

# THE LONG, COLD SHADOW OF BEFORE: SPECIAL EDUCATION DURING AND AFTER COVID-19

THOMAS A. MAYES\*

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\* Attorney, Iowa Department of Education; Baylor University, B.A.; University of Iowa, J.D.; Lehigh University, M.Ed. Certified by the National Association of Counsel for Children as a Child Welfare Law Specialist. Affiliations are listed for identification purposes only. The views expressed are solely the Author’s. Thanks to the *RLSJ* editorial board for their excellent work!

## I. INTRODUCTION

As this Article is being written, the world is grappling with the COVID-19 pandemic.<sup>1</sup> COVID-19 is spread by “respiratory transmission,”<sup>2</sup> and is therefore easily spread among persons closely situated.<sup>3</sup> Furthermore, COVID-19 is capable of asymptomatic transmission.<sup>4</sup> This highly contagious disease is projected to result in 278,606 deaths in the United States as of December 5, 2020.<sup>5</sup>

Because of how easily COVID-19 is transmitted, the world has learned a new phrase: social distancing.<sup>6</sup> The federal government has encouraged social distancing measures as a core component of its COVID-19 response.<sup>7</sup> State governments, local governments, and private industries have moved activities online and cancelled or postponed in-person events. Examples include festivals<sup>8</sup>, sporting events,<sup>9</sup> elections, political conventions,<sup>10</sup>

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<sup>1</sup> See, e.g., Eric Benson, *A Plague on All Our Houses*, TEX. MONTHLY, May 2020, at 58, 64; *The Eye of the Storm*, VANITY FAIR, May 2020, at 44; Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24–April 21, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 551, 551–53 (2020).

<sup>2</sup> Daniel B. Jernigan, *Update: Public Health Response to the Coronavirus Disease 2019 Outbreak—United States, February 24, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 216, 216 (2020).

<sup>3</sup> Schuchat, *supra* note 1, at 553.

<sup>4</sup> Wycliffe E. Wei et al., *Presymptomatic Transmission of SARS-CoV-2—Singapore, January 23–March 16, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 411, 415 (2020); Schuchat, *supra* note 1, at 554.

<sup>5</sup> Univ. Wash., *COVID-19 Projections: United States of America*, INST. HEALTH METRICS & EVALUATION, <https://covid19.healthdata.org/united-states-of-america> [https://perma.cc/XQ7E-237K]. This is likely an underestimate of the case count. See Schuchat, *supra* note 1, at 555.

<sup>6</sup> Arielle Lasry et al., *Timing of Community Mitigation and Changes in Reported COVID-19 and Community Mobility—Four U.S. Metropolitan Areas, February 26–April 1, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 451, 451 (2020); Schuchat, *supra* note 1, at 553–55; Wei et al., *supra* note 4, at 411.

<sup>7</sup> *Social Distancing: Keep Your Distance to Slow the Spread*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [https://perma.cc/56WL-65US].

<sup>8</sup> See, e.g., Benson, *supra* note 1, at 63 (cancelling South by Southwest festival).

<sup>9</sup> *Id.* (cancelling NCAA basketball tournaments, suspending NBA season, and postponing MLB season).

<sup>10</sup> Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic: Here’s a List*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> [https://perma.cc/GZ6F-KWEJ].

academic contests, concerts,<sup>11</sup> and performances.<sup>12</sup> Many bars and restaurants have closed, while others have transitioned to curbside or delivery services.<sup>13</sup> State and local governments have issued stay-at-home orders or limited the number of persons who may gather in one place.<sup>14</sup> Those who can are now working remotely.<sup>15</sup> However, not everyone is able to transition to this new work environment: unemployment has spiked and may equal or exceed rates not seen since the Great Depression.<sup>16</sup> Businesses are at risk.<sup>17</sup> In order to save lives and curtail the spread of COVID-19, the United States has voluntarily, temporarily, and nearly universally<sup>18</sup> placed itself and its economy into the functional equivalent of a medically induced coma.<sup>19</sup>

One facet of social distancing includes widespread school closures.<sup>20</sup> As of June 5, 2020, according to UNESCO, over 67 percent of the world's student population was still affected by school closures, with additional students affected by locality-specific closures.<sup>21</sup> This has placed a disproportionate burden on students with disabilities and their families.<sup>22</sup>

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<sup>11</sup> See, e.g., *2020 Nationals Overview: Now an Online Tournament*, ROSTRUM, April–May 2020, at 16 (changing the National Speech and Debate Tournament from in-person to online); Scripps Nat'l Spelling Bee, *Updates Regarding COVID-19*, SPELLING BEE, <http://spellingbee.com/updates> [<https://perma.cc/5SP6-NPWS>] (cancelling the National Spelling Bee).

<sup>12</sup> *Here Are All the Major Music Events Canceled Due to Coronavirus (Updating)*, BILLBOARD, <https://www.billboard.com/articles/business/touring/9323647/concerts-canceled-coronavirus-list> [<https://perma.cc/3AKM-96EW>].

<sup>13</sup> *From Pandemic to Protests: How Food Businesses are Responding*, BON APPETIT, <https://www.bonappetit.com/story/food-businesses-covid-19> [<https://perma.cc/XR89-4N3J>].

<sup>14</sup> See, e.g., Schuchat, *supra* note 1, at 553–55.

<sup>15</sup> See, e.g., *id.*; Megan Howard, *How to Stay Cybersecure While Working at Home*, IOWA LAW., Apr. 2020, at 10; Brandon Vogel, *Easing Stress While Working from Home*, N.Y. STATE BAR ASS'N J., Apr. 2020, at 11.

<sup>16</sup> See, e.g., Benson, *supra* note 1, at 70–71.

<sup>17</sup> See, e.g., Kathleen Lynn, *COVID-19 Upends the Legal World*, N.Y. STATE BAR ASS'N J., Apr. 2020, at 16.

<sup>18</sup> See, e.g., *Wis. Legislature v. Palm*, 942 N.W.2d 900, 918 (Wis. 2020) (declaring “stay at home” order unenforceable for failure to follow Wisconsin’s emergency rulemaking process).

<sup>19</sup> See, e.g., Peggy Noonan, *A Plainer People in a Plainer Time*, WALL ST. J. (May 22, 2020), <https://www.wsj.com/articles/covid-will-make-america-a-plainer-place-11590103104> [<https://perma.cc/6D39-7HU7>].

<sup>20</sup> See, e.g., Danielle Dooley et al., *Low-Income Children and Coronavirus Disease 2019 (COVID-19) in the US*, 174 JAMA PEDIATRICS 922, 922 (2020), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2766115> [<https://perma.cc/B7SV-F4NF>]; Schuchat, *supra* note 1, at 553–55.

<sup>21</sup> U.N. Educ. Sci. Cultural Org. [UNESCO], *COVID-19 Impact on Education*, at June 5, 2020, <https://en.unesco.org/covid19/educationresponse> [<https://perma.cc/5TN5-F5FY>].

<sup>22</sup> Jennifer Gavin, *Are Special Education Services Required in the Time of COVID-19?*, A.B.A. (Mar. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens->

During school closures, students with disabilities under the Individuals with Disabilities Education Act (“IDEA”)<sup>23</sup> are unable to receive the specially designed instruction and related services called for in their individualized education programs (“IEPs”).<sup>24</sup> In other circumstances, where schools are providing instruction through telecommunications or over the internet, students with disabilities are unable to receive services that fully replace those they had received before the COVID-19 outbreak.<sup>25</sup>

In response to some of these concerns, the U.S. Department of Education’s Office of Special Education Programs (“OSEP”) issued a question-and-answer document (“COVID-19 Q&A”).<sup>26</sup> The first question is pertinent to school closures.

