

COVID-19’S IMPACT ON STUDENTS WITH DISABILITIES IN UNDER-RESOURCED SCHOOL DISTRICTS

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INTRODUCTION

The COVID-19¹ pandemic has had an undeniably devastating impact on the world. In the United States, the pandemic touched all facets of society as non-essential businesses closed, millions of people became ill, and thousands died. In the spring of 2020, pursuant to state-mandated stay-at-home orders, most U.S. schools physically closed their buildings. Some school districts presented students with the opportunity to complete the remainder of the school year at home through online remote instruction — others ended the school year early. While moving to online instruction was appreciated as a common-sense approach to a difficult and unprecedented situation, it was not a solution for many students with

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1. “COVID-19” is an abbreviation for the coronavirus disease 2019. See *Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics> [https://perma.cc/D27U-JHPS] (last visited Oct. 21, 2020). The virus that causes COVID-19 spreads from person to person.

disabilities. Students with disabilities in majority low-income school districts and communities of color faced additional challenges due to their disabilities and social factors impacting their communities.² Many students lacked computers with updated technology like webcams, speakers, and reliable internet, a quiet place to work, or parents available to help them with assignments.³

The school districts that did not have the resources to transition quickly to online instruction were forced to end the school year prematurely.⁴ Districts that continued to operate questioned whether they were legally compelled by the state education agencies to provide special education services remotely, and even when there was a clear duty to do so, financially strapped schools were simply not up to the task.⁵ The challenges revealed during the pandemic serve as a reminder of the disparities in special education services between wealthier, better-resourced school districts and schools that are under-resourced.⁶ Federal and state governments need to develop a more equitable infrastructure that will adequately support all students, especially in times of crisis.

This Essay explores the plight of students with disabilities during the COVID-19 pandemic, particularly those enrolled in under-resourced school districts.⁷ To address these ongoing disparities, remediate student regression, and prevent further educational loss, we must act quickly to get resources to the students who need it most and to guide districts towards using these resources effectively.⁸ This Essay questions whether federal and

2. See LINDA DARLING-HAMMOND ET AL., *LEARNING POL'Y INST., RESTARTING AND REINVENTING SCHOOL: LEARNING IN THE TIME OF COVID AND BEYOND* 98 (2020), https://restart-reinvent.learningpolicyinstitute.org/sites/default/files/product-files/Restart_Reinvent_Schools_COVID_REPORT.pdf [<https://perma.cc/E44F-V9KH>].

3. See Benjamin Herold, *The Disparities in Remote Learning Under Coronavirus (in Charts)*, EDUC. WK. (Apr. 10, 2020), <https://www.edweek.org/ew/articles/2020/04/10/the-disparities-in-remote-learning-under-coronavirus.html> [<https://perma.cc/D4RH-Q7C9>].

4. See *id.*

5. See Erica L. Green, *DeVos Decides Against Special Education Waivers During the Pandemic*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/us/politics/coronavirus-devos-special-education.html> [<https://perma.cc/2CF9-3MH8>].

6. See DARLING-HAMMOND ET AL., *supra* note 2.

7. This Essay uses the term “under-resourced” to describe school districts that serve students from predominantly low-income communities. These districts often lack the necessary materials and facilities to provide students with an optimal education, and typically serve students with heightened academic and social difficulties. See generally Edith S. Tatel, *Teaching in Under-Resourced Schools: The Teach for America Example*, 38 THEORY INTO PRACTICE 37 (1999).

8. These under-resourced school districts are the result of decades of housing segregation, school segregation, and unequal school funding. See *Nonwhite School Districts Get \$23 Billion Less Than White Districts Despite Serving the Same Number of Students*,

state governments are truly committed to creatively examining the current special education framework and adopting solutions that will prioritize expanding access to resources for students with disabilities. These solutions include an immediate advancement of funds to aid states and under-resourced school districts in implementing the Individuals with Disabilities Education Act (IDEA), adopting effective guidelines to address educational loss, and closing the digital divide by providing greater access to technology for all students and their parents.

Students with disabilities who need specialized instruction and accommodations in school receive services under the IDEA,⁹ which funds states to provide educational programs to children with disabilities.¹⁰ On average, it costs school districts more money to educate students with disabilities than those without disabilities.¹¹ However, Congress has never fully funded states with 40% of the special education costs that the IDEA promised.¹² This discrepancy between the monies promised and the amount actually provided has created inconsistencies in the way school districts implement the IDEA.¹³ A student's access to appropriate special education services may vary depending on the resources available in their school district.¹⁴ Local communities have been pleading for help with special education funding long before COVID-19 made landfall in the United States.¹⁵

The special education funding challenges that schools face are very similar to their overall funding struggles, particularly in under-resourced, low-income, and low-performing school districts.¹⁶ Less resourced school

EdBUILD, <https://edbuild.org/content/23-billion> [<https://perma.cc/X8GH-Q5TV>] (last visited Oct. 26, 2020).

