

Back to School After COVID-19

Educational Rights Protecting Students With Disabilities

I. BACKGROUND

The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1401 *et seq.*, Section 504 of the Rehabilitation Act of 1975 (“Section 504”), 29 U.S.C. § 794 *et seq.*, and Colorado’s Exceptional Children’s Educational Act (“ECEA”) set forth the legal requirements for special education and related services for students with disabilities. IDEA, Section 504, and the ECEA do not specifically address a situation where schools are closed for a prolonged period of time because of “exceptional circumstances,” such as the outbreak of a global pandemic.¹ The purpose of this section is to provide background information regarding significant legal requirements set forth in IDEA, Section 504, and the ECEA under normal circumstances. To be clear, school districts were **not** excused from any legal requirements set forth in IDEA, Section 504, and the ECEA during the COVID-19 pandemic. However, unfortunately, many students experienced delays and disruptions related to their special education services due to the COVID-19 pandemic, which later sections will address.

This resource will largely cite to:

- Federal regulations (34 C.F.R. § 300.1 *et seq.*; 34 C.F.R. pt. 104 *et seq.*);
- State regulations (1 CCR 301-8, 2220-R-1.00 *et seq.*) [hereinafter “ECEA Rules”];
- Federal guidance from the United States Department of Education (“USDOE”); and
- State guidance from the Colorado Department of Education (“CDE”).

A. Free, Appropriate Public Education (FAPE)

Federal and state law require all school districts to provide students with disabilities with a free, appropriate public education (“FAPE”). Under IDEA and the ECEA, FAPE means special education and related services that are provided in conformity with a student’s individualized education program (“IEP”), which meets the IEP content, development, and review requirements under state and federal law. 34 C.F.R. § 300.17; ECEA Rule 2.19. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student’s individual educational needs as adequately as the needs of nondisabled students are met. 34 C.F.R. § 104.33(b)(1)(i). During the COVID-19 pandemic, Federal guidance and the CDE directed school districts to ensure that—“to the greatest extent practicable”—students with disabilities receive the special education services required in their IEPs or Section 504 plans.² Regardless of instructional approach (e.g., remote instruction, hybrid instruction, in-person instruction, etc.), school districts remained responsible for ensuring that students with disabilities received FAPE.³

¹ U.S. DEP’T OF EDUC., *Questions & Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* [hereinafter “USDOE Q&A (3/12/2020)”], 76 IDELR 77, at Q A-1 (3/12/2020), available at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

² COLO. DEP’T OF EDUC., *Special Educ. & COVID-19 FAQs* [hereinafter “CDE COVID-19 FAQs”], Comp. Serv. Q2 (10/14/2020), available at https://www.cde.state.co.us/cdesped/special_education_faqs; see also USDOE Q&A (March 2020), at Q A-1.

³ U.S. DEP’T OF EDUC., *Questions & Answers on IDEA Part B Service Provision* [hereinafter “USDOE Q&A (9/28/2020)”], at 2 (OSEP/OSERS 9/28/2020), available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf> (“No matter what

B. Special Education Evaluation—*Legal Standards*

A school district must ensure that all of its students with disabilities who need special education and related services are identified, located, and evaluated. 34 C.F.R. § 300.111(a)(1)(i); 34 C.F.R. § 104.35; ECEA Rule 4.02(1)(a). This legal obligation is referred to as “Child find.” Child find must include (1) students who are suspected of being a child with a disability in need of special education—including those students who are advancing grade to grade—and (2) highly mobile students. 34 C.F.R. § 300.111(c)(1)–(2). A school district also must ensure that every student with a disability is re-evaluated at least once every three years. 34 C.F.R. § 300.30(b); 34 C.F.R. § 104.35(d);⁴ ECEA Rule 4.02(4).

To comply with **IDEA evaluation requirements**:

- A student must be assessed in all areas of suspected disability, and the evaluation must be “sufficiently comprehensive to identify all of the student’s special education and related services needs.” 34 C.F.R. § 300.304(4), (6); *see also* ECEA Rule 4.02(4) (incorporating all evaluation requirements and procedures under 34 C.F.R. § 300.304).
- A school district must use a variety of assessment tools and strategies to collect relevant functional and academic information about the student. 34 C.F.R. § 300.304(b)(1); ECEA Rule 4.02(4).
- An evaluation must be completed within 60 calendar days of receipt of signed consent for evaluation. ECEA Rule 4.02(5).

