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When Stay Put Meets Stay at Home: An Examination of the Effects of the COVID-19 Pandemic on the Stay Put Provision of the IDEA

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I. Introduction

Stay put. This phrase became increasingly meaningful worldwide at the onset of the global COVID-19 pandemic, but it has long been meaningful within the framework of the Individuals with Disabilities Education Act (IDEA).[1] In that context, the stay put provision provides that when a new educational placement is suggested and contested, the student must be permitted to remain in their last agreed-upon placement while the issue is reviewed by the administrative body.[2] In short, stay put functions as an automatic injunction in place to protect students from unnecessary upheaval. This small provision within the larger IDEA has long been the source of some confusion and concern, most often stemming from a split within circuit as to the provision's duration.[3] But the world-shifting pandemic brought with it a whole new wave of complications and cases focused on the broader concern – what role does the stay put provision play when everything shuts down and upheaval is unavoidable?

This Comment will first outline the aims of the broader IDEA before examining the reasoning and history of the stay put provision. Part II will provide context for the goals and aims of the IDEA, while Part III will explore the history and development of the stay put provision as well as standards for a free and appropriate education. Part IV will analyze how the stay put provision has been invoked and litigated during the COVID-19 pandemic, arguing that

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[1] Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482 (2004).

[2] *See id*. § 1415 (j) (2004).

[3] *See generally* Lisette Guzman, Comment, *In Defense of Disabled Students: Why the Stay-Put Provision Protects Student Placement Throughout the Entire Appeals Process*, 12 SETON HALL CIR. REV. 291.

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courts should endeavor to focus on the importance of "individuals" baked into the very foundation of the IDEA. Advocating and upholding ideals of equity over equality, even in times of unprecedented hardship, is the surest way to serve the justice owed to some of the most vulnerable members of our community.

II. The Idea Behind IDEA

For generations, society turned a blind eye to the plight of the disabled, hiding them away and denying them equal opportunities regarding employment, housing, healthcare, public facilities, and education. Congress began to address these issues with the enactments of Section 504 of the Rehabilitation Act and the Education for All Handicapped Children Act in the 1970s.[4] The importance of providing education to all children was underlined as courts applied due process and equal protection analysis to claims of disability discrimination in educational settings, relating these to racial discrimination.[5] For five decades, this country has recognized the vital importance of providing access to public education to all students, regardless of their disability status. In that time, Congress has continued to develop the protections provided to these children by codifying the expansion of their rights within the ADA and subsequent amendments.[6] In all this time, legislation has expanded the rights and protections for disabled students, repeatedly doubling down on the key concept that it is the responsibility of the public to provide for these individuals.[7] Most recently, in 2004 Congress amended the IDEA to extend protections and broaden the definitions of who is to be protected by these kinds of legislation.[8]

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[4] The Rehabilitation Act of 1973, 29 U.S.C. § 701 (1973).
[5] *See generally* Guzman, *supra* note 3.
[6] *See generally* IDEA, supra note 1.
[7] US DEPT. OF EDUCATION, IDEA: About IDEA, https://sites.ed.gov/idea/about-idea/#IDEA-Purpose.
[8] Individuals with Disabilities Education Improvement Act of 2004, 118 Stat. 2647 (2004).

Like the ADA, the IDEA was enacted to address a pervasive problem in the way that children with disabilities – be they physical, behavioral, emotional, or intellectual challenges – were treated in educational environments.[9] Most of the time, these children were either banned from the classroom entirely, segregated from "normal" children, or ignored and mistreated until they could leave on their own accord. To integrate these children into the public education system in a real way and provide them with a level of educational support they deserve, the IDEA requires that special education and services are provided to each and every disabled child.[10] According to the IDEA, a disabled student is entitled to an education that is free, appropriate, and individualized – a FAPE for short.[11] This FAPE is to be provided in the least restrictive appropriate setting, though a bright line rule has never been established to help define exactly what that means.[12] Instead, IDEA includes specific instruction and procedures to determine when a district is providing the necessary services, including the Individualized Education Plan (IEP) process.[13] The placement and services that define a FAPE for each child is defined in conformity with an IEP that must be tailored specifically to each child, regularly reviewed, and revised as necessary.[14] IEPs are built through an interactive process between the child's teacher, parents or guardian, and a representative of the educational agency.[15] The IEP document must include a statement of the child's present levels of educational performance, annual goals and short-term objectives, the services currently provided to the child, and objective criteria and evaluation procedures that will be used to determine if educational objectives are

[9] 20 U.S.C. § 1400 (c) (2004).
[10] *Id*.
[11] *Id*. at § 1401 (9) (2004).
[12] *Id*.
[13] *Id*. at § 1414 (2004).
[14] *Id.*
[15] 20 U.S.C. § 1414 (2004).

being achieved.[16] The parents/guardians of the child must be notified as to any proposed changed in the child's "identification, evaluation, or placement."[17] When such a change is proposed, the stay put, or pendency, provision comes into play.

III. History and Development of the Stay Put Provision

This history of IDEA jurisprudence is a battleground of balancing interests. Why does the IDEA include a provision directing that a child "shall remain in the then-current educational placement" unless otherwise agreed-upon "during the pendency of any proceedings" arising from the act itself?[18] In short, to ensure stability and protection. Stay put functions as "a preliminary injunction that does not require the usual showing of irreparable harm" and allows a student to stay within their current environment while the issue is resolved.[19] Stay put is often invoked when a district wishes to bring a student in-district from an out of district setting, or a school proposes changes to the duration and/or frequency of related services such as occupational or speech therapy or extended school day – though it can also be invoked by districts when parents request similar changes.[20] Once the provision has been invoked by either party filling out the proper paperwork within the allotted period of time, the child's current program must be maintained until the issue is resolved – no matter how long it takes.[21]

Mills v. Board of Education is an early case that laid the groundwork for establishing special educations protections and granting constitutional protections for students with disabilities.[22] While the *Mills* Court spent much of its time discussing and highlighting the educational rights

