



# SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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## LEGAL UPDATE

September 23, 2020

**To:** Superintendents, Member School Districts (K-12)  
**From:** Jennifer E. Nix, Associate General Counsel *JEN*  
**Subject:** **Reminder of Obligation to Provide FAPE During Distance Learning**  
**Memo No. 55-2020**

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As most schools conclude their first month of school, it bears reminding that there has been no abrogation of the requirement to provide Free Appropriate Public Education (“FAPE”) despite many schools being required to provide education via distance learning. Both the U.S. Department of Education and the California Department of Education have stated unequivocally that no waiver of any of the core tenets of the Individuals with Disabilities Education Act (“IDEA”) has been provided, and that schools must provide education and related services to all students with disabilities, regardless of whether that is achieved via in-person services or via online services.<sup>1</sup> If a child’s FAPE cannot be provided, the child’s Individualized Education Program (“IEP”) team should review whether compensatory education is needed.<sup>2</sup>

As discussed below, several recent administrative findings and decisions have found that Local Educational Agencies (“LEAs”) should have provided the special education and related services in student’s IEPs during the COVID-19-related school closures.

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<sup>1</sup> OSERS, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 12, 2020); OSERS, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020); Report to Congress of U.S. Secretary of Education Betsy DeVos, Recommended Waiver Authority (April 27, 2020); CDE, Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020).

<sup>2</sup> OSERS, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 12, 2020); OSERS, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020); CDE, Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020).



## **Law Regarding Material Implementation of IEPs**

There appears to be a common misconception that, because of distance learning, schools are permitted to offer fewer services than those agreed upon in students' IEPs. This is not the case. Failing to implement a student's IEP as written typically is considered a material implementation failure that can lead to a denial of FAPE.

In order to provide a student with a FAPE, a school district must deliver special education and related services "in conformity with" the student's IEP. (20 U.S.C. § 1401(9)(D).) The Ninth Circuit has stated that: "IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute – not to decide on its own no longer to implement part or all of the IEP." (*Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 821 (9th Cir. 2007) (*Van Duyn*) (citing 20 U.S.C. §§ 1414(d)(3)(F), 1415(b)(3)).) A school district that fails to implement an IEP exactly does not violate IDEA "unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Van Duyn*, 502 F.3d at 815.)

In *Van Duyn*, the seminal case on material implementation of IEPs in the Ninth Circuit, the court found the district's failure to provide five hours of math tutoring per week out of the 10 hours specified in the student's IEP was a material failure to implement the IEP. (502 F.3d at 823.) The court rejected the district's argument that the student was required to prove the district's failure to implement his IEP caused him to lose educational benefits, stating that: "Because the parties debate whether Van Duyn's skills and behavior improved or deteriorated during the 2001–02 school year, we clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (502 F.3d at 822.) However, the court also noted that a child's educational progress, or lack of it, might be one indicator of whether a discrepancy in services was material. (*Ibid.*) Presenting the example of a child not provided the reading instruction called for in their IEP, the court noted, "a shortfall in the child's reading achievement . . . would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material." (*Ibid.*)

The Ninth Circuit previously has addressed a similar situation to the current COVID-19-related school closures. In *N.D. v. Hawaii Dept. of Education*, 600 F.3d 1104 (9th Cir. 2010), the court held that a one day per week shutdown of public schools statewide to address a fiscal crisis did not constitute a change of placement for special education students. The court suggested in dicta that the student's claim was "more properly characterized as a 'material failure to implement the IEP.'" (*Id.* at 1117, citing *Van Duyn*, 502 F.3d. at 822.) The court explained, "A school district's failure to provide the number of minutes and type of instruction guaranteed in an IEP could support a claim of material failure to implement an IEP." (*Ibid.*)



## **Recent Cases Regarding Implementation of IEPs During Distance Learning**

Several recent administrative findings, orders, and decisions against LEAs with regard to the provision of FAPE, including stay put, are worth reviewing. The decisions below relied on *Van Duyn* to analyze whether LEAs materially implemented students' IEPs.

