

**(LEAST) RESTRICTIVE ENVIRONMENT: COVID-19,
STUDENTS WITH DISABILITIES, AND THE NEED FOR
COMPENSATORY EDUCATION**

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I. INTRODUCTION

When the COVID-19 pandemic began in March 2020, K-12 students and teachers across the United States left school with no idea when they would return to the classroom.¹ By May of the 2019–2020 school year, any remaining hopes of returning to in-person learning during that academic term were lost, as nearly all states announced that their schools would be closed for the remainder of the academic year.² In this environment, schools transitioned to distance learning, an arrangement that quickly proved to be wholly inadequate for many students.³ By May 2020, the majority of school districts were providing students with less instructional time per day than prior to the pandemic, and most of the instruction provided in the spring of 2020 was merely review, rather than teaching new skills.⁴ The pandemic led to increases in the achievement gap, worsening mental health

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¹ *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUC. WEEK (July 1, 2020) [hereinafter *The Coronavirus Spring*], <https://www.edweek.org/leadership/the-coronavirus-spring-the-historic-closing-of-u-s-schools-a-timeline/2020/07>.

² *Id.*

³ *See id.* A survey of teachers conducted by EdWeek Research Center revealed that by early May 2020, only 37 percent of teachers reported that they interacted with their students daily or multiple times per day, while 50 percent of teachers interacted with their students only on a weekly basis due to the shift to remote learning. *Id.*

⁴ U.S. DEP'T OF EDUC., OFF. FOR C.R., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS 2 (2021) [hereinafter DISPARATE IMPACTS], <https://www.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

conditions, and absenteeism for all students—especially students of color and those from low-income families.⁵

Arguably, these drastic shifts in the delivery of education most impacted students with disabilities.⁶ Consider a student with an intellectual disability who cannot engage in virtual learning and who desperately needs hands-on life-skills training; a student with limited mobility who needs hand-over-hand support with writing or typing and who cannot benefit from virtual occupational therapy; or a student who is deaf without a sign language interpreter at home. Parents of students with disabilities quickly became their children's teachers, speech therapists, occupational therapists, one-to-one aides, and translators with no formal training for these roles imposed upon them.⁷ Virtual special education and related services became inconsistent or nonexistent and proved entirely inadequate compared to hands-on, in-person instruction.⁸ The result was that the quality of education that students with disabilities received diminished significantly, and the effects of this inferior education impacted these students behaviorally as well.⁹ For example, many students with disabilities are at high-risk for depression and began lashing out at their families as a result of remote learning.¹⁰

In a survey conducted by the advocacy group ParentsTogether in May 2020, only 20 percent of the respondents reported that schools were implementing their children's individual education plans (IEPs), and 39 percent of the respondents reported that their children were

⁵ Emma Dorn et al., *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & CO. (July 27, 2021), <https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning>.

⁶ Angela Nelson, *How COVID-19 Has Affected Special Education Students*, TUFTS NOW (Sept. 29, 2020), <https://now.tufts.edu/articles/how-covid-19-has-affected-special-education-students>; Sonali Kohli, *Children with Disabilities Are Regressing. How Much Is Distance Learning to Blame?*, L.A. TIMES (Aug. 7, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-08-07/covid-19-distance-learning-weakens-special-education>.

⁷ See Kohli, *supra* note 6.

⁸ *Id.*; Cory Turner & Rebecca Klein, *After Months of Special Education Turmoil, Families Say Schools Owe Them*, NPR (June 16, 2021, 5:00 AM), <https://www.npr.org/2021/06/16/994587239/after-months-of-special-education-turmoil-families-say-schools-owe-them>; Amanda Morris, *Parents of Students with Disabilities Try to Make Up for Lost Year*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2021/09/17/nyregion/special-needs-children-coronavirus-pandemic.html>.

⁹ See Kohli, *supra* note 6; Turner & Klein, *supra* note 8; Morris, *supra* note 8.

¹⁰ See Kohli, *supra* note 6.

not receiving any of their special education services.¹¹ According to the U.S. Department of Education's Office for Civil Rights, the pandemic likely increased the academic achievement gap for students with disabilities due to the disruption in their special education and related services.¹² The pandemic increased the achievement gap for students in general,¹³ but it is difficult to determine the increase for students with disabilities specifically.¹⁴ Yet *any* disruption in access to education increases the achievement gap between students with disabilities and their general education peers.¹⁵

The pandemic has been a major interference for many students with disabilities. Although COVID-19 transmission mitigation policies in schools were necessary due to public health concerns,¹⁶ these policies should have been constructed with due attention to the effects on students with disabilities, as some mitigation strategies were in violation of federal guarantees under the Individuals with Disabilities Education Act (IDEA). The IDEA requires that students receiving special education services be educated in the least restrictive environment (LRE).¹⁷ This means that students with disabilities should be educated with their general education peers to the

¹¹ DISPARATE IMPACTS, *supra* note 4, at 25–26 (1,594 parents of students with disabilities responded to the survey).

¹² *Id.* at iv.

¹³ See generally DAN GOLDHABER ET AL., THE CONSEQUENCES OF REMOTE AND HYBRID INSTRUCTION DURING THE PANDEMIC (2022), <https://cepr.harvard.edu/files/cepr/files/5-4.pdf?m=1651690491> (explaining that remote and hybrid learning widened achievement gaps by race and poverty level); Megan Kuhfeld et al., *Test Score Patterns Across Three COVID-19-Impacted School Years* (Annenberg Inst. for Sch. Reform at Brown U., Working Paper No. 22-251, 2022), <https://edworkingpapers.com/sites/default/files/ai22-521.pdf> (analyzing test scores to track the pandemic-related achievement gap in reading and math); KARYN LEWIS ET AL., CTR. FOR SCH. & STUDENT PROGRESS, LEARNING DURING COVID-19: READING AND MATH ACHIEVEMENT IN THE 2020-21 SCHOOL YEAR (2021), <https://www.nwea.org/content/uploads/2021/07/Learning-during-COVID-19-Reading-and-math-achievement-in-the-2020-2021-school-year.research-brief-1.pdf> (detailing declines in student achievement in reading and math during the 2020–2021 school year).

¹⁴ See Kuhfeld et al., *supra* note 13 (noting that the authors were “unable to disaggregate [their] data by . . . special education status”).

¹⁵ Joline E. Brandenburg et al., *School Reopening During COVID-19 Pandemic: Considering Students with Disabilities*, 13 J. PEDIATRIC REHAB. MED.: INTERDISC. APPROACH 425, 426 (2020).

¹⁶ See generally *A Year of COVID-19: What It Looked Like for Schools*, EDUC. WEEK (Mar. 4, 2021), <https://www.edweek.org/leadership/a-year-of-covid-19-what-it-looked-like-for-schools/2021/03>.

¹⁷ Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412(a)(5)(A).

maximum extent appropriate.¹⁸ But the pandemic prevented schools from educating students with disabilities in their LREs.¹⁹ Because of this shortcoming, schools should be required to provide compensatory education to redress this issue.

This Comment proceeds in four additional parts. Part II provides a background on the IDEA and its key mandates and outlines what IEPs entail for educators and students. IEPs set forth the services schools must provide to individual students with disabilities as the IDEA requires. Part II then defines the LRE requirement. Part III assesses the interaction of LRE principles with COVID-19 policies to demonstrate that schools were not educating students with disabilities in their LREs, were violating federal law, and were preventing these students from making meaningful educational progress. This Part also includes discussions of LRE principles in relation to distance learning, lack of mask mandates, and the implementation of mask mandates. While issues with the lack of mask mandates *and* the implementation of mask mandates may seem contradictory, this Part explains how these mask policies impact different groups of students based on their disabilities. Finally, Part IV explains compensatory education and proposes that schools should provide compensatory education to students with disabilities to remedy the harms caused by the failure to educate them in their LREs during the pandemic. These compensatory education proposals could also be implemented if any future event causes the majority of students with disabilities to be removed from their LREs again. Part V briefly concludes.

This Comment should not be construed to argue against COVID-19 mitigation policies in schools, as these policies were necessary given the public health crisis. Rather, the intended contribution of the Comment is to shed light on the previously underexplored fact that these policies prevent schools from meeting the statutory requirement to educate students in their LREs. These pandemic policies negatively impacted students with disabilities, so schools must provide compensatory education.

¹⁸ *Id.* For the purposes of this Comment, the term “general education” is used to describe traditional classrooms and typical curriculum in contrast to “special education.” The term “general education peers” is used to describe students who do not receive services under the IDEA, while the term “students with disabilities” refers to students who receive services under the IDEA.

¹⁹ *See, e.g.*, Brandenburg et al., *supra* note 15, at 428 (stating that the lack of special education services “would result in decreased access to an appropriate education, and for many a more restricted learning environment”).

II. OVERVIEW OF SPECIAL EDUCATION PRINCIPLES AND THE LEAST RESTRICTIVE ENVIRONMENT

Schools must provide students with disabilities with certain educational guarantees under federal law, the IDEA.²⁰ Section A provides a history of the IDEA. Section B explains IEPs, the individual education plan developed for each student receiving services under the IDEA. Section C explains and defines the LRE principle. An LRE is the least restrictive educational environment most appropriate for a student with disabilities based on the student's needs.

A. *History of the Individuals with Disabilities Education Act*

The purpose of the IDEA is, among other things, “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”²¹ Congress initially enacted the Education for All Handicapped Children Act (EAHCA), the IDEA's predecessor, in 1975 to protect the rights and meet the needs of students with disabilities.²² Before the EAHCA was signed into law, many children with disabilities were denied educational opportunities in schools and were instead institutionalized.²³ The EAHCA was reauthorized in 1990 as the IDEA.²⁴ Amendments to the EAHCA and the IDEA over the years included provisions that mandated early intervention programs, increased disability categories, expanded opportunities for educating students with disabilities in their LRE, required educators to use research-based assessments and interventions, added progress reporting requirements, and addressed parental consent and due process in the special education context.²⁵ The IDEA requires states

²⁰ See 20 U.S.C. § 1400(d)(1)(A).

²¹ *Id.* A student can qualify under the IDEA for having an intellectual disability, a hearing impairment, a speech or language impairment, a visual impairment, an emotional disturbance, an orthopedic impairment, autism, a traumatic brain injury, a specific learning disability, or another health impairment. See *id.* § 1401(3)(A).