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[16] *Id*.
[17] Bd. of Ed. of Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 177 (1982).
[18] *See* 20 U.S.C. § 1415 (j) (2004), supra note 2.
[19] Guzman, *supra* note 3, at 300.
[20] *Id*. at 300-302.
[21] *Id*.
[22] Mills v. Board of Education, 348 F. Supp. 866, 874 (1972).

of the "exceptional" student plaintiffs, subsequent cases have found within *Mills* language the foundation for the stay put provision as well.[23] Citing *Mills*, the Supreme Court in *Honig v. Doe* stated that it seemed clear that Congress "meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students" and deny officials the right to remove disabled students from their placements without "the permission of the parents or, as a last resort, the courts."[24] So then, how to determine when a student is receiving a FAPE, and when they are not? Though the stay put provision works to protect students from potentially harmful unilateral decisions made by school officials, courts cannot "substitute their own notions of sound educational policy" for the recommendations and policies of the districts, which are given a high level of deference.[25] Standards to define a satisfactory FAPE, and thus an adequate placement, were raised in recent years with the Supreme Court's decision in *Endrew F.* which further emphasized the importance of individualized assessment – there are as many definitions for a FAPE as there are disabled children in need of support and resources.[26]

A. More than Merely Minimum but Less than Ideal: FAPE Standards Post-*Endrew F.*

The Supreme Court first examined the issue of determining if the educational benefits and resources provided were sufficient to satisfy a child's right to a FAPE in a 1982 case, *Board of Ed. of Hendrick Hudson Central Sch. Dist., Westchester Cit. v. Rowley*.[27] Amy Rowley, a hearing impaired first grade student, performed well in school and advanced alongside her peers from grade to grade.[28] Even so, her parents believed that her IEP should be amended and expanded to include a sign-language interpreter in all classes in order to provide her with an

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[23] *Id*.
[24] Honig v. Doe, 484 U.S. 305, 323-25 (1988).
[25] *Rowley*, 458 U.S. at 206.
[26] *See generally* Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).
[27] *See generally* 458 U.S. 176, 179-210 (1982).
[28] *Id*. at 185.

educational opportunity that was equal to her non-disabled peers.[29] The *Rowley* Court rejected this equal opportunity standard due in part to the difficulty of measurements and comparisons necessary to determine such educational equality, even among general education students.[30] The *Rowley* decision did, however, determine that though the IDEA does not establish specific FAPE requirements, it does "guarantee a substantively adequate" educational program, "reasonably calculated to enable the child to receive educational benefits."[31] For Amy, this meant that her existing IEP satisfied her FAPE requirements.[32] For countless other disabled students, the absence of a defined test of adequacy meant that over the ensuing 35 years lower courts did their best to apply the *Rowley* standard to more challenging cases.

Endrew F., diagnosed with autism at age two, attended public school through the fourth grade.[33] Though he progressed through the grade levels, his behavioral issues made it difficult for him to learn in the classroom setting.[34] From year to year, Endrew's IEP merely repeated the same basic goals, and his parents came to believe that his academic progress had stalled.[35] When the school proposed an unchanged IEP for fifth grade, Endrew's parents removed him from the public school and enroll him in a private school that specializes in providing education for autistic children.[36] At the private school, Endrew's "behavior improved significantly, permitting him to make a degree of academic progress" he was unable to make in the public school.[37] Endrew's parents subsequently filed a complaint seeking tuition reimbursement, arguing that the

[29] *Id*. at 198.
[30] *Id*. at 199.
[31] *Id*. at 207.
[32] *Rowley*, 458 U.S. 176 at 202.
[33] *Endrew F*., 137 S. Ct. 988 at 996.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.

public school district had failed to provide Endrew with a satisfactory FAPE.[38] The District Court and Tenth Circuit affirmed the district's decision, relying as it had for years on *Rowley's* language that though services and support must be reasonably calculated to "confer some educational benefit," the definition of some benefit is merely more than no benefit.[39] An amicus brief filed by the National Association of State Directors of Special Education decried the Tenth Circuit's standard at the time as "just-above-trivial" and argued that educators were already applying their own higher, more meaningful standard.[40] The Supreme Court raised this basement-level standard in the *Endrew* decision by declaring that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[41] A win for students, the higher standard demands that disabled children be given the resources needed to "meet challenging objectives" at their own level and pace, instead of simply making progress so minimal it would be comparable to sitting idly and passing time.[42] Again, the importance of a fact-intensive, specially designed, individualized program was stressed.[43] One size will never fit all.

Though a win for student rights advocates, the decision included strong language calling for deference to the expertise and judgement of school and district officials.[44] A flexible standard that defers to the expertise of schools allows for the ever-present balancing of interests. Sasha Pudelski, a lobbyist for the School Superintendents Association, noted at the time that in practice the heightened standard was unlikely to have "a big impact on district policies" that

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[38] *Id*. at 997.
[39] *Rowley*, 458 U.S. 176 at 200.
[40] Brief for Nat'l Ass'n of State Dirs. of Special Educ. as Amici Curiae Supporting Neither Party, Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15-827).
[41] *Endrew F.*,137 S. Ct. 988 at 999.
[42] *Id*. at 1000.
[43] *Id*. at 999.
[44] *Id*. at 1001.

already endeavored to provide more meaningful than minimum educational advancement.[45] If the heightened standard *did* have an impact, Pudelski expressed concerns regarding "the escalating costs of educating children with disabilities puts a lot of pressure on schools, especially given past and proposed cuts to education funding."[46] Undoubtedly, this is a precarious balance to maintain and still without a single test to determine when a student is being provided a satisfactory FAPE. The *Endrew F.* opinion also adopted the *Rowley* Court's assessment that to require an "equal opportunity education" would be a step too far.[47] Noting that Congress has not "materially changed the statutory definition of a FAPE" in the 30+ years since Rowley, the Court declines to adopt this standard now.[48] Yet, in a post-*Endrew* world, one thing is certain – allowing a student to sit in the classroom (or at home) without making any meaningful progress does not satisfy the IDEA requirements.

