



## THE FLORIDA BAR EDUCATION LAW COMMITTEE

*The Florida Bar's First Online Journal*



# FLORIDA EDUCATION LAW

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# Message from the Chair

by Nathan A. Adams, IV<sup>1</sup>

This past year stretched most educators further than they imagined feasible, but schools at all levels and their attorneys have emerged the stronger for it. The pandemic required innovation. Innovation required cooperation and professionalism to address new problems and resolve new disputes.

The Education Law Committee's programming this year has been exclusively virtual and dedicated to coping with the pandemic. For example, we heard from Judge Bruce Anderson on *Virtual Trial by Virtual Jury* and from Walter James Harvey on *COVID-19 Issues Affecting K-12 Public Schools*. Thanks goes to Vice-Chair Lacey Hofmeyer and our authors for continuing this theme in this issue.

The Committee's first meeting of the Florida Bar's fiscal year on June 11 was still virtual, but our subject matter began to evolve. As traditional, we had the chance to learn about the education bills approved and disapproved during the last legislative session. Thanks goes again to Lacey Hofmeyer and to Matthew Bouck for their presentations. Then, we turned to an issue dominating headlines on many postsecondary campuses: controversial speech. Robert Farrell and Gerard Solis discussed free speech in the context of a case study at a private university. We considered the lessons that Florida school leaders and counsel should take from it for the controversies certain to recur here.

God-willing, this was our last exclusively on-line Committee meeting for the year. The leadership team wants education lawyers to have the chance to network again. In



fact, we decided that the Committee's theme this year will be **"Reconnecting and rebuilding bridges."**

We are planning for a virtual and in-person meeting on October 8 (1 p.m.) in Orlando. The meeting will focus on labor and collective bargaining, a subject we have not featured recently. We will also return to a point and counterpoint format, featuring counsel for management and labor, besides a primer on the subject that may prove especially useful to in-house counsel.

Our next scheduled event will be a Florida Bar Education Law Certification exam preparation session on January 27, 2022 (1 p.m.). Because the Committee is dedicated to professionalism, the Committee wants to assist all those willing to sit for the exam. Our subject matter this year will include topics not covered last year.

On June 24, 2022 (1 p.m.), we are scheduled to come together in person for the Bar's Annual Convention in Orlando.

Please connect with me or any of our Vice-Chairs David D'Agata, Lacey Hofmeyer, Gregg Morton and Mary Lawson about CLE / exam preparation topics or articles you would like to contribute, besides social media content for the Committee's website. Please also continue to spread the news about our Committee as we look to grow during the December-January renewal cycle.

## Endnotes

<sup>1</sup> Partner with Holland & Knight LLP and Florida Bar board certified education lawyer.





## MOVING?

### Need to update your address?

The Florida Bar's website ([www.FLORIDABAR.org](http://www.FLORIDABAR.org)) offers members the ability to update their address and/or other member information.

The online form can be found on the website under "Member Profile."

# Special Education During a Pandemic: the Covid Conundrum

By: Laura E. Pincus, Esq.

Assistant General Counsel, Office of the General Counsel, School District of Palm Beach County

As the second semester of the 2019-2020 school year began, nobody could have imagined the storm brewing on the horizon. Certainly, an international pandemic was never a possible thought in 1973 when Section 504 of the Rehabilitation Act was promulgated or in 1975 when the original version of the Individuals with Disabilities Education Act was passed. The implementation of these laws has proven very challenging this year in ways that could have never been contemplated. The aftermath of COVID-19 and the detrimental impact to students with disabilities will be seen for years.

On March 5, 2020, I attended a meeting whereby legal minds came together to contemplate how to handle a student who recently returned from a trip to China. Could we legally require the student to quarantine? Does the answer lie within the School Board Policy intended for students with lice? What was the precedent set in place during the AIDS crisis and is that even relevant? Was it the responsibility of the Local Education Agency (LEA) or the Health Department to make a final determination as to quarantine? The outcome of the meeting was that it generated more questions than answers with no final decisions made.

