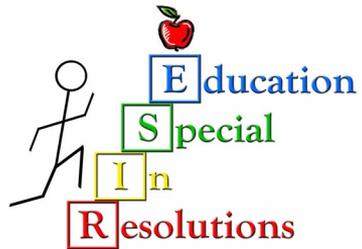


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# ESE Legal Considerations in Light of COVID-19



Julie Weatherly, Esq.  
Resolutions in Special Education, Inc.

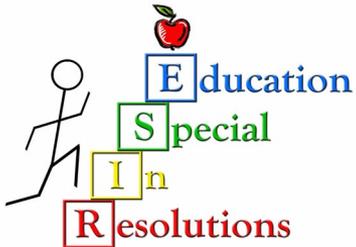
Presentation to FADSS  
June 8, 2020

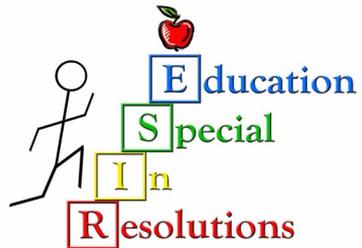
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## Disclaimers

The information provided 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 federal or state level.
- It is intended as general information on ESE legal issues and not legal advice. Consult with your board attorney on specific, local matters and for legal advice with respect to those matters.
- It must be analyzed in light of Florida DOE's guidance (on all things COVID) and the State's "phase" of reopening.





