

How To Protect Special Education During COVID-19: From the Courts to the Capitol

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Recommended Citation

Sarah Coleman, *How To Protect Special Education During COVID-19: From the Courts to the Capitol*, 12 U. MIA Race & Soc. Just. L. Rev. 249 ()

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How To Protect Special Education During COVID-19: From the Courts to the Capitol

Sarah Coleman*

The COVID-19 pandemic has forced students around the country out of brick-and-mortar schools and into virtual classrooms. While the switch to remote learning has helped keep students and teachers safe from contracting the virus, students with disabilities have largely been deprived of a meaningful education and in-person services mandated under federal law. This essay will explain how students have been denied a free appropriate public education (FAPE) under the Individuals with Disabilities Act (IDEA), how litigation has been unsuccessful in creating systemic change for these students, and how public policy by U.S. legislators can offer a solution.

* J.D. Candidate, 2022, University of Miami School of Law. I would like to thank Professor Kele Stewart for her guidance and inspiration in writing on this topic. I would also like to thank my parents, Pamela and Kevin Coleman, for their endless support throughout my law school journey. Lastly, I would like to express gratitude towards the University of Miami Race and Social Law Review for the opportunity to publish this piece and address meaningful issues.

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I. INTRODUCTION

We know that our education system must hold children with disabilities to the same high standards as those without disabilities, and hold them accountable for their success and their growth. We remember that disability rights are civil rights, too—and pledge to enforce those rights in order to live up to our founding principles and ensure the promise of opportunity for all our people.¹

Imagine this: you are an associate attorney working remotely from home due to the COVID–19 pandemic. You are balancing Zoom conferences with your office, client phone calls, research, memos, and motions. You are also a single parent to a child with disabilities. Under normal circumstances, you would drop your child off at school during the week. At school, he would be taught by special education providers, practice his social skills, and receive services for his specific needs, all while you’re at work. However, now that most schools have closed due to the pandemic, you must be both a lawyer and a teacher. You are forced to keep your child focused, ensure he understands the material, and provide his physical therapy. For the services that you cannot provide yourself, you have to hire a private professional so that your child does not fall behind in his educational progression.

This situation is not novel in the times of COVID–19. Families around the country are struggling to educate their children with disabilities. In California, the mother of a 6-year-old boy with autism has to sit with her son during his Zoom classes while constantly reminding him to sit up and pay attention, all while simultaneously caring for three other children and pursuing a master’s degree.² In Philadelphia, the parents of two sons, both born with a rare, genetic condition that causes autism, must balance working and caring for their children.³ The two boys’ learning goals included typing their names, tracing their initials, and managing their

¹ Statement by the President on the 35th Anniversary of the Individuals with Disabilities Education Act, 2 PUB. PAPERS 1860 (Nov. 29, 2010) (stated by former President Barack Obama).

² Kristen Taketa, *Closed Schools Have to Serve Some Special Education Students in Person, Experts Say*, THE SAN DIEGO UNION-TRIBUNE (Sept. 19, 2020, 6 AM), <https://www.sandiegouniontribune.com/news/education/story/2020-09-19/closed-schools-have-to-serve-some-special-education-students-in-person-experts-say>.

³ Kristen A. Graham, *“He’s not being educated”*: For Students with Autism and Severe Disabilities, the Pandemic is a Disaster. What Comes Next?, THE PHILADELPHIA INQUIRER (Aug. 24, 2020), <https://www.inquirer.com/education/covid-special-education-students-services-lacking-20200824.html>.

behaviors, which has been difficult for their teachers to teach without the assisted communications devices used at school.⁴

While most everyone has heard someone say, “these are unprecedented times,” this phrase is especially true when determining how legal precedent will apply to current issues facing the courts. There has never been another instance where school districts around the country were simultaneously forced to close and conduct virtual instruction.⁵ Technological advances and online platforms have allowed schools to provide students with an education while also practicing social distancing. However, this remote learning has largely left students with disabilities in the dark by not offering the necessary physical services and proper education afforded to them under federal laws. This Note details this deprivation of education and how seeking redress via the court system has been largely unsuccessful. It posits that Congress should pass legislation that would require schools to provide *all* services in students’ education plans, including in-person services, in the case of school shut-downs, and provide the necessary funding for schools to complete this mission. Part II will discuss the current landscape including the federal laws governing special education along with the state and federal responses to COVID–19. Part III will address how remote learning has impacted students with disabilities, Part IV will explain how individual and class action litigation has not provided an effective method of creating wide-ranging change, and Part V will consider the possible policy solution to ensure proper education.

II. EXISTING LAW AND CURRENT LANDSCAPE

a. The Substantive Right to a Free Appropriate Public Education

Section 504 of the Rehabilitation Act of 1973, the first U.S. disability civil rights law, prohibits disability discrimination in federally funded programs and requires that special education students have their educational needs met as adequately as the needs of non-disabled students.⁶ Additionally, Title II of the Americans with Disabilities Act of

⁴ *Id.*

⁵ See Rebecca Winthrop, *COVID–19 and School Closures: What Can Countries Learn From Past Emergencies?*, BROOKINGS INSTITUTION (Mar. 31, 2020), <https://www.brookings.edu/research/COVID-19-and-school-closures-what-can-countries-learn-from-past-emergencies/> (noting that crisis has disrupted education in smaller regions but the situation created by COVID–19 is unprecedented).

⁶ See 29 U.S.C. § 794.

1990 prohibits the denial of services, programs, or activities of a public entity or discrimination by such entity towards an individual with disabilities.⁷

Then, in 1990, Congress reauthorized the Education for All Handicapped Children Act (EHA) by creating the Individuals with Disabilities Education Act (IDEA)⁸ to further the national policy of ensuring equality by requiring schools to provide students with disabilities an education analogous to that of their peers.⁹ The IDEA requires states to provide students with disabilities a Free Appropriate Public Education (FAPE) that emphasizes special education and services designed to meet the student's unique needs and prepare them for further education, employment, and independent living.¹⁰ To provide a proper education, the Act requires schools to create an Individualized Education Plan (IEP) that describes the child's current academic level and specifies the services to be provided and how often to provide them.¹¹ Under the Act, the student must be placed in the least restrictive environment (LRE), meaning an environment most similar to the general population of children and where the child can also succeed academically.¹² The IDEA contains a pendency provision, also known as the "stay put provision,"¹³ in which a child shall remain in the then-current educational placement during the pendency of a due process proceeding.¹⁴ Because the IDEA provides students with disabilities the right to a FAPE, the Act provides these students with due process protections with a formal set of policies and procedures. Parents may request a due process hearing if they believe that their child has been denied a FAPE, disagree with their child's school about appropriate teaching methods, or believe that their child's IEP has not been implemented appropriately.¹⁵ The parent-plaintiff presents their case in front of an impartial hearing officer, and may submit a brief or subpoena witnesses. The impartial hearing officer would then issue a formal decision

⁷ 42 U.S.C. § 12132.

⁸ 20 U.S.C. § 1400 *et seq.* (previously known as the Education for All Handicapped Children Act from 1975 to 1990).

⁹ *See id.* § 1400(c)(1).

¹⁰ *Id.* § 1400(d)(1)(A).

¹¹ *Id.* § 1414(c)(1)(B).

¹² *Id.* § 1412(a)(5).

¹³ *See e.g.*, Blakely Evanthia Simoneau, *Stay Put and the Individuals with Disabilities Education Act: A Proposal for Clarity and Change*, 21 U. PA. J. L. & SOC. CHANGE, 153, 155 (2018).

¹⁴ § 1415(j); 34 C.F.R. § 300.518(a).