On March 7, 2020, I embarked on a 5-night Royal Caribbean cruise. I had my temperature taken upon my arrival at the pier, increased my use of hand sanitizer and literally sang "Happy Birthday" as I washed my hands.

On March 12 I arrived back in Miami as my phone was lighting up with messages regarding shortages of toilet paper and college closings. With Spring Break on the horizon for students, school districts around the country were facing the reality that it was not safe to continue operating in-person schools.

Within a matter of days, schools around the globe closed their buildings and elected to teach on a virtual platform. But... what about the legal obligations of school districts to meet the needs of students with disabilities? What about the notion of Free and Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE)? Would FAPE be redefined to reflect the unique circumstances of a pandemic? Should IEPs be reconstructed to take into account virtual platforms? There were definitely more questions than answers surrounding the past, present and future of special education. And the questions haven't ceased: Masks or no masks? Six feet or three? Brick and mortar or distance learning? Other vocabulary terms were infused in our daily conversations as we discussed the need for School Districts to provide a "full panoply" of services to students.

On March 12, 2020, the United States Department of Education Office for Civil Rights (OCR) issued a Question and Answer document pertaining to students with disabilities and COVID-19. This initial guidance suggested:

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## Follow Us on SOCIAL MEDIA

The Education Law Committee (ELC) is on Facebook, Twitter, and LinkedIn! These accounts give ELC members an additional way to stay in touch with each other between meetings and also give the ELC the ability to conduct more public outreach about the work and achievements of the ELC and its members. If you have articles, achievements, or updates you would like to share on the ELC's new social media accounts, please send them to [educationlawfloridabar@gmail.com](mailto:educationlawfloridabar@gmail.com).

You can follow the ELC's accounts by searching for @FlaBarEdLaw on Twitter and Facebook. Members of the ELC who are on LinkedIn can send a message to [educationlawfloridabar@gmail.com](mailto:educationlawfloridabar@gmail.com) to be added to the ELC LinkedIn group.



"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 be required to provide services to students with disabilities during that same period of time."<sup>1</sup> On March 16, 2020, the United States Department of Education issues a "Fact Sheet" whereby it stated that "[c]ompliance with CDC's recommendations should not create civil rights concerns."<sup>2</sup> The "Fact Sheet" recognized that school districts "have discretion to make educational decisions based on local health needs and concerns," but that school leaders "should be mindful of the requirements of Section 504, Title II, and Title IV, to ensure that all students are able to study and learn in an environment that is safe and free from discrimination."<sup>3</sup> The document goes on to state that "provision should be made to maintain education services" for students with IEPs.<sup>4</sup> In this document, OCR seemingly provides some relief to schools by providing the following guidance: "IEP Teams are not required to meet in person while schools are closed."<sup>5</sup> If an evaluation of a student with a disability requires face-to-face assessment or observation, the evaluation would need to be delayed until school reopens ...." Furthermore, OCR opined that IEP Teams would be charged with making individual determinations as to what compensatory services would be needed to make up for any skills that may have been lost due to the exceptional circumstances brought on by the pandemic.

Shortly after, the Office for Civil Rights clarified the original guidance in a March 21, 2020 "Supplemental Fact Sheet" which recognized "OCR and OSERS must address a serious misunderstanding that has recently circulated within the educational community. ... Some educators ... have been reluctant to provide any distance instruction because they believe that federal disability law presents insurmountable barriers to remote education. This is simply not true."<sup>6</sup> OCR further highlights in bold: **"To be clear: ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance learning."**<sup>7</sup> The memo recognizes "[s]chool districts must provide free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction and related services to these students. In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance

instruction provided virtually, online or telephonically."<sup>8</sup> The United States Department of Education affirmed its understanding "that, during this national emergency, schools may not be able to provide all services in the same manner as they are typically provided."<sup>9</sup>

As the pandemic wore on, it became clear that schools were not addressing a temporary inconvenience. Rather, schools were involuntarily thrust into education reform analogous to building and flying a plane simultaneously. This reform included virtual platforms for students, many who may not have the capacity, motivation or desire to utilize a computer all day every day. Education has never seen anything like this in such a widespread manner. The closest similarity would be school districts who needed to respond local emergencies such as hurricanes.

