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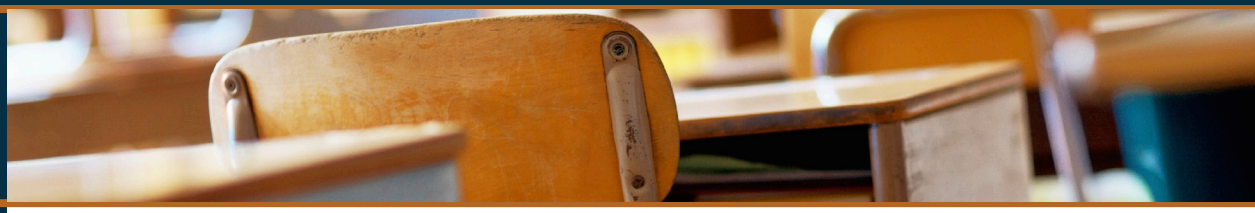

FAQs: Reopening 2020, Special Education Edition

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As schools across the state rushed to solidify reopening plans, a number of special education concerns needed to be addressed. We have prepared the following FAQ document, which addresses a variety of pressing topics, including the latest on masks and mask exemptions, obligations based on the district's mode of operations, obligations to students who opt into temporary remote learning opportunities, live streaming considerations, and PPT meetings.

This FAQ document was prepared for informational purposes and in conjunction with a webinar dated September 24, 2020, and does not necessarily reflect any guidance that may have changed since then. If you have specific questions about newer guidance, please feel free to contact one of the attorneys listed on page 1.

Here are twelve FAQs:

Q1. *What should I do if a student with an IEP shows up to school with a mask exemption letter from her treating physician?*

A1.

The first step is to review the letter and have the school nurse or another designated professional communicate with the physician, if needed, to confirm the legitimacy and necessity of the stated exemption. School districts will be well-served to have medical exemption sample forms available which they ask families and physicians to complete. Pending completion of the form and the ultimate medical determination, the district can utilize temporary strategies, such as potentially asking that the student remain remote, or in an individualized learning space in the school environment. (*Note:* These temporary strategies can also be utilized for students with disability-based reasons for not wearing a mask, as discussed below.) We understand through the guidance developed by the Connecticut State Department of Education ("CSDE") and the Department of Public Health ("DPH") that there are two primary circumstances in which a student may be "exempted" from wearing a mask. One is a true medical exemption wherein the student's medical condition prevents the student from being able to safely wear a mask. The health guidance thus far has been clear that there are very few medical conditions that would actually prohibit a student from being able to wear a mask. Some examples may be significant respiratory and lung conditions. (*See* DPH webinar on 8/17/2020 and CSDE, DPH joint FAQ regarding Reopening K-12 Public Schools, Volume 3, dated 9/2/2020). The CSDE and DPH September 2, 2020 FAQ makes clear that, "Staff and parents of students with underlying medical conditions severe enough to preclude use of face coverings should consider the potential risk of serious complications of possible COVID infection when making the decision of whether or not to attend school in person."

The second primary circumstance in which a student may not be able to wear a mask is disability based in which the student's developmental or other disabilities make it not possible for the student to safely wear a mask. In this circumstance, the information about the need for an exemption could come from the parents directly, from an outside provider, or could be generated by school staff themselves. The next step in this scenario is to convene the PPT or Section 504 meeting to discuss how to accommodate the student and implement the student's IEP in light of the inability to wear a mask. Questions to be explored include:

1. Can the student be taught how to gradually tolerate longer periods of wearing a mask?
2. Can the student be significantly distanced from other students in her/his cohort while at school?
3. Can the teacher or providers have additional layers of protection when in the presence of the student, such as plexiglass dividers, face shields or double masking?
4. Does it make sense for the student to receive her education and services in another location -- such as a separate room within the school building or in an administrative building -- to limit the number of people with which the student will have contact?
5. Does the student have behaviors which would cause her/him to be unable to distance herself from other students or staff during instruction? If so, can we address these behaviors effectively through the IEP?
6. Is the family receptive to a home-based model if these other protections cannot be put into place?