9. The IDEA is a federal law that applies to all schools receiving federal funding. It governs the special education services and supports provided to children with disabilities. These individualized services and supports enable students to access a free and appropriate public education, commonly referred to as a "FAPE," and make meaningful progress toward their educational goals. See 20 U.S.C. § 1412.

10. See *id.* § 1400(d)(1)(C).

11. See MICHAEL GRIFFITH, EDUC. COMM'N OF THE STATES, A LOOK AT FUNDING FOR STUDENTS WITH DISABILITIES 3 (2015), <https://www.ecs.org/clearinghouse/01/17/72/11772.pdf> [<https://perma.cc/N9TM-8T4K>].

12. See *id.*

13. See *id.*

14. See Crystal Grant, *Special Education by Zip Code: Creating Equitable Child Find Policies*, 52 LOY. U. CHI. L.J. 127 (2020).

15. See Lizzy Francis, *The State of IDEA Special Education Funding Shows That Lawmakers Don't Prioritize Kids*, FATHERLY (Oct. 7, 2019, 5:56 PM), <https://www.fatherly.com/love-money/idea-special-education-funding/> [<https://perma.cc/7CCV-F623>].

16. See MATTHEW M. CHINGOS & KRISTIN BLAGG, URB. INST., DO POOR KIDS GET THEIR FAIR SHARE OF SCHOOL FUNDING? 2 (2017),

districts often receive the same funding as wealthier districts without accounting for the reality that their students have more needs.¹⁷ The COVID-19 pandemic compounded these financial difficulties in under-resourced school districts that primarily serve students of color. As a result, special education services have become even more out of reach for students of color with disabilities.¹⁸ The outlook for these students is bleak unless we take immediate action to counter the disruption the pandemic has caused and the pre-existing conditions in under-resourced school districts. Policy proposals should focus not only on increasing funding but also on providing districts with guidelines to use those resources on solutions — assessment and remediation of lost skills.

I. STUDENTS WITH DISABILITIES DURING COVID-19

Students with disabilities in under-resourced school districts are particularly vulnerable to educational loss during the COVID-19 pandemic. In general, people with disabilities who live in urban areas are prone to worse outcomes during a pandemic because urban health policy and practices have not adequately addressed their needs.¹⁹ Schools in under-resourced urban areas are not insulated from these negative outcomes. School districts in affluent communities are twice as likely as their peers in low-income communities to set an expectation for teachers to deliver real-time or synchronous instruction to groups of students.²⁰ Despite the challenges brought on by COVID-19, schools remain responsible for ensuring that students with disabilities have access to the same information and programming as their non-disabled peers.²¹ For children with disabilities,

https://www.urban.org/sites/default/files/publication/90586/school_funding_brief.pdf
[<https://perma.cc/5VBH-6A5X>].

17. *See id.* at 7.

18. *See Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/R373-EUCY>]; *see also* Chioma M. Oruh, *Students with Disabilities in the Age of COVID-19: How We're Faring 30 Years After the Americans with Disabilities Act* (July 31, 2020), <https://www.ebony.com/news/opinion/students-with-disabilities-in-the-age-of-covid-19-how-were-faring-30-years-after-the-americans-with-disabilities-act/> [<https://perma.cc/CWC3-CKUV>].

19. *See* Victor Santiago Pineda & Jason Corburn, *Disability, Urban Health Equity, and the Coronavirus Pandemic: Promoting Cities for All*, 97 J. URB. HEALTH 336, 336 (2020).

20. *See* BETHENY GROSS & ALICE OPALKA, CTR. FOR REINVENTING PUB. EDUC., TOO MANY SCHOOLS LEAVE LEARNING TO CHANCE DURING THE PANDEMIC 2 (2020), https://www.crpe.org/sites/default/files/final_national_sample_brief_2020.pdf [<https://perma.cc/26BS-P4B5>].

21. *See* Janice V. Arellano, *How Will COVID-19 Affect Equity in Education?*, AM. BAR ASS'N (Mar. 23, 2020),

closing school buildings often results in the suspension or reduction of the services they receive from various providers — physical therapists, occupational services, and speech and language providers. These related services enable students to achieve their academic, functional, and social goals. Because their access to these services has been reduced or eliminated, students with disabilities are among the groups of students who are most likely to regress during the COVID-19 pandemic.²²

Working with students with disabilities online can be challenging. Pre-COVID, online teachers who worked with students with disabilities had a high turnover rate in different types of programs.²³ One reason for this turnover is that few teachers — both licensed special education and general education teachers, have received adequate training in online learning.²⁴ Little research has been dedicated to educating students with disabilities online and developing corresponding pedagogy.²⁵ School psychologists have found themselves in a legal and ethical bind where there are no educational regulations and guidelines for remote testing, and existing guidance is conflicting. The U.S. Department of Education (ED) has permitted remote testing if in-person testing is not required, but state psychology organizations have encouraged practitioners in school settings to delay testing under these conditions.²⁶ Given the circumstances that have led to remote learning and therapy, it is unlikely that teachers and school providers have received sufficient training and support to deliver effective special education and related services to all the students who need it. Some

<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2020/covid-19-coronavirus-equality-education/> [https://perma.cc/E3YV-GRZD].