To comply with **Section 504 evaluation requirements**:

- A school district must use tests and other evaluation materials that “have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer.” 34 C.F.R. § 104.35(b)
- A school district must “draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.” 34 C.F.R. § 104.35(c).
- A school district must “ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.” 34 C.F.R. § 104.35(c).

C. Individualized Education Program (IEP)⁵—*Legal Standards*

A school district must offer an IEP that is reasonably calculated to enable a student to make appropriate progress in light of the child’s circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An IEP must include annual

primary instructional delivery approach is chosen, SEAs, LEAs, and [IEP] Teams remain responsible for ensuring that a [FAPE] is provided to all children with disabilities. If State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, SEAs, LEAs, and IEP Teams are *not* relieved of their obligation to provide FAPE to each child with a disability under IDEA.”) (emphasis added); U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Questions & Answers for K-12 Public Schools in the Current COVID-19 Environment* [hereinafter “OCR Q&A (9/28/2020)”], at Q5 (9/28/2020), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf> (confirming that school district still must meet the requirements of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act during the COVID-19 pandemic).

⁴ Although Section 504 does not have a set timeline for reevaluations, the USDOE has stated that reevaluation procedure consistent with the IDEA is one means of meeting this Section 504 requirement. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, at p. 22 (Dec. 2016), available at <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>.

⁵ Unlike the IDEA, Section 504 does not require a written Section 504 plan, which is why there is not a separate section discussing requirements for Section 504 plans in this document. Note, however, that the USDOE has stated that one way to comply with Section 504’s FAPE requirement is to implement a student’s IEP. A student eligible under both Section 504 and IDEA does not need both a Section 504 plan and an IEP, but instead must be served with an IEP. *Id.*

goals that are designed to meet all of the student’s educational needs related to his disability. 34 C.F.R. § 300.320(a)(2). In addition, an IEP must include special education and related services that will be provided to enable the student to advance appropriately towards his annual IEP goals, to make progress in the general education curriculum, and to be educated and participate with his non-disabled peers. 34 C.F.R. § 300.320(a)(4). A school district must ensure that a student’s IEP team revises his IEP to address any lack of expected progress towards his annual IEP goals. 34 C.F.R. § 300.324(b). Lastly, decisions regarding a student’s special education services must be determined on a case-by-case basis, depending on the student’s unique needs and circumstances—not on the availability of such services. *See Letter to Trigg*, 50 IDELR 48 (OSEP 11/30/2007).

D. Compensatory Education Services—Legal Standards

Compensatory education is an equitable remedy for a denial of FAPE (e.g., failure to provide the services required in a student’s IEP or Section 504 plan). Compensatory education services could include academic tutoring, mental health supports, additional related services (e.g., extra speech-language or OT services), summer programming (including camps and recreational programs), etc.—funded by the school district. The goal of compensatory education is to place the student in the position they would have been in, but for a denial of FAPE. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C.C. 2005). Colorado follows the **qualitative approach** for determining compensatory education services. *See CDE COVID-19 FAQs*, Comp. Serv. Q1. Instead of awarding services based on the quantity of services missed, the qualitative approach focuses on the lost educational benefit to the student and the progress that the student should have, but did not, make. *Reid*, 401 F.3d at 524. This analysis should be fact-specific and based on the unique needs of each student. *Id.* Based on the qualitative approach, some students may need short, intensive compensatory services, while other students may need more extended programming—actually *exceeding* hour-for-hour of missed services. *Id.* In all cases, compensatory education should be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Id.*

II. STUDENTS IN NEED OF EVALUATION

Special education evaluations should be completed within **sixty (60) calendar days** of the school district receiving signed consent for evaluation from the student’s parent. *See* ECEA Rule 4.02(3)(c).⁶ COVID-19 school closures and remote learning disrupted this timeline for many students and significantly complicated the evaluation process in general. In March of 2020, the USDOE encouraged school districts and families to “reach mutually agreeable extensions of time, as appropriate” for a variety of IDEA timelines, including evaluations.⁷ However, to be clear, the USDOE did not otherwise modify or excuse school districts from meeting standard IDEA or Section 504 timelines. Instead, the USDOE directed school districts to investigate all appropriate assessments that could be administered remotely, without significantly affecting the validity and reliability of the results. USDOE Q&A (9/28/2021), at Q7.