¹⁵ Ann Logsdon, *Due Process in Special Education Under the IDEA Law*, VERYWELL FAMILY (updated on May 9, 2020) <https://www.verywellfamily.com/what-is-due-process-under-idea-216203>.

based on case law.¹⁶ The IDEA requires that the plaintiffs exhaust IDEA remedies, including a due process hearing, before they can bring lawsuits under the IDEA in federal court.¹⁷

b. The Contagion

Toilet paper, hand sanitizer, and water. These were the necessities that clouded our minds in March 2020 as we recognized that we were faced with a global pandemic.¹⁸ As people sought sanitary goods and prepared for quarantine, governors across the U.S. issued stay-at-home orders and closed schools to promote social distancing.¹⁹ Most schools shortly resumed classes remotely, utilizing platforms such as Zoom and Microsoft Teams, to provide students with instruction from their teachers while remaining at home.²⁰ School districts addressed children's needs by offering supplies for students who did not have them and by providing meals for those receiving free and reduced lunch.²¹ For some students, the transition to remote learning was a favorable one.²² They could sleep in and work from the comfort of their home while watching their teacher's lectures and completing assignments online. However, students with disabilities were left without assistive technologies and the necessary personnel to progress equally.

¹⁶ *Id.*

¹⁷ § 1415(l).

¹⁸ Jessica Guynn, Mike Snider & Kelly Tyko, *Coronavirus Fears Spark 'Panic Buying' of Toilet Paper, Water, Hand Sanitizer. Here's Why We All Need to Calm Down*, USA TODAY (Mar. 2, 2020, 6:59 PM), <https://www.usatoday.com/story/money/2020/03/02/coronavirus-toilet-paper-shortage-stores-selling-out/4930420002/>.

¹⁹ *Lockdowns, closures: How is each US state handling coronavirus?*, AL JAZEERA (Apr. 14, 2020), <https://www.aljazeera.com/news/2020/4/14/lockdowns-closures-how-is-each-us-state-handling-coronavirus>.

²⁰ Mark Hachman, *What Remote Learning Will Look Like This Fall in Meet, Teams, and Zoom*, PC WORLD (Aug. 11, 2020 11:40 AM), <https://www.pcworld.com/article/3570614/what-remote-learning-will-look-like-this-fall-in-meet-teams-and-zoom.html>.

²¹ See Carley Lanich, *Gary Schools Deliver Meals, Laptops to Families in Need During Coronavirus Outbreak*, THE TIMES OF NORTHWEST INDIANA (Apr. 14, 2020), https://www.nwitimes.com/news/gary-schools-deliver-meals-laptops-to-families-in-need-during-coronavirus-outbreak/article_e391742d-8c83-50f4-8b2b-6971bff4fea6.html.

²² See Society for Industrial and Applied Mathematics, *One in Three High School Students Favor Keeping an Online Component to their Education Post-Pandemic, Survey Shows* (Apr. 05, 2021), <https://www.globenewswire.com/news-release/2021/04/05/2204362/0/en/One-in-Three-High-School-Students-Favor-Keeping-an-Online-Component-to-their-Education-Post-Pandemic-Survey-Shows.html> (finding that about 29% of U.S. and U.K. 11th and 12th graders preferred a hybrid virtual learning environment, while 4% would prefer to be virtual full time).

c. Federal Response to Providing a Public Education during COVID

In April 2020, U.S. Secretary of Education Betsy DeVos recommended that Congress not pass any additional waiver authority regarding the core tenants of IDEA, including FAPE and LRE requirements, because there is no reason that a student's access to education cannot continue online via distance education or other alternative strategies.²³ Under Section 8401 of the Elementary and Secondary Education Act (ESEA) and the 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Secretary of Education has the authority to waive educational accountability requirements.²⁴ Such a waiver would make schools not liable for failing to meet certain IDEA requirements. For example, if the IEP requirements were waived, schools could choose not to follow students' plans and the parents would not have a cause of action under the IDEA. In the 2020 CARES Act, Congress specifically requested that the Secretary report her recommendations on any additional waivers under the IDEA in response to COVID-19, within 30 days from the date in which the Act was enacted.²⁵ DeVos made the recommendation for no waivers despite school administrative groups, such as the National Association of State Directors of Special Education and the Council of Administrators of Special Education, pushing for waivers to the IDEA provisions on the basis that such federal laws were not written in anticipation of a global pandemic.²⁶

d. States Response to Providing a Public Education During COVID

While schools across the nation were moved to virtual instruction during the onset of the pandemic, this Note looks to three states

²³ Press release, U.S. Department of Education, Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA (Apr. 27, 2020), <https://sites.ed.gov/idea/secretary-devos-declines-to-seek-congressional-fape-lre-waivers-to-idea-requirements>.

²⁴ Rebecca R. Skinner, *Secretarial Waiver Authority Under the ESEA and CARES Act*, CONGRESSIONAL RESEARCH SERVICE (Apr. 23, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11517>.

²⁵ *Victory: U.S. Education Secretary Betsy DeVos to maintain IDEA obligations for states*, BERNEY & SANG <https://www.berneylaw.com/2020/04/28/victory-u-s-education-secretary-betsy-devos-to-maintain-idea-obligations-for-states/>.

²⁶ See Rebecca Klein, *To Access Online Services, New Jersey Students with Disabilities Must Promise Not To Sue*, HUFFPOST (Apr. 25, 2020, 1:33 PM), https://www.huffpost.com/entry/new-jersey-special-education-online-services-waiver-coronavirus_n_5ea4637ec5b6d3763590790c.

specifically to illustrate the transition and issues with providing services to students with disabilities.

In New York, Governor Cuomo issued an Executive Order on March 16, 2020, closing all school buildings across the state for two weeks, and later announced closure for the rest of the school year.²⁷ On June 5, 2020, the governor issued an Executive Order permitting school districts in the state to reopen their buildings to accommodate extended school year special education starting on July 1.²⁸ The New York State Education Department provided guidance that allowed for flexibility in the delivery of the extended school year programs: either in-person, remotely, or a combination of both.²⁹ Accordingly, some school districts did not offer in-person special education over the summer due to the inability to meet health standards.³⁰

In California, as of March 20, 2020, schools were advised by the state's DOE to provide special education and services through distance learning model if they could meet IEPs and that they may consider alternative service delivery options such as in-home service delivery or meeting with individual students at school sites while complying with social distancing.³¹ On July 17, 2020, Governor Newsom announced a framework to reopen that allowed schools to open for in-person instruction only "if they [were] located in a local health jurisdiction (LHJ) that ha[d] not been on the county monitoring list within the prior 14 days."³² The following month, a California administrative judge ordered in-person instruction for a child receiving IDEA services, although she attended a

²⁷ N.Y. Exec. Order No. 202.4 (Mar. 16, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.4.pdf>.

²⁸ N.Y. Exec. Order No. 202.37 (June 5, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.37-new.pdf>.

²⁹ *Supplement #3-Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus Outbreak in New York State*, NYSED OFFICE OF SPECIAL EDUC. (June 20, 2020), <https://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-3-covid-qa-memo-6-20-2020.pdf>.

³⁰ *See e.g.*, Cosimo Tangorra, Jr., *Update on This Summer's Special Education Extended School Year Program*, NISKAYUNA CENTRAL SCHOOL DISTRICT (June 17, 2020), <https://www.niskayunaschools.org/update-on-this-summer-special-education-extended-school-year-program/>.

³¹ *Special Education Guidance for COVID-19*, CAL. DEP'T OF EDUC. (Mar. 20, 2020), <https://www.cde.ca.gov/ls/he/hn/specialedcovid19guidance.asp>.