Question A-1: Is an LEA [local education agency] required to continue to provide a free appropriate public education (FAPE) to students with disabilities during a school closure caused by a COVID-19 outbreak?

Answer: The IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease.

If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not

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rights/articles/2020/are-special-education-services-required-in-the-time-of-covid19 [https://perma.cc/SJ8Y-8G9P]; Corey Mitchell, *How to Handle IEPs During the Coronavirus Crisis? Some Expert Advice*, EDUC. WK.: ON SPECIAL EDUC. (Apr. 3, 2020), https://www.edweek.org/teaching-learning/how-to-handle-ieps-during-the-coronavirus-crisis-some-expert-advice/2020/04 [https://perma.cc/35JQ-24ES]; Perry A. Zirkel, *COVID-19 and K-12 Students with Disabilities: A Second Legal Look* (Apr. 13, 2020) [hereinafter Zirkel, *A Second Legal Look*], https://perryzirkel.com/2020/04/13/covid-19-and-k-12-students-with-disabilities-a-second-legal-look [https://perma.cc/A562-2C9V].

<sup>23</sup> 20 U.S.C. § 1401(3) (2018) (defining “child with a disability” under the IDEA) .

<sup>24</sup> *Id.* § 1401(14) (defining IEP).

<sup>25</sup> See, e.g., Dooley et al., *supra* note 20; Gavin, *supra* note 22; Mitchell, *supra* note 22; Perry A. Zirkel, *COVID-19 and K-12 Students with Disabilities: Initial Guidance* (Mar. 20, 2020) [hereinafter Zirkel, *Initial Guidance*], https://perryzirkel.com/2020/03/20/special-supplement-covid-19-and-k-12-students-with-disabilities-initial-guidance [https://perma.cc/M4F8-374W].

<sup>26</sup> OFF. SPECIAL EDUC. PROGRAMS [OSEP], QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK, at A-1 (Mar. 2020) [hereinafter OSEP, COVID-19 Q&A], as reprinted in 76 IDELR 77 (OSEP 2020).

be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). SEAs [state education agencies], LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).<sup>27</sup>

This answer, which is not legally binding and without the force of law,<sup>28</sup> provides a great deal of flexibility<sup>29</sup> for schools and IEP Teams to respond to the needs of the moment. However, it is not clear whether schools and IEP Teams are either aware of or are utilizing that flexibility.

In my view, some of this reluctance is likely attributable to schools and IEP Teams judging their actions based on pre-COVID-19 standards. “We would not have offered this child speech-language services by telepractice

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<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., Zirkel, *Initial Guidance*, *supra* note 25.

<sup>29</sup> *Id.*

before!” “We would never have dreamed of suspending this child’s occupational therapy before!” “We would have never considered online education for this child before!” “We would have never made such a drastic change without an IEP Team meeting before!” “Our lawyers would have never let us do this before!” “We didn’t think about programming this into the data system before!”

When schools suspend or reconfigure services due to COVID-19, the focus on pre-COVID-19 standards and expectations is cruel, unreasonable, and counterproductive. IEP Teams need to focus on now and the future, not on the *before*. While the *before* is knowable and comforting, it no longer exists. The focus instead needs to be on the present and future: the *now* and the *next*. This is uncomfortable because the era of COVID-19 is unpredictable, emergent, and beyond anyone’s ability to completely control.<sup>30</sup> However, this is the new reality that IEP Teams must face. Nostalgia for pre-COVID-19 times and evaluation of current actions based on pre-COVID-19 expectations will result in misguided educational decisions. These decisions would harm students and families, as will any misguided decisions in administrative actions and in the courts.

## II. THE UNREASONABLENESS OF DWELLING ON *BEFORE*

The IDEA, with both its substantive and procedural requirements, was not designed for a society destabilized by a global pandemic. OSEP acknowledged as much in its COVID-19 Q&A: the IDEA does “not specifically address a situation in which elementary and secondary schools are closed for an extended period of time . . . because of exceptional circumstances, such as an outbreak of a particular disease.”<sup>31</sup> Julie Weatherly, a prominent special education attorney, concurred, noting that “[w]e may be coloring outside the lines and we’ll ask for forgiveness later. These procedural requirements were all written in a world that wasn’t in a national, or worldwide, safety and health emergency.”<sup>32</sup> The Supreme Court described the IDEA as providing a “basic floor of opportunity”<sup>33</sup> for

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<sup>30</sup> See, e.g., Thomas A. Mayes, *A Brief Model for Explaining Dispute Resolution Models in Special Education*, 34 OHIO ST. J. ON DISP. RESOL. 153, 158 (2019) [hereinafter Mayes, *A Brief Model*] (describing briefly the human needs for control and stability); Tyler Coe, *Cover Your Firm, Your Clients, and Your Cough*, IOWA LAW., Apr. 2020, at 12, 12 (“Generally, I only like change in my life when I am the creator and dictator of the change.”).

<sup>31</sup> OSEP, COVID-19 Q&A, at A-1 (Mar. 2020), as reprinted in 76 IDELR 77 (OSEP 2020).

<sup>32</sup> Mitchell, *supra* note 22.

<sup>33</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982). For scholarship employing the floor metaphor, see, for example, Maureen A. MacFarlane, *The Shifting Floor of Educational Opportunity: The Impact of Educational Reform on Rowley*, 41 J.L. & EDUC. 45 (2012); Nicholas

children with disabilities. The floor connotes a stable and reliable structure. However, this structure must be set on a foundation, which in turn must be set on solid ground. When the foundation is shaken, the structure is destabilized, and there is a risk of collapse. The IDEA might have been a solid foundation, but COVID-19 is an earthquake that has fractured—and perhaps liquefied—that foundation.<sup>34</sup> To borrow from a biblical text, the IDEA house that was built on a ground of solid rock is now resting on a bed of unstable sand.<sup>35</sup>

Although the law was not designed for interruption of services due to a global pandemic, the law offers some requirements and guiding principles. Based on those requirements and principles, an unyielding focus on the *before* is unreasonable and would result in unreasonable decisionmaking. I base this assertion on the substantive standard reiterated by the Supreme Court in *Endrew F. v. Douglas County School District RE-1*.<sup>36</sup> In *Endrew F.*, the Court described the substantive standard under the IDEA as an IEP “reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.”<sup>37</sup> Two clauses in this standard illustrate the risks posed by focusing on the special educational system before COVID-19: “reasonably calculated” and “appropriate in light of the child’s circumstances.”

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L. Townsend, *Framing the Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229 (2007); and Perry A. Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983) [hereinafter Zirkel, *Building an Appropriate Education*].

<sup>34</sup> Liquefaction is a process by which certain soils when disturbed (such as by an earthquake) behave like a fluid. N. Ambraseys & S. Sarma, *Liquefaction of Soils Induced by Earthquakes*, 59 BULL. SEISMOLOGICAL SOC'Y AM. 651, 653 (1969).

<sup>35</sup> *Matthew* 7:24-27.

