



Recommendations on the Provision of FAPE to Students with Disabilities When a Parent opts to Keep Their Child Home During the 2020-2021 School Year

Recommendations

The Council of Parent Attorneys and Advocates (COPAA) requests that the United States Department of Education (ED) and state education authorities issue guidance securing the right to a free appropriate public education (FAPE) for eligible students with disabilities whose parents opt to keep them out of school for the 2020-2021 school year. States and districts must provide FAPE whether education is conducted through distance, in-person, hybrid, or home-based learning.

Background

Despite months of intensive study by scientists across the country, little is known about SARS-CoV-2, the virus that causes COVID-19. It is not known whether exposure results in immunity; whether children can be asymptomatic carriers of the disease; or whether there will be a second wave in the fall and winter. What is known at this writing is that COVID-19 has killed over 130,000 thousand Americans and over 3 million Americans have contracted the disease, and the numbers continue to rise on both fronts.

States and local educational agencies (LEAs) are now dealing with the dilemma posed by school reopening in the fall. On the one hand, the economy cannot really resume at full capacity until schools are open. On the other, few believe that social distancing, proper hygiene, and mask usage can be maintained in a public school, particularly at the elementary level. At this time, it appears that some schools are reopening, some are continuing with distance learning, and some are creating a hybrid model of the two.

Students with disabilities are entitled to a FAPE, which is embodied in the student's individualized education program (IEP). A team of parents and school personnel meet to develop a program to address the student's unique educational, social, emotional, and behavioral needs. The IEP specifies the special education and related services the student is entitled to receive. Ordinarily, if schools are open, the special education and related services will be provided in the school. As a rule, if the LEA offers appropriate services, the district has met its legal obligation, even if the student fails to access the services.

Why States and Districts Must Rethink the Provision of FAPE

COPAA understands and appreciates that some parents may not send their student with a disability to school in the fall of 2020, even if schools are fully open, due to concern about the contagion of COVID-19. Multiple factors impact this decision including the student's age, nature of their disability, physical or mental health status, and other risk factors. Many students with disabilities have complex medical issues that make them especially vulnerable to the potential impact of COVID-19.

Hence, the general rule regarding the provision of special education and related services under the IDEA to students with disabilities who do not attend school needs to be modified for the 2020-2021 school year. If a parent refuses to send their student with a disability back to school, the IEP team should be obligated to offer a FAPE and

appropriate accommodations through distance, hybrid, or home-based learning to the maximum extent possible. Indeed, the IEP team should be tasked with creating a separate service delivery page for when special education and related services are delivered through distance learning. Amendments to the IEP, for purposes of remote learning, should be discussed, agreed upon, and documented in the IEP. If the student returns to school, the last in-school IEP would be the operative IEP, unless the parties agree otherwise. No student with a disability should be deprived of all special education and related services because the student's family and/or physician does not think it safe to return the student to the school building.

Parents and guardians who voluntarily choose for students to temporarily engage in learning from home for any reason need to be supported. ED and SEAs should develop temporary support options for students who continue remote learning from home, including but not limited to offering families robust educational support and special education ensuring the student is offered a free appropriate public education (FAPE).

Homebound and Home Schooling

Keeping a student home for a limited time because of COVID-19, as described above, is very different from Homebound Instruction (a placement on the continuum under the IDEA) and Homeschooling – both of which significantly reduce or limit the services and supports provided to the student. Under current law, homebound instruction can be provided when a child is unable to attend school due to a verified medical or emotional reason relating to the child. If the child is a student with a disability, the IEP team needs to design an educational program to provide a FAPE. Yet, IDEA does not articulate how homebound instruction must occur and is typically limited by the state or district and to a medical or emotional condition present in the child, which is generally time limited. The availability of homebound instruction does not effectively cover the current situation. Homeschooling results in the loss of IDEA's protections as under state laws students are generally only available for Equitable Services. Parents are cautioned to fully explore the implications of either of these options if they are considering.

Districts Should Not Criminalize Parent Choice for Virtual Learning or Student Struggles

Parents and students should not fear or experience criminal charges as a result of not choosing in person learning during COVID-19 or struggling to participate or access virtual learning. Students are being charged with truancy for failing to participate, and in one case, a student in MI was arrested for failing to turn in an assignment. This kind of punitive approach is unnecessary and unfair. Providing a trauma-informed supportive approach to assist parents and students to participate is important.

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