²² *A History of the Individuals with Disabilities Education Act*, U.S. DEP'T OF EDUC. [hereinafter *History of the IDEA*], <https://sites.ed.gov/idea/IDEA-History> (last modified Mar. 18, 2022).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

and school districts to comply with the law's provisions to receive federal funding.²⁶

A free appropriate public education (FAPE) must be provided to all students with disabilities under federal law.²⁷ The Supreme Court, in *Board of Education v. Rowley*, elaborated on the meaning of FAPE when it held that a student with an IEP receives a FAPE “if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction.”²⁸ The Court further developed the meaning of providing a FAPE under the IDEA in *Joseph F. ex rel. Andrew F. v. Douglas County School District RE-1*.²⁹ In this case, the Court observed that the IDEA requires an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”³⁰

Accordingly, the EAHCA and the IDEA achieved several objectives, including increasing the identification of students with disabilities, the percentage of students with IEPs educated with their general education peers, and the graduation and employment rate of students with disabilities.³¹ The National Center for Education Statistics reported that in the 2020–2021 academic year, 15 percent of students ages three through twenty-one enrolled in public schools received special education services under the IDEA.³² This rate increased from 8.3 percent in the 1976–1977 school year and 13 percent in the 2010–2011 school year.³³ More recently, this increasing trend plateaued, as 13 percent of students received IDEA services in the 2014–2015 school year, 13.2 percent of students in the 2015–2016 school year, 13.4 percent of students in the 2016–2017 school year, 13.7 percent of students in the 2017–2018 school year, and 14.1 percent of students in the 2018–2019 school year.³⁴ Thus, the jump to

²⁶ 20 U.S.C. § 1412(a).

²⁷ *Id.* § 1412(a)(1)(A).

²⁸ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982).

²⁹ *See Joseph F. ex rel. Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

³⁰ *Id.*

³¹ *See History of the IDEA*, *supra* note 22.

³² Institute of Education Sciences, *The Condition of Education 2022: Students with Disabilities 1* (2022) [hereinafter *The Condition of Education*], https://nces.ed.gov/programs/coe/pdf/2022/cgg_508.pdf.

³³ Institute of Education Sciences, *Digest of Education Statistics 2019*, at 88 (2021) [hereinafter *Digest of Education Statistics*], <https://nces.ed.gov/pubs2021/2021009.pdf>.

³⁴ *Id.*

15 percent of all students is concerning and likely a result of the pandemic. Although statistics for the most recent academic year are not yet available, based on the increasing trend, more than 15 percent of all students likely receive special education services today. Due to the number of students receiving services under the IDEA, we must consider if these students were denied their federal educational guarantees due to COVID-19 policies in schools.

B. *Individualized Education Programs*

If a student has a qualifying disability under the IDEA, schools must develop an IEP detailing the special education and related services required to meet the student's needs.³⁵ An IEP is "a written statement for each child with a disability that is developed, reviewed, and revised."³⁶ IEPs are legally binding documents.³⁷ According to the Supreme Court in *Fry v. Napoleon Community Schools*, the IEP "serves as the 'primary vehicle' for providing each child with the promised FAPE,"³⁸ and "spells out a personalized plan to meet all of the child's 'educational needs.'"³⁹

An IEP team develops a student's IEP.⁴⁰ The IEP team includes: the student's parents; a regular education teacher; a special education teacher; a school district representative; any related service personnel who have special expertise or knowledge regarding the student; and

³⁵ Andrew M.I. Lee, *What Is the Individuals with Disabilities Education Act (IDEA)?*, UNDERSTOOD, <https://www.understood.org/articles/en/individuals-with-disabilities-education-act-idea-what-you-need-to-know> (last visited Jan. 1, 2022).

³⁶ IDEA, 20 U.S.C. § 1414(d)(1)(A).

³⁷ *Education Law FAQs*, JUSTIA (Oct. 2021), <https://www.justia.com/education/faqs>; see also Bonnie Spiro Schinagle, *Considering the Individualized Education Program: A Call for Applying Contract Theory to an Essential Legal Document*, 17 CUNY L. REV. 195, 227 (2013) ("IEPs have significant contract-like qualities."); Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 189 (2005) (describing an IEP as a pseudo-contractual document implemented by a governmental agency); FED'N FOR CHILD. WITH SPECIAL NEEDS & MASS. DEP'T OF EDUC., A PARENT'S GUIDE TO SPECIAL EDUCATION 19, <https://fcsn.org/wp-content/uploads/sites/2/2021/08/pgenglish.pdf> ("The IEP is a contract between [the parent] and the school."). Note, however, the IDEA does not refer to an IEP as a "contract," but as "a written statement." See 20 U.S.C. § 1414(d)(1)(A)(i).

³⁸ *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017) (citing *Honig v. Doe*, 484 U.S. 305, 311 (1988)).

³⁹ *Fry*, 137 S. Ct. at 749 (citing 20 U.S.C. § 1414(d)(1)).

⁴⁰ 20 U.S.C. § 1414(d)(1)(B).

the student, if appropriate.⁴¹ Subject to annual review and revision,⁴² the IEP must include: (i) a statement of the student's present levels of achievement and performance; (ii) measurable annual goals; (iii) the student's progress towards those goals; (iv) the special education and related services the student will receive; (v) the extent to which the student will or will not participate with general education peers; (vi) necessary accommodations and modifications; (vii) the start date, location, duration, and frequency of services; and (viii) postsecondary goals for students over sixteen years old.⁴³ The fifth item on this list, the extent to which a student participates with general education peers, establishes the student's LRE.⁴⁴

The entire IEP team must agree to revise an IEP, unless the parent and the school agree to develop a written plan to amend the IEP without a meeting.⁴⁵ Further, the IDEA provides for certain procedural safeguards for students with disabilities and their parents.⁴⁶ Among these procedural safeguards, schools must provide parents with written prior notice if the school proposes to change the student's educational placement.⁴⁷ Additionally, the IDEA allows for mediations, due process hearings, appeals, and filing civil actions when disagreements arise between schools and parents.⁴⁸ Schools must allow students to remain in their current educational placement during the pendency of any dispute proceedings.⁴⁹

C. *Least Restrictive Environment*

The IDEA explains the least restrictive environment as follows:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate

⁴¹ *Id.*

⁴² *Id.* § 1414(d)(4)(A).

⁴³ *Id.* § 1414(d)(1)(A)(i).

⁴⁴ Compare *id.* § 1414(d)(1)(A)(i)(V) (requiring "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class"), with *id.* § 1412(a)(5)(A) (explaining LRE as "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled").

⁴⁵ *Id.* § 1414(d)(3)(D), (F).

⁴⁶ See 20 U.S.C. § 1415.

⁴⁷ *Id.* § 1415(b)(3).

⁴⁸ *Id.* § 1415(e), (f), (g), (i)(2).

⁴⁹ *Id.* § 1415(j).

schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁵⁰

As the Tenth Circuit noted in *L.B. ex rel. K.B. v. Nebo School District*, educating students in their LREs “in which they can receive an appropriate education is one of the IDEA’s most important substantive requirements.”⁵¹

Although some may argue that remote learning satisfies the LRE requirement due to the circumstances surrounding the pandemic,⁵² this position is misguided. A student’s LRE must be appropriate for the student’s needs.⁵³ Notably, per the IDEA Regulations, a child with an IEP must not be “removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.”⁵⁴ Thus, the individual student’s disability-specific needs—without regard to “needed modifications,” such as pandemic circumstances—determine the “maximum extent appropriate” requirement of an LRE placement.

A student’s LRE placement refers to the student’s program, rather than a specific physical location.⁵⁵ For example, one student’s LRE may be the general education classroom with accommodations and modifications. Another student may receive “push-in” support from a special education teacher or paraeducator in which the educator provides the student with support in the general education classroom. Some students may need to be in a special education

⁵⁰ *Id.* § 1412(a)(5)(A).

⁵¹ *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004) (citing *Murray ex rel. Murray v. Montrose Cnty. Sch. Dist.* RE-1J, 51 F.3d 921, 926 (10th Cir. 1995)).

⁵² *See, e.g.*, Press Release, U.S. Dep’t of Educ., Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA (Apr. 27, 2020) [hereinafter Learning Must Continue], <https://sites.ed.gov/idea/secretary-devos-declines-to-seek-congressional-fape-lre-waivers-to-idea-requirements>.

⁵³ *See* Amanda Morin, *What Is Least Restrictive Environment (LRE)?*, UNDERSTOOD, <https://www.understood.org/articles/en/least-restrictive-environment-lre-what-you-need-to-know> (last visited Jan. 1, 2022); *see also* 20 U.S.C. § 1412(a)(5)(A).

⁵⁴ 34 C.F.R. § 300.116(e) (2018).

⁵⁵ Mitchell L. Yell et al., *Making Legally Sound Placement Decisions*, 52 TEACHING EXCEPTIONAL CHILD. 291, 292 (2020) (citing Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,687 (Aug. 14, 2006)).

classroom full-time. Another student may be removed from the general education classroom for a portion of the day for specialized instruction and related services, such as occupational therapy, social work, or speech therapy. Other students' LREs may be in a classroom co-taught between a general education teacher and a special education teacher. Thus, a student's LRE incorporates not only where the student is educated, but also who the student is taught by, who the student is taught with, accommodations, modifications, supports, services, and other considerations.

Senator Robert Stafford, co-author of the EAHCA (the IDEA's predecessor, referenced above), explained the impetus for the LRE requirement: "We are concerned that children with [disabilities] be educated in the most normal possible and least restrictive setting, for how else will they adapt to the world beyond the educational environment, and how else will [their general education peers] adapt to them?"⁵⁶ Thus, teams responsible for placement decisions should maximize opportunities for students with disabilities to interact with their general education peers.⁵⁷ Students with disabilities have improved social, behavioral, and academic outcomes when they are educated in the general education environment.⁵⁸ Moreover, Senator Stafford explained that the IDEA's predecessor sought to center students with disabilities more squarely within the broad purposes of public education and eliminate the "invisibility" these students encounter, while also considering these students' differences and individuality.⁵⁹ According to Senator Stafford, this invisibility comes in two forms: "the gross invisibility of literally being hidden away from the rest of us, and, secondly, the more subtle and perhaps more destructive invisibility of being in fact 'seen,' but 'seen' by an inner eye that perceives a label rather than a unique person."⁶⁰ Although students with disabilities are no longer "hidden away," the rights of students with disabilities have been overlooked throughout the pandemic, threatening a return to invisibility.

As the Second Circuit emphasized in *A.M. ex rel. T.M. v. Cornwall Central School District*, a student's LRE is the student's "least restrictive

⁵⁶ Yell et al., *supra* note 55, at 293.

⁵⁷ *Id.* at 299.

⁵⁸ Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 EMORY L.J. 1037, 1064 (2019).

⁵⁹ See Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72, 74-75 (1978).