<sup>36</sup> See *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). For discussions of *Endrew F.*, see, for example, Josh Cowin, *Is That Appropriate?: Clarifying the IDEA's Free Appropriate Public Education Requirement Post-Endrew F.*, 113 NW. L. REV. 587 (2018); Janet R. Decker et al., *Legal Matters: Behavior Intervention Plans: More Important than Ever After "Endrew,"* PRINCIPAL LEADERSHIP, Jan. 2018, at 56; H. Rutherford Turnbull et al., *The Supreme Court, Endrew, and the Appropriate Education of Students with Disabilities*, 84 EXCEPTIONAL CHILD. 124 (2018); Mark C. Weber, *Endrew F. Clairvoyance*, 35 TOURO L. REV. 591 (2019); Allison Zimmer, *Solving the IDEA Puzzle: Building a Better Special Education Development Process Through Endrew F.*, 93 N.Y.U. L. REV. 1014 (2018); Perry A. Zirkel, *Professional Misconceptions of the Supreme Court's Decision in Endrew F.*, COMMUNIQUÉ, Jun. 2019, at 12 [hereinafter Zirkel, *Professional Misconceptions*]; Perry A. Zirkel, *The Aftermath of Endrew F.: An Outcomes Analysis 18 Months Later*, 361 EDUC. L. REP. 488 (2019); Perry A. Zirkel, *The Supreme Court's Decision in Endrew F. v. Douglas County School District RE-1: A Meaningful Raising of the Bar?*, 341 EDUC. L. REP. 545 (2017).

<sup>37</sup> *Endrew F.*, 137 S. Ct. at 999.

## A. “REASONABLY CALCULATED”

The first principle to remember is that the IDEA does not guarantee or require any particular outcome or level of achievement.<sup>38</sup> It tests inputs, not outcomes.<sup>39</sup> The law, rather than guaranteeing that a child meets her IEP goals,<sup>40</sup> guarantees that important adults will do reasonable things with the resources and information available. This substantive standard is like the “reasonable efforts” test in child-welfare law.<sup>41</sup> Child-welfare law requires child-welfare agencies to (1) make reasonable efforts to prevent the removal of a child from the child’s home, (2) make reasonable efforts toward reunification, and (3) make reasonable efforts toward attaining permanency.<sup>42</sup> It does not guarantee that a child will be reunified with the child’s parents, for example, but does guarantee that the child welfare agency will take a thoughtful, individualized approach that is responsive to the child’s safety and other needs. Whether the child-welfare agency’s efforts are reasonable depends on the facts of each case. For example, two children have come to the attention of a child-welfare agency because of parental drug use: one child’s parents occasionally and recreationally use marijuana and one child’s parents use and manufacture methamphetamine.

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<sup>38</sup> See, e.g., *I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 863 F.3d 966, 971–72 (8th Cir. 2017); *M.M. v. District 0001 Lancaster County Sch.*, 702 F.3d 479, 487 (8th Cir. 2012); *Perkiomen Valley Sch. Dist. v. S.D.*, 405 F. Supp. 3d 620, 629–30 (E.D. Pa. 2019).

<sup>39</sup> In many respects, the IDEA’s input standard stands in contrast to many of the standards in public education, such as proficiency on statewide assessments, cut scores on universal screening measures, grades or scores on end-of-unit and end-of-course assessments, and the decision to confer a high school diploma. For a brief, early discussion of outcome standards as they relate to special education, see, e.g., Zirkel, *Building an Appropriate Education*, *supra* note 33, at 484; see also Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 EDUC. L. REP. 550 (2010) [hereinafter Zirkel, *Two Competing Approaches*].

<sup>40</sup> Some commentators interpreted *Endrew F.* to set an outcome test, and in my opinion, mistakenly so. See, e.g., Joshua Dunn, *Special Education Standards: Supreme Court Raises Level of Benefit*, EDUC. NEXT, Summer 2017, <https://www.educationnext.org/special-education-standards-supreme-court-raises-level-benefit-endrew-f-v-douglas-county> [https://perma.cc/E347-7YNJ] (“... IDEA requires meaningful benefits.”).

<sup>41</sup> See, e.g., Brooke N. Silverthorn, *Agency Representation in Child Welfare Proceedings*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 751, 761–63 (Donald N. Duquette et al., eds., 3d ed. 2016).

<sup>42</sup> *Id.* For two brief comparisons between special education law and child welfare law, see, for example, Thomas A. Mayes, *Keeping the “I” in the IDEA: A Response to a Proposal to Abandon Individualization in Special Education in Favor of Rule-Based Delivery Models*, 2018 BYU EDUC. & L.J. 141, 155–56 [hereinafter Mayes, *Keeping the “I” in the IDEA*] (discussing the “reasonable efforts” standard); Zirkel, *Building an Appropriate Education*, *supra* note 33, at 486–87 (discussing the “best interest of the child” standard).



These facts, standing alone, suggest a high likelihood that reasonable efforts must be particularized to each case.

The *Andrew F.* FAPE standard, in my view, is like the Drake equation. The Drake equation was developed by Frank Drake to determine the probability of intelligent life in the universe, based on factors such as star formation, planet formation, the existence of life, the percentage of intelligent life, and the duration of intelligent civilizations.<sup>43</sup> Based on the inputs, the solution to the equation could be inconceivably high, or it could be one—our own civilization standing alone in the universe. As knowledge increases, such as our knowledge of planets outside of our solar system, the precision of the probability represented by the Drake equation increases.<sup>44</sup> The Drake equation is completely dependent on inputs. A major change in a single variable could drastically alter the outcome.<sup>45</sup> It makes no sense to start with a preferred solution and then force values into the variables to suit the desired outcome.

Likewise, it makes no sense to start the FAPE analysis with a preferred outcome and then twist, force, or massage the inputs to make that outcome appear feasible. If a special education director tells a teacher that she needs to write goals for two students to be able to read one hundred words per minute at the end of the IEP, that may be unreasonable (though not conclusively so) for the child who is currently reading ten words per minute. Such a goal may be more reasonable (though not conclusively so) for the child who is currently reading sixty words per minute. Rather than reason in reverse from a desired outcome, reason forward from inputs and data; trust the process; and understand that those inputs and data may change as knowledge of the child increases or knowledge of effective general education and special education increases.

The *reasonably calculated* standard under the IDEA will vary based on the child-specific data and inputs. If an input changes because it is no longer reasonable, then the output and the substantive entitlement will change to the degree that the input changes. If an input is no longer reasonable, it is no longer accounted for by the reasonably calculated standard. An input that may have been reasonable *before* but is unreasonable *now*, cannot be held against the public agencies. For example, if an IEP called for in-person occupational therapy for thirty minutes per week, and in-person therapy is temporarily suspended by a state's occupational therapy licensing board, insistence that a child was denied a FAPE because in-person occupational therapy was not provided ignores the

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<sup>43</sup> Frank Drake, *Reflections on the Equation*, 12 INT'L J. ASTROBIOLOGY 173, 173 (2013).

<sup>44</sup> *Id.* at 173–175.

<sup>45</sup> *Id.*

*now* and lives in the *before*. That specific provision of occupational therapy might have been reasonably calculated *before*, but it is no longer. In the *now*, it is reasonable to ask how or when those occupational therapy needs are to be met. Rigid insistence on implementing an IEP developed *before*, as if COVID-19 never happened, is not reasonable.