As the school year came to a close, education was still stalled in a remote atmosphere. Most high stakes tests were cancelled. Modified Advance Placement (AP) exams were administered virtually in essay format only. SAT and ACT tests were cancelled and/or postponed prompting many colleges and universities to convert to "test optional" admissions policies for applicants.

While the latter part of the 2019-20 school year saw a vast majority of schools similarly situated and operating in a virtual platform, the 2020-21 school year began with inconsistent models from state to state and from district to district. Some elected to remain virtual. Others opened their doors and expected all students to return. Many schools opened with a hybrid model. Discussions turned to whether schools should bring back only the special needs students as a population who needed in person support or whether doing so may infringe upon the safety of a most vulnerable population. Again, more questions than answers.

There was talk on the national level about the IDEA and whether a waiver was necessary. Congress invited then Secretary of Education Betsy DeVos to request waivers to the Federal requirements.<sup>10</sup> However, on April 27, 2020, Secretary DeVos stated, "[w]hile the department has provided extensive flexibility to help schools transition, there is no reason for Congress to waive any provision designed to keep students learning. With ingenuity, innovation, and grit, I know this nation's educators and schools can continue to faithfully education every one of its students."<sup>11</sup>

Even without a specific waiver, those involved in the education of students with disabilities knew that live IEP meetings were not happening, live evaluations were not being completed and the only environment offered to students was virtual, which was not consistent with the Federal mandate of Least Restrictive Environment. In accordance with these concerns, Florida Department of Education Commissioner Richard Corcoran issued an Emergency Order on May 13 whereby delays in holding

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## COVID CONUNDRUM, continued

annual IEP meetings, developing IEPs and completing evaluations were “extended” by the number of days Spring Break was extended.<sup>12</sup>

On September 28, 2020, the Office for Civil Rights issued a new Questions and Answers assistance document whereby it stated that any reopening plan that prioritizes, gives preference to or limits supports or services to students based on their race, color or national origin were discriminatory.<sup>13</sup> However, OCR noted “there may be circumstances where schools decide to prioritize in person instruction for students with disabilities, in order to provide the services necessary to ensure that those students receive a free appropriate public education (FAPE) under Section 504.”<sup>14</sup>

As schools have re-opened, Districts were mandated to provide “a full panoply” of services.<sup>15</sup> Effective August 2020, school districts in Florida were obligated to provide the opportunity for students to return to brick and mortar schools.<sup>16</sup> With this order, school districts developed reopening plans and many teachers quickly learned to teach live and virtually simultaneously.<sup>17</sup>

With the opening of the 2021-22 school year being planned, it is anticipated that all Florida school districts will switch back to traditional in-person instruction in brick and mortar. Parents that choose to have their children on a virtual platform will still have access to classes via programs such as Florida Virtual School.

In time, the short- and long-term detriments to the disruption of education caused by the pandemic will come to

light. It will be interesting to see if there are any changes over time to the legal landscape surrounding education law. For now, let’s just hope things revert to “educationally normal.”

### Endnotes

- 1 U.S. Dept. of Educ. Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020); <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.
- 2 U.S. Dept. of Educ. Fact Sheet (March 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>.
- 3 Id.
- 4 Id.
- 5 Id.
- 6 U.S. Dept. of Educ. Supp. Fact Sheet (March 21, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.
- 7 Id.
- 8 Id.
- 9 Id.
- 10 Section 3511(d)(4) of Division A of the Coronavirus Aid, Relief and Economic Security Act (“Cares Act”) (March 27, 2020)
- 11 Report to Congress of U.S. Sec. of Educ. Betsy DeVos Recommended Waiver Authority Under Section 3511(d)(4) of Division A of the Coronavirus Aid, Relief and Economic Security Act (“Cares Act”) (April 27, 2020). <https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf>.
- 12 Florida Dept Educ., DOE Order No. 2020-EO-02 (May 13, 2020); <https://feaweb.org/wp-content/uploads/2020/05/DOE-Emergency-Order-2020-EO-02-FINAL.pdf>.
- 13 U.S. Dept. of Educ. Questions and Answers for k-12 Public Schools in the Current COVID-19 Environment, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf>.
- 14 Id.
- 15 Florida Dept Educ., DOE Order No. 2020-EO-06 (July 6, 2020), <https://www.fldoe.org/core/fileparse.php/19861/urll/DOE-2020-EO-06.pdf>.
- 16 Id.
- 17 Id.



