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**COVID 2.0: Ongoing Legal Issues**

**Surrounding Educating Children with Disabilities**

**in the Absence of a Governor's Order**

I. GUIDANCE FROM OSERS ON IEPS AND RETURNING TO IN-PERSON SERVICES.

On September 30, 2021, OSERS issued a “Return to School Roadmap” Q & A for developing and implementing IEPs in the least restrictive environment during COVID-19. There are 41 questions, and it is worth reviewing the document in full and ask your attorney if you have questions. For purposes of brevity, this presentation addresses some of the key questions our office has been receiving and considering:

**A. If the School Has Reopened for In-Person Instruction, Can the IEP Team Still Meet Virtually?** Yes, provided that either the parent(s) agree(s) to a virtual meeting, or the school’s COVID-19 prevention practices necessitate it.

**B. If a Student Was provided with a Laptop or Other Assistive Technology for Distance Learning/Remote Instruction, Does the School Still Have to Provide that Same Technology Once the Student Returns for In-Person Instruction?** It depends. In some cases, the continued provision of this technology will be necessary to provide a FAPE. The IEP team will need to review each student’s assistive technology needs on a case-by-case basis.

OSERS’s guidance also notes that it may be appropriate, if a student with an IEP is returning to in-person instruction, it may be appropriate for the IEP team to address how the student’s services will be modified if the learning model changes during the school year

**C. What are Examples of Social, Emotional, Behavioral, and Mental Health Supports that are Related to COVID-19 that Students with IEPs may Need?**

1. Counseling services for mental health needs;

2. Social skill instruction

3. Explicit reinforcement of positive behavior;

4. Explicit instruction in stress, anxiety, and depression management;

5. Positive behavioral support plans; and

6. Program modifications, such as adapted homework assignments, or additional training for school staff on positive behavioral supports.

In essence, OSERS currently takes the position that, although the tools a school may use for supporting students who receive special education services remain the same, the specific tools that any given student needs may have changed as a result of the COVID-19 pandemic, and schools should be ready to make updates accordingly.

**D. Could a School Policy that Prohibits or Limits COVID-19 Prevention and Risk Reduction Strategies in the Regular Education Classroom, or Other Areas Where Students Interact, Violate the IDEA?** Potentially, yes. “Congress specifically enacted IDEA in part to rectify the exclusion of children with disabilities from public school classrooms.” Schools are required to make a continuum of alternative placements available, and restrictions on where COVID prevention measures are implemented could potentially preclude a school from providing the appropriate continuum of placements to students with an underlying medical condition. Therefore, schools should avoid outright restricting the use of COVID-19 mitigation measures.

**E. Could a Parent Bring a Complaint or Seek a Due Process Hearing If the School Does Not Adequately Address The Health and Safety of Their Child Who is at Increased Risk of Severe Illness Through Masks, PPE, or other COVID-19 Prevention Measures?** Potentially, yes. IDEA remains a fact-intensive and case-specific statute, and schools should be very careful about how they handle parental requests for COVID safety measures.

https://sites.ed.gov/idea/files/rts-iep-09-30-2021.pdf

**II. Legal challenges to the presence or absence of mask mandates for students**

**A. *Let them Play MN v. Walz*, 517 F.Supp.3d 870 (D. Minn. 2021).**

**1. Facts:** On January 6, 2021, Governor Walz issued Executive Order 21-01, which included directives for organized youth sports and indoor and outdoor youth sport facilities to develop and implement a COVID-19 Preparedness Plan that complied with MDH guidance. This lawsuit challenged two components of the guidance in effect in January 2021—first, the requirement for all people to wear facemasks at all times, with limited exceptions for wrestling, swimming, outdoor sports, and athletes who had a medical condition that precluded them from wearing a mask; and second, the guidance’s limitation of 1-2 spectators per athlete. A group of parents and students sued the State, arguing that these requirements violated student-athletes’ equal protection and due process rights under the U.S. and Minnesota Constitutions. The Plaintiffs asked the Court to issue a preliminary injunction to prevent the State from enforcing any of the requirements of Executive Order 21-01 relating to youth sports and youth athletics.