Finally, and importantly, at the end of the analysis: if the student's "inability" to wear a mask, whether for medical or disability-based reasons, endangers the health and safety of other students, staff and the school community in general, because that student cannot be safely protected through others' use of additional measures or through a different classroom environment, the district does have the right to say: "you need to learn in an environment outside of the school right now until we can progress to a way to keep you and others safe in school." Then, the work begins of creating the other appropriate environment. This may include services in the home which parent contracts for and district reimburses; it may include virtual instruction and services; it may include receiving instruction in another building in the district with individualized instruction.

Q2. *A medically complex student with an IEP is requesting remote learning during the pandemic due to the health risk posed to the student. How should the district respond?*

A2.

Addendum 6 [https://portal.ct.gov/-/media/SDE/COVID-19/Addendum6-Reopen-Guidance-for-Educating-Students-with-Disabilities.pdf] to the State Reopening Plan (Adapt, Advance, Achieve) [https://portal.ct.gov/-/media/SDE/COVID-19/CTReopeningSchools.pdf] offers guidance to school districts for meeting the special education needs of students with serious health conditions during the pandemic.

The requirements under state law for the provision of homebound and

hospitalized instruction for special education students remain unchanged.... Homebound and hospitalized instruction, pursuant to state law, should not be confused with instruction in the home, which is an articulated placement on the continuum of educational placements outlined in the IDEA....

In accordance with the IDEA, the child's PPT may determine that the child requires instruction in the home in order to receive FAPE, after considering in-district supports and other LRE considerations, evaluation information, and input from any private supports. In this case, the PPT would be making a placement decision pursuant to the IDEA, and not under RCSA § 10-76d-15 [homebound/hospitalized instruction].

Instruction in the home must be made available pursuant to the IDEA's obligation to provide a continuum of alternative placements. Such placements should be rare and made only after careful consideration of the child's individual needs and LRE considerations. Given the restrictive nature of this placement, it should be reviewed by local education officials on a regular basis to ensure that special education students are receiving FAPE and return to school as soon as possible."

In addition to the above guidance, it may be helpful to distinguish between situations in which students are "opting in" to voluntary remote instruction and situations in which the PPT recommends a change in placement for health and/or safety reasons.

Q3. *Our school district is currently operating in the hybrid model with live streaming of instruction. Students assigned to the resource room "live stream" on alternating days. Parents told the principal that the live streaming resource room violates student privacy rights. Are they correct?*

A3.

"Privacy rights" of students is an often-misunderstood concept. The federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Part 99, (FERPA) governs the confidentiality of education records from disclosure to third persons without parental consent or an applicable exception (e.g., disclosure to a school official). Importantly, FERPA only applies to ***education records***. FERPA defines education records as those that are directly related to a student and maintained by the school district. 34 C.F.R. § 99.3.

Live Streaming Lessons

"Live streaming" group instruction does not implicate FERPA because, generally, a class lesson does not directly relate to any specific student, even if a student is observable in the class, personally identifiable information about students from their education records are not disclosed, and no record is maintained. Moreover, under FERPA, while a parent can generally opt out of a district disclosing "directory information" such as a student's name or image in general district publications (e.g., honor roll lists, sports programs, newsletters, etc.), parents may not exercise such a right to prevent a school from disclosing a student's name, identifier or school email address in a class in which the student is enrolled. 34 C.F.R § 99.37(c)(1). Therefore, the appearance of a student's name on a Zoom or Google Meet participant list does

not violate FERPA. In the wake of the school closure in the spring of 2020, the Student Privacy Policy Office within the U.S. Department of Education conducted a webinar and confirmed this position. U.S. Dep't of Educ., FERPA and Virtual Learning (March 30, 2020) [http://www.lawadmin.com/sg/gendocs/FERPAandVirtualLearning.pdf]

Moreover, third parties being able to observe a live-streamed class also does not violate the confidentiality requirements of FERPA. Just as general observation in a traditional school or classroom setting does not violate FERPA absent a disclosure of personally identifiable information for a student's education records, the mere possibility of a third party observing or overhearing a remote lesson similarly creates no FERPA violation. *See* Letter to Mamas (Family Policy Compliance Office, Dec. 8, 2003) [https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Mamas%28Recreated%29v508.pdf] which states "FERPA does not protect the confidentiality of information in general; rather, FERPA applies to the disclosure of tangible records and of information derived from tangible records."