A. Initial Evaluations

For students who were not yet eligible for special education services (e.g., in need of an initial evaluation), there may have been delays, including, but not limited to:

⁶ Note that Section 504 does not set forth a specific timeline for evaluations. However, the USDOE has stated that “The school’s evaluation process may be the same under Section 504 and the IDEA. An evaluation could reveal that the student is eligible for services under the IDEA and Section 504, Section 504 only, or that the student is not a student with a disability under Section 504, or is a student with a disability under Section 504 who does not need special education or related aids and services.” *Id.*

⁷ USDOE, *Supplemental Fact Sheet – Addressing the Risk of COVID-19 in Preschool, Elementary, & Secondary Schools While Serving Children with Disabilities* [hereinafter “USDOE, *Supplemental Fact Sheet* (3/21/2020)”], 76 IDELR 104 (OCR/OSEP 3/21/2020), available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.

- Delays reaching agreement that the student *should* be referred for evaluation;
- Delays completing the referral process (e.g., sending a consent for evaluation to the parent); and/or
- Delays conducting appropriate assessments and observations necessary for a comprehensive evaluation—especially any assessments that needed to be completed in-person. USDOE Q&A (9/28/2021), at Q7. For many reasons, this may have been especially challenging for students exhibiting social-emotional and behavioral needs.⁸

Notably, while the delays described above occurred, the student was likely not receiving *any* special education instruction or related services.⁹ Students who experienced issues with their initial special education evaluations may be entitled to compensatory education services (*see supra* Section IV) and/or in need of new special education evaluations.

B. Re-Evaluations

As noted above, special education re-evaluations typically occur once every three (3) years, unless the parent and the school district agree to re-evaluate earlier or more frequently. 34 C.F.R. § 300.303(b). The due date for a student’s next re-evaluation or “next eligibility meeting” is typically identified on the cover page of their IEP.¹⁰ Appropriate re-evaluations are incredibly important because they provide essential information about whether the student is making appropriate progress and whether all of the student’s disability-related needs are being supported. Without appropriate re-evaluations, a student’s IEP or Section 504 team may not have accurate baseline information (e.g., “present levels of performance”) needed to develop an appropriate IEP or Section 504 plan for the student.

For students who were already eligible for special education services during the COVID-19 pandemic, there may have been delays, including, but not limited to:

- Delays referring the student for re-evaluation (e.g., sending a consent for evaluation to the parent); and/or
- Delays conducting appropriate assessments and observations necessary for a comprehensive evaluation—especially any assessments that needed to be completed in-person. For many reasons, this may have been especially challenging for students exhibiting social-emotional and behavioral needs.

As noted above, a parent and a school district can agree to re-evaluate a student for special education services *earlier* or more frequently than every three years. 34 C.F.R. § 300.303(b). Parents can initiate this process by submitting a written request (letter, email, etc.) to their student’s IEP or Section 504 team, outlining their concerns and requesting that their student be re-evaluated. Additionally, students who experienced issues with their special education re-evaluations may be entitled to compensatory education services (*see infra* Section IV) and in need of new special education evaluations and/or IEP or Section 504 plan revisions.

⁸ First, many formal behavior assessments require in-person observation of the student *in the school setting*, which was not available during remote instruction. Additionally, students may exhibit very different needs in different settings. For example, a student may struggle with group activities or during unstructured school activities (lunch, recess, etc.), but more effectively be able to self-regulate at home. Likewise, a student may struggle with attending to instruction in a large classroom setting, but better attend to instruction with parent assistance at home during remote instruction. Lastly, the COVID-19 pandemic was a highly stressful experience for many families, and, as a result, students may have developed new social-emotional and mental health needs.