³² *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year*, CAL. DEP'T OF EDUC. (July 17, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID19/Schools%20Reopening%20Recommendations.pdf?TSPD_101_R0=087ed344cfab2000ba1cb6bb87609b68b968c61c6b8a5acac62ff56112757c3a4dad654c12486417083fe0595714300094d39a1d34a903ad04ab6abe66da59dccc6afaa7393914291d94dde100be0fc6eeaac2c7529df0cd5ce55787e042f5d

school barred from re-opening under the governor's framework.³³ On September 30, the California DOE permitted schools to offer in-person support and services to small groups of students with disabilities based on guidance from the California Department of Public Health.³⁴

At the onset of school closures, some New Jersey schools began forcing parents of students with disabilities to sign waivers from all claims, liabilities, and obligations of every kind and nature in law and equity before providing students with the counseling and speech services required by their IEPs.³⁵ In April 2020, the New Jersey Department of Education issued a memo claiming the illegality of these waivers in violation of the IDEA and the state's Department of Education regulations.³⁶ The NJ DOE asserted that schools cannot require waivers of present or future claims, including claims to compensatory services, in order for students with disabilities to receive their entitled services based on their IEPs.³⁷ The department also noted that a key right guaranteed by the IDEA is the right to disagree with a school district's determination or action concerning the educational program of a student with a disability through various dispute resolution options.³⁸

The dismissal of waivers by federal and state governments demonstrate that federal disability laws remain in place. The question now becomes, are schools obeying these laws? And if not, what is the solution?

III. THE GOOD, THE BAD, AND THE ILLEGAL: THE EFFECTS OF REMOTE LEARNING FOR STUDENTS WITH DISABILITIES

In March 2020, schools sought to limit the number of students on campus at a time, and for good reason. COVID-19 is believed to spread

³³ Parent on Behalf of Student v. Pleasanton Unified Sch. Dist., Office of Admin. Hearings Case No. 2020070970 (Aug. 24, 2020), <https://www.dgs.ca.gov/-/media/Divisions/OAH/Special-Education/SE-Orders-Page/Stay-Put/2020070970-Order-Granting-Motion-for-Stay-PutRE.pdf?la=en&hash=09A412A1C6C6EF9D335C5435FFD8F0B34399935F> [hereinafter Cal. OAH Order] (order granting motion for stay put).

³⁴ *Id.*

³⁵ Klein, *supra* note 26.

³⁶ N.J. DEP'T. OF EDUC., PARENTAL WAIVERS FOR THE DELIVERY OF REMOTE OR VIRTUAL SPECIAL EDUCATION AND RELATED SERVICES (Apr. 30, 2020), <https://www.nj.gov/education/broadcasts/2020/apr/30/Parental%20Waivers%20for%20the%20Delivery%20of%20Remote%20or%20Virtual%20Special%20Education%20and%20Related%20Services.pdf>

³⁷ *Id.*

³⁸ *Id.*

more easily and lead to more serious illness than the typical flu.³⁹ As of January 20, 2021, exactly one year from the first reported U.S. case, there had been more than 400,000 deaths from coronavirus in the U.S.⁴⁰ The contagious nature of the virus, coupled with the fact that public education under the status quo typically involves hundreds of students congregating in relatively small areas, can pose significant health risks and promote the spread of the virus. Thus, the desire to reduce the number of students physically present in schools is a valid one. However, despite these risks, the American Academy of Pediatrics has advocated for physical school presence because children may be less likely to become infected and spread the virus.⁴¹ Additionally, some data has shown relatively low infection rates among students who have returned back to in-person classes and that schools are not COVID hotspots despite individuals being in large groups for extended periods of time.⁴² One explanation for these results is that children are less likely to show the symptoms of the virus, therefore go undetected, although they actually carry higher levels of the virus and can be more contagious.⁴³ To further complicate the impact of the virus on children, schools in several states that conducted in-person classes in 2020 returned to remote learning due to COVID outbreaks.⁴⁴ For

³⁹ See *Why Is COVID-19 More Contagious Than The Flu?*, HENRY FORD HEALTH SYS. (Nov. 23, 2020), <https://www.henryford.com/blog/2020/11/why-is-covid-more-contagious-than-flu>; see also Andrew Pekosz, *No, COVID-19 Is Not the Flu*, JOHN HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Oct. 20, 2020), <https://www.jhsph.edu/COVID-19/articles/no-covid-19-is-not-the-flu.html>.

⁴⁰ Christina Maxouris & Jason Hanna, *US Surpasses 400,000 Deaths from Covid-19*, CNN HEALTH (Jan. 20, 2021, 2:39 AM), <https://www.cnn.com/2021/01/19/health/us-coronavirus-tuesday/index.html>.

⁴¹ *COVID-19 Guidance for Safe Schools*, AM. ACAD. OF PEDIATRICS (Jan. 5, 2021), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

⁴² See Dyani Lewis, *Why Schools Probably Aren't COVID Hotspots*, NATURE (Oct. 29, 2020), <https://www.nature.com/articles/d41586-020-02973-3#ref-CR4>; see also Brandon L. Guthrie et al., *Summary of Evidence Related to Schools During the COVID-19 Pandemic*, WASH. ST. DEP'T OF HEALTH (last updated Oct. 19, 2020), <https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/20201019-SchoolsSummary.pdf> (“there is very little evidence, at least in the context of relatively low community transmission, that schools have been a driver of transmission”).

⁴³ See Katie Macbride, *Why the '6 Feet Apart' Recommendation May Not Be Enough for COVID-19*, HEALTHLINE (July 9, 2020), <https://www.healthline.com/health-news/children-may-be-silent-carriers-of-covid-19#Going-forward>.

⁴⁴ See Madeline Fox, *With COVID-19 On The Rise In Wisconsin, Many Schools Have Transitioned To Virtual Learning*, WPR (Sept. 23, 2020, 6:35 AM), <https://www.wpr.org/covid-19-rise-wisconsin-many-schools-have-transitioned-virtual-learning>; see also Gabriella DeLuca, *Squirrel Hill Jewish school closed after COVID-19 outbreak*, WPXI-TV (Feb. 25, 2021, 6:44 PM), <https://www.wpxi.com/news/top-stories/squirrel-hill-jewish-school-closed-after-covid-19-outbreak/AM2MKCDZRVHDNDIPK46VZUFJ4U/>.

students with disabilities in particular, they may have underlying health conditions that can put them at greater risk of contracting COVID and experiencing severe illness; thus warranting their need to practice social distancing. The mixed data and varying COVID rates in different jurisdictions demonstrate the difficulty in weighing the health risks involved with forcing children back into schools. But one thing is clear: there is no one-size-fits-all approach that can work for every school.

Given the potential health risks, many have chosen to lean on the side of caution and advocate for complete remote learning to limit the spread of the virus and protect the health of students and administration. However, this knee jerk reaction also creates grave consequences for students with disabilities whose educational progression often rests on in-person services. Instruction alone is not the only service offered in a student's IEP; it may include related services such as counseling, speech therapy, or occupational therapy.⁴⁵ Students assigned a one-on-one aide, for example, would have surely been denied this service outlined in their IEPs if their schools went completely remote and no accommodations were made to send an aide to the child's house. One study conducted in July 2020 found that of 1,000 preschool-age children around the country, nearly 25% were receiving no IEP services at all and only 37% were receiving their full IEP services.⁴⁶ Another 2020 survey, conducted by ParentsTogether, found that only 20% of parents whose children had IEPs reported to have been receiving those services.⁴⁷ With services not being provided by LEAs, students with disabilities have been left to either regress or families have been forced to provide these services themselves. As the pandemic progresses with no immediate end in sight, families cannot continue to allow their children to receive an inadequate education. Even as COVID rates dwindle and schools return back to normal, it is imperative to offer a framework that will provide students with disabilities a proper education.

