



# Virtual & On-Line Instruction After Your Schools Re-open

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## Relevant Laws

- ❑ Americans with Disabilities Act of 1990 (ADA), including
  - ❑ Title II
- ❑ Section 504 of the Rehabilitation Act of 1973
- ❑ Individuals with Disabilities Education Act (IDEA)
- ❑ Family Educational Rights and Privacy Act (FERPA)



## The ADA and Section 504

- ❑ No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

34 CFR §104.4

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## Equal Access to Technology

- ❑ Students with disabilities must be given the opportunity to "acquire the same information, engage in the same interactions, enjoy the same services as [students without disabilities] with substantially equivalent ease of use." FAQ, 111 LRP 36986 (OCR 5/26/11)

Q.7. applies to online content that is part of the operation of the school (such as applications, admission, class assignments, housing)

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## Equal Access (cont.)

- ❑ Q.10. For accessibility, consider:
  - ❑ What educational opportunities and benefits does the school provide through the use of technology?
  - ❑ How will the technology provide these opportunities and benefits?
  - ❑ If the technology is not accessible, can it be modified, or is there a different technological device available, so that students with disabilities can obtain the educational opportunities and benefits in a timely, equally effective, and equally integrated manner?
    - ❑ Is it accessible to students who are VI? Compatible with screen readers, large font
    - ❑ If not, is another product available that can give equal access or can product be altered?
    - ❑ If not, provide accommodations and modifications that give equally effective and equally integrated access

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## Effective Communication

- ❑ A district shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. To this end, a district shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by the district. In determining what type of auxiliary aid or service is necessary, a district shall give primary consideration to the requests of the individual with disabilities. *28 C.F.R. 35.160*

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## Full Continuum of Services

- ❑ “Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a).
- ❑ The continuum must include regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1).
- ❑ The continuum must make provision for supplementary services. 34 C.F.R. § 300.115(b)(2).

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## 504 and the IDEA in the Virtual School

- ❑ SWD are entitled to a FAPE under both Section 504 and the IDEA.
- ❑ The ADA and Section 504 prohibit discrimination against students with disabilities (SWD) in admission/acceptance policies, practices and procedures, including as they apply to a school-of-choice for students without disabilities.
- ❑ To avoid discrimination, the District must provide reasonable accommodations to SWD attending a virtual campus.
- ❑ Students are entitled to “reasonable accommodations” that do not create a “fundamental alteration” in the program.
- ❑ The fundamental nature of a virtual campus may include:
  - ❑ Instruction is home-based and provided virtually and on-line; and
  - ❑ Parents must serve as a Learning Coach.

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## Placement v. Location

- Is a virtual program more restrictive or the same?
  - Disciplinary context – generally considered more restrictive due to lack of access to peers
  - At least one court considered the student's off-task behavior, prior difficulties with online programming, social skills needs, and the need for proximity control. *Downington Area Sch. Dist. v. K.D.* (PA Commonwealth Court 2017).
  - During the COVID remote instruction period, courts recognized that "placement" does not mean the "classroom" and online learning will satisfy the LRE requirements for some students but not others. Whether a change from the brick and mortar building to a virtual classroom is a change in placement will depend on the amount and type of synchronous instruction and participation with non-disabled peers. *Order granting Motion for Summary Judgement*, 220 WL 7481741, 78 IDELR 12 (D.N.M. 12/18/2020)

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## Placement v. Location (cont.)

- Placement may include both services and location. Where private school was "notably different" from virtual school, student was entitled to stay put in virtual school that Court had previously deemed appropriate. "Clearly shifting from what is essentially a completely individualized instructional setting separate from other students to a more traditional school setting does constitute a change in [the student's] 'then-current educational placement.'" *Eley v. District of Columbia* (DCDC 2014)

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## Related Services

- ❑ *Related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 CFR 300.34

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## Can FAPE Be Provided?

- ❑ Review the current 504 plan or IEP. Can it be implemented in the virtual program?
- ❑ If it cannot be implemented because the placement is not available on the virtual campus, offer the parent an opportunity for an IEP meeting to consider a change in placement. Send a Prior Written Notice (PWN).
- ❑ If it cannot be implemented but a change in placement is not required, convene a 504 or IEP team meeting, to consider whether additional accommodations will permit the 504 plan or IEP to be implemented.