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

## 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



ALL  
YES

### 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



ALL  
YES

### 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

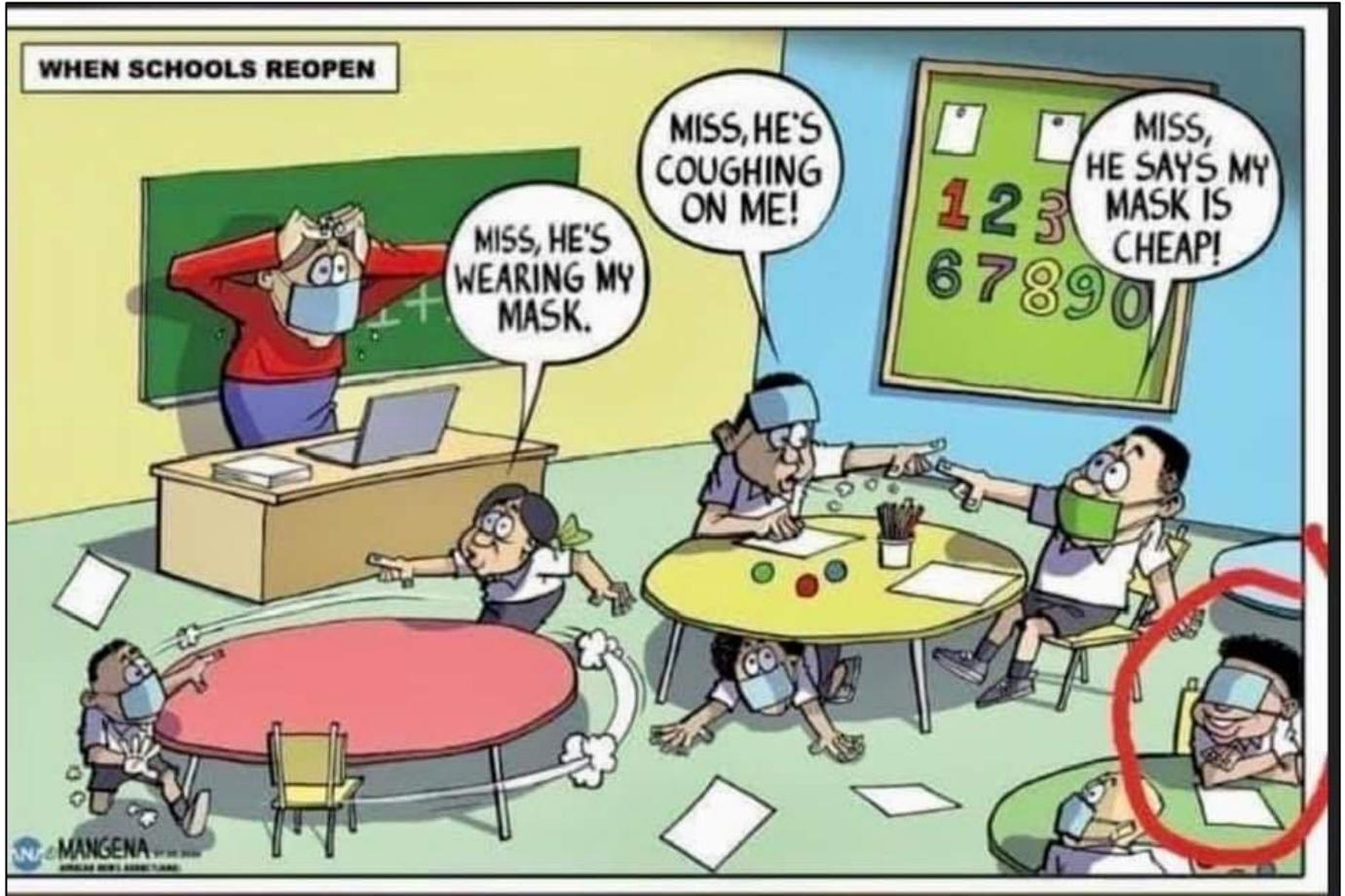
ANY  
NO



ALL  
YES

OPEN AND  
MONITOR



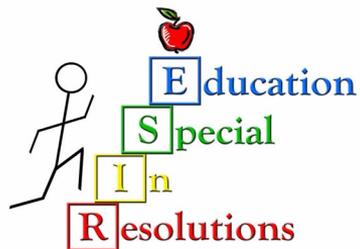


 Education  
Special  
In  
Resolutions



## 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 COVID-19 ESE Legal Issues: Past, Present & Future

## Schools Closed with Distance Learning for All

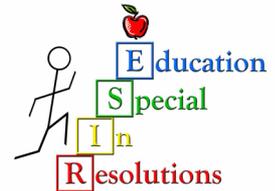
- What is “FAPE” during the COVID-19 school closures?
- What do we do with the IEP in place when schools closed?
- What about IEPs that were and are up for annual review?
- What about pending evaluation/eligibility processes?
- What if the parent wants to wait until later for services, evaluations or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

## Summer Break 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)

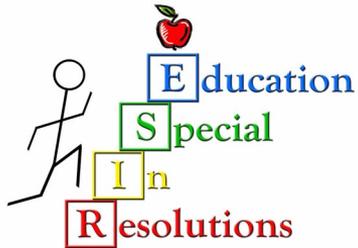
- What is this I am hearing about Compensatory Education? Did we do something wrong?
- Question & Answers



## 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 *Andrew F* standard for FAPE will be applied:

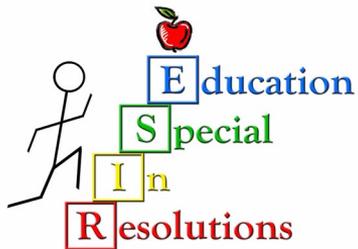


“To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress *appropriate in light of the child’s circumstances*”

## Schools Closed with Distance Learning for All

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

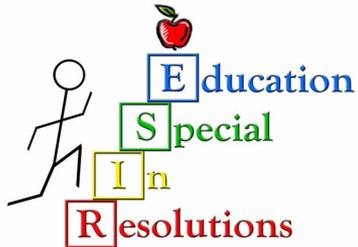
- All bricks and mortar schools closed with an abrupt move to distance learning
- All students confined to the home (even if they were not sick)
- All service providers confined to the home (even if they were not sick), many with their own children/family to care for
- No (or limited) in-person services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



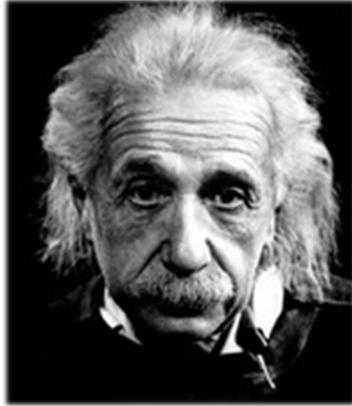
## Schools Closed with Distance Learning for All

Should a “denial of FAPE” analysis also consider:

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

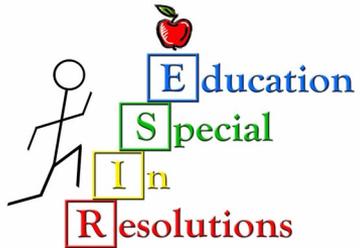


If “COVID-FAPE” is challenged, I have to believe that these things will be considered by ALJs and courts— understanding that a “reviewing court may fairly expect [school authorities] to be able to offer a cogent and responsive explanation for their decisions.”