In addressing the present circumstances—the *now*—and future circumstances—the *next*,<sup>46</sup> any calculations must be reasonable. This weighs against a district requiring mass IEP revisions to meet a specific statutory or regulatory timeline. If IEPs were rewritten en masse without the time or thought to make sure the IEPs were reasonably calculated to confer a FAPE, mere compliance would seem to be the goal. It would suggest that the focus of the revisions is compliance with a rule, instead of calculating the anticipated benefit to each child being served. Thus, to maintain procedural compliance with the IDEA, districts may foster a climate where individualization will be denied<sup>47</sup> by implementing one-size-fits-all IEPs, or the rush to completion may inhibit full consideration. The rush to meet a procedural requirement, moreover, creates an atmosphere of heightened risk of unreasonable decisions, which are substantive violations. The rules exist to serve the child, not the other way around.

The IDEA requires both procedural and substantive compliance.<sup>48</sup> However, the IDEA sets out a hierarchy: relief for procedural violations is available only if those procedural violations “impeded the child’s right to a free appropriate public education;” “significantly impeded the parents’ opportunity to participate in the [IDEA] decision-making process;” or “caused a deprivation of educational benefits.”<sup>49</sup> Thus, it would be foolhardy to rush through an IDEA-required process to meet an IDEA-required deadline when doing so increases the risk of a substantive violation.<sup>50</sup>

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<sup>46</sup> See, e.g., Dixie Snow Heufner, *Judicial Review of the Special Education Program Requirements under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J. L. & PUB. POL’Y 483, 493 (1991) (noting that IEPs are “future oriented”).

<sup>47</sup> For a discussion about the essential nature of individualization under the IDEA, see Mayes, *Keeping the “I” in the IDEA*, *supra* note 42, at 144–57.

<sup>48</sup> See, e.g., Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement Under the IDEA?*, 15 CONN. PUB. INT. L.J. 1, \*3 (2016) [hereinafter Zirkel, *Parental Participation*].

<sup>49</sup> 20 U.S.C. § 1415(f)(3)(E)(ii) (2018).

<sup>50</sup> Zirkel, *Initial Guidance*, *supra* note 25 (cautioning against “emotion-laden legalism”).

Another consideration informing what it means to be *reasonably calculated* is the “snapshot rule.”<sup>51</sup> The snapshot rule considers substantive adequacy of an IEP based on the circumstances known to the IEP Team when the IEP was drafted.<sup>52</sup> If a child does not make progress as expected, that does not mean that the IEP was ipso facto unreasonable or inappropriate.<sup>53</sup> The IEP Team cannot be held to the standard of a fortune teller. A negative future outcome does not mean that the IEP was inappropriate when developed.<sup>54</sup> However, the snapshot rule also cautions teams to evaluate IEPs’ continued appropriateness in light of changing circumstances.<sup>55</sup> If a child’s changed circumstances, such as those associated with COVID-19, cause the IEP to no longer be appropriate, it tempts fate to pretend as if the circumstances, in fact, had not changed. The snapshot rule also requires that school and state actions in response to COVID-19 be judged in light of what was known at the time the schools were closed, not in light of later-acquired knowledge that school closures may not have been a necessary or effective preventative measure.<sup>56</sup>

Finally, a focus on the *before* runs the risk of ignoring the effects of COVID-19. Viewing the IEP that was developed *before* as the only solution for a child once schools reopen ignores the possibility that the needs of the child may differ, requiring a corresponding change in services.<sup>57</sup> From interruption in instruction, to loss of practice opportunities for newly learned academic and behavioral skills, to the disruption of routines, to the trauma of losing family and friends to COVID-19, the child’s IEP must reflect any new needs. The *before* IEP is the starting place, but it cannot be the unquestioned goal or destination.

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<sup>51</sup> See, e.g., *K.E. v. Indep. Sch. Dist.*, 647 F.3d 795, 808 (8th Cir. 2011) (“‘An IEP is a snapshot, not a retrospective,’ and we must ‘take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.’”).

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 809–10.

<sup>54</sup> OSEP, QUESTIONS AND ANSWERS (Q&A) ON U. S. SUPREME COURT CASE DECISION *ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT RE-1*, at Q. 15 (Dec. 7, 2017), as reprinted in 71 IDELR 68 (OSEP 2017) (“An IEP is not a guarantee of a specific educational or functional result for a child with a disability.”).

<sup>55</sup> *Id.*; see also 34 C.F.R. § 300.324(b) (2020) (governing revisions of IEPs).

<sup>56</sup> Cf. Russell M. Viner et al., *School Closure and Management Practices During Coronavirus Outbreaks Including COVID-19: A Rapid Systemic Review*, 4 LANCET CHILD & ADOLESCENT HEALTH 397, 398 (2020); see also Dooley et al., *supra* note 20.

<sup>57</sup> See, e.g., Gavin, *supra* note 22; Mitchell, *supra* note 22.

## B. “APPROPRIATE IN LIGHT OF THE CHILD’S CIRCUMSTANCES”

Another component of the *Endrew F.* standard is the appropriateness of an IEP in light of a child’s circumstances.<sup>58</sup> The child’s circumstances include the child’s relationship with the world,<sup>59</sup> including COVID-19. To make decisions about the child’s special education without reference to the impact of COVID-19 and its effect on the child is impractical and dehumanizing. Even if the IEP Team’s survey of the child’s circumstances is somehow restricted to the IDEA’s text,<sup>60</sup> the IDEA makes multiple references to the external world.<sup>61</sup> The purpose of the IDEA is clearly anchored in the child’s relationship to the world the child inhabits “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 . . .*”<sup>62</sup>

The IDEA’s contextualization of the child in the broader world calls to mind the words of Ralph Waldo Emerson that “[a] man is a bundle of relations, a knot of roots, whose flower and fruitage is the world . . . He cannot live without a world.”<sup>63</sup> Artificially delinking the child in the IEP development process from the realities of COVID-19 fails to acknowledge the completeness and complexity of the child’s experience<sup>64</sup> and oversimplifies the world that the child inhabits.

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<sup>58</sup> *Endrew F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 999 (2017).

<sup>59</sup> See *infra* notes 60–64; see also Brandon Vogel, *School’s Back For . . . We’ll See*, N.Y. STATE BAR ASS’N STATE BAR NEWS, Fall 2020, at 18 (describing the numerous agencies that govern school closings and reopenings).

<sup>60</sup> See, e.g., Turnbull et al., *supra* note 36, at 133.

<sup>61</sup> See, e.g., 20 U.S.C. §§ 1400(d)(1)(A) (purposes of IDEA), 1412(a)(5) (other children in the child’s placement), 1414(d)(1)(A)(i)(IV)(cc) (education with other children), 1414(d)(7) (adult correctional system), 1415(k)(7) (referral to law enforcement) (2018); see also, e.g., 34 C.F.R. § 300.311(a)(6) (2020) (“cultural factors” and “environmental or economic disadvantage” as part of evaluation criteria for specific learning disabilities”).

<sup>62</sup> 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

<sup>63</sup> RALPH WALDO EMERSON, *History, in* ESSAYS: FIRST SERIES (1841), *reprinted in* 5 THE UNIVERSITY LIBRARY 158, 185 (John Finley, ed., 1927). Emerson’s emphasis on the defining nature of relationships should resonate with special educators and parents with disabilities, who know—at least at some level—the importance of relationships within the IEP Team and between the IEP Team, the child, and the broader school community. Mayes, *A Brief Model*, *supra* note 30, at 167, 167 n.102.