B. 'Stay'ing Power: Limitations and Disagreements Surrounding the Provision

Since 2017, there has been a circuit split as to whether the stay put provision in an IDEA dispute is meant to apply through the district court decision or throughout the entire appeals process to the circuit courts.[49] According to the Sixth and DC Circuits, the provision lasts through the district level only. Though subsection 1415(e)(3) of the IDEA dictates that the effects of a stay put injunction must exist throughout "the pendency of any proceedings conducted pursuant to this section," the section references three kinds of proceedings "due process hearings, state administrative review where available, and civil actions for review

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[45] Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, THE ATLANTIC (March 23, 2017), https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/.
[46] *Id*.
[47] *Endrew F*.,137 S. Ct. 988 at 1001.
[48] *Id*.
[49] For a well-written, in-depth review of this issue, *see generally* Guzman, s*upra* note 3.

brought in any State court of competent jurisdiction or in a district court of the United States."[50] The DC Circuit Court in *Andersen v. District of Columbia* relied on a close reading of the statute to determine that Congress's focus was on the trial stage of proceedings, and actions brought in the three named forums only.[51] If Congress wanted the provision to apply during appeals to the circuit courts, it had every opportunity to make that clear in the text.

In this view, the main goals of the stay put provision – stability and protection from unilateral displacement while a review is pending – are achieved when it applies through the trial court only.[52] Once a court has reviewed the proposed changes and made their ruling, there is no danger of unilateral displacement by school officials; the decision is now based on court order.[53]

The Ninth and Third Circuits have held instead that the stay put provision should be read more broadly to apply throughout the entire appeals process, relying in part on the fact that since civil IDEA actions may be brought in federal district courts,[54] which can then be appealed in circuit courts, Congress meant for the pendency provision to last throughout any potential litigation.[55]

"By giving [students] the right to appeal the ALJ's decision to the district court, § 1415 also made it possible for [them] to appeal the dispute to this circuit court. We presume that Congress was aware of this fact when it enacted § 1415(j)."[56] From this perspective, a larger concern of the stay put provision is to protect students from districts that will either ignore their stay put obligations, or continue to make unilateral moves, even after the first court order.[57]

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[50] 20 U.S.C. § 1415(e)(2).
[51] Andersen v. District of Columbia, 877 F.2d 1018, 1023 (1989). *See also* Manchester Sch. Dist. v. Williamson, 17 EHLR 1 (D.N.H. 1990); Dan H. v. Franklin Special Sch. Dist., 1997 U.S. App. LEXIS 21724.
[52] *Honig*, 484 U.S. 305 at 323.
[53] *Andersen*, 877 F.2d at 1024.
[54] 20 U.S.C. § 1415(i)(2)(A).
[55] 28 U.S.C. § 1291.
[56] Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036.
[57] M.R. v. Ridley Sch. Dist., 868 F.3d 218.

There is a danger inherent in such a broad reading. In tipping the scale so far on the side of the student's interests, districts may seek to avoid lengthy appeals processes by finding loopholes and administrative workarounds. To best protect students with disabilities, the provision should be interpreted in a way that balances the student's interest in robust educational programs and stability along with the district's concerns regarding budgetary constraints and quickly resolving disputes. The court must also consider the reverse – if a student is made to stay put in an educational environment that is toxic or triggering or simply not serving their needs for even an hour longer than necessary, then the very core of the IDEA is being ignored.

While this conflict over the durational reach of the stay put provision remains, recent years have not seen any movement to resolve the issue at a federal level. And, with the onset of the COVID-19 pandemic in 2020, a new and more pressing set of issues arose – how should districts handle stay put/pendency placements in the age of stay-at-home orders? What is owed to students when the lines between home and school are inextricably blurred?

IV. When Stay Put Meets Stay Home

On March 11, 2020, the World Health Organization declared that the COVID-19 viral disease was officially a pandemic.[58] By this time, the virus had spread into 114 countries and resulted in more than 4,000 fatalities.[59] At this precipice of the pandemic, answers were few and far between and no one could predict what was to come. Countries around the world grappled with how to curb the spread of the virus and prevent worst case scenarios. Beginning in mid-March, districts across the country began to close their doors as states issued stay-at-home

[58] Bill Chappell, *Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says*, NPR (Mar. 11, 2020), https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says.
[59] *Id*.

orders.[60] Though restrictions and closures changed from state to state and even district to district, a UNESCO report on the pandemic's impact on education notes that the United States experienced one of the longer periods of school closures worldwide – 48+ weeks and counting at the time of this writing.[61]

In early September 2020, Natalie Jones, an attorney in the due process unit of the special education bureau at the Connecticut State Department of Education, and Perry A. Zirkel, university professor emeritus at Lehigh University, conducted a survey of all 51 state education agencies (SEAs).[62] As defined by the IDEA, a state education agency is "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools."[63] The survey inquired as to the number of COVID-19 related IDEA complaints made and filed before each SEA by students/families, as well as how many decisions had been made in these COVID-19 related filings as of August 31, 2020.[64] SEAs were asked to provide stats for IDEA and due process complaints/decisions.[65] With a 92% response rate, the response revealed a ratio of 432 due process claim filings to 11 decisions, and 230 filings to 207 written complaint decisions.[66] While a more comprehensive report is forthcoming, these numbers alone make it clear that courts are just beginning to grapple with these claims and the work is not only ongoing, but will likely increase as the pandemic continues. With so many IDEA claims going through the state systems at once, courts will undoubtedly be split in their decisions and applications of existing precedent to this

[60] COVID-19 Impact on Education, UNESCO (Mar. 30, 2020), https://en.unesco.org/covid19/educationresponse
[61] *Id*.
[62] Natalie Jones & Perry A. Zirkel, PRELIMINARY SUMMARY OF DISPUTE RESOLUTION SURVEY RESULTS, September 28, 2020, https://perryzirkel.files.wordpress.com/2020/09/addendum-to-supplement-5.pdf
[63] 20 U.S.C. § 1401(32).
[64] Jones, *supra* note 62.
[65] *Id*.
[66] *Id*.

extraordinary state of affairs. As cases weave their way through the system and decisions emerge, it is instructive to identify and examine the developing themes and approaches.

