</sup> The EEOC recently provided guidance to employers, saying that employers are not always required to grant remote learning as an accommodation, but they must consider the accommodation request and provide specific reasons for any denials.<sup>81</sup> Employee performance working remotely during lockdowns can be used to assess financial and productivity costs to employers.<sup>82</sup> Additionally, allowing remote work to non-disabled employees will also be considered in the overall reasonableness of the accommodation.<sup>83</sup> Still, if an employee can come up with an on-site way for the employee to have equal opportunity, the employer can choose that route.<sup>84</sup>

Applying this theory to the educational realm, it is clear remote learning can be considered a reasonable modification under the ADA<sup>85</sup>, which is tied to IDEA and Section 504, but it is unclear when it is required. Reasonableness depends on the specific facts of each

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<sup>78</sup> *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 1995 U.S. App. LEXIS 99, (7th Cir. 1995).

<sup>79</sup> *Id.*

<sup>80</sup> EEOC v. ISS Facility Services, No. 21-cv-3708 (N.D. GA. filed Sept. 2021).

<sup>81</sup> Connor Leedom, *EEOC Addresses Telework as Reasonable Accommodation*, H.R. DAILY ADVISOR (Dec 11, 2020), <https://hrdailyadvisor.blr.com/2020/12/11/eec-addresses-telework-as-reasonable-accommodation/>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> ISS Facility Services, Inc. will pay \$47,500 for failing to consider remote work as a reasonable accommodation under the ADA. *See ISS Facility Services to Pay \$47,500 to Settle Disability Discrimination Lawsuit*. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec 20, 2022), <https://www.eeoc.gov/newsroom/iss-facility-services-pay-47500-settle-disability-discrimination-law-suit#:~:text=ATLANTA%20%E2%80%93%20ISS%20Facility%20Services%2C%20Inc,the%20federal%20agency%20announced%20today.>

case, but the courts have held that “an accommodation is not reasonable if it imposes an undue burden on the public entity or requires it to substantially alter its program.”<sup>86</sup> Districts denying remote options must be ready to show specific reasons why remote learning cannot be accommodated or why it would alter the fundamentals of the program, especially when almost every school provided virtual instruction during the pandemic. Indeed, some advocates are pushing for remote learning to become a requirement in IDEA based on the premise that remote learning was a low-cost solution that schools have used before to provide access to education. Teaching during the pandemic, however, likely was a completely different program than the normal curriculum. Typical elementary and secondary curriculums do not use lectures or screens as often as paper worksheets, tangible crafts, and kinesthetic activities with collaborative learning, none of which are easily available with remote learning.<sup>87</sup>

If schools provided virtual learning as a reasonable accommodation to students who do not want to attend in-person, they would likely have to pay a separate teacher to provide remote instruction, a third-party program to provide instruction for the student or require a classroom teacher to teach that child remotely while also teaching a classroom of children. Although on the surface the last option may not seem expensive or unduly burdensome, schools are currently paying a high price for their decision to force teachers into synchronous learning situations with the current teaching shortage, so the argument that it is cost effective is not based on data but rather on

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<sup>86</sup> Pollack v. Reg'l Sch. Unit 75, No. 2:13-cv-109-NT 15 (D. Me. Apr. 28, 2017).

<sup>87</sup> As a former teacher with nearly a decade of experience who taught through the pandemic, I have my own opinions on the effectiveness of remote options. In my experience, remote learning required an entirely different curriculum that was less engaging, less effective, and slower paced. Like most teachers across the nation, I had to cut a significant amount of the curriculum or alter it significantly to fit remote options during this time period. For these reasons, using remote learning during Covid closures as evidence that it can be implemented without disrupting the program is flawed reasoning. In an era where edtech companies are making millions from private contracts with public schools, even the new Secretary of Education embraces low-tech and relationship driven solutions to deal with student achievement gaps because, as a teacher himself, he understands effective teaching methods. See Rebecca Koenig, *Secretary of Education Envisions Solutions that are Low-Tech, High-Touch*, ED SURGE (Jan. 27, 2022), <https://www.edsurge.com/news/2022-01-27-secretary-of-education-envisions-solutions-that-are-low-tech-high-touch>.

assumptions. For these reasons, a school can claim both that the requested modification is unreasonable and unduly burdensome, but without clear precedent, no one knows how the courts or SEAs would receive this argument.