**2. Issues:**

a. Were the plaintiffs substantially likely to prevail on the merits of their equal protection claims?

b. Were the plaintiffs substantially likely to prevail on the merits of their procedural due process claims?

c. Would the plaintiffs be irreparably harmed if the State was permitted to enforce Executive Order 21-01, including the requirement for youth sports teams and facilities to have a COVID-19 Preparedness Plan that met MDH guidelines?

**3. Holdings:** The Court first noted that, under the Eleventh Amendment to the U.S. Constitution, it did not have jurisdiction to consider claims relating to Minnesota’s state constitution, and it was therefore impossible for Plaintiffs to prevail on those claims.

a. The Court also found that the plaintiffs were not likely to succeed on their equal protection claims. The plaintiffs failed to identify a similarly situated group of people who were treated more favorably. The Court also noted that there was no constitutional right, let alone a fundamental right, to participate, without restriction, in organized youth sports. Accordingly, Executive Order 21-01 was subject to rational-basis review. The Court concluded that the portions of Executive Order 21-01 and the Department of Health’s subsequent requirements at issue in this lawsuit were reasonably related to the State’s legitimate interest in reducing the risk of COVID transmission posed by the increased exhalation that naturally arises during sports. The fact that the students disagreed, on a policy-making level, with the masking requirement during sports was a political dispute, not a legal issue for the Court to resolve.

b. Similarly, the Court found that the plaintiffs’ claims that the state had violated the due process clause of the Fourteenth Amendment required only rational-basis review of the Executive Order. The Court went on to note that alleged state law violations do not give rise to a federal due process claim, and that plaintiffs’ complaint focused entirely on alleged state law violations by Governor Walz and MDH. Further, the Court noted that a procedural due process claim only arises when the government is making an individualized determination, not when it engages in an act that is applicable to and equally affects all other similarly-situated individuals.

c. The Court further noted that, to establish irreparable harm, the plaintiffs would need to show that the harm was imminent and attributable to the state’s conduct. In this case, the plaintiffs showed neither, and only argued that they had established irreparable harm because they had shown they were likely to succeed on their constitutional-violation claims. As the Court had already concluded that they were *not* likely to succeed on those claims, it found that the plaintiffs had not established irreparable harm.

**4. Result:** The Court denied the plaintiffs’ motion. The Court subsequently granted a motion to dismiss by the State in August 2021, noting that the Eleventh Amendment barred many of the claims, and the remainder were moot because the Executive Order was no longer in place. *Let them Play MN v. Walz*,File No. 21-cv-79 (ECT/DTS), 2021 WL 3741486 (D. Minn. Aug. 24, 2021). In its dismissal order, the Court noted that, even if the claims were not moot or barred by the Eleventh Amendment, they would fail on the merits for similar reasons described in its order on their motion for an injunction.

**B. *Parents Advocating for Safe Schools (“PASS”) v. State of Minnesota and Governor Timothy James Walz*, Court File No. 62-CV-21-4711 (Ramsey Cty. Dist. Ct., Sept. 14, 2021) (order).**

**1. Facts:** PASS is a group of parents of Minnesota students, some with disabilities and some without disabilities, who attend school in various school districts. PASS sued Governor Walz, Attorney General Keith Ellison, and MDH Commissioner Jan Malcolm, in Ramsey County District Court, and sought seeking a court order to require Governor Walz to declare a peacetime emergency and issue an executive order directing all schools and school districts to impose and enforce mask mandates. PASS brought claims under

PASS then sought a temporary restraining order to compel the Governor “to provide to the Minnesota Department of Education to require that all K-12 schools in the state of Minnesota implement and enforce mandatory mask policies for all students, administrators, faculty, staff, and visitors to the school facilities and cites.” *Id.* at 4–5. The Governor and the State opposed this motion. Although they acknowledged that the best course of action would be for schools to require universal masking, they argued that the Court did not have the authority to force the Governor to declare a peacetime emergency or issue any particular executive order.

**2. Issues:**

a. Does the Ramsey County District Court have the authority to order the Governor to declare a peacetime emergency?

b. Is PASS likely to succeed on the merits of its claims under:

i. The Education Clause of the Minnesota Constitution; or

ii. The Minnesota Human Rights Act; or

iii. a private or public nuisance theory of relief?

c. Do public policy considerations support granting or denying PASS’s motion?