Recording Lessons

In addition, as part of some districts' remote learning and hybrid learning models, teachers are recording their lessons and making them available for students to access at a later time. In general, a video does not become an education record subject to FERPA merely because it contains students in the footage. The student Privacy Policy Office has provided guidance as to when a video (or photo) could be an education record. The guidance provides:

> *In the context of photos and videos, determining if a visual representation of a student is directly related to a student (rather than just incidentally related to him or her) is often context-specific, and educational agencies and institutions should examine certain types of photos and videos on a case by case basis to determine if they directly relate to any of the students depicted therein. Among the factors that may help determine if a photo or video should be considered "directly related" to a student are the following:*
>
> - *The educational agency or institution uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);*
> - *The photo or video contains a depiction of an activity:*
>   - *that resulted in an educational agency or institution's use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student);*
>   - *that shows a student in violation of local, state, or federal law;*
>   - *that shows a student getting injured, attacked, victimized, ill, or having a health emergency;*
> - *The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (e.g., ID photos, or a recording of a student presentation); or*

- *The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.*

A photo or video should not be considered directly related to a student in the absence of these factors and if the student's image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without a specific focus on any individual.

U.S. Dep't of Educ., FAQs on Photos and Videos under FERPA

See U.S. Dep't of Educ., FAQs on Photos and Videos under FERPA. [https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa]. Therefore, the context of the recorded lessons will be important. If the video is focused on the instruction of the teacher, we believe there is a strong argument that the video would not constitute an education record even if students happened to be visible or heard incidentally. However, if a student or students become the focus of the video (e.g., such as a student presentation), then it is possible the video could become an education record if it is maintained by the district. Therefore, if districts are recording lessons, or plan to, it is important to be cognizant of these issues and set rules and expectations for both teachers and students/parents regarding how that process will work. For example, it may be advisable to focus the video on the teacher and his or her instruction, but stop recording for a student presentation.

Of course, in the context of special education students in particular, districts should expect that some families will be sensitive to the possibility of others seeing or learning that their child is in a special education class. It is important to communicate to parents how the remote instruction used by the district will work and notify all parents and students of rules and expectations related to participation in live remote instruction, such as a prohibition on parents and students recording lessons.

Q4. *The district is cohorting students throughout K-8. As a result, special education teachers are "pushing in" service delivery to the general education classrooms as much as possible. Are we required to notify parents of this plan?*

A4.

Addendum 6 [https://portal.ct.gov/-/media/SDE/COVID-19/Addendum6-Reopen-Guidance-for-Educating-Students-with-Disabilities.pdf] to the State Reopening Plan (Adapt, Advance, Achieve) [https://portal.ct.gov/-/media/SDE/COVID-19/CTReopeningSchools.pdf] recognizes that it may be necessary to deliver special education and related services to students in a manner that is different than described in the student's IEP. Addendum 6 requires that school districts develop a Learning Model IEP Implementation Plan (LMIIP) [https://portal.ct.gov/-/media/SDE/COVID-19/Learning_Model_IEP_Implementation_Plans.docx]"to describe any differences in the delivery of IEP services." Addendum 6 further clarifies that such LMIIPs must be developed following consultation with parents and the LMIIP services as the requisite notice to parents. An LMIIP must be completed for each learning model in which IEP services will be delivered in a different manner than set forth in the IEP. These documents are critically important because the student's IEP and corresponding LMIIP constitute the district's offer of a free appropriate public education to the student.

Addendum 6 also reminds districts that the IDEA's least-restrictive-environment requirement still applies, and changes to a student's usual placement along the continuum of alternative placements that are necessary because of health and safety procedures must be documented in the LMIIP. In the case of delivering services in a "push in" model as described in the example, it may be necessary to document this delivery model in an LMIIP if the general education setting is a different location for the receipt of services than is described in the student's IEP.

