



KROKIDAS & BLUESTEIN LLP

**CLIENT ALERT**

## FAPE IN THE AGE OF COVID

The U.S. Department of Education’s Office of Special Education and Rehabilitative Services (OSERS) recently issued two sets of questions and answers (Q & A’s) addressing, among other things, considerations arising from the return of students to in-person learning in a COVID-19 pandemic environment: [Return to School Roadmap: Child Find Under Part B of the Individuals with Disabilities Education Act](#) and [Return to School Roadmap: Development and Implementation of Individualized Education Programs Under the Individuals with Disabilities Education Act](#).

While acknowledging the many challenges of the COVID-19 pandemic, the OSERS guidance is based on the principle that children with disabilities are entitled to a free appropriate public education (FAPE) regardless of the COVID-19 pandemic or the mode of instruction. The OSERS guidance does not create new law, but attempts to place COVID-19 pandemic challenges within the framework of existing law, namely the Individuals with Disabilities Education Act (IDEA).

### Child Find Obligations

Under IDEA, charter schools are subject to a “child find” obligation, meaning an obligation to identify children who need special education and related services. In the COVID-19 pandemic environment, a school’s child find obligations include identifying children suspected of having “long COVID” or suspected of having post-COVID conditions that meet the definition of a disability under IDEA. The OSERS guidance cautions that child find procedures that might have been adequate prior to the pandemic might not have been sufficient to identify children with disabilities who were receiving instruction virtually. In particular, child find procedures that relied mainly on informal teacher observation and referral would likely have been inadequate during COVID, because remote instruction limited a teacher’s ability to observe students casually, and limited a parent’s opportunity to make informal referrals. As a result, charter schools might need to conduct additional screenings of students under IDEA as these students return to in-

person learning. However, charter school teachers and administrators should also understand that the limitations of remote instruction do not necessarily entitle a student to IDEA-related services.

### Reviewing the Individualized Education Plan (IEP)

IEP Teams are advised to consider the many potential impacts of the COVID-19 pandemic on their students by reviewing the following:

*1. What services did the student receive during virtual instruction?*

The OSERS guidance encourages IEP Teams to review the pre-pandemic services required to provide FAPE to each student, and determine whether these were received during school closure and other educational disruptions.

*2. Did the pandemic result in new or different needs?*

The OSERS guidance notes that an updated individualized education plan (IEP) might be required to address COVID-19 pandemic-related considerations including (but not limited to):

- i. Lost skills or lack of expected progress toward attaining the child's annual IEP goals and in the general curriculum during the 2020-21 school year;
- ii. Updated data, such as information gathered from formal and informal assessments and parental input;
- iii. All areas of need, including behavioral, social, emotional and mental health needs, and needs that arose during the pandemic; and
- iv. Implementing COVID-19 prevention measures, such as masks and social distancing.

IEP Teams are encouraged to make general observations regarding each student's attendance, engagement, attention, behavior, progress, and home experience during the COVID-19 pandemic. Examples of additional supports and services that might be required as a result of the pandemic include counseling services for mental health needs (e.g., anxiety and depression), social skill instruction, explicit reinforcement of positive behavior, and explicit instruction in stress, anxiety, and depression management.

The OSERS guidance includes a reminder that IEP Teams are responsible for addressing the school-related health needs of students with disabilities in the context of the COVID-19 pandemic. If a student with a disability has an underlying medical condition that puts the student at increased risk of severe illness if he/she/they contracts COVID-19, the IEP Team should include a team member who knows about the student's health needs, such as a school nurse.

### *3. Do services provided during remote learning need to be updated?*

If a student's IEP was developed during remote learning, and includes special education and related services to be delivered solely through virtual instruction that cannot be modified to reflect in-person services, the student's IEP Team must convene as soon as possible to determine the revisions that are necessary to ensure FAPE. When IEP Teams meet, it might be prudent for them to develop contingency plans to account for virtual learning or hybrid instruction.

#### IEP Team Meetings

IEP Team meetings were generally held virtually while education was provided virtually. The OSERS guidance provides that IEP Teams may continue to meet virtually if the parent agrees, whether by telephone conference or video conference, or if continued COVID-19 prevention practices require virtual meetings.

#### Compensatory Services

It is possible that a charter school will be required to provide compensatory services as a result of the educational disruptions during the COVID-19 pandemic. The OSERS guidance outlines some of the circumstances in which compensatory services might be required:

1. If a student's initial identification, evaluation, and eligibility determination, or the eligible student's development and the implementation of an IEP, were delayed;
2. If the special education and related services that were provided during the COVID-19 pandemic through virtual, hybrid or in-person instruction were not appropriate to meet the child's needs;
3. If some or all of the child's IEP could not be implemented using the methods of service delivery available during the pandemic (e.g., physical therapy and behavioral intervention strategies); and
4. If meaningful services to facilitate transition from secondary school were not provided.

The OSERS guidance notes that compensatory services might take the form of an additional period of eligibility for FAPE following high school graduation, or for students who have exceeded the age of eligibility for IDEA services.

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The COVID-19 pandemic created huge challenges for charter schools as they marshalled their resources to continue educating all students. Krokidas & Bluestein LLP has been most gratified by our client schools' successes in

addressing these challenges. We look forward to our clients' continued successes as they return to in-person learning.

If you have any questions about the OSERS guidance or other student matters, please contact Elka Sachs ([esachs@kb-law.com](mailto:esachs@kb-law.com)) or Allison Lennon ([alennon@kb-law.com](mailto:alennon@kb-law.com)).