While IDEA is probably the most well-known statute used in k12 education to protect students with disabilities, administrators should be equally concerned with FAPE violations under Section 504 of the Rehabilitation Act of 1973. Section 504 applies to all public agencies and requires that people with disabilities have access to the same public resources as everyone else.<sup>88</sup> In the education realm, students can be put on 504 plans, which, like IEPs in IDEA, require educational partners and parents to meet and decide upon a plan of assistance. A student qualifies for a 504 if s/he has “a physical or mental impairment that substantially limits one or more major life activities.”<sup>89</sup> These plans are also legally enforceable and must be generally followed. Aggrieved parents can file with the Office of Civil Rights,<sup>90</sup> though OCR will look more closely at whether the school followed the statutory required procedure rather than question the 504 plan itself. Districts must comply with the OCR ruling, or the OCR can (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.<sup>91</sup>

As districts attempt to return to solely in-person learning, there will likely be students on 504 plans who do not want to return to the physical building. Like IEPs, 504 plans protect students from discrimination and allow accommodations or modifications to the curriculum. Unlike IDEA, however, Section 504 is not limited to the

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<sup>88</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

<sup>89</sup> *Protecting Students With Disabilities*, U.S. DEP’T. OF EDUC. (last visited Jan. 2, 2023 at 12:37pm) <https://www2.ed.gov/print/about/offices/list/ocr/504faq.html>.

<sup>90</sup> The Office of Civil Rights investigates and rules on civil rights complaints in the educational realm. Housed under the Department of Education, the Office of Civil Rights is an executive agency who is given much deference by the court system upon appeals. See *How the Office for Civil Rights Handles Complaints*, U.S. DEP’T. OF EDUC: OFF. FOR CIV. RTS. (last visited Jan. 2, 2023 at 12:32pm) <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html>.

<sup>91</sup> See *Case Processing Manual*, U.S. DEP’T. OF EDUC: OFF. FOR CIV. RTS, 8, 15 (Aug 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

elementary and secondary educational realm and does not require complainants to exhaust complaints with SEAs before bringing a civil suit. This can make 504 violations more costly than IDEA violations for districts. In the context of remote learning, 504 violations may occur when students with disabilities are denied equal access to the same education as their peers. This can occur in a variety of ways, including prejudices in the screening process and inaccessible online learning tools.

Some states have attempted to provide clear guidance for administrators and have even passed legislation preferring in-person learning to remote learning, leaving parents, who want to make remote learning permanent, with few resources.<sup>92</sup> The state of California, for example, passed Assembly Bill 130, which parents claim put barriers in the way of accessible remote learning for students that are unable to return to the building due to health conditions.<sup>93</sup> Assembly Bill 130 states the only available online learning format in California is a program called Independent Study.<sup>94</sup> Parents filed suit, claiming that the bill is discriminatory and violates Title II of the ADA and Section 504 of the Rehabilitation Act.<sup>95</sup> The District Court in the Northern District of California agreed. According to the rationale, because Independent Study enrollment can occur only *after* the team has changed an IEP or 504 plan to include this option, and since the process is lengthy, this can result in students with disabilities being forced on campus against parents' wishes and doctor recommendation.<sup>96</sup> Independent Study can also not be effectively used by students who require alternative educational programs, which is often required for students with learning disabilities.<sup>97</sup>

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<sup>92</sup> Sydney Johnson, *California directs districts to offer remote independent study this fall*, EDSOURCE (July 7, 2021), <https://edsources.org/2021/california-directs-districts-to-offer-remote-independent-study-this-fall/657578>.

<sup>93</sup> *Id.*; *AB-130 Education finance: education omnibus budget trailer bill*, CAL. LEGIS. INFO. (July 12, 2021), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB130](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB130).

<sup>94</sup> *Id.*

<sup>95</sup> Order Granting Plaintiff's Motion for a Temporary Restraining Order, *E. E. v. State of California*, No. 21-cv-0785-SI (Nov. 4, 2021), <https://s3.documentcloud.org/documents/21098990/order-granting-tro.pdf>.

<sup>96</sup> *Id.* at 9.

<sup>97</sup> *Id.* at 20.

Because of these discriminatory elements of AB 130, the court ordered a temporary restraining order on these requirements, forcing districts to quickly provide remote learning to students seeking enrollment in the online platform until the lawsuit is resolved.<sup>98</sup> While it is just a restraining order, it is important to note the court's conclusion that the suit would likely succeed on the merits: "Thus, absent a reasonable accommodation – such as access to the distance learning mode that disabled students utilized during the 2020-2021 school year – these students are denied the benefits of public education by reason of their disability, in violation of the ADA and the Rehabilitation Act."<sup>99</sup> These are federal statutes, and all districts around the country are subject to this holding.