Importantly, Addendum 6 suggests districts consider flexible solutions for reducing the mixing of cohorts and specifically recommends that, in appropriate circumstances, districts consider whether, among other possible options, "pull-out services could be appropriately changed to push-in services to limit the mixing of cohorts." As always, decisions must be made on an individualized basis.

Q5. *The district is currently prioritizing initial evaluations. The district's clinical team has proposed conducting evaluations without the use of normed assessments due to concerns of validity and reliability. Is this ok?*

A5.

Addendum 6 [https://portal.ct.gov/-/media/SDE/COVID-19/Addendum6-Reopen-Guidance-for-Educating-Students-with-Disabilities.pdf] sets forth guidance for school districts related to planning and conducting initial evaluations and reevaluations.

Some relevant highlights from Addendum 6 are set forth below.

- As to initial evaluations, state timelines are in effect, regardless of the model of reopening adopted by local school districts. There are some circumstances that may warrant an extension of the 45-day timeline.
- Evaluations must proceed for students, including students participating in voluntary remote learning. If a student is not made available to the school district for in-person evaluation, the SDE advises that school officials may wish to discuss which assessments can be administered remotely. School officials should ensure that the family's decision not to proceed with in-person evaluation is well documented. The SDE also advises that school officials may need to consider whether such a decision either extends the timeline for evaluation or constitutes a refusal to consent to the recommended evaluation.
- School districts are encouraged to address the evaluations that were paused during the spring closures, "while simultaneously complying with evaluation timelines for new referrals for special education and reevaluations due in the fall."
- PPTs should plan for in-person evaluations "whenever feasible."
- Teachers and clinicians will "exercise their professional judgment when deciding whether to conduct a specific assessment or parts of an assessment remotely."
- It may be necessary to note in "the evaluation report if any assessments were completed under nonstandard conditions (e.g., remotely, with masks, behind plastic barrier), or not completed at all because of the need for in-person administration."
- The SDE further advises school officials to consider a number of factors when making decisions about the administration of assessments through remote means. See Addendum 6 for further information.

Q6. *Some parents questioned the district's plan to expand in-person instruction to students with "high needs." They are claiming that this is unfair and discriminatory. Are they correct?*

A6.

The state's reopening plan, Adapt, Advance, Achieve, [https://portal.ct.gov/-/media/SDE/COVID-19/CTReopeningSchools.pdf] directs districts to prioritize access to school buildings for vulnerable populations, including special education students (e.g., "Identify students who have had the most difficulty accessing remote learning opportunities and prioritize access to in-person instruction."). In addition, Addendum 3 [https://portal.ct.gov/-/media/SDE/COVID-19/Addendum-3-Fall-Reopening-Resource-Document-for-Students-with-High-Needs.pdf] attempts to provide further guidance to school districts in determining which students may qualify as "students with high needs." Specifically, Addendum 3 provides that such students may present or often present with intensive needs and:

- have experienced significant challenges accessing remote educational opportunities as a result of the impact of their learning challenges, behavior, and level of engagement;
- require constant or consistent supervision by adults, often with an adult to student ratio of 1:1 or 2:1;
- require physical assistance to learn and attend to their basic safety, health, and self-care needs (e.g., mealtime supports, toileting, medical interventions);
- often present with skill deficits with functional communication via both verbal and nonverbal means, thus limiting their ability to effectively express feelings and symptoms of illness. Undetected illness may pose a safety risk to themselves and others;
- exhibit significant behaviors that, at times, require an escort to safe areas or, in the case of emergency and only as a last resort physical restraint; and
- may not be able to wear personal protective equipment (PPE), practice social distancing (in accordance with), or abide by other Centers for Disease Control and Prevention (CDC), Occupational Safety and Health Administration (OSHA), and CSDE reopening guidance.

Addendum 3 at 1

In addition, Addendum 6 [https://portal.ct.gov/-/media/SDE/COVID-19/Addendum6-Reopen-Guidance-for-Educating-Students-with-Disabilities.pdf] expressly provides that, with respect to a hybrid model, "CSDE requires the school district to consider providing in-person services in school to high needs students full time, if it can be done so consistent with public health and safety protocols, and if not, the maximum frequency which may be more days per week than what the Hybrid Model schedule generally allows for the full school population." Similarly, with respect to full remote models, Addendum 6 provides that "As public health and safety mandates allow, the school district is required to consider providing in-school services to high need students even if the school district is operating under the full remote instructional delivery model." Therefore, it is clear that the State Department of Education supports providing prioritizing opportunities for in-person instruction for certain students with special needs as appropriate and as can be done safely.