⁹ Unless the student was already eligible for services under Section 504 of the Rehabilitation Act (“Section 504”) and had a Section 504 Plan. In those cases, the school district should have continued providing services consistent with the student’s Section 504 Plan, while completing IDEA evaluations.

¹⁰ Section 504 plans tend to be less detailed than IEPs, so this information may not be included on a Section 504 plan. Additionally, the Section 504 regulations require “periodic” re-evaluation rather than the set 3-year timeframe; however, as noted above, a school district may comply with Section 504 by following the timelines laid out for IEPs.

C. Parent/Guardian Action Items:

To address an evaluation issue related to COVID-19, parents can:

1. Request or renew a previous request that their student be evaluated—in writing, to student’s IEP or Section 504 team. The parent may also make a request, in writing, to the school district’s special education or Section 504 coordinator.¹¹
2. Carefully consider all of the areas that their student may need assessed—including new areas of need that might not have been evaluated before. *Make sure all areas are identified in the consent for evaluation form.*
3. Request (in writing, to student’s IEP or Section 504 team) that their student receive compensatory education services. *It may be easier to reach consensus as an IEP or Section 504 team about compensatory services after evaluations are completed. However, parents should also know that it is possible, based on the results of an evaluation, that their student may not be entitled to compensatory services.*¹²

III. STUDENTS IN NEED OF IEP REVISIONS

As the 2021-2022 school year begins, programming decisions for students with disabilities should take into account (1) special education services that a student needs **prospectively** through their IEP or Section 504 plan in order to receive FAPE, in light of any new or different educational needs of the student; **and** (2) compensatory education services to address past denials of FAPE (discussed below in Section IV). It may be difficult to delineate between which services are needed to meet a student’s needs moving forward versus which services are needed to address a past issue. When discussing educational needs related to COVID-19 with a student’s IEP or Section 504 team, families and advocates should not lose sight of student’s need for new and/or more intensive special education services prospectively through their IEP or Section 504 plan—in addition to compensatory services.

Potential educational needs that may prospectively require different IEP or Section 504 plan supports and services, include:

- School refusal behaviors (*may need FBA/BIP, social work services, etc.*),
- Symptoms of anxiety or depression (*may need direct mental health supports*),
- Increased executive functioning needs (*may need additional accommodations and modifications*),
- Regression in adaptive behavior skills (*may need additional SLP, OT, or PT services*), and/or
- Regression in communication skills (*may need additional SLP supports and services*).

Changes to a student’s IEP can be completed: (1) through a student’s annual IEP review; (2) through an IEP meeting (not annual review); or (3) through a written agreement between the parent and school district, without an IEP meeting. 34 C.F.R. § 300.324(b). A parent can request an IEP meeting at any time in the school year—in other words, a parent *does not* have to wait for a student’s annual IEP review in order to consider necessary IEP revisions.

¹¹ The Special Education Director for each school district can be found at <https://www.cde.state.co.us/cdesped/sped-dir>. School districts who employ fifteen or more people are also required to have a Section 504 coordinator, and that information should be available to parents. 34 C.F.R. § 104.7(a).

¹² Also note that Section 504 requires that this decision be made by “a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.” 34 C.F.R. § 104.35(c).

Section 504 requires that decisions regarding Section 504 plans be made by “a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.” Thus, a Section 504 team could potentially change a student’s Section 504 plan via a Section 504 meeting or by written agreement so long as the process complies with 34 C.F.R. § 104.35.

A. Mental Health & Social Emotional Needs

The USDOE has recognized that the COVID-19 pandemic exposed students to a variety of factors—including emotional trauma, social and physical isolation, and disruptions in learning—that may negatively affect their mental health, causing new or different educational needs and/or exacerbating existing needs.¹³ As a result, impacted students may need new, additional, and/or more intensive school-based services in order to receive FAPE. *ED COVID-19 Handbook, Vol. 2*, at 12. “Regardless of a student’s disability classification”, students with disabilities can and should receive mental health services through their IEP or 504 Plan if needed in order to receive FAPE. *Id.* at 14. In short, IEP and Section 504 teams should broadly consider additional supports and services that students with disabilities may need, regardless of their IDEA disability category or primary disability under Section 504.

