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A Changing Educational Landscape: Requiring a Virtual Education Option for Qualifying Students with Disabilities

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**A CHANGING EDUCATIONAL LANDSCAPE: REQUIRING A
VIRUTAL EDUCATION OPTION FOR QUALIFYING
STUDENTS WITH DISABILITIES**

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Introduction

Michael, a tenth-grade student at the local high school, seemingly has it all: a starting position on the football team, straight A's, and a close-knit group of friends. While playing football with his friends in the park one weekend, Michael is tackled and lands on his neck, fracturing his spine. Thankfully, Michael will make a full recovery, but he needs surgery to repair the injury and three months of physical therapy. During this time, Michael will be mostly immobile and unable to leave his house. Although unable to be physically present at school, Michael wants to keep up with his peers and maintain his grades. Michael and his parents request that Michael attend class virtually, as he had done during the COVID-19 pandemic, so he can continue to engage with his classmates and be taught in real time. However, the school has determined that home instruction is the appropriate placement, which includes no peer engagement and limited, weekly, one-on-one sessions with a teacher. Unfortunately, despite Michael's preference to actively participate in his education virtually, and his positive contributions to the educational environment, current disability law in the United States does not require that his school provide him this opportunity.

This paper contends, because during the COVID-19 pandemic, virtual education became the normal mainstream method of instruction, schools cannot now claim that it is too burdensome to provide virtual education to qualifying students with disabilities. Qualified students, for purposes of this paper, are otherwise successful students who, due to acute health concerns, such as illness or surgery recovery, are unable to be physically present in the classroom for more than a month, like Michael. This paper will first explore a brief history of the relevant legal background applicable to this discussion. It will then outline how the COVID-19 pandemic impacted the current state of education in the United States. Next, it will define essential terms, both legally and for the purposes of this paper. Finally, relying on that foundation this paper will argue that, due to changes in the educational landscape, denying qualified students a virtual education is now a denial of the rights guaranteed by the federal government, specifically in the Individuals with Disabilities

Education Act (IDEA), the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act.

History and Legal Background

Historically, the American education system excluded disabled individuals from traditional classroom learning.¹ Families were left to care for and educate their own.² There was a common perception that the disabled were unable to participate in and benefit from a traditional education, and therefore disabled individuals were typically exempt from compulsory education laws.³ Throughout the early and mid-1900's, traditional education for the disabled improved, but still remained grossly inconsistent.⁴

In 1954, although typically known for establishing equal educational opportunity with regard to race, the Supreme Court stated in *Brown v. Board of Education* that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁵ Building upon the *Brown* foundation, the federal court in Pennsylvania decided in 1971, in *Pa. Assoc. for Retarded Children v. Pennsylvania*, that the state could not deny mentally disabled children access to free public education.⁶ This case was followed by another, *Mills v. Bd. of Education*, where the court concluded that eligible disabled children could not be,

excluded from a regular school assignment by a Rule, policy, or practice of the Board of Education ... or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing

¹ 4 Rapp, James A., *Education Law*, §10C (2021).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ 347 U.S. 483, 493 (1954).

⁶ 334 F. Supp. 1257, 1260 (E.D. Pa. 1971).

and periodic review of the child's status, progress, and the adequacy of any educational alternative.⁷

While the above cases demanded access to free public education for disabled individuals, there was no substantive requirement to that education.⁸ In 1975, Congress stepped in with the Education for All Handicapped Children Act (EAHCA), which has since been amended and is now known as the IDEA.⁹ The IDEA ensures that disabled children have access to a FAPE, including access to special education and related services.¹⁰ However, while the IDEA imposes an obligation to ensure a free appropriate public education, “a school does not have to maximize the potential of handicapped children.”¹¹ The IDEA works in conjunction with the ADA and the Rehabilitation Act, to prohibit discrimination against qualified individuals in federally assisted programs.¹²

The ADA seeks to provide a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities.¹³ The ADA precludes discrimination on the basis of disability, stating, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁴ Similarly, Section 504 of the Rehabilitation Act states, “no otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied

⁷ 348 F. Supp. 866, 872 (1972).

⁸ Rapp, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; See Also *Wilkins v. District of Columbia*, 571 F. Supp. 2d 163 (D.D.C. 2008) (holding that while home tutoring may be ideal, the district did not have to provide the most convenient or potential-maximizing education to provide a FAPE.).

¹² *Id.*

¹³ 42 U.S.C.S. § 12101 (LexisNexis 2021).