#### **DISTRICT POLICY RECOMMENDATIONS TO ENSURE EQUAL OPPORTUNITY**

It seems, from these holdings, districts can be held responsible for both taking too much control over the child's education and for not monitoring a child's progress enough. As a result, districts must develop specific policies and procedures for these four situations when it comes to avoiding discrimination lawsuits: 1) the screening process for students who are eligible for these programs along with truancy clauses that bring students back; 2) remote, synchronous learning programs and student success within these programs; 3) third party, asynchronous online learning programs offered and paid for by the district; and 4) situations where districts want to end remote learning completely.

##### **1. *Screening***

Since IDEA and section 504 were written with brick-and-mortar schools in mind, this makes for murky water in settings where a school has little control over whether a student logs in and

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<sup>98</sup> *Id.* at 23.

<sup>99</sup> *Id.* at 21.



participates in an online or remote format.<sup>100</sup> As a result, schools want certain eligibility standards to ensure students are not using online platforms as a tool for truancy.<sup>101</sup> To prevent discrimination against students in the screening process, schools need to be careful on how they craft eligibility and screening for both synchronous and asynchronous online learning programs.<sup>102</sup> Creating a screening process that does not discriminate yet holds students accountable for their academic progress is a challenge schools must face if they offer online learning options. The screening process should 1) avoid facial discrimination that prohibits students with disabilities from entering programs by tying it to their disability status, 2) ensure parent participation in the program to avoid “change of placement” claims if students are on IEPs, 3) ensure access to the program through materials provided by the district to avoid 504 violations, and 4) provide a clear set of student expectations that apply to behavior rather than to abilities.

In order to avoid the many land mines of the screening process, districts could allow open enrollment and provide parents with information on the independence needed to be successful. Districts will probably not prefer this option because, besides the cost for the district, few students in the k12 realm are going to thrive in this

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<sup>100</sup> The Office of Special Education and Rehabilitative Services (OSERS) confirms that IDEA and 504 protections were written to ensure inclusiveness in a physical setting and still prefers that placement for the least restrictive environment. A Department of Education document specifically addresses the least restrictive environment concerns in remote learning, saying “Congress has previously expressed concerns about children with disabilities being excluded entirely from the public school system and about not being able to participate in the general curriculum with their nondisabled peers. Section 601(b)(4) of the Education for All Handicapped Children Act of 1975 (P.L. 94-142); Section 601(c)(2) of IDEA (P.L. 108-446). IDEA has continually reflected a strong preference for educating children with disabilities in regular classes with appropriate aids and supports.” *See Return to School Roadmap*, *supra* note 50 at 39.

<sup>101</sup> Truancy is a growing problem nationwide with remote learners. *See*, Abby Goodnough, *As Schools Go Remote, Finding ‘Lost’ Students Gets Harder*, N.Y. Times (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/us/schools-covid-attendance.html>

<sup>102</sup> Admissions requirement of a reading level at or above sixth grade level was discriminatory. Quillayute Valley (WA) SD, 108 LRP 17959 (OCR 2007).

setting,<sup>103</sup> and there is the potential for abused students to become even more victimized with a program that lacks day-to-day interactions from a teacher.<sup>104</sup> In order to keep students safe and ensure they are making progress, open enrollment programs must have strict policies that bring students back into the building. Policy language that requires student participation and lesson completion is vital, and when any student is failing, s/he should be meeting with administrators and parents to review the virtual setting. There should also be regular wellness check-ins with a school counselor. Other policies will depend on the type of remote learning option, and administrators need to understand and equally enforce the district's responsibilities for each setting.

## 2. *Temporary Synchronous Teaching*

Districts will undoubtedly have a great responsibility for students who are learning remotely from public school district teachers, most likely through a Zoom, Microsoft Team, or Google Meet platform, and must ensure the remote learning is delivered in a quality format that engages students. During the pandemic, many administrators have opted to have district teachers offer both traditional and remote classes simultaneously, known as synchronous learning.<sup>105</sup> Although many districts are not offering this in 2021-22 as a general education option, some are already planning for this type of teaching to become permanent.<sup>106</sup> The quality of online education is certainly the district's responsibility and possibly the parents' responsibility as well. Teacher responsibilities for remote students with disabilities

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<sup>103</sup> Tawnell D. Hobbs & Lee Hawkins, *The Results Are in for Remote Learning: It Didn't Work*, W.S.J (June 5, 2020), [https://www.panoramic.com/wp-content/uploads/2020/06/The-Results-Are-In-for-Remote-Learning\\_-It-Didn%E2%80%99t-Work-WSJ.pdf](https://www.panoramic.com/wp-content/uploads/2020/06/The-Results-Are-In-for-Remote-Learning_-It-Didn%E2%80%99t-Work-WSJ.pdf).

