



NOTE

Education Equity During COVID-19: Analyzing In-Person Priority Policies for Students with Disabilities

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Abstract. During the COVID-19 pandemic, schools nationwide failed to provide essential supports and services to students with disabilities. Based on reviews of 115 school-district reopening plans, this Note finds that numerous schools sought to remedy these gaps through in-person priority policies designed to return students with disabilities to physical classrooms before other students. This Note evaluates the legal and policy implications of such in-person priority policies through the lenses of critical race theory and dis/ability critical race studies (DisCrit).

This Note begins by identifying the structural barriers to learning that students with disabilities faced during school closures, including disparities in internet access and accessibility, removal or reduction of related services, absence of social interaction and structure, and heightened trauma and mental health concerns. While in-person priority policies are meant to mitigate these barriers, this Note argues that they ultimately segregate classrooms and exacerbate already egregious disciplinary disparities. Consequently, these policies impose disproportionate harm on students of color with disabilities.

Additionally, this Note calls on policymakers to develop individualized approaches to in-person priority, adopt nonexclusionary disciplinary policies, and expand access to compensatory education and extended school year services. Beyond the current crisis, policymakers must commit to eliminating systems of stratification that categorically filter students into segregated classroom settings. By centering students of color, schools can reimagine special education to ensure that all students receive the education they deserve.

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Introduction

In 1982, the Supreme Court affirmed that “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”¹ The COVID-19 pandemic that has ravaged the United States since March 2020 has brought these words into stark relief once again. During the 2019-2020 school year, forty-eight states invoked mandatory or recommended school closures for the remainder of the year.² All told, over 50 million students were left without the support and resources of their school communities.³ In its report on school reopening, the National Academies of Sciences, Engineering, and Medicine emphasized that without support from schools, many families lost a source of childcare, nutrition, medical care, therapy, and social services.⁴ The far-reaching effects of this loss of services have reverberated through communities across the country, but they have not impacted all students equally.

The seven million students with disabilities in the U.S. public education system have been among the hardest hit by school closures.⁵ The situation has been particularly tenuous for this population because the Individuals with Disabilities Education Act (IDEA) does not explicitly contemplate extended school closures.⁶ The U.S. Department of Education sought to fill this gap through multiple fact sheets and other forms of guidance. In the early days of the pandemic, however, these efforts lacked clarity at best and encouraged the withholding of educational services at worst. For example, in its initial

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1. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (upholding the rights of undocumented children to a public education).
 2. See *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUC. WK. (July 1, 2020), <https://perma.cc/SX49-KR3R> (indicating that only Montana and Wyoming did not close schools for the end of the 2019-2020 academic year).
 3. See *id.*
 4. NAT’L ACADS. OF SCIS., ENG’G, & MED., REOPENING K-12 SCHOOLS DURING THE COVID-19 PANDEMIC: PRIORITIZING HEALTH, EQUITY, AND COMMUNITIES 25 (2020), <https://perma.cc/UE3C-P4GW>.
 5. See NAT’L CTR. FOR EDUC. STATS., THE CONDITION OF EDUCATION 2021: STUDENTS WITH DISABILITIES 1 (n.d.), <https://perma.cc/AQ9X-ZCBQ> (“In 2019-20, the number of students ages 3-21 who received special education services under the Individuals with Disabilities Education Act (IDEA) was 7.3 million, or 14 percent of all public school students.”).
 6. See 20 U.S.C. § 1400; U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK 2 (2020), <https://perma.cc/MPT5-79Z9> (“The IDEA . . . do[es] not specifically address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of . . . an outbreak of a particular disease.”).

March 16, 2020 fact sheet, the Department of Education stated that “[i]f a school district closes its schools and does not provide any educational services to the general student population, then a school would not be required to provide services to students with disabilities during that same period of time.”⁷ School districts saw this as a loophole: They needed to provide students with disabilities a free and appropriate public education (FAPE)—which includes the special education and related services needed to enable students with disabilities to benefit from their education⁸—only if schools remained open and provided services to all general-education students.

In response, some school districts began eliminating all services for students without disabilities. Some districts in Massachusetts told parents that “remote learning will not serve as a substitute for school or replicate classroom instruction,” suggesting that any virtual support was enrichment, not education.⁹ Another district in Seattle distributed thousands of tablets and Wi-Fi hotspots, only to halt all learning to avoid being out of compliance with the IDEA.¹⁰ Other districts in New Jersey and Illinois took the extraordinary step of asking families to expressly waive their right to FAPE during the pandemic.¹¹ Under the Department of Education’s original guidance, these strategies appeared to absolve districts of obligations to students with disabilities. The school districts’ actions forced the Department to release further guidance on March 21, 2020, declaring that schools could not suspend all educational services to avoid providing services to students with disabilities.¹² The FAPE requirement was upheld for the time.

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7. OFF. FOR C.R., U.S. DEP’T OF EDUC., OCR-000115, FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS 3 (2020), <https://perma.cc/3ZEK-ZNWM>; see also U.S. DEP’T OF EDUC., *supra* note 6, at 2 (applying the same logic to Local Educational Agencies (LEAs), which encompass school boards and other public entities that exercise administrative control over public education).
 8. See 20 U.S.C. § 1401(9); 34 C.F.R. § 300.101 (2020).
 9. Jennifer Gavin, *Are Special Education Services Required in the Time of COVID-19?*, A.B.A. (Mar. 31, 2020), <https://perma.cc/KA5G-5BP8>.
 10. Corey Mitchell, *How Will Schools Provide Special Education During the Coronavirus Crisis?*, EDUC. WK. (Mar. 19, 2020), <https://perma.cc/7NNX-AJAD>.
 11. Jodi S. Cohen & Jennifer Smith Richards, *Families of Special Needs Students Fear They’ll Lose School Services in Coronavirus Shutdown*, PROPUBLICA ILL. (May 20, 2020, 3:24 PM), <https://perma.cc/L6NC-G2HY> (describing a waiver from the Sangamon Area Special Education District in Illinois stating, “I am voluntarily waiving my right to a free appropriate public education (FAPE) and will not be able to seek compensatory services related to the school closure.”); see also Mark Keierleber, *Fearing Special Ed Lawsuits, These New Jersey School Districts Asked Parents to Sign Away Their Rights in Order to Get Services During Pandemic*, 74 MILLION, <https://perma.cc/3GDU-DDB2> (last updated May 2, 2020).
 12. OFF. FOR C.R., U.S. DEP’T OF EDUC., OCR-000116, SUPPLEMENTAL FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY
footnote continued on next page

But the damage had already been done. School districts were left scrambling to transition to online learning for all students while attempting to provide FAPE for students with disabilities.¹³ Parents of students with disabilities worried about the security of their children's education as they watched years of academic and behavioral progress slip through their fingers.¹⁴ And students with disabilities were often left in the lurch, finding their educational services reduced or eliminated through distance learning. The cumulative effect has been enormous learning loss for students with disabilities.¹⁵

Throughout the 2020-2021 school year, the landscape of learning changed significantly as the remaining statewide, mandatory school closures were lifted in September 2020.¹⁶ In light of these changing conditions, President Biden announced a crucial goal for his first 100 days in office: reopening more than 50% of elementary and middle schools.¹⁷ The Biden administration took a number of key steps to make this goal a reality. On February 12, 2021, the Centers for Disease Control and Prevention (CDC) released new and more detailed guidelines for reopening schools.¹⁸ By March 19, 2021, these guidelines were updated to recommend universal masking and a reduced, three-foot social-distancing policy, making it more feasible to reopen schools.¹⁹ President Biden also directed all states to prioritize teachers to receive the COVID-19

SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES 1 (2020), <https://perma.cc/N68F-N5DD> ("To be clear: ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction." (citations omitted)).

13. *Id.*; Benjamin Herold, *The Scramble to Move America's Schools Online*, EDUC. WK. (Mar. 27, 2020), <https://perma.cc/2VMW-9TL3>.
14. *See infra* note 72.
15. *See* JOÃO PEDRO AZEVEDO, AMER HASAN, DIANA GOLDEMBERG, SYEDAH AROOB IQBAL & KOEN GEVEN, WORLD BANK GRP., SIMULATING THE POTENTIAL IMPACTS OF COVID-19 SCHOOL CLOSURES ON SCHOOLING AND LEARNING OUTCOMES: A SET OF GLOBAL ESTIMATES 19-20 (2020), <https://perma.cc/2GAZ-UR3P>.
16. *See School Responses to the Coronavirus (COVID-19) Pandemic During the 2020-2021 Academic Year*, BALLOTPEdia, <https://perma.cc/GF3G-XS68> (archived Nov. 4, 2021) (indicating no statewide, state-ordered closures after August 2020).
17. Statement on Safely Reopening Schools, 2021 DAILY COMP. PRES. DOC. 202100141 (Feb. 12, 2021).
18. CDC, OPERATIONAL STRATEGY FOR K-12 SCHOOLS THROUGH PHASED MITIGATION (2021), <https://perma.cc/G6RN-AMAV>; *see* Cory Turner, Anya Kamenetz & Tamara Keith, *CDC Offers Clearest Guidance Yet for Reopening Schools*, NPR (updated Feb. 12, 2021, 5:30 PM ET), <https://perma.cc/X7XV-R3LZ>.
19. Press Release, CDC, CDC Updates Operational Strategy for K-12 Schools to Reflect New Evidence on Physical Distance in Classrooms (Mar. 19, 2021), <https://perma.cc/TC2C-JL5T> (maintaining a six-foot social-distancing requirement in some high-transmission communities).

vaccine,²⁰ enabling over 80% of all teachers to receive their first vaccination by the end of March 2021.²¹ In addition, the passage of the American Rescue Plan Act of 2021 earmarked over \$170 billion for education, including over \$122 billion to allow K-12 school districts to improve facilities, staffing, and social and emotional learning and \$3 billion to support the implementation of the IDEA.²²

It is difficult to make a direct connection between President Biden’s policies and school reopening numbers due to changing global conditions and state and local policies, some of which preceded those of the federal government.²³ Nonetheless, the United States did experience a significant shift toward in-person learning throughout the 2020-2021 school year. By April 2021, “96 percent of K-8 schools were offering in-person learning options and 59 percent of these schools were offering full-time in-person instruction.”²⁴