22. See Nathan Jones et al., *Academic Supports for Students with Disabilities*, EDRESEARCH FOR RECOVERY 2 (June 2020), https://annenbergbrown.edu/sites/default/files/EdResearch_for_Recovery_Brief_2.pdf [https://perma.cc/VZS7-NGZ8].

23. See MARY F. RICE ET AL., *CTR. ON ONLINE LEARNING & STUDENTS WITH DISABILITIES, TEACHER PREPARATION AND PROMISING PRACTICES IN ONLINE LEARNING* 6 (2015), https://kuscholarworks.ku.edu/bitstream/handle/1808/22593/Superintendent_Topic_7_Summary_November2015.pdf?isAllowed=y&sequence=1 [https://perma.cc/8SH7-AMLF].

24. See Richard Allen Carter Jr. & Mary F. Rice, *Administrator Work in Leveraging Technologies for Students with Disabilities in Online Coursework*, 31 J. SPECIAL EDUC. TECH. 137, 140, 145 (2016); see also TONI M. CROUSE ET AL., *CTR. ON ONLINE LEARNING & STUDENTS WITH DISABILITIES, "HOW DID I SURVIVE?" ONLINE TEACHERS' DESCRIBE LEARNING TO TEACH STUDENTS WITH DISABILITIES* 3–4 (2016), <http://www.centeronlinelearning.res.ku.edu/wp-content/uploads/2017/04/HowDidISurvive-Nov2016.pdf> [https://perma.cc/VBP4-VFAR].

25. See Leanna Archambault & Kathryn Kennedy, *Teacher Preparation for K–12 Online and Blended Learning*, in *HANDBOOK OF RESEARCH ON K–12 ONLINE AND BLENDED LEARNING* 221, 221–44 (Kathryn Kennedy & Richard E. Ferdig eds., 2d ed. 2014).

26. See Ryan L. Farmer et al., *Teleassessment with Children and Adolescents During the Coronavirus (COVID-19) Pandemic and Beyond: Practice and Policy Implications*, PRO. PSYCH. 7 (2020).

remote services — behavioral interventions and occupational and physical therapy — are difficult, if not impossible, to provide remotely. They often require equipment, and most parents do not have the specialized training to use them.²⁷

Schools can intervene to reduce learning gaps by continuing the IDEA's mandate to create individualized education programs (IEPs) based on a student's unique needs and circumstances. Researchers recommend strategies such as providing small group or one-to-one interventions three to five times per week.²⁸ Another important strategy to reduce learning gaps during school closures is to collect data regularly.²⁹ This ensures that interventions are data driven and aids the IEP team in making instructional decisions.³⁰ When school district evaluators are unavailable, districts should contract with independent providers or use emergency funding to access community-based services for their students. In some cases, a child's disability may interfere with their ability to access remote instruction, interventions, or related services. Students with visual impairments, mental health needs, or those who rely on expensive equipment in the school building face additional barriers.³¹ For these students, their accommodations require in-person services delivered by an essential provider following the Centers for Disease Control and Prevention's (CDC) guidelines. For students with autism, intellectual disabilities, or other processing disorders, strategies aimed at creating a structured routine and engaging in sensory activities at home can help.³² During the pandemic, therapists have quickly found ways to use technology to provide Applied Behavior Analysis (ABA)

27. See Mallory Warner-Richter & Chrishana M. Lloyd, *Considerations for Building Post-COVID Early Care and Education Systems That Serve Children with Disabilities*, CHILD TRENDS 3 (Aug. 2020), https://www.childtrends.org/wp-content/uploads/2020/08/ECEDisabilitiesCovid19_ChildTrends_August2020.pdf [<https://perma.cc/SZA4-SCJ2>].

28. See CROUSE ET AL., *supra* note 24, at 13.

29. See *id.* at 20.

30. See *id.* at 16–17.

31. See Collin Binkley, *Remote Learning Poses Hurdles for Students with Disabilities*, ABC NEWS (Mar. 31, 2020, 7:48 PM), <https://abcnews.go.com/Health/wireStory/parents-feel-virus-shutdowns-leave-disabled-students-69890939> [<https://perma.cc/JNY7-NNZL>]; see also Alex Zimmerman et al., *How Remote Learning Upended Instruction for NYC Students with Disabilities and Their Families*, CITY (June 17, 2020, 11:05 PM), <https://www.thecity.nyc/education/2020/6/17/21295189/nyc-special-education-students-remote-learning-struggles> [<https://perma.cc/EQ9Q-D3RC>].