<sup>104</sup> *Traffickers abusing online technology, UIN crime prevention agency warns*, U.N. NEWS (October 30, 2021), <https://news.un.org/en/story/2021/10/1104392>.

<sup>105</sup> Mathew Murray et al., *An Introduction to Synchronous e-Learning*, E-LEARNING GUILD (2007) <https://www.learningguild.com/pdf/4/synchronousbook.pdf>

<sup>106</sup> Julia F. Kaufman, Heather L. Schwartz, and Melissa K. Diliberti, *The Remote Learning Paradox: Some Educators, Parents Want to Keep Online Classes Option Even Though Instruction Suffered*, RAND CORP. (June 24, 2021), <https://www.rand.org/blog/2021/06/the-remote-learning-paradox-some-educators-parents.html>.

include traditional duties of preparing lessons, delivering lessons, grading lessons, and implementing IEP services, in addition to clear documentation of a student's attendance and participation. Students who needed access to an aid in a traditional setting will still need access to an aid in a virtual setting, and districts need to communicate a clear accountability action plan to its teacher aids, who often work with students who struggle with attention and behavior issues. District communication with parents and implementation of the remote learning IEP will be crucial in cases where remote learners failed to make progress, and each district should have a specific policy approved that applies to all students who are failing to attend remote services.<sup>107</sup>

When students do not log on, fail to participate, and do not complete assignments in a temporary remote learning situation, districts should be pursuing truancy, requiring students to return to the building or face charges. Local district attorneys will need to decide whether to prosecute parents when students do not log on to remote learning and refuse to attend in person. In most jurisdictions with compulsory school attendance statutes, parents will be charged with a misdemeanor if their children are truant. In South Dakota, for example, parents of truant children can be charged with a class two misdemeanor for the first offense and a class one misdemeanor thereafter.<sup>108</sup> Districts need a clear policy on what constitutes virtual "attendance" and must communicate the policy to parents and report any violations in a timely manner. Districts who do not pursue truancy will likely find they are in violation of state law. With so much absenteeism nationwide, however, state laws may have to

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<sup>107</sup> In South Dakota, even though there are a minimum number of required instructional hours, attendance policy is set by the local school district. Record keeping of attendance is also up to the local school district. For remote policies, it is especially important that the district communicate its policies clearly to parents to avoid IEP violations and still comply with state mandated instructional time. *See* S.D. Cod. L. §13-26-1, [https://sdlegislature.gov/Statutes/Codified\\_Laws/2041973](https://sdlegislature.gov/Statutes/Codified_Laws/2041973).

<sup>108</sup> S.D. Cod. L. §13-27-11 states "Any person having control of a child of compulsory school age who fails to have the child attend school, as required by the provisions of this title, or provide alternative instruction pursuant to § 13-27-3, is guilty of a Class 2 misdemeanor for the first offense. For each subsequent offense, a violator of this section is guilty of a Class 1 misdemeanor."

adapt and change to help districts bring students back into the building. The South Dakota Department of Education's 2020-2021 report card noted, for example, that the rate of chronic absenteeism doubled, and economically disadvantaged students, minorities, and students with disabilities felt the effects the most.<sup>109</sup> States like South Dakota must revise and enforce absenteeism policies quickly to avoid long term effects, such as illiteracy, low graduation rates, and increased crime.

In cases where the district wants to bring an absent child back and the parent disagrees or is unresponsive, if the district has ample evidence that student is not succeeding and has attempted to involve the parent in the process, state agencies and courts have typically sided with the district to pull the student back into the brick-and-mortar setting.<sup>110</sup> This requires documentation from teachers and administration, especially when a child is not thriving, to alert the parent of the lack of progress as well as request the parent's involvement in an IEP meeting to discuss change of placement from remote to in person learning. If students continue to miss school, the administration must report the absenteeism to the truancy officer.<sup>111</sup> If the administration fails to notify parents, they could later sue the district for compensatory damages for the child's lack of progress and fight a placement change from the online to the traditional school setting. Districts should provide specific forms to teachers to communicate and track absenteeism or class failure, and administrators must adopt procedures for documentation of any absent remote learners to be referred to the truancy officer.

