

DEFINING FAPE DURING A GLOBAL PANDEMIC

FEBRUARY MAASE
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STATUS OF FAPE

- USDOE and MDE **have not waived or stated that the FAPE standard is different** in a Global Pandemic;
- *Endrew F* and *Rowley* still the “law of the land” outside of a Global Pandemic;
- “[IDEA] requires an **educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.**” [*Endrew F*, 580 US 11 (2017)].

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REVISITING *ENDREW F* IN A PANDEMIC

- **Progress** through this system is what our society generally **means** by an “**education.**” And **access to an “education” is what the IDEA promises.** Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be **“reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”**

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USDOE MARCH 12, 2020

• If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)).

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USDOE MARCH 12, 2020

• SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).

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IN-PERSON INSTRUCTION

• Whether a school district that is phasing in in-person instruction may be required to give priority to a student with a disability, however, will depend on an individualized determination of the student's educational and disability-related needs, and whether providing in-person instruction or services would be a reasonable modification to a reopening policy that is necessary to provide a student a FAPE or otherwise to avoid discrimination on the basis of disability.
• OCR 09-28.2020.

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INDIVIDUALIZATION

- Section 504 requires **individual decision-making** regarding the **type, frequency, and manner** in which special education and related services will be provided to students with disabilities. As such, **State-wide or district-wide policies that reduce or limit services specifically for students with disabilities in a particular jurisdiction, without regard to any reasonable modifications or services that may be necessary to meet the individualized needs of those students, run afoul of Section 504.**
- OCR 09-28.2020.

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TA KE-AWAYS FOR DEFENDING FAPE DECISIONS

- **March through June 2020** represent time when State closed public schools;
- **Still must be able to demonstrate individualized determinations** related to delivery of programs and services during the pandemic;
- **Process** for defining FAPE **may be different** during a pandemic, but **still must be individualized, still must obtain parent input, still must demonstrate progress and equal access to general education;**
- **Litigation is on the horizon.**

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