32. See Gabrille Galto, *How to Entertain a Child with Autism and Provide Ideal Learning Environment During School Closure*, ATTENTIVE BEHAV. CARE (Mar. 19, 2020), <https://www.attentivebehavior.com/how-to-entertain-child-with-autism/> [<https://perma.cc/BP4V-U7NZ>].

therapy using a telehealth model.³³ However, even with telehealth innovations, some students require in-person instruction and support to benefit from these services. Unfortunately, families are finding that some school districts refuse to provide any in-person instruction during the pandemic, even when the data indicates that a student needs it to access the curriculum and avoid educational loss.³⁴ Millions of students with disabilities have lost access to the special education and related services that they rely on daily.³⁵ Parents — who support their children with IEPs' learning — often take on roles, frequently without training, that teacher assistants, aides, and paraprofessionals previously delivered.³⁶ Without in-home support, whether from parents who have received training or providers offering services outside the school building, these students will continue to be left behind.

II. THE IMPACT OF COVID-19 ON STUDENTS OF COLOR

Black and Latinx students stand to experience devastating educational loss as the achievement gap may become an insurmountable gulf.³⁷ Black Americans are contracting COVID-19 at higher rates and are more likely to die from the virus.³⁸ The anticipated stressors to these families include loss of income, ongoing physical health concerns, and increased mental health challenges. In the United States, the segregated school system is leaving students of color behind their white counterparts.³⁹ White students are less

33. See Kimberly A. Zoder-Martell et al., *Technology to Facilitate Telehealth in Applied Behavior Analysis*, 13 BEHAV. ANALYSIS PRAC. 596, 597–99 (2020).

34. The Author bases this on observations made in the Duke Children's Law Clinic during the COVID-19 pandemic.

35. Letter from Mike Doyle & Christopher Smith, to Nancy Pelosi, Mitch McConnell, Kevin McCarthy & Charles Schumer (Mar. 21, 2020), https://chris-smith.house.gov/uploadedfiles/2020-03-21_doyle_smith_letter_on_autism_services_in_covid19_package.pdf [<https://perma.cc/T9KP-D67J>].

36. See Warner-Richter & Lloyd, *supra* note 27, at 3.

37. An achievement gap exists when one group of students outperforms another and the difference in average scores is statistically significant. See *generally* KITMITTO G. BOHRNSTEDT ET AL., NAT'L CTR. FOR EDUC. STAT., SCHOOL COMPOSITION AND THE BLACK-WHITE ACHIEVEMENT GAP (2015), https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf [<https://perma.cc/2VGH-WTXF>].

38. See Reis Thebault et al., *The Coronavirus Is Infecting and Killing Black Americans at an Alarming High Rate*, WASH. POST (Apr. 7, 2020), <https://www.washingtonpost.com/nation/2020/04/07/coronavirus-is-infecting-killing-black-americans-an-alarming-high-rate-post-analysis-shows/> [<https://perma.cc/EZ37-WBWP>].

39. See Osamudia James, *An Old Story Made New Again: Why Students of Color Are Primed to Be Left Behind in the Coronavirus Crisis*, WASH. POST (Apr. 24, 2020, 3:10 PM), <https://www.washingtonpost.com/education/2020/04/24/an-old-story-made-new-again-why-students-color-are-primed-be-left-behind-covid-19-crisis/> [<https://perma.cc/UBY6-NNBE>].

likely to be concentrated in under-resourced school districts.⁴⁰ Wealthier, white school districts can afford the services students will need to address deficits due to educational loss during the pandemic.⁴¹ These opportunities include individual and small group tutoring, as well as enrichment and summer programming.⁴²

By contrast, low-income Black and Latinx students are more likely to experience educational loss because they are less likely to have access to the conditions that are conducive to successful remote learning.⁴³ In cities like Dallas, Houston, Memphis, Phoenix, and San Antonio, 57%–63% of students do not have access to a computer at home.⁴⁴ “Low-income students struggle [the] most when schools are not in session.”⁴⁵ In many low-income neighborhoods, where summer programming is a luxury and not the norm, families are unable to access high-quality child care or enrichment programs that prevent educational loss or introduce new skills.⁴⁶ As a result, achievement gaps between low-income and middle-class students widen during the summer months.⁴⁷ We are likely to see similar patterns during the pandemic.⁴⁸ Low-income, working-class families will have a difficult

40. *Concentration of Public School Students Eligible for Free or Reduced Price Lunch*, NAT'L CTR. FOR EDUC. STAT. (May 2020), https://nces.ed.gov/programs/coe/indicator_clb.asp#r1 [<https://perma.cc/Z3J3-PEKS>].

41. See Dania Francis & Christian E. Weller, *The Black-White Wealth Gap Will Widen Educational Disparities During the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (Aug. 12, 2020, 9:01 AM), <https://www.americanprogress.org/issues/race/news/2020/08/12/489260/black-white-wealth-gap-will-widen-educational-disparities-coronavirus-pandemic/> [<https://perma.cc/5H2V-HCT5>].