⁶⁰ *Id.* at 71-72.

educational setting *consistent with that student's needs*, not the least restrictive setting that the school district chooses to make available,”⁶¹ focusing on “the nature of the child’s disabilities.”⁶² Further, per the Third Circuit’s decision in *S.H. ex rel. I.H. v. State-Operated School District*, “[i]f the educational environment is not appropriate, then there is no need to consider whether it is the least restrictive.”⁶³ In determining the student’s LRE, unless some other arrangement is required per the IEP, the student should be educated in the neighborhood school, per the IDEA Regulations.⁶⁴ Additionally, the IDEA Regulations specify that the IEP team must also consider “any potential harmful effect on the child or on the quality of services that he or she needs.”⁶⁵ To comply with the IDEA, parents must be included in any group that determines students’ LRE placements.⁶⁶

Although the Supreme Court has yet to articulate the precise parameters of an appropriate LRE, several circuits have developed and adopted standards for review.⁶⁷ The “Daniel standard,” developed by the Fifth Circuit in *Daniel R.R. v. State Board of Education*, has been adopted by the Second, Third, Fifth, Tenth, and Eleventh Circuits.⁶⁸ This standard evaluates whether a student is educated in the student’s LRE by asking: (i) “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily;” and (ii) if not, whether the school “has mainstreamed the child to the maximum extent appropriate.”⁶⁹ The Fourth, Sixth, and Eighth Circuits assess whether the LRE mandate has been satisfied using the “Roncker standard” that the Sixth Circuit developed in *Roncker ex rel. Roncker v. Walter*.⁷⁰ There, the court observed that “where the segregated facility is considered superior, the court should

⁶¹ *A.M. ex rel. T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 163 (2d Cir. 2014) (emphasis added) (quoting *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998)).

⁶² *A.M.*, 752 F.3d at 163.

⁶³ *S.H. ex rel. I.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 272 (3d Cir. 2003).

⁶⁴ See 34 C.F.R. § 300.116(c) (2018).

⁶⁵ *Id.* § 300.116(d).

⁶⁶ 20 U.S.C. § 1414(e).

⁶⁷ *Yell et al.*, *supra* note 55, at 296.

⁶⁸ *Id.* at 296–98.

⁶⁹ *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989); *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir. 1993); see also *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004).

⁷⁰ *Yell et al.*, *supra* note 55, at 297–98.

determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.”⁷¹ The Ninth Circuit uses the “Rachel H. standard,” established in *Sacramento City Unified School District, Board of Education v. Holland ex rel. Rachel H.*⁷² The “Rachel H. standard” follows a four-part balancing test, which weighs: (i) the educational benefits available in the regular classroom compared to those of the special education classroom; (ii) the benefits of interacting with general education peers; (iii) the effect of the student’s presence on other students and the teacher; and (iv) the cost of mainstreaming in the general education classroom.⁷³ The First, Seventh, and District of Columbia Circuits have not adopted a judicial standard to review LRE placements.⁷⁴ Synthesizing the circuit standards, placement teams should make a good-faith effort to place a student with disabilities in the general education classroom with necessary supports, accommodations, and modifications before considering removal.⁷⁵

To reiterate, the IDEA’s LRE principle requires that to the “maximum extent appropriate,” students with disabilities must be educated with their general education peers⁷⁶ and cannot be removed from their “regular classrooms” because of necessary modifications for general education students.⁷⁷ The IDEA does not explicitly define “classroom.”⁷⁸ But based on plain-meaning definitions, the drafters of the IDEA and Regulations likely contemplated a “classroom” as a physical room or place without considering any sort of virtual “room.”⁷⁹

⁷¹ *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

⁷² *Yell et al.*, *supra* note 55, at 297, 299.

⁷³ *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Holland ex rel. Rachel H.*, 14 F.3d 1398, 1400–01 (9th Cir. 1994).

⁷⁴ *Yell et al.*, *supra* note 55, at 296–97.

⁷⁵ *Id.* at 299.

⁷⁶ 20 U.S.C. § 1412(a)(5)(A).

⁷⁷ IDEA Regulations, 34 C.F.R. § 300.116(e) (2018).

⁷⁸ *See* 20 U.S.C. § 1401.

⁷⁹ A “classroom” is generally defined as “a room, as in a school or college, in which classes are held.” *Classroom*, DICTIONARY.COM, <https://www.dictionary.com/browse/classroom> (last visited Dec. 26, 2021). It can also be defined as “a place where classes meet.” *Classroom*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/classroom> (last updated Oct. 1, 2022). A “place” is defined as, among other things, “a building or locality used for a special purpose,” with an example given as “a place of learning.” *Place*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/place> (last updated Sept. 29, 2022). This definition makes no mention of a “place” being any sort of online platform. *See id.*

Additionally, the IDEA defines “special education” to include “instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.”⁸⁰ This definition differentiates between classroom and at-home instruction. Therefore, for purposes of the IDEA’s LRE requirement, students with IEPs must be educated in physical classrooms with their general education peers to the maximum extent appropriate. The drafters of the IDEA likely did not consider a pandemic’s implications on education whatsoever,⁸¹ so virtual “classrooms” were not contemplated nor included in the use of the term “classroom” in the IDEA and Regulations. Importantly, the purpose of the LRE principle is to maximize social interaction between students with disabilities and their general education peers.⁸² As COVID-19 policies in schools inhibited social interactions, students with disabilities may not have been educated in their LREs with these policies in place, as further explained in Part III.

Nevertheless, at the start of the pandemic, Secretary of Education Betsy DeVos determined that no reason existed to waive the FAPE and LRE requirements, as schools could continue to provide a FAPE in students’ LREs “online, through distance education or other alternative strategies.”⁸³ Even contemplating the necessity for a waiver of the FAPE and LRE requirements suggests the Department’s acknowledgement that remote learning disrupted these guarantees. Although this Comment agrees with the decision not to waive the LRE requirement during the pandemic, the Secretary of Education’s statement disregards the basic principles of LRE—as pandemic protocols disrupted schools’ abilities to educate students with disabilities in their LREs—and threatens to make students with disabilities invisible again.

⁸⁰ 20 U.S.C. § 1401(29).

⁸¹ See Jessica K. Heldman et al., *COVID-19 and Preventing Harm to Vulnerable Children*, 57 SAN DIEGO L. REV. 865, 883 (2020) (“The COVID-19 pandemic presents obstacles never envisioned by the drafters of IDEA”); Thomas A. Mayes, *The Long, Cold Shadow of Before: Special Education During and After COVID-19*, 30 S. CAL. REV. L. & SOC. JUST. 89, 94 (2021) (“The IDEA . . . was not designed for a society destabilized by a global pandemic.”).

⁸² See Yell et al., *supra* note 55, at 293, 299.

⁸³ Learning Must Continue, *supra* note 52; see also U.S. DEP’T OF EDUC., SUPPLEMENTAL FACT SHEET ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES 1–2 (2020) [hereinafter SUPPLEMENTAL FACT SHEET], <https://www.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> (stating that special education and services may be provided through distance learning).

III. PANDEMIC POLICIES AND THE IMPACT ON LRES

The federally-guaranteed rights of students with disabilities have been overlooked during the pandemic, which is problematic particularly because 15 percent of students—over 7.2 million students total—enrolled in public schools receive services under the IDEA.⁸⁴ Thus, we must consider how pandemic policies in schools impact these students' right to be educated in their LREs.

As discussed in Part II, the LRE requirement provides that students must be educated in the least restrictive conditions based on their individual, disability-specific needs to maximize social interaction with their general education peers.⁸⁵ The IEP team, including the student's parent, must determine the LRE placement; any change must be made as an amendment to the IEP; and a student's LRE cannot bend to accommodate changes in the general education curriculum.⁸⁶ Despite these requirements, COVID-19 mitigation protocols rearranged the general education curriculum and in turn interfered with the purposes of IEPs. Although federal education officials could not predict the changes to the educational environment that would surface, a pandemic cannot permit schools to set aside the IDEA's LRE mandate. The U.S. Department of Education suggested that IEP teams could include remote learning contingency plans for future COVID-19 outbreaks in a student's IEP.⁸⁷ Thus, the Department acknowledged that IEP teams did not consider contingencies—including supplemental aids and services that students may need with COVID-19 protocols in place—prior to the initial outbreak of the pandemic. But redefining LRE to encompass pandemic protocols contravened the express purpose that LRE placements must be based on the individual needs of students—not based on necessary changes to education generally.

Students with disabilities are especially at risk of regressing when their IEP services are reduced or removed.⁸⁸ Unsurprisingly then, a

⁸⁴ The Condition of Education, *supra* note 32.

⁸⁵ See discussion *supra* Part II.C.

⁸⁶ *Id.*

⁸⁷ U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK 5 (2020) [hereinafter QUESTIONS AND ANSWERS], <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

⁸⁸ Janice K. Frederick et al., *Advocacy, Collaboration, and Intervention: A Model of Distance Special Education Support Services Amid COVID-19*, 13 BEHAV. ANALYSIS PRAC. 748, 748 (2020). In the special education context, regression can be defined as losing

survey that the Council of Parent Attorneys and Advocates (COPAA) conducted in October–November 2021 indicated that more than 86 percent of parents reported that their children with disabilities experienced regression, learning losses, or slower-than-anticipated progress towards their goals since the onset of the pandemic.⁸⁹ Additionally, the U.S. Department of Education recognized that students with disabilities may have developed new disability-related needs, regressed, or failed to make expected progress due to the impact of COVID-19.⁹⁰ Under the Supreme Court’s standard announced in *Joseph F. ex rel. Andrew F. v. Douglas County School District*, an IEP must “enable a child to make progress appropriate in light of the child’s circumstances.”⁹¹ Several federal circuit courts announced that the IEP must be “likely to produce progress, not regression.”⁹² Thus, regression lends support to the finding that a violation of students’ LREs occurred, demonstrating that COVID-19 response policies were not adequate for these students’ needs.

The pandemic prevented school districts from meeting the requirements of the IDEA. Although efforts, such as remote learning and mask mandates, were necessary to mitigate the public health crisis, this does not excuse the requirement of educating students with disabilities in their LREs based on what would most promote their progress. Section A explains the negative impacts of distance learning

previously attained skills, including academic skills, social and behavioral skills, and communication abilities. Lisa Lightner, *IEP Regression and Progress Monitoring During Distance Learning*, A DAY IN OUR SHOES (May 1, 2020), <https://adayinourshoes.com/how-to-deal-with-iep-and-skills-regression-for-parents>; see also Amanda Morin, *Extended School Year Services: What You Need to Know*, UNDERSTOOD, <https://www.understood.org/articles/en/extended-school-year-services-what-you-need-to-know> (last visited Feb. 17, 2022) (listing questions IEP teams may consider to predict and determine regression).

⁸⁹ COUNCIL OF PARENT ATT’YS & ADVOCs., COMPENSATORY SERVICES RELATED TO COVID-19: PARENT SURVEY RESULTS AND RECOMMENDATIONS 1 (Nov. 2021) [hereinafter PARENT SURVEY], https://www.copaa.org/resource/resmgr/docs/2021_docs/parent_survey_findings_repor.pdf.