B. District-Wide Policies & Programs

IEP and Section 504 team determinations regarding a student’s IEP or Section 504 plan must be individualized and based on the student’s unique needs. 34 C.F.R. § 300.320, 300.324; 34 C.F.R. § 104.33(b). While COVID-19 affected all students, that does *not* mean that IEP or Section 504 teams can or should rely on district-wide policies or practices when making programming determinations for students with disabilities. Specifically, District-wide policies that reduced or limited services for students with disabilities—without an individualized determination based on the student’s unique needs—may violate Section 504 of the Rehabilitation Act, in addition to IDEA. OCR Q&A (9/28/2020), at Q4. Similarly, district-wide efforts to provide supplemental instruction (e.g., tutoring, summer learning opportunities) for all students will not replace or lessen a school district’s requirement to make individualized determinations regarding a student’s IEP or Section 504 services. *ED COVID-19 Handbook, Vol. 2*, at 27.

C. Parent/Guardian Action Items:

To address an IEP or Section 504 revision issue related to COVID-19, parents can:

1. Closely review their student’s current IEP or Section 504 plan and identify missing needs and/or additional services needed.
 - *Did the student make less progress than expected in any areas?*
 - *Have the student’s needs changed since the current IEP was written? How?*
 - *Are there any new needs that the school may not be fully aware of yet? (e.g., anxiety, depression)*
2. Request an IEP or Section 504 team meeting to consider this information.
 - *Annual IEP Review Timing—*
 - If the student’s annual IEP review normally occurs towards the beginning of the school year, a parent can address these concerns at this IEP meeting, likely without having to request an additional meeting.
 - If the student’s annual IEP review normally occurs later in the school year, a parent can ask for (1) the annual IEP review to be moved up, or (2) simply ask for an IEP revision meeting and complete the student’s annual review later in the year.

¹³ See U.S. DEP’T OF EDUC., Office of Planning, Evaluation, & Policy Dev., *ED COVID-19 Handbook, Vol. 2: Roadmap to Reopening Safely and Meeting All Students’ Needs* [“*ED COVID-19 Handbook, Vol. 2*”] (April 2021), at 11, available at <https://www2.ed.gov/documents/coronavirus/reopening-2.pdf>.

- *Remember:*
 - A student’s disability category is not a proper basis for limiting access to school-based services.
 - District-wide policies or practices are also not a proper basis for student-specific programming decisions.
3. Continue to closely monitor the student’s needs and the implementation of any new services—and consider requesting another IEP or Section 504 meeting later in the school year.
 4. Consider requesting (in writing, to student’s IEP or Section 504 team) that their student receive compensatory education services to address any lack of expected progress or regression under the prior IEP, Section 504 plan, or contingency plan.

IV. STUDENTS IN NEED OF COMPENSATORY EDUCATION SERVICES

As a preliminary matter, no finding of school district *fault* is needed to obtain compensatory education.¹⁴ Regardless of fault, COVID-19 resulted in significant delays, disruptions, and service delivery changes for many students with disabilities. The USDOE has made clear that “[w]here, due to the global pandemic and resulting closures of schools, there has been an inevitable *delay* in providing services—or even making decisions about how to provide services—IEP [and Section 504] teams . . . must make an **individualized** determination whether and to what extent compensatory services may be needed when schools resume to normal operations.”¹⁵ More specifically, to address the impact of these issues, school districts must make an *individualized* determination about (1) whether and (2) to what extent students may need compensatory education services. CDE *COVID-19 FAQs*, Comp. Serv. Q2; USDOE *Q&A* (3/12/2020), at Q A-2, A-3.

As a practical matter, school districts may (1) notify a parent that an IEP or Section 504 plan meeting to consider compensatory education services for their child will be scheduled, or (2) provide the parent with a Prior Written Notice (“PWN”) describing its proposal for compensatory education services. If a parent disagrees with the proposal in the PWN, the parent can always request an IEP or Section 504 plan meeting to further discuss this determination. Policies and practices will likely vary district by district, and more specific information may be made available through school district websites.

