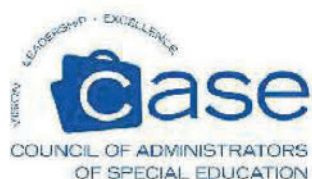


**May 22, 2020**



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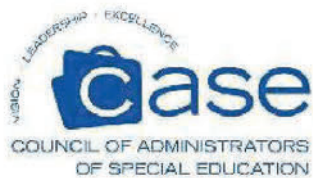
# The Provision of “COVID-19 FAPE” to Students with Disabilities: Top Legal Concerns

**Julie Weatherly, Esq.**

Owner, Resolutions in Special Education, Inc.

Moderated by Phyllis Wolfram, Executive Director, CASE

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**Phyllis Wolfram**  
Executive Director  
CASE

Missouri



@phylliswolfram

## Presenters for Today



@jweatherlyesq

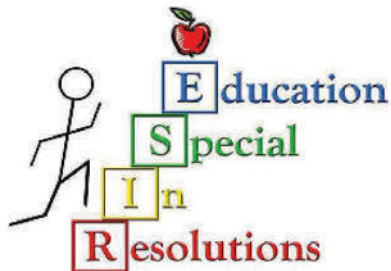


**Julie Weatherly, Esq.**  
Owner/Attorney  
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Alabama

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## Disclaimers

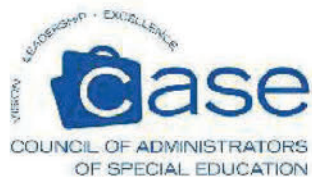


**The information I am providing today is the best that I think I know right now .**

- It may change by the end of the Webinar based on additional guidance or laws at the state or federal level.
- It is intended as general information on special education legal issues. You must consult with your attorney on specific, local matters and for legal advice.
- It must be analyzed in light of your State's guidance (on all things COVID), applicable legal guidance in your jurisdiction (there are wide variations), and your "phase" of reopening.



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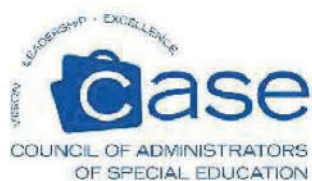
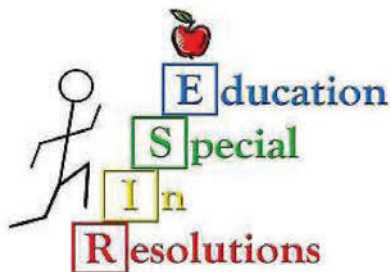
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We have a 6 phase plan to reopen the state. The plan will be a phased plan that we will plan to utilize in phases. The phases will be planned and the planning will be phased. We will move quickly and slowly to open but remain closed. I have created a staff of staffers who will plan the phase and planning while phasing their phases.

And that is our reopening plan.

Thank you





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## SCHOOLS DURING THE COVID-19 PANDEMIC



The purpose of this tool is to assist administrators in making (re)opening decisions regarding K-12 schools during the COVID-19 pandemic. It is important to check with state and local health officials and other partners to determine the most appropriate actions while adjusting to meet the unique needs and circumstances of the local community.

### Should you consider opening?

- ✓ Will reopening be consistent with applicable state and local orders?
- ✓ Is the school ready to protect children and employees at higher risk for severe illness?
- ✓ Are you able to screen students and employees upon arrival for symptoms and history of exposure?