⁹⁰ U.S. DEP’T OF EDUC., RETURN TO SCHOOL ROADMAP: DEVELOPMENT AND IMPLEMENTATION OF INDIVIDUALIZED EDUCATION PROGRAMS IN THE LEAST RESTRICTIVE ENVIRONMENT UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 18 (2020) [hereinafter RETURN TO SCHOOL ROADMAP], <https://sites.ed.gov/idea/files/rts-iep-09-30-2021.pdf>.

⁹¹ *Joseph F. ex rel. Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

⁹² See, e.g., *Bd. of Educ. v. Diamond ex rel. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998); *M.H. ex rel. P.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 224 (2d Cir. 2012).

on special education, and Section B discusses how mask policies may have affected students with various disabilities. Section C summarizes the ineffectiveness of COVID-19 protocols in schools for students with disabilities and extends the analysis for any future LRE removals. Schools can rectify these deficiencies by providing compensatory education to students with disabilities.

A. *Distance Learning and LREs*

Prior to the end of the 2019–2020 academic year, all U.S. public school buildings closed.⁹³ As the 2020–2021 school year began, 49 percent of public school districts started the academic year with remote learning, 27 percent of districts began using hybrid instruction, and only 24 percent of districts opened with in-person instruction available to all students.⁹⁴ The pandemic continued to disrupt in-person learning throughout the 2021–2022 school year.⁹⁵

But students with disabilities did not receive comprehensive instruction and services through remote learning compared to what they received prior to the pandemic.⁹⁶ One survey showed that students with disabilities “were twice as likely as their [general education peers] to be doing little or no remote learning and twice as likely to say that distance learning was going poorly.”⁹⁷ This could be due to students’ specific disabilities, diminished or total lack of virtual accommodations and services, and lack of teacher training on online

⁹³ *The Coronavirus Spring*, *supra* note 1.

⁹⁴ *School Districts’ Reopening Plans: A Snapshot*, EDUC. WEEK (Oct. 16, 2020), <https://www.edweek.org/leadership/school-districts-reopening-plans-a-snapshot/2020/07> (data sampling covering over 900 of the country’s 13,000 public school districts).

⁹⁵ See *Burbio’s K-12 School Opening Tracker*, BURBIO, <https://cai.burbio.com/school-opening-tracker> (last updated June 25, 2022, 7:00 AM); Danielle Campoamor, *It’s Happening Again: Schools Are Going Remote Because of COVID*, TODAY (Dec. 16, 2021, 3:07 PM), <https://www.today.com/parents/parents/schools-are-closing-country-omicron-surge-rna9030>; Jeanine Santucci & Grace Hauck, *At Least 1,000 Schools in 35 States Have Closed for In-Person Learning Since the Start of the School Year: COVID-19 Updates*, USA TODAY (Sept. 5, 2021, 5:17 PM), <https://www.usatoday.com/story/news/health/2021/09/05/covid-updates-mu-variant-spreads-hawaii-begs-travelers-stay-away/5735064001>.

⁹⁶ Mayes, *supra* note 81, at 92; Alison Morris, *The Negative, and Often Inconsequential, Impact Remote Learning Has Had on Students with Disabilities During COVID*, 45 WESTCHESTER BAR J. 161, 161 (2020).

⁹⁷ Crystal Grant, *COVID-19’s Impact on Students with Disabilities in Under-Resourced School Districts*, 48 FORDHAM URB. L.J. 127, 138 (2020).

teaching.⁹⁸ Although remote learning may be necessary in a public health crisis, remote education could remove students from their LREs.⁹⁹ School districts necessarily adapted due to the pandemic, but they cannot disregard the IDEA's requirements and must still meet the needs of students with disabilities by educating them according to their IEPs in their LREs.

Subsection 1 demonstrates how LRE violations generally occur during distance learning, Subsection 2 discusses examples of schools' failed attempts to remain in compliance with the IDEA, Subsection 3 illustrates more specific, disability-related examples of LRE breaches, and Subsection 4 summarizes the inadequacies of remote learning. While the rapid academic changes due to the pandemic are to blame, not school districts, schools still must rectify the failure to implement students' IEPs in their LREs.

1. General Remote Learning and LRE Issues

All students faced challenges with the drastic shift to remote learning and other forms of instruction (i.e., hybrid instruction) that departed from the norm. Yet students receiving services under the IDEA experienced an arguably disproportionate impact due to their individual needs for specialized instruction. Although students with disabilities still received education "with" their general education peers remotely, distance learning was likely an inappropriate form of education to meet the needs of many students with disabilities. Students with disabilities may not have been able to interact with their general education peers—an important component of the LRE requirement—to the extent that their IEP team initially contemplated due to virtual learning.¹⁰⁰

Many students without computers or internet could not access their education if school districts did not provide devices, and parents may have especially struggled to assist their children with disabilities in accessing technology.¹⁰¹ Many school districts provided devices for

⁹⁸ See Melissa Gomez, *LAUSD's Independent Study Program Is Overwhelmed. Students with Disabilities Pay the Price*, L.A. TIMES (Dec. 12, 2021, 4:25 PM), <https://www.latimes.com/california/story/2021-12-06/lausd-city-of-angels-students-with-disabilities>.

⁹⁹ Heldman et al., *supra* note 81, at 886.

¹⁰⁰ See Morris, *supra* note 96.

¹⁰¹ See Lauren E. Godshall, *Much More Than Masks: Legal Issues Facing People with Disabilities and Who Can Help*, 68 LA. BAR J. 98, 99 (2020); see also discussion *infra* Part III.A.3. Students lacked computers, webcams, speakers, internet, parents to assist them, and even a quiet room and a table to work. Grant, *supra* note 97, at 128. These

distance learning; however, the devices and virtual learning programs may not have been tailored to the individual students' needs due to their disabilities.¹⁰² Some families had to request devices from their school districts when schools switched to remote learning, and many students had to wait several weeks or more before they received any computers or devices.¹⁰³ These technology issues inhibited schools from educating students with disabilities in their LREs.

The middle school where this author was a teacher during the start of the pandemic did not send devices home for the remainder of the 2019–2020 school year. For students who did not have devices at home, the school provided paper packets for parents to pick up at their discretion.¹⁰⁴ As an initial matter, the underlying premise that parents would in fact pick up the packets is speculative at best, considering work schedules, transportation issues for many low-income families, and/or hesitations regarding going to public places amid a pandemic. Setting aside these considerations, sending packets home was wholly inadequate because packets cannot make up for direct specialized instruction and related services, like occupational therapy or speech therapy. For students across the country who received paper packets as a substitute for their education, “the work assigned was often not on skill level, and it rarely accounted for the student’s disability-related deficits.”¹⁰⁵ The U.S. Department of Education and school districts

issues disproportionately impacted students from low-income neighborhoods and communities of color. *Id.* Students from low-income families are also more likely to live with more people in smaller homes as an additional challenge to focusing on school in a quiet setting. *Id.* at 136. Additionally, a Household Pulse Survey conducted by the U.S. Census Bureau reported that in late May and early June 2020, 85.8 percent of students from families with a household income of \$100,000 or more were using online resources, while only 65.8 percent of students from families with a household income of less than \$50,000 were using online resources. Kevin McElrath, *Schooling During the Covid-19 Pandemic: Nearly 93% of Households with School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. CENSUS BUREAU (Aug. 26, 2020), <https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html>.

¹⁰² Morris, *supra* note 96, at 163.

¹⁰³ Gary Stern, *Survey: Westchester Parents Spend Average of Three Hours a Day Helping Kids with Schoolwork*, LOHUD (June 19, 2020, 3:52 PM), <https://www.lohud.com/story/news/education/2020/06/19/westchester-parents-spend-3-hours-day-helping-schoolwork-survey/3221723001>.

¹⁰⁴ Students from lower-income households received paper materials from schools at higher rates than students from higher-income households. McElrath, *supra* note 101.

¹⁰⁵ Kevin P. Shields & Jennifer Swanson, *A Transformative Year: Education: A Transformative Year for Students with Disabilities*, 58 HOUS. LAW. 22, 24 (2021) (noting

cannot argue that students with disabilities—lacking access to the requisite, appropriate technology—were educated in their LREs, or even educated at all.

Schools and teachers typically encourage parental involvement in their child's education. But parents spent more and more time as their children's educators as a result of the switch to remote learning.¹⁰⁶ Parents of students with disabilities became not only the teachers, but also the special educators and service providers.¹⁰⁷ For example, one sixteen-year-old student who is nonverbal and has autism typically had an aide with him all day at school.¹⁰⁸ But with the transition to distance learning, the student's mother had to fill the role of the aide.¹⁰⁹ Additionally, the parents who were able to support their children's education throughout the school day—and by no means should any parent be required to do this—often did so without the training that educational professionals have.¹¹⁰ The extent of parental involvement may have further increased the educational achievement gap, as student engagement throughout the pandemic was linked to the education level of their parents and other adults in the neighborhood.¹¹¹ Schools were not providing students with disabilities a FAPE in their LREs if parents—and only those parents with the ability to do so—became the educators.

2. Failed Attempts to Remain in Compliance with the IDEA

Some schools drafted “contingency plans” as IEP amendments in response to the transition to distance learning.¹¹² According to special education attorneys, schools used these “contingency plan” documents

additionally that at least one school district sent home paper packets as “speech” services).

¹⁰⁶ See Stern, *supra* note 103; see also Swapna Venugopal Ramaswamy, *Parents of Children with Special Needs Hopeful About Summer School Amid Lack of Clarity*, LOHUD (June 9, 2020, 2:57 PM), <https://www.lohud.com/story/news/education/2020/06/09/special-needs-children-nys-summer-school/3143172001>; Nelson, *supra* note 6.

¹⁰⁷ See Kohli, *supra* note 6.

¹⁰⁸ Matt Villano, *Students with Special Needs Face Virtual Learning Challenges*, CNN (Sept. 24, 2020, 3:52 AM), <https://www.cnn.com/2020/09/24/health/special-needs-students-online-learning-wellness/index.html>.

¹⁰⁹ *Id.*

¹¹⁰ Grant, *supra* note 97, at 133.

¹¹¹ *Id.* at 135. Further, many low-income essential workers were not able to stay at home to educate their children or afford childcare to assist their children in remote learning. *Id.* at 136.