This progress toward in-person learning was by no means uniform. Instead, it was largely the product of district-level decisions. As of June 2021, only thirteen states required in-person instructional options for all grades and one state required in-person options for only some grades during the following school year.²⁵ As a result, two-thirds of K-12 students’ school-reopening policies were determined at the school or district level.²⁶ Such decentralized decisionmaking has resulted in both regional differences²⁷ and racial

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20. Remarks on COVID-19 Vaccination Efforts and an Exchange with Reporters, 2021 DAILY COMP. PRES. DOC. 202100185 (Mar. 2, 2021).
 21. *Secretary Cardona’s Remarks on School Reopening and 100 Days of the Biden Administration*, U.S. DEP’T EDUC. (Apr. 30, 2021), <https://perma.cc/Z2RE-A5C5>.
 22. Michael Griffith, *An Unparalleled Investment in U.S. Public Education: Analysis of the American Rescue Plan Act of 2021*, LEARNING POL’Y INST.: LPI BLOG (Mar. 11, 2021), <https://perma.cc/8FKU-SP68>.
 23. See Amy Sherman, *Why It’s Hard to Link School Reopenings to Biden’s Efforts*, POLITIFACT (Apr. 27, 2021), <https://perma.cc/4VWR-UZE4>.
 24. *Statement from U.S. Secretary of Education Miguel Cardona on Results of April 2021 NAEP Survey on School Reopening*, U.S. DEP’T EDUC. (June 10, 2021), <https://perma.cc/Z9ZM-4CNE>.
 25. *Map: Where Were Schools Required to Be Open for the 2020-21 School Year?*, EDUC. WK., <https://perma.cc/M7S8-KM2C> (last updated June 14, 2021).
 26. See *School Responses to the Coronavirus (COVID-19) Pandemic During the 2020-2021 Academic Year*, *supra* note 16.
 27. For example, as of February 2021, “[m]ore than 70% of all K-12 students in Alabama, North Dakota, Texas, and Utah have the option of in-person instruction, while Florida and Wyoming are teaching almost all of their students in person,” whereas “more than 75% of all students in Maryland, Oregon, New Mexico, California, Washington and Virginia have only had access to remote learning for the last 10 months.” Bo Erickson, *Many Schools Have Reopened Without White House Guidance, but Can Be Hard to Track How They’re Teaching*, CBS NEWS (Feb. 9, 2021, 7:24 AM), <https://perma.cc/2CGA-6PSQ>.

disparities in access to in-person learning.²⁸

As schools resume in-person learning across the country, policymakers must better understand the implications of extended school closures and evaluate how to respond to them most equitably. To support this goal, this Note applies the conceptual frameworks of critical race theory²⁹ and dis/ability critical race studies (DisCrit)³⁰ to evaluate in-person priority policies that invited only students with disabilities and English language learners (ELLs) to return to in-person classrooms before their peers. Through the work of contemporary critical legal scholars such as Derrick Bell and Kimberlé Crenshaw, critical race theory builds on the intellectual legacy of individuals including Frederick Douglass, Sojourner Truth, Bayard Rustin, and W.E.B. Du Bois.³¹ Drawing on the rich history of abolitionist advocacy and thought, critical race theory “center[s] race within interlocking and oppressive structures of society,” thereby “provid[ing] a means to understand how racism and White supremacy function . . . while seeking to disrupt them.”³² DisCrit adds further nuance by integrating disability-studies perspectives into the critical race theory framework, thereby “confronting the mutually constitutive nature of race and ability and . . . exploring how unmarked norms of White and able-bodied-ness influence perceptions of both.”³³ This Note identifies core tenets of these frameworks and illuminates how in-person

28. See Secretary Cardona’s Remarks on School Reopening and 100 Days of the Biden Administration, *supra* note 21 (reporting that Black, Hispanic, and Asian students are disproportionately enrolled in virtual learning).

29. See generally RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 6-9 (2001) (introducing five core tenets of critical race theory: the ordinary and endemic nature of racism, the principle of interest convergence, the social-construction thesis, the reality of intersectionality, and the voice-of-color thesis).

30. See generally Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 1 (2013) (explaining that DisCrit “combine[s] aspects of Critical Race Theory (CRT) and Disability Studies (DS) to propose a new theoretical framework that incorporates a dual analysis of race and ability”).

31. Subini Ancy Annamma, Yolanda Anyon, Nicole M. Joseph, Jordan Farrar, Eldridge Greer, Barbara Downing & John Simmons, *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 URB. EDUC. 211, 216 (2019) [hereinafter Annamma et al., *Black Girls*]; see also Subini Annamma, Deb Morrison & Darrell Jackson, *Disproportionality Fills in the Gaps: Connections Between Achievement, Discipline and Special Education in the School-to-Prison Pipeline*, 5 BERKELEY REV. EDUC. 53, 55 (2014) [hereinafter Annamma et al., *Disproportionality*].

32. Subini Ancy Annamma, Beth A. Ferri & David J. Connor, *Disability Critical Race Theory: Exploring the Intersectional Lineage, Emergence, and Potential Futures of DisCrit in Education*, REV. RSCH. EDUC., Mar. 2018, at 42, 48.

33. Annamma et al., *Disproportionality*, *supra* note 31, at 56.

priority policies can perpetuate systemic inequities for students with disabilities—in particular, students of color with disabilities.

Using the above methodologies, this Note argues that district-level plans to provide in-person priority only to students with disabilities and ELLs raise significant equity concerns due to the segregated classrooms they create and the disciplinary disparities they exacerbate. Returning students of color with disabilities to in-person classrooms should remain a top priority. But there are central flaws to current district-level plans, and these plans must be modified to allow for more integrated settings. These flaws should also motivate the consideration of alternative policy solutions. Part I details four structural barriers and sources of COVID-19 learning loss for students with disabilities. Part II situates the impacts of COVID-19 school closures within the context of the IDEA and demonstrates why closures represent a material failure to provide FAPE to these students. Part III utilizes core tenets of critical race theory and DisCrit to explore school districts' attempts to give in-person priority to students with disabilities, highlighting the legal and policy-based concerns with segregated learning environments. Finally, Part IV proposes some essential modifications to in-person priority policies along with complementary policies designed to ensure effective support for students with disabilities.

While the effects of COVID-19 will persist for years to come, this Note has relevance beyond the current crisis. First, this critique of seemingly benevolent in-person priority policies underscores how critical race theory “exposes how laws, policies, and practices that are considered neutral actually reinforce normative standards of Whiteness, and . . . problematize bodies that differ from these ideals.”³⁴ In this way, this Note highlights the urgency of centering students of color within intersectional analyses of special education policy. Further, the racial disproportionalities discussed in this Note reflect deeply rooted systemic inequalities in special education. Beyond the question of in-person priority, policymakers must commit to eliminating all systems of racial stratification that categorically isolate students of color with disabilities in self-contained classroom settings.³⁵ Finally, by centering students of color within an analysis of the mechanisms that perpetuate the segregation of students with disabilities, this Note calls on policymakers to reimagine a special education system that enables all students to receive the education they deserve.

34. Annamma et al., *Black Girls*, *supra* note 31, at 217.

35. See Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 308 (2019) (defining racial stratification as “a hierarchical sorting of races that relegates Black and Latinx children with constructed disabilities to segregated classrooms with a substandard education, a decreased graduation rate, and an increased likelihood of ending up in the criminal justice system”).

I. COVID-19 and Structural Barriers for Students with Disabilities

In the wake of nationwide school closures, policymakers, educators, and advocates emphasized the significant learning loss that resulted from the extended use of online learning. Despite the best efforts of dedicated and dynamic teachers across the country, some studies estimate that COVID-19 school closures could result in up to about seven months of learning loss.³⁶ Others estimate as much as a nine- to twelve-month loss.³⁷ In May 2020, scholars at Brown University and the University of Virginia estimated that children would return to in-person learning in fall 2020 “with approximately 63–68% of the learning gains in reading relative to a typical school year and with 37–50% of the learning gains in math.”³⁸

The potential long-term effects of school closures are particularly concerning. Studies on school closures following Hurricane Katrina found that learning loss continued for up to three years.³⁹ And a McKinsey & Company report suggests that COVID-19 school closures are likely to cause a rise in high school dropouts—estimating a 2–9% increase—due to a loss of the resources that keep disengaged youth in school.⁴⁰ It is clear that schools will be dealing with these aftereffects for years to come.

While the prospect of severe learning loss is harmful to all students, those with disabilities are likely to be among the most acutely affected. The CDC emphasized that “[s]tudents from low-resourced communities, English learners, and students with disabilities might disproportionately experience learning loss due to limited access to remote learning technology and fewer learning support systems and services outside of schools.”⁴¹ These concerns have been magnified by systemic failures that leave students with disabilities behind. In an alarming poll of 1,200 parents of New York public school students in March 2020, only 27% reported receiving instructional materials

36. AZEVEDO ET AL., *supra* note 15, at 14.

37. Dimitri A. Christakis, Opinion, *School Reopening—The Pandemic Issue That Is Not Getting Its Due*, 174 JAMA PEDIATRICS 928, 928 (2020).

38. Megan Kuhfeld, James Soland, Beth Tarasawa, Angela Johnson, Erik Ruzek & Jing Liu, *Projecting the Potential Impacts of COVID-19 School Closures on Academic Achievement 2*, 23 (Annenberg Inst. at Brown Univ., Working Paper No. 20-266, 2020), <https://perma.cc/B4EN-YSHF>.

39. Bruce Sacerdote, *When the Saints Go Marching Out: Long-Term Outcomes for Student Evacuees from Hurricanes Katrina and Rita*, AM. ECON. J., Jan. 2012, at 109, 125.

40. Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. (June 1, 2020), <https://perma.cc/A5CA-HKXA>.