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## When FAPE Can't Be Provided

- ❑ Not all students can receive a FAPE in a virtual program.
- ❑ It may be impossible to provide FAPE virtually when a student needs:
  - Related services in-person (e.g., PT, OT, travel training, O&M) (but consider related services on campus and remainder virtual)
  - Direct social skills instruction and interaction with peers
  - Hand-over-hand instruction
  - Community-based instruction
  - Augmentative communication instruction
  - A segregated special education classroom not offered virtually
  - Intense behavioral interventions

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## Child Find

- ❑ "Child find" is the affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction who are in need of special education and related services. 34 CFR 300.111 (a)(1)(i)
- ❑ Child find obligations arise under both Section 504 and the IDEA.

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## Child Find (cont.)

- ❑ OCR recognizes that Child Find may be more difficult in during virtual instruction. Specific procedures should be developed and may include: including child-find information in the Student Handbook and campus website; parent training on signs of a disability; additional screening of students; MLSS for student absences, lack of work completion, social skill deficits and behavior; established criteria and indicators for teachers and administrators to serve as procedural guide for further investigation; additional staff training, especially for general education teachers; more frequent monitoring of child find procedures.

*Dear Colleague Letter* (OCR Aug. 5, 2016)

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## FERPA

- ❑ The District cannot require a parent to waive FERPA rights as a condition of enrollment.
- ❑ Accounts of siblings should not be shared.

*Ltr to Anonymous* (FPCO June 16, 2016)

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## OCR and SEA Decisions

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### *Quillayute Valley Sch. Dist.*

- ❑ An on-line school's admission criteria that restricted special education to 40 min/week and did not provide for tutoring, translator support, certain assistive technology, or extended time beyond six weeks past the end of the school year to complete courses violated Section 504 by screening out students who had a documented inability to complete schoolwork independently or a documented reading-writing ability level below 6<sup>th</sup>/7<sup>th</sup> grade level.
- ❑ School did not provide evidence that it applied same criteria to non-disabled students or provide evidence that it could not or should not apply this to all applicants.
- ❑ School denied admission to a student with behavior intervention plan (BIP), an inability to work independently, and a need for more than 40 min/week of sped, based on reading/written achievement scores in 5<sup>th</sup> grade.

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## Quillayute Valley Sch. Dist.

- ❑ Settlement Agreement
  - ❑ Review, revise admissions policies, procedures, criteria to ensure they do not discriminate solely based on disability, designed to achieve educational mission, no disparate treatment
  - ❑ Publish on website
  - ❑ Train employees in admissions and 504

49 IDELR 293 (OCR 11/16/07)



## Vashon Island School Dist.

- ❑ A student's need for in-person social skills instruction and peer-interaction *may* be offset by increased anxiety caused by the peer interaction when those services are provided in a brick-and-mortar school. For example, a state complaint investigator determined that a Washington school district failed to sufficiently *consider* alternative placements when the parent stated that her son could not attend a brick and mortar school due to the adverse impact on his well-being and anxiety, despite the fact that the student also had "significant behavioral needs related to impulse control and self-regulation." The complaint investigator found that the student's evaluation and other data could be read to support both the parent's and district's positions.

121 LRP 5315 (State Complaint Wash. 2019)



## Vashon Island (cont.)

Key Quote:

- ❑ “Neither the District's policy that students in the program receive special education at their neighborhood school nor the statement that the middle school is not a virtual school and therefore cannot provide remote instruction are not individualized reasons based on the Student's unique disability related needs. The District failed to make an individualized decision and failed to sufficiently consider a continuum of placements.”

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## Virtual Community Sch. Of Ohio

- ❑ OCR provided the following examples of materials that are not equally accessible:
  - ❑ An electronic book reader provides greater functionality than audiobooks or an aide who reads the passage.
  - ❑ Lack of, or inadequate, closed captions (YouTube's auto-captions may not provide equitable access under Title II.)
  - ❑ Material that is not compatible with screen readers
  - ❑ Pictures without text equivalents
  - ❑ Course content, class assignment instructions, other “critical information” in PDF format so inaccessible to screen readers or those with VI

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## Virtual Community Sch. (cont.)