¹⁴ 42 U.S.C.S. § 12132 (LexisNexis 2021).

the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁵

Impact of COVID-19 on Education

The United States had its first confirmed Coronavirus case on January 21, 2020.¹⁶ Infections spread rapidly, and during a 3-week period in late February to early March, US cases increased a thousandfold.¹⁷ Officials implemented various public health measures to minimize contagion, such as restricting mass gatherings and international travel, initiating stay-at-home orders, and transitioning to virtual events.¹⁸ Educational institutions also took swift action, turning on a dime and providing virtual education for entire populations.¹⁹ Schools around the world transitioned 1.6 billion students, from 193 countries, to online learning.²⁰

During this transition, the Department of Education released guidance to schools in the United States to help them navigate the best way to continue educating our children: “School districts and postsecondary schools have significant latitude and authority to take necessary actions to protect the health, safety, and welfare of students and school staff.”²¹ The guidance further states that school leaders must be mindful of the requirements of the IDEA, ADA, and Rehabilitation Act to ensure they are providing safe environments free of discrimination.²² In additional guidance released with special regard to disability legislation, the Department of Education stated, “ensuring compliance with the [IDEA], Section 504 of the Rehabilitation Act, and Title II of the Americans

¹⁵ 29 U.S.C.S. § 794(a) (LexisNexis 2021).

¹⁶ Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24-April 21, 2020*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ James D. Basham, Jose Blackorby, & Matthew T. Marino, *Opportunity in Crisis: The Role of Universal Design for Learning in Educational Redesign*, 18 LEARNING DISABILITIES: A CONTEMPORARY JOURNAL 1 (2020).

²⁰ *Id.*

²¹ United States Department of Education Office for Civil Rights, *Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students*, OCR FACT SHEET CORONAVIRUS (Mar. 13, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>.

²² *Id.*

with Disabilities Act should not prevent any school from offering educational programs through distance instruction.”²³

Definitions

Before presenting the legal analysis, it is essential to define some terms for the purposes of this paper. The below terms are critical for an accurate understanding of the legal arguments:

- Alternative placement: Location where a student with disabilities is educate when the regular classroom is not the best placement.²⁴
- Home instruction: Instruction within a student’s home consisting of weekly visits with a teacher, tutor, or other education professional, along with instructions for completing classwork on their own at home.
- Least restrictive environment: IDEA preference that students are placed in an environment that is both best suited for their needs and not unnecessarily limiting.²⁵
- Qualified student with disabilities: For this paper, a qualified student with a disability is one like Michael: successful student, making educational progress and not disruptive in class, who is physically unable to attend school for a month or more due to illness, injury, or surgery recovery.
- Reasonable accommodation: public entity’s obligation to take reasonable measures to allow access to individuals with disabilities.²⁶
- Virtual education: education taking place within a student’s home, but with live classroom engagement via technology. This can be via discussion boards, synchronous courses, video-chat, and more.

Legal Analysis

This paper argues that in light of the COVID-19 pandemic, and subsequent transition to fully virtual education for all students, a qualified student is entitled to a virtual education by the IDEA, ADA, and Rehabilitation Act. This paper will first contend that a student’s advocate can argue that refusal to provide the student with virtual education would be a denial of FAPE under the IDEA, because a qualifying student would be a student with a disability under the IDEA, and

²³ United States Department of Education Office for Civil Rights, *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (Mar.21, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.

²⁴ 34 C.F.R. § 300.115 (LexisNexis2021).

²⁵ *Id.*

²⁶ 42 U.S.C.S. 12102(4) (LexisNexis 2021).

virtual education would be a special education or related service. Alternatively, even if not required under the IDEA, one can argue that virtual education should be considered a reasonable accommodation under the ADA and Section 504 of the Rehabilitation Act for qualifying students, because a qualifying student would meet the definition of a person with a disability and failure to provide a virtual education would be discrimination.

I. SCHOOLS MUST PROVIDE A VIRTUAL EDUCATION OPTION FOR QUALIFIED STUDENTS WITH DISABILITIES IN ORDER TO COMPLY WITH THE FAPE REQUIREMENT OF THE IDEA.

Students with qualifying disabilities should receive a FAPE in the form of a virtual education because they qualify as children with disabilities and virtual education qualifies as special education or related services. Schools receiving funding through the IDEA must provide a FAPE to children with disabilities.²⁷ To qualify as a child with a disability under the IDEA, a student must (1) have certain intellectual disabilities or impairments; and (2) by reason of those impairments, need special education or related services.²⁸

A. A qualifying student with disabilities meets the definition of a child with a disability under the IDEA.

A child who is unable to be physically present in the classroom for more than a month due to an acute health issue qualifies as a child with a disability under the IDEA. The IDEA defines child with disability as a child: (1) with certain intellectual, speech and language, visual, emotional, or orthopedic impairments, as well as autism, traumatic brain injury, other health impairments, or specific learning disabilities; (2) who needs special education and related services due to such impairment.²⁹ Further, the IDEA defines FAPE as special education and related services that: (1) are provided at public expense; (2) meet state educational agency standards; (3) include

²⁷ 20 U.S.C.S. § 1401(9) (LexisNexis 2021).

²⁸ 20 U.S.C.S. § 1401(3)(A) (LexisNexis 2021).