41. *Operational Strategy for K-12 Schools Through Phased Prevention*, CDC, <https://perma.cc/Z87Q-2LVT> (last updated May 15, 2021).

for students with disabilities.⁴² Another survey of 1,200 California-based parents found that only 24% were receiving materials.⁴³ With 767,562 California students and 522,221 New York students receiving special education services in 2017-2018, it is alarming that these disparities emerged in the states with the two highest populations of students with disabilities.⁴⁴

Racial disparities that existed long before the pandemic are likely to compound these harms because students of color are persistently overidentified for special education across numerous eligibility categories.⁴⁵ Students entered the pandemic with a well-established achievement gap across race and socioeconomic status, and distance learning disparities will likely widen that persistent gap.⁴⁶ One estimate suggests that compared to an average of seven months of learning loss, “[B]lack students may fall behind by 10.3 months, Hispanic students by 9.2 months, and low-income students by more than a year.”⁴⁷ The estimate suggests this learning loss “would exacerbate existing achievement gaps by 15 to 20 percent.”⁴⁸ This disparity arises from a

42. Lauren Camera, *Schools Struggle to Educate Students with Disabilities amid Pandemic*, U.S. NEWS (Apr. 15, 2020), <https://perma.cc/GM43-N36W>.

43. *Id.*

44. NAT’L CTR. FOR EDUC. STATS., INST. OF EDUC. SCIS., DIGEST OF EDUCATION STATISTICS 2018, at 86 (2019), <https://perma.cc/SN4W-A682>.

45. See, e.g., RACIAL INEQUITY IN SPECIAL EDUCATION, at xv-xxvi (Daniel J. Losen & Gary Orfield eds., 2002) (providing a detailed account of the overrepresentation of students of color through special education identification, testing, placement, and discipline); Alfredo J. Artiles, Beth Harry, Daniel J. Reschly & Philip C. Chinn, *Over-identification of Students of Color in Special Education: A Critical Overview*, 4 MULTICULTURAL PERSP. 3, 4-5 (2002) (evaluating multiple methodologies for analyzing and presenting the disproportionate identification of students of color for special education); *Key Findings at the National Level from the 42nd Annual Report to Congress on IDEA, Parts B and C. 2020*, U.S. DEP’T EDUC., <https://perma.cc/D73E-RQS2> (last updated Jan. 22, 2021) (showing that students of color, including American Indian or Alaska Native students, Black or African American students, Latinx students, and Native Hawaiian or Pacific Islander students, were overrepresented for all disabilities among students served by IDEA Part B in the 6 to 21 age group, but not younger age groups). *But see* Paul L. Morgan & George Farkas, *Evidence and Implications of Racial and Ethnic Disparities in Emotional and Behavioral Disorders Identification and Treatment*, 41 BEHAV. DISORDERS 122, 122 (2016) (arguing that white students are actually overrepresented in special education when controlling for academic and behavioral factors).

46. There are “persistent achievement disparities across income levels and between white students and students of black and Hispanic heritage. School shutdowns could not only cause disproportionate learning losses for these students—compounding existing gaps—but also lead more of them to drop out.” Dorn et al., *supra* note 40. Furthermore, “[f]or many of these groups, there is a significant pre-existing deficit that is likely to be compounded by school closures, and they may thus face an even greater risk of being left behind.” AZEVEDO ET AL., *supra* note 15, at 19.

47. Dorn et al., *supra* note 40.

48. *Id.*

number of factors. For example, Black, Latinx, and low-income families are more likely to include essential workers who cannot work from home,⁴⁹ so students may not have parental supervision to assist with attending virtual classes or completing homework. Additionally, low-income families are less likely to have access to the internet and the necessary technology for virtual classrooms.⁵⁰ Students with disabilities who share these marginalized identities (i.e., multiply-marginalized students⁵¹) are likely to experience even greater learning loss as a result.

Given this context, it is no wonder that parents of students with disabilities have been left heartbroken. Jenn Orchard, a parent of a five-year-old with a genetic disorder, shared that “[i]t’s like going through the process of grief again We thought we had everything set up and we had all this help, and I don’t have it anymore.”⁵² Personal stories such as these lay bare that COVID-19 has not only been a public health crisis, but also an education crisis of monumental proportions—with disparate impacts on students with disabilities, and particularly multiply-marginalized students of color with disabilities.

While learning loss and achievement gaps reflect the predominant language in the media describing COVID-19 school closures, critical race theory and DisCrit scholars call for a deeper contextual analysis of the barriers for students of color with disabilities. In a 2006 address to the American Educational Research Association, Gloria Ladson-Billings offered a powerful critique of the achievement gap.⁵³ While the language of the achievement gap is reminiscent of an annual budget deficit, Ladson-Billings argued that “what is actually happening to African American and Latina/o students is really more like the national debt. We do not have an achievement gap; we have an education debt.”⁵⁴ Ladson-Billings’s distinction is that the systemic disadvantages imposed upon students of color reflect the cumulative weight of “historical, economic, sociopolitical, and moral decisions,” not a simple

49. NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 4, at 33.

50. *Id.* at 29.

51. The term “multiply-marginalized” refers to “those that exist at the intersections of multiple marginalized identities.” Subini Annamma & Deb Morrison, *DisCrit Classroom Ecology: Using Praxis to Dismantle Dysfunctional Education Ecologies*, TEACHING & TCHR. EDUC., July 2018, at 70, 71-72.

52. Manola Secaira, *Parents of Kids with Disabilities Fear Lasting Consequences of School Closures*, CROSS CUT (Apr. 8, 2020), <https://perma.cc/7MSF-NP2C>.

53. See Gloria Ladson-Billings, Presidential Address, *From the Achievement Gap to the Education Debt: Understanding Achievement in U.S. Schools*, EDUC. RESEARCHER, Oct. 2006, at 3.

54. *Id.* at 5.

difference in test scores at one moment in time and not a deficit inherent in those individual students.⁵⁵

Policy responses aiming to address learning loss alone risk myopically focusing on the singular context of COVID-19, rather than considering how overlapping and intertwined histories of inequality intersect with the current moment. In 2006, Ladson-Billings warned that emphasizing deficit-based achievement gaps “moves us toward short-term solutions that are unlikely to address the long-term underlying problem.”⁵⁶ Today, education scholars have similarly argued that in the context of COVID-19, “legislative policy and schooling practices enacted in response to ‘learning loss’ should center equity in ways that address the education debt.”⁵⁷ This Note heeds that call.

To develop an appropriate response to COVID-19 school closures, policymakers must understand the aspects of distance learning that have diminished progress over the past year, while also designing long-term solutions that reflect and respond to the deeper educational debt owed to marginalized students. To begin, this Note identifies four key features compounding educational debt in the context of the COVID-19 pandemic: (1) disparities in internet access and accessibility; (2) the removal and reduction of instruction and related services; (3) a lack of social interaction and structure that causes behavioral regression; and (4) heightened trauma and mental health concerns in the context of quarantine.

A. Disparities in Internet Access and Accessibility

Students with disabilities who undertake virtual learning face dual obstacles to both internet access and accessibility. Internet access refers to the baseline ability to get online, and it may be impacted by lack of access to devices like computers and smartphones or by the limited coverage by internet service providers in certain geographical regions, such as rural areas. The separation between those who have reliable internet access and those who cannot connect to the internet is commonly known as the digital divide.⁵⁸

55. *Id.*; see also Kathleen A. King Thorius & Paulo Tan, *Expanding Analysis of Educational Debt: Considering Intersections of Race and Ability*, in *DISCRIT—DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION* 87, 88 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) (expanding the concept of education debt to encompass students with disabilities).

56. Ladson-Billings, *supra* note 53, at 4.

57. Jennifer Diaz & Joaquin Muñoz, *On “Learning Loss” and the Critical Need to Address Existing Inequities in Education*, *MINNPOST* (Mar. 22, 2021), <https://perma.cc/2MQN-7XRE>.

58. See Joyce Winslow, *America’s Digital Divide*, PEW CHARITABLE TRS. (July 26, 2019), <https://perma.cc/WT4P-TR45> (stating that 40% of schools lack broadband and that over 163 million Americans may be without broadband).

Students with disabilities also face barriers to internet accessibility, which refers to whether devices and online platforms are usable for people with disabilities.⁵⁹

In terms of access, the Pew Research Center found in 2018 that roughly 15% of U.S. households with school-age children did not have high-speed internet access.⁶⁰ Beyond that overall statistic, disparities widen rapidly on the basis of race, income level, indigenous status, and geographical location.⁶¹ Such disparities distinctly affect students with disabilities. As of 2017, American adults with disabilities are roughly 20% more likely than those without a disability to be without internet access or not own a desktop, smartphone, or tablet.⁶² As a result, Americans with disabilities are also three times less likely to go online at all.⁶³ This reduced access to the internet creates a barrier preventing students with disabilities from utilizing online learning.

In addition, a variety of disabilities present significant challenges to the accessibility of online learning even when students have access to the internet. For example, one special education teacher in Oregon shared that her students with learning disabilities had difficulty focusing in virtual classrooms and demonstrated discomfort with being visible to peers and teachers on camera.⁶⁴

59. See *Accessibility Basics*, USABILITY.GOV, <https://perma.cc/PQ5F-KTAX> (archived Nov. 4, 2021) (describing internet accessibility as a “focus[] on how a disabled person accesses or benefits from a site, system or application”).

60. Katie Reilly, *The Achievement Gap Is “More Glaring than Ever” for Students Dealing with School Closures*, TIME (Mar. 26, 2020), <https://perma.cc/K6H8-9ZDL>; Monica Anderson & Andrew Perrin, *Nearly One-in-Five Teens Can’t Always Finish Their Homework Because of the Digital Divide*, PEW RSCH. CTR. (Oct. 26, 2018), <https://perma.cc/5PDR-AZQ7> (basing their conclusions on 2015 U.S. Census Bureau data).

61. NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 4, at 29 (“About 26 percent of low-income 3- to 18-year-olds do not have Internet access or have it only through a smartphone, compared with 12 percent of middle low-income families, 5 percent of middle high-income families, and 2 percent of high-income families. Similarly, 30 percent of American Indian or Alaskan Native families do not have access or have it only through a smartphone, as is the case for 24 percent of families of Pacific Islander descent, 21 percent of Black families, 19 percent of LatinX families, 7 percent of white families and 4 percent of Asian families. Finally, in urban areas, just 2 percent of people lack adequate broadband coverage, compared with 26 percent of those in rural areas and 32 percent of those living on tribal lands.”).

62. Andrew Perrin & Sara Atske, *Americans with Disabilities Less Likely than Those Without to Own Some Digital Devices*, PEW RSCH. CTR. (Sept. 20, 2021), <https://perma.cc/5YK2-KUGF>.