<sup>64</sup> Cf. Mayes, *Keeping the “I” in the IDEA*, *supra* note 42, at 144–54 (describing the importance of education for the whole child, rather than focusing on singular attributes of the child).

## C. OTHER CONSIDERATIONS

There are two additional reasons why dwelling on *before* is unreasonable. First, one component of FAPE is that it meets “the standards of the State educational agency.”<sup>65</sup> The closure of the schools in the state or restrictions on how or when schools may operate in light of COVID-19 must be viewed as a substantive standard. It is a meta-standard designed to protect health and safety,<sup>66</sup> which is an affirmative, desirable good.<sup>67</sup> Unlike school closures because of budget shortfalls<sup>68</sup> or teacher strikes,<sup>69</sup> COVID-19-related school closures are not the result of a policy or fiscal failure. Rather, these closures address the threshold question of human life and survival. To insist that the IDEA was somehow violated by school closures is unreasonable because it ignores the fact that schools were unable to remain open due to state policy responding to a disaster.<sup>70</sup>

Another consideration is the IDEA’s requirements for placement in the least restrictive environment.<sup>71</sup> As a general rule, children with disabilities are educated “to the maximum extent appropriate” as children without disabilities.<sup>72</sup> The general education environment is the default rule, and removal from the general education environment to other settings “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.”<sup>73</sup> Assume that a school moves instruction for all children entirely online in response to state orders and that a child with a disability is educated primarily in the general education environment. The online instruction, and not the brick-and-mortar

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<sup>65</sup> 20 U.S.C. § 1401(9)(B) (2018). For a brief discussion of this provision, see Zirkel, *Building an Education*, *supra* note 33, at 476, 476 n.65, 487–91. For two discussions of litigation against SEAs under the IDEA, see generally Thomas A. Mayes & Perry A. Zirkel, *State Education Agencies and Special Education: Obligations and Liabilities*, 10 B.U. PUB. INT. L.J. 62 (2000); Perry A. Zirkel, *State Education Agencies as Defendants Under the IDEA and Related Federal Laws: A Compilation of the Court Decisions*, 336 EDUC. L. REP. 667 (2019).

<sup>66</sup> See, e.g., Zirkel, *Initial Guidance*, *supra* note 25.

<sup>67</sup> Noonan, *supra* note 19.

<sup>68</sup> N.D. v. Hawaii Dep’t of Educ., 600 F.3d 1104, 1116 (9th Cir. 2010).

<sup>69</sup> OSEP, Opinion Letter to Pergament (Dec. 20, 2013), as reprinted in 62 IDELR 212 (OSEP 2013).

<sup>70</sup> See, e.g., OSEP, Opinion Letter to Geary & DeLorenzo (Nov. 20, 2012), as reprinted in 120 LRP 10281 (OSEP 2012) (responding to Hurricane Sandy). For examples of states that temporarily modified state law to allow flexibility in services during the pandemic, see Zirkel, *A Second Legal Look*, *supra* note 22.

<sup>71</sup> See 20 U.S.C. § 1412(a)(5)(A) (2018).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

schoolhouse, *is* the general education environment for the time being.<sup>74</sup> The child has not been removed from the general education environment—the child remains in the general education environment. The resources the child may need to succeed in the general education environment may have changed, but the child’s placement has not.

Likewise, it makes no sense to rewrite an IEP to call for “homebound placement” when schools are closed because of COVID-19. While “home instruction” is a point on the continuum of alternative placements,<sup>75</sup> a placement in home instruction is based on an individual’s needs.<sup>76</sup> If the health and safety needs of society as a whole determine that all children are to be educated at home, it would be contrary to the letter of the IDEA to rewrite IEPs and placement arrangements to adopt a location of services as a “placement” when that location was dictated not based on child needs, but on an emergency order from a governor, chief state school officer, or superintendent. To do so would exalt form over substance in an exercise of “emotion-laden legalism.”<sup>77</sup>

#### D. THE CRUELTY OF DWELLING ON *BEFORE*

Not only is dwelling and perseverating on *before* unreasonable, it is also subtly, but undeniably cruel.

First, a legal and emotional inability to move beyond *before* has an odor of blame to it. Nobody chose this. The child’s teacher did not choose this. The child’s physical therapist did not choose this. The governor did not choose this. The child’s parent did not choose this. By focusing on *before*, the IEP Team traps itself in circumstances it cannot control, rather than focusing on the change the team has the power to create.<sup>78</sup> While the inclination to grieve the loss of these educational opportunities is strong and understandable, grief cannot be permitted to excuse blaming the innocent for the failure to implement a *before* IEP. Furthermore, educators must avoid blaming parents for circumstances beyond the parents’ control. If a school arranges for online special education services for its students with

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<sup>74</sup> See generally IOWA DEP’T OF EDUC., GUIDANCE REGARDING OPEN ENROLLMENT OF AN ELIGIBLE INDIVIDUAL TO A DISTRICT OFFERING A VIRTUAL SCHOOL OPTION (July 2020), <https://iowaideainformation.org/wp-content/uploads/2020/07/IDoE-Guidance-Regarding-Open-Enrollment-of-Eligible-Individual-to-Districts-Offering-a-Virtual-School-Option.pdf> [https://perma.cc/SK6B-8UVQ].

<sup>75</sup> 34 C.F.R. § 300.115(b)(1) (2020).

<sup>76</sup> *Id.* § 300.116(a)(2)(b)(2).

<sup>77</sup> Zirkel, *Initial Guidance*, *supra* note 25.

<sup>78</sup> See, e.g., STEPHEN R. COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE 81–93 (1989) (describing and discussing the “circle of concern” and “circle of influence”).

disabilities, there may be reasons why parents are unable to access those services, such as limited connectivity, limited devices in the home, or the parents' need for the devices or connectivity for their own work obligations.<sup>79</sup> In addition to being cruel, blame creates and intensifies conflict,<sup>80</sup> sometimes needlessly so.

In addition to acknowledging the dangers of blame, the dangers of distrust also must be considered. In many school systems, school buildings, and IEP Teams, the *before* was characterized by a trust deficit.<sup>81</sup> Parents did not trust teachers, teachers did not trust parents, and seemingly nobody trusted "Central Office" or "The State." During the *before*, in some school communities, every decision was questioned, and sometimes rightly so. For example, many school advocates have decried Supreme Court decisions as the financial ruin of public education.<sup>82</sup> They were not.<sup>83</sup> When school advocates have cried wolf before, one can hardly blame parents and parent advocates for not knowing what to believe from school officials when something globally catastrophic happens. On the other hand, some parent advocates, in my view at least, have oversold the holdings of other Supreme Court decisions, such as the holding in *Andrew F.*,<sup>84</sup> and going so far as to imaginatively extract from a Supreme Court decision on tuition reimbursement a requirement for psychometric testing.<sup>85</sup> Focusing on the *before* locks in the trust deficits that existed in the *before*. Moreover, focusing on the *before* magnifies distrust by attributing fault to the

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<sup>79</sup> See, e.g., Peter DeWitt, *6 Reasons Students Aren't Showing Up for Virtual Learning*, EDUC. WKLY. (Apr. 26, 2020, 8:05 AM), <https://www.edweek.org/leadership/opinion-6-reasons-students-arent-showing-up-for-virtual-learning/2020/04> [<https://perma.cc/E3U8-MC5L>].

<sup>80</sup> Mayes, *A Brief Model*, *supra* note 30, at 167–68.