### *Decisions Implicating Compensatory Education*

1. In July 2020, the California Department of Education ("CDE") issued noncompliance findings against a district in San Diego County ordering the district to provide compensatory remedies for missed Resource Specialist Program ("RSP") and speech and language services. The CDE found that: "Although the District provided resources to the student's parents and some assignments related to two of the student's RSP goals that focused on the student's ability to answer questions or write narratives, the District did not implement the Specialized Academic Instruction ("SAI")/RSP services in the student's IEP to the greatest extent possible." The CDE noted that "The District did not persuasively set forth why 'logistics', or union agreements, or service providers' personal commitments, prevented the RSP teacher from directly and simultaneously interacting with the student in relation to RSP activities to address all of the student's RSP goals, as the provider had done prior to COVID-19."
2. On August 24, 2020, in *Parent v. Los Angeles Unified School District*, Office of Administrative Hearings ("OAH") Case No. 2020050465, an Administrative Law Judge ("ALJ") found that LAUSD denied the student a FAPE from March 16, 2020, through the filing of the complaint, by changing Student's educational program to a distance learning program that did not adequately implement Student's operative IEP. In that case, the ALJ found that the student's nonpublic school provided various types of asynchronous instruction from March 12 to 26, 2020, and that beginning on March 27, 2020, the nonpublic school began using synchronous instruction. Speech and language services did not begin until April 25, 2020. Under distance learning, the student received at most 450 minutes per week of interactive instruction and completed individual learning in 150 minutes per week, for a total of 600 minutes of instruction per week. This was approximately 45 percent of the total instruction called for in the student's IEP. The ALJ found that this "fell materially short of adequately implementing Student's IEP." The ALJ pointed out that this instruction did not allow the student to make meaningful progress on her goals as none of the instruction was designed to work on any of her goals. The ALJ ordered the district to fund 40 hours of postsecondary transition counseling and 1 hour of group speech and language services.
3. On September 2, 2020, in *Parent v. Norris School District*, OAH Case Nos. 2020010423/2020060184, the ALJ found that Norris School District denied Student a FAPE during the 2020 COVID-19 school closure, through May 7, 2020, by failing to provide Student with academic instruction and speech therapy services. Specifically, the ALJ stated that "Although it was not possible to implement Student's IEP as written, Norris was obligated to offer a temporary placement that 'closely approximated' Student's last educational placement." The ALJ noted that, during the period of school closures, "Norris provided Student with no direct instruction." The ALJ found that the

district should have sent prior written notice (“PWN”) “explaining how Norris proposed to change or modify Student’s IEP as an alternate mode of delivery of instruction during the school closure.” The ALJ noted that the general PWNs the district sent did not comply with this requirement. The ALJ found that the district should have held an IEP to consider how to serve the student, as the parents were unable to deliver the instructional materials provided by the district. This failure, and the failure to provide a specific PWN, denied Parents the opportunity to participate in the development of an IEP during school closures. The ALJ awarded approximately 2 hours of speech and language services and 25 hours of academic tutoring for these violations.

### Orders Implicating Stay-Put Rights

1. On August 24, 2020, in *Parent v. Pleasanton USD and Contra Costa COE*, OAH Case No. 2020070970, an ALJ issued an Order Granting Motion for Stay Put. The ALJ ordered the LEAs to provide in-person services in the duration and intensity provided in the IEP, to include a 1:1 Licensed Vocational Nurse, speech therapy, physical therapy, and vision services. The ALJ noted that the services can be provided by a nonpublic agency and in student’s home, and that: “Nothing in this Order requires Pleasanton and Contra Costa to provide services on school sites, or with school staff.” The ALJ also noted that the LEAs were under an order from the CDE compliance division to provide in-person physical therapy to student since July 2020, “which has been successful.”<sup>3</sup>
2. On September 11, 2020, in *Parent v. Campbell Union High School District and Santa Clara COE*, OAH Case No. 2020080779, an ALJ issued an Order Granting Requests for Reconsideration and Granting in Part and Denying in Part Motion for Stay Put. The ALJ rescinded a prior order directing the LEAs to provide related services in the home based on the LEAs’ statements that they were providing the student’s educational program “in a manner that approximates the IEP as closely as possible in light of the school closures and the restrictions for in-person instruction and services imposed by COVID-19 health orders.”
3. On September 22, 2020, in *Parents v. Ventura Unified School District*, OAH Case No. 2020090317, an ALJ issued an Order Denying Motion for Stay Put. The student requested that an order issue requiring the school district to provide one-on-one behavior therapy services in the home during distance learning. The ALJ found that stay put was implementation of the last consented-to IEP via distance learning, which the school district was doing. However, the ALJ noted that the school district must provide 1,775 minutes weekly of intensive individualized services, as provided for in the last consented-to IEP, not 1,175 minutes of intensive individualized services, as specified in the student’s distance learning plan.

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<sup>3</sup> The California Department of Public Health has given flexibility needed to provide in-person services to students with disabilities in its August 25, 2020, “Guidance for Small Cohorts/Groups of Children and Youth,” updated September 4, 2020. The accompanying FAQ specifies that “[s]tudents with disabilities should be prioritized by the LEA and school for receiving targeted supports and services.” (FAQ available at <https://files.covid19.ca.gov/pdf/guidance-schools-cohort-FAQ.pdf>)



## **Steps to Mitigate Risk**

LEAs should be taking steps to mitigate the risk associated with adverse CDE compliance findings and due process decisions. Some of those steps include:

- Offering services as detailed in students' IEPs as close to 100% as possible.
- Holding IEP meetings to discuss distance learning programs, especially if IEPs cannot be implemented as written or students are not accessing the distance learning program.
- Writing into IEPs accommodations and services to support students in the current environment (distance learning environment).
- Being upfront with parents about the potential need for compensatory services for students who are not accessing distance learning well or whose IEPs cannot be implemented as written.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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