²⁹ *Id.*

involvement of an appropriate state school; and (4) are provided in conformity with an individual's IEP.³⁰ The IDEA requires schools to evaluate children with disabilities and come up with an IEP for them, to ensure they receive a FAPE. A student recovering from surgery, who is unable to make it into school, qualifies as a child with a disability because (1) they meet the criteria for having an impairment, and (2) because of their impairment, they need special education and related services.

i. Moderate-term absence due to surgery or illness qualifies as “other health impairment” under the IDEA.

The first part of the “child with a disability” criteria within the IDEA is that the child must have a qualifying impairment.³¹ This includes intellectual disabilities, hearing and speech impairments, emotional disturbances, brain injury, autism, other health impairments, learning disabilities, and orthopedic impairments.³² Although an acute medical challenge, such as surgery or recovery from an illness, is not specifically listed within the IDEA, a student meeting this definition would fall under the “other health impairment” category because they would: (1) have limited strength, vitality, or alertness with respect to the educational environment that, (2) is due to a chronic or acute health problem, and (3) adversely affects their educational performance.³³

The IDEA specifically states that students with other health impairments who need special education and related services qualify for a FAPE.³⁴ Other health impairments is elaborated upon to include, “chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome.”³⁵ Although this

³⁰ 20 U.S.C.S. § 1401(9) (LexisNexis 2021).

³¹ 20 U.S.C.S. § 1401(3)(A)(i) (LexisNexis 2021).

³² *Id.*

³³ 34 C.F.R. § 300.8 (LexisNexis 2021).

³⁴ 20 U.S.C.S. § 1401(3)(A)(i) (LexisNexis 2021)

³⁵ 34 C.F.R. § 300.8 (LexisNexis 2021).

definition does not explicitly include the acute health problems at issue here, recovery from surgery or illness resulting in an inability to physically be present in school, the list is not exhaustive, “but rather provides examples of problems that children have that could make them eligible for special education and related services under the category of other health impairment.”³⁶

Courts have also implicitly treated recovery from surgery as a disability under the IDEA. In *Ripple v. Marble Falls Indep. Sch. Dist.*, a high school student, was injured repeatedly while playing football.³⁷ After his injuries, Ripple had two unrelated surgeries—a thyroid nodule removal and tonsil removal.³⁸ During his recovery from both surgeries, Ripple received homebound instruction, including work sent home from school with instructions.³⁹ Similarly, in *Daniels v. S. F. Unified Sch. Dist.*, a student in California injured his leg in a car accident, requiring surgery.⁴⁰ Prior to his return to school, during his recovery, Daniels received home instruction to continue his education while he could not be present.⁴¹ Although the court did not explicitly state that either student was a student with a disability under the IDEA, the court applied the law assuming they were qualified.

Although surgery recovery is not explicitly listed in the IDEA as a qualifying disability, the text of the statute is not meant to be all-inclusive of each condition that qualifies as a health impairment.⁴² A student who is ill or recovering from surgery and is physically unable to attend school for a moderate amount of time qualifies as having a health impairment under the IDEA. Qualifying students will be lacking strength, vitality, or alertness due to their condition, such as Michael who will lack the motor skills to be mobile for three months. Further, students in this

³⁶ 71 Fed. Reg. at 46550.

³⁷ 99 F. Supp. 3d 662, 668 (W.D. Tex. 2015).

³⁸ *Id.* at 669-70.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 71 Fed. Reg. at 46550.

category are suffering from acute conditions which “occur suddenly, have immediate or rapidly developing symptoms, and are limited in their duration.”⁴³ This condition adversely affects the student’s educational performance if they are unable to be physically present in school, and as such, would miss out on their education. In addition to meeting the specific definition of “other health impairment,” courts have repeatedly treated surgery recovery as a qualifying disability under the IDEA. Due to fitting the definition of “other health impairment,” as well as precedent, surgery recovery qualifies as a qualifying disability under the IDEA.

ii. Virtual education meets the criteria for special education and related services under the IDEA.

Virtual education qualifies as a special education or related service under the IDEA because it is a developmental, corrective, and supportive service required to assist a child with a disability to benefit from special education.⁴⁴ Special education means “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”⁴⁵ Specially designed instruction means adapting, as appropriate, the content, methodology, or delivery of instruction.⁴⁶

The Department of Education has already recognized that virtual education can meet the requirements under FAPE. In guidance released on March 21, 2020, the Department stated, “ensuring compliance with the IDEA . . . should not prevent any school from offering education programs through distance education.”⁴⁷ The guidance continues to explain that the Office of Civil Rights and the Office of Special Education and Related Services understand that FAPE may include, where appropriate, special education and related services provided through distance

⁴³ Jennifer Whitlock, *The Difference Between Acute and Chronic Illnesses*, VERY WELL HEALTH, (Mar. 25, 2020), <https://www.verywellhealth.com/chronic-definition-3157059>.

⁴⁴ 20 U.S.C.S. § 1401(26)(A) (LexisNexis 2021).

⁴⁵ 20 U.S.C.S. § 1401(29) (LexisNexis 2021).

⁴⁶ 34 C.F.R. § 300.39(b)(3) (LexisNexis 2021).