3. **Analysis:**

a. The Court began its analysis by determining that, regardless of whether any individual members of PASS had sufficient standing to bring this lawsuit, it could not provide the relief sought. The Governor’s authority to declare a peacetime emergency is derived from Minn. Stat. § 12.31, which provides that the Governor “may” do so. “May” is permissive language, and the declaration of a peacetime emergency is therefore a matter of discretion. The Court stated that, under separation of powers principles, it could not exercise any power delegated to the governor. The decision to declare an emergency is therefore a political question not subject to judicial review.

Likewise, the decision to issue an executive order, and the contents of the executive order, are permissive, not required, under Minn. Stat. § 4.035. For the same reasons, therefore, the Court could not order the Governor to issue an executive order.

b. The Court concluded that PASS was not likely to succeed on the merits of any of its claims.

i. In addition to the standing issues, PASS’s claims under the Education Clause failed because enforcement of that clause is the responsibility of the Legislature, not the Governor. PASS did not sue the Legislature, and had therefore failed to sue the party whose action or inaction cause the alleged injury and was responsible for redressing that grievance.

ii. The Court found it unlikely that the Governor’s decision not to declare a peacetime emergency or impose a statewide K-12 mask mandate was a decision made for the purpose of discriminating against students with disabilities. Additionally, the alleged harm that students with disabilities might suffer in the absence of a mask mandate was speculative and would be difficult to connect to the State. The MHRA prohibits intentional discrimination, and it was not likely that PASS could prove this was Governor Walz’s intent.

iii. PASS’s private nuisance claim failed because private nuisance is a claim that involves real property rights, which are not at issue here. With respect to the public nuisance claim, PASS’s members had not demonstrated or asserted that its members would suffer a greater injury than the potential injury to the general public resulting from the absence of a mask mandate.

c. The Court also expressed significant public policy concerns about the prospect of allowing a district court to order the Governor to declare a peacetime emergency, particularly where the justification was the Education Clause, which is the exclusive responsibility of the Legislature. The Court declined to order the Governor to perform the Legislature’s work.

The Court further expressed concerns with the potential implications of allowing courts to issue such an order: “If a citizen is experiencing a spike in violent criminal activity in their neighborhood, can they avail themselves of court intervention to force the Governor to issue an executive order to dispatch the National Guard to control the streets?”

**4. Result:** The Court expressed grave concern about the public health consequences if school districts failed to require masks, and characterized COVID-19 as “a coronavirus forest fire that will not stop until it finds all of the human wood it can burn.” Nevertheless, the Court concluded that it did not have the authority to grant the relief that PASS was seeking.

PASS has amended its Complaint, and a second motion for a Temporary Restraining Order is pending.

**C. *ARC of Iowa v. Reynolds*, --- F.Supp.3d ----, 2021 WL 4166728 (S.D. Iowa Sept. 13, 2021).**

**1. Facts:** The State of Iowa enacted a statute, Iowa Code section 280.31, that prohibited school districts from mandating masks. A group of eleven parents of children with disabilities sued the state, arguing that prohibiting school districts from requiring masks constituted disability discrimination under Title II of the ADA (“Americans with Disabilities Act”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”).

Each child had an underlying health condition that increased their risk of severe illness or death from COVID-19, including asthma, cerebral palsy, sickle cell anemia, Down Syndrome, and other heart and lung conditions. All of the children whose parents brought suit were under the age of 12 and therefore not yet eligible to receive a COVID-19 vaccine. Evidence was presented that these students had struggled during distance learning in the 2020-2021 school year, that some students attended school districts that were not offering online instruction in the 2021-2022 school year, and that some of these students’ pediatricians had opined that even having the student’s healthy sibling(s) attend school was too great a risk given the student’s underlying conditions.

The parents sought a temporary restraining order to prevent enforcement of Iowa Code section 280.31. Their motion was supported by the American Academy of Pediatrics, which filed an amicus brief stressing the importance of masking to prevent the spread of COVID-19.

**2. Issues:**

a. Did the parents establish that their children would be irreparably harmed if their schools were prohibited from requiring indoor masking?

b. Were the parents likely to succeed on the merits of their claims?