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<sup>109</sup> See *Understanding the Impact of Covid-19 on South Dakota K-12 Education*, DEP'T. OF EDUC., 13 (July 2021), <https://doe.sd.gov/publications/documents/CovidReport.pdf>.

<sup>110</sup> DOE State of Hawaii, 112 LRP 31884 (SEA Hawaii 2012) (student did little virtual work and was often tardy or absent, so change of placement was appropriate).

<sup>111</sup> S.D. Cod.L §13-27-6 states, "Warnings by school boards to send children to school—Report to truancy officer. Each school board shall warn parents or persons in control of children of compulsory school age that the children must enter school and attend regularly and shall report the parents or persons in control of the children to the truancy officer for the district if the warning is not heeded. All school board members, superintendents, and teachers shall cooperate in the enforcement of school attendance laws."

### 3. *Third Party Options*

Due to many teachers finding synchronous learning an unacceptable new job duty, districts will not likely look at synchronous teaching as a long-term option.<sup>112</sup> There are simply not enough teachers to provide for both in-person and remote learning needs. Many districts, in an attempt to keep their staff from leaving and still offering online learning, are opting to pay for a third-party option.<sup>113</sup> Online programs run by third parties instead of the public school system are typically functioning as private EdTech companies that do not have the same responsibilities and requirements that public schools have towards their disabled students.<sup>114</sup> When public school systems are contracting out services to these third-party online programs for students on IEPs, however, the virtual school has become a public school.<sup>115</sup> With online learning as a fairly new frontier, districts and their third-party online platforms must understand their responsibilities to students; otherwise, it may be months or even an entire school year before someone in the school system is alerted to missing credits or lack of academic progress. This can result in consequences for the public school district violating IEPs and 504 plans.

Each state will have rules about accredited online platforms, and

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<sup>112</sup> Synchronous learning was meant for university and graduate students, who are often adults, not for k-12 where students need classroom management for engagement. The expectations are unrealistic and unsustainable long term for a field that is already suffering for applicants. See, Safia Sami Almi, *Educators teaching online and in person at the same time feel burned out*, NBC NEWS (Oct.18, 2020), <https://www.nbcnews.com/news/us-news/educators-teaching-online-person-same-time-feel-burned-out-n1243296>.

<sup>113</sup> See *Understanding the Impact of Covid-19 on South Dakota K-12 Education*, DEPT. OF EDUC. 6 (July 2021), <https://doe.sd.gov/publications/documents/CovidReport.pdf>.

<sup>114</sup> Students typically do not have the same extent of FAPE rights in private educational settings. See *South Dakota Parental Rights and Procedural Safeguards*, S.D. DEP'T. OF EDUC. 18 (2020), <https://doe.sd.gov/sped/documents/parentalrights/Eng.pdf>.

<sup>115</sup> "When a public school sponsors a virtual school, the virtual school is a public school. As such, the virtual school has a legal obligation to comply with all provisions in federal and state law regarding children with disabilities." See *FAQ on Students with Disabilities and Virtual Schools and Programs*, KAN. STATE DEP'T OF EDUC. GUIDANCE, 5 (June 15, 2021), <https://www.ksde.org/Portals/0/CSAS/CSAS%20Home/Graduation%20and%20Schools%20of%20Choice/FAQ%20on%20Students%20with%20Disabilities%20and%20Virtual%20Schools%20and%20Programs%20-%20Final.pdf>.

administrators should contact their departments of education if they do not know. According to the South Dakota Department of Education, students are allowed to use the South Dakota Virtual School, which allows public funding for approved private programs like Black Hills Online Learning, which has been a popular program with South Dakota public schools during the pandemic.<sup>116</sup> There are significant downsides for disabled students on this type of platform, and it may even result in a Title II ADA or Section 504 violation. Administrators are likely not aware of the problems with third party providers who do not take responsibility for teaching students with disabilities. For example, Black Hills Online Learning offers only one curriculum and states that it is appropriate for independent learners, much like the program in *E.E. v. State of California* that resulted in discrimination against students with disabilities. In addition to providing only one curriculum, third party online programs typically will not provide extra services to students with disabilities, which the public school is legally required to supply. The Black Hills Online Learning program, a company that partners with forty-two school districts,<sup>117</sup> specifically states in the learning agreement that the company will not modify the program in any way or provide Special Education services.<sup>118</sup> The application process asks students if they are on IEPs and notes that BHOLC will not provide services for students on IEPs.<sup>119</sup> When offering programs like Black Hills Online Learning to the entire student body with no alternatives to those on IEPs, schools have created the same situation in *EE v. State of California*, which the court said was a violation of the ADA and Section 504.<sup>120</sup>

While Courts have repeatedly held that private schools are not

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<sup>116</sup> See South Dakota Virtual School, BLACK HILLS ONLINE LEARNING CMTY. (2021) <https://sdvs.k12.sd.us>.