## Calling All Authors!

The Education Law Committee is seeking articles for future newsletters. Our goal is to release four issues a year with articles that are helpful to both experienced practitioners and the public. The authors of past articles have received a lot of interest and positive feedback, so it is a great way to share your knowledge. There is no minimum or maximum length, but typically the articles are between two to six pages double-spaced. Additionally, if you would like to write an article for The Florida Bar Journal, we are soliciting longer articles as well. If you have an idea for article for either the newsletter or the Bar Journal, please contact [educationlawfloridabar@gmail.com](mailto:educationlawfloridabar@gmail.com) and let us know!

# Requiring Workers To Receive COVID-19 Vaccines – Not So Fast

Jay P. Lechner, Esq.\*

It has become accepted employment law gospel, supported by EEOC guidance, that employers may require employees to submit to COVID-19 vaccinations, provided their policies comply with the ADA, Title VII and other anti-discrimination laws.<sup>1</sup> A lawsuit filed on February 28, 2021 in federal court in New Mexico challenges that tenet. See *Legaretta, et al. v. Macias, et al.*, No. 2:21-cv-179 (D.N.M.). In addition, a new Florida law that takes effect July 1, 2021 will prohibit educational institutions from requiring documentation certifying COVID-19 vaccination or post-infection recovery for attendance or enrollment, or to gain access to, entry upon, or service from such educational institution. However, the law does not ban private employers from requiring vaccines of employees.

## Federal Law

Fernando Macias, the Dona Ana County Manager, issued a “Mandatory COVID-19 Vaccination Directive” requiring first responders to receive vaccinations as a condition of ongoing employment. The plaintiff received a “coaching and counseling” write up for not complying with the directive. After the write up, he was “in imminent

danger of being terminated from his job for refusing to accept the vaccine,” hence the filing of the complaint.

The plaintiff asserted that a policy requiring workers to take vaccines that are not yet fully approved by the federal Food and Drug Administration (e.g., all COVID-19 vaccines) violates the Food, Drug and Cosmetic Act. Specifically, 21 U.S.C. § 360bbb-3, which addresses the “emergency use of an unapproved product,” provides that recipients of experimental products must be, among other things:

1. Advised of the “known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown”; and
2. Given “the option to accept or refuse administration of the product.”

The plaintiff asserted that the FDCA “does not permit [his employer] to coerce an employee to accept an unapproved vaccine on penalty of termination or other sanctions.” He claimed that the County violated the law

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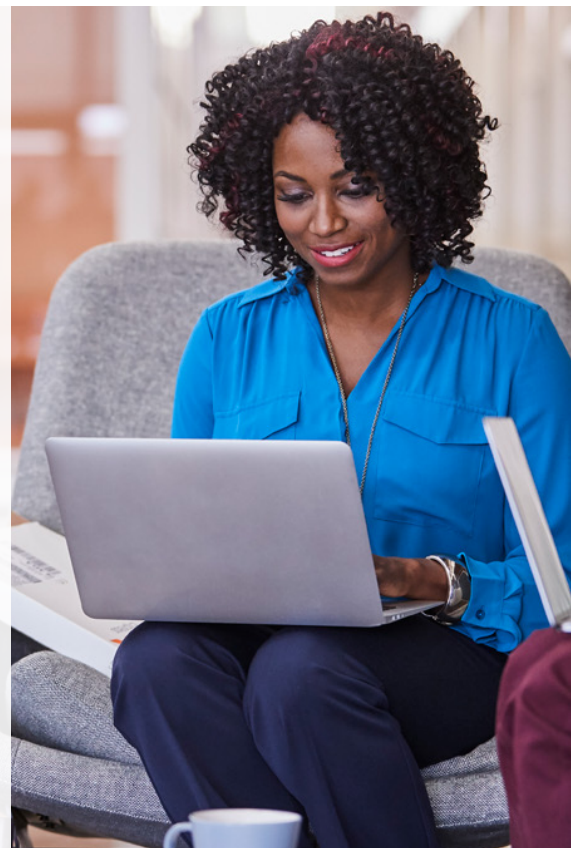
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## ***NOT SO FAST, continued***