**3. Holdings:**

a. The Court concluded that the parents had shown their children would be irreparably harmed if Section 280.31 was enforced. If the students went to school, they faced a substantial risk of severe illness or death. On the other hand, some students were faced with online instruction that had already proven ineffective for them in the preceding school year, while others were in school districts that did not offer online instruction at all. Essentially the students were faced with risking their lives, or losing their educational opportunities. The Court also noted that, if Section 280.31 did violate the ADA or Section 504, that would constitute a separate showing of irreparable harm.

b. The Court concluded that Section 280.31 did conflict with the ADA and Section 504. The Court noted that, if a school had a universal mask mandate, students with disabilities could participate and have a more similar experience to their peers who did not have disabilities. Additionally, there was no evidence that allowing schools to require universal masking as a reasonable accommodation for students with disabilities would fundamentally alter the nature of the services that public schools provide. Furthermore, banning mask requirements would result in some students with disabilities being segregated from their peers, and prevented from receiving instruction in the most integrated setting. Section 280.31 therefore appeared to conflict with federal law, which, if ultimately proven, would mean the parents prevailed on the merits.

**4. Result:** The Court granted the parents’ motion for a preliminary injunction. The case is currently on appeal to the Eighth Circuit Court of Appeals.

Additionally, the U.S. Department of Education’s Office for Civil Rights has announced that it investigating whether Iowa’s law, and similar laws that have been passed in 4-5 other states, discriminate against students with disabilities.

**D. *Julianne Paulsen et al v. Rock Ridge Pub. Sch. – Indep. Sch. Dist. 2909*, Case No. 69VI-CV-21-495 (St. Louis County Dist. Ct. (Virginia) Oct. 15, 2021) (order).**

**1. Facts:** A group of parents sued Rock Ridge Public Schools asserting that the mask mandate in its COVID-19 mitigation plan was unconstitutional. The parents alleged that the mandate violated the Education Clause of the Minnesota Constitution, as well as equal protection and due process rights. Plaintiffs’ claims centered on the allegation that masks were a “medical treatment,” and that students would be denied access to education if they did not consent to this unwanted medical treatment.

**2. Issue:** Was Rock Ridge’s mask mandate a constitutional violation?

**3. Holdings:** The Court denied the parents’ request for an injunction. The Court first noted that the Education Clause of the Minnesota Constitution creates a positive right to an adequate education, not negative rights that prohibit government action. Citing *N.H. v. Anoka Hennepin School District*, the Court noted that the Education Clause did not guarantee “equal treatment across all aspects of education such as facility access.” The parents also admitted that the school district’s adoption of its COVID-19 plan was a legislative act, which affected all district residents equally, and therefore did not implicate due process concerns. The Court further concluded that masks are not a “medical treatment” in this context, because they are designed to prevent, not treat, COVID-19. Finally, the Court rejected the parents’ equal protection claims, noting that they had not identified a similarly situated group of individuals but treated differently, other than students who refused to wear a mask and those that did not. As the complaint was about the effect of an otherwise neutral school board action on the students’ particular circumstances, an equal protection claim did not arise.

**4. Result:** The Court has expressed doubt as to whether the parents have stated any claims upon which relief can be granted. For now, however, the litigation is ongoing.

E. **A Related Case to Watch: *B.R. by his next friend Shannon Jensen v. Waukesha Bd. of Educ. et al*, Case No. 2:21-cv-1151 (E.D. Wis. 2021).** On October 5, 2021, a mother sued her son’s school district, asserting that their failure to require masks and other COVID-19 precautions in schools resulted in her son contracting COVID-19 and needing to quarantine. In the lawsuit, the mother is seeking to represent all students in Wisconsin, K-12, against all school boards and school board members in Wisconsin, to obtain an injunction against school districts that forego COVID-19 precautions.

**III. legal Challenges to Distance Learning**

**A. *Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021).**

**1. Facts:** Prior to the beginning of the 2020-2021 school year, the State of California generally prohibited in-person learning, unless the school’s local health jurisdiction had not been on the state’s County Monitoring List for the preceding 14 days. Counties were placed on the County Monitoring List if their 14-day COVID-19 case rate was over 100 per 100,000 people, or if it’s 14-day case rate was over 25 per 100,000 people and its 7-day testing positivity rate was over 8%.