¹¹² Shields & Swanson, *supra* note 105.

to “shirk their responsibilities and fundamentally alter the IEP itself.”¹¹³ These plans typically were one- to two-page documents with a blanket statement about the instruction a student would be entitled to during remote learning, with no mention of the student’s actual IEP.¹¹⁴ Additionally, at least one state permitted school districts to provide IEP modifications for remote learning without requiring any parental consent.¹¹⁵ Parents in some school districts reported receiving “waiver” letters requesting they either accept the distance learning offered or decline and waive their child’s right to a FAPE.¹¹⁶ For parents who did not know their rights, these plans and waivers may have gone into effect for the students.¹¹⁷ Yet schools violate federal law in attempting to fundamentally and unilaterally change an IEP or “waive” FAPE requirements to remold a student’s LRE.¹¹⁸

Under the IDEA, IEPs, including LREs, can be changed only by the entire IEP team or if the parent agrees with the school to develop a written amendment to the IEP without a meeting.¹¹⁹ School districts attempted to take the latter route with these contingency plans and waivers. But IEP teams must include parents in determining students’ LRE placements according to the IDEA.¹²⁰ Additionally, the IDEA Regulations provide that a student with disabilities cannot be “removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.”¹²¹ Although the pandemic created needed modifications to education in general, a statutory violation occurred because distance learning may not have been the LRE for many students with disabilities. Contingency plans and waivers that schools provided did not require the LRE most appropriate for the students, did not include parents in the decision-making process, and changed students’ LREs

¹¹³ *Id.*

¹¹⁴ *Id.* at 24–25.

¹¹⁵ See Nelson, *supra* note 6.

¹¹⁶ Jodi S. Cohen & Jennifer Smith Richards, *Families of Special Needs Students Fear They’ll Lose School Services in Coronavirus Shutdown*, PROPUBLICA (May 20, 2020, 3:24 PM), <https://www.propublica.org/article/families-of-special-needs-students-fear-theyll-lose-school-services-in-coronavirus-shutdown>.

¹¹⁷ See Shields & Swanson, *supra* note 105, at 25.

¹¹⁸ See IDEA, 20 U.S.C. § 1414(d)(3)(D), (F).

¹¹⁹ *Id.*

¹²⁰ *Id.* § 1414(e).

¹²¹ 34 C.F.R. § 300.116(e) (2018).

solely based on needed modifications to the general education curriculum in violation of the IDEA and Regulations.

3. Examples of Disability-Specific LREs and Challenges with Distance Learning

Students' specific disabilities presented differing LRE challenges with distance learning. This goes to the core of the LRE requirement: a student's LRE must be tailored as appropriate for the student's individual needs.

Consider a child with attention-deficit/hyperactivity disorder (ADHD) who cannot sit focused at a computer for the entire school day.¹²² Virtual learning may be especially difficult for students with ADHD who benefit from physical activity, engaging and exciting lessons, opportunities to increase their social skills, and structured transitions, which are all difficult to provide virtually.¹²³ IEP teams likely did not contemplate the requisite supports and services to address attention and hyperactivity challenges with online learning when drafting students' IEPs and determining their LREs.

For students who require behavioral interventions, these services "are difficult, if not impossible, to provide remotely."¹²⁴ If schools did not provide the interventions required by the IEP, then schools did not provide students with disabilities an education in their LREs. Further, school routine may help stabilize students' moods and reduce maladaptive behavior,¹²⁵ reinforcing that in-person education is many students' LRE. Additionally, students with autism or intellectual disabilities may not be capable of participation in virtual lessons, and thus, could not receive any meaningful special education or instruction remotely.¹²⁶ Further, some students with disabilities may not be able to access technology independently, removing them from their LREs.

Many students with disabilities are not verbal, and teachers faced further challenges in interacting with these students virtually. Students who are deaf or have a hearing impairment also had difficulties interacting with their peers and learning remotely. Distance learning

¹²² Shields & Swanson, *supra* note 105.

¹²³ *School Changes – Helping Children with ADHD*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 29, 2021), <https://www.cdc.gov/ncbddd/adhd/features/adhd-and-school-changes.html>.

¹²⁴ Grant, *supra* note 97, at 132.

¹²⁵ Brandenburg et al., *supra* note 15, at 427.

¹²⁶ Morris, *supra* note 96.

disproportionately impacted these students “due to the increased listening effort from difficulties interpreting nonverbal cues ([e.g.], inability to lip-read because of pixelated video), poor audio quality, and audiovisual dyssynchrony.”¹²⁷ Additionally, using technology and online learning presented an immense challenge for students who are blind or visually impaired without the appropriate assistive technology and training.¹²⁸ Because the LRE must be tailored based on a student’s individual needs, IEP teams must consider the student individually in assessing whether an LRE and IEP violation occurred.

As a result of remote learning, students with disabilities regressed. For example, one eleven-year-old who is severely developmentally delayed and nonverbal could no longer say the three words he learned at school—“hi,” “bye,” and “mom”—and resorted to self-harm due to frustration.¹²⁹ A six-year-old with autism struggled to recall letters of the alphabet and even shapes for a vision test.¹³⁰ An eighteen-year-old with autism who is nonverbal began demonstrating intensified negative behaviors, such as biting and grabbing, as a result of remote education.¹³¹ These disability-specific examples are by no means exhaustive.

To reiterate, an IEP must promote progress for the individual student.¹³² Thus, if a student regressed during the period of remote learning, the IEP failed to facilitate progress in violation of the IDEA. Compensatory education for students with disabilities in their LREs is vital.

¹²⁷ Sara A. Charney et al., *Potential Impact of the COVID-19 Pandemic on Communication and Language Skills in Children*, 165 *OTOLARYNGOLOGY-HEAD & NECK SURGERY* 1, 1 (2021).

¹²⁸ This author had a student who was blind during the 2019–2020 school year. At the onset of the pandemic, the student was unable to access remote education independently even with assistive technology.

¹²⁹ Ramaswamy, *supra* note 106.

¹³⁰ Taylor Knopf, *Are Students with Disabilities Being Left Behind? Challenges of Virtual Learning*, N.C. HEALTH NEWS (Sept. 16, 2020), <https://www.northcarolinahealthnews.org/2020/09/16/are-students-with-disabilities-being-left-behind-challenges-of-virtual-learning/>.

¹³¹ Jade Abdul-Malik, *Feeling Forgotten: Students with Special Needs Face Unique Challenges with Virtual Learning*, GPB NEWS (Sept. 3, 2020, 8:29 AM), <https://www.gpb.org/news/2020/08/04/feeling-forgotten-students-special-needs-face-unique-challenges-virtual-learning>.

¹³² See Joseph F. *ex rel.* Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 1001 (2017).

4. Inadequacy of Remote Learning for Students with Disabilities

As experienced by many during the pandemic, remote and online communication is difficult—including difficulties with internet connections, muting and unmuting, and the impossibility of hearing one another when multiple people speak at the same time. Virtual learning is by no means the “least restrictive” method of educating students with disabilities. Students with disabilities cannot interact and learn with their general education peers in such a format. Schools are unable to educate the majority of students with disabilities in their LREs online.¹³³ Unfortunately, students with disabilities were once again being ignored and becoming invisible.

B. *Masks and LREs*

Both the lack of mask mandates *and* the presence of mask mandates may have violated LREs of different groups of students based on their varying disabilities. This is due to the very nature of the LRE principle: it must be appropriate for students’ disability-specific needs. Subsection 1 explains how the lack of mask mandates during a public health crisis infringes upon some students’ LREs, and Subsection 2 illustrates how implementing mask mandates violates other students’ LREs. Again, this Comment should not be construed to advocate for or against masking, but instead argues that compensatory education should be provided for any student who was not educated in that student’s LRE.

¹³³ LRE violations during remote learning can also be assessed using the circuit standards, although application is difficult due to the unprecedented nature of remote learning. *See* discussion *supra* Part II.C. Using the “Daniel standard,” remote education, even with supplemental aids and services, is likely unsatisfactory for many students with disabilities, and schools likely have not integrated students to the maximum extent appropriate based on students’ individual needs. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989). Under the “Roncker standard,” districts can argue that students are not segregated because all students are learning remotely. *See* Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983). But schools cannot remove students with disabilities from the regular education *classroom* because of modifications to general education. IDEA Regulations, 34 C.F.R. § 300.116(e) (2018). Under the “Rachel H. standard,” the benefits of interacting with general education peers factor weighs heavily in finding LRE violations, as communication and one-on-one conversations are extremely difficult with virtual learning. *See* Sacramento City Unified Sch. Dist., Bd. of Educ. v. Holland *ex rel.* Rachel H., 14 F.3d 1398, 1400–01 (9th Cir. 1994).

1. Lack of Mask Mandates in Schools and LREs

The lack of, or prohibitions on, mask mandates prevented schools from educating some students with disabilities in their LREs. Students who receive special education services for a health condition that also makes them more at risk if they contract COVID-19¹³⁴ may not have been able to attend school at all without school-wide mask mandates. Thus, immunocompromised students with disabilities may have been forced out of schools for their health and safety in violation of their LREs.

By the start of the 2021–2022 academic year, most states gave school districts discretion to decide whether to implement mask mandates, while several states prohibited universal mask mandates in schools.¹³⁵ The U.S. Department of Education’s Office for Civil Rights investigated whether these prohibitions restrict educational access for students with disabilities who are more at risk from COVID-19.¹³⁶

It is unclear how many students with disabilities are immunocompromised.¹³⁷ But many of these at-risk students likely qualify for special education services under the disability categories of orthopedic impairment or other health impairment.¹³⁸ Students with

¹³⁴ See Brandenburg et al., *supra* note 15, at 428 (“[T]hose with disabilities are more likely to require intensive care than those without disabilities if they contract COVID-19.”).

¹³⁵ Erica L. Green & Daniel E. Slotnick, *The U.S. Education Department Is Investigating Five States Over Their Mask Mandate Bans*, N.Y. TIMES (Sept. 2, 2021), <https://www.nytimes.com/2021/08/30/us/politics/biden-masks-investigations-special-education.html>.

¹³⁶ Press Release, U.S. Dep’t of Educ., Department of Education’s Office for Civil Rights Opens Investigations in Five States Regarding Prohibitions of Universal Indoor Masking (Aug. 30, 2021), <https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-opens-investigations-five-states-regarding-prohibitions-universal-indoor-masking>.

¹³⁷ In addition to students with IEPs, students with disabilities who do not qualify under the IDEA may receive a 504 plan with accommodations and modifications pursuant to Section 504 of the Rehabilitation Act (Section 504). *What Is a 504 Plan?*, UNDERSTOOD, <https://www.understood.org/articles/en/what-is-a-504-plan> (last visited Jan. 1, 2022). Note, however, 504 plans do not have the same LRE requirements. About 2.3 percent of students in the United States have 504 plans. Andrew Lee, *Thousands of Public Schools Aren’t Using 504 Plans, New Analysis Suggests*, UNDERSTOOD (Dec. 10, 2018), <https://www.understood.org/articles/en/thousands-of-public-schools-arent-using-504-plans-new-analysis-suggests>. Yet it is difficult to determine how many of these students with 504 plans have a disability that puts them at a higher risk if they contract COVID-19.