ANY NO

DO NOT OPEN

### Are recommended health and safety actions in place?

- ✓ Promote healthy hygiene practices such as hand washing and employees wearing a cloth face covering, as feasible
- ✓ Intensify cleaning, disinfection, and ventilation
- ✓ Encourage social distancing through increased spacing, small groups and limited mixing between groups, if feasible
- ✓ Train all employees on health and safety protocols

ANY NO

MEET SAFEGUARDS FIRST

### Is ongoing monitoring in place?

- ✓ Develop and implement procedures to check for signs and symptoms of students and employees daily upon arrival, as feasible
- ✓ Encourage anyone who is sick to stay home
- ✓ Plan for if students or employees get sick
- ✓ Regularly communicate and monitor developments with local authorities, employees, and families regarding cases, exposures, and updates to policies and procedures
- ✓ Monitor student and employee absences and have flexible leave policies and practices
- ✓ Be ready to consult with the local health authorities if there are cases in the facility or an increase in cases in the local area

ANY NO

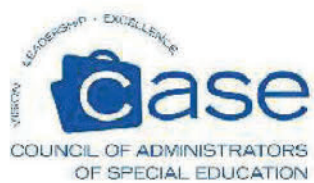
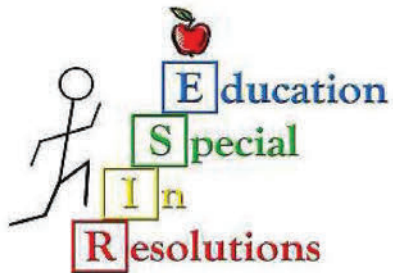
MEET SAFEGUARDS FIRST

ALL YES

OPEN AND MONITOR



[cdc.gov/coronavirus](https://cdc.gov/coronavirus)

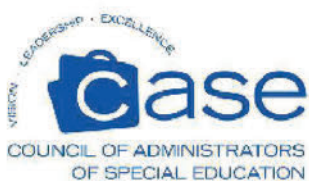
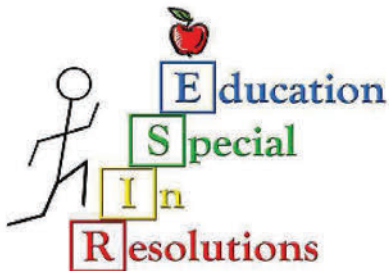


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**SOCIAL DISTANCE SERVICE DOGS**







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## Four Priorities for Special Education:

- 1** Focus on the safety, health, and welfare of students and staff members in your community.
- 2** Provide FAPE- Deliver services to as many students as you reasonably can in the best way you know how.
- 3** Document your efforts; make sure documentation is focused, consistent, detailed and demonstrates a good faith effort to provide good services.
- 4** Compliance during the pandemic- IDEA wasn't built for this.

## Top Legal “COVID -19 FAPE” Issues: Past, Present & Future

### Schools Closed with Distance Learning for All

- What is “FAPE” during the COVID-19 school closures?
- What do we do with the IEP in place when schools closed?
- What about IEPs that were and are up for annual review?
- What about pending evaluation/eligibility processes?
- What if the parent wants to wait until later for services, evaluations or IEP meetings?

### Summer Break is Close or Has Arrived

- What about Extended School Year Services?
- If a student is found eligible for ESY, can we provide it in person?
- What about in-person evaluations right now?

### Schools Reopen (Whenever and Whatever that Means)

- What is this I am hearing about Compensatory Education? Did we do something wrong?

- **Question & Answer Session**



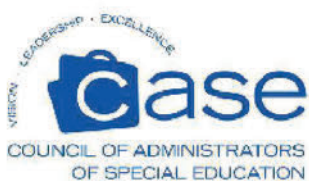


## Schools Closed with Distance Learning for All

What is "FAPE" during COVID-19 school closures?

Though not decided at a time of a national health/safety emergency, I remain convinced that the *Endrew F* standard for FAPE will be applied:

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress ***appropriate in light of the child's circumstances***"

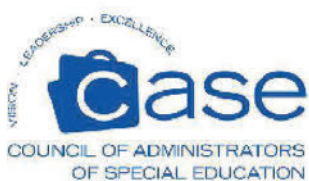


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## Schools Closed with Distance Learning for All

The “child’s circumstances” should include those created by COVID-19 that impacted the ability of school personnel to provide “FAPE to the maximum extent possible,” such as:

- All bricks and mortar schools closed with move to distance learning
- All students confined to the home (even if they are not sick)
- All service providers confined to the home (even if they are not sick), many with their own children to care for
- No (or limited) in-person services for any student
- No (or limited) reliable internet services or assistive technology



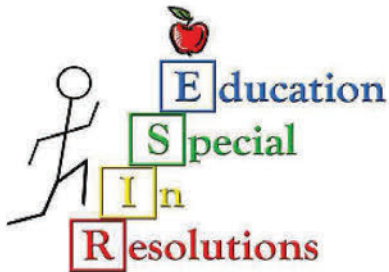
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## Schools Closed with Distance Learning for All

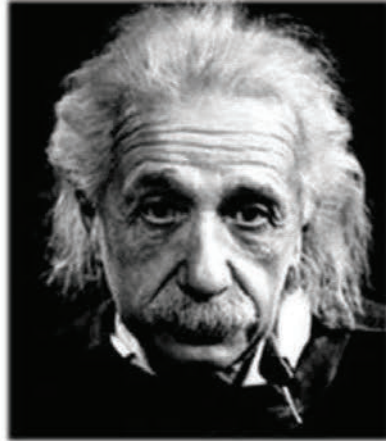
Should a “denial of FAPE” analysis also consider:

- Efforts on the part of school personnel in light of the circumstances?
- Parent/student refusal of services offered in light of the circumstances?

For the FAPE analysis, I have to think so—understanding that a “reviewing court may fairly expect [school authorities] to be able to offer a cogent and responsive explanation for their decisions.”

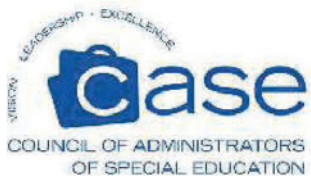


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Albert Einstein—

**“I’d rather be an optimist and a fool than a pessimist and right.”**



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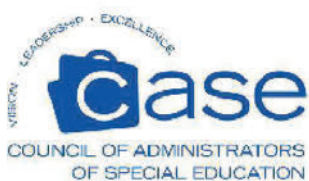
## Schools Closed with Distance Learning for All

What do we do with the IEP in place when schools closed?

U.S. DOE guidance (March 21, 2020):

Parents and schools could agree not to convene an IEP Team meeting for purposes of making changes to the IEP and could, instead, develop a written document to amend or modify the child's current IEP. (34 C.F.R. 300.324(a)(4))

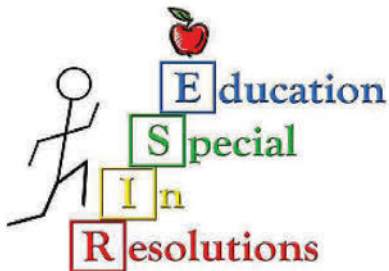
State or local guidance determined what was/is to be done right now, though Congress could change this answer for the future (language is still being negotiated).



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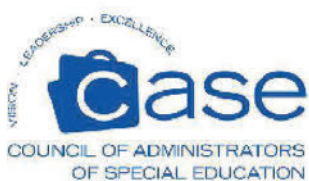


## Schools Closed with Distance Learning for All



- What about IEPs that were/are up for annual review?
- What about pending evaluation/eligibility processes?

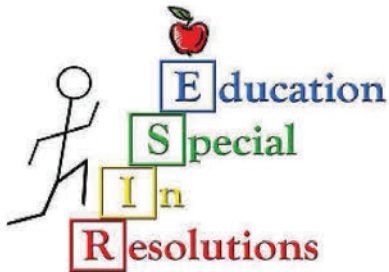
Notwithstanding the tireless efforts of CASE and other organizations to seek targeted and temporary flexibility—not waivers—on these issues, there is no provision in the law to extend these timelines, even if the parent agrees or wants to postpone these activities.