Not only is compensatory education after the pandemic not guaranteed in the near future, but re-learning months or even years of missed lessons

⁴⁵ Jessica K. Heldman et al., *COVID-19 and Preventing Harm to Vulnerable Children*, 57 SANDLR 865, 886 (2020).

⁴⁶ Steven Barnett, Kwanghee Jung & Milagros Nores, *Young Children's Home Learning and Preschool Participation Experiences During the Pandemic: NIEER 2020 Preschool Learning Activities Survey: Technical Report and Selected Findings*, NATIONAL INSTITUTE FOR EARLY EDUCATION RESEARCH *at 22 (July 2020), <https://nieer.org/wp-content/uploads/2020/07/NIEER-Technical-Report-July-2020-Young-ChildrenE28099s-Home-Learning-and-Preschool-Participation-Experiences-During-the-Pandemic.pdf>.

⁴⁷ Heldman et al., *supra* note 45, at 887; *see also* Robert Brodsky, *Report: Remote learning Caused Special Education Students to Fall Behind During Pandemic*, NEWSDAY (Sept. 8, 2021), <https://www.newsday.com/long-island/education/dinapoli-report-special-education-pandemic-e42424> (noting that the survey was conducted in 2020).

could have grave consequences for children. Thus, many families have taken it upon themselves to ensure their children can receive a proper education during the pandemic. For some parents who cannot work from home, or cannot manage to work while also educating their children, they have been forced to quit their jobs or find suitable alternatives such as hiring educators on their own.⁴⁸ Given that students under the IDEA tend to disproportionately come from low-income households, it leaves the most vulnerable families to experience employment disruptions and educational costs.⁴⁹

In order to meet IEP obligations with remote learning, schools may change student's IEPs to make them compatible with virtual learning. In such instance, the school may be obeying the student's new IEP, but the question becomes, can students with disabilities really earn a meaningful education remotely to offer an adequate FAPE? The U.S. Department of Education's Office of Special Education and Rehabilitative Services stated in a March 2020 supplemental fact sheet that "[m]any disability-related modifications and services may be effectively provided online."⁵⁰ However, some parents say otherwise.⁵¹ Many argue that even with IEP services being tailored to at-home learning, special education students cannot properly learn in the remote environment like their non-disabled counterparts.⁵² At the beginning of the implementation of remote education, the Council of Parents Attorneys and Advocates (COPAA) released a statement offering three principles to ensure IDEA rights of students with disabilities: (1) Plan with equity and individualization in mind . . . (2) Collaborate and communicate with families . . . (3) Review,

⁴⁸ See e.g., Doree Lewak, *More Parents Than Ever Are Quitting Their Jobs Because of the Pandemic*, N.Y. POST (Oct. 7, 2020), <https://nypost.com/2020/10/07/more-parents-than-ever-are-quitting-their-jobs-because-of-covid-19/> (noting how one single mother quit her job to care for her child with learning disabilities); Corey Turner & Rebecca Klein, *After Months of Turmoil, Families Say Schools Owe Them*, NPR (June 16, 2021, 5 AM), <https://www.npr.org/2021/06/16/994587239/after-months-of-special-education-turmoil-families-say-schools-owe-them> (noting how one mother had to hire a private tutor for her child with severe autism during the shutdown).

⁴⁹ Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections From the Frontlines of Special Education Lawyering*, 20 AMUJGSPL 107, 112-113 (2011).

⁵⁰ *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, U.S. DEP'T OF EDUC. (Mar. 21, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.

⁵¹ See, e.g., Graham, *supra* note 3 (noting one mother of a son with disabilities explaining how her son got "nothing out of [online-only services as mandated by his special-education plan]").

⁵² See generally *id.*

and if necessary, revise IEPs and 504 plans to be responsive to the child's needs."⁵³ Therefore, schools may be subject to IDEA violations throughout the pandemic for not only failing to follow IEPs, but even when IEPs are met, they may fail to provide an adequate FAPE.

For some students with disabilities, working from home may provide comfort and familiarity.⁵⁴ It also allows some students to work in a setting that they are already familiar with and likely most comfortable, while also eliminating the stress of waking up early and traveling to school which may be daunting. It can also alleviate the pressures of societal norms, which can lead to depression and anxiety for students with high-functioning autism.⁵⁵ However, for many other students with disabilities learning from home can be essentially impossible. Many of these students have become accustomed to their daily routine of attending school and being taught personally by their special educators. Disruption in routines or the new lack of routine can trigger anxiety and tantrums in people with autism spectrum disorder, as restricted, repetitive patterns of behavior are part of their diagnosis.⁵⁶ The lack of social interaction and recreational activities can also cause frustration for students with disabilities.⁵⁷ Additionally, the absence of the student's normal teacher or service provider can make it difficult for students to understand that it is time to learn. Working parents may not be able to provide the constant redirecting that their child needs while learning all day from a computer screen.⁵⁸ For example, one speech pathologist noted that video sessions do not allow her

⁵³ Heldman et al., *supra* note 45, at 888.

⁵⁴ See Veonna King, *For students with autism, remote learning is particularly challenging. Here's how children are parents are adjusting*, PUBLICSOURCE (Aug. 5, 2020), <https://www.publicsource.org/autism-remote-learning-challenging-pittsburgh/> (noting how Leslie Paat, clinical manager at the Children's Institute of Pittsburgh, reported that a benefit to remote therapy is that "you get to see children in a natural environment where they are most comfortable").

⁵⁵ Laura Walters, *As a Mom of a Son With Multiple Disabilities, I Have the Receipts on Remote Instruction*, EDUC. POST (Feb. 1, 2021), <https://educationpost.org/as-a-mom-of-a-son-with-multiple-disabilities-i-have-the-receipts-on-remote-instruction/>.

⁵⁶ See *Why is Routine so Important to People with ASD?*, APPLIEDBEHAVIORANALYSIS.ORG (last visited Mar. 4, 2021), <https://www.appliedbehavioranalysis.edu.org/why-is-routine-so-important-to-people-with-asd/>; see also Khushboo Patel, *Mental Health Implications of COVID-19 on children with disabilities*, 54 ASIAN J. PSYCHIATRY 102273 (2020) ("lack of routine and uncertainty can make children with Autism Spectrum Disorder (ASD) feel more anxious, grumpy, restless, and develop unpleasant feelings").

⁵⁷ See Patel, *supra* note 56.

⁵⁸ See, e.g., Graham, *supra* note 3 (noting how a mother of a student with disabilities "works full time and won't be able to manage his schoolwork and the constant redirection [he] will need during the day.").

to tap on a student's desk to get them back on track like she could normally do in-person.⁵⁹ Thus, the task is left to the parent.

Non-disabled students have recognized the challenges that come with learning on online platforms, such as Zoom and Microsoft Teams, including connectivity issues, not being able to clearly see the instructor, or only hearing one speaker at a time. These issues can be multiplied for students with disabilities. Interruptions in internet connection or technological issues can aggravate and distract students who struggle to remain focused as it is.⁶⁰ "Zoom fatigue" has been used to describe the tiredness and burnout that users experience on online platforms, which can be caused by the lack of reward processing involved in live social interactions.⁶¹ Scientists have noted that audio delays and lack of direct mutual gaze on these platforms can offer a neuropathophysiological explanation for the fatigue.⁶² Furthermore, remote learning platforms can also be incompatible with assistive technology such as braille and screen reading software for students with visual impairments or make it difficult to understand sign language for students with auditory impairments.⁶³ While many LEAs have made an effort to provide students with assistive technologies in their homes, less resourced schools have struggled, as they often receive equal funding to wealthier districts although their students typically have more needs.⁶⁴

The state of public education for students with disabilities following the March 2020 closure of schools demonstrates the need for malleable guidelines to provide students with their federally mandated services without falling for the trap of choosing one extreme: completely opening or completely closing schools. The increased cases of COVID, along with

⁵⁹ Carolyn Thompson, *School Closings Threaten Gains of Students with Disabilities*, ASSOCIATED PRESS (Dec. 3, 2020), <https://apnews.com/article/coronavirus-pandemic-fd26be67a40112130b59f946577c86d8>.