A. Step 1—Need

The CDE has identified the following factors as relevant for determining *whether* a student **needs** compensatory education services:

- The student’s rate of progress on IEP goals before closure/disruption;
- The student’s rate of progress or lack of progress on IEP goals during closure/disruption;
- Any regression in skills that the student experienced during closure/disruption;
- The difference between IEP progress monitoring data immediately before closure/disruption and data collected a “reasonable time” after the return to in-person instruction;

¹⁴ There has been resistance from school districts nationwide to using the term “compensatory education” to describe additional educational services related to COVID-19 closures/disruptions, because “compensatory education” is an available remedy when a hearing officer or judge determines that a school district failed to comply with IDEA. School districts have expressed concern that they were not at fault for closures/disruptions related to COVID-19. It is important to (1) be aware of this potential perspective from school district employees, and (2) understand that case law and guidance regarding “compensatory education” will still be most helpful for understanding this issue.

¹⁵ See USDOE, *Supplemental Fact Sheet* (3/21/2020) (emphasis added).

- The difference between the services in a student’s IEP and the services offered during closure/disruption (including changes in the amount, frequency, duration, type, and delivery model);
- The accessibility of services offered to the student during the closure/disruption;
- Any changes in the general education curriculum for all students during closure/disruption; **and**
- Input and information from parents regarding student performance during closure/disruption.
- See CDE *COVID-19 FAQs*, Comp. Serv. Q3, Q6.

To analyze the factors outlined above, school teams should collect student-specific data, including, but not limited to:

- IEPs, Section 504 plans, and Contingency Learning Plans (if any) from before, during, and after any closure(s)/disruptions(s);
- IEP progress monitoring data and reports from before, during, and after closure/disruption(s);
- The student’s most recent special education evaluation;
- Any private evaluations or assessments that the parent shares with the school team;
- General education grades from before, during, and after closure/disruption(s);
- Standardized assessments from before and after closure/disruption(s) (e.g., NWEA, DIBELS, i-Station); and/or
- Input and information from the parents regarding student needs and progress before, during, and after closure(s)/disruption(s).

If parents do not already have copies of school records with this information, they can (1) informally request their student’s education records from their student’s case manager or special education teacher or (2) submit a formal (“FERPA”) request to their student’s school district. In general, school districts will have 45 calendar days to respond to a FERPA request. 34 C.F.R. § 99.10(b). However, IDEA requires school districts to allow parents to review any requested education records before any meeting regarding an IEP (e.g., compensatory education meeting). 34 C.F.R. § 300.613(a). Section 504 states that school districts must provide “an opportunity for the parents or guardian of the person to examine relevant records” though it is not as clear as the IDEA regulations that this must occur prior to a meeting. 34 C.F.R. § 104.36.

B. Step 2—Amount

School districts should offer compensatory education services that are “sufficient to allow the student to recoup lost skills and continue to make progress on IEP goals.” See CDE *COVID-19 FAQs*, Comp. Serv. Q7. As noted above, under the *qualitative approach*, there typically will not be an hour-for-hour award of compensatory services. See CDE *COVID-19 FAQs*, Comp. Serv. Q1. School districts should **not** create “blanket” rules or policies for the amount or type of compensatory education services. See CDE *COVID-19 FAQs*, Comp. Serv. Q4. Compensatory education services could include:

- Private academic tutoring;
- District-provided academic tutoring (1:1 or small group);
- Mental health services and supports (including in-school and/or private providers);
- Services with private or outside providers (e.g., speech, OT, PT, etc.);
- Additional IEP services (e.g., additional speech services, OT services, etc.), provided during school day; and/or
- Summer programming or services during school breaks (including summer camps and recreational activities).

Parents and IEP/Section 504 plan teams can and should be creative when determining what type of compensatory services might be appropriate for each student.