- ❑ Lessons directed to inaccessible sites
- ❑ Electronic forms on website not formatted to be completed by assistive technology
- ❑ Pages not organized to be readable without requiring an associated style sheet
- ❑ Factors impacting the ease of use and/or access to content in online environment
- ❑ Videos/other multimedia without accessible features, such as keyboard-only controls, audio descriptions, and text captions synchronized with the video images
- ❑ Assignments and quizzes not available via keyboard

62 IDELR 124 (OCR 11/6/13)



## Carlsbad Municipal Schools

- ❑ Charter School within the District provides all instruction online
- ❑ Elementary age student with ASD, SLI; needs special education communications, math, motor skills, reading, social-emotional, and written language instruction
- ❑ Requires frequent redirection, prompting, performs best in small group with small student-to-teacher ratio
- ❑ Fluent in reading but has difficulty with comprehension
- ❑ IEP provided text-to-speech, speech-to-text, laptop
- ❑ "The IEP team discussed the least restrictive environment and determined [student] required 30 minutes per week of special education instruction in a special education classroom, 30 minutes per week of direct Occupational Therapy, 60 minutes per week of direct Speech and Language Therapy and 30 minutes per week of direct counseling/social work in order to receive FAPE. ...Furthermore, the IEP team discussed the continuum of placement alternatives and determined that [charter school] was the appropriate placement in the least restrictive environment for [student] in order for [student] to receive FAPE. ..."



## Carlsbad (cont.)

- ❑ In contrast, the new IEP developed by the charter school's IEP team provides student with only 30 minutes weekly in an online special education classroom and relies on accommodations and modifications to enable the student to progress in the online general education curriculum. Parent reports that he or she spends 30 hours a week assisting student with student's online lessons. Both parent and student report that student is struggling with online lessons in the general education curriculum. The reevaluation of student conducted on 11/17/17 concluded that student was struggling with the current curriculum despite having special education accommodations and modifications.
- ❑ There is sufficient evidence to conclude that the district has failed to make access to an online continuum of alternative placements available to this student. The district is cited with respect to Issue No. 3.

118 LRP 19602 (PED Complaint 2018)



## Downingtown Area Sch. Dist. v. K.D.

- ❑ The placement of gifted student in on-line course by himself was inappropriate where student tended to get off-task due to ADHD. Prior difficulties with online program made placement inappropriate because the student sought out peers, played games, and asked to be part of regular education classroom. The proposed program would have included sensory breaks, collaboration with peers through Skype, group projects; teacher in room.
- ❑ Note: school was under CAP for placing gifted students in program, rather than providing individualized instruction, but this student had been in next grade general education math for 2 years, and it was effective.

69 IDELR 162 (PA Commonwealth Court 2017)



## Citrus County School Board

- ❑ District contracts with virtual school to provide the virtual option.
- ❑ Student had "obvious difficulties" with social skills, reading social cues, rigidity, difficulty with transitions and a narrow range of interests, hyperactivity, distractibility, restlessness and an inability to sustain focus.
- ❑ A prior IEP provided for a classroom behavioral management program and a word processor as assistive technology.
- ❑ The challenged IEP provided for placement in general education and noted Petitioner would be "superior" in writing skills if allowed to keyboard rather than write by hand, requires tutoring for math, is easily distracted, cannot focus while reading, and recorded books would increase his comprehension.
- ❑ OT evaluation recommended two sessions/week for sensory integration, typing course, consideration of dictation software, Mead RediSpace notebook paper.

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## Citrus County (cont.)

- ❑ Primary impediment to learning: resistance to completing work; family "chaos" caused by student/parent relations
- ❑ Recommendations from included two hours, five days/week of "intensive behavioral interventions"
- ❑ IEP team found that Petitioner was not experiencing any behavioral problems in the brick-and-mortar school setting [although he had been in a behavioral management class] so refused to write behavior goals for virtual setting

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## **Citrus County (cont.)**

- ❑ The following was recommended for home:
  - ❑ The learning environment be adjusted to allow for constant monitoring and viewing the computer screen;
  - ❑ During the school day, follow a 45 minute pattern and scheduling in breaks;
  - ❑ Petitioner's mother should make flash cards for math facts;
  - ❑ Petitioner's mother should contact a home school group for additional peer
  - ❑ Considered brick and mortar as alternative
- ❑ District provided ST direct

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## **Citrus County (cont.)**

- ❑ "In the typical case, educational placement means a child's educational program and not the particular institution where that program is implemented." However, there may be circumstances under which a change in schools or even classrooms within a school is so profound as to constitute a change of placement and a violation of FAPE.