In making such decisions, school districts should consider health and safety issues from a facilities standpoint in consultation with district and building leaders, facilities

personnel and local health departments. Questions to consider may include, but not be limited to, Does increasing the number of students in a building during a hybrid or full remote model impact health and safety steps the school has taken? Do building-level protocols need to be adjusted to account for more students using certain spaces? Is additional staffing or staff training needed (e.g. crisis response teams, bus monitors, etc.)?

If health and safety circumstances permit, decisions about how and whether to offer additional in-person instruction must be individualized decisions. Districts should not categorically exclude certain students or disability categories at the outset and must consider these decisions on a case-by-case basis. However, Addendum 3 does provide factors that the State Department of Education determined are relevant in determining which students may qualify as students with high needs and may require prioritization for opportunities for in-person instruction. As always, make objective decisions and consider available data when making determinations about increased in-person instruction. Districts may not be able to avoid some families from lodging complaints if safety considerations do not permit their child full access to in-person instruction, but if districts consult with public health officials about the safety of increasing in-person access, and then make individualized decisions based on objective information, districts will be in a better position to be able to defend their decisions.

Q7. *The district's 18-21 age program typically engages in community-based learning opportunities. What do we need to consider when determining whether to provide instruction in community-based settings?*

A7.

Addendum 3 [https://portal.ct.gov/-/media/SDE/COVID-19/Addendum-3-Fall-Reopening-Resource-Document-for-Students-with-High-Needs.pdf] provides helpful considerations and suggestions for the provision of community-based special education and related services.

- The SDE suggests ongoing communication with families and students in the development of plans unique to each student.
- Health and safety remain the priority in planning for the implementation of services within community settings. Districts may wish to consult with local health officials, medical advisors, etc. in connection with the development of implementation plans for community-based services.
- The SDE advises that school districts must assess the student's ability to adhere to the health and safety protocols in the community-based setting, including the student's ability to adhere to such protocols in connection with transportation to and from community settings.
- Addendum 3 includes a table setting forth additional suggestions related to training and documentation for community-based instruction.

Q8. *The district recently learned that the State of Connecticut expects school districts to provide special education and related services to students who recently exited eligibility at the end of the school year in which they turned twenty-one. To whom must the district offer services? How must the district proceed in fulfilling this new state expectation?*

A8.

The federal court action, ***A.R. v. Connecticut State Board of Education***, recently decided in Connecticut, has increased the responsibility of school districts to provide special education services and programming to identified special education students in the state of Connecticut until the day before their 22nd birthday. Although the CSDE has appealed this decision, for now, this decision is the state of the law in Connecticut. Thus, the CSDE published additional guidance [https://portal.ct.gov/SDE/Digest/Superintendents-Digest] disseminated to districts on September 4, 2020 regarding procedures surrounding the implementation of this decision. Previously, on July 24, 2020, the CSDE published its initial memorandum on this decision.

The September 4 guidance clarifies that districts now have the affirmative obligation to notify students and their families who have not yet turned 22 years old and **who have not received a regular high school diploma**. The memorandum sets forward that for this group of students, districts must make these students and their families aware of their right to obtain services until the day before their 22nd birthday and ask them if they want to receive these services. Following the initial notification of the availability of the continuation of these services, districts must utilize some mechanism of trying to obtain a response -- whether through e-mail, letter or telephone -- so that they have enough information to complete their IEP responsibilities. Depending upon a family's response, the district must either record that response in the student's IEP under Prior Written Notice ("PWN") if services have been refused or, if they have chosen to continue services, convene the PPT to plan and discuss the continuation of services. In cases where a family has chosen to continue services, it should be noted that these services do not continue through the school year in which the student turns 22 years old. Rather, the eligibility for services ceases at the student's 22nd birthday, regardless of when that falls in the school year calendar. The PPT then needs to discuss and plan what the student's program will be until they reach the age of 22. It is possible that the program in which the student was participating prior to aging out will not accept a student beyond the age of 21. In that case, alternative programming will need to occur. The CSDE recommends including outside agencies such as the Bureau of Rehabilitative Services or the Department of Developmental Services (DDS) in the PPT process, if the family consents and it is appropriate.