Albert Einstein —

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

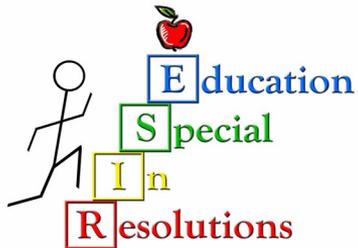


## Schools Closed with Distance Learning for All

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))

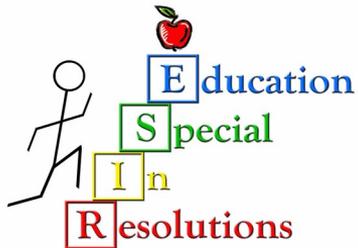


State or local guidance determined what was/is to be done right now, though Congress could change this answer for the future (language is still being negotiated).

## Schools Closed with Distance Learning for All

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

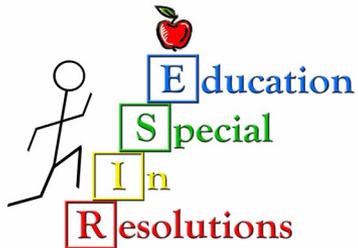
Notwithstanding the tireless efforts of CASE and other educational organizations to seek targeted and temporary flexibility—not waivers—on these issues, there is no provision in IDEA to extend these timelines, even if the parent agrees or wants to postpone these activities.



## Schools Closed with Distance Learning for All

There is bi-partisan support for providing flexibility to schools on missed timelines and other IDEA procedural issues. *See Letter to DeVos from Murphy (D -Conn) and Cassidy (R-La)– April 21, 2020.*

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—perhaps later this month when it is expected that the Senate will begin to address the next stimulus package.**



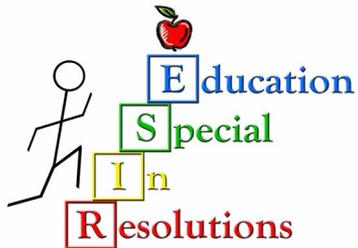
## Schools Closed with Distance Learning for All

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

Florida DOE's Response: **Emergency Order (May 13, 2020)**

**“Subject to federal approval of the flexibility:”**

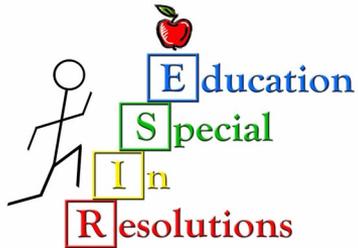
- **Extended annual IEP meeting deadlines**
- **Extended reevaluation deadline**
- **Extended initial evaluation/eligibility deadlines**
- **Extended initial IEP development deadlines**



## Schools Closed with Distance Learning for All

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

I have said don't push it. However, I also recommend that school personnel check in with the parents and discuss the reason(s) why they are refusing or wish to wait.



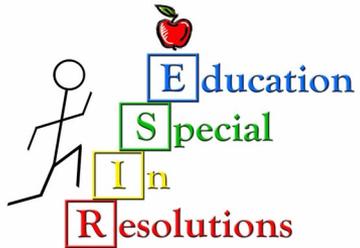
Conversations and parent reasoning should be documented and an agreeable schedule or plan as to when these things can/will occur should be created.



## Summer Break Has Arrived

### What about Extended School Year Services?

ESY is required if determined necessary for FAPE. During COVID-19, IEP teams must determine each student's need for ESY and, if needed, it must be provided in the most reasonable and possible way “in light of the circumstances.”