<sup>81</sup> Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 119 PENN ST. L. REV. 485, 489–90 (2014); Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 77–79 (2005).

<sup>82</sup> See, e.g., *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246–47 (2009); Deborah Rebores & Perry A. Zirkel, *The Supreme Court's Latest Special Education Ruling: A Costly Decision?*, 135 EDUC. L. REP. 331, 338–40 (1999).

<sup>83</sup> Allan G. Osborne Jr. & Megan L. Rehberg, *Know the Law: Reimbursement Under the IDEA*, SCH. BUS. AFFS., Oct. 2009, at 18, 20.

<sup>84</sup> Zirkel, *Professional Misconceptions*, *supra* note 36, at 12–14.

<sup>85</sup> See, e.g., Shauna G. Dixon et al., *Forest Grove School District v. T.A. Supreme Court Case: Implications for School Psychology Practice*, 29 J. PSYCHOEDUCATIONAL ASSESSMENT 103, 107–10 (2010). For further discussions of this article, see Perry A. Zirkel, *A Comprehensive Evaluation of the Supreme Court's Forest Grove Decision?*, 31 J. PSYCHOEDUCATIONAL ASSESSMENT 313, 315–16 (2013) [hereinafter Zirkel, *A Comprehensive Evaluation*]; Peter W.D. Wright et al., *Forest Grove v. T.A. Rejoinder to Zirkel: An Attempt to Profit From Malfeasance?*, 31 J. PSYCHOEDUCATIONAL ASSESSMENT 318, 319–22 (2013).

faultless.<sup>86</sup> To restore trust in the *now* and *next*, parents, students, and school officials need to have a space to be candid about this universally shared experience and how it affects particular children.

Finally, the COVID-19 pandemic exposed and magnified issues of inequity in special education. These inequities include access and the ability to participate between children with and without disabilities,<sup>87</sup> as well as inequities based on race and poverty.<sup>88</sup> In the *before*, on balance, children of color had a different and more negative experience in special education than white children.<sup>89</sup> In the *before*, on balance, children of low-income households had a different and more negative experience in special education than their more affluent peers.<sup>90</sup> In the *before*, race, ethnicity, and poverty, taken together, had a multiplying effect.<sup>91</sup> Applying the *before* to the *next* and *now* risks compounding racial and socioeconomic inequities—the inequities that already existed in American special education turbocharged by the inequities of COVID-19.<sup>92</sup> Following the OSEP’s COVID-19 Q&A, many schools indicated they would provide no services to any student because of a belief that “federal disability law presents insurmountable barriers to remote education.”<sup>93</sup> The U.S. Department of Education responded: “This is simply not true.”<sup>94</sup> In my view, OSEP and OCR were directly and correctly responding to a subtle—and perhaps unintended, but still very real—shift of blame to children with disabilities: “If it was not for those pesky IEPs and that pesky OCR and that pesky OSEP and their insistence on equity, we could be doing online learning now.” This blame-shifting seemed to be an attempt of the adults to absolve themselves

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<sup>86</sup> See COVEY, *supra* note 78, at 81–93; Mayes, *A Brief Model*, *supra* note 30, at 167–68; DeWitt, *supra* note 79.

<sup>87</sup> Gavin, *supra* note 22.

<sup>88</sup> Elissa M. Abrams & Stanley J. Szeffler, *COVID-19 and the Impact of Social Determinants on Health*, 8 LANCET RESPIRATORY MED. 659, 659–60 (2020); Erin K. Stokes et al., *Coronavirus Disease 2019 Case Surveillance—United States, January 22–May 30, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 759, 763 (2020).

<sup>89</sup> See, e.g., Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WISC. L. REV. 1237, 1312–37.

<sup>90</sup> See, e.g., Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1424–30 (2011).

<sup>91</sup> Dooley et al., *supra* note 20.

<sup>92</sup> See OFF. CIV. RTS., [OCR] & OSEP, SUPPLEMENTAL FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES (Mar. 21, 2020) [hereinafter OCR & OSEP, COVID-19 SUPPLEMENTAL FACT SHEET], as reprinted in 76 IDELR 104 (OCR & OSEP 2020).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (emphasis in original).



for their lack of skill or capacity to provide equitable services or their misunderstanding of what equity requires.

#### E. THE IMPERATIVE TO ACT DURING THE *NOW* AND THE *NEXT*

The task for IEP Teams, policymakers, and leaders is to give due attention to the *before* without becoming immobilized by it or unquestionably bound to it. This will certainly be difficult for the reasons stated above, including the comforting familiarity of *before*.<sup>95</sup> To properly confront this new reality, these groups must be cognizant of the below mentioned concepts.

First, we must recognize collective trauma and loss. Everyone has lost something, tangible or intangible, due to COVID-19, which may never be recovered.<sup>96</sup> Those losses must not be forgotten or minimized. The best way to honor that loss is to address it and attempt to mitigate it,<sup>97</sup> rather than admire it or refuse to move beyond it. Remaining stuck in grief is only a step or two away from blame, which on a macro level is misplaced in this circumstance.<sup>98</sup> I further suggest the collective loss will allow skilled and proactive IEP teams to reason from a common reservoir of empathy: the child may have lost a large amount of physical therapy services (a special education issue) or the opportunity to compete in the state debate tournament (most likely an “all students” issue); however, each person at the IEP Team meeting also has lost a thing of great value. While the focus must be on the child, the focus may be informed and animated by collective grief. This shared focus on a child-specific solution based on a shared experience of loss may help foster trust and cultivate relationships.<sup>99</sup>

Secondly, IEP teams, policymakers, and leaders must recognize and remember that it will be much more difficult to return to normal after COVID-19 than it was to close schools in the first place. The *now* and the *next* is more resource intensive and cognitively complex than *before*. It will not be as simple as flipping a switch, opening a faucet, or hitting rewind. Physical space will be different. Social distancing and hygiene practices

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<sup>95</sup> See Mayes, *A Brief Model*, *supra* note 30, at 158; Coe, *supra* note 30, at 12.

<sup>96</sup> See, e.g., Kristin Danley-Greiner, *Allow Your High School and College Seniors to Mourn This Loss*, DES MOINES REG. (Apr. 6, 2020, 11:45 PM), <https://www.desmoinesregister.com/story/news/local/altoona/2020/04/07/greiner-allow-your-high-school-and-college-seniors-mourn-loss/2954095001> [<https://perma.cc/AT4S-CMXB>].

<sup>97</sup> See, e.g., OSEP, COVID-19 Q&A, at A-2, A-3 (Mar. 2020), as reprinted in 76 IDELR 77 (OSEP 2020).

<sup>98</sup> See COVEY, *supra* note 78, at 81–93; Mayes, *A Brief Model*, *supra* note 30, at 167–68; DeWitt, *supra* note 79 (discussing blame).

<sup>99</sup> See Kotler, *supra* note 81, 489–90; Mayes et al., *supra* note 81, 77–79 (discussing trust).

will be the order of the day. Those changes will be expensive.<sup>100</sup> The restoration and recovery costs will also be high for special education, including services required due to COVID-19-related closures;<sup>101</sup> services required to address new needs, such as social-emotional-behavioral health needs due to trauma and disruption of routines;<sup>102</sup> and “child find”<sup>103</sup> and initial evaluation needs<sup>104</sup> due to physical and mental health needs caused by COVID-19. These additional expenses will require prudence and planning by IEP Teams and school officials; however, COVID-19-related financial difficulties will not excuse a failure to provide a FAPE.