¹³⁸ The IDEA Regulations define an orthopedic impairment as “a severe orthopedic impairment that adversely affects a child’s educational performance,” including

orthopedic impairments and other health impairments receiving services under the IDEA accounted for 0.1 percent and 2.1 percent, respectively, of all students enrolled in public schools during the 2018–2019 school year,¹³⁹ and less than 0.5 percent and 15 percent, respectively, of students receiving services under the IDEA in the 2020–2021 academic year.¹⁴⁰ But it cannot be determined how many of these students have health conditions that put them more at risk from COVID-19.

Several courts addressed prohibitions on mask mandates in schools, including the Southern District of Iowa in ruling on *Arc of Iowa v. Reynolds* and the Western District of Tennessee in deciding *Schwaigert ex rel. G.S. v. Lee*.¹⁴¹ When Iowa prohibited school districts from implementing mask mandates, the plaintiffs claimed this violated the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).¹⁴² Notably, several pediatricians stated the ban on mask mandates meant that “remote learning is the *only* safe option for immune-suppressed children,” but the record also indicated that remote learning was unsuccessful for the students at issue.¹⁴³ The court concluded that the ban on mask mandates conflicted with the ADA and Section 504 “because it excludes disabled children from participating in and denies them the benefits of public schools’ programs, services, and activities to which they are entitled.”¹⁴⁴ Thus, the court granted an order enjoining enforcement of the ban on mask mandates.¹⁴⁵

“impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).” 34 C.F.R. § 300.8(c)(8) (2018). Other health impairments may include “chronic or acute health problems such as asthma, [ADHD], diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome.” *Id.* § 300.8(c)(9).

¹³⁹ Digest of Education Statistics, *supra* note 33.

¹⁴⁰ The Condition of Education, *supra* note 32.

¹⁴¹ See generally *Arc of Iowa v. Reynolds*, 559 F. Supp. 3d 861 (S.D. Iowa 2021); *Schwaigert ex rel. G.S. v. Lee*, 560 F. Supp. 3d 1113 (W.D. Tenn. 2021).

¹⁴² *Arc of Iowa*, 599 F. Supp. 3d at 867.

¹⁴³ *Id.* at 871.

¹⁴⁴ *Id.* at 880.

¹⁴⁵ *Id.* at 881, *aff'd in part*, *Arc of Iowa v. Reynolds*, 24 F.4th 1162, 1182 (8th Cir. 2022) (tailoring the injunction to only apply to the plaintiffs’ children’s schools and districts), *vacated as moot*, *Arc of Iowa v. Reynolds*, 33 F.4th 1042, 1044 (8th Cir. 2022) (vacating the preliminary injunction due to changes in COVID-19 conditions).

The Western District of Tennessee addressed a similar issue after the Governor of Tennessee signed an Executive Order that allowed parents to opt their children out of mask mandates.¹⁴⁶ Plaintiffs claimed the opt-out policy violated the ADA and Section 504.¹⁴⁷ One plaintiff student could not attend his physical education class due to the Order, which was the only class in which he was able to interact with his general education peers per his IEP.¹⁴⁸ In other words, he could no longer be educated in his LRE. The court granted the preliminary injunction to prevent enforcement of the opt-out policy.¹⁴⁹ It should be noted that the plaintiffs brought these cases under the ADA and Section 504, but prohibitions on school-wide mask mandates also violate the IDEA's LRE requirements.¹⁵⁰

At-risk students may not be able to attend school at all without school-wide mask mandates. Immunocompromised students with disabilities may need to continue learning online,¹⁵¹ which may not be their LRE.¹⁵² But students cannot be removed from the classroom with their general education peers "solely because of needed modifications in the general education curriculum," as the IDEA Regulations mandate.¹⁵³ Rather, LRE placements must be focused on individual students' needs. Prohibitions on mask mandates in schools violated immunocompromised students' LREs, entitling them to compensatory education.

2. Mask Mandates in Schools and LREs

During the 2021–2022 school year, eighteen states plus the District of Columbia mandated masks in schools, and twenty-two states allowed districts to determine whether to implement mask

¹⁴⁶ *Schwaigert*, 560 F. Supp. 3d at 1117.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1121.

¹⁴⁹ *Id.* at 1132, *vacated as moot*, *Schwaigert ex rel. G.S. v. Lee*, No. 2:21-cv-02552-SHL-atc, 2022 WL 1560391, at *7 (W.D. Tenn. Mar. 28, 2022) (granting the defendant's motion to dismiss for lack of subject matter jurisdiction for mootness due to changes in COVID-19 circumstances).

¹⁵⁰ See 20 U.S.C. § 1415(i)(2) (providing the right of aggrieved parties to bring a civil action); *Arc of Iowa*, 24 F.4th at 1175 (noting that the plaintiffs could have brought the suit under the IDEA).

¹⁵¹ See QUESTIONS AND ANSWERS, *supra* note 87, at 4–5.

¹⁵² See discussion *supra* Part III.A.

¹⁵³ 34 C.F.R. § 300.116(e) (2018).

mandates.¹⁵⁴ An important component of LRE placements is maximizing social interactions between students with disabilities and their general education peers.¹⁵⁵ Masks may restrict social interactions, removing students from their LREs.

The Centers for Disease Control and Prevention (CDC) recommended adjusting masking strategies as needed, as wearing masks may be difficult for people with certain disabilities, young children, and people with sensory or cognitive difficulties.¹⁵⁶ In fact, the CDC acknowledged that clear masks or masks with clear plastic panels should be worn when interacting with those who have hearing impairments, young children, children learning to read, students learning new languages, people with disabilities, and “[p]eople who need to see the proper shape of the mouth for making appropriate vowel sounds”¹⁵⁷—an important strategy used when teaching articulation to emergent readers and students with disabilities. But difficulties with clear masks may arise if the plastic fogs up. Face shields may seem like an appropriate alternative, but the CDC did not recommend face shields to replace masks.¹⁵⁸ Further, the CDC recommended “using written communication, closed captioning, or decreasing background noise” for those who do not have a clear mask when interacting with people with hearing impairments.¹⁵⁹ Yet these strategies may violate a student’s IEP and LRE because this may not be what would most promote the student’s progress, and using these strategies would change the LRE solely due to necessary modifications for general education.¹⁶⁰

¹⁵⁴ Stacey Decker, *Which States Banned Mask Mandates in Schools, and Which Required Masks?*, EDUC. WEEK (July 8, 2022), <https://www.edweek.org/policy-politics/which-states-ban-mask-mandates-in-schools-and-which-require-masks/2021/08>.

¹⁵⁵ See discussion *supra* Part II.C.

¹⁵⁶ *Guidance for COVID-19 Prevention in K-12 Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 2021) [<https://public4.pagefreezer.com/browse/CDC%20Covid%20Pages/05-12-2021T03:26/https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>].

¹⁵⁷ *Guidance for Wearing Masks: Help Slow the Spread of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2021) [hereinafter *Guidance for Wearing Masks*], [<https://public4.pagefreezer.com/browse/CDC%20Covid%20Pages/03-09-2021T13:31/https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See discussion *supra* Part II.C.

One percent of students who receive services under the IDEA qualify for a hearing impairment.¹⁶¹ Masks diminish the speech signal, which may significantly affect speech comprehension for children with hearing loss.¹⁶² Further, these students rely on lip-reading to communicate, and these visual cues are important for speech processing.¹⁶³ But lip-reading is not possible with standard masks.¹⁶⁴ To solve this issue, everyone in schools would need to wear clear masks if a mask mandate is in effect. Yet transparent masks inhibit sound even more than typical masks.¹⁶⁵ No comprehensive solution exists for students with hearing impairments if masks are worn. Schools cannot provide students with hearing impairments with an appropriate education in their LREs if these students cannot communicate with their teachers and peers.

Nineteen percent of students receiving services under the IDEA qualify for speech or language impairments, and 33 percent qualify for specific learning disabilities.¹⁶⁶ Yet masks muffle sound, make it difficult to understand speech, and remove the ability to see facial expressions and read lips for better comprehension.¹⁶⁷ This may create difficulties for students with limited speech and language abilities when attempting to speak with, and comprehend, teachers and peers. Mask mandates may also negatively impact students with specific learning disabilities who struggle with oral expression, listening comprehension, and oral reading skills.¹⁶⁸ One must utilize additional cognitive processes to listen to speech distorted by masks,¹⁶⁹ which may

¹⁶¹ The Condition of Education, *supra* note 32.

¹⁶² Charney et al., *supra* note 127.

¹⁶³ *Id.*

¹⁶⁴ *Communicating Effectively While Wearing Masks*, AM. SPEECH-LANGUAGE-HEARING ASS'N [hereinafter *Communicating Effectively*], <https://www.asha.org/public/communicating-effectively-while-wearing-masks-and-physical-distancing> (last visited Jan. 1, 2022); Manoel Nobrega et al., *How Face Masks Can Affect School Performance*, 138 INT'L J. PEDIATRIC OTORHINOLARYNGOLOGY 1, 1 (2020). Additionally, wearing masks may be especially difficult for people who have cochlear implants or wear hearing aids. *Communicating Effectively*, *supra* note 164.

¹⁶⁵ Nobrega et al., *supra* note 164, at 1–2.

¹⁶⁶ The Condition of Education, *supra* note 32.

¹⁶⁷ *Communicating Effectively*, *supra* note 164.

¹⁶⁸ A student may qualify as having a specific learning disability if the child is below-level for oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, and/or mathematic problem solving. IDEA Regulations, 34 C.F.R. § 300.309(a) (2018).

¹⁶⁹ Nobrega et al., *supra* note 164.

make communicating even more challenging for students with disabilities. Inhibiting the ability to communicate with and understand teachers and peers is not what is most appropriate to promote progress for students with disabilities, resulting in removal from their LREs.

Further, recognizing facial expressions of emotion is critical for establishing interpersonal relationships from a young age.¹⁷⁰ Yet masks cover the lower half of the face, greatly inhibiting the ability to detect facial expression and featural information.¹⁷¹ Masks may also impact reciprocity and imitation.¹⁷² This could especially impact students with autism, who account for 12 percent of students who receive services under the IDEA.¹⁷³ Individuals with autism have difficulties recognizing, understanding, and reacting appropriately to emotions.¹⁷⁴ Students with autism are further inhibited from recognizing and developing their understanding of emotions due to masks. These students are prevented from making meaningful progress towards social-emotional goals and are thus removed from their LREs.

Schools should, at the very least, allow exemptions from mask mandates for certain groups of students who cannot wear masks due to their disabilities.¹⁷⁵ The CDC does not recommend masks for people who cannot properly or safely wear a mask due to a disability.¹⁷⁶ Per the CDC, people with disabilities who may not be able to wear a mask include those with high sensitivity issues, those who cannot understand the necessity of wearing a mask (such as someone with an

¹⁷⁰ Keiran M. Rump et al., *The Development of Emotion Recognition in Individuals with Autism*, 80 CHILD DEV. 1434, 1434 (2009).