<sup>117</sup> *Partnering School Districts*, BLACK HILLS ONLINE LEARNING CMTY. (last visited Jan. 2, 2023), <https://www.bholc.org/about/partners/>.

<sup>118</sup> See *Learning Agreement*, BLACK HILLS ONLINE LEARNING CMTY. (March 11, 2020), [https://www.bholc.org/wp-content/uploads/2020/05/2020-21.BHOLC\\_Learning\\_Agreement.pdf](https://www.bholc.org/wp-content/uploads/2020/05/2020-21.BHOLC_Learning_Agreement.pdf).

<sup>119</sup> *2021-2022 BHOLC Application*, BLACK HILLS ONLINE LEARNING CMTY. (last visited date), <https://bhssctie.wufoo.com/forms/mypxm670oqnnuu/>.

<sup>120</sup> ORDER, *E.E. v. State of California*, *supra* note 93.

subject to FAPE requirements to the same extent as public schools,<sup>121</sup> ADA or 504 claims could be raised against the *public* school district contracting with these third-party online programs if no other remote options are available to students with disabilities.<sup>122</sup> Additionally, just because the sponsored virtual school discloses that it does not provide modifications, accommodations, or IEP assistance in the curriculum, does not mean that parents signing their disabled children up for the program waive their students' rights or remedies. If virtual schools sponsored by public schools refuse to provide any services, then the public school needs to decide how students will receive services required in his or her IEP or 504 plan. Unfortunately, that means that, not only is the school district paying someone else for the education, but the district will also have to pay for a case manager and possibly teacher aids for assistance as well. If a district does not provide these supports, they are held equally liable as if the district itself was providing the curriculum.

Districts choosing a third-party online option will want clear procedures in place, similar to synchronous learning, that would also establish 1) who is monitoring the child's progress (district or third-party program), 2) expectations of parents and students for independent learning, and 3) non-discriminatory measurements that will force a student back into the building if s/he is not making progress. In order to comply with IDEA, the ADA, and Section 504, administrators should make sure students with disabilities have access to the program and are assigned to a building SPED teacher who will regularly monitor progress and provide accommodations and services as required in the student's IEP. Failing to do this, under the *E.E. v. State of California* decision, will open districts to ADA and Section 504 lawsuits or IDEA failure to implement complaints for the Dept of Education. Due to the cost of the online option and the cost of the extra services the school must provide, many districts will find this

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<sup>121</sup> Private schools are not bound by the requirements of FAPE in IDEA, but some IDEA protections still exist for disabled children in private schools. FAPE can also arise in the context of private schools if public schools fail to provide for the child. See *Individuals with Disabilities Education Act (IDEA): Private Schools*, CONG. RSCH. SERV. 3-7 (March 10, 2011), [https://www.everycrsreport.com/files/20110310\\_R41678\\_a0412a556e59db0c46bf1c57225ab26292af6db5.pdf](https://www.everycrsreport.com/files/20110310_R41678_a0412a556e59db0c46bf1c57225ab26292af6db5.pdf).

<sup>122</sup> ORDER, *E.E. v. State of California*, *supra* note 93.

measure that they intended to be cost effective as one that is entirely out of budget. Instead, districts might look at online options specifically designed for students with disabilities. While they may cost more initially, due to their expertise and willingness to accommodate students with disabilities, these programs may actually be more cost effective for the district.<sup>123</sup>

#### 4. *Ending Remote Learning Equitably*

Despite parents' interest in remote options, some districts may want students back in person for a variety of reasons. Students learning off site may have a hard time engaging in the material.<sup>124</sup> Students learning off site may lack access to nutritious foods.<sup>125</sup> Worst of all, students learning off-site may be victims of abuse, which experts believe went unreported during remote learning due to the lack of student and teacher interactions.<sup>126</sup> It is undeniable that most k-12 students learn better in the physical environment with human interaction and teacher accountability.<sup>127</sup> Even adults struggle with device distractions and procrastination, and in a world full of so much accessible entertainment, it is no wonder children underperform in the online setting. Districts who are pressured both by the state and the public to do well on standardized testing have a real interest in

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<sup>123</sup> See e.g., *Supports for Students with Special Educational Needs*, EDGENUITY (2022), <https://www.edgenuity.com/special-populations/>. Edgenuity is a private ed tech option that claims to provide support for students with disabilities through appropriate scaffolding and curriculum customization. One of the problems in South Dakota for students with disabilities, however, is that they cannot receive modifications from the general curriculum and still receive a traditional diploma; instead, they can only receive a certification of completion. Additionally, all South Dakota students must also go through programs certified by the SD Department of Education to receive any credit for completed courses.