because he was not advised of the “known and potential benefits and risks” of the experimental COVID-19 vaccine. More importantly, the employer “did not inform Plaintiff that he had an option to refuse the vaccine. Quite the opposite, he was advised that he would be fired if he did so.”

The complaint seeks injunctive relief enjoining the termination of the plaintiff’s employment on the grounds that the policy (issued by a governmental official) is preempted by the federal law. It is not entirely clear as to whether the plaintiff asserts that the FDCA creates a private right of action against his employer, or employers in general. The more obvious cause of action under this theory would be pursuant to a state whistleblower statute that prohibits retaliation against an employee for objecting to a policy, such as Dona Ana County’s, that purportedly violates a federal statute.

The case is still in the early stages. The court denied the plaintiff’s request for a TRO on procedural grounds but, as of the date this article was written, has not addressed the substantive merits of the plaintiff’s arguments.

### **Florida Law**

On May 3, 2021, Governor DeSantis signed CS/CS/SB 2006 into law. Among other things, the new law prohibits businesses and governmental entities from requiring proof of COVID-19 vaccination to gain access or service. The new law takes effect July 1, 2021.

Specifically with respect to educational institutions, an educational institution “may not require students or residents to provide any documentation certifying COVID-19 vaccination or post-infection recovery for attendance or

enrollment, or to gain access to, entry upon, or service from such educational institution in this state.” This provision is limited to “students or residents.” However, because other subsections of the law ban “governmental entities” and “business entities” from requiring proof of COVID-19 vaccination “to gain access to, entry upon, or service from” their operations, both public and private schools also could not require employees to provide proof of COVID-19 vaccination.

Notably, the new law “does not otherwise restrict educational institutions from instituting screening protocols consistent with authoritative or controlling government-issued guidance to protect public health.” However, the law does not ban private employers from requiring the vaccine. Business employers should follow the EEOC and the litigation outcomes in cases like *Macias* for guidance on the requirement of vaccines for employees. With respect to governmental employers, the new law prohibits them from requiring “persons” to provide proof of a vaccine “to gain access to” or “entry upon ... the governmental entity’s operations,” which does not expressly prohibit, but could be construed as prohibiting, government employers from requiring employees to provide proof of vaccination.

*\* Jay P. Lechner owns his own firm in Tampa and is Board Certified by The Florida Bar in Labor and Employment Law.*

*\*\* An earlier version of this article appeared in the Labor & Employment Law Section’s newsletter: [The Checkoff](#), Vol. LX., No.3 (April 2021).*

### **Endnotes**

<sup>1</sup> Although communicating with coworkers regarding concerns about such a policy would likely be deemed protected concerted activity under the NLRA.



# **Florida Lawyers Helpline**

# **833-FL1-WELL**

**The Florida Bar mental health helpline (1-833-351-9355) is a free and confidential service that connects members with professional counselors. There’s no cost for calls to the hotline and you may be referred for up to three free telehealth counseling sessions per year to help you develop strategies to overcome life’s challenges, balance priorities, and better handle both personal and professional pressures.**

# Department of Education Provides Guidance and Relief with Emergency Order

Gregg Morton, Esq.

As the unprecedented 2020-21 school year comes to a close, the ramifications of a year of dominated by the COVID pandemic continue to play out. To provide schools with some flexibility and additional guidance on year-end considerations, the Florida Department of Education (DOE) issued a new emergency order (EO) on April 9, 2021. *See In Re: Waiving Strict Adherence to the Florida Education Code, as Specified Herein, Pursuant to Executive Order Number 20-52, Made Necessary By the COVID-19 Public Health Emergency, Order No. 2021-EO-02* (DOE April 9, 2021). The EO covers a number of topics and builds on earlier emergency orders. The EO should be reviewed by school administrators and education law practitioners to make sure they understand the changes and comply with its requirements. This article briefly addresses each of the provisions of the EO. The Department also [recorded a helpful webinar](#) that provides additional details on the EO.