Students and parents should be told that their choice to continue services with the district will impact their ability to receive and participate in their adult programs, through agencies such as DDS. They will not be able to do both at the same time.

The issue of notification and responsibility also becomes complicated by the distinction between those students who have under our previous rules "aged out" (meaning they reached the end of the academic school year in which they turned 21) but did not earn a "regular high school diploma." Some school districts award regular diplomas to all of their students and some do not, so that analysis may have to occur for districts on an individualized basis. The distinction put forward by the CSDE in its September 4, 2020 guidance does hinge upon the diploma piece and focuses on the group of students who have most recently aged out. This group is separate from the group of students going back two years in time that was also included by the Court in its decision: the "compensatory education" group. The Court is still currently contemplating how responsibility for that "compensatory" education will be measured and awarded.

Q9. *Parents disagreed with the district's psychoeducational evaluation and requested an IEE. The district agreed to fund the IEE. The district requires its staff to conduct classroom-based observations as part of the evaluation. The IEE evaluator recently requested permission to observe the student during in-person instruction. The district is not permitting visitors to school buildings. How may the district respond to the request?*

A9.

In-school observations are addressed in the SDE's Guidance for Independent Educational Evaluations and In-School Observations [https://portal.ct.gov/SDE/Special-Education/Guidance-for-Independent-Educational-Evaluations-and-In-School-Observations]. The Guidance explains that "[f]or most evaluations, it is important for the independent evaluator to understand the student within the context of his or her classroom, and the student's general presentation in school." The current pandemic health emergency may require schools to limit outside visitors to school buildings, including parents and IEE evaluators. School districts should consider adopting and publicizing any limitations on visitors to school buildings. School districts may wish to consider speaking with parents and/or evaluators regarding the use of alternative (non-physical) means of providing information regarding student presentation in school settings.

Q10. *Parents of an elementary student with learning disabilities recently sent a "10-day letter" to the school district informing the district that they are enrolling the student in a full-time educational program at an independent school with tutoring support with an OG specialist because the school district's hybrid instructional model fails to provide the student with FAPE. What should the district do in response to the parents' letter?*

A10.

In response to receipt of the parents' 10-day letter, the district should convene a PPT to discuss and should consider this notification to be akin to notification of an out-of-district unilateral placement. The fact that the district is offering a hybrid program, which needs to be well documented in the IEP and in the IEP Implementation Plan which the CSDE rolled out in August, as referenced in Appendix 6 to the Adapt, Advance, Achieve Plan, does not render the program per se deficient in providing FAPE. Thus, the PPT should review the IEP and Implementation Plan and listen to the parents' concerns and reiterate its plan for providing FAPE to the student. The combined IEP and Implementation plan together constitute the plan for the district's provision of FAPE to the student. The parents will then state their request for support of placement on the record, the district will (most likely) refuse, it will be noted on PWN, and the parents will then have the ability to exercise their due process rights.

Q11. *I heard there was a recent court decision related to FBAs and IEEs. What is the decision and what does it mean for our school operations?*

A11.

On September 17, 2020, the U.S. Court of Appeals issued a decision in ***D.S. v. Trumbull Board of Education,*** 19-644, --- F.3d ---, 2020 WL 5552035 (2d Cir. Sept. 17, 2020). The case involved a parent's request for an independent educational

evaluation (IEE) in a variety of areas based on their disagreement with a functional behavioral assessment (FBA) conducted by the school district. The district court had held that the parents were not entitled to IEEs in areas that were not within the scope of the FBA. The district court also held that the IDEA's two-year statute of limitations applied to requests for IEEs at public expense.