¹⁷¹ Janet Green et al., *The Implications of Face Masks for Babies and Families During the COVID-19 Pandemic: A Discussion Paper*, 27 J. NEONATAL NURSING 21, 24 (2021).

¹⁷² *Id.*

¹⁷³ The Condition of Education, *supra* note 32.

¹⁷⁴ Rump et al., *supra* note 170.

¹⁷⁵ Although, as explained above, individual exemptions may not be sufficient, as teachers and classmates wearing masks may also prevent schools from educating students with disabilities in their LREs. *See* discussion *supra* Part III.B.2. Further, mask exemptions may also harm other students with disabilities who may be immunocompromised. *See* discussion *supra* Part III.B.1. To reiterate, this Comment acknowledges that both the lack of mask mandates and mask mandates present differing issues. Rather than advocating for a specific policy regarding masking, schools must provide compensatory education for individual students who were not educated in their LREs due to mask policies.

¹⁷⁶ *Guidance for Wearing Masks*, *supra* note 157.

intellectual disability), and those with behavioral concerns.¹⁷⁷ For example, many individuals with autism have sensory sensitivities that make wearing masks extremely challenging.¹⁷⁸ As another example, one school tied a mask to a student with Down syndrome's head for weeks without her parents knowing, despite this being dangerous for her health because she cannot speak, has an enlarged tongue, and breathes through her mouth.¹⁷⁹ During the time that she had the mask tied to her face, the student had behavioral issues both at school and at home,¹⁸⁰ demonstrating that mask mandates for certain students may lead to behavioral regression. If schools did not, at the very least, permit exemptions from mask mandates as necessary, masking resulted in a more restrictive educational environment. Even so, parents may have had difficulty obtaining a medical exemption if the school required one.¹⁸¹ Further, if only some students with disabilities were exempt from mask mandates, this could have led to their general education peers labeling students with disabilities as different, making them invisible again, as Senator Stafford warned.¹⁸²

C. *Ineffectiveness of COVID-19 Policies and Beyond for Students with Disabilities*

While prohibiting mask mandates may remove some students from their LREs, implementing mask mandates may violate other students' LREs. But virtual learning and mask policies are not the only changes to education that removed students from their LREs during the pandemic. Students with disabilities may have also been removed from their LREs due to social distancing and restrictions on large groups, for example.¹⁸³ Due to necessary COVID-19 policies, schools simply could not educate all students with disabilities in their individual LREs.

¹⁷⁷ *Id.*

¹⁷⁸ *The Challenge of Face Masks*, ORG. FOR AUTISM RSCH. (Nov. 12, 2020), <https://researchautism.org/the-challenge-of-face-masks>.

¹⁷⁹ Audrey Conklin, *Florida Educators Tied Mask to Disabled Student's Face for 6 Weeks Without Parents' Consent, Father Says*, FOX NEWS (Oct. 23, 2021, 2:37 PM), <https://www.foxnews.com/us/florida-educators-tied-mask-student-face>.

¹⁸⁰ *Id.*

¹⁸¹ See *The Challenge of Face Masks*, *supra* note 178.

¹⁸² See Stafford, *supra* note 59, at 71–72; see also discussion *supra* Part II.C.

¹⁸³ See, e.g., Charney et al., *supra* note 127, at 2 (“Social distancing measures and restrictions on large group gatherings have affected school-age children from having meaningful, in-person interactions with peers.”).

Further, it should be noted that future public health and safety crises causing major changes in the delivery of education could also lead to removals from LREs. Importantly, a student's LRE is based on what is most appropriate for that student's individual, disability-specific needs. It is imperative that schools provide compensatory education to rectify LRE removals during the pandemic and if students with disabilities are ever systematically removed from their LREs in the future.

IV. SOLUTION TO RESOLVE LRE VIOLATIONS: COMPENSATORY EDUCATION

This Part proposes that schools should provide compensatory education to students with disabilities who were, and may be, deprived of an education in their LREs due to pandemic protocols and future public health and safety crises. As LRE determinations must be tailored to students' needs, compensatory education awards should be tailored in the same way, considering students' individual needs and the extent to which they were removed from their LREs. Section A provides a background on compensatory education, and Section B presents compensatory education as a solution to resolve LRE violations due to the pandemic.

A. *Compensatory Education Overview*

Compensatory education is a form of equitable relief designed to remedy the harms that accrue when a student is denied the rights to a FAPE under the IDEA.¹⁸⁴ Compensatory education, as the name suggests, seeks to compensate students for deficiencies in their IEPs and for inadequate implementation of their special education instruction and related services.¹⁸⁵

The IDEA and Regulations do not address compensatory education; rather, this form of equitable relief developed from case law.¹⁸⁶ This development began with the Supreme Court's decision in

¹⁸⁴ Perry A. Zirkel, *COVID-19 Confusion: Compensatory Services and Compensatory Education*, 30 S. CAL. REV. L. & SOC. JUST. 391, 392 (2021); see also RETURN TO SCHOOL ROADMAP, *supra* note 90, at 25–26.

¹⁸⁵ See also *RG ex rel. G v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003) (defining compensatory education as “educational services . . . to be provided prospectively to compensate for a past deficient program”).

¹⁸⁶ Peter W.D. Wright, *Compensatory Education Case Law from the Beginning Through Draper in 2008*, WRIGHTSLAW (July 27, 2022), <https://www.wrightslaw.com/info/comp.ed.law.htm>.

School Committee v. Department of Education, in which the Court stated that “relief is to be ‘appropriate’ in light of the purpose of the [IDEA],” and that “equitable considerations are relevant in fashioning relief.”¹⁸⁷ The Eighth Circuit was the first circuit to recognize compensatory education as a form of equitable relief in deciding *Miener ex rel. Miener v. Missouri* in 1986, holding that the “plaintiff is entitled to compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the [IDEA].”¹⁸⁸ In deciding *Jefferson County Board of Education v. Breen*, the Eleventh Circuit recognized that “providing a compensatory education should serve as a deterrent against states unnecessarily prolonging litigation in order to decrease their potential liability.”¹⁸⁹ Additionally, the Third Circuit in deciding *M.C. ex rel. J.C. v. Central Regional School District* asserted:

[A] child’s entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district’s behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child’s teachers, therapists, and administrators—and of the multi-disciplinary team that annually evaluates the student’s progress—to ascertain the child’s educational needs, respond to the deficiencies, and place him or her accordingly.¹⁹⁰

Further, the Eighth Circuit noted in *Strawn v. Missouri State Board of Education* that, even though the student lost one year of schooling, she “may be entitled to more than just one year of compensatory education because . . . ‘the optimum time for language acquisition is at a younger age than [the student’s] present age.’”¹⁹¹ Thus, more compensatory education may be required than the amount of time lost.

There is no fixed way to determine the compensatory education that a particular student might be entitled to. But the approach announced by the District of Columbia Circuit in *Reid ex rel. Reid v. District of Columbia* is prevailing.¹⁹² The *Reid* approach dictates that

¹⁸⁷ *Id.*; *Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 369, 374 (1985).

¹⁸⁸ Wright, *supra* note 186; *Miener ex rel. Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986).

¹⁸⁹ *Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853, 858 (11th Cir. 1988).

¹⁹⁰ *M.C. ex rel. J.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

¹⁹¹ *Strawn v. Mo. State Bd. of Educ.*, 210 F.3d 954, 959 (8th Cir. 2000).

¹⁹² Zirkel, *supra* note 184, at 393.

compensatory awards should be based on individual needs and assessments in a case-by-case approach by the fact-finding court or hearing officer, rather than a “mechanical hour-counting” approach.¹⁹³ The *Reid* decision further explained that compensatory education should be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.”¹⁹⁴ Further, the Ninth Circuit provided in *Parents of Student W v. Puyallup School District, No. 3* that “[a]ppropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA.”¹⁹⁵

Importantly, compensatory education awards are not predicated on negligence or fault of the school district.¹⁹⁶ Rather, compensatory education remedies a deprivation of special education services regardless of the cause of such deprivation.¹⁹⁷ Thus, schools should provide compensatory education to remedy losses in special education services and violations of students’ IEPs and LREs without regard to the cause—the pandemic.

B. *Compensatory Education to Resolve LRE Violations During the Pandemic*

Despite the obvious need for compensatory education for many students with disabilities, only 18 percent of students received any such award offer related to the pandemic, according to a COPAA survey conducted in October–November 2021.¹⁹⁸ The survey also demonstrated that the majority of parents did not receive any information from schools about the availability of or process for determining compensatory education awards.¹⁹⁹ For the students who were lucky enough to receive a compensatory award proposal, only 23 percent of such proposals reflected parental input, and many parents

¹⁹³ *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

¹⁹⁴ *Id.*

¹⁹⁵ *Parents of Student W v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994).

¹⁹⁶ COUNCIL OF PARENT ATT’YS & ADVOCS., FAQ ON COMPENSATORY EDUCATION IN THE TIME OF COVID-19 1 (2020), <https://www.wrightslaw.com/covid/2020.0813.COPAA.CompEd.FAQ.pdf>.

¹⁹⁷ *Id.*

¹⁹⁸ PARENT SURVEY, *supra* note 89.

¹⁹⁹ *Id.* at 2.

felt as though the process for awarding compensatory education was unfair.²⁰⁰

Subsection 1 discusses the U.S. Department of Education's guidance and recommendations for compensatory education due to the pandemic. Subsection 2 provides additional suggestions for calculating the compensatory education awards necessary due to pandemic protocols. Subsection 3 suggests allowing students to remain in public schools beyond their anticipated graduation year and /or the statutory maximum age to fulfill compensatory relief. Subsection 4 proposes extended school year services as a means to implement compensatory education. Subsection 5 summarizes and reiterates the need for compensatory education.

1. Guidance from the U.S. Department of Education

The U.S. Department of Education recommended that IEP teams make individualized determinations as to whether students require compensatory services because of delays in or lack of services due to pandemic-related school closures.²⁰¹ The Department also recommended IEP teams review the services that the student with disabilities required prior to the pandemic to determine whether the student actually received these services during the pandemic.²⁰² The Department noted several factors that IEP teams could consider to determine compensatory education awards: "(1) the child's present levels of academic achievement and functional performance; (2) the child's previous rate of progress toward IEP goals; and (3) documented frequency and duration of special education and related services provided to the child prior to the service disruptions caused by the COVID-19 pandemic."²⁰³ The Department also asserted that states have a role in guaranteeing that needed compensatory education is considered and addressed.²⁰⁴

Yet these are merely recommendations, rather than requirements. The Department of Education has not provided obligatory specifications for states, districts, and IEP teams for determining the required compensatory education or the means for

²⁰⁰ *Id.*

²⁰¹ QUESTIONS AND ANSWERS, *supra* note 87, at 2–4; SUPPLEMENTAL FACT SHEET, *supra* note 83, at 2.