42. See James, *supra* note 39.

43. See Emma Dorn et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. 4–5 (June 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime> [<https://perma.cc/J9BT-4UEF>].

44. See KRISTIN BLAGGET AL., URB. INST., *MAPPING STUDENT NEEDS DURING COVID-19*, at 12 (2020), https://www.urban.org/sites/default/files/publication/102131/mapping-student-needs-during-covid-19-final_2.pdf [<https://perma.cc/BWX8-TWTA>].

45. RUTH FADEN ET AL., JOHNS HOPKINS UNIV., *THE ETHICS OF K–12 SCHOOL REOPENING: IDENTIFYING AND ADDRESSING THE VALUES AT STAKE* 7 (2020), <https://bioethics.jhu.edu/wp-content/uploads/2020/06/White-Paper-Equity-FINAL.pdf> [<https://perma.cc/2F68-GBVV>].

46. See JENNIFER MCCOMBS ET AL., RAND CORP., *THE VALUE OF OUT-OF-SCHOOL TIME PROGRAMS* 12 (2017), <https://www.rand.org/pubs/perspectives/PE267.html> [<https://perma.cc/CJG3-W2CT>].

47. See *id.*

48. See, e.g., Megan Kuhfeld & Beth Tarasawa, *The COVID-19 Slide: What Summer Learning Loss Can Tell Us About the Potential Impact of School Closures on Student Academic Achievement*, NWEA 2 (Apr. 2020),

time accessing the developing array of neighborhood learning pods, private tutors (in-person and online), and private online programming.⁴⁹ One study found that the strongest indicator of student engagement during the pandemic was the education level of parents and other adults in a school's neighborhoods.⁵⁰ Students from families and neighborhoods with lower or limited education levels may have the hardest time staying engaged with their learning and may experience educational loss.

Even when students do not have a disability, social factors make remote instruction challenging for many Black and Latinx students, furthering the achievement gap or cementing their placement in it. Those factors include a lack of adequate food and shelter, access to high-quality internet, a quiet place to work, books, and academic support from parents.⁵¹ Longstanding structural racism has contributed to these inequities in almost every area of life, including housing, healthcare, financial opportunities, and education.⁵² Many low-income students of color lack access to computers that are equipped with the technology necessary for remote learning (i.e., webcam, speaker system, newer operating system).⁵³ However, even when students have access to the requisite technology, the lack of access to high-speed internet service or knowledge of how to use technology to support learning

https://www.nwea.org/content/uploads/2020/05/Collaborative-Brief_Covid19-Slide-APR20.pdf [<https://perma.cc/8MTN-VKNE>]; Richard Rothstein, *The Coronavirus Will Explode Achievement Gaps in Education*, ECON. POL'Y INST.: WORKING ECON. BLOG. (Apr. 14, 2020, 1:16 PM), <https://www.epi.org/blog/the-coronavirus-will-explode-achievement-gaps-in-education/> [<https://perma.cc/54NS-49U2>].

49. See, e.g., Terry Nguyen, *The Pandemic Is Fueling the Private Tutoring Industry*, VOX (Oct. 9, 2020, 9:52 AM), <https://www.vox.com/the-goods/2020/8/6/21354637/pandemic-learning-pods-private-tutoring> [<https://perma.cc/AJ9Q-SE3Z>]; see also Michelle Fox, *Desperate Parents Are Turning to 'Learning Pods' This Fall. Here's What It Can Cost*, CNBC (Aug. 14, 2020, 11:04 AM), <https://www.cnbc.com/2020/08/10/parents-turn-to-learning-pods-this-fall-amid-covid-what-it-can-cost.html> [<https://perma.cc/F7V6-T72V>].

50. See DOUGLAS N. HARRIS ET AL., NAT'L CTR. FOR RSCH. ON EDUC. ACCESS & CHOICE, *HOW AMERICA'S SCHOOLS RESPONDED TO THE COVID CRISIS 27* (2020), <https://educationresearchalliancenola.org/files/publications/20200713-Technical-Report-Harris-et-al-How-Americas-Schools-Responded-to-the-COVID-Crisis.pdf> [<https://perma.cc/G4VY-VXZN>].

51. See GEOFF MASTERS ET AL., AUSTRAL. COUNCIL FOR EDUC. RSCH., MINISTERIAL BRIEFING PAPER ON EVIDENCE OF THE LIKELY IMPACT ON EDUCATIONAL OUTCOMES OF VULNERABLE CHILDREN LEARNING AT HOME DURING COVID-19, at 1 (2020), https://research.acer.edu.au/cgi/viewcontent.cgi?article=1025&context=learning_processes [<https://perma.cc/3VDW-YYEJ>].

52. See, e.g., Brenda Álvarez, *COVID-19 and the Impact on Communities of Color*, NAT'L EDUC. ASS'N (Apr. 24, 2020), <http://neatoday.org/2020/04/24/covid-19-and-communities-of-color/> [<https://perma.cc/HT83-H96H>].