⁴⁷ Supplemental Fact Sheet, *supra* note 23.

instruction—virtually, online, or via telephone.⁴⁸ The guidance emphasizes that federal disability law allows flexibility in determining how to meet individual needs of a student with disabilities.⁴⁹

Although a relatively new development, some courts have also acknowledged that virtual education can meet the requirements of special education and related services under the IDEA. In a recent case, *Hernandez v. Grisham*, state guidance on COVID-19 procedure required all public schools in New Mexico to close and all instruction to be delivered virtually.⁵⁰ Since non-disabled students were being educated virtually, New Mexico guidance required disabled students also have access to education in compliance with the IDEA.⁵¹ The guidance also allowed, but did not require, students with disabilities to be taught in-person in groups smaller than five.⁵² Plaintiffs in the case filed a complaint alleging denial of FAPE because their district prohibited in-person instruction in favor of virtual education.⁵³ Plaintiffs alleged that this denied the disabled student a uniform educational system that met critical socialization requirements.⁵⁴ The court stated that IDEA’s history indicated that Congress’s goal was to prevent disabled students from being separated from non-disabled, and that Congress understood that new technology could change how we define a regular educational environment.⁵⁵ “Providing children with disabilities access to the same remote instruction that children without disabilities receive, therefore, fits within the statute’s presumption in favor of placement in a “regular educational environment.”⁵⁶ The court acknowledged in dicta that, even absent a pandemic, the best placement for a child may be his or her home.⁵⁷

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ U.S. Dist. LEXIS 238477, 13 (D.N.M. Dec. 18, 2020).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 33-34.

⁵⁴ *Id.* at 219-20.

⁵⁵ *Id.* at 220.

⁵⁶ *Id.*

⁵⁷ *Id.*

According to the Department of Education’s guidance, virtual education FAPE may include virtual education, where appropriate.⁵⁸ The guidance also emphasizes the flexibility of federal disability law.⁵⁹ Although the guidance was issued during the COVID-19 pandemic, it is likely that there may be other situations where virtual education is the most appropriate manner of instruction.

Although a state case and not binding federally, the *Hernandez* case exhibits that the goal is to reduce, and ultimately eliminate, separation between disabled and non-disabled students.⁶⁰ It also discusses how Congress was aware that changes in technology may ultimately alter the landscape of how all students have been taught.⁶¹ Since all students have now been taught remotely, and can continue to be taught in such a manner if circumstances necessitate it, utilizing remote instruction to benefit qualified disabled students would be a type of special education—adapting the delivery of instruction as appropriate. Despite virtual education not currently being required to accommodate a FAPE, that does not mean that there is no room for advancement. Further, now that most schools in the United States have had to implement virtual education on some level, it is less of a burden to determine the details for an individual or small handful of students who may benefit from this option.

B. Due to the numerous benefits, and minimal cost, of virtual education, virtual education should be a required option for alternative placement under the IDEA.

Virtual education should be a required option as an alternative placement under the IDEA because there are a number of benefits, minimal cost, and it would align with the goals of the IDEA to integrate students with disabilities into their normal classroom as much as possible. There is a preference within the IDEA that a student’s IEP includes their “placement”—or the location where

⁵⁸ Supplemental Fact Sheet, *supra* note 23.

⁵⁹ *Id.*

⁶⁰ *Hernandez*, *supra* note 47.

⁶¹ *Id.*

their learning will take place.⁶² The Department of Education has promulgated regulations that assist schools in determining placements.⁶³ Placements should be determined at least annually, and should be based on the child's IEP and be as close as possible to the child's home.⁶⁴ Children should typically be educated within the school that they would attend if not disabled.⁶⁵ However, the Department of Education also understands that alternative placements may be necessary when the typical school is not the best option for placement.⁶⁶ They require each public agency have a continuum of alternative placements, which dictates options for students who cannot be educated in their typical school.⁶⁷ The continuum of alternative placements includes options such as special classes, special schools, home instruction, and instruction in hospitals and institutions.⁶⁸

Home instruction is not a placement that is taken lightly as it runs counter many of the goals of IDEA.⁶⁹ The Department of Education has stated that it is the most restrictive type of placement because it does not allow education to take place with other children.⁷⁰ Guidance further states that home instruction should only be used in limited circumstances, when students cannot be educated with other children even with the use of related services and supplementary aids and services—such as when a child is recovering from surgery.⁷¹ The IDEA currently does not mention virtual education as an alternative placement for students unable to be present in class.⁷²

Most schools in the United States engaged in virtual learning during the COVID-19 pandemic. Forty-eight states and four territories forced school closures, impacting 56.6 million

⁶² *Id.*

⁶³ 34 C.F.R. § 300.116 (LexisNexis 2021).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Rapp, *supra* note 1.

⁶⁷ 34 C.F.R. § 300.115 (LexisNexis 2021).

⁶⁸ *Id.*

⁶⁹ Rapp, *supra* note 1.

⁷⁰ 64 FR § 12406.