Even if a school satisfied this criteria, only elementary schools could only reopen, and only if the relevant elementary school official requested to do so. Once reopened, the school was not required to revert to distance learning again if its local health jurisdiction later appeared on the County Monitoring List; however, the State did also recommend that, if 25% or more of schools in a school district closed due to COVID-19, the superintendent should close the remainder of the district and revert to only offering distance-learning.

A group of parents of both public- and private-school students sued the State of California, asserting that the prohibition on in-person learning violated children’s “fundamental rights” to receive “a basic minimum education,” and also treated them differently than those in nearby school districts, as well as minors in childcare and attending summer camps. The District Court granted summary judgment on all claims in favor of the state, and the plaintiffs appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit noted that California’s laws and regulations regarding COVID-19 prevention in schools had changed significantly since the lawsuit was commenced in July 2020, but concluded that the lawsuit was not moot and addressed the merits of the claims.

**2. Issues with Respect to Public School Plaintiffs:[[1]](#footnote-1)**

a. Did California’s prohibition on in-person learning violate the students’ due process rights?

b. Did California’s prohibition on in-person learning violate the Equal Protection Clause of the Fourteenth Amendment?

**3. Holdings:**

a. With respect to the due process claim, the Ninth Circuit reiterated that the United States Constitution does not create a fundamental right to education that can be enforced by a court. The Court noted that there was a “critical distinction” between a law that denied a group or group(s) of children access to education, which could implicate fundamental rights, and requiring a state to affirmatively provide an education. The Ninth Circuit also noted that this case was not brought as a class action, and that the individual plaintiffs had not shown how their children’s rights to an education, even if such a right existed, had been infringed by limiting the availability of in-person learning.

Accordingly, the Ninth Circuit concluded that, if the State of California could show a rational basis for its policy of prohibiting in-person learning except in specified circumstances, it would be entitled to summary judgment on the plaintiffs’ due process claims. The Court concluded that limiting the spread of COVID was a legitimate state interest, and preventing in-person instruction was rationally related to that interest. Accordingly, the Ninth Circuit Court of Appeals affirmed summary judgment against the public school plaintiffs’ due process claims.

b. The Ninth Circuit also noted that there was no evidence that a school district’s location implicated a suspect classification, or was an invidious distinction. As such, like the public school plaintiffs’ due process claims, their equal protection claim was subject to rational-basis review, and failed for the same reasons. The Court specifically rejected the comparison between schools and childcare or summer camps, holding that this was a permissible distinction and that the state had rationally chosen to address COVID-19 incrementally.

4. **Result:** The Court affirmed summary judgment with respect to the plaintiffs who were parents of public school students’ claims.

**B. *Open PA Schools v. Department of Education*, 247 A.3d 1190 (Pa. Commw. Ct. 2021).**

**1. Facts:** In this case, a group of parents petitioned directly to Pennsylvania’s Commonwealth Court (one of Pennsylvania’s appellate courts) challenging nine school districts’ decisions to being the 2020-2021 school year in remote learning, consistent with the Pennsylvania Department of Health’s guidance. The group also sued the Pennsylvania Department of Education. The group of parents argued that days of remote instruction did not count, as a matter of law, toward the 180 school days required by statute. The parents noted that they were not seeking to have the schools immediately reopened; rather, they sought a declaratory judgment stating that remote learning days would not count toward the 180-day requirement and that the students would receive at least 180 days of in-person instruction during the 2020-2021 school year. ***Note:*** *This petition was filed on September 8, 2020*, *the first day of school for many Pennsylvania school districts*.

The school districts and state entities that responded challenged whether the group of parents, an unincorporated association, had standing to bring this action.

**2. Issue:** Did the group of parents have standing?

**3. Holding**: No. The Commonwealth Court, upon reviewing the petition for declaratory judgment, found that it contained no allegations that any individual member of the group of parents had actually been harmed or aggrieved by the school districts beginning the school year in a remote or mostly remote learning model.

**4. Result:** The parents’ petition was dismissed, without prejudice, in January 2021.

**IV. COVID-19 RECOVERY SUPPORTS AND SERVICES AND COMPENSATORY EDUCATION.**

**A.** **Compensatory Education Generally.** Compensatory Educational Services are available generally when a school has failed to provide FAPE. Compensatory education traditionally includes direct and indirect special education and related services that are ordered by MDE or a hearing officer because the school did not offer or make available a FAPE and the student “suffered a loss of educational benefit.” This is the traditional definition of compensatory education and is not the analysis being used by MDE for COVID-19 services.