⁶⁰ See, e.g., Bill Hand, *Online School Especially Hard for Functional Needs Students*, SUN JOURNAL (Sep. 15, 2020, 8:01AM), <https://www.newbernsj.com/story/news/coronavirus/2020/09/15/online-school-especially-hard-for-functional-needs-students/42626895/> (a 15-year-old with autism and severe intellectual disability finds the audible echo and feedback from Zoom sessions distracting and technical difficulties send him into an angry fit).

⁶¹ Jena Lee, MD, *A Neuropsychological Exploration of Zoom Fatigue*, PSYCHIATRIC TIMES (Nov. 17, 2020) <https://www.psychiatristimes.com/view/psychological-exploration-zoom-fatigue>.

⁶² *Id.*

⁶³ Faith Hill, *The Pandemic Is a Crisis for Students With Special Needs*, THE ATLANTIC (April 18, 2020), <https://www.theatlantic.com/education/archive/2020/04/special-education-goes-remote-covid-19-pandemic/610231/>.

⁶⁴ Crystal Grant, *COVID-19'S IMPACT ON STUDENTS WITH DISABILITIES IN UNDER-RESOURCED SCHOOL DISTRICTS*, 48 FDMULJ 127, 129-130 (2020).

potential new strands and their dangerous effects, pose genuine threats associated with the blanket re-opening of public schools for in-person classes. However, strict, unconditional remote learning has also proven to not be the proper response in providing adequate special education. Educators have admitted that even personalized video sessions are poor substitutes for in-person classroom experience.⁶⁵ Many students have been left without the appropriate equipment, physical services, or special providers to learn and develop. Thus, the solution requires a tailored approach for each student and jurisdiction, coupled with the unwavering commitment to deliver necessary in-person services. Students with disabilities who are in need of physical services to fulfill their IEPs should be allowed to attend brick and mortar schools if the school can open safely. These students should have the opportunity to meet with their providers in small group settings outside of school, or meet with the school's providers at the child's home. While the location may be subject to change, all physical in-person services needed by these students should be provided by the school. Such mandated services would be the result of a student's existing IEP or a determination by the school and child's family that the child is not receiving a FAPE under remote learning conditions.

Ultimately, immediate change, rather than just compensatory education in the future, is necessary to educate students with disabilities. Even one year after COVID-19 was first detected in the U.S., there had still been no end in sight to the pandemic. Families cannot be expected to wait until the pandemic passes for their children to receive proper instruction and services mandated under the IDEA, given that regression can be quick and severe for students with disabilities. Failure to receive an adequate education for an extended period of time could likely have irreversible consequences to students' growth. Past public emergencies, such as Hurricane Katrina, suggest that post-COVID-19 will involve indirect costs, besides tangible loss and disruption, including more students requiring special education services and overall lost productivity to society as a result.⁶⁶ How the government addresses special education during COVID-19, even if towards the end of the pandemic's lifespan, will set the precedent as to how potential, future school closures will be handled.

⁶⁵ Thompson, *supra* note 59.

⁶⁶ Jasmine E. Harris, *THE FRAILTY OF DISABILITY RIGHTS*, 169 UPALRON 29, 43-44 (2020).

IV. “YOU’LL BE HEARING FROM MY LAWYER”

As schools fail to provide students with disabilities with the services necessary for their education, families across the country have filed lawsuits seeking punitive and compensatory damages, injunctions, and temporary restraining orders. Although there are valid legal arguments to be made, litigation appears to be relatively unsuccessful in creating systemic change for special education during COVID-19.⁶⁷

a. Overview of the Legal Theories for Special Education Lawsuits

Lawsuits filed against school districts in New York and California have claimed substantive due process and equal process violations under the Fourteenth Amendment on the basis that students have been deprived of their fundamental right to an education while those in other districts have not.⁶⁸ Plaintiffs have contended that the government deprived them of their substantive right to a FAPE without due process, and that the closing of specific schools has led to different treatment for students with disabilities.⁶⁹ Despite the fact that the categorization of education as a fundamental right is heavily disputed, one major hurdle for these suits is the presumption of constitutionality for emergency government actions. In approaching COVID-19 lawsuits against local governments, courts have looked to the Supreme Court’s 1905 decision in *Jacobson v. Commonwealth of Massachusetts*.⁷⁰ In addressing the constitutionality of a compulsory vaccination law enacted during a smallpox epidemic, the Court held that the judicial authority over emergency measures is a narrow scope with a strong presumption of constitutionality that can only be reviewed when the public health statute has no real or substantive relation to those objects, or is a plain, palpable invasion of rights secured by the

⁶⁷ See *Characteristics of Effective Class Action Lawsuits in Special Education: An Examination of Case Studies*, THE ADVOCACY INSTITUTE (Aug. 2013), https://www.advocacyinstitute.org/advocacyinaction/Class_Action_Lawsuits.shtml (“[t]ypically, lawsuits in special education brought on behalf of individual children with disabilities do not result in systemic policy change”).

⁶⁸ See Class Action Complaint for Declaratory and Injunctive Relief, J.T. et. al. v. Blasio, et. al., No. 1:20-cv-05878 (S.D.N.Y. July 28, 2020), 2020 WL 4346656; see also *Brach v. Newsom*, No. 2:20-cv-06472-SVW-AFM, 2020 WL 6036764 *2 (C.D. Cal. Aug. 21, 2020).

⁶⁹ See *Brach*, 2020 WL 6036764, at *4-5.

⁷⁰ 197 U.S. 11 (1905). See, e.g., *Brach*, 2020 WL 6036764, at *2-3; *In re Abbott*, 956 F.3d 696, 705 (5th Cir. 2020), cert. granted, judgment vacated sub nom. *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261, 209 L. Ed. 2d 5 (2021); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020).

fundamental law.⁷¹ Under this precedent, a U.S. District Court found that California's framework for closing schools is entitled to a presumption of constitutionality.⁷² Equal protection claims for individuals with disabilities are also under a presumption of constitutionality due to the rational basis review prescribed under the *City of Cleburne v. Cleburne Living Ctr.*⁷³ Further, the problems associated with remote education for special education students appears to be a problem of equity rather than equality: all students in a given school may be forced to learn from their homes, but the innately hands-on nature of special education demands that this type of learning be given extra effort to ensure that children under the IDEA are given the same chance to learn.

Due to the high bar for constitutional claims, the legal claim that is more likely to succeed is grounded in the failure to provide FAPE under the IDEA. According to the mandates by the U.S. Department of Education, if a school provides learning opportunities to the general school population, it must also ensure equal access to the same opportunities to students with disabilities, including FAPE, to the "greatest extent possible."⁷⁴ However, the law itself does not appear to offer this wiggle room because the IDEA demands a FAPE for students with disabilities.⁷⁵ Even if this mandate was in accordance with the IDEA, completely depriving students of necessary in-person services solely because it is not compatible with remote learning does not equate to ensuring access to the "greatest extent possible."⁷⁶ Instead, schools should have implemented other modes of providing services such individual home delivery or small group meetings. The September U.S. Department of Education guidance explicitly stated, "No matter what 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."⁷⁷ For some

⁷¹ *Brach*, 2020 WL 6036764, at *2-3 (citing *Jacobson*, 197 U.S. at 12-13, 31).