⁷¹ 64 FR § 12406.

⁷² Rapp, *supra* note 1.

students.⁷³ These institutions transitioned entire student populations from in-person to virtual learning in a matter of days or weeks.⁷⁴ Therefore, while many schools may not have had the infrastructure before, the vast majority certainly do, now.

However, even schools that claim they do not have the proper infrastructure likely cannot claim that cost is too big a burden to overcome to provide virtual education to qualifying students. In *Cedar Rapids Cmty. Sch. Dist. V. Garret F. by Charlene F.*, the school argued that the financial burden required to provide services to the student was too great to bear.⁷⁵ The Court stated that, although the District's financial concerns may have been legitimate, the Court's job was to interpret the law as it exists.⁷⁶ The Court held that, since the IDEA does not employ cost in its definition of related services, a cost-based standard cannot be the sole test for determining the scope of provision required by the law.⁷⁷

Since most schools have engaged in some sort of virtual learning, and thus have the capacity, the financial burden on the educational system is relatively low. Due to the great benefit of allowing students recovering from surgery to remain engaged through virtual learning, and the relatively low cost to the institution, a FAPE under IDEA should require virtual learning as an alternative placement when in-classroom learning is not possible, particularly for qualified students who are unable to be physically present in the classroom for a month or more.

II. EVEN IF NOT REQUIRED UNDER THE IDEA, VIRTUAL EDUCATION SHOULD BE CONSIDERED A REASONABLE ACCOMMODATION UNDER THE ADA AND SECTION 504 OF THE REHABILITATION ACT FOR QUALIFYING STUDENTS WITH DISABILITIES.

⁷³ Basham, *supra* note 19.

⁷⁴ *Id.*

⁷⁵ 526 U.S. 66 at 76-77 (1999).

⁷⁶ *Id.*

⁷⁷ *Id.*

Denying virtual education to qualifying students would be denial of a reasonable accommodation under the ADA and Rehabilitation Act and therefore would be unlawful discrimination. The ADA and the Rehabilitation act have similar requirements to establish a prima facie case of discrimination: (1) the individual must be disabled and otherwise qualified to participate in school activities; (2) must be excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (3) the school or board of education knew or should reasonably have known about the disability.⁷⁸ In the case of a student recovering from surgery or an illness, where an advocate is requesting virtual education, knowledge of the disability can be assumed. Therefore, denial of virtual education to a student recovering from surgery would be a violation of both the ADA and Section 504 because: (1) a student recovering surgery meets the definition of disabled within both acts; (2) denying the student virtual education would be discrimination-a denial of a FAPE under Section 504 and a failure to make a reasonable accommodation under the ADA.

A. Qualifying students recovering from surgery or illness qualify as disabled under the ADA and Section 504 of the Rehabilitation Act.

The ADA and Section 504 of the Rehabilitation Act use the same definition of disability. A disabled individual is one who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment.⁷⁹ Major life activities include, but are not limited to: caring for oneself, eating, sleeping, communicating, standing, and performing major bodily functions.⁸⁰ The ADA further advises that the definition of disability should be construed broadly.⁸¹ The definition of disability for both the ADA and Rehabilitation Act acknowledges the temporary and transitory nature of

⁷⁸ *Id.*

⁷⁹ 42 U.S.C.S. § 12102(1)(LexisNexis 2021).

⁸⁰ 42 U.S.C.S. § 12102(2)(LexisNexis 2021).

⁸¹ 42 U.S.C.S. § 12102(4)(A) (LexisNexis 2021).

some disabilities.⁸² Specifically, the legislation states that, for individuals “regarded as” having an impairment, transitory impairments are not disabilities if there is an expected duration of six months or less.⁸³

Although temporary, non-chronic disabilities with no long term or permanent impact are typically not disabilities, regulations from the Equal Opportunity Employment Commission, who guide ADA application to workplaces, state that an impairment does not have to be permanent to rise to the level of a disability.⁸⁴ In these cases, EEOC guidance states that because the duration of some conditions may be unknown or at least several months, these conditions may constitute disabilities.⁸⁵ The EEOC regulations state that an impairment lasting less than six months can constitute a disability if it is sufficiently severe.⁸⁶

Courts agree with the EEOC’s interpretation of the ADA and believe that short-term surgery recovery that results in substantially limiting a major life activity is a disability. In *Summers v. Altarum Inst., Corp.*, the Court stated that sufficiently severe temporary impairments may constitute disabilities.⁸⁷ In that case, a government contractor employee severely injured his leg and needed surgery to correct it.⁸⁸ While the district court held that Summers’ injury did not constitute a disability because it was temporary, the circuit court reversed.⁸⁹ The circuit court stated, “[a]lthough short-term impairments qualify as disabilities only if they are ‘sufficiently severe,’ it seems clear that the serious impairment alleged by Summers is severe enough to qualify.”⁹⁰ Further, the court determined that the EEOC’s interpretation of the statute was reasonable, and that severe, temporary impairments qualifying as disabilities advances the goal of

⁸² 42 U.S.C.S. § 12102(3)(C) (LexisNexis 2021).