## Graduating Seniors

The first provision of the EO addresses high school seniors scheduled to graduate during the 2020-21 school year. Currently, section 1003.4282, Florida Statutes (2020), requires graduating seniors to pass assessments to earn a standard high school diploma. The EO suspends the assessment requirement solely for students who are expected to graduate in the spring of 2021 and allows school districts to waive the assessments for graduation. The waivers are applied on a case-by-case basis for each student who has a high school record that establishes a comparable level of achievement. School districts are required to report the waivers to DOE. The EO also allows school districts to waive the requirement of passing assessments in section 1003.4285, Florida Statutes (2020) to earn standard high school diploma scholar designations, such as mathematics, science, or social studies. Again, the waiver only applies to spring 2021 graduates and similarly can be authorized by school districts only on a case-by-case basis where the student's high school record establishes a comparable level of achievement. To be qualified for the applicable scholar designation, students still need to complete any other requirements, such as course work; the waiver only applies to the assessment.

The provision related to graduating seniors in the EO applies equally to charter schools. Charter school governing boards are required to use best efforts to maintain consistent standards with the school district. Both school districts and charter school governing boards can request assistance from DOE to resolve any disputes about

whether a student's high school record establishes an equivalent level of achievement as passing the assessment. DOE will attempt to resolve these disputes within three business days, but may withhold the approval of any requests from the school district until all such disputes, if any, have been resolved.

## Promotion and Retention Decisions

The second provision of the emergency order addresses promotion and retention decisions. For certain courses, promotion and grades are contingent on passing end-of-course (EOC) exams. *See, e.g., §§ 1003.4282, 1008.22, 1008.25, Fla. Stat. (2020).* Notwithstanding the EOC exam requirements in statute, the EO grants the authority to both school districts and charter school governing to determine promotion and final course grades in classes based solely on the student's performance in the course without an EOC exam score. Again, the authorization online applies to courses students successfully completed in the 2020-21 school year.

The EO allows for students in third grade to be promoted to grade four, notwithstanding the requirements of section 1008.25(5), Florida Statutes (2020). The school district must be able to determine that the student is performing at least at Level 2 on the ELA assessment through the good cause exemption process provided in section 1008.25, Florida Statutes (2020) or other means reasonably calculated to provide reliable evidence of a student's performance.

The EO also provides extra support for struggling students who are at risk of being retained. In order to make sure that students who will graduate after this year are able to meet the standards established in statutes or rules, DOE is requiring school districts to begin remediation efforts and give priority to students who are at risk of being retained to summer learning programs. Districts must also use their best efforts to assign these at-risk priority students to teachers that have been ranked as highly effective.

## Bright Futures Scholarships

The third portion of the EO addresses volunteer hour requirements several Bright Futures scholarships, such as the Florida Academic Scholar and Florida Medalion Scholar Awards, the Florida Golda Seal Vocational Scholar Award, and the Florida Gold Seal CAPE Scholar Award. In particular, the EO suspends sections 1009.534(1), 1009.535(1), 1009.536(1)(e), 1009.536(2)(b), Florida Statutes, and Florida Administrative Code

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## ***EMERGENCY ORDER, continued***

Rule 6A-20.028(3)(d), for students expected to graduate in the spring of 2021. High school guidance counselors, or other persons approved by a district school board or the administrator of a nonpublic school, can submit the following information to DOE to satisfy the required number of service hours for scholarship eligibility: (1) the student completed the service hours; (2) the student had planned for, and intended to, complete the service hours prior to the student's high school graduation, but was unable to do so because the pandemic created a lack of access to volunteer opportunities; or (3) due to health concerns, the student fell short of the volunteer service hours.