**B.** **Recovery Services and Supports.**

**1.** Every parent of a student with a disability who has an IEP must be invited to an IEP team meeting as soon as practicable, but no later than December 1, 2021, “to determine whether special education services and supports are necessary to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic.” The law requires that the parents must be *invited* by December 1, 2021, not that the meeting actually occur prior to December 1, 2021. Also, if these topics are addressed in a student’s annual or regularly scheduled IEP meeting, there is no requirement to schedule a separate IEP meeting.

2. Services and supports to address lack of progress or loss of learning may include, “but are not limited to extended school year services, additional IEP services, compensatory services, or other appropriate services.” Any services or supports provided to students with disabilities to address lack of progress or loss of learning must be reported to MDE, including the costs of providing the services.

Subsequent guidance from MDE requires the IEP team to consider providing the following supports and services:

a. General Education Recovery Services (*e.g., tutoring, small group instruction, after school help, counseling, wraparound services, etc.*)

b. ESY services. ***NOTE:*** *ESY services are not considered general education recovery services or COVID-19 compensatory services. Annual determination of whether a student needs ESY services is still required; however, ESY services can be considered as a component of the recovery services and supports required by law*.

c. Revised IEP Services (*IEP teams should bear in mind that new or additional services may be necessary now that were not needed before distance learning*)

d. COVID-19 Compensatory Services (***NOTE:*** *MDE uses this term specifically to refer to services provided for lack of progress or loss of skills that resulted from a school’s delay or inability to provide IEP services, or the student’s inability access appropriate IEP services. COVID-19 compensatory services are based on a student’s need to make up for lost skills and regain progress, regardless of the specific cause for the delay or disruption in services*).

3. To determine whether a student is eligible for recovery services and reports, the IEP team is required to consider:

a. The services and supports the student was receiving prior to COVID-19 and distance learning;

b. The ability of the student to access services and supports;

c. The student's progress toward IEP goals, including the goals in the IEP in effect before disruptions to in-person instruction related to the COVID-19 pandemic, and progress in the general education curriculum;

***NOTE:*** *Schools should be careful about seeking out new data during the 2021-2022 school year. Attempting to obtain new data could arguably constitute conducting a new evaluation or re-evaluation, which would trigger all the IDEA requirements and deadlines for evaluations. Given that schools need to consider whether recovery services are for every student with an IEP, triggering IDEA’s evaluation requirements and procedures could create a tremendous unintended burden. To be safe, therefore, IEP teams should rely on data that they already have, including progress data collected during distance learning.*

d. The student’s regression or lost skills resulting from disruptions to instruction or in-person learning;

e. Other significant influences or changes to the student’s ability to participate in or benefit from educational instruction that are related to COVID-19, such as family loss, changed family circumstances (e.g., parental job loss), other trauma, and illness;

f Any applicable guidance from the Minnesota and/or U.S. Departments of Education; and

g. The types of services and supports that would benefit the student and improve the student's ability to benefit from school, including academic supports, behavioral supports, mental health supports, related services, and other services and supports.

4 If a student is determined to be in need of special education recovery services and supports, the IEP team must then consider the timing and delivery method most appropriate for the student to receive these services. The services and supports must be provided until the IEP team determines that they are no longer necessary to address lack of progress or loss of learning.

a. **How does the IEP team make this determination?** There is no guidance at this point. We recommend consulting with your legal counsel, as well as keeping a weather eye out for future guidance.

5. These requirements also apply to students who are enrolled in a nonpublic school and receive special education services on a shared time basis from a school district.

**C. The Cheese Stands Alone.** COVID-19 compensatory education is not the same thing as recovery services which much be offered to and made accessible for *all* students regardless of disability. COVID-19 compensatory education is also a separate analysis from the determination as to a student’s eligibility for extendedschool year services (see below). IEP teams should make determinations regarding COVID-19 compensatory education on an individualized basis for each student, apart from any other recovery services or ESY the school or school district is offering.