⁸³ 42 U.S.C.S. § 12102(3)(B) (LexisNexis 2021).

⁸⁴ 29 C.F.R. § 1630.2(j) (LexisNexis 2021).

⁸⁵ EEOC, Interpretive Manual (1995), reprinted in 2 EEOC Compliance Manual § 902.4(d), at 902-30 (BNA 1997)

⁸⁶ 29 C.F.R. § 1630.2(j)(1)(ix).

⁸⁷ 740 F.3d 325, 327 (4th Cir. 2014).

⁸⁸ *Id.*

⁸⁹ *Id.* At 330.

⁹⁰ *Id.*

the ADA.⁹¹ The court also stated that temporary impairments can include broken bones and torn tendons and other short-term serious injuries.⁹²

In the event of a student recovering from a surgery, who is unable to physically make it to school, it is likely that they meet the definition of disability under the ADA and Section 504. A student physically unable to make it to the school building has a substantial limitation of a major life activity. For example, a student recovering from some surgeries may be unable to walk, may be unable to sit or stand for extended periods of time, or have some other mobility issue that interferes with their ability to physically attend school, such as Michael who was fully immobile. A qualifying student who is unable to physically be present in school for at least a month due to illness or injury is therefore likely to have a disability within the meaning of the ADA and Section 504 of the Rehabilitation Act.

B. Virtual education is required to comply with the FAPE requirement under Section 504 of the Rehabilitation Act.

Section 504 of the Rehabilitation Act protects individuals with disabilities by prohibiting exclusion, solely on the basis of disability, in programs receiving federal financial assistance.⁹³ Section 504 requires public school districts who receive federal funds to provide a FAPE to each qualified person with a disability.⁹⁴ A FAPE under Section 504 requires students with disabilities have an equal opportunity to participate in school and requires the district provide special education to meet the student's individual needs.⁹⁵ Virtual education is required to provide a FAPE

⁹¹ *Id.*

⁹² *Id.*

⁹³ 29 U.S.C.S. § 794 (LexisNexis 2021).

⁹⁴ Arne Duncan and Russlyn Ali, *Free Appropriate Public Education for Students With Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. DEPARTMENT OF EDUCATION (Rev. Aug. 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html>.

⁹⁵ 34 C.F.R. § 104(A)-(D)

via Section 504 because it is the best fit to meet individual needs, allows disabled students to be educated with nondisabled students, and can be made in accord with appropriate procedures.⁹⁶

Section 504 requires that students with disabilities be educated with nondisabled students.⁹⁷ This is to the maximum extent appropriate, and there is an understanding that the same placement may not always be possible.⁹⁸ If a district cannot meet a student's needs, the district may propose, or the parent may seek, an alternative placement.⁹⁹ Specific aids and services must be provided for students with disabilities, if needed.¹⁰⁰ This can include interpreters for deaf students, note takers for blind students, and transportation for mobility impaired students.¹⁰¹

Finally, these decisions must be made in accord with appropriate procedures. Decisionmakers cannot base placement decisions on stereotypes.¹⁰² This is one reason that an IEP is required for each individual student.¹⁰³ There must be appropriate standards for conducting evaluations and implementing related services and special education.¹⁰⁴ Decisions must be made in accordance with due process procedures, including an impartial hearing if guardians disagree with the school's decisions.¹⁰⁵

Virtual education for a qualified disabled student serves the need of individual students and ensures that they receive the same education as their non-disabled peers. Now that most schools have shown that it is possible, when this sort of distance learning would meet a unique need for a student with disabilities, it cannot be easily dismissed as too costly or impractical, as it may have been in the past. Throughout the COVID-19 pandemic, schools worked to provide internet access

⁹⁶ Duncan, *supra* note 91.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

and computers to all students to ensure they could access virtual content.¹⁰⁶ Now that schools have found ways to make content available online, and to allow students to access it, it is their obligation to continue to provide this service to qualifying students who are unable to make it to the classroom.

Additionally, allowing for virtual education ensures more than home instruction that qualifying disabled students are educated with their peers. Students who are educated virtually have a wide array of options for participating with their peers. They can engage in online discussion boards, participate through synchronous video streaming, engage in group work and discussion, and listen to their peers' questions, thoughts, and concerns during class. Home instruction lacks these important components where students must work independently, without the benefit of a thorough understanding from a class discussion. Although not able to be physically present with their peers, qualifying disabled students are able to engage with them intellectually, and even socially if some extracurriculars could convert to an online format, as well.