C. Special Complications

Below is a summary of special circumstances that may further complicate determinations regarding compensatory education services:

- **District-Wide Services**—“Inclusion of students with disabilities in district or school-wide interventions to address lost instructional time *does not* relieve a district of its responsibility to make individualized decisions required under the IDEA about needed special education and related services for a student with a disability.”¹⁶ *ED COVID-19 Handbook, Vol. 2*, at 27 (emphasis added).
- **Parent “Refused” Services**—CDE guidance indicates that schools *may* be excused from providing compensatory education services if a parent refused instructional services during a closure/disruption. See *CDE COVID-19 FAQs*, Comp. Serv. Q10. If a school district claims that a parent declined or “refused” services, consider the individual circumstances of the student. A family’s inability to access remote instructional services and/or a student’s inability to benefit from remote instructional services **does not** constitute a refusal. *Id.*
- **School Discipline Issues**—There were a number of reports of exclusionary disciplinary practices during the COVID-19 pandemic, which resulted in students being wholly excluded or having limited access to participate in instruction—including exclusions from remote and/or hybrid instruction. For example, in response to disciplinary incidents, there were reports of school districts not allowing students to participate in virtual classes, placing students in break-out rooms by themselves, or muting students during classes. Students may be entitled to compensatory education services to address inappropriate disciplinary actions, which resulted in missed instructional time and a lack of appropriate progress.
- **Family Moved Out-of-District**—Moving outside of a school district’s attendance boundaries does not moot a student’s claim for compensatory education services. See *e.g., D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488 (3d Cir. 2012) (“[L]ow-income families, disproportionately likely to have a disabled child, would be particularly burdened by a holding that compensatory education cannot be obtained after a move.”).
- **Student Graduated**—A student’s graduation from high school does not end a school district’s obligation to remedy past denials of FAPE. See *Letter to Riffel*, 34 IDELR 292 (OSEP Aug. 200) (“The fact that the student has graduated or reached the age at which the right to FAPE would ordinarily end does not necessarily negate the relevancy of, and the need for, compensatory services.”); see also *San Dieguito Union High Sch. Dist. v. Guray-Jacobs*, 2005 WL 8173338 (S.D. Cal. 2005).

V. OTHER RELATED ISSUES

¹⁶ This analysis would be similar under Section 504.

A. Dispute Resolution Options

If a parent disagrees with a school district's determination regarding evaluations, IEP or Section 504 plan revisions, and/or compensatory education services, the parent has the right to pursue the following dispute resolution processes described below.

- **Parent Dissent**—If parent disagrees with a school district's determination regarding any of the issues described above—but is not sure whether they want to pursue a formal complaint—the parent can always submit a written dissent to their student's IEP or Section 504 plan team. A written dissent will document the parent's disagreement and may become useful evidence if the parent later decides to pursue a state complaint or due process complaint.
- **Alternative Dispute Resolution**—This is a free-of-charge option that includes IEP facilitation with an impartial CDE facilitator, who promotes effective communication during any IEP meeting and assists the IEP team in developing an IEP based on the student's needs, including those meetings that involve the disciplinary process. Both the parent and the school district have to agree to facilitation.
- **Mediation**—A parent can request mediation any time there is a dispute regarding their student's special education services. However, parents should keep in mind the timelines for a state complaint or due process complaint (listed below), in case efforts to mediate a dispute are unsuccessful.
- **OCR Complaint**—An OCR complaint must be filed **within 180 days** of a Section 504 violation. At this time, there may be some COVID-19 related violations that fall outside of this window.
- **State Complaint**—A state complaint must be filed **within one year** of an IDEA violation. At this time, there may be some COVID-19 related violations that fall outside of this window.
- **Due Process Complaint**—A due process complaint must be filed **within two years** of when a parent knew or should have known of an IDEA violation.

If a parent is planning to undertake one of the options above—especially filing for due process—the parent should seriously consider contacting a special education attorney for assistance.