63. *Id.*

64. Elizabeth Hlavinka, *Kids Languish amid School Closures, but No Clear Solution to Reopening*, MEDPAGE TODAY (June 25, 2020), <https://perma.cc/DS89-ASV2> (“Her students, many of whom have learning disabilities and health impairments, didn’t like being on camera and struggled to focus using the virtual learning model Four-fifths of her class never participated at all.”).

One mother described how her son's negative reaction to screens had forced the family "to forego getting therapists to talk to him until recently because the longer he is on screens, the worse he feels."⁶⁵ Other students with intellectual disabilities struggle with writing and typing, which limits their technology usage.⁶⁶ Still others with sight or hearing impairments cannot use online learning without proper accommodations, including assistive technologies such as screen readers and text-to-speech services.⁶⁷

Schools were not prepared to serve students with disabilities online. In 2016, the Center on Online Learning and Students with Disabilities determined that thirty-seven states did not have any policies indicating who would provide special education in an online school setting if necessary, and that only 24% of states publish information regarding the online implementation of FAPE.⁶⁸ Further, districts often did not follow the minimal preparation and guidance that did exist. A 2014 Department of Education planning document illustrating strategies for maintaining continuity of learning during school closures recommended regular teacher check-ins and synchronous, online classes that allow for real-time interaction between teachers and students.⁶⁹ Yet a nationwide survey of 477 districts in June 2020 found that only one-third of school districts expected teachers to provide synchronous, online instruction and only half expected teacher-student check-ins.⁷⁰ Taken together, these challenges limit access to and accessibility of online learning, with distinct impacts on students with disabilities.

B. Removal or Reduction of Related Services

Many students with disabilities require multiple forms of support throughout the day, including hands-on services such as academic tutoring, speech and language therapy, one-on-one paraprofessional assistance, and physical, occupational, and behavioral therapy. These services often require a

65. Heather Barr, *School Closures Particularly Hard on Children with Disabilities*, HUM. RTS. WATCH (June 15, 2020, 12:00 AM EDT), <https://perma.cc/QQ7H-XNLY>.

66. Elissa Nadworny, *With Schools Closed, Kids with Disabilities Are More Vulnerable than Ever*, NPR (Mar. 27, 2020, 3:01 PM ET), <https://perma.cc/AE3E-77H8>.

67. See AZEVEDO ET AL., *supra* note 15, at 20.

68. Kelsey R. Ortiz & McKenzie Nicholis, *National Review of Online Learning Guidance and Policy*, in THE CTR. ON ONLINE LEARNING & STUDENTS WITH DISABILITIES, EQUITY MATTERS 2016: DIGITAL & ONLINE LEARNING FOR STUDENTS WITH DISABILITIES 16, 27 (2016), <https://perma.cc/7TMH-6R7L>.

69. See U.S. DEP'T OF EDUC., PREPARING FOR INFECTIOUS DISEASE: DEPARTMENT OF EDUCATION RECOMMENDATIONS TO ENSURE THE CONTINUITY OF TEACHING AND LEARNING FOR SCHOOLS (K-12) DURING EXTENDED STUDENT ABSENCE OR SCHOOL DISMISSAL 2 (2014), <https://perma.cc/KB89-6TRY>.

70. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 4, at 28.

level of closeness and human contact that cannot be replicated in a virtual setting.⁷¹

Online therapies are particularly difficult to provide when the only person physically able and present to support the student's learning is a parent who is untrained and overwhelmed. Iolani Azul, for example, was an eleven-year-old in San Francisco with visual and other disabilities who required one-on-one support throughout the day.⁷² Suddenly, Iolani's mother was expected to take the place of the "two teachers, three instructional aides and seven therapists" who had provided support in the classroom.⁷³ While Iolani's mother did her best to provide constant supervision, she also needed to work and care for her other 18-month-old daughter.⁷⁴ Many parents like these are putting in a herculean effort but are simply stretched too thin to replicate services comparable to those required under their child's individualized education program (IEP).⁷⁵

Considering the difficulty of providing related services, many districts have reduced or eliminated them entirely. Consider Trevor de la Torre, a nine-year-old with visual, auditory, speech, and developmental delays and a physical disability.⁷⁶ The moment schools closed, his family found "[h]is one-on-one reading specialist, gone. His speech therapy, gone. His occupational therapist who is teaching him how to write letters, gone. . . . Overnight, the intense hands-on assistance required for their children's education and physical needs was no longer available."⁷⁷ Such an abrupt elimination of all support reflects a clear abdication of a district's commitments in an IEP.

71. See, e.g., Sophie Quinton, *Switch to Remote Learning Could Leave Students with Disabilities Behind*, PEW: STATELINE (Mar. 24, 2020), <https://perma.cc/U9UK-JBSE> ("Services such as occupational therapy, speech therapy and behavioral counseling can be hard to provide online . . ."); Jeffrey L. Forte, Opinion, *Students with Disabilities Are Missing Out During the Coronavirus Closures. We Need to Make It Up to Them.*, HARTFORD COURANT (Apr. 22, 2020), <https://perma.cc/2SA8-L7JW> ("Services such as small group or one-on-one instruction, paraprofessional support, daily counseling, physical therapy, academic tutoring, speech and language therapy, and behavioral and/or psychological support cannot practically and effectively be delivered by computer, despite best efforts.").

72. Caroline Preston, *"It Feels a Little Hopeless": Parents of Kids with Disabilities Worry Coronavirus Quarantine Will Mean Regression*, HECHINGER REP. (Mar. 31, 2020), <https://perma.cc/G2DH-HS4H>.

73. *Id.*

74. *Id.*

75. An IEP is a document that lists the form of special education and related supports and services that the school district has agreed to provide to a student with disabilities pursuant to the IDEA. 34 C.F.R. § 300.320(a)(4) (2020).

76. Sonali Kohli, *Disability Laws Finally Gave Them an Education. School-From-Home Threatens to Make That Impossible*, L.A. TIMES, <https://perma.cc/3AVT-52DY> (last updated Apr. 2, 2020, 5:51 PM PT).

77. *Id.*

Other students across the country have found their services significantly reduced. In Chicago, the public school system was up front with families, admitting that it could not “commit to providing the full amount of service minutes outlined in a student’s individualized education plan during remote learning.”⁷⁸ Some New York students found a significant reduction in services as well. For example, Cayla Wetters, a student with disabilities in the Bronx, only received thirty minutes to an hour of synchronous, online instruction instead of a full day.⁷⁹ Without much-needed services, students like these are simply not receiving the basic requirements listed in their IEPs.

C. Absence of Social Interaction and Structure

Beyond instructional and therapeutic services, schools also offer the type of social interaction that is essential to child development. Friendly exchanges with peers, teachers, and other adults play a crucial role in “the development of language, communication, social, emotional, and interpersonal skills.”⁸⁰ The absence of these opportunities for social engagement affects children of all ages: Younger children are missing out on the social and emotional growth that takes place in early development, and adolescents are missing experiences that help them develop independence and begin “to identify themselves outside of the family structure.”⁸¹

As a result, students across the country are experiencing significant behavioral regression, with dramatic effects for students with disabilities. Take, for example, Brodie Stover-Mejias, a six-year-old with Down syndrome, whose communication skills were growing prior to the pandemic because he would copy the behavior of his friends at school.⁸² Without social models, Brodie began to lose this hard-fought progress.⁸³ For some, behavioral regression can be even more severe. Parents have reported children returning

78. Hannah Leone & Karen Ann Cullotta, *Coronavirus School Shutdown Has Been Particularly Tough on Kids with Special Needs: “It’s Not Just a Disruption. We’re Going to See Kids Who Actually Go Backward,”* CHI. TRIB. (Apr. 27, 2020), <https://perma.cc/TF32-VSK9>.

79. Alex Zimmerman, Lauren Constantino, Rebekah Ward, Veronica Penney & Yoav Gonen, *How Remote Learning Upended NYC Students with Disabilities and Their Families*, THE CITY (June 17, 2020, 11:05 PM EDT), <https://perma.cc/CMD5-XA85>.

80. *The Importance of Reopening America’s Schools This Fall*, CDC, <https://perma.cc/2TGA-5HNR> (last updated July 23, 2020).

81. Hlavinka, *supra* note 64.

82. Katherine Knott, “*Survival Mode*”: *School Shutdown Hits Special Education Classrooms Hard*, DAILY PROGRESS (Apr. 29, 2020), <https://perma.cc/TW9Q-F3VQ>.

83. *See id.*

to self-injury and losing feeding and chewing skills after years of dedicated progress.⁸⁴

Further, researchers have confirmed what many parents already know: The loss of structure and routine has been particularly debilitating for a variety of students with disabilities.⁸⁵ Students with autism spectrum disorders (ASDs) “do best when daily routines are predictable.”⁸⁶ With their routines in upheaval due to COVID-19 school closures, students with ASDs may react with “aggression, tantrums, or refusals to engage in daily activities.”⁸⁷ This has been especially damaging for students like sixteen-year-old Nathaniel Lesch, a student with autism who still asked for his backpack and shoes to continue his morning school routine months into online classes.⁸⁸ In the absence of consistent structure and routine, he has started scratching and hitting.⁸⁹ The loss of long-standing routines affects students with a wide variety of intellectual and developmental disabilities (IDDs) as well. One study published in the *Journal of Intellectual Disability Research* found that “[t]he marked uncertainty of the pandemic and associated disruptions in routine may be particularly deleterious for children with IDDs, who often benefit from heightened structure, clear expectations and an array of services.”⁹⁰ The behavioral regression experienced by these populations only compounds the academic setbacks discussed so far.

D. Heightened Trauma and Mental Health Concerns

External, environmental factors have exacerbated trauma and mental illness, impacting student learning as well. Some children experienced the

84. See Eleanor Goldberg Fox, *Children with Disabilities Are Losing Skills They Worked Hard to Develop as They're Forced to Miss School. Parents Worry About What's Next*, BUS. INSIDER AUSTRAL. (June 26, 2020, 5:17 AM), <https://perma.cc/NWF5-2VMM>.