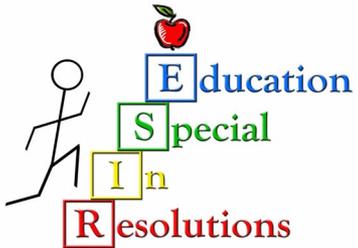
It is important to understand the origins of ESY. It is not mentioned in the IDEA itself. It is what I call a “court-created phenomenon.”

## Summer Break 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.



## Summer Break 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.* (6th Cir. 1986): “Substantial regression”/inordinate amount or unacceptable length of time to recoup lost critical skills within a reasonable period of time due to the break in instruction must be considered.
- *Johnson v. Independent Sch. Dist. No. 104* (10th Cir. 1990): Factors to consider include more than regression/recoupment.

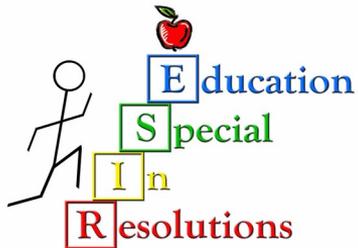




## Summer Break Has Arrived

While IDEA does not mention ESY, the 1999 IDEA regulations finally did and contain 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**.



## Summer Break Has Arrived

ESY determinations this summer should be data-based and under Florida standards, require consideration of whether:

- There is a likelihood that significant regression will occur in critical life skills related to academics, communication, independent functioning, self-sufficiency and social/emotional development or behavior;
- The student is at a critical stage in the development of a critical life or emerging skill and a lapse in services would substantially jeopardize the student's chances of learning that skill;
- The nature or severity of the student's disability is such that the student is unlikely to benefit from education without the provision of ESY services; and
- Extenuating circumstances pertinent to the student's current situation indicate a likelihood that FAPE would not be provided without ESY services.





## Summer Break 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.

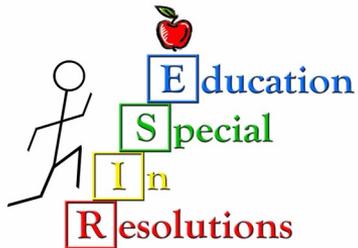


## Summer Break Has Arrived

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

Schools must make in-person service decisions based upon CDC and State and local health agency guidelines.

Many students who qualify for ESY services can be the most vulnerable, so extra precautions must be considered and individualized decisions made.

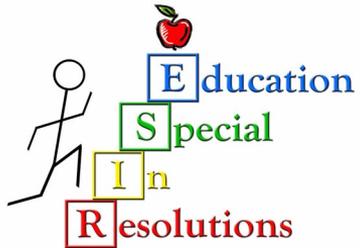




## Summer Break Has Arrived

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 is agreed that an evaluation will render valid, reliable and appropriate data.

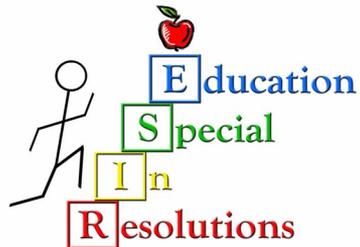




## Schools Fully Reopen (Whenever and Whatever that Means)

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

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



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.

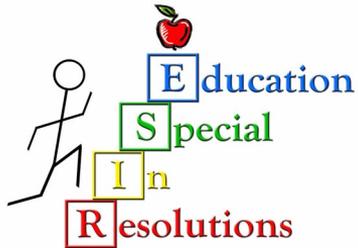


## Schools Fully Reopen (Whenever and Whatever that Means)

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.”





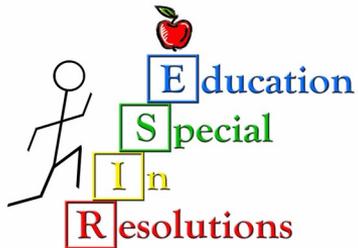
## Schools Fully Reopen (Whenever and Whatever that Means)

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

What “compensatory education” 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 by parents in almost every due process  
request. It is based upon an alleged denial of FAPE by a school  
district because of an inappropriate program or the district’s  
failure to properly implement an IEP.