<sup>124</sup> Almi, *supra* note 110.

<sup>125</sup> Cory Turner, 'Children Are Going Hungry': Why Schools Are Struggling To Feed Students, N.P.R. (Sept. 8, 2020), <https://www.npr.org/2020/09/08/908442609/children-are-going-hungry-why-schools-are-struggling-to-feed-students>.

<sup>126</sup> Neil Schoenherr, *WashU Expert: Decrease in abuse phone calls not a good sign*, WASH. UNIV. ST. LOUIS (April 15, 2020), <https://source.wustl.edu/2020/04/washu-expert-decrease-in-abuse-hotline-calls-not-a-good-sign/>.

<sup>127</sup> See e.g. J.J. Arias, John Swinton, & Kay Anderson, *Online vs Face-to-Face: A Comparison of Student Outcome with Random Assignment*, E-J. OF BUS. EDUC.& SCHOLARSHIP OF TEACHING, 16 (Sept. 2, 2018), <https://files.eric.ed.gov/fulltext/EJ1193426.pdf>.



getting students back in the classroom to perform at their highest levels. For students who are not performing, it is difficult to know whether the lack of performance is due to lack of motivation or ability, so identifying students with disabilities will also be difficult. Additionally, for those students who are already identified as having disabilities, teachers and districts may be worried that these students are not engaging with their peers, which is the entire premise behind IDEA. The framers of this legislation saw students with disabilities being isolated and left out of the most important parts of education—peer interaction and social development. This is evident with the “Least Restrictive Environment” requirement,<sup>128</sup> which states that “Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” Online classes isolate students with disabilities in a way that directly contradicts the original purpose behind IDEA.

In addition to student welfare, cash strapped districts may be simply unwilling to pay the costs associated with remote learning when in-person learning is already offered.<sup>129</sup> With a growing number of students placed on 504 plans due to anxiety and behavioral issues,<sup>130</sup> a demand for remote learning could have a significant financial impact on schools, especially middle-sized schools who are large enough to have interested students but too small to offer meaningful solutions. As a result, the most financially sound route for a district, especially one trying to avoid a discrimination claim, would be to have a blanket policy that does not provide online learning options at all, or at least restricts online learning to disabled students

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<sup>128</sup> Individuals with Disabilities Education Act, 20 U.S.C § 1400 §§300.114(a)(2).

<sup>129</sup> Mark Lieberman, *One Big Reason Schools Are Ditching Remote Learning: The Cost*, EDUC. WK. (June 7, 2021), <https://www.edweek.org/leadership/one-big-reason-schools-are-ditching-remote-learning-the-cost/2021/06>.

<sup>130</sup> A recent study suggests that depression and anxiety orders among children doubled over the pandemic, and I expect we will see an increase of students on IEPs and 504s as a result. See Nicole Racine et al., *Global Prevalence of Depressive and Anxiety Symptoms in Children and Adolescents During COVID-19: A Meta-analysis*, JAMA NETWORK (August 9, 2021), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2782796>.

on 504 or IEPs who benefit from digital platforms.<sup>131</sup> After all, there is no Title II ADA violation or Section 504 violation if no one has the option to participate, and many courts have already held that FAPE violations do not occur just because a student did not get the educational program or setting s/he prefers.<sup>132</sup> Districts can prioritize students with disabilities for services under Section 504; they just can't deny disabled students the same opportunities they allow for every other student. Therefore, districts who want to end remote learning should limit enrollment in online programs to only students who have IEP and 504 plans, or at least medically documented disabilities, as there is no protection or cause of action for non-disabled students who want free remote learning options.<sup>133</sup>

The district still might face a change-of-placement complaint if students have IEPs or 504 plans that specifically state remote learning as their placement if that is no longer an option and parents are unwilling to change it to the building. This situation could certainly arise for students with severe anxiety, especially as the Covid variants frighten parents away from buildings. Districts should 1) hold a change of placement meeting, 2) involve the parent through proper notice and decide whether the building is appropriate as an IEP team, and 3) either a) document reasons the team feels online learning is not a good option or b) pay for a third-party provider that specializes in education for students with disabilities.