⁷² *Id.* at 3.

⁷³ See 473 U.S. 432, 446 (1984); see also Travis Gray, *A Cataclysmic Blindness: The Court's Denial of Equal Protection to Those Who are Mentally Handicapped*, 25 WIDLR 91, 102 (2019).

⁷⁴ *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, U.S. DEP'T OF EDUC. (Mar. 2020), <https://www.isbe.net/Documents/qa-covid-19-03-12-2020.pdf>.

⁷⁵ See 34 CFR § 300.101(b) ("[e]ach state must ensure that . . . [t]he obligation to make FAPE available to each eligible child residing in the State begins no later than the child's birthday"); see also 34 CFR § 300.101(c) ("[e]ach State must ensure that FAPE is available to any individual child with a disability who needs special education and related services").

⁷⁶ U.S. DEP'T OF EDUC., *supra* note 74.

⁷⁷ Press Release, U.S. Department of Education: Office of Special Education and Rehabilitative Services Office of Special Education Programs, OSEP QA 20-01 (Sept. 28, 2020), <https://sites.ed.gov/idea/files/qa-provision-of-services-idea-part-b-09-28-2020.pdf>.

students, an appropriate education cannot be achieved without certain physical services. Consequently, the failure to provide in-person services necessary for the education of an IDEA student constitutes an IDEA violation.

b. Individual Suits

In August 2020, the California Office of Administrative Hearings (OAH) issued an order allowing a student with disabilities to receive in-person services either at school or at her home.⁷⁸ The student, whose IEP included a one-on-one aide, physical therapy, and specialized vision services, was replaced with a distance-learning plan that did not offer her a FAPE.⁷⁹ Although the child's school was barred from re-opening under the state's Department of Public Health framework due to high number of COVID-19 cases in the area, the administrative judge granted the stay put motion for the student to receive her in-person services mandated by her IEP prior to school closures.⁸⁰ This due process hearing depicts the possibility of utilizing litigation under the IDEA's administrative process to ensure IDEA obligations are met during the pandemic, albeit on an individual scale.

As a matter of compensating families for costs spent on providing a proper education for their children, federal law precedent suggests that they may be successful in obtaining reimbursements. Prior to COVID-19, in instances where schools have failed to provide FAPes, courts have awarded reimbursements for services to meet the children's special needs such as therapies, transportation expenses, and even special living arrangements.⁸¹ Some districts have been ordered to pay for home-based programs for children and even compensate parents for services that they provided themselves when unable to obtain the services elsewhere.⁸² In *Bucks County Dept. of Mental Health/ Mental Retardation v. Pennsylvania*, the Third Circuit upheld a state administrative hearing officer's decision to order the district to pay a parent for her time in providing Lovaas therapy to her disabled child after the county refused to provide it.⁸³ The court held that reimbursement under the IDEA was not limited to a parent's out-of-pocket expenses and that \$22 per hour granted

⁷⁸ Cal. OAH Order, *supra* note 33, at 7-8.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.* at 7-8; *see also* Taketa, *supra* note 2.

⁸¹ Lewis M. Wasserman, *Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004*, 21 STJLCL 171, 191 (2006).

⁸² *Id.*

⁸³ 379 F. 3d 61, 63 (3d Cir. 2004).

by the hearing officer was reasonable because it is within the range of cost that the county would have had to pay for a professional.⁸⁴

Although the Third Circuit believed that the reimbursement would not have far reaching effects as the Department of Public Welfare imagined,⁸⁵ it is possible that nearly 17 years later, this precedent could be used to compensate families across the country. The Third Circuit limited reimbursement to situations where “1) there has been a violation of IDEA and appropriate private services were provided [removed citation], 2) the amount of the reimbursement is reasonable [remove citation], and 3) a trained service provider was not available so that the parent stepped in to act as the trained service provider and not as a parent.”⁸⁶ The applicability of these requirements to copious families might have been unlikely in 2004, but now this holding has the potential to affect countless parents. Families that have been denied in-person services by their children’s schools and unable to find specialized professionals to meet those needs during the pandemic, may be entitled to reasonable reimbursements for the time they have spent “step[ping] into the shoes of a therapist.”⁸⁷

Despite the potential success of this approach in individual cases, it may not be the most effective in addressing nationwide deprivations in special education. With more than 7 million students receiving services under the IDEA, and only 1 in 5 families reporting to receive all of the special education services their child is entitled to,⁸⁸ it is impractical and unrealistic to require millions of families to pursue litigation in order to obtain education for their children. The legal costs alone for a two-day due process hearing for one student could range from \$1,500 to \$7,500,⁸⁹ not to mention the judicial overload if every qualifying student’s family was to file. Then, if the administrative order is appealed by either party, the family must endure more costs to take the case to federal court. Further, students under the IDEA are disproportionately lower income, with approximately one-quarter of these students living below the poverty line

⁸⁴ *Id.* at 69-70.

⁸⁵ *Id.* at 75.

⁸⁶ *Id.* (in this case, parent “De Mora” found one person to provide the Lovaas training but that provider could not work the hours her child needed and could not find another provider to work the remaining hours).

⁸⁷ *Id.* at 73 (finding that the plaintiff acted above and beyond what is expected of parents under the IDEA and acted as a provider).

⁸⁸ Anya Kamenetz, *Survey Shows Big Remote Learning Gaps For Low-Income And Special Needs Children*, NPR (May 27, 2020, 12:03 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/862705225/survey-shows-big-remote-learning-gaps-for-low-income-and-special-needs-children>.

⁸⁹ *Understanding IEP Due Process*, UNDERSTANDING SPECIAL EDUC. (last visited Mar. 4, 2021), <https://www.understandingspecialeducation.com/IEP-due-process.html>.

and two-thirds living in households with incomes of \$50,000 or less.⁹⁰ This makes access to legal services, specifically hiring an attorney, financially burdensome if not impossible for these families.

c. Class Actions

To promote judicial economy, various class actions have been brought against school districts and education departments for failing to meet IDEA requirements. Though the IDEA does not prohibit class action litigation, stringent requirements to form a representative class have made such claims difficult to pursue.⁹¹

One New York putative class action filed in June 2020 sought a preliminary injunction directing schools across the country to reopen to fulfill IEPs or issue “pendency vouchers” to “self-cure” families for programs and services, along with compensatory damages for the families’ expenses.⁹² Although the case presented viable solutions to providing FAPes to students with disabilities moving forward, the plaintiffs’ denial-of-FAPE claims were dismissed because their administrative remedies were not exhausted.⁹³ As previously mentioned, the IDEA requires potential plaintiffs to exhaust their administrative remedies, including an administrative hearing, before filing a civil action.⁹⁴ Though some parents have completed this task, this requirement defeats the purpose of a class action in consolidating claims and saving families money in each pursuing change.

In October 2020, another district court struck down a putative class action alleging IDEA violations, presenting the major issue in special education class action cases: certifiability. In *Hernandez v. Grisham*, the court held that the plaintiffs’ proposed subclass lacked commonality because the State’s Reentry Guidance did allow for in person classes, therefore the state-wide subclass did not all endure the same harm by individual school closures.⁹⁵ Additionally, the class lacked typicality because the plaintiffs failed to provide evidence of other students’ IEPs, other than the named plaintiff, or evidence that they were similarly impacted.⁹⁶ Lastly, because the plaintiffs did not identify a uniformly applicable policy that prohibits class members from receiving in-person learning, the court found that the class likely failed to satisfy Rule

⁹⁰ Hyman, *supra* note 49, at 112-113.