Third, it is important to recognize and remember that certain IDEA tenets remain applicable, a pandemic notwithstanding.<sup>105</sup> The inputs to the FAPE equation may have changed, but the variables of the equation remain.<sup>106</sup> Parents still have rights under the IDEA.<sup>107</sup> IEPs must still be individualized.<sup>108</sup> Progress is still the driver for decisionmaking and must be measured.<sup>109</sup> I will consider these in turn.

The IDEA’s parental rights<sup>110</sup> remain as important as during *before*, if not more so. In communicating with parents, the IEP team should take advantage of the flexibility to offer meetings remotely<sup>111</sup> and the use of electronic signatures.<sup>112</sup> Parental rights include the right to participation in

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<sup>100</sup> See, e.g., Lauren Camera, *Report: No Way to Reopen Schools Safely Without Federal Bailout*, U.S. NEWS (June 8, 2020), <https://www.usnews.com/news/education-news/articles/2020-06-08/report-schools-need-a-federal-bailout-in-order-to-reopen> [<https://web.archive.org/web/20210113074758/https://www.usnews.com/news/education-news/articles/2020-06-08/report-schools-need-a-federal-bailout-in-order-to-reopen>].

<sup>101</sup> See OSEP, COVID-19 Q&A, at A-3, B-3 (Mar. 2020), as reprinted in 76 IDELR 77 (OSEP 2020); BETSY DEVOS, U.S. SEC’Y OF DEP’T OF EDUC., REPORT TO CONGRESS: RECOMMENDED WAIVER AUTHORITY UNDER SECTION 3511(D)(4) OF DIVISION A OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT, at 11 (2020) [hereinafter DEVOS, REPORT TO CONGRESS]; Dooley et. al, *supra* note 20; Zirkel, *Initial Guidance*, *supra* note 25; 20 U.S.C. § 1415(f)(3)(E)(i) (2018).

<sup>102</sup> Dooley et al., *supra* note 20.

<sup>103</sup> 34 C.F.R. § 300.111 (2020).

<sup>104</sup> *Id.* §§ 300.301–300.311.

<sup>105</sup> See, e.g., DEVOS, REPORT TO CONGRESS, *supra* note 101, at 11.

<sup>106</sup> See Drake, *supra* note 43, at 173–75.

<sup>107</sup> See 34 C.F.R. §§ 300.500–.520 (2020); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017); Zirkel, *Parental Participation*, *supra* note 49, at \*11–12.

<sup>108</sup> See Mayes, *Keeping the “I” in the IDEA*, *supra* note 42; 20 U.S.C. §§ 1401(29), 1415(f)(3)(E)(i) (2018); *Andrew F.*, 137 S. Ct. at 999.

<sup>109</sup> See *Andrew F.*, 137 S. Ct. at 999.

<sup>110</sup> 34 C.F.R. §§ 300.500–.520 (2020).

<sup>111</sup> *Id.* § 300.501(c)(3).

<sup>112</sup> See, e.g., IOWA ADMIN. CODE § 281–41.51(14) (2020) (defining signature under Iowa law).

IEP and placement decisionmaking,<sup>113</sup> as well as the right to a prior written notice whenever the public agency proposes or refuses a change to the child’s “identification, evaluation, or educational placement or the provision of FAPE to the child.”<sup>114</sup> The difficulty COVID-19 presents to IEP decisionmaking does not eliminate schools’ obligations to include parents in decisionmaking and explain those decisions to parents in a “cogent and responsive”<sup>115</sup> manner.

Decisionmaking hindered by COVID-19 is also no reason to offer look-alike IEPs.<sup>116</sup> The IDEA’s requirement for individualization,<sup>117</sup> most recently expressed in *Endrew F.*,<sup>118</sup> still exists. In fact, given the degree of disruption of education—and of life—the IDEA’s individualization mandate takes on a greater urgency. Children will respond to the pandemic in different ways, even children that may have the same “labels” or goal areas. The harm of offering one-size-fits-all IEPs<sup>119</sup> is magnified by COVID-19.<sup>120</sup> If schools erroneously assume that all children with autism have the same needs, it would compound that error to assume that all children with autism will respond to COVID-19 in the same way.

Another IDEA non-negotiable is the requirement to attend to student progress.<sup>121</sup> A particular child’s expected progress might look different than *before*, and monitoring progress may be more difficult in the *now* and *next*, especially during periods of remote learning. Still, each IEP Team must

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<sup>113</sup> See Zirkel, *Parental Participation*, *supra* note 49, at \*11–15.

<sup>114</sup> 34 C.F.R. § 300.503(a).

<sup>115</sup> See *Endrew F.*, 137 S. Ct. 988, 1002 (2017) (refining the substantive standard for an IEP’s adequacy, and possibly planting the seeds for the substantive standard for the adequacy of a prior written notice that it must be “cogent and responsive”).

<sup>116</sup> See generally Mayes, *Keeping the “I” in the IDEA*, *supra* note 42 (discussing the law and policy behind the individualization requirement in special education).

<sup>117</sup> 20 U.S.C. § 1401(29) (2018) (defining “special education” as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability”).

<sup>118</sup> *Endrew F.*, 137 S. Ct. at 999.

<sup>119</sup> See generally Mayes, *Keeping the “I” in the IDEA*, *supra* note 42 (outlining the harm posed by abandoning individualization in providing IDEA services).

<sup>120</sup> In addition to being improper for IEP development, a formulaic approach also is conceptually irreconcilable with the IDEA. In *W.G. v. Kishimoto*, the plaintiffs seek a court order to develop a decision tree or matrix for awarding services missed due to COVID-19. Complaint at 12–14, *W.G. v. Kishimoto*, No. 1:20-CV-00154 (D. Haw. Apr. 13, 2020). In my view, this is incompatible with the remedial authority under the IDEA: remedies for a denial of a FAPE. See, e.g., 20 U.S.C. § 1415(f)(3)(E)(i). This remedial authority is child-specific and child-driven. See, e.g., *id.* Developing an all-children decision tree for determining what remedies are owed runs the risk of making the child fit the remedy, rather than the remedy fit the child. See generally Mayes, *Keeping the “I” in the IDEA*, *supra* note 42.

<sup>121</sup> *Endrew F.*, 137 S. Ct. at 999.

attend to, and respond to, a lack of progress.<sup>122</sup> If a child's IEP Team decides to deliver specially designed instruction in mathematics by video conference for thirty minutes a day because the school is using remote learning for all students, and the student does not make progress towards IEP goals in mathematics, the Team must respond. Was the intensity or duration of the specially designed instruction appropriate? Were there barriers to the child's access to instruction through remote learning, such as needs that may be addressed with assistive technology or additional adult assistance? What alternatives to video conferencing are available? Were the goals themselves appropriate based on the child's present levels of performance in mathematics, or were they—in retrospect—inappropriate based on lack of prerequisite skills? If video conferencing is the only feasible means of instruction, and that means is inappropriate, what will be done in the future to support the child? How will the IEP be revised, if at all? Though remote learning might not be ideal, it would be improper to allow the child to flounder in an unacceptable status quo.