85. See, e.g., Khushboo Patel, Letter to the Editor, *Mental Health Implications of COVID-19 on Children with Disabilities*, ASIAN J. PSYCH., July 2020, at 1, 1 (“Making adjustments to routines, like, experiencing closure of schools and day care centers, social distancing and/or confinement to home can prove to be a real struggle for children with physical and mental disabilities.”).

86. Tiffany R. Bellomo, Sanjana Prasad, Tiffany Munzer & Naomi Laventhal, Short Communication, *The Impact of the COVID-19 Pandemic on Children with Autism Spectrum Disorders*, 13 J. PEDIATRIC REHAB. MED. 349, 350 (2020).

87. *Id.*

88. Hannan Adely, “No One to Help Me”: *Special Education Families Struggle with Coronavirus School Closures*, USA TODAY (updated May 6, 2020, 7:09 PM ET), <https://perma.cc/QGA2-8JQ2>.

89. *Id.*

90. C. Neece, L.L. McIntyre & R. Fenning, *Examining the Impact of COVID-19 in Ethnically Diverse Families with Young Children with Intellectual and Developmental Disabilities*, 64 J. INTELL. DISABILITY RSCH. 739, 740 (2020).

illness or death of loved ones and financial hardship as a direct result of the pandemic.⁹¹ Others were put in situations that could increase exposure to abuse⁹² or online exploitation.⁹³ Constant isolation in the home—near potential abusers and away from teachers who might notice evidence of such abuse—could put children in sustained contact with these traumatic situations, with no clear end in sight.

This type of trauma can have a significant impact on mental health. A recent study has found that children who experienced enforced isolation or quarantine were “five times more likely to require mental health service input and experienced higher levels of posttraumatic stress.”⁹⁴ The loneliness these children experienced was connected to increased rates of mental health problems and depression up to nine years later.⁹⁵ A study of school closures following Hurricane Katrina confirmed that students experienced heightened rates of depression and difficulty focusing.⁹⁶ This past experience provides strong evidence of increased mental health issues that school leadership will need to navigate as students return to in-person learning.

Finally, research indicates that people with intellectual disability “have a range of vulnerabilities” to the COVID-19 pandemic.⁹⁷ Some are more susceptible to infection due to a higher prevalence of comorbidities, the close proximity of group-living situations, and difficulty with self-advocacy.⁹⁸ Others may experience increased anxiety or obsessive thinking during quarantine due to changes in routine, the need for caretakers to self-isolate, or existing obsessive-compulsive disorders.⁹⁹ In addition, students with autism in

91. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 4, at 32.

92. Andrew M. Campbell, Commentary/Letter to Editor, *An Increasing Risk of Family Violence During the Covid-19 Pandemic: Strengthening Community Collaborations to Save Lives*, FORENSIC SCI. INT'L, Apr. 2020, at 1, 1-2.

93. See Press Release, FBI, School Closings Due to COVID-19 Present Potential for Increased Risk of Child Exploitation (Mar. 23, 2020), <https://perma.cc/RYJ3-3PQQ>.

94. Maria Elizabeth Loades, Eleanor Chatburn, Nina Higson-Sweeney, Shirley Reynolds, Roz Shafran, Amberly Brigden, Catherine Linney, Megan Niamh McManus, Catherine Borwick & Esther Crawley, Review, *Rapid Systematic Review: The Impact of Social Isolation and Loneliness on the Mental Health of Children and Adolescents in the Context of COVID-19*, 59 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1218, 1234 (2020).

95. *Id.*

96. J. Steven Picou & Brent K. Marshall, *Social Impacts of Hurricane Katrina on Displaced K-12 Students and Educational Institutions in Coastal Alabama Counties: Some Preliminary Observations*, 27 SOCIO.SPECTRUM 767, 773 (2007).

97. K. Courtenay & B. Perera, *COVID-19 and People with Intellectual Disability: Impacts of a Pandemic*, 37 IRISH J. PSYCH. MED. 231, 231 (2020).

98. *Id.* at 231-32.

99. *Id.* at 232-33.

particular are more likely to have existing psychiatric conditions which may be exacerbated by the traumatic conditions of the pandemic.¹⁰⁰

Taken together, the disparities in internet access and accessibility, reduced or eliminated related services, behavioral regression due to upheaval of structure and routines, and heightened trauma due to social isolation all contributed to the significant academic challenges that students with disabilities experienced due to school closures.

II. Implications of School Closures: Widespread Denial of FAPE

The barriers to learning discussed in Part I above must be understood in the context of the requirements established by the IDEA for educating students with disabilities.¹⁰¹ The IDEA “was enacted ‘to throw open the doors of public education and heed the needs’ of students with disabilities who had for too long been ‘either completely ignored or improperly serviced by American public schools.’”¹⁰² In fact, the Act itself states that before its passage, millions of children with disabilities in the United States did not receive an adequate education because they were “excluded entirely from the public school system.”¹⁰³ To address this disparity, the IDEA mandates that states receiving federal funds for education must provide a “free appropriate public education”¹⁰⁴ to eligible students with disabilities through an “individualized education program”¹⁰⁵ designed to educate students with disabilities in the

100. See Meng-Chuan Lai et al., *Prevalence of Co-occurring Mental Health Diagnoses in the Autism Population: A Systematic Review and Meta-analysis*, 6 LANCET PSYCHIATRY 819, 819 (2019); Courtenay & Perera, *supra* note 97, at 232-33.

101. 20 U.S.C. §§ 1400-1482. This Note utilizes the IDEA as the governing law in its analysis, but it does not do so uncritically. While beyond the scope of this Note, multiple scholars have critiqued the IDEA’s LRE requirement and eligibility categories as mechanisms that perpetuate racial segregation in special education. See Gregg D. Beratan, *The Song Remains the Same: Transposition and the Disproportionate Representation of Minority Students in Special Education*, 11 RACE ETHNICITY & EDUC. 337, 342 (2008) (arguing that the LRE requirement has been implemented in ways that justify the segregation of students that do not assimilate into the mainstream system); see also Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TCHRS. COLL. REC. 453, 457-59 (2005) (arguing that the practice of labeling students with eligibility categories serves as a socially acceptable way of segregating students of color into highly restrictive settings).

102. T.B. *ex rel.* T.B. v. Prince George’s Cnty. Bd. of Educ., 897 F.3d 566, 571 (4th Cir. 2018) (quoting *In re Conklin*, 946 F.2d 306, 307 (4th Cir. 1991)).

103. 20 U.S.C. § 1400(c)(2)(B).

104. *Id.* § 1412(a)(1)(A).

105. *Id.* § 1414(d)(1)(A).

“[l]east restrictive environment” (LRE) possible.¹⁰⁶ The process of identifying a student with disabilities begins with a referral from a parent or a representative of a state or local educational agency, such as a teacher or other educator.¹⁰⁷ The school district is then required to conduct comprehensive psychoeducational testing to evaluate whether the student is eligible for services under the IDEA.¹⁰⁸ An IEP team—comprised of parents, teachers, and other school district officials—is formed to make this eligibility determination and ultimately develop an IEP for eligible students.¹⁰⁹

The Supreme Court has recognized that the IEP is “the centerpiece of the [IDEA]’s education delivery system for disabled children.”¹¹⁰ The IEP document must include the student’s educational status, the annual goals for their education, the instruction and services to be provided in support of those goals, and the degree to which the student will be included in general-education classrooms.¹¹¹ The LRE requirement further stipulates that the level of inclusion into general education must be “[t]o the maximum extent appropriate.”¹¹² This language reflects a strong “preference for ‘mainstreaming’” that has been referenced by the Supreme Court.¹¹³ The resulting IEP lays out how the district will provide FAPE for that individual student.

A. The FAPE Requirement Under the IDEA

In the case of extended school closures, the operative question is whether an alteration and reduction in services is sufficient to constitute a denial of FAPE. The IDEA stipulates that FAPE includes special education “to meet the unique needs of a child with a disability” and related services “required to assist a child with a disability to benefit from” instruction.¹¹⁴ Further interpretation has come from the courts.

106. *Id.* § 1412(a)(5)(A) (describing an LRE as a space alongside other children who are not disabled unless the “nature or severity of the disability of a child is such that education in regular classes . . . cannot be achieved satisfactorily”).

107. *See id.* § 1414(a)(1)(B).

108. *See id.* § 1414(a)(1)(A); *see also* Chad C. Nelson, *A Parent’s Guide to Psychoeducational Evaluations*, FOREIGN SERVS. J., Dec. 2013, at 72, 72.

109. *See* 20 U.S.C. § 1414(d)(1)(B) (explaining the definition and composition of an IEP team); *see also id.* § 1414(d)(3) (describing the role of the IEP team in developing an IEP).

110. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

111. 20 U.S.C. § 1414(d)(1)(A).

112. *Id.* § 1412(a)(5)(A).

113. *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 181 n.4, 202 (1982).

114. 20 U.S.C. § 1401(26)(A), (29).

In the formative case of *Board of Education v. Rowley ex rel. Rowley*, the Supreme Court established that FAPE only requires that students with disabilities receive “some educational benefit.”¹¹⁵ What constitutes “some benefit” has been a point of contention that has evolved over the years. The Third Circuit offered one of the strongest early assessments in *Polk v. Central Susquehanna Intermediate Unit 16*.¹¹⁶ The court held that *Rowley* did not leave us with “an entirely toothless standard of substantive review.”¹¹⁷ Instead, the Third Circuit held that *Rowley* requires a “meaningful benefit.”¹¹⁸ The Fifth Circuit later offered another interpretation, holding that to satisfy the FAPE requirement, the education provided under an IEP must be “meaningful” and “likely to produce progress” in the student, but it “need not be the best possible one, nor one that will maximize the child’s educational potential.”¹¹⁹

Twenty years after the Fifth Circuit’s decision, the Supreme Court in *Joseph F. ex rel. Andrew F. v. Douglas County School District RE-1* further refined the standard for students who are not fully integrated into general-education classrooms.¹²⁰ Here, the Court elevated the requirement by holding that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”¹²¹ The Court explained that “[t]he goals may differ, but every child should have the chance to meet challenging objectives.”¹²² The Court established this heightened standard because “a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”¹²³ While that still leaves significant latitude for interpretation, the Court’s decision to affirm that FAPE requires more than the bare minimum is significant nonetheless.