53. See *id.*

adds another obstacle.⁵⁴ In urban areas, low-income families are more likely to live in smaller homes with more people, making it difficult to do schoolwork in a distraction-free setting that is conducive to learning.⁵⁵ In other families, low-income essential workers are unable to provide supervision or procure affordable child care while their children work remotely.⁵⁶ The impact of educational loss on students of color will have an economic impact on the country for years to come. Learning loss leads to school dropout and eventually a reduction in future earnings as these students enter the workforce with fewer skills and less productivity.⁵⁷

III. APPLICABLE LAWS DURING THE PANDEMIC

During the COVID-19 pandemic, public schools must continue to provide special education and accommodations under a student's IEP or Section 504 plan to the greatest extent possible.⁵⁸ The IDEA remains in effect despite efforts by some school leaders to waive its requirements.⁵⁹ Both the Council of Administrators of Special Education and the National Association of State Directors of Special Education (NASDE) have sought waivers from ED that would exempt school districts from complying with IDEA timelines for IEP reviews, evaluations for special education services, and responses to legal complaints.⁶⁰ Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, ED may waive certain requirements for state and local educational agencies during the pandemic.⁶¹ To reduce waiver requests, ED's guidance has encouraged parents and their school districts to work collaboratively towards the best interest of children with disabilities,

54. See, e.g., *Coronavirus Impact on Students and Education Systems*, NAACP, <https://naacp.org/coronavirus/coronavirus-impact-on-students-and-education-systems/> [<https://perma.cc/HXS3-U4WH>] (last visited Oct. 25, 2020).

55. See Dorn et al., *supra* note 43, at 7.

56. See *Coronavirus Impact on Students and Education Systems*, *supra* note 54.

57. See Dorn et al., *supra* note 43, at 7.

58. See U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK 2 (2020) [hereinafter QUESTIONS AND ANSWERS], <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf> [<https://perma.cc/9STX-WZB4>].

59. See *School Leader Voices: Concerns and Challenges to Providing Meaningful IDEA-Related Services During COVID-19*, NAT'L SCH. BDS. ASS'N ET AL. 16 (2020), [https://aasa.org/uploadedFiles/AASA_Blog\(1\)/Advocacy%20IDEA%20White%20Paper%20FINAL.pdf](https://aasa.org/uploadedFiles/AASA_Blog(1)/Advocacy%20IDEA%20White%20Paper%20FINAL.pdf) [<https://perma.cc/E6EX-6EG5>].

60. See Corey Mitchell, *Special Ed. Administrators Press Congress for IDEA Waivers During Pandemic*, EDUC. WEEK (Apr. 16, 2020, 1:40 PM), http://blogs.edweek.org/edweek/speced/2020/04/special_education_groups_want_idea_waivers.html [<https://perma.cc/KDC7-5GTW>].

61. See Pub. L. No. 116-136, § 3511, 134 Stat. 281, 400 (2020). The CARES Act is a federal economic relief package enacted in response to the COVID-19 pandemic.

acknowledging that services may look different during the pandemic as many schools continue to use some level of remote or virtual instruction.⁶² The school and IEP team make these decisions on a case-by-case basis. If schools provide virtual or remote educational opportunities to the general student population, students with disabilities are entitled to equal access to those same opportunities.⁶³ For students who are not a good fit for distance learning or virtual therapy, the school district should track the hours of special education and related services not provided to the child and base compensatory services on those hours.⁶⁴ Parents can request that the district consider teletherapy options to continue related services, such as speech and language therapy.⁶⁵

A. Special Education Services During March–June 2020

At the onset of the COVID-19 pandemic, many state governors attempted to mitigate the spread of the virus by issuing stay-at-home orders to close all schools and non-essential businesses.⁶⁶ During this period, some schools ceased instruction completely while others switched to remote learning. About 85% of all school districts made sure that their students received some form of instruction, whether in packets, posted assignments, or online learning software.⁶⁷ The change was done quickly in an effort to continue providing some level of education to students, even if the quality of the instruction was substandard. In a survey the ParentsTogether Foundation conducted during the COVID-19 pandemic, only 20% of parents whose children had an IEP said they were receiving services, and 39% were not

62. See U.S. DEP'T OF EDUC., IDEA PART B DISPUTE RESOLUTION PROCEDURES 1 (2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-dispute-resolution-procedures-part-b.pdf> [<https://perma.cc/8ZEG-Q2SS>].

63. See QUESTIONS AND ANSWERS, *supra* note 58, at 2.

64. See *id.* Compensatory education is an equitable remedy to remediate the loss of a FAPE for a period of time. It aims to provide “services ‘prospectively to compensate for a past deficient program.’” *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008) (citing *G ex. rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 308 (4th Cir. 2003)). An award of compensatory education “should place children in the position they would have been in but for the violation of the Act.” *Id.* at 1289 (citing *Reid v. D.C.*, 401 F.3d 516, 518 (D.C. Cir. 2005)).