A. The Effects of COVID-19 on Special Education

Though the IDEA is a federal law, the US consists of a patchwork of jurisdictions and school districts working to enforce and interpret that law. The US Department of Education (USDOE) has provided a number of fact sheets, guidelines, and informational packets that have aimed to direct districts on how to deal with IDEA requirements in our new, remote world.[67] Recognizing the severity of the health risks presented by in-person instruction for all, the Department endeavored to make it clear that "ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction."[68] Put simply, remote/distance learning options have the potential to meet the requirements set forth in IDEA. Understanding the immense difficulties facing districts (including administrators, support staff, paraprofessionals, and teachers), the guidance stresses flexibility, creativity and collaboration between educators, administrators, and parents when designing remote learning plans for IEP students.[69] Importantly, the guidance highlights the need to continue to meet the *individual* needs of students with disabilities even if the way these needs are met must be adjusted during "this time of unprecedented national emergency."[70]

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[67] *See generally* COVID-19 Topic Area, Individuals with Disabilities Education Act, https://sites.ed.gov/idea/topic-areas/#COVID-19.

[68] Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, Individuals with Disabilities Education Act, updated March 21, 2020, https://sites.ed.gov/idea/idea-files/supplemental-fact-sheet-addressing-risk-covid-19-preschool-elementary-secondary-schools-serving-children-disabilities-march-21-2020/

[69] *Id*.

[70] *Id*.

The guidance paints a hopeful picture of flexibility, creativity, collaboration, and technology working together to empower students and families staying put in their living room classrooms. For many families with disabled students, the reality has been grimmer. Families across the nation were forced to adapt to remote learning environments overnight – a challenge that cannot and should not be minimized. But the struggle to provide a legally mandated FAPE to children with IEPs, including necessary therapies, support, and resources, all from an in-home classroom has proven to be particularly difficult. Advocacy group ParentsTogether conducted an online survey of 1,500 members across the country which illustrated large learning gaps by both income and between students with and without special education needs.[71] Though the survey was not scientifically weighted, respondents were racially, geographically, and socioeconomically diverse.[72] The responses provided by parents of special education students are particularly illuminating with four parents in 10 declaring that their children are "not receiving any support at all," and just one in five stating that their children are receiving all the services they are entitled to via their IEP.[73] Comparatively, 35% of parents reported that their children in special education programs were participating in "little to no" remote learning, while only 17% of general education parents said the same.[74] 40% of parents with special education children reported being concerned about their children's mental health during this time away from school and therapies.[75]

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[71] Anya Kamenetz, *Survey Shows Big Remote Learning Gaps for Low-Income and Special Needs Children*, NPR (May 27, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/862705225/survey-shows-big-remote-learning-gaps-for-low-income-and-special-needs-children.
[72] *Id*. It is important to note that students from lower income families and districts are less likely than their higher income peers to receive the support needed to succeed at at-home learning, whether they have an IEP or not. These issues are intersectional.
[73] *Id*.
[74] *Id*.
[75] *Id*.

Perhaps the most important piece of guidance provided by the USDOE, as related to the stay put provision, is that the provision of remote or distance learning support is not necessarily equal to a lapse in provision of a FAPE, depending on the student's needs.[76] Recognizing the national emergency at hand, and conscious that automatically equating remote learning with a change in placement had the potential to trigger the stay put provision for hundreds of thousands of students across the nation, overnight, the Department of Education allowed that while schools may no longer be able to provide services "in the same manner" as they have in the past, amended services and substitutions were encouraged.[77] Issuing this guidance, the Department of Education had a fundamental choice to make. Deciding that school closures, while literally a physical change of placement and one that lasted far longer than 10 days, also constituted a legal change in placement would have had significant implications. At the time the guidance was issued, much was still unknown, including if this was going to be a long- or short-term emergency, and the Department needed to balance the interests of public health and financial and logistical concerns of districts around the country against those of students with disabilities. By refusing to either let districts off the hook on providing a FAPE or to give parents and guardians an automatic trigger to make pendency claims, the Department both adhered to the individualized nature of the IDEA and kicked the can a little down the road, leaving it up to officials and courts to determine what is best.

B. The Class Action Catch-22

At least 50.8 million public school students enrolled in 48 states, four US territories, the District of Columbia, and the Department of Defense Education Activity were affected by school

[76] Supplemental Fact Sheet, *supra* note 68.
[77] *Id*.

closures throughout 2020.[78] According to the National Center for Educational Statistics, during the 2018-19 school year, 14% of all public school students received special education services under IDEA – approximately seven million students.[79] With this in mind, the sheer number of potential IDEA/stay put claims arising from COVID-19 is insurmountable. In theory, giving parents and guardians the ability to join claims together into class action suits would be an efficient way to handle the backlog and could potentially save both time and money for all parties. And some have already tried.

Class action suits are guided by the Federal Rules of Civil Procedure which state that to certify as a class the number of plaintiffs must be high enough that regular joinder is impracticable, that common questions of law or fact exist, that the claims of the representative parties are "typical" of the class, and that the interests of the class will be "fairly and adequately" protected by the representative class.[80] In regard to potential IDEA class action claims, it is likely that plaintiffs are numerous enough to qualify and that common questions of law or fact exists. The roadblock to these kinds of claims lies in determining whether the representative claims are considered typical for the whole class. IDEA services and supports can vary widely from student to student and include everything from transportation, medical needs, therapies, amended class schedules, one-on-one support, and so much more.[81] It would be disingenuous to claim that one student's needs are "typical" in a population of seven million student with unique, individualized needs. To certify such students as a class, the criteria would need to be adjusted.

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78 *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline*), EDWEEK (JUL. 1, 2020), https://www.edweek.org/leadership/the-coronavirus-spring-the-historic-closing-of-u-s-schools-a-timeline/2020/07.
79 *The Condition of Education*, NAT'L CENTER FOR EDUC. STATISTICS (NCES) (MAY 2020), https://nces.ed.gov/programs/coe/indicator_cgg.asp#:~:text=(Last%20Updated%3A%20May%202020),of%20all%20public%20school%20students.
80 Fed. R. Civ. P. 23(a)(1-4).
81 20 U.S.C. § 1401 (26)(A) (2004).