The EO also suspends portions of Florida Administrative Code Rule 6A-20.028(3)(g) in order to allow students graduating in the 2020-21 academic year additional time to earn the minimum required PERT, SAT and ACT scores as specified for scholarship award levels. See §1009.531(6), Fla. Stat. Students will now have until December 1, 2021, to meet these requirements.

### **School Grades and School Improvement Ratings**

One of the larger questions answered by the EO was whether school grades and improvement ratings would return after the Spring 2020 assessments were cancelled. This year's Spring 2021 assessments will go forward, but the EO strikes a balance that provides flexibility to school districts and charter schools when it comes to school grades and improvement ratings based on the Spring 2021 assessments. While grades are not required, schools have the opportunity to opt-in to school grades, if they choose to do so. As long as 90% of eligible students are tested, schools can opt-in to receive a school grade or school improvement rating. The EO also allows the decision to be made after school assessment results are released. Schools have thirty-days from the release of the assessment results to opt-in. For any school that applies to opt-in and has tested 95% or more of its eligible students, their applications are presumptively approved. The EO also provides guidance on how school grades will be calculated, including how missing prior year data will be addressed. The EO suspends sections 1008.34(1)(b), 1008.341(3), and Florida Administrative Code Rule 6A-1.09981(4)(b)1, in part, due to the cancellation of the Spring 2020 statewide assessments. Furthermore, for purposes of establishing high performance charter schools under section 1002.331(1), Florida Statutes, which requires more than one year of a school grade to establish, DOE will continue to interpret the law to refer only to the years that a grade was assigned. For example, a charter

school that earned an "A" in 2018-2019 and then earns an "A" in its next graded year, either 2020-21 or 2021-22, would qualify as high performing.

### **Summer VPK**

The final portion of the EO lowers the required number of hours for summer early-learning VPK programs. Because many schools postponed the start of the school year, which required extending the school year into June, there was a concern about being able to comply with section 1002.61(2)(a), Florida Statutes (2020), which requires a minimum of 300 hours of instruction for public schools and private prekindergarten providers. The EO suspends this requirement for the 2021 Summer VPK program and instead requires a minimum of 200 hours of instruction with the funding prorated accordingly.

As schools approach the end of an unprecedented year, the new EO provides school districts, students, and parents answers to questions and flexibility to requirements, while maintaining academic excellence and measures.



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# Case Law Regarding COVID-19 and Compensatory Education for ESE Students Still Quiet

By: Joseph McGehee, J.D. (2021)<sup>1</sup>  
Law Clerk, Sniffen & Spellman, P.A.  
Tallahassee, Florida 32301

The sudden school closures as a result of the COVID-19 pandemic dramatically impacted the approach that public schools were required to take to provide students with disabilities a free appropriate public education ("FAPE"). Early in the pandemic, public schools were notified by the United States Department of Education ("US DOE") that they would potentially need to examine whether students enrolled in Exceptional Student Education ("ESE") programs should be provided compensatory education if services were delayed for a prolonged period of time. See <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>. However, case law under the Individuals with Disabilities Education Act ("IDEA") has long made clear that compensatory education is a form of "appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act]." *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008) (internal citations omitted).

Compensatory education awards are premised on a failure of a public school to provide a FAPE. Unfortunately, case law is still relatively silent on how then have courts addressed compensatory education demands when learning was interrupted as a result of COVID-19 shutdowns. However, the following are a few reported federal cases discussing IDEA challenges during the COVID-19 pandemic:

- *J.T. v. de Blasio*, 20 CIV. 5878 (CM), 2020 WL 6748484 at \*30 (S.D.N.Y. Nov. 13, 2020).

Plaintiffs alleged that when schools were shut down due to the pandemic, every school district in the United States that went from in-person to remote learning (i) automatically altered the pendency placement of every special education student in the United States; and (ii) ceased providing every one of those students with FAPE in violation of IDEA's substantive and procedural safeguards. In *J.T.*, the Court entered an order dismissing Plaintiffs' complaint with prejudice for all Defendants except the NYC Defendants and the New York State Department of Education, and entering an order *sua sponte* without prejudice dismissing the remaining New York defendants. Among other things, the Court held, "[i]n the specific context of the COVID-19 pandemic, the USDOE has clearly embraced an approach of granting schools maximum flexibility to keep their students safe so long as they continue to offer all students a free appropriate public education." *Id.* at \*37. Moreover, the Court noted that "the USDOE expressly endorsed

'special education and related services provided through distance instruction provided virtually, online, or telephonically.'" *Id.* at \*38.