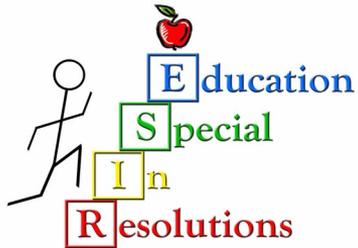
## Schools Fully Reopen (Whenever and Whatever that Means)

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 a legal remedy may be ordered:

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.

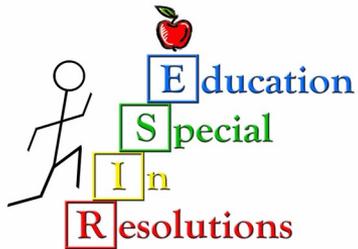




## Schools Fully Reopen (Whenever and Whatever that Means)

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

- Often it is ordered or provided via settlement based upon a “minute denied, minute ordered” (tit-for-tat) 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 schooling or other private services).





## 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 it is 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/needs and what revisions are necessary, if any, to the student's IEP.

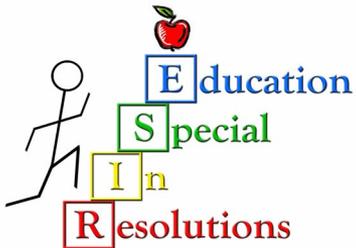
## Schools Fully Reopen (Whenever and Whatever that Means)

It is not educationally sound to assume that every student with a disability will need CISS or that schools will just immediately being providing CISS by “doubling up” or “piling on” services. The use of an MTSS framework for many students will be vital in the identification of their current levels of performance and needs upon return.

It is also not sound for districts to refuse to consider CISS for students with disabilities for any of these reasons:

- “because all students were impacted and experienced ‘COVID-slide’”
- “it’s the mom’s fault because she refused services”
- “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.



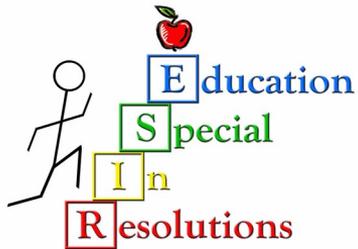
# 10 Tips for Avoiding “Deep Due Due Process”

- Use stellar PR and “customer service” skills with parents and continue to engage with them as much as possible. Encourage your school administrators to be in touch often with parents and ESE students and do not allow them to rely only on ESE personnel to do this.
- Listen to and support your ESE Directors. They know their stuff.
- Provide distance learning services 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, documented, documented
  - Progress monitored



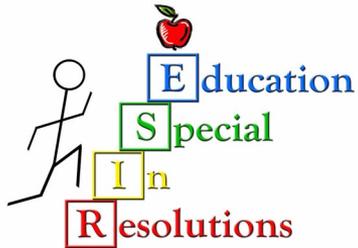
# 10 Tips for Avoiding “Deep Due Due Process”

- When planning phases of reopening of schools and school activities, think first about students with disabilities that will participate and what they will need. Work and plan in an outward fashion rather than treating ESE as an afterthought.
- Make sure ESE folks are sitting around the planning table and that general education and ESE personnel are not working with a silo mentality, especially as it relates to providing distance learning services to ESE students, providing reorientation and instructional services upon return, and determining the need for compensatory services.
- Distribute funds equitably to benefit ESE students. Parent advocates are and will continue to be watching.

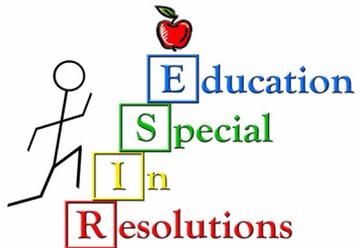


# 10 Tips for Avoiding “Deep Due Due Process”

- Prepare all school personnel to be on the “look out” for immediate and long-term physical, psychological, social and emotional needs of students and institute trauma-informed and SEL learning initiatives.
- Learn from any past mistakes. Assess how the school closure period went for students with disabilities—what went well and what did not—just in case school closure happens again (as some are predicting). Courts are not likely to be as forgiving next time around.
- Debrief everything that occurred then, occurs now and in the future with your school attorney.
- Take good care of yourself. The district can’t do this without you!



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





**Thank you for attending today and for all that you do  
for students with disabilities!**

**Questions?**

**Comments or Concerns?**

**Good Lawyer Jokes?**



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