65. See U.S. DEP'T OF EDUC., SUPPLEMENTAL FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES 2 (2020) [hereinafter SUPPLEMENTAL FACT SHEET], <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> [<https://perma.cc/245Y-J4H6>].

66. See Mark E. Czeisler et al., *Public Attitudes, Behaviors, and Beliefs Related to COVID-19, Stay-at-Home Orders, Non-essential Business Closures, and Public Health Guidance — United States, New York City, and Los Angeles, May 5–12, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 751, 751 (2020).

67. See GROSS & OPALKA, *supra* note 20, at 2.

receiving any support at all.⁶⁸ Children with IEPs were twice as likely as their peers without IEPs to be doing little or no remote learning and twice as likely to say that distance learning was going poorly.⁶⁹ Even with the IDEA's promise of individualized programming for students with disabilities, parents continued to experience difficulties obtaining a free and appropriate public education for their children through the end of the 2019–2020 academic year.

B. Special Education Services at the Start of the 2020–2021 School Year

When the new school year commenced in August, school districts varied in their reopening approaches. Using the CDC guidelines and local COVID-19 data, districts opened either in-person, online, or used a hybrid approach — with students alternating between remote instruction and physical time in school.⁷⁰ ED advised parents of students with disabilities to reach out to their school if their child's IEP could not be implemented fully by the district.⁷¹ However, there have been reports that districts, instead, have inappropriately asked parents to waive their rights to special education services.⁷² More than four in ten school districts do not require teachers to monitor students' academic progress.⁷³ Also concerning is that only 42% of districts expect teachers to collect and grade student work during the 2020–2021 school year.⁷⁴ When school districts reopened, students should have received diagnostic assessments to identify learning loss,⁷⁵ yet reporting suggests that in large part, many did not.

68. See *ParentsTogether Survey Reveals Remote Learning Is Failing Our Most Vulnerable Students*, PARENTSTOGETHER ACTION, <https://parents-together.org/parentstogether-survey-reveals-remote-learning-is-failing-our-most-vulnerable-students/> [<https://perma.cc/W4C3-23RP>] (last visited Oct. 25, 2020).

69. See *id.*

70. See Jenna Buckle, *What Will Return to School Look Like This Fall? A Look Inside Hybrid Learning Plans*, PANORAMA EDUC. (July 17, 2020), <https://www.panoramaed.com/blog/hybrid-learning-return-to-school> [<https://perma.cc/W34V-DLCX>].

71. See SUPPLEMENTAL FACT SHEET, *supra* note 65, at 2.

72. See Jodi S. Cohen & Jennifer Smith Richards, *Families of Special Needs Students Fear They'll Lose School Services in Coronavirus Shutdown*, PROPUBLICA ILL. (May 20, 2020, 2:24 PM), <https://www.propublica.org/article/families-of-special-needs-students-fear-theyll-lose-school-services-in-coronavirus-shutdown> [<https://perma.cc/7L78-QCFW>].

73. See SUPPLEMENTAL FACT SHEET, *supra* note 65, at 3.

74. *Id.*

75. See Lynelle Morgenthaler, *Start Smart: Reopening School After COVID Learning Loss*, EDMENTUM 5 (2020), <https://www.edmentum.com/sites/edmentum.com/files/resource/media/Start%20Smart%20->

Based on observations and lessons learned from spring 2020, local school districts and state governments have been making efforts to bridge the digital divide. School districts with the highest concentration of low-income households were 38.4% likely to distribute hotspots, as opposed to 20.5% in districts with more affluent populations.⁷⁶ ED should ensure that these efforts are not gratuitous but required in every school district and implemented with fidelity. In 2020, no child in the United States should lack access to a computer and reliable internet.

CONCLUSION

There are mixed emotions about returning to in-person instruction in the immediate future. Family members and students with compromising health conditions may not receive medical clearance to return to a traditional school setting while the pandemic continues. Some educators are not comfortable with returning to school unless there is a vaccine.⁷⁷ Others predict that there may be a second wave of COVID-19 coinciding with the annual flu season,⁷⁸ which will threaten the stability of the U.S. healthcare system.⁷⁹ When schools fully reopen in person, educators will find that some students with disabilities have regressed. Other students may have new challenges due to anxiety and social factors that have impacted them during the quarantine. ED should provide additional services to account for this educational loss and additional mental health needs. ED must set aside funds and guidance for this specific purpose. NASDE refers to educational services offered to all students as the result of missed or disrupted services during the

%20Reopening%20School%20After%20COVID%20Learning%20Loss%20Whitepaper%20FINAL.pdf [https://perma.cc/NG54-YASD].

76. Robin Lake & Alvin Makori, *The Digital Divide Among Students During COVID-19: Who Has Access? Who Doesn't?*, CTR. FOR REINVENTING PUB. EDUC. (June 16, 2020), <https://www.crpe.org/thelens/digital-divide-among-students-during-covid-19-who-has-access-who-doesnt> [https://perma.cc/877F-DMAJ].