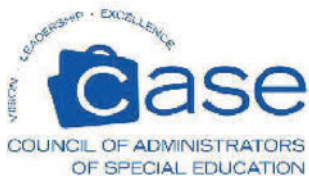
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## Schools Closed with Distance Learning for All



While Secretary DeVos did not recommend flexibility to speak of in her Report to Congress on April 27th, it is expected **that there will be further discussion/negotiation as the next relief package goes forward—probably in late June when the Senate begins to address it.**

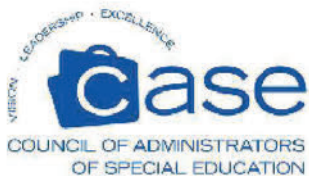


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## Schools Closed with Distance Learning for All

What if the parent wants to wait until later for services, evaluations or IEP meetings?

I say don't push it. However, I also recommend that you check in and discuss the reason(s) why. Document the parent's reasoning and create an agreeable schedule as to when these things can/will occur.



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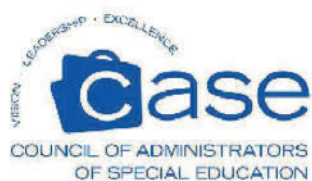


## Summer Break is Close or Has Arrived

### What about Extended School Year Services?

ESY is required if determined necessary for FAPE. During COVID-19, the need for ESY must be determined and, if needed, must be provided in the most reasonable and possible way “in light of the circumstances.”

It is important to understand the origins of ESY. It is not mentioned in the statute itself. It is what I call a “court-created phenomenon.”



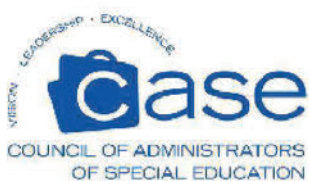
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## Summer Break is Close or Has Arrived

Early 80's - Circuit Court cases established the notion of ESY:

- *Battle v. Commonwealth of Pennsylvania* (3d Cir. 1980)
- *GARC v. McDaniel* (11th Cir. 1983)
- *Crawford v. Pittman* (5th Cir. 1983)

Blanket 180-day school year limitation for all students is a violation of the Act.

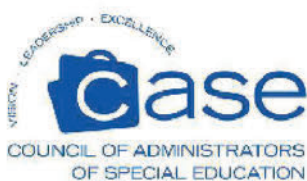
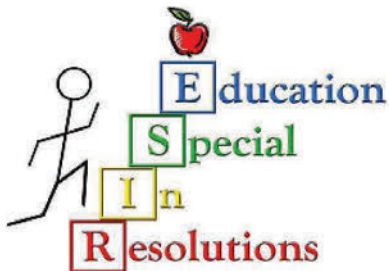


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## Summer Break is Close or Has Arrived

Late 80's/Early 90's - Circuit Court cases set forth possible standards for determining need for ESY:

- *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.* (5th Cir. 1986): "Substantial regression"/inordinate amount or unacceptable length of time to recoup lost critical skills due to the break in instruction is to be considered.
- *Johnson v. Independent Sch. Dist. No. 104* (10th Cir. 1990): Factors to consider include more than regression/recoupment.



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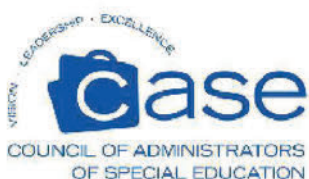


## Summer Break is Close or Has Arrived



**While IDEA does not mention ESY, the 1999 IDEA regulations finally did and contains these tenets:**

- **Must be determined on an individual and annual basis;**
- **Must not be limited to particular disability category or type, amount, or duration of services;**
- **Must be provided beyond the normal school year and in accordance with the IEP; and**
- **Must meet **state standards**.**



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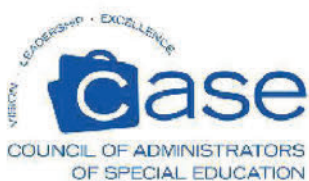


## Summer Break is Close or Has Arrived



**ESY determinations during the summer of COVID-19 should be based upon historical and current available data. Some common factors contained in state standards (typically derived from case law):**