Thus, to determine whether a particular student is receiving FAPE in compliance with the IDEA, courts apply a two-prong test, evaluating both procedural and substantive violations.¹²⁴ This Note focuses on substantive

115. 458 U.S. at 200.

116. 853 F.2d 171 (3d Cir. 1988).

117. *Id.* at 179.

118. *Id.* at 184.

119. *Cypress-Fairbanks Indep. Sch. Dist. v. Barry ex rel. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997) (first quoting *Polk*, 853 F.2d at 182; and then quoting *Bd. of Educ. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986)).

120. 137 S. Ct. 988 (2017).

121. *Id.* at 999.

122. *Id.* at 1000.

123. *Id.* at 1001 (quoting *Bd. of Educ. v. Rowley ex rel. Rowley*, 485 U.S. 176, 179 (1982)).

124. *Rowley*, 458 U.S. at 206-07 (“First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through
footnote continued on next page

compliance, though COVID-19 does raise numerous procedural compliance questions. To evaluate substantive compliance in the context of extended school closures, the operative questions are (1) whether an IEP was sufficiently implemented; and (2) whether any deficits constitute a denial of FAPE.

The Supreme Court has not yet established a test for substantive compliance with FAPE, but lower courts have generally applied one of two approaches.¹²⁵ First is the materiality approach, for which *Van Duyn ex rel. Van Duyn v. Baker School District 5J* is a representative case.¹²⁶ There, the Ninth Circuit held that “a material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”¹²⁷ The court also noted that while the student does not need to experience educational harm, lack of progress can be “probative of whether there has been more than a minor shortfall in the services provided.”¹²⁸ In 2019, the Eleventh Circuit adopted the materiality approach as well.¹²⁹ Here, the court further specified that “[a] material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.”¹³⁰

Second is the materiality-benefit approach. In *Houston Independent School District v. Bobby R.*, the Fifth Circuit held that plaintiffs must show that the district “failed to implement substantial or significant provisions of the IEP” and that the student did not receive a “meaningful educational benefit.”¹³¹ In 2006, the Third Circuit also adopted this two-part standard.¹³² The key

the Act’s procedures reasonably calculated to enable the child to receive educational benefits?”).

125. Perry Zirkel suggests that there are three potential approaches, but he notes that no court has pursued the “per se” approach outside of a dissent, so this Note does not discuss this approach. See Perry A. Zirkel, *Failure to Implement the IEP: The Third Dimension of FAPE Under the IDEA*, 28 J. DISABILITY POL’Y STUD. 174, 176 (2017).

126. 502 F.3d 811 (9th Cir. 2007).

127. *Id.* at 822.

128. *Id.*

129. *N.N.J. ex rel. L.J. v. Sch. Bd.*, 927 F.3d 1203, 1206 (11th Cir. 2019).

130. *Id.* at 1211.

131. 200 F.3d 341, 349 (5th Cir. 2000).

132. *Karen S. ex rel. Melissa S. v. Sch. Dist.*, 183 F. App’x 184, 187 (3d Cir. 2006) (holding that “a plaintiff must show that the school failed to implement substantial or significant provisions of the IEP, as opposed to a mere *de minimis* failure, such that the disabled child was denied a meaningful educational benefit”). The court did not explicitly delineate a two-part test, but to prove a violation of the FAPE requirement a plaintiff must show both a substantial failure and that the student has not received a meaningful educational benefit. See Zirkel, *supra* note 125, at 175. This analysis requires determinations of how the IEP was implemented and whether the student received an educational benefit.

distinction of this approach is that a material failure to implement an IEP does not constitute denial of FAPE unless the failure sufficiently diminished the student's educational benefit.

B. Application to COVID-19 School Closures

The threat of lawsuits alleging denial of FAPE is a significant concern for school districts because their obligation to provide FAPE remains unchanged during the COVID-19 pandemic. Federal guidance has explicitly affirmed that FAPE requirements remain in place even during COVID-19 school closures.¹³³ The CARES Act introduced an option for the Secretary of Education to request waivers to IDEA requirements,¹³⁴ but then-Secretary DeVos declined to pursue any waivers.¹³⁵ A Dear Colleague Letter on virtual schools from August 2016 also states that FAPE applies in virtual settings.¹³⁶ The FAPE requirement persists even if districts choose to contract with outside vendors to provide virtual platforms.¹³⁷

In a due process hearing, a hearing officer makes a determination as to whether FAPE has been denied based on the specific facts of each child's case.¹³⁸ While such a decision is tailored to each individual student, there is strong evidence of widespread failure to provide FAPE for students with disabilities during the 2019-2020 academic year. First, many reports suggest that

133. OFF. FOR C.R., *supra* note 12, at 1 (“School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students.”).

134. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 3511(d)(4), 134 Stat. 281, 403 (2020) (codified as amended at 15 U.S.C. § 9001 note).

135. Press Release, U.S. Dep’t of Educ., Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA (Apr. 27, 2020), <https://perma.cc/M6NY-TYSP> (“[T]he Secretary is not recommending Congress pass any additional waiver authority concerning the Free Appropriate Public Education (FAPE) and Least Restrictive Environment (LRE) requirements of the Individuals with Disabilities Education Act . . .”).

136. Letter from Sue Swenson, Acting Assistant Sec’y, Off. of Special Educ. Programs, U.S. Dep’t of Educ. & Ruth E. Ryder, Acting Dir., U.S. Dep’t of Educ., Off. of Special Educ. Programs, to Colleagues 6 (Aug. 5, 2016), <https://perma.cc/3KQQ-S9Y3> (“The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools . . .”). Dear Colleague Letters are a form of guidance document from executive agencies, like the Department of Education, that provide a statement of policy or explain the agency’s interpretation of existing laws and regulations.

137. *Id.* at 5.

138. *See* 20 U.S.C. § 1415(f).

instruction and related services were dramatically reduced or denied.¹³⁹ Those reductions ranged from decreased instructional hours and lowered expectations that teachers lead synchronous, online classes to the abrupt removal of crucial education-related services that enable students with disabilities to benefit from their education.¹⁴⁰ Courts have repeatedly determined that districts are required to provide aides,¹⁴¹ occupational therapy,¹⁴² physical therapy,¹⁴³ and counseling.¹⁴⁴ Yet these are precisely the services that many families reported disappeared in the spring of 2020. For many students, these changes are far more than minor, constituting material failure to implement an IEP. While districts might suggest that the changes they made during the COVID-19 pandemic represented their best effort “in light of the child’s circumstances” as *Andrew F.* requires, this would be a misreading of the law.¹⁴⁵ The COVID-19 pandemic does not impact the circumstances considered in an evaluation of FAPE. Instead, “a child’s intellectual abilities and potential” are “among the most important circumstances to consider.”¹⁴⁶ These are features of an individual child, not global conditions. Therefore, even outside the context of COVID-19, the IDEA

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139. See, e.g., Catherine Gewertz, *Instruction During COVID-19: Less Learning Time Drives Fears of Academic Erosion*, EDUC. WK. (May 28, 2020), <https://perma.cc/53YG-578U> (“The picture of instruction that has emerged since the coronavirus forced students and teachers into remote learning is clear and troubling: There’s less of it, and the children with the greatest need are getting the least.”).
140. See *supra* Part I.B (discussing the removal or reduction of related services during school closures).
141. See *River Forest Sch. Dist. No. 90 v. Ill. State Bd. of Educ.*, No. 95C5353, 1996 WL 189279, at *23 (N.D. Ill. Apr. 17, 1996) (holding that an aide was an integral part of the student’s rehabilitation); *District of Columbia v. Ramirez*, 377 F. Supp. 2d 63, 70 (D.D.C. 2005) (finding that the failure to provide an aide denied FAPE).
142. See *River Forest Sch. Dist. No. 90*, 1996 WL 189279, at *14 (holding that a student’s language and occupational therapy had a “clear educational component” that was covered under the IDEA); *Douglas v. Cal. Off. of Admin. Hearings*, 650 F. App’x. 312, 315 (9th Cir. 2016) (holding that occupational therapy services were necessary for a student to benefit from special education).
143. See *SS ex rel. Myles S. v. Montgomery Cnty. Bd. of Educ.*, 824 F. Supp. 1549, 1559 (M.D. Ala. 1993) (holding that a student was entitled to weekly, thirty-minute physical therapy sessions); *Dep’t of Health Care Servs. v. Off. of Admin. Hearings*, 210 Cal. Rptr. 3d 790, 814-16 (Ct. App. 2016) (holding that an agency’s unilateral reduction of medically necessary physical and occupational therapy denied a student FAPE).
144. See *Conlin ex rel. Papacoda v. Connecticut*, 528 F. Supp. 68, 72 (D. Conn. 1981) (holding that psychological services were required related services necessary to enable a student with disabilities to benefit from special education); *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 203 (D.D.C. 2010) (finding that failure to provide counseling and tutoring services for a five-month period was a denial of FAPE, warranting compensatory education).
145. *Joseph F. ex rel. Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).
146. *Dunn ex rel. K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018).

requires districts to consider “the unique needs of” an individual student, not the current capacity of the district to provide those services.¹⁴⁷ This analysis suggests that the COVID-19 education plans in many districts around the country would fail both the materiality approach and the first prong of the materiality-benefit approach.

In addition, the education provided during spring 2020 widely failed to provide meaningful educational benefit. Instead of making progress, countless students have experienced academic learning loss¹⁴⁸ and behavioral regression.¹⁴⁹ With estimates of up to a full year of learning loss resulting from spring 2020 school closures, the prospect of making *progress* on IEP goals seems unattainable.¹⁵⁰ *Andrew F.* emphasized that progress must be more than de minimis,¹⁵¹ but in light of the significant regression being reported around the country, it seems likely that many districts would fail even the more forgiving materiality-benefit approach. Existing evidence of both a material failure to implement an IEP and a lack of an educational benefit would likely constitute a denial of FAPE under either standard.

III. Response to Learning Loss: In-Person Priority

In the face of significant regression, and in fear of exposure to lawsuits alleging a denial of FAPE,¹⁵² schools entered the fall of 2020 scrambling to identify strategies to better serve their marginalized students, particularly students with disabilities. A number of districts introduced various ways to give “in-person priority” to the students who faced the greatest obstacles to utilizing online learning.¹⁵³ The groups covered by these policies varied. Some districts used narrowly constructed language naming only students with disabilities and ELLs while others used more expansive approaches encompassing a wider range of marginalized students facing barriers to online

147. *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 181 (1982).