77. See Laura Meckler et al., *Under Pressure to Reopen This Fall, School Leaders Plot Unprecedented Changes*, WASH. POST (Apr. 27, 2020, 8:56 AM), https://www.washingtonpost.com/local/education/schools-reopen-fall-coronavirus/2020/04/26/d60e2f62-85b3-11ea-878a-86477a724bdb_story.html [https://perma.cc/Q5FJ-BP8A].

78. The annual flu season peaks vary in different parts of the country each season. See *Frequently Asked Influenza (Flu Questions): 2020–2021 Season*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 7, 2020), <https://www.cdc.gov/flu/season/faq-flu-season-2020-2021.htm> [https://perma.cc/C29Q-J35K].

79. See Heather Grey, *What a Second Wave of Coronavirus in the Fall Could Look Like*, HEALTHLINE (May 20, 2020), <https://www.healthline.com/health-news/what-a-covid-19-wave-in-the-fall-could-look-like#Educated-guesses-about-the-future> [https://perma.cc/GZG4-97FZ].

COVID-19 school building closures as “recovery services.”⁸⁰ Another option is to provide students with disabilities with “compensatory education” — services to place the student in the position they would have been in if the school district delivered services in the first place.⁸¹

Educators and researchers around the world are wondering whether a complete overhaul of education as we know it is warranted.⁸² This is the moment when the United States can take unprecedented measures to support the educational needs of vulnerable children as one step in reviving the economy and recovering from the pandemic. Wealthier, more educated parents are more likely to notice when their child is struggling and have the resources to address educational challenges. Experts recommend addressing inequity by directing resources to the students who need it the most and continuing to expand internet access.⁸³ Students not only need internet access but social services as well.

Simply reminding school districts of their legal mandate to provide equitable and accessible educational opportunities is ineffective without the resources and financial support to implement the legal requirements safely. Expert recommendations for safely reopening schools are costly, especially in districts that struggled financially before the pandemic. These recommendations include evaluating building systems, ventilation, filtration, and air cleaning; obtaining air-cleaning device supplements; installing plexiglass to create physical barriers around desks and shared spaces; installing touchless technology for hand soap, hand sanitizer, and paper towels; providing protective equipment and implementing frequent cleaning by custodial staff; and forming a COVID-19 response team and a plan to implement policies and conduct contact tracing.⁸⁴

The state of special education underfunding, coupled with the significant additions to overall general education needs, leaves little room for extra spending on students with disabilities and other challenges. Congress and state educational agencies must act quickly to address the needs outlined in

80. See *A Successful Launch of the 2020–2021 School Year for Students with Disabilities*, NAT'L ASS'N ST. DIRS. SPECIAL EDUC. 2 (2020), http://www.nasdse.org/docs/NASDSE_20-21_Launch_Document_.pdf [<https://perma.cc/UE6H-MJVZ>].

81. See *supra* note 64 and accompanying text.

82. See Pasi Sahlberg, *Will the Pandemic Change Schools?*, 5 J. PRO. CAP. & CMTY. 5 (2020).

83. See Dorn et al., *supra* note 43, at 8, 9.

84. See EMILY JONES ET AL., HARVARD T.H. CHAN SCH. OF PUB. HEALTH, SCHOOLS FOR HEALTH: RISK REDUCTION STRATEGIES FOR REOPENING SCHOOLS 31–42 (2020), <https://schools.forhealth.org/wp-content/uploads/sites/19/2020/06/Harvard-Healthy-Buildings-Program-Schools-For-Health-Reopening-Covid19-June2020.pdf> [<https://perma.cc/2DR4-BUT3>].

this Essay and to prevent the current achievement gaps from widening and further distancing vulnerable children from their educational goals. The National Education Association has asked Congress for a minimum of \$175 billion for the Education Stabilization Fund, which would fill state budget gaps resulting from the COVID-19 pandemic.⁸⁵ Approving and funneling this money to most financially strapped districts is a start. In addition to funding, policy makers should consider encouraging in-home school or contracted providers services when appropriate.⁸⁶ These students need help now, and the guidance can help reduce further educational loss. State educational agencies need to develop consistent guidelines for districts to implement for diagnostic testing, in-person services, and addressing educational loss during the pandemic. The road to recovery for children with disabilities in under-resourced districts is a long one, but children are worth the time, money, and effort necessary to rebuild. This country has a moral and ethical responsibility to ensure that students with the most needs are adequately supported as schools recover from the pandemic.

85. See *Coronavirus Crisis Threatens Education Funding*, NAT'L EDUC. ASS'N (Apr. 24, 2020), <https://educationvotes.nea.org/2020/04/24/coronavirus-crisis-threatens-education-funding/> [<https://perma.cc/R6Y9-5NDS>].

86. See Warner-Richter & Lloyd, *supra* note 27, at 4.