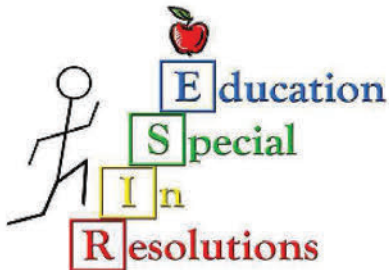
- Regression/recoupment in critical skills areas based upon data
- Consideration of what parent will provide or have available over the summer
- Child's overall rate of progress
- Child's behavioral and physical problems
- Professional judgment
- Substantial/significant jeopardization of emerging critical skill
- Pertinent extenuating circumstances



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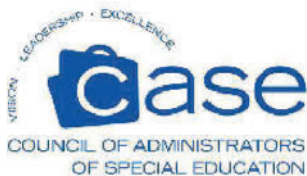
## Summer Break is Close or Has Arrived



### ESY is not:

- Child or respite care
- Intended to maximize educational potential or growth
- The same as summer school or other summer services
- For the purpose of maintaining skills
- For the purpose of continuing progress during a break in instruction

**It is to prevent severe regression in critical skill areas due to a school-scheduled break in instruction.**



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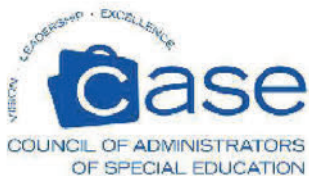


## Summer Break is Close or Has Arrived

If a student is found eligible for ESY, can we provide it in person?

First and foremost, you must make these in-person service decisions based upon CDC and State and local health agency guidelines.

Many students who qualify for ESY services are your most vulnerable, so extra precautions must be considered.

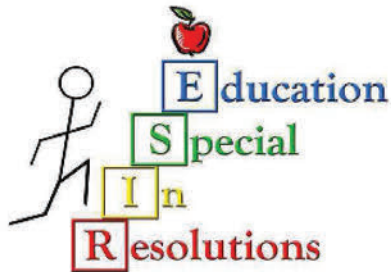


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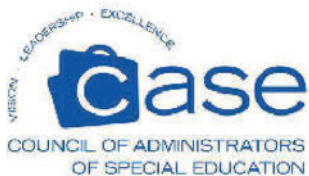
## Summer Break is Close or Has Arrived



I am finding that there is a lot of angst about moving to in-person services for one reason: **Fear of liability!**

### Alabama Governor's Proclamation (an example):

A "business," health care provider, or other covered entity shall not be liable for the death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission or a covered COVID-19 response activity, unless a claimant shows by clear and convincing evidence that the claimant's alleged death, injury, or damage was caused by the entity's wanton, reckless, willful, or intentional misconduct.



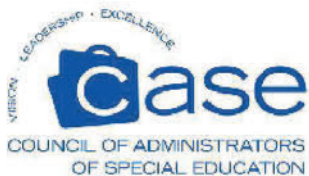
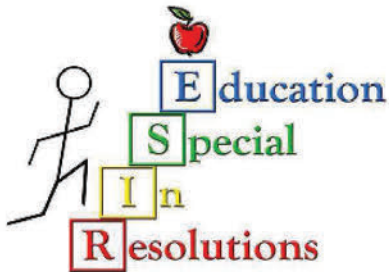
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## Summer Break is Close or Has Arrived

What about in-person evaluations right now?

Same answer but may be more easily/validly done if the evaluator, parent and student are completely comfortable with it—and it will be worthwhile data collection.



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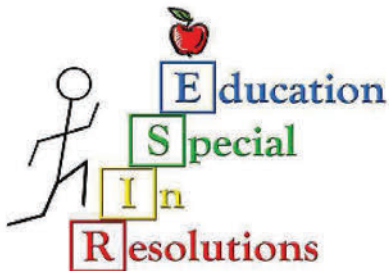
## Schools Fully Reopen (Whenever and Whatever that Means)

What is this I am hearing about Compensatory Education?  
Did we do something wrong?