148. *See supra* notes 36-41 and accompanying text.

149. *See supra* Part I.C (discussing how a lack of social interaction can lead to behavioral regression).

150. *See Christakis, supra* note 37, at 928.

151. *Joseph F. ex rel. Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

152. *See* 20 U.S.C. § 1401(9); *see also* Suevon Lee, *Lawsuit: Special Ed Students Need Extra Help when Schools Reopen*, HONOLULU CIV. BEAT (Apr. 15, 2020), <https://perma.cc/75EL-Q99N> (describing a class-action lawsuit in which the plaintiffs alleged that students with disabilities in Hawaii were denied FAPE during COVID-19 school closures).

153. *See* Anya Kamenetz, *New Data Highlight Disparities in Students Learning in Person*, NPR (Mar. 24, 2021, 1:00 AM ET), <https://perma.cc/6VH6-NJYG> (discussing a 2021 Department of Education survey indicating that “[m]ore than 4 in 10 districts said they were giving priority to students with disabilities for in-person instruction”).

learning as a result of numerous aspects of their identities.¹⁵⁴ In September 2020, the Department of Education condoned such policies in a question-and-answer document.¹⁵⁵ By May 2021, 50% of elementary schools and 55% of middle schools participating in the 2022 National Assessment of Educational Progress reported prioritizing in-person learning for students with disabilities.¹⁵⁶ By bringing small, targeted groups of students back to classrooms before the full population, schools hoped to make in-person learning safer for those select students. This Note, however, argues that these narrower policies, which single out students with disabilities and ELLs, categorically create segregated classrooms for these students. This segregation isolates them from their general-education peers, exacerbates long-standing disciplinary disparities, and perpetuates what DisCrit scholars presciently recognized: “[I]n symbolic and material ways dis/ability occupies quarantined spaces.”¹⁵⁷

A. In-Person Priority Models in School Reopening Plans

By reviewing 115 district-level school reopening plans to date, this Note identifies four predominant approaches to in-person priority:

Prioritize early years. This model allows for a phased approach that would bring students in roughly kindergarten to third grade back to school for in-person learning before any other students. For example, the East Baton Rouge Parish School System in Louisiana announced, “The district stands committed to gradually returning to face-to-face learning for students,

154. See *infra* notes 159-63 and accompanying text.

155. OFF. FOR C.R., U.S. DEP’T OF EDUC., OCR-000122, QUESTIONS AND ANSWERS FOR K-12 PUBLIC SCHOOLS IN THE CURRENT COVID-19 ENVIRONMENT 2 (2020), <https://perma.cc/K2Q3-EYCQ> (“The Department understands that there may be circumstances where schools decide to prioritize in-person instruction for students with disabilities, in order to provide the services necessary to ensure that those students receive a free appropriate public education . . .”).

156. See *Monthly School Survey, Groups Prioritized for In-Person Instruction: May*, INST. EDUC. SCIS., <https://perma.cc/4QUV-Z7Y8> (archived Nov. 4, 2021) (to locate the May 2021 survey results, click “View the live page,” then select “View Monthly Data,” select “May,” select “In-Person Priorities,” select either “Grade 4” or “Grade 8,” and select “Summary Results: Nation”). This study involved a national survey of schools. Seventy percent of schools serving fourth-grade students (elementary schools) responded to the survey, with 50% of those schools prioritizing students with disabilities for in-person instruction. Sixty-eight percent of schools serving eighth-grade students (middle schools) responded to the survey, with 55% of those schools prioritizing in-person learning for this population. *Id.*

157. Annamma et al., *supra* note 30, at 9 (citations omitted).

prioritizing those in the early grades first, as the city and state continue to monitor the public health crisis and navigate the phased reopening.”¹⁵⁸

Prioritize students with disabilities and ELLs. This approach focuses on specialized instructional needs, rather than age or developmental level, allowing students with individualized education programs (IEPs) and ELLs in-person priority. For example, Iowa City provides that a “[l]imited number of students may be brought on-site to provide support in accessing the online instruction and to provide direct services (i.e., students with IEPs, English Language Learners).”¹⁵⁹

Prioritize students with disabilities, ELLs, early years, and/or transition years. These districts combine the prior two categories and occasionally add students in transition to lower, middle, or high school. For example, Montgomery County, Maryland, stipulates that “[s]tudents in specific special education programs and students new to a school level (Prekindergarten, Kindergarten, 6th and 9th) are the first returning to school.”¹⁶⁰

158. Press Release, East Baton Rouge Parish Sch. Sys., EBRPSS Shifts School Reopening Plans to All-Virtual Learning Model, Delays Start Date (July 2020), <https://perma.cc/UD4F-FXQV>.

159. IOWA CITY CMTY. SCH. DIST., RETURN-TO-LEARN BOARD 2 (2020), <https://perma.cc/X8L4-ZYEV>; *see also, e.g.*, CHI. PUB. SCHS., SCHOOL REOPENING 2020: PRELIMINARY FRAMEWORK 16 (2020), <https://perma.cc/B74S-S77A> (indicating that “diverse learners and English learners will be prioritized to return daily” in accordance with IEPs); MADISON METRO. SCH. DIST., 2020-2021 REOPENING SCHOOLS 5 (2020), <https://perma.cc/XC2K-96XX> (prioritizing “[s]tudents with differentiated learning needs (like students receiving ESL and IEP supports)”; JUNEAU SCH. DIST., SMART START 2020: PLANNING FOR THE START OF THE 2020-2021 SCHOOL YEAR 2 (2021), <https://perma.cc/P2DS-4HS4> (indicating that “students on IEPs, English Language Learners, etc.,” may receive “some face to face delivery of instruction”); Letter from Casey J. Handfield, Superintendent, Auburn Pub. Schs., to Parents and Caregivers (Aug. 2, 2020), <https://perma.cc/S6DB-F6Q6> (stating that “[s]tudents with unique needs will attend school in-person every day” and defining this group as students in special education and ELLs); ELKO CNTY. SCH. DIST., ELKO COUNTY SCHOOL DISTRICT PROPOSED REOPENING PLAN FOR SCHOOL YEAR 2020-2021, at 7 (2020), <https://perma.cc/4CPK-FLC8> (giving priority for full-time, in-person learning to “[s]tudents served in self-contained special education programs” and ELLs).

160. *Considerations for Recovery of Education in Second Semester*, MONTGOMERY CNTY. PUB. SCHS., <https://perma.cc/DV9G-5SBX> (archived Nov. 4, 2021); *see also, e.g.*, N. KAN. CITY SCHS., RETURN TO SCHOOL PLAN 7 (2020), <https://perma.cc/6ZJ3-AZ2U> (prioritizing “more face-to-face instruction” for “PK-2 students, students with disabilities, and English language learners” when possible); ALBUQUERQUE PUB. SCHS., INSTRUCTIONAL & OPERATIONAL REENTRY PLAN SY20-21, at 4-5 (2020), <https://perma.cc/MTB6-M3VR> (making “special education, some K-3 students[] eligible for in-person instruction, if feasible”); BD. OF SCH. TRS., LYON CNTY. SCH. DIST., LYON COUNTY SCHOOL DISTRICT’S PROPOSED REOPENING PLAN 22 (2020), <https://perma.cc/2XQ4-BNNQ> (going beyond students with disabilities and ELLs to include “students living in transition or in foster care”); LESLIE TORRES-RODRIGUEZ, HARTFORD PUB. SCHS., RETURN TO LEARN &

footnote continued on next page

Prioritize all vulnerable students. This category is inspired by Prince William County, Virginia, the only district to take such an expansive approach.¹⁶¹ The district defines thirteen groups of students as “vulnerable” and indicates that they will be “considered for additional in-person and/or virtual instruction and support.”¹⁶² The groups identified by Prince William County include “students experiencing homelessness”; “students from low socio-economic backgrounds”; “[s]tudents experiencing food, housing, or healthcare insecurities”; “[s]tudents under state care, including foster care, detention facilities, and in the hospital”; students who “have been personally impacted by personal/family illness, family death, or job loss”; and “[s]tudents with a previous history of inconsistent attendance, among others.”¹⁶³

B. Potential Benefits of In-Person Priority

There is an intuitive appeal to offering in-person priority to the highest-need students in the name of equity. First, this approach responds to concerns of disparate internet access and accessibility.¹⁶⁴ By bringing marginalized students back to campus—either more frequently or full-time—this priority system should mitigate or ameliorate the digital divide by reducing at-home reliance on technology.¹⁶⁵ The availability of in-person instruction would address accessibility issues that prevent students with disabilities from attending to screens or utilizing technological devices without supervision or assistance.¹⁶⁶

Second, a return to the classroom would allow for better provision of related services that are difficult to achieve virtually.¹⁶⁷ Students could have

ACCELERATE [RTLA] MANUAL: HPS RE-OPENING PLAN FOR SCHOOL YEAR 2020-21, at 2 (2020), <https://perma.cc/PF24-DGXC> (indicating in-person priority for “students with exceptionalities, our English learners, and our youngest learners”); SCH. DIST. OF PHILA., ADVANCING EDUCATION SAFELY: OUR PLAN FOR A SAFE AND SUCCESSFUL SCHOOL YEAR 3 (2020), <https://perma.cc/3F35-FCR3> (suggesting the prioritization of “students with complex needs and our youngest learners” for in-person learning “whenever possible”).

161. PRINCE WILLIAM CNTY. PUB. SCHS., EMBARGOED DRAFT 2020-21: RETURN TO NEW LEARNING INSTRUCTIONAL PLAN 5-6 (2020), <https://perma.cc/SZ5A-DXBY>.

162. *Id.*

163. *Id.* at 6.

164. *See supra* notes 58-66 and accompanying text.

165. PAUL M. ONG, UCLA CTR. FOR NEIGHBORHOOD KNOWLEDGE, COVID-19 AND THE DIGITAL DIVIDE IN VIRTUAL LEARNING 9 (2020), <https://perma.cc/MH2S-ZR2Z> (highlighting how the return to in-person school “reduces reliance on technology-based remote learning” and thereby leads to “improvement’ in digital access by reducing the number of students requiring a computer and the internet”).