**V. EXTENDED SCHOOL YEAR SERVICES**

1. **Federal Regulations.** If an IEP team determines that a child requires ESY services as part of the child’s FAPE, those services must be made available to the child. 34 C.F.R. § 300.106(a)(1)(2).
2. **Definition.** ESY services are “special education and related services” that are provided to a disabled child outside of the normal school year, and in accordance with the child’s IEP at no cost to the child’s parents. 34 C.F.R. § 300.106(b).
3. **Eligibility Determination.** To determine eligibility for ESY services, the IEP team assesses whether one of the following is true:

1. there will be significant **regression** of a skill or acquired knowledge from the pupil’s level of performance on an annual goal that requires more than the length of the break in the instruction to recoup unless the IEP team determines a shorter time for recoupment is more appropriate;

2. services are necessary for the pupil to attain and maintain **self-sufficiency** because of the critical nature of the skill addressed by an annual goal, the pupil’s age and level of development, and the timeliness for teaching the skill; ***or***

3. the IEP team otherwise determines, given the pupil’s **unique needs**, that ESY services are necessary to ensure the pupil receives a FAPE.

Minn. R. 3525.0755, subp. 3 (emphasis added).

**VI. VIRTUAL SCHOOLS**

**A. Overview**

1. Virtual Schools. Educational models involving online instruction are becoming more common, including the ability to attend virtual school. *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

2. A “virtual school” is a public school that offers only virtual courses: instruction in which children and teachers are separated by time and/or location. In addition, interaction occurs via computers and/or telecommunications technologies, and the school generally does not have a physical facility that allows children to attend classes on-site. *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

3. A virtual school may be run by a public school district or state, or it may be chartered by a state. Public virtual schools are required to meet the same state and federal requirements as other public schools.

**B. Legal Obligations**

1. IDEA. “The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

2. FAPE. Virtual schools are required by IDEA to provide FAPE, including by:

a. Identifying and evaluating children with disabilities;

b. Developing IEPs;

c. Providing special education and related services in the least restrictive environment; and

d. the provision of procedural safeguards.

*Letter to Barnes*, 41 IDELR 35 (OSEP 2003).

3. Child Find. “LEAs, including virtual schools that operate as LEAs, should review the State's child find policies and procedures as well as their own implementing policies, procedures, and practices to ensure that children with disabilities who attend virtual schools are identified, located, and evaluated.” Dear Colleague Letter, 68 IDELR 108 (OSERS/OSEP 2016).

a. Child Find Strategies: “Where the practices of the virtual school, whether it is an LEA or operated by an LEA, limit or prevent the teacher's interaction and contacts with a child, the SEA's child find policies should suggest additional ways that LEAs can meet this IDEA responsibility for children attending virtual schools (e.g., screenings to identify children who might need to be referred for an evaluation and questionnaires filled out by virtual school teachers and staff and children's parents). In general, reliance on referrals by parents should not be the primary vehicle for meeting IDEA's child find requirements.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

4. Reevaluations: “For children who have IEPs and have been determined eligible for special education and related services prior to their enrollment in the virtual school, child find responsibilities also include ensuring that periodic reevaluations are conducted.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

5. Section 504: “The same nondiscrimination principles that apply to all schools under [Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990] also apply to virtual schools.” Dear Colleague Letter, 68 IDELR 108 (OSERS/OSEP 2016).

**B. Contracting with Virtual Schools**

1. Contracting. LEAs retain the responsibility for making FAPE available to an eligible child with a disability even if they choose to contract with virtual schools to provide educational services to children with disabilities. *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

2. *Quillayute Valley (WA) Sch. Dist. No 402*, 49 IDELR 293 (OCR 2007): The OCR found that the online high school “is part of [the school district’s] public education program and is operating under a management services agreement with [the school district], and that [the school district] did not ensure that [the school] is complying with Section 504 and Title II. Because [the school district] did not ensure that [the online school] is complying with Section 504 and Title II, [the OCR] conclude[d] that [the school district] is using methods of administration that have the effect of subjecting disabled students to discrimination on the basis of disability. As a result, OCR concludes that [the school district] did not comply with Section 504 and Title II.”

1. The Court reached different conclusions as to whether public-school and private-school plaintiffs’ claims could proceed to trial. [↑](#footnote-ref-1)