⁹¹ See Joshua M. Anderson, *IDEA Class Action Lawsuits*, 15 TJLP 225, 232 (2021).

⁹² Class Action Complaint for Declaratory and Injunctive Relief, *supra* note 68.

⁹³ *J.T. v. de Blasio*, No. 20 Civ. 5878 (CM), 2020 WL 6748484, at *41-44 (S.D.N.Y. Nov. 13, 2020).

⁹⁴ See *supra* note 17 and accompanying text.

⁹⁵ No. Civ. 20-0942 JB\GBW, 2020 WL 6063799, at *60 (D.N.M. Oct. 14, 2020).

⁹⁶ *Id.* at *61.

23(B)(2)'s requirement (that the opposing party has acted or refused to act on grounds that apply generally to the class).⁹⁷

Grisham demonstrates the difficulty in obtaining class certification for a class that is so varied. Students receiving special education are by virtue vastly different from one another and have diverse needs. This makes seeking reimbursements and compensatory damages nearly impossible given that some families have endured larger costs than others. Given the differences in needs, not all families desire in-person services, or they may prefer different legal remedies.⁹⁸ Additionally, not all schools are the same. A student attending a school that is fully remote may experience greater IEP deprivations than a student attending a hybrid school, although both students may be merged into the same class for purposes of a lawsuit. Historically, successful class action lawsuits under the IDEA have involved smaller, insular classes which may not be practical when addressing the nationwide violations that have occurred from school closures during COVID-19.

Looking to precedent, the difficulty in class certification for IDEA violations is highlighted in the 2013 closings of Chicago public schools. On May 22, 2013, the Chicago Public School board voted to close 49 elementary schools due to underperformance and underutilization in order to combat a one-billion-dollar budget deficit.⁹⁹ These closures forced over 5,000 special education students to be transferred to new receiving schools.¹⁰⁰ In *Swan ex rel. I.O. v. Board of Education*, plaintiffs challenged the school board's ability to implement transferring IEPs at new schools, alleging that the rushed timeline for school closings produced academic setbacks.¹⁰¹ However, the U.S. district court held that individual IEP inadequacies failed to demonstrate a class-wide issue for class certification.¹⁰² Similarly, courts may now rule that remote learning during the pandemic creates varying degrees of IEP inadequacies that are too individualized to allow for class certification.

Despite striking down class certification, the *Grisham* court granted a temporary restraining order ordering that a named-plaintiff's IEP be amended by her LEA after the student was not progressing under remote

⁹⁷ *Id.*

⁹⁸ *J.T.*, 2020 WL 6748484, at *7 (“[a]s of September 18, 42.6% of all [New York] families of students with disabilities had opted not to send their children back into school buildings, but instead chose 100% remote instruction for their children”).

⁹⁹ Michael Toren, *Shuttered: An Examination of How the 2013 Chicago Public School Closings are Denying Special Education Students the Right to an Appropriate Public Education*, 35 NILULR 231, 243 (2014).

¹⁰⁰ *Id.* at 245.

¹⁰¹ No. 13 C 3623, 2013 WL 4047734, at *3 (N.D. Ill. 2013).

¹⁰² *Id.* at *5.

instruction.¹⁰³ The court ordered that her IEP be “reasonably calculated to ensure the child[] receives[s] educational benefits” and amend its misinterpretation of state health regulations.¹⁰⁴ The court noted that providing a FAPE based on the order might include small group, in-person instruction which would provide educational benefits that outweigh the relatively low risk of contagion.¹⁰⁵ The court also held that the exhaustion of administrative remedies was not required in the student’s case because it presented a purely legal question in which her IEP misinterpreted state health regulations as forbidding in-person instruction, when the state’s guidance actually permitted in-person instruction for special needs students.¹⁰⁶

The New York and New Mexico class actions present another major obstacle in succeeding on IDEA claims: the exhaustion requirement.¹⁰⁷ Without exhausting the administrative remedies prescribed under the IDEA, courts do not have subject matter jurisdiction to review a case.¹⁰⁸ While this rule applies to all IDEA cases, both individual and class actions, it bears little impact in individual cases where the child’s parent likely already initiated a due process hearing before taking the case to court. This requirement, however, bears a great impact in class action cases where the goal is to create systematic change and avoid copious individual disputes. In *Brach v. Newsom*, a California district court held that the plaintiffs were unlikely to overcome the exhaustion requirement simply because the alleged COVID-IDEA violations were systemic.¹⁰⁹ Rather, plaintiffs were required to show that the violation “implicate[d] the integrity or reliability of the IDEA dispute resolution procedures themselves, or require[d] restructuring the education system itself in order to comply the dictates of the Act.”¹¹⁰ Further, the court noted that seeking IDEA administrative remedies would allow decisionmakers with subject-matter expertise to

¹⁰³ *Hernandez*, 2020 WL 6063799, at *68-69.

¹⁰⁴ *Id.* at 69 (citing *Andrew F. ex rel. Joseph F. v. Douglas Cty Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017)).

¹⁰⁵ *Id.* at 68.

¹⁰⁶ *Id.* at 67.

¹⁰⁷ 20 U.S.C. 1415(l) (“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter”).

¹⁰⁸ *Polera v. Board of Educ. Of Newburgh Enlarged City School Dist.*, 288 F.3d 478, 483 (2d Cir. 2002).

¹⁰⁹ No. 2:20-cv-06472-SVW-AFM, 2020 WL 6036764 at *8 (C.D. Cal. Aug. 21, 2020) (claims brought by several named plaintiffs rather than a class).

¹¹⁰ *Id.* (citing *Doe v. Arizona Dept. of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997)).

evaluate the challenges of online learning and the specific needs of the plaintiffs' children.¹¹¹ Although exceptions to the exhaustion requirement exist, courts have been inclined to rule in favor of school districts to require exhaustion so that agencies can have the opportunity to consider and correct errors.¹¹²

V. PUBLIC POLICY PROPOSAL

The remedy to education deprivations for students with disabilities may lie in policy rather than litigation. Instead of holding school districts accountable for the failure to provide students with a FAPE, the burden should be shifted to the federal government as a matter of legislation. LEAs are forced to make difficult decisions to balance safety from COVID-19 risks and the education of students, bound by state or local health guidance mandating school closures while also being held to IDEA requirements.¹¹³ Additionally, not all school districts can afford to open brick and mortar schools to meet health safety guidelines. One Colorado private school, that remained open for the 2020-2021 school year, installed a \$25,000 thermal camera and \$100,000 special air purification system, along with one-way hallways, spaced out classrooms, and to-go lunches.¹¹⁴ However, not all public schools, with typically more students than their private school counterparts, have sufficient funding to implement such precautions. Despite the December 2020 COVID-19 Relief Package that provided \$54.3 billion to K-12 schools, public schools are still facing a financial crisis dealing with increased COVID-19 costs and less state funding.¹¹⁵ For example, a Washington school district experienced a 4% decrease in enrollment forcing the schools to furlough more than 600 employees including classroom aides.¹¹⁶

¹¹¹ *Id.* at 9.

¹¹² *See* *Hoefl v. Tucson*, 967 F.2d 1298,1307 (9th Cir. 1992).

¹¹³ *See* Matt Barnum & Claire Bryan, *America's Great Remote-Learning Experiment: What Surveys of Teachers and Parents Tell Us About How It Went*, CHALKBEAT (June 26, 2020, 12:18 PM), <https://www.chalkbeat.org/2020/6/26/21304405/surveys-remote-learning-coronavirus-success-failure-teachers-parents> (83% of 501 school district superintendents from across the country who responded to a survey said that providing special education services was difficult to provide equitably during remote learning).