This kind of adjustment is exactly what parents in Hawaii are seeking in a complaint filed in April of 2020.[82] As the only single district state in the US, comprised of 256 schools, it represents a unique microcosm of the challenges and claims that are arising in larger, multi-district states.[83] In addition to claims of discrimination due to a lack of necessary supports and services as outlined by the students' IEPs and 504 plans, the filing asserts that refusal to provide these services was a systemic failure of the Hawaii Department of Education (HDOE) which resulted in "thousands of violations of civil rights day after day."[84] Each family included allegations of ways that their children had regressed during the shutdown – academically, behaviorally, emotionally, or all three.[85] One parent, Vanessa Ince, spoke to *NPR* about her daughter Alexis, describing her daughter's regression as "severe" and "devastating."[86] The parent plaintiffs are seeking an order requiring that HDOE establish new methods to address the needs of special education students, as well as certification by the court of a declaratory relief class and compensatory education relief sub-class.[87] As Keith Peck, the attorney representing this class of parents as well as a number of other individual claims within the state, explained, "[w]e want a systemic approach to address people's need for compensation."[88] If the court upholds their allegations of equal protection and class certification, it is likely that they would be a model for other parents, not only in Hawaii, but nationwide.

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[82] Complaint, W.G., R.S. et al v. Hawaii Dept. of Ed., Case 1:20-cv-00154-RT-NONE (D. Haw 2020) (Apr. 13, 2020).
[83] STATE OF HAWAII BOARD OF EDUCATION, https://boe.hawaii.gov/About/Pages/Department-of-Education.aspx.
[84] *See* Compl. *supra* note 82 at §33.
[85] *Id*.
[86] Anya Kamenetz, *Families of Special Needs Children are Suing in Several States. Here's Why.,* NPR (July 23, 2020), https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why.
[87] *See* Compl. *supra* note 82.
[88] Kamenetz, *supra* note 71.

A much larger attempt at asserting rights to class action relief for special education students was filed in July 2020 in the Southern District of New York.[89] In a gesture that can be characterized as aspirational or audacious – depending on your point of view – the complaint names "the school districts of the United States" as defendants, and seeks to establish a class of "hundreds of thousands, and likely millions, of persons," essentially granting access to relief to any plaintiff-parents across the nation.[90] Arguing that school closures longer than 10 days violated the stay put provision, the complaint sought several forms of relief including, but not limited to, immediate reopening of schools, implementation of "substantially similar" educational programs to align with students' IEPs, pendency vouchers, independent evaluations to determine loss of competency, compensatory damages, and punitive damages.[91]

Ultimately, this ambitious swing did not quite pay off. The court's opinion issued November 2020 first dismissed all claims against defendants outside of New York due to jurisdiction and venue issues, then dismissed all other claims, except for those brought by plaintiffs enrolled in New York City Public Schools against the New York State Department of Education.[92] Though the claims were dismissed "without prejudice," the court's tone tells a different story, often sounding exasperated and resentful of the extra efforts this case would require.[93] "It is obvious that this is no class action at all, but rather tens of thousands of individual cases that Plaintiffs' counsel has tried to amalgamate into a single lawsuit."[94] Noting that this is an "unorthodox pleading" that requires an equally "unorthodox response" the court spends 53 pages outlining why the only appropriate claims to be decided are those made against

[89] J.T. v. de Blasio, 2020 U.S. Dist. LEXIS 212663 108 (S.D.N.Y. 2020).
[90] *See* Compl. Case No. 20cv5878 at ¶ 130.
[91] *See generally* Id.
[92] *J.T.*, 2020 U.S. Dist. LEXIS 212663 at 10-11.
[93] *Id*. at 39.
[94] *Id*.

the NYC defendants by the NYC plaintiffs, effectively quashing further attempts for wide-scale, national class action suits.[95] After severing and dismissing the improper claims, the court did consider the remaining 43 claims individually, though the plaintiffs fared no better for it.[96] In reviewing the claims, the court declared that the filings contain "precious little" information about the individual students and their unique situations and ruled that, taken individually, not one of the plaintiffs had made the necessary showing to establish a change in placement.[97] The strategy of bringing broad, general claims in a class-action format backfired when the court looked for evidence of individual hardship.

While still in flux, it seems likely that depending on the scope, courts might be willing to address IDEA claims in class action procedures in their efforts to consolidate the number of cases on the horizon. The individualized nature of evaluation required for IDEA claims, however, would make it nearly impossible for the plaintiffs in any IDEA class action suit to prevail.[98] Courts also have a strong public interest incentive to find in favor of the schools/districts, knowing how many resources would be expended should a whole class of plaintiffs win relief in one fell swoop. This would indeed be the "recipe for disaster" feared by Sasha Pudelski when the *Endrew F.* ruling was first handed down,[99] a perfect storm of diminished resources and increased challenges to a system that could buckle from the weight. Though more time- and money-consuming, it is in the best interest of the students to bring individual claims regarding the specific services and support they lacked during school closures. This is complicated by that reality that the need to bring individual claims effectively bars many

[95] *Id*. at 41-94.
[96] *Id*. The court discusses and ultimately denies the remaining claims on merit. See Part IV Section C for details.
[97] *Id.* at 101-111.
[98] *See generally* supra note 26.
[99] *Supra* note 45.

students and families with limited resources – a population that has been disproportionately affected by pandemic shutdowns – from asserting their rights and pursuing claims.