B. Language Access—Assessments & Instruction

In May of 2020, the USDOE issued guidance regarding the responsibilities of school districts to serve English learners ("ELs") and their parents.¹⁷ In summary, the USDOE:

- Granted waivers for completion of annual English language proficiency ("ELP") **assessments** in the spring of 2020, but clarified that ELP assessments would be required during school year 2020-2021;
- Directed school districts to continue to **screen** new students to determine EL status "to the greatest extent possible", during remote instruction;
- Directed school districts to continue providing language **instruction** services for EL students, "to the greatest extent possible", during remote instruction. More specifically, the USDOE recommended (1) that EL teachers continue to provide instruction for EL students who were assigned to self-contained EL classrooms or receiving pull-out services and (2) the EL teachers continue to collaborate with content teachers to support EL students participating in a mainstreamed or co-taught classroom;

¹⁷ See U.S. DEP'T OF EDUC., *Fact Sheet – Providing Services to English Learners During the COVID-19 Outbreak* [hereinafter "USDOE EL Fact Sheet (May 2020)"], 120 LRP 15994 (5/18/2020), available at <https://www2.ed.gov/documents/coronavirus/covid-19-el-factsheet.pdf>.

- Confirmed that language **accommodations** must be provided for content classes during remote instruction;¹⁸
- Directed school districts to “ensure that, to the greatest extent possible, each student **with a disability**, including each EL with a disability, can be provided the special education and related services identified in the student’s [IEP or 504 Plan]”¹⁹;
- Confirmed that school district could not **exit** an EL from EL status unless the student had “demonstrated proficiency on a valid and reliable assessment that includes the four domains of listening, speaking, reading, and writing,”²⁰ but state agencies could modify or eliminate additional exit criteria beyond the ELP assessment; **and**
- Confirmed that school districts still had an obligation to “ensure meaningful communication with **parents of ELs** in a language that they can understand and to adequately notify limited English proficient (“LEP”) parents of information about any program, service, or activity . . . that is called to the attention of non-LEP parents.”²¹
 - **Meaningful Parent Participation**—A school district must always provide materials and conduct meetings in an accessible manner for parents, including providing translated records and interpretation support during meetings, in a language that the parent understands, so that LEP parents can meaningfully participate in their child’s special education meetings. 34 C.F.R. § 300.322(e).

VI. RESOURCES

Federal Guidance:

- U.S. DEP’T OF EDUC., Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools, at p. 22 (Dec. 2016), available at <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>.
- U.S. DEP’T OF EDUC., *Questions & Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* [hereinafter “USDOE Q&A (3/12/2020)”], 76 IDELR 77, at Q A-1 (3/12/2020), available at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.
- U.S. DEP’T OF EDUC., *Supplemental Fact Sheet – Addressing the Risk of COVID-19 in Preschool, Elementary, & Secondary Schools While Serving Children with Disabilities*, 76 IDELR 104 (OCR/OSEP 3/21/2020), available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.
- U.S. DEP’T OF EDUC., *Fact Sheet – Providing Services to English Learners During the COVID-19 Outbreak*, 120 LRP 15994 (5/18/2020), available at <https://www2.ed.gov/documents/coronavirus/covid-19-el-factsheet.pdf>.
- U.S. DEP’T OF EDUC., *Questions & Answers on IDEA Part B Service* (OSEP/OSERS 9/28/2020), available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf>.
- U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Questions & Answers for K-12 Public Schools in the Current COVID-19 Environment*, (9/28/2020), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf>.

¹⁸ Accommodations may include: extended time for assignments, video captioning, embedded interpreting, translated reading materials, online translation dictionaries, or other assistive technology. USDOE *EL Fact Sheet* (May 2020), at 4.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 8.

²¹ *Id.* at 9.

- U.S. DEP'T OF EDUC., OFFICE OF PLANNING, EVALUATION, & POLICY DEV., *ED COVID-19 Handbook, Vol. 1: Strategies for Safely Reopening Elementary & Secondary Schools* (Feb. 2021), available at <https://www2.ed.gov/documents/coronavirus/reopening.pdf>.
- U.S. DEP'T OF EDUC., OFFICE OF PLANNING, EVALUATION, & POLICY DEV., *ED COVID-19 Handbook, Vol. 2: Roadmap to Reopening Safely and Meeting All Students' Needs* (April 2021), available at <https://www2.ed.gov/documents/coronavirus/reopening-2.pdf>.

State Guidance:

- COLO. DEP'T OF EDUC., *Special Educ. & COVID-19 FAQs* (10/14/2020), available at https://www.cde.state.co.us/cdesped/special_education_faqs.