Fourth, it is important to acknowledge procedural violations, but it would be inadvisable to persevere on them.<sup>123</sup> It may be impossible to complete an initial evaluation as it was designed, but that does not mean the evaluation is suspended in time. The evaluation team instead might consider completing the evaluation using alternative methods. The evaluation team also may consider completing the evaluation as best as the team can, with the understanding that additional data will be gathered when possible. If completing the evaluation is impossible, the evaluation team may propose ways to remedy the delayed evaluation. Candor and communication, with appropriate documentation and notice, is the proper way to address unavoidable procedural violations,<sup>124</sup> rather than doing nothing out to the fear of acknowledging the obvious or waiting for a parent question or request. A “business-as-usual compliance orientation on strict proceduralism and over-documented formalism is neither feasible nor fruitful at this time of limited resources and pressing demands.”<sup>125</sup>

Finally, it is important to recognize the obligation to provide make-up services to children with disabilities. This obligation has two related dimensions. First, there is its legal foundation: the obligation to provide a

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<sup>122</sup> *Id.*

<sup>123</sup> See, e.g., Mitchell, *supra* note 22; Zirkel, *A Second Legal Look*, *supra* note 22; Zirkel, *Initial Guidance*, *supra* note 25.

<sup>124</sup> See, e.g., Mitchell, *supra* note 22; Zirkel, *A Second Legal Look*, *supra* note 22; Zirkel, *Initial Guidance*, *supra* note 25.

<sup>125</sup> Zirkel, *A Second Legal Look*, *supra* note 22.

FAPE did not end during COVID-19-related school closures.<sup>126</sup> The U.S. Department of Education stated that children with disabilities may have a claim for additional services to address services lost during school closures.<sup>127</sup> Additionally, when given an opportunity to recommend to Congress IDEA statutory waivers, the U.S. Department of Education refused to recommend waiving any of the IDEA's core principles.<sup>128</sup> If these core principles are not waived, it creates a strong inference that interruption of those core principles must somehow be addressed.

The second dimension is a moral commitment to honor sacrifices made by children.<sup>129</sup> The personal harms of school closings largely fell on children, while the benefits of school closures largely accrued to adults. The needs of one group of vulnerable persons—children—have been subordinated to the needs of another group of vulnerable adults—older Americans and others who are at greater risk for death and poor health outcomes due to COVID-19. Addressing low-income children, but applicable at some level to all children, including children with disabilities, Dooley and colleagues write: “[d]irectly and indirectly, low income children have been forced to subordinate their own well-being for the greater good. To recognize and respect this sacrifice, the United States should make a commitment to provide them with the opportunities they have long deserved.”<sup>130</sup> In addition to any legal principle at issue, whether this moral debt is repaid will be a measure of whether this nation's moral compass is calibrated.

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<sup>126</sup> See OSEP, COVID-19 Q&A, at A-1 (Mar. 2020), as reprinted in 76 IDELR 77 (OSEP 2020); see also OSEP, Opinion Letter to Pergament (Dec. 20, 2013), as reprinted in 62 IDELR 212 (OSEP 2013); *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). In *W.G. v. Kishimoto*, the plaintiffs seek compensatory services based on the State of Hawaii's "material failure" to implement IEPs. See Complaint at 12–14, *W.G. v. Kishimoto*, No. 1:20-CV-00154 (D. Haw. Apr. 13, 2020).

<sup>127</sup> OSEP, COVID-19 Q&A, at A-2 (Mar. 2020), as reprinted in 76 IDELR 77 (OSEP 2020).

<sup>128</sup> See DEVOS, REPORT TO CONGRESS, *supra* note 101, at 11 (2020).

<sup>129</sup> Dooley et al., *supra* note 20.

<sup>130</sup> *Id.*

In providing these make-up services,<sup>131</sup> one must construct them around the IDEA’s standard: has the child been denied a FAPE?<sup>132</sup> This suggests that a crude day-for-day or hour-for-hour method of calculating make-up services is a poor match for the task at hand.<sup>133</sup> This is not a compliance audit—it is an attempt to address missed learning and teaching. Make-up services should be intended to address a gap: what would the child’s achievement have been but for the interruption of services and what additional services are necessary to close that gap?<sup>134</sup> Under this gap-filling approach, a child might need more services than under the day-for-day, “cookie cutter”<sup>135</sup> approach, or she might need less. The gap-filling approach is focused on the child’s actual needs to a much greater extent than the day-for-day approach: the additional services are to serve the child, not to serve the paperwork. This gap-filling approach is also more consistent with the general judicial remedial approach of not requiring perfection in IEP implementation but focusing on materiality of the missed services.<sup>136</sup>

In these ways, schools in the *now* and the *next* may honor the purpose of the IDEA without being bound to the *before*.

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<sup>131</sup> I am intentionally not using “compensatory services,” the term used by OSEP in its COVID-19 Q&A, OSEP, COVID-19 Q&A, at A-1, A-2, A-3, B-1, B-2 (Mar. 2020), *as reprinted in* 76 IDELR 77 (OSEP 2020), or “compensatory education.” These two terms connote that somehow a school district violated the IDEA by not providing these services. Use of the term “compensatory services,” as it implies fault or a violation, might provoke a defensive-to-combative response by school districts. Since shortly after OSEP released its COVID-19 Q&A, I have been looking for a synonym for “compensatory services” for this reason. *See, e.g.*, E-mail from Thomas Mayes, Att’y, Iowa Dep’t of Educ., to Ctr. for Appropriate Disp. Resol. in Special Educ. [CADRE] (April 1, 2020) (on file with author).

<sup>132</sup> 20 U.S.C. § 1415(f)(3)(E)(i) (2018).

<sup>133</sup> *See, e.g.*, Zirkel, *Two Competing Approaches*, *supra* note 39, at 550–52.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 551.

<sup>136</sup> Zirkel, *Initial Guidance*, *supra* note 25 (citing Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE Under the IDEA: IEP Implementation*, 36 J. NAT’L ASS’N ADMIN. L. JUDICIARY 449 (2016)). A final, related consideration is the standard for liability under Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794 (2018), and the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213 (2018). Section 504 and the ADA are not strict liability statutes—not every failure results in liability. Zirkel, *Initial Guidance*, *supra* note 25. Rather, a Section 504 or ADA plaintiff must prove the school acted with “gross misjudgment, bad faith, or deliberate indifference.” *Id.* (citing Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students’ Section 504 and ADA Claims Against School Districts?*, 47 J.L. & EDUC. 109 (2018)).

## III. CONCLUSION

COVID-19 has created new challenges for schools<sup>137</sup> and society.<sup>138</sup> Schools and parents must not fall into the nostalgia trap<sup>139</sup> of idolizing the *before*. This benefits no one. Draw from the *before*, but do not be beholden to it. Rather, schools and parents must do what they reasonably can, when they reasonably can, with what is reasonably available<sup>140</sup> until COVID-19 has passed. That is how schools and parents will meet the challenge of the *now* and *next*.

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<sup>137</sup> See Dooley et. al, *supra* note 20; Zirkel, *Initial Guidance*, *supra* note 25; Zirkel, *A Second Legal Look*, *supra* note 22; Gavin, *supra* note 22; Mitchell, *supra* note 22; *see also* 20 U.S.C. § 1401(14) (defining IEP).

<sup>138</sup> See *supra* notes 1–19 and accompanying text.

<sup>139</sup> For a discussion of the concept of the “nostalgia trap,” see STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992).

<sup>140</sup> See, e.g., Zirkel, *Initial Guidance*, *supra* note 25.