This discussion started with early (and quickly issued) guidance documents from U.S. DOE:

The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency....FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students. Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services – **IEP teams must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.**





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## Schools Fully Reopen (Whenever and Whatever that Means)

COPAA Blog Post & Comments (April 24, 2020)

Let's Not Talk "Comp Ed" Generally for COVID-19  
Andrew Feinstein, Esq.

"'Comp Ed' are fighting words. By talking that language, we are creating a confrontational posture with school districts and we are misleading our clients. Compensatory education is not the right analytic framework for this situation."



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## Schools Fully Reopen (Whenever and Whatever that Means)

Why is the term “compensatory education” provocative for schools?

### What it is:

Another “court-created phenomenon”—an equitable remedy—based upon IDEA’s language that courts have the authority to “grant the relief the court determines is appropriate.”

It is a legal remedy sought in almost every due process request based upon an alleged denial of FAPE by the school agency because of an inappropriate program or its failure to properly implement an IEP.



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## Schools Fully Reopen (Whenever and Whatever that Means)

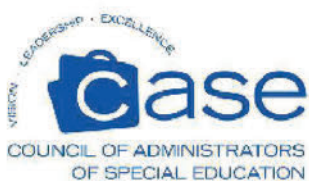
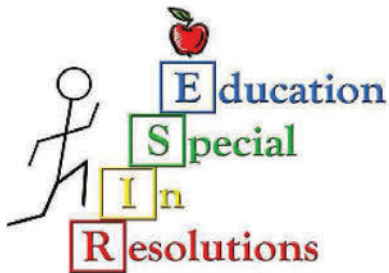
### What “compensatory education” is not:

It was not fashioned to remedy a denial of FAPE caused by massive school closures due to a pandemic.

### Situations where it might be applicable:

The school agency failed to engage in good faith, reasonable efforts to try to provide FAPE during the school closure or refuses to take appropriate action when “normal operations” resume.



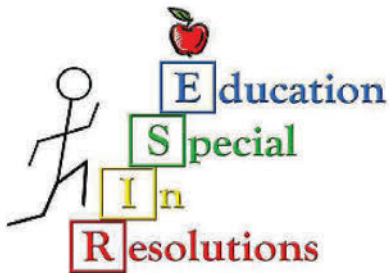


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## Schools Fully Reopen (Whenever and Whatever that Means)

Even if it did apply, I have found “compensatory education” to be a very hollow legal remedy in my practice.

- Often it is provided via settlement or ordered based upon a “minute denied, minute ordered” approach, whether the student actually needs the service or not.
- Often it is provided over and above the school day/school year or for a time period beyond the age of FAPE entitlement.
- Often the student does not want it or benefit from it (unless it is ordered in the form of funding for private or other services).



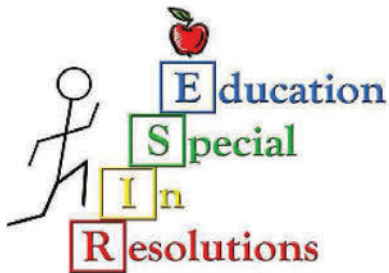
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## Schools Fully Reopen (Whenever and Whatever that Means)

US DOE's term "compensatory services" is not the same as "compensatory education," so let's call it something else during this time (e.g., COVID-19 Impact Services and Supports (CISS), Future Services, Unfinished Learning Services).

Reasonable minds agree: When appropriate and feasible—i.e., when reliable and relevant data can be collected—schools will assess what impact, if any, COVID-19 school closures had on a student's levels of performance/critical skills and what revisions are necessary, if any, to the student's IEP.





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## Schools Fully Reopen (Whenever and Whatever that Means)

It is not educationally sound to assume that every student with a disability will need CISS or that schools will just provide CISS by “doubling up” or “piling on” services. The use of an MTSS framework for most students will be vital.