¹¹⁴ Rob Low & Serena Ung, *COVID Lessons Public Schools Could Learn From Private School That Stayed Open*, KDVR (Jan. 18, 2021, 10:48 PM), <https://kdvr.com/news/coronavirus/covid-lessons-public-schools-could-learn-from-private-school-that-stayed-open/>.

¹¹⁵ Shawn Hubler, Kate Taylor & Amelia Nierenberg, *Public Schools Face Funding 'Death Spiral' as Enrollment Drops*, NY TIMES (last updated Dec. 22, 2020), <https://www.nytimes.com/2020/12/22/us/public-schools-enrollment-stimulus.html>.

¹¹⁶ *Id.*

Congress should be held accountable for providing proper funding to not only allow schools to safely re-open for small student populations, but to also provide more assistive technologies, special education providers, and in-person accommodations. Upon passage of the IDEA, Congress promised to cover 40% of the extra costs associated with providing special education under the Act.¹¹⁷ In reality, the federal government has covered less than 15% of the additional costs.¹¹⁸ Specifically, in California where it costs about \$27,000 annually to educate a student with disabilities, federal funds cover only about \$1.2 billion of the state's \$13 billion special education costs.¹¹⁹ This type of shortfall in federal funding puts states on the hook for funding special education, which can force these schools to divert money from general education or hiring teachers.¹²⁰ In December 2020, Congress passed its second act for COVID-19 relief funds under the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA Act).¹²¹ This Act provides nearly \$82 billion to the Education Stabilization Fund, \$54.3 billion of which is directed to the Elementary and Secondary School Emergency Relief Fund, thus providing LEAs with 4 times the amount provided in the March 2020 CARES Act.¹²² While the funds *may* be used for IDEA activity and making school improvements to reduce the risk of virus transmission, there is no directive that these funds be used for these specific tasks.¹²³ Thus, allowing schools to continue to refuse in-person services. A Senate Bill, S4100, titled "Supporting Children with Disabilities During COVID-19 Act," seeks to appropriate \$11 billion for state grants under the IDEA; though as of 2021, it remains on hold in Congress.¹²⁴

Allocating federal funds to LEAs, contingent on schools providing students with their necessary in-person services, could create meaningful change. The increased funding could allow schools to open for small group meetings or send providers to the students' homes or outside locations. With talks about a potential third stimulus act under the Biden

¹¹⁷ Evie Blad, *Why the Feds Still Fall Short on Special Education Funding*, EDUCATIONWEEK (Jan. 10, 2020), <https://www.edweek.org/teaching-learning/why-the-feds-still-fall-short-on-special-education-funding/2020/01>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ Phyllis W. Jordan, *What Congressional Covid Funding Means for K-12 Schools*, FUTUREED (last updated Mar. 6, 2021), <https://www.future-ed.org/what-congressional-covid-funding-means-for-k-12-schools/>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Hallie Levine, *As School Returns, Kids with Special Needs Are Left Behind*, NY TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/parenting/school-reopening-special-needs.html>.

administration, the possibility for such a requirement becomes apparent.¹²⁵ Unlike some federal and state threats to withhold funding if schools don't reopen, this proposed federal contingency would not require that all schools open to the general student population nor would it require that schools open at all if they cannot do so safely.¹²⁶ Instead, the contingency would allow for the personal delivery of IDEA services to students' homes. The only absolute requirement of this federal funding would be for schools to provide in-person services to special education students deemed to need them in their IEPs.

While these funding requirements and modes of educational delivery to individual homes may appear extreme or unprecedented, the critical needs of students with disabilities cannot be forgotten. In a country with strong values tied to educating our youth and providing equality for all, special education cannot be left in the dark. The administrative processes involved in establishing students' IEPs ensure that the prescribed in-person services are necessary for their education, rather than parents' meritless desire for their children to receive extra treatment on the school's dime. It is important to remember the principals that the IDEA is grounded on. It is "the national interest that the federal government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law."¹²⁷ To ensure that students with disabilities have an opportunity to receive an education and transition to independent living and employment, their vital in-person services should be federally mandated.

The issues and policy solutions offered in this Note are not limited to COVID-19. With the end of the pandemic in sight, more schools returning to in-person instruction, and vaccinations becoming widely available, students with disabilities may soon be able to experience school the way they did prior to the pandemic. However, addressing these issues and promoting legislation is still imperative. Students with disabilities must be

¹²⁵ See Aamer Madhani, *Third Stimulus Check Updates: Biden Invites GOP Lawmakers to White House for Virus Relief Talks*, CHICAGO TRIBUNE (Jan. 31, 2021, 9:00 PM), <https://www.chicagotribune.com/coronavirus/ct-nw-third-stimulus-check-updates-20210131-fa3gzwpnge3fmxkqe6pc6pky-story.html>.

¹²⁶ See, e.g., Peter Baker, Erica L. Green & Noah Weiland, *Trump Threatens to Cut Funding if Schools Do Not Fully Reopen*, NY TIMES (last updated July 24, 2020), <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html>; Lori Rozsa, Moriah Balingit & Valerie Strauss, *A Florida School District Wanted To Wait To Reopen School Buildings. Gov. Ron DeSantis Threatened To Cut Its Funding.*, THE WASHINGTON POST (Aug. 14, 2020, 2:22 PM), https://www.washingtonpost.com/local/education/florida-coronavirus-schools/2020/08/14/a37b39a8-dd99-11ea-b205-ff838e15a9a6_story.html.

¹²⁷ 20 U.S.C. § 1400(c)(6).

protected in the event that the pandemic becomes worse or for future occasions in which schools may be shut down. Additionally, addressing the costs and burdens endured by the parents of children deprived of their FAPES is vital to ensure that they receive just compensation.

V. CONCLUSION

Remote learning has provided students around the country with the opportunity to earn an education while also practicing social distancing in an effort to stay safe from COVID-19. However, the cancellation of in-person classes has left students with disabilities without physical therapy, one-on-one aides, and behavioral supports. Additionally, under-funding has left many of these students without enough teachers, service providers, or assistive technologies necessary to meet their educational needs. While individual litigation has been successful in providing some students with the chance to receive in-person services when remote learning could not offer them a FAPE, this approach fails to remedy the large number of students affected by school closures. Class action lawsuits have also faced various hurdles including certifiability and the IDEA's exhaustion requirement. Ultimately, federal funding contingent on in-person service delivery appears to be the solution that considers the realities facing both schools and students.

The current state of special education represents a problem that is not limited to the COVID-19 pandemic. It exposes the rigid thinking often associated with providing special education and inclination to neglect IDEA services in unprecedented times. Families and special education advocates hope that the pandemic can spark systemic change to allow for creativity in reaching students, collaboration with parents, and adequate federal funding.¹²⁸ Providing FAPE to students under the IDEA is not a "well, we tried" task, but rather a substantive obligation. While doing so safely will likely require substantial federal funding, it is a responsibility that cannot be ignored. The issues associated with providing special education during COVID-19 is not limited to this moment in time but will affect the educational progression and future development of students with disabilities. The time for change is now: students with disabilities should receive their necessary in-person services mandated under federal law.

¹²⁸ Cayla Bamberger, *Is The Pandemic A Chance To Reimagine Special Education?*, DISABILITY SCOOP (Feb. 4, 2021), <https://www.disabilityscoop.com/2021/02/04/is-pandemic-chance-reimagine-special-education/29180/>.