²⁰² RETURN TO SCHOOL ROADMAP, *supra* note 90, at 16.

²⁰³ *Id.* at 26–27.

²⁰⁴ *Id.* at 29.

implementing these services.²⁰⁵ Some states provided guidance on implementing compensatory services.²⁰⁶ But the Department of Education should provide comprehensive guidance on compulsory determinations of compensatory education and its implementation to ensure that all states, school districts, and IEP teams comply.

2. Calculating Compensatory Education Awards

Students with disabilities who were denied a FAPE in their LREs due to COVID-19 protocols must receive compensatory education. As noted by the District of Columbia Circuit in *Reid ex rel. Reid v. District of Columbia*, compensatory education should be calculated on a case-by-case basis to compensate for the educational benefits students should have received but were deprived of²⁰⁷ due to the pandemic. IEP teams should determine students' required compensatory education at the annual IEP review meeting. This is similar to what the U.S. Department of Education suggested, but the Department must *require* this to deter states from unnecessarily prolonging the process to decrease potential liability to students, per the Eleventh Circuit in *Jefferson County*.²⁰⁸

²⁰⁵ See generally QUESTIONS AND ANSWERS, *supra* note 87, at 2–4, 7–8; SUPPLEMENTAL FACT SHEET, *supra* note 83, at 2; RETURN TO SCHOOL ROADMAP, *supra* note 90, at 24–31.

²⁰⁶ See generally, e.g., TEX. EDUC. AGENCY, CONSIDERATIONS FOR EXTENDED SCHOOL YEAR AND COMPENSATORY SERVICES FOR STUDENTS WITH DISABILITIES DURING AND AFTER TEXAS SCHOOL CLOSURES DUE TO COVID-19 (2020), <https://tea.texas.gov/sites/default/files/covid/covid19-compensatory-services-and-extended-school-year-guidance.pdf> (providing information on compensatory services and extended school year due to COVID-19 in Texas); MICH. DEP'T OF EDUC. OFF. OF SPECIAL EDUC., GUIDANCE TO ADDRESS FOREGONE LEARNING FOR STUDENTS WITH IEPs AS A RESULT OF THE COVID-19 PANDEMIC (2020) [https://web.archive.org/web/20220322123917if_/https://www.michigan.gov/-/media/Project/Websites/mde/specialeducation/COVID/RecoveryServices.pdf?rev=083689defbac42c0a71cbdbbf5e47926] (explaining Michigan's recovery services for students who failed to progress due to the pandemic); W. VA. DEP'T OF EDUC., OFF. OF SPECIAL EDUC., COVID-19 RECOVERY SERVICES VERSUS COMPENSATORY SERVICES (2020), <https://wvde.us/wp-content/uploads/2020/08/21028-CompensatoryServiceBrochure-v2-1.pdf> (distinguishing compensatory services from West Virginia's COVID-19 recovery services); *Guidance and Answers to FAQs on COVID-19 Compensatory Services*, PA. DEP'T OF EDUC. (June 15, 2021), <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx> (providing information on compensatory COVID-19 services based on lack of progress in Pennsylvania).

²⁰⁷ See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

²⁰⁸ See *Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853, 858 (11th Cir. 1988) (“[P]roviding a compensatory education should serve as a deterrent against states unnecessarily prolonging litigation in order to decrease their potential liability.”).

Students from lower-income families have been disproportionately disadvantaged throughout the pandemic. Their parents may not be aware of the IDEA's guarantees or have the resources to advocate for compensatory education. To prevent further growth of the inequality gap, the U.S. Department of Education should require compensatory education determinations to be compulsory to ensure that all students receive this equitable relief. This furthers the principle that the Third Circuit announced in *M.C.* that it is the school staff's responsibility—not the parents'—to determine educational needs and remedy deficiencies.²⁰⁹ Any time in which a student was removed from the student's LRE must be compensated for, while also considering the student's progress or regression under the IEP due to COVID-19 protocols.

The U.S. Department of Education should assist states with additional funding, as providing compensatory education for the majority of students with disabilities will be costly. As a condition for funding, the Department must require compulsory determinations of pandemic-related compensatory education awards for all students receiving services under the IDEA.

3. Special Education Beyond the Anticipated Graduation Year and the Statutory Age Limit as Compensatory Education

Schools may allow students with disabilities to remain in the public education system for extra time to compensate for inadequacies due to the pandemic.²¹⁰ Under the IDEA, students receiving services may remain in schools until the age of twenty-one.²¹¹ Yet case law provides that compensatory education awards can extend beyond this age limit.²¹² For example, the Third Circuit in *Octavia P.* permitted a

²⁰⁹ *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

²¹⁰ RETURN TO SCHOOL ROADMAP, *supra* note 90, at 30. Although, this Comment acknowledges that this may not be the appropriate solution for all students with disabilities, as some may want to attend higher education or enter the workforce immediately. The stigma attached to graduating high school “late” may also limit this solution.

²¹¹ 20 U.S.C. § 1412(a)(1)(A)–(B).

²¹² *See, e.g., Octavia P. ex rel. Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 185 (1st Cir. 1993) (holding that the IDEA permits courts to grant compensatory education to students with disabilities beyond the statutory age limit); *Bd. of Educ. v. Ill. State Bd. of Educ.*, 79 F.3d 654, 660 (7th Cir. 1996) (“Compensatory education is a benefit that can extend beyond the age of 21.”); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1279, 1283–84, 1290 (11th Cir.

compensatory award for a twelve-year-old student to begin when the student aged past twenty-one.²¹³ The court further held that future educational needs could not be predicted as to the “form or components of the instructional program,” but the IEP team could determine the details once the student turned twenty-one.²¹⁴

Compensatory education can be provided after students with disabilities would typically age out of public schools to compensate them for time removed from their LREs. Many students with disabilities turned twenty-one during the pandemic, so allowing them to remain in or reenroll in schools is the only way to provide these students equitable relief. For students who have not yet aged beyond twenty-one years, attempting to compensate them immediately may further remove them from their LREs (e.g., if students must be removed from the general education classroom for compensatory instruction and services). Thus, providing compensatory education beyond the statutory age limit would prevent continued disruptions in special education.

Additionally, not all students with disabilities need to remain in school until they are twenty-one years old. For students who are set to graduate with their general education peers, schools should offer to allow them to remain in the school system as compensatory education; the statutory age limit may not need to be extended for these students. Overall, compensatory education beyond when students with disabilities age out or otherwise plan to graduate may be the most appropriate equitable remedy given the extended removal from LREs due to the public health crisis.

States, school districts, and students’ IEP teams should consider providing special education and services beyond the statutory age limit as compensatory education. The award should be solidified now, while the details of the program can be determined once the student reaches the statutory maximum age or is otherwise set to graduate. This would ensure that students with disabilities are provided equitable relief for the time removed from their LREs due to COVID-19 policies.

2008) (affirming the compensatory education award, which was available to the student for several more years, even though he was twenty-one years old at the time of the ruling).

²¹³ *Octavia P.*, 916 F.2d at 867–68.

²¹⁴ *Id.* at 868–69.

4. Extended School Year Services as Compensatory Education

Extended school year (ESY) services are another solution to provide compensatory education. The IDEA requires school districts to provide the ESY services necessary as determined by the IEP team.²¹⁵ These services are typically provided over the summer.²¹⁶ Although ESY services are considered distinct from compensatory education, ESY education may be an avenue to compensate students whose IEPs were not implemented in their LREs during the pandemic.

According to the Second Circuit's *A.M. ex rel. T.M. v. Cornwall Central School District* decision, the LRE requirement also applies to ESY services.²¹⁷ School districts do not provide ESY education for general education students, so schools may not be able to educate students with disabilities in their LREs via ESY education. Alternatively, schools may place students at educational programs conducted by other entities for ESY services, including private schools or other public agencies.²¹⁸ Further, schools may consider offering an extended school year for all students, especially because COVID-19 policies also harmed many general education students.²¹⁹ It should be noted, however, that many students with disabilities already receive ESY services,²²⁰ so this may not be a solution for compensating all students with disabilities.

²¹⁵ IDEA Regulations, 34 C.F.R. § 300.106(a)(1)–(2) (2018).

²¹⁶ RETURN TO SCHOOL ROADMAP, *supra* note 90, at 32.

²¹⁷ *A.M. ex rel. T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 151 (2d Cir. 2014).

²¹⁸ *Id.* at 165. A private school placement can also be provided as compensatory education during the regular school year and/or after the student reaches the age limit of twenty-one. *See, e.g., Draper*, 518 F.3d at 1279, 1286. But this Comment does not suggest private school placements during the regular school year as pandemic compensatory education due to the overwhelming number of students with disabilities who require relief.

²¹⁹ *See Dorn*, *supra* note 5 (highlighting the decrease in assessment scores and the increase in achievement gaps for all students due to the pandemic).

²²⁰ For students who were not provided ESY services due to the pandemic, the Department of Education's Office of Special Education Programs suggested—but did not require—providing these services during the typical school year or during school breaks or vacations. *See* U.S. DEP'T OF EDUC., Q&A: IMPLEMENTATION OF IDEA PART B PROVISION OF SERVICES IN THE CURRENT COVID-19 ENVIRONMENT 5 (2020), <https://www.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf>.

5. The Overall Need for Compensatory Education

Whatever the method, compensatory education is necessary for students who were not provided a FAPE in their LREs due to COVID-19 protocols. The U.S. Department of Education should address this and provide detailed requirements immediately, rather than neglecting the needs of students with disabilities and letting them become invisible again. Additionally, if students were to be systematically removed from their LREs in the future for any other reason, this Comment can be used as guidance for redressing this and providing compensatory education.

V. CONCLUSION

While the COVID-19 pandemic impacted virtually everyone across the globe, students with disabilities have endured a tremendous burden. Under the IDEA, students with disabilities are entitled to an education in the LRE appropriate for their disability-specific needs. Although COVID-19 mitigation protocols were necessary, the pandemic prevented schools from providing students with disabilities an education in their LREs.

Students with disabilities are entitled to compensatory education whenever they are removed from their LREs. The U.S. Department of Education should require compulsory compensatory education determinations by IEP teams at annual review meetings due to LRE removals during the COVID-19 pandemic. Compensatory education may be provided beyond the IDEA's statutory age limit or anticipated graduation year, as ESY services, or another way the Department, states, districts, and IEP teams see fit. The Department must provide further guidance on the compensatory education required due to the pandemic to ensure all students with disabilities receive the equitable relief they are entitled to, reaffirming that these students are not invisible. The Department should also do so in the future if students with disabilities are ever systematically removed from their LREs again.