It is also not sound to fail to consider CISS for students with disabilities “because all students were impacted and experienced the ‘COVID slide’” or “well, it’s the mom’s fault because she refused services” or “he wouldn’t sign on to participate.” While “contributory negligence” might be relevant in determining whether a legal remedy should be ordered, it is not relevant to determining what the student needs when school resumes.

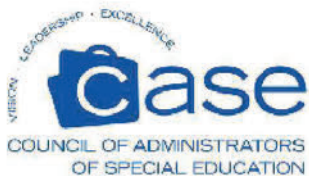
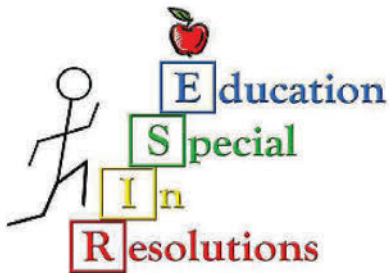




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## Practical Summary Tips for Then, Now and the Future

- Use good “customer service” skills with parents and students and continue to engage with them as much as possible.
- Provide distance learning services to each student that are, as feasible:
  - Individualized to the student’s and parent’s/family’s support needs
  - Aligned with critical skill areas and IEP goals/objectives when school was closed
  - Determined with the opportunity for parent input and collaboration
  - Documented
  - Progress monitored



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## Practical Summary Tips for Then, Now and the Future

- Do not refer to distance learning services as a proposed “change of placement.” This is not a change of placement made by the district—it was/is a change of placement in response to a health and safety emergency.
- Avoid compliance obsession with typical IDEA forms and procedures when providing distance learning services—do the best that you can—but consider not creating new forms/agreements for parents to sign.
- Include related services in distance learning, where feasible and appropriate for the student.
- Keep FERPA provisions in mind at all times, especially if providing instruction/related services virtually with groups of students.

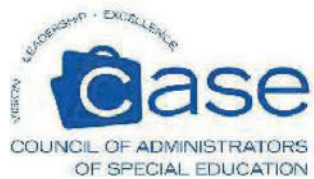
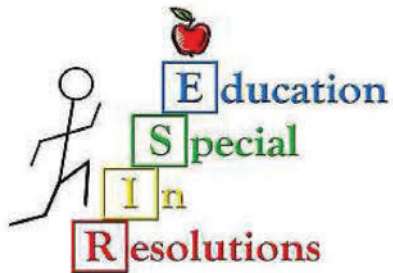
## Practical Summary Tips for Then, Now and the Future



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- Document informally everything discussed and agreed upon—parent agreements/disagreements on timelines, meetings, services; parent contacts/attempts to contact; services provided and when; etc.
- Try to get current IEPs in place by the beginning of the school year (whenever that is).
- Within a reasonable period of time in light of the circumstances, make appropriate team determinations regarding the impact, if any, the school closure had on critical needs/skills and determine whether changes are needed to the IEP.
- Learn from your past mistakes. Assess how the school closure period went—what went well and what did not—just in case school closure happens again (as some are predicting).
- Debrief everything then, now and in the future with your school attorney.

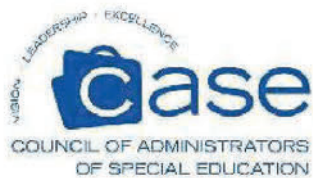




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Keep going.  
Because you did not  
come this far just to  
come this far.





**Phyllis Wolfram**  
Executive Director  
CASE

Missouri



@phylliswolfram

## Questions?



@jweatherlyesq



**Julie Weatherly, Esq.**  
Owner/Attorney  
RISE, Inc.

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**Thank you for participating in the  
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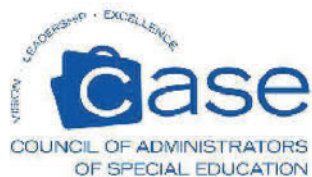


**Connect with CASE  
again soon!**

**Save the Date: July 10, 2020**

**You Create the Agenda**

**Send Questions as they arise to  
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