Equal access to education is not just in the screening process. It is also in the learning process. Students need to be able to access digital materials and make reasonable accommodations to students with

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<sup>131</sup> *Return to School Roadmap*, *supra* note 50 at 38-39.

<sup>132</sup> *Return to School Roadmap*, *supra* note 50; see also Andre M.I. Lee, *What is and isn't covered under FAPE*, UNDERSTOOD (last visited Jan. 2, 2023) <https://www.understood.org/en/articles/what-is-and-isnt-covered-under-fape>.

<sup>133</sup> In an OCR question and answer document, OCR addresses the concern of offering extra services to students with disabilities that are not offered by the public. OCR explains that a "school district can consider whether a student has a disability when prioritizing students for in-person instruction," so the same should be said for prioritizing remote learning only for students with disabilities. See *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment*, U.S. DEP'T. OF EDUC. OFF. FOR CIV. RTS., 7 (May 13, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf>. It is important to remember, however, that for ADA Title II claims and ADA claims, IDEA prefers in-person learning for LRE. See *Return to School Roadmap supra* note 50.

disabilities to ensure equal opportunity in the classroom. Section 508 of the Rehabilitation Act of 1973,<sup>134</sup> similar to Section 504, is a remedy for a person with disabilities who is not receiving equal digital access to a non-disabled person. In the educational realm, digital access directly involves remote learning. When districts are engaging in synchronous remote learning or partnering with private schools to provide remote curriculum options to students, they must be careful to ensure students with disabilities are receiving equitable access. This means that, unless it places an undue burden on the school, students with disabilities must have access to online materials that accommodate their learning needs, whether that is having text to speech services, audio captions for pictures, or print that is large and distinguishable enough to read.<sup>135</sup>

Web Content Accessibility Guidelines, known as WCAG 2.1,<sup>136</sup> contain the latest guidance in complying with Section 508. While not federally mandated, WCAG 2.1 provides information on how digital content can be accessible. The premise is that digital content should be perceivable, operable, understandable, and robust. Unfortunately, many privatized online programs may not be accessible, especially if they specifically say they do not provide modifications to students with disabilities, creating unequal opportunities in learning. Though private programs are not typically subject to Section 508 requirements, when contracting with districts to provide remote learning services for students with disabilities, privately held online programs will likely be held to the same standards as the district. As a result, districts contracting with these companies should ask about their accessibility of digital content and Section 508 compliance before entering into any agreements for online curriculums.

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<sup>134</sup> Electronic & Information Technology 29 U.S.C. § 794d.

<sup>135</sup> "Section 508 is a federal law that requires agencies to provide individuals with disabilities equal access to electronic information and data comparable to those who do not have disabilities, unless an undue burden would be imposed on the agency" *See Accessibility Statement*, REHAB. SERVS. ADMIN. (last visited date), <https://rsa.ed.gov/help/accessibility>.

<sup>136</sup> WEB CONTENT ACCESSIBILITY GUIDELINES 2.1 (June 5, 2018), <https://www.w3.org/TR/WCAG21/>.

## CONCLUSION

Remote teaching enables many different modes of communication with students, but due to the novelty of these opportunities, the digital landscape is less clear with regards to the rights of students with disabilities and the requirements of schools. With so many students across the country affected by the pandemic, school districts can expect several years of complaints, lawsuits, and guidance shaping remote learning requirements. Current case law from state educational agencies (SEAs), though not always consistent in interpreting federal statutes, have been clear about several requirements:

- 1) Remote learning does not change the obligations of districts to provide services listed in a student's IEP. Districts that cannot provide these services have failed to implement the IEP and will need to pay compensatory damages or provide compensatory education.
- 2) Districts must continue to involve parents if there are changes in placement. If districts and parents disagree on placement, parents can file a complaint for change of placement, and the student will need to remain in the currently placed setting until the hearing occurs. Districts may have to pay for alternative placement if the child's needs cannot be met in the building, but in cases where remote learning is just preferred, the building placement will prevail. Districts may have to plan for the interim remote learning to honor the placement until the hearing.
- 3) Remote educational opportunities must be equal. Districts cannot block students with disabilities from remote learning opportunities or create screening processes that are facially discriminatory. If a program is offered to the regular student body, students with disabilities must have access as well.

As districts plan for the future and how to best help students

learn, they should be extra cautious when writing their policies and working with third party online programs to ensure they are in compliance with federal statutes. Planning ahead can help students continue learning effectively in a crisis and help administrators prevent an unnecessary lawsuit, ensuring productive relationships between districts, parents, and students.