C. The Importance of Individualized Assessment: Equality v. Equity

When deciding not to grant a stay put injunction to the remaining plaintiffs in *J.T.*, the court first looked to the USDOE guidance for clarity, granting it great deference.[100] Interpreting the guidance as "clearly" giving "schools maximum flexibility to keep their students safe," the judge in *J.T.* held that it would be "impossible" to claim that the switch to remote learning constituted a change in placement capable of triggering the provision.[101] Highlighting the "unprecedented health crisis" faced by the district, the court notes that "there can be no question" that a shutdown order applied "equally to abled and disabled students" does not constitute a change in pendency.[102] In this, the court relies on *N.D. v. Hawaii Department of Education*, what the court calls a "reasonably close" case from 2010.[103] The plaintiffs in *N.D.* were parents of disabled students challenging the state's "system-wide decision to shut down public school's on seventeen Friday's to alleviate a financial crisis."[104] The Ninth District held that Congress did not intend IDEA to "apply to system wide administrative decisions" affecting "all students, disabled and non-disabled alike."[105] The *J.T.* court declared that, as in *N.D.*, the students did not experience a change in pendency because they "remain in the same classification, in the same school district, and likely have the same teachers."[106] Since every student in the district was moved to remote learning, without in-person services, the court ruled that it was "neither

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[100] *J.T.*, 2020 U.S. Dist. LEXIS 212663 at 114-15.
[101] *Id*.
[102] *Id*. at 116.
[103] N.D. v. Hawaii Dep't of Educ., 600 F.3d 1104 (9th Cir. 2010).
[104] *Id*. at 1116.
[105] *Id*.
[106] *J.T.*, 2020 U.S. Dist. LEXIS 212663 at 120.

equipped or prepared" to question the administrative decision made during "a health crisis of unprecedented proportions."[107]

Setting aside how many times the court itself uses the word "unprecedented" to describe the situation facing not just the district but the parents and students as well, it is a stretch to rely on *N.D.* as precedent or to consider the circumstances of the plaintiff students in that case as "reasonably close" to those faced by the plaintiff students now. Missing 17 days of school, spread out across 17 weeks, is not comparable to the complete shutdown of in-person educational services for months on end. Though disabled and non-disabled students are in the same situation, generally, the individualized nature of the IDEA requires that each student's needs be met to provide them with a free and appropriate education.[108] Post-*Endrew*, the IDEA "demands more" than the minimum in terms of educational progress[109] – and the USDOE guidance did not grant districts a pass on this.

This kind of strict, plaintiff-unfriendly interpretation has been rejected by courts in several other districts in favor of more equitable, individualized determinations. A complaint filed in Iowa asserted that the school district failed to provide speech language services for a student whose IEP required it.[110] Though the district continued to provide voluntary educational services to all students, such as optional extended school year opportunities, the student's IEP services were not provided.[111] The Iowa Department of Education (IDOE) issued a decision that interpreted the USDOE guidance as "non-binding," noting that it "entitled to weight only to the extent that is has the power to persuade" and should be used as a tool in conversations about

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[107] *Id*.
[108] 20 U.S.C. § 1401 (9) (2004).
[109] *Endrew F.*, 137 S. Ct. 988 at 1001.
[110] In re Complaint Concerning OJ, Iowa Dept. of Ed., Compliant 19-19 (June 8, 2020).
[111] *Id*. at 4.

COVID-related IDEA claims but not as the be all and end all.[112] The IDOE also made sure to note that, where voluntary educational opportunities were offered, students with disabilities must be provided the opportunity to participate.[113] Reviewing the facts of the case, the IDOE ruled in favor of the school district, asserting that though the student "may be entitled to services to address or mitigate lost opportunities" due to COVID, the law does not require that the services be provided in the "time or manner demanded" by the student or their representative.[114] This decision is consistent with the IDEA, while leaving open the possibility that another student in the district, in a different set of circumstances, might be entitled to the relief sought.

In California, an administrative law judge issued a decision in favor of a seven-year-old student with speech and language needs, relying on *N.D. v. Hawaii* and focusing on the fact that the decision in that case held open the possibility that furloughs due to financial needs *could potentially* support a claim of failure to implement an IEP.[115] The California district had made attempts to deliver written, general notices to the parents, as well as a general distance learning packet and "speech therapy materials."[116] Due to technology issues and the inability of the parent to understand the speech therapy plans, not being a speech therapist themselves, these efforts ultimately failed.[117] The judge held that the district failed to materially implement the student's IEP, even as the pandemic prevented (and excused) it from fully implementing services.[118] Aligned with the USDOE's guidance to remain "flexible" and "creative" when working through the pandemic, the judge noted that the district could have "collaborated with

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[112] *Id*. at 6.
[113] *Id*. at 8.
[114] *Id*. at 9-10.
[115] Parent v. Norris School District, OAH Case Nos. 2020010423/2020060184 (Sept. 2, 2020).
[116] *Id*. at 59.
[117] *Id*.
[118] *Id*.

parents to find ways" to provide more resources and instruction for the student during this time, from parent training to tech support.[119]

In direct contrast to the *J.T.* opinion, the judge in *L.V. v. N.Y. City Department of Education*, another Southern District of New York case, placed focus both on the USDOE filings and the lack of individualized assessment of L.V.'s needs and how they could be safely met during the COVID pandemic.[120] Among other issues, L.V., a five-year-old student with autism, was unable to effectively use the tablet device provided by the school for remote learning.[121] In their filing, the DOE pointed to the fact that "'thousands' of other special education children . . . have been using a DOE-provided tablet to engage in remote learning in satisfaction of IDEA-mandated services."[122] The court, rightly, gave little weight to this argument, pointing out that "at the heart of the IDEA is a free and appropriate public education" delivered via individualized education plans.[123] As the *Rowley* Court stated, the law "requires participating states to educate a wide spectrum of students."[124] What works best for a child at one end of the spectrum will "differ dramatically" from what works for a child at the other end and there may be "infinite variations in between."[125] Ruling in favor of L.V. and his mother, the court called out the district for failing to "attempt to consider the individual educational and special educational needs" of the child, or explaining how "services that appear inherently subject to in-person delivery, such

[119] *Supra* note 68; OAH Case Nos. 2020010423/2020060184 at 61.
[120] L.V. v. N.Y. City Dep't of Educ., 2020 U.S. Dist. LEXIS 120955 (S.D.N.Y. July 8, 2020).
[121] *Id*. at 5.
[122] *Id.* at 12.
[123] *Id*.
[124] *Rowley*, 458 U.S. 176 at 202.
[125] *Id*.