Finally, implementing a virtual education mandate for qualifying individuals under Section 504 would not deny any student procedures or due process. It is a more flexible option that addresses many concerns that parents may have when the alternative is their child being removed from the classroom. Having the option of virtual education available further supports not making decisions based on stereotyping different conditions. Students who are recovering from surgery should not be labeled as being unable to participate in class discussion, unwilling to come into school, and looking for a way to get off easy. They have had experiences that put them in an uncomfortable position and may be striving to maintain some sense of normalcy and contact with their peers. This option allows for that when it is needed. Because virtual education is designed to

¹⁰⁶ *NJDOE Says Every Student Now Has Internet Access, Closing the 'Digital Divide'*, NEW JERSEY SCHOOL BOARDS ASSOCIATION (Mar. 16, 2021), <https://www.njsba.org/news-publications/school-board-notes/march-16-2021-vol-xliv-no-35/njdoe-says-every-student-now-has-internet-access-closing-the-digital-divide/>.

meet individual needs, allows students with disabilities to be educated with their peers, and is not contrary to appropriate procedures, virtual education is required to meet the FAPE requirement under Section 504 of the Rehabilitation Act.

C. Failure to provide a virtual education to a qualifying student is discrimination based on disability and schools would be liable under a failure to modify claim under the ADA and Rehabilitation Act.

Schools that fail to provide a virtual education to qualifying students with disabilities would be denying them a reasonable accommodation, and thus would be liable under the ADA and Section 504. Students with disabilities are entitled to reasonable modifications to ensure they are not denied access to programs and services that are federally funded.¹⁰⁷ The ADA requires that educational institutions make reasonable accommodations and provide auxiliary aids and services for individuals with disabilities.¹⁰⁸ This means that schools must be prepared to make adjustments or modifications in programs and related services.¹⁰⁹ Reasonable accommodations may include: extra time on tests, access to an elevator, schedule changes, or assistance taking notes.¹¹⁰ Auxiliary aids and services may include an interpreter, closed captioning, or assistive learning systems.¹¹¹ The reasonable accommodation requirement under both the ADA and Rehabilitation Act are interpreted the same.¹¹² An individual can show discrimination under the ADA or Rehabilitation Act by showing that “(1) the defendant intentionally acted on the basis of disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant’s rule disproportionately impacts disabled people.”¹¹³

¹⁰⁷ Rapp, *supra* note 1.

¹⁰⁸ 42 U.S.C.S. § 12102(4)(1)(E)(i) (LexisNexis 2021).

¹⁰⁹ Rapp, *supra* note 1.

¹¹⁰ Rapp, *supra* note 1.

¹¹¹ U.S. Department of Justice, Civil Rights Division, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, DOE AND DOJ DCL FAQs (Nov. 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>.

¹¹² *Washington v. Ind. High Sch. Ath. Ass'n*, 181 F.3d 840, 846 (7th Cir. 1999)

¹¹³ *Id.* at 847

A failure to modify claim has been supported by the Supreme Court, saying, “situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.”¹¹⁴ To establish a failure-to-modify claim, a plaintiff must show that the denial of the modification prevented them from participating in or enjoying the benefits of the service, program, or activity, or otherwise subjected them to discrimination.¹¹⁵ The plaintiff must also show that the requested modification was reasonable.¹¹⁶ Public entities subject to Title II of the ADA, such as k-12 educational institutions, do not need to make changes to programs that would fundamentally alter them.¹¹⁷ They also do not need to alter programs in ways that would incur undue financial burdens.¹¹⁸

Providing virtual education to qualifying students who are recovering from surgery is a reasonable accommodation under the ADA and Rehabilitation Act. In light of the COVID-19 pandemic, virtual education does not fundamentally alter educational programs, nor does it impose an undue financial burden. As the Department of Education has articulated, complying with the ADA and Rehabilitation Act should not prevent a school from offering distance instruction.¹¹⁹ Distance instruction has already been used as a reasonable accommodation for entire student populations who were unable to safely attend class in person.¹²⁰ Since distance education has already been utilized for millions of students as the best alternative to in-person classes, denying that opportunity to students with disabilities would prevent them from participating in, and enjoying the benefits of, their education. Virtual education allows for a level of interaction that home instruction does not. It has already been established that students can enjoy the benefits of

¹¹⁴ *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979)

¹¹⁵ *Pollack v. Reg'l Sch. Unit 75*, 12 F. Supp. 3d 173, 187 (D. Me. 2014)

¹¹⁶ *Id.*

¹¹⁷ 28 C.F.R. § 35.130(b)(7) (LexisNexis 2021).

¹¹⁸ 28 C.F.R. § 35.150(3) (LexisNexis 2021).

¹¹⁹ Supplemental Fact Sheet, *supra* note 23.

¹²⁰ Basham, *supra* note 19.

virtual education under certain circumstances. Therefore, qualifying disabled students should be able to continue to enjoy the benefits of participating in class in this manner.

Further, the Department of Education has already stated that virtual education is a sufficient substitute for in-person instruction under certain circumstances.¹²¹ Although perhaps not exactly the same as in person learning, virtual education allows students to engage with the material and their peers in a way home instruction does not. Virtual education cannot be deemed sufficient for all, yet not for some. Therefore, because distance education has already been said to meet the needs of all students under certain circumstances, it must continue to be an option for qualifying students.