- *Hernandez v. Grisham*, CIV 20-0942 JB\GBW, 2020 WL 7481741 at \*43 (D.N.M. Dec. 18, 2020).

Plaintiff parents filed a lawsuit alleging that the New Mexico Governor and Secretary infringed upon the Plaintiffs' fundamental general right to an in-person education guaranteed under the IDEA when the Governor issued Reentry Guidance that prohibited students without disabilities from attending school in-person in select counties. In *Hernandez*, the Court held, among other things, that the Defendants' prohibition on in-person schooling in certain counties was rationally related to the Defendants' legitimate purpose of preventing the spread of COVID-19 because students, teachers, and staff spread the virus to one another during in-person learning. *Id.* at \*1. The Reentry Guidance affected neither a suspect class nor a fundamental right, and because of this, the Court evaluated the policy under rational basis review to determine whether the Reentry Guidance was "rationally related to a legitimate state interest." *Id.* at \*57.

- *LV v. New York City Dep't of Educ.*, 03-CV-9917 (LAP), 2021 WL 663718 at \*8 (S.D.N.Y. Feb. 18, 2021).

At issue in *LV* was the New York Department of Education's ("NY DOE") alleged failure to implement administrative orders that required it to pay tuition for certain students with disabilities to attend private schools whose remote-learning plans were not approved by NY DOE. As a result, these students lost their private-school placements or otherwise had their educational services curtailed. *Id.* at \*1. Ultimately, the Court held that the interruptions in services were especially harmful to students with disabilities, stating "[u]nder both the IDEA and the New York statutes implementing it, DOE is acting unlawfully by withholding tuition payments required by final Orders until DOE approves a private school's remote-learning plan. Consequently, Plaintiffs are entitled to a declaration to that effect." *Id.* at \*7.

- *Martinez v. Newsom*, 520CV01796SVWAFM, 2020 WL 7786543 at \*7 (C.D. Cal. Nov. 24, 2020).

Plaintiff parents brought suit under the IDEA and the Americans with Disabilities Act ("ADA") after the Defendant Governor ordered that remote learning be

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provided during the COVID-19 pandemic. The Court dismissed Plaintiffs' claims on the grounds that they had not exhausted their administrative remedies by filing a due process complaint alleging violations of FAPE. *Id.* at \*7.

Moving forward, it remains to be seen whether courts will require schools to provide compensatory education when schools were not at fault for a delay in services, and whether courts will require students to demonstrate regression as a result of the COVID-19 shutdown in order to obtain compensatory education. If the scant case law available thus far provides any indication of how other

courts will rule on allegations of denial of FAPE during the COVID-19 pandemic, it appears that school districts have received a reprieve, the likes of which have never been applied to date under the IDEA. Nonetheless, in light of the two-year statute of limitations applicable to FAPE claims under the IDEA, school districts should continue to carefully monitor case law and agency guidance.

#### **Endnotes**

1 Mr. McGehee, a law clerk at Sniffen & Spellman, P.A., earned his Juris Doctorate from Florida State University in 2021 and is preparing to take the July 2021 Florida Bar Exam. Mr. McGehee authored this article with assistance from Mr. Terry Harmon, a shareholder at Sniffen & Spellman, P.A. Sniffen & Spellman, P.A. is located in Tallahassee, Pensacola, and West Palm Beach, and provides legal services to both K-12 and higher educational institutions throughout Florida.



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## **Education Law Committee Meeting**

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October 8, 2021

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## **The Florida Bar Fall Meeting**

• *Virtual* •

October 8, 2021

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## **Winter Bar Meeting**

• *Virtual* •

January 27, 2022

Education Certification  
Exam Preparation Session

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