On appeal, and although it was not disputed by the parties at the lower stages of litigation, the Second Circuit held that an FBA is a not an "evaluation" within the meaning of the IDEA, and that the term "evaluation" under the IDEA referred to an initial evaluation or reevaluation. Instead, the court concluded that an FBA was an "assessment tool" or "evaluation material." As a result, the court held that parents are not entitled to an IEE at public expense based on their disagreement with an FBA conducted by a school district.

The Second Circuit also observed that, for purposes of requesting an IEE, a parent's disagreement with an evaluation or reevaluation can be based on the scope of an evaluation or reevaluation conducted by a district. Parents, however, are not entitled to an IEE at public expense based on a disagreement with a "limited assessment," such as an FBA, conducted by a district. Instead, the court noted that when a parent disagrees with a district's "intermediary limited assessment because they believe a more comprehensive evaluation was appropriate," the parent could request a comprehensive evaluation, of which they are entitled to request one per year.

Finally, the court held that the IDEA's two-year statute of limitations does not apply to requests for IEEs. Rather, the timeline for requesting an IEE is naturally circumscribed by the frequency with which the district conducts an evaluation/ reevaluation of the student.

Note: The school district filed a request for rehearing, *en banc*, of the decision, requesting rehearing in connection with the statute of limitations applicable to independent educational evaluations.

Q12. *I have been receiving emails from national school organizations regarding a national class action challenging school reopening plans for students with disabilities. What can you tell us about this national case?*

A12.

On or about July 28, 2020, an attorney group out of New York, specifically the Brain Injury Rights Group and attorneys named Patrick Donahue and Peter Albert, filed a sprawling class action law suit entitled ***J.T. v. DiBlasio*** in federal court in New York, New York. The suit named almost every school district and state department of education across the country, including most or all in Connecticut. The action claims that all identified special education students in the country were deprived of FAPE due to the mandated period of school closure due to COVID-19 in the Spring of 2020 and that, therefore, they are all entitled to independent evaluations and compensatory education. The suit also claims that all schools must be fully open immediately, among other untenable positions.

Defense of this action has been undertaken by groups of attorneys across the country on behalf of districts. Some districts are receiving representation through their insurance companies and some directly. Shipman & Goodwin is representing

a number of school districts in this action, as is at least one another Connecticut firm. As of this date, the Court is considering whether to allow this action to continue against the non-New York state defendants, including Connecticut, or not. There are many procedural flaws with the case including jurisdictional issues and the failure to exhaust administrative remedies. We are awaiting the Court's decision on dismissal or otherwise.

In the meantime, these same attorneys have filed a number of due process cases across the country, purportedly on behalf of individual students, including here in Connecticut. Again, there are multiple procedural flaws with these New York attorneys filing these cases in Connecticut. Two cases here in Connecticut have already been dismissed by Connecticut hearing officers because neither of the named New York attorneys are admitted to practice law in Connecticut, or are being sponsored in these cases by a Connecticut attorney, and this is a regulatory requirement under Connecticut special education law. In addition, the nature of the stated claims are generic and non-specific. There is an additional issue which has come to the federal Court's attention and which has the Court most concerned. Although a number of the families signed what the plaintiffs' attorneys are categorizing as "representation letters", these letters are not specific to representation in a due process hearing and more globally reference participation in the large class action matter. Thus, numerous parents, including some in Connecticut, have written letters clarifying that they have not authorized these attorneys to represent them in a due process hearing at all. Currently, these plaintiffs' attorneys are under order of the Court not to file any further due process hearings.

At this juncture, if you or your superintendent receive any e-mailed complaint or experience an alternate mode of service attempt (such as delivery of a box of papers) from a New York attorney regarding one of your students and including a due process filing, please contact your special education attorney to talk through and also notify your insurance carrier. We do expect more orders from the federal Court shortly. Of course, even if these due process actions in Connecticut are dismissed, there is the possibility that they will be re-filed by a Connecticut attorney, so we should be on the lookout for that, as well.

We will continue to update ctschoollaw.com, and our Shipman's COVID-19 Resource Center with any developments in this area. If you have specific questions regarding this FAQ, please contact Alyce Alfano, Andy Bellach or Peter Maher (contact information appears on page 1).