Finally, providing virtual education to students with disabilities would not cause an undue financial burden on educational institutions.¹²² Undue financial burden is an affirmative defense to providing a reasonable accommodation.¹²³ The assessment of whether there is an undue financial burden on a public entity is individualized and fact-specific.¹²⁴ However, since virtual education has already been utilized nationwide as a viable means of educating the masses, it is unlikely that a district can now claim there is an undue financial burden. Schools have already set up the needed infrastructure to conduct virtual education for over a year, and therefore the up-front costs associated with virtual education have already been incurred. Although there are some costs associated with upkeep and maintenance, the ADA and Rehabilitation Act do not require that there is no financial burden, just not an undue one. Therefore, denial of a virtual education would be denial of a reasonable accommodation, and thus discrimination under the ADA and Section 504 of the Rehabilitation Act.

Conclusion

¹²¹ Supplemental Fact Sheet, *supra* note 23.

¹²² 28 CFR §35.164 (LexisNexis 2021).

¹²³ *Id.*

¹²⁴ *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185 (10th Cir. 2007).

The COVID-19 pandemic has forever changed a lot of things, including the education landscape. While there were many challenges to overcome, there was also great development and opportunity. The normalization of virtual education is one opportunity that we should continue to work into our regular educational practices, especially when it comes to accommodating qualifying individuals with disabilities.

The transition to virtual learning has not always been easy and implementing a virtual education option for students who are recovering from surgeries will come with complexities. Virtual education still has drawbacks similar to home instruction in that there is limited peer interaction and socialization. There also may be a slippery slope with regard to who qualifies to receive virtual education and who does not meet the criteria. However, virtual education provides more interaction than simply home instruction. Additionally, accommodations and adaptations for students with disabilities are already handled on a case-by-case basis. Adding in this additional option would not be any greater of a burden than the system already in place. Further, this paper does not seek to claim that all students with disabilities who cannot attend school in person should have the option to attend virtually. There may be cases where students are disruptive to class operations or are unable to benefit from virtual education, and those students should have educational plans tailored to their needs and their ability to be successful.

There is also the issue of different types of virtual education and what type of opportunity a school may owe to its students. For example, some schools may have the ability to conduct live streamed classes to their students, and students at home can participate in real time. Other schools may only have online forums available for their students or the opportunity for students to watch back recorded lessons. It is normal for schools to vary in their teaching and delivery methods—and virtual education is no different. The question should be less about a minimum standard for virtual education and more about whether the institution is providing the same opportunities for disabled

students to learn virtually as it offered for nondisabled students during COVID-19. This is the determining factor on whether schools are discriminating and is indicative of the duty they owe to their disabled students.

Finally, there is still the challenge of inequity in education and students having access to virtual education across the country. A very limited number of schools may not have implemented virtual learning during COVID-19, and thus do not have the infrastructure to transition to this accommodation. It's possible that these institutions face an undue financial burden. Additionally, although states are working to close the digital divide, students from marginalized, impoverished, and rural areas are less likely to have access to reliable internet and computers. This may increase educational inequity and make it so that these students fall even further behind. However, it's important to be creative with solutions. Once the vast majority of students are back to in-person learning, schools can have a limited number of laptops and mobile broadband access points to distribute to qualifying students who need to learn virtually. There is no need to have the infrastructure to support the entire student body when only a handful of students at any given time may need the accommodation. Further, there is the possibility of legislation that may make broadband more accessible to all, at little or no cost to educational institutions.¹²⁵

The IDEA, ADA, and Rehabilitation Act seek to protect individuals with disabilities from being separated from their peers while in school.¹²⁶ Unfortunately, reliance on home instruction as an alternative placement without requiring access to virtual education denies qualifying students their right to an accessible education. Although in the past, such a requirement may have seemed unfeasible due to lack of infrastructure, cost, and unexplored virtual options, the COVID-19 pandemic has changed that.¹²⁷ Students who meet certain qualifying criteria, such as recovering

¹²⁵ *Fact Sheet: The American Jobs Plan*, THE WHITE HOUSE (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

¹²⁶ Rapp, *supra* note 1.

¹²⁷ Basham, *supra* note 19.

from a surgery, are entitled to a free appropriate public education under the IDEA and Section 504 of the Rehabilitation Act.¹²⁸ Further, under the Rehabilitation Act and the ADA, they are also entitled to reasonable accommodations to the delivery of their education as long as it does not fundamentally alter the program for cause undue hardship.¹²⁹ Due to the changing technological and educational landscape, providing virtual education is not an undue hardship, nor does it fundamentally alter the program. Therefore, these qualifying students are entitled to a virtual education.

¹²⁸ See 20 U.S.C.S. § 1400 (LexisNexis2021); 29 U.S.C.S. § 794(a) (LexisNexis 2021).

¹²⁹ See 29 U.S.C.S. § 794(a) (LexisNexis 2021); 42 U.S.C.S. § 12101 (LexisNexis 2021).