as physical therapy" could be delivered remotely.[126] Individuality and equity were placed above equality in this case, demanding the district fulfill its duties to this student, specifically.[127]

Researchers from Bellwether Education Partners, a national nonprofit focused on dramatically changing education and life outcomes for underserved children, published in October 2020 that approximately 3 million of the most educationally marginalized students in the country had been "missing" since March 2020.[128] These missing students, including students with disabilities, English learners, students in foster care, migrant students, and homeless students, "have functionally disappeared from school for the past seven months."[129] The cause can be linked directly back to a lack of support, oversight, and services.[130] It is undeniable that districts had no real choice when it came to school closings – powers well beyond their control forced the doors to close to preserve the health and safety of communities around the nation, and the world. The vast majority of administrators, officials, teachers, parents, and guardians worked together and did their best to continue supporting students in an impossible situation. Nevertheless, there were students for whom virtual learning simply did not provide the level of support and services that their IEPs required. The fact that virtual learning was not ideal for all students does not negate the fact that public school districts are legally required to provide for special education students in certain ways above and beyond the general education population.

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[126] *Id*. at 12-13.
[127] Claims were ultimately dismissed, without prejudice, in a later proceeding owing to the inability of L.V.'s single parent (living with two autistic children during a global pandemic) to respond and work with the district to the court's satisfaction. Alas, the court's empathy only goes so far.
[128] *See* Hailly T.N. Korman, Bonnie O'Keefe & Matt Repka, *Missing in the Margins: Estimating the Scale of the COVID-19 Attendance Crisis*, BELLWETHER EDUCATION PARTNERS (Oct. 21, 2020), https://bellwethereducation.org/publication/missing-margins-estimating-scale-covid-19-attendance-crisis. *See also* Lauren Camera, *As Many as 3 Million Children Have Gone without Education Since March: Estimate*, US NEWS (Oct. 21, 2020), https://www.usnews.com/news/education-news/articles/2020-10-21/as-many-as-3-million-children-have-gone-without-education-since-march-estimate.
[129] Korman, O'Keefe & Repka *supra* note 128.
[130] *Id*.

The needs of special education students must be individually assessed, and equity demands that these students be given the additional help needed to constitute a FAPE – equality is not enough.

D. What Harms can be Reversed?

When a court establishes that the stay put provision has been implicated in a case, it can act as an immediate injunction.[131] When they decide that stay put is not in play, courts may apply a different standard to determine if preliminary injunctive relief is nonetheless appropriate.[132] Some jurisdictions use the standard as set forth by the Supreme Court in *Winter*.[133] Under this standard, in order to receive the injunctive relief, plaintiffs must show they are likely to succeed on the merits, that without relief they are likely to suffer irreparable harm, the injunction is in the public interest, and the balance of equity is in their favor.[134] As jurisdictions are wading through countless stay put claims, these concepts of irreparable harm, of equity and public interest, float around the initial assessment. In the *E.M.C. v. Ventura Unified* opinion, the court first determined that automatic stay put injunctive relief was not warranted because the claim challenged the stay put order itself.[135] The plaintiff provided three assessments detailing behavioral regression, increased maladaptive behavior, and decline in academic, behavior and emotional functioning during the time she was out of the classroom receiving only remote services.[136] Applying these assessments to the *Winter* factors, the court was unmoved by one doctor's claims that the student faced "permanent loss of critical and adaptive skills" and another assessment of "modest decline."[137] Instead, the court emphasized the "temporary" nature of the school closures caused by COVID-19, and maintained what while

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[131] 2020 U.S. Dist. LEXIS 212663 at 108.
[132] *Id*. at 122.
[133] Winter v. National Resource Defense Council, 555 U.S. 7, 24 (2008).
[134] *Id*.
[135] E.M.C. v. Ventura Unified Sch. Dist., 2020 U.S. Dist. LEXIS 232006 (C.D. Cal., Dec. 29,2020).
[136] *Id*. at 7-9.
[137] *Id*. at 20.

"long-term educational or behavioral impairment would be a significant burden," the harms suffered during the COVID-19 closures were not long-term enough to be irreparable.[138] Courts in New York, Arkansas, and Guam (among others) have all reached similar conclusions surrounding the reparability of harm balanced against the hardships and challenges faced by districts during this time.[139] The simple fact is that at the time these decisions were made, no one yet had the information needed to confidently make claims around the effects of COVID-19 – from how long it will last, to how damaging it will be to this generation of students with and without disabilities. While the world is living through it, judges are forced to make decisions without the benefit of hindsight – and that can be incredibly difficult. Still, surveys and studies have been done that provide constructive data regarding the science of learning gaps and such studies can, and should, be used as guidance when declaring how much harm is acceptable and where the "irreparable" line should be drawn.

It will likely be years before the full worldwide effects of the pandemic on the social, educational, and developmental progress of children are understood and it is impossible to compare this situation with another in recent memory. Emerging evidence suggests that while many children experienced academic and social challenges during school closings, these challenges were exacerbated for "kids with developmental challenges."[140] Speaking to the *New York Times*, Dr. Eileen Costello, the chief of ambulatory pediatrics at Boston Medical Center, noted that she was "seeing a lot of stalling of developmental progress . . . [t]he toll this is taking

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[138] *Id*.

[139] Killoran v. Westhampton Beach Sch. Dist., 120 LRP 27565 (E.D.N.Y. Sept. 10, 2020) (Noting "all students nationwide are grappling with modified learning right now"); Jacksonville North Pulaski Sch. Dist. V. DM, 120 LRP 18312 (E.D. Arkansas June 12, 2020); J.C. v. Fernandez, 2020 U.S. Dist. LEXIS 125951 (Dist. Ct. Guam, July 15, 2020).