115 LRP 27165 (SEA Fl. 2014)

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## Take Aways

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### Take Aways for Admission

- ❑ Decisions regarding whether a SWD can be reasonably accommodated in a virtual program must be made on an individual basis by their respective Section 504 or IEP teams.
- ❑ District administrators can make a decision regarding whether a student's Section 504 plan or IEP can be implemented in a virtual program as written.
- ❑ If a student's IEP provides for placement in a self-contained special education class that is not available in a virtual program (such as a social-emotional class, behavior class, or life skills class), the District can refuse enrollment in the virtual program but should provide PWN and offer an IEP meeting to consider a change in placement.

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## Take Aways for Admission (cont.)

- ❑ If the District or campus determine a student's IEP cannot be implemented in a virtual program for another reason, a Section 504 or IEP team meeting should be convened to determine if the student can be accommodated in the virtual program. That is, admission should not be denied automatically by the administrator.
- ❑ For each student with a Section 504 plan or IEP accepted to a virtual program, the teachers and administrators should review the plan to ensure all provisions can be implemented in that program and that no additional accommodations are needed. A 504 or IEP team meeting should be considered for any needed changes. The District can also consider an amendment to the 504 plan or IEP without a meeting to add accommodations.
- ❑ Once admitted and attending a virtual program, follow regular procedures to hold a 504 or IEP team meeting to address concerns regarding student progress.

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## Take Aways for Accessibility

- ❑ Accessibility considerations arise with respect to websites, online learning environments, electronic communication programs, instructional materials, instructional tools (laptop, tablets, mouse, keyboard, etc.), and navigation of websites and on-line materials.
- ❑ Keep in mind that even if the District-approved instructional materials/websites meet ADA guidelines, teachers often supplement instruction with materials that may not be accessible. Additionally, platforms used for teacher/student/parent communication, posting assignments and grades, etc. must be accessible.
- ❑ Because parents are expected to take an active role in the education of the students, it will be equally important to ensure that the materials are accessible to parents.

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## Accessibility (cont.)

- ❑ Include information about accessibility in the Student Handbook and on the virtual school and District website, including:
  - ❑ The right to accessibility;
  - ❑ Contact information for students and parents who have accessibility needs or concerns.
- ❑ Provide staff training regarding the importance of ensuring that all materials are equally accessible to all students.
- ❑ Conduct periodic review of instructional materials/websites used by staff.
- ❑ Conduct an annual survey of students and parents regarding accessibility needs and to determine whether the District is meeting those needs.

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## Accessibility (cont.)

- ❑ Consider the following:
  - ❑ Are all educational opportunities and benefits that are available through the use of the technology equally available to students with disabilities through the provision of accommodations or modifications (i.e., do students with disabilities have the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as sighted students)?
  - ❑ Are the educational opportunities and benefits provided to students with disabilities in as timely a manner as those provided to students without disabilities?
  - ❑ Will it be more difficult for students with disabilities to obtain the educational opportunities and benefits than it is for students without disabilities?

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## Accommodation Considerations

- ❑ Students may need accommodations for home-based virtual instruction that they do not need in a brick and mortar school. Thus, accommodation decisions should be made based on which program the student will attend.
- ❑ Executive functioning deficits may require accommodations for self-paced online learning.
- ❑ Vocabulary for on-line content may be significantly above enrolled grade level.
- ❑ Text-to-speech and speech-to-text should be provided when needed.
- ❑ Audio texts may not provide equal access compared to other technology (see equal access discussion below).
- ❑ A PT, OT, SLP, and or AT specialist may need to provide input on accessibility accommodations, and additional evaluation may be needed.
- ❑ Students may need direct instruction to access and efficiently use technology.

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