[140] Perri Klass, M.D., *The Pandemic's Toll on Children with Special Needs and their Parents*, NY TIMES (July 27, 2020), https://www.nytimes.com/2020/07/27/well/family/children-special-needs-pandemic.html?smid=em-share.

on both kids and parents cannot be underestimated."[141] Previous studies have examined the connection between absences/unexpected school closings due to weather (snow days, etc.) and decrease in test scores throughout the student population.[142] Based on empirical data collected in both Maryland and Massachusetts, it is clear that losing school days due to unscheduled closings and absences has a direct negative impact on student performance – and the in-school time lost during the pandemic has already been exponentially greater.[143] In June 2020, after more than three months of stay-at-home learning for students across the nation, the *Wall Street Journal* published an article bluntly titled, "The Results are In for Remote Learning: It Didn't Work."[144] The article does not call out outcomes specific to students with disabilities.[145] For the population as a whole it highlights early research from Oregon-based nonprofit NWEA suggesting that, compared to a full year of in-school learning, students made "70% of learning gains in reading . . . and less than 50% in math."[146] While there is not an overwhelming amount of scholarship surrounding the remote learning gap, over the past two decades, studies in the UK, Israel and Canada have shown significant discrepancies between the efficacy of online/remote learning frameworks for students with disabilities and those without.[147] These show that cognitive ability

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[141] *Id*.
[142] Dave E. Marcotte and Steven W. Hemelt, *Unscheduled School Closings and Student Performance*, EDUCATION FINANCE AND POLICY, Vol. 3, No. 3 316-338 (Summer 2008).
[143] *Id*.; Joshua Goodman, *Flaking out: Student Absences and Snow Days as Disruptions of Instructional Time*, NAT'L BUREAU OF ECON. RESEARCH, June 2014.
[144] Tawnell D. Hobbs & Lee Hawkins, *The Results are in for Remote Learning: It Didn't Work*, WALL STREET JOURNAL (June 5, 2020), https://www.wsj.com/articles/schools-coronavirus-remote-learning-lockdown-tech-11591375078.
[145] *Id*.
[146] *Id*. Again, the research draws conclusions related to socioeconomic status and highlights the increased difficulty in remote learning for lower-income districts and families with limited resources and internet connections. While not directly tied to students with disabilities, this is an important factor that complicates the discussion.
[147] *See generally* Baruch Offir, Yossi Lev & Rachel Bezalel, *Surface and deep learning processes in distance education: Synchronous versus asynchronous systems*, COMPUTERS & EDUCATION 51 (2008); Victoria Pearson, et al., *Embedding and Sustaining Inclusive Practice to Support Disabled Students in Online and Blended Learning*, JOURNAL OF INTERACTIVE MEDIA IN EDUCATION, 1 – 10 (2019); Phillip Abrami, et al., *A Review of e-Learning in Canada: A Rough Sketch of the Evidence, Gaps and Promising Directions,* CANADIAN JOURNAL OF LEARNING AND TECHNOLOGY (2006).

is linked to success in autonomous learning, either synchronous or asynchronous.[148] Direct interaction between students and teachers is very important for all learners, but is especially crucial for students with lower cognitive abilities who are unable to overcome the disconnect and create independent learning opportunities and assessments of their own skills.[149] It is true that online and remote learning can offer flexibility and access to certain student populations.[150] And though these technologies enabled educational institutions to continue during the health crisis, without individualized assessments these same tools have the potential to create unseen barriers and roadblocks to student development.[151] Courts that have attempted to draw a hard line precluding "irreparable harm" during the COVID-19 stay-at-home orders – either because all students were in the "same" situation or because the time spent out of the classroom was not long-term enough in their view – are making decisions that are presumptive and short-sighted. There is another option, and one that allows for more flexibility, empathy and individualized assessment of specific students and their needs. Simply, leave the door open. The plaintiff in *L.V.* did not argue irreparable harm, but the court made sure to note that, if they had, the failure for a student to receive necessary services for an extended period – particularly during formative years – "can certainly result in irreparable harm."[152] Instead of sealing the door shut tight, the court allowed for the possibility that another case, another student, another set of circumstances might warrant a determination of irreparable harm during this time.[153]

V. Conclusion

[148] Offir (2008).
[149] *Id*.
[150] Pearson 1 (2019).
[151] *Id*.
[152] 2020 U.S. Dist. Lexis 120995 (2020).
[153] *Id*.

The IDEA protects children with intellectual and physical disabilities – their right to public education is at the center of every line of this act. When disagreements exist as to the best placement for a student, the 'stay put' provision of the IDEA dictates that the individual should remain in the last agreed-upon situation until the issue is resolved. While practicality dictates that the interests of these students must be balanced against interests of other students, both disabled and not, the limitations of their district, the demands of their caregivers, and unseen challenges that arise, the unyielding spirit of the law remains to protect and educate these children. The extraordinary circumstances brought on by the COVID-19 pandemic redefined the meaning of a classroom and brought with it a variety of challenges, from the emotional to the financial to the practical. While all students were forced to adapt suddenly, many students with IEPs were placed in impossible situations and held back by disadvantages above and beyond what was felt by the general population. It may be years before we fully understand the long-term effects of the remote learning experience on disabled students. As officials around the country deal with hundreds of claims and complaints regarding the interplay between the stay put provision and stay at home orders, the best way forward is to remember the key tenets of the law itself.

First, the need for equity above equality. Providing the same support and resources to students with disabilities as well as general education students is simply not enough. Equity demands that students are given the resources and support that serve their unique needs to allow them to perform to the best of their ability. Which brings us to another crucial aspect of the IDEA – individuality. When judges fail to focus on the individual students at the center of each case, they tend to miss the point. Yes, districts were faced with difficult choices and limited options during this year, but this does not absolve them of their responsibility to adapt and

address the needs of each student individually, as the law demands. The COVID-19 pandemic was a difficult, traumatic event, unprecedented in our lifetimes, the likes of which we all hope never to experience again. But dismissing these cases and the lessons learned from them as anomalies does a disservice to the students and families that have fought through this year. Instead, the legal and education communities must examine what they got right – and wrong – during this test and do everything they can to be better prepared to serve all students when the next challenge arises.