166. *See supra* notes 64-67 and accompanying text.

167. *See supra* Part I.B (describing related services that were reduced or removed during virtual learning in spring 2020).

renewed access to paraprofessionals, physical therapy, occupational therapy, and other services that were largely absent from distance learning in spring 2020. While the availability of these services is a significant step forward, there are some features of in-person priority that limit its efficacy in this respect. Bringing limited groups of students to campus does not remove stringent health and safety guidelines that schools are expected to follow.¹⁶⁸ Further, social-distancing requirements do not allow for the closeness and physical touch that some therapies require, limiting the benefits of these in-person settings.¹⁶⁹

Third, the opportunity for social interaction with peers could mitigate some of the behavioral regression that students have been experiencing under isolation.¹⁷⁰ However, models that bring back only students with disabilities and ELLs do not offer the same social benefits that inclusive or integrated settings provide through interaction between students with disabilities and general-education students.¹⁷¹ There are important mitigating factors that are necessary to consider while weighing the benefits and consequences of the limited in-person priority approach to school reopening.

C. Potential Problems with In-Person Priority

Upon closer inspection, in-person priority policies raise serious equity concerns for all students with disabilities and impose distinct harms on multiply-marginalized students of color in special education. The frameworks of critical race theory and DisCrit provide useful lenses through which to inspect these disparities. Critical race theory is a powerful tool for “studying and transforming the relationship among race, racism, and power” by uncovering the ways in which racism is embedded in ostensibly neutral laws and institutions.¹⁷² DisCrit builds upon this foundation by applying a disability

168. Although each district has developed its own guidelines, see generally *Operational Strategy for K-12 Schools Through Phased Prevention*, *supra* note 41, for guidance on operational protocols to prevent the transmission of COVID-19, including facility cleaning, social distancing, contact tracing, vaccination, and communication.

169. See Fox, *supra* note 84 (“I am used to having a warm, unspoken, and physical connection to the kids . . . ,” Baker [a therapist] told *Insider*. “Physical closeness makes them feel safe.”).

170. See *supra* Part I.C (describing examples of behavioral regression resulting from the lack of social interaction and routine during quarantine).

171. THOMAS HEHIR, TODD GRINDAL, BRIAN FREEMAN, RENÉE LAMOREAU, YOLANDA BORQUAYE & SAMANTHA BURKE, INSTITUTO ALANA, A SUMMARY OF THE EVIDENCE ON INCLUSIVE EDUCATION 18-19 (2016), <https://perma.cc/57KZ-X9JH> (“Research on United States students utilizing data from the NLTS and SEELS studies also indicates that spending time in inclusive settings is associated with better social skills for students with disabilities.” (citation omitted)).

172. DELGADO & STEFANCIC, *supra* note 29, at 2-3.

studies lens to develop “a framework that theorizes about the ways in which race, racism, dis/ability, and ableism are built into the interactions, procedures, discourses, and institutions of education, which affect students of color with dis/abilities qualitatively differently than white students with dis/abilities.”¹⁷³

The remainder of this Part applies core tenets of these frameworks to identify and analyze three consequences of in-person priority policies that disproportionately harm students of color with disabilities. This analysis will focus on policies that single out students with disabilities and ELLs for in-person learning. First, these narrower plans necessarily segregate students with disabilities and ELLs from other general-education students, threatening the IDEA’s least restrictive environment (LRE) requirement. Second, this form of segregation imposes a variety of academic and social harms on students with disabilities. And third, these narrower plans have the potential to exacerbate existing disparities in school discipline when school resource officers enforce health and safety rules against the only students at school. Each of these critiques is informed by the historical and sociopolitical context of students of color with disabilities in the U.S. education system. Parts III and IV propose critiques and alternative policies that more fully respond to the cumulative educational debt imposed upon students of color with disabilities.¹⁷⁴

1. Violations of the least restrictive environment standard

While well intentioned, plans that prioritize only students with disabilities and ELLs necessarily segregate these students into their own classrooms. This separation should immediately raise red flags because preventing unnecessary segregation is the central concern of the IDEA’s LRE requirement.¹⁷⁵

The term “least restrictive environment” originates from the federal regulations implementing the IDEA,¹⁷⁶ but the operative language within the statute itself mandates that:

To the *maximum extent appropriate*, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs *only when the nature or severity of the disability* of a child is such that

173. Annamma et al., *supra* note 30, at 7 (citation omitted).

174. *See supra* notes 54-57 and accompanying text.

175. *See Simchick ex rel. M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (“The [Act’s] preference for mainstreaming was aimed at preventing schools from segregating handicapped students from the general student body.” (emphasis omitted) (citation omitted) (quoting *Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991))).

176. 34 C.F.R. §§ 300.114-.120 (2020).

education in regular classes *with the use of supplementary aids and services* cannot be achieved satisfactorily.¹⁷⁷

This language has three key implications for in-person priority. First, the decision to remove a child from the regular, virtual classroom in favor of an in-person setting should be an individualized assessment based on the nature of the student's disabilities, not primarily based on external factors such as the school's ability to provide services. Second, any determination of whether a student can be satisfactorily served in a general-education classroom must include the use of supplementary aids and services, not the baseline situation in spring 2020 when many services were not provided. Third, since students with disabilities must be integrated to the maximum extent appropriate, we must consider whether alternative placements provide the same level of services while increasing inclusion.

Courts have evaluated compliance with the LRE requirement in various ways. The Sixth Circuit set out the first interpretation of LRE's "maximum extent appropriate" language in *Roncker ex rel. Roncker v. Walter*.¹⁷⁸ *Roncker* involved a placement in which nine-year-old Neill would have no contact with his peers without disabilities.¹⁷⁹ The Sixth Circuit reinforced the statutory preference for mainstreaming by holding that an academically superior placement may be inappropriate if it does not mainstream the child in a general-education class.¹⁸⁰ Further, the court established the following standard: "In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."¹⁸¹ To apply this standard, the court weighed the benefits of an integrated, general-education classroom as compared to special education, the level of disruption the child causes in an integrated classroom, and the cost of the integrated placement.¹⁸²

The Fifth Circuit disagreed with the *Roncker* standard and proposed its own two-part test in *Daniel R.R. v. State Board of Education*.¹⁸³ Six-year-old

177. 20 U.S.C. § 1412(a)(5)(A) (emphasis added).

178. 700 F.2d 1058, 1063 (6th Cir. 1983).

179. *Id.* at 1060.

180. *Id.* at 1063 ("In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming.").

181. *Id.* The Fourth and Eighth Circuits have also adopted the *Roncker* standard. See *N.W. ex rel. A.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987); *DeBlaay ex rel. Devries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989).

182. *Roncker*, 700 F.2d at 1063.

183. 874 F.2d 1036, 1046, 1048 (5th Cir. 1989). The Second, Third, Tenth, and Eleventh Circuits have also adopted the *Daniel R.R.* two-part test. See *P. ex rel. P. v. Newington Bd.*
footnote continued on next page

Daniel R. had Down syndrome, causing an intellectual disability and speech impairment that prevented his benefitting from the regular curriculum in a general-education classroom.¹⁸⁴ As a result, the district proposed an IEP that segregated Daniel into a special education class, leaving lunch and recess as the only times when he would interact with general-education students without disabilities.¹⁸⁵ Finding that the *Roncker* standard “necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials,” the Fifth Circuit devised an alternate approach.¹⁸⁶ To evaluate the appropriateness of Daniel’s placement, the court divided its analysis into two parts: “First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child.”¹⁸⁷ Then, “[i]f we determine that education in the regular classroom cannot be achieved satisfactorily, we next ask whether the child has been mainstreamed to the maximum extent appropriate.”¹⁸⁸ In evaluating these prongs, the court considered the steps the school took to provide accommodations, the child’s capacity to receive educational benefits from the integrated, general-education classroom, the child’s overall experience in the integrated classroom in comparison to special education, and the student’s disruptive impact on the integrated classroom.¹⁸⁹

In *Sacramento City Unified School District Board of Education v. Rachel H.*, the Ninth Circuit borrowed features of both the *Roncker* and *Daniel R.R.* standards, fashioning them into a four-part balancing test.¹⁹⁰ In this case, the district proposed placing second-grader Rachel in an integrated, general-education classroom for nonacademic subjects and a special education classroom for all academic subjects due to her intellectual disability.¹⁹¹ To assess this proposed placement, the court weighed consideration of “(1) the educational benefits of placement full-time in a regular [integrated] class; (2) the nonacademic benefits [for the child] of such placement; (3) the effect [the student] had on the teacher

of Educ., 546 F.3d 111, 119-20 (2d Cir. 2008); *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1220 (3d Cir. 1993); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004); *Greer ex rel. Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991).

184. *Daniel R.R.*, 874 F.2d at 1039.

185. *Id.*

186. *Id.* at 1046.

187. *Id.* at 1048.

188. *Id.* at 1050.

189. *Id.* at 1048-50.

190. *Sacramento City Unified Sch. Dist. Bd. of Educ. v. Holland ex rel. Rachel H.*, 14 F.3d 1398, 1403-04 (9th Cir. 1994).

191. *Id.* at 1400.

and children in the regular class; and (4) the costs of mainstreaming [the student].”¹⁹²

While the narrowest in-person priority policies raise LRE concerns under any of these standards, this Note will apply the *Daniel R.R.* test as a representative analysis because it has been adopted by the most circuits. The two parts of the *Daniel R.R.* test map onto two key features of the distance-learning analysis.

The first question is “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child.”¹⁹³ In the COVID-19 context, the first prong of *Daniel R.R.* asks whether a student should be served in a virtual or in-person format. As the language “for a given child”¹⁹⁴ suggests, schools must perform an individualized analysis to identify the students who are in need of in-person learning because they cannot be satisfactorily served in a virtual format.

To conduct this case-specific analysis, courts look to the factors considered in *Daniel R.R.* This analysis views the virtual setting as the “regular classroom” because this is where general-education students have been placed throughout the COVID-19 pandemic. First, courts may consider the steps schools took to provide accommodations in this online setting.¹⁹⁵ The setting relevant to analyzing denial of FAPE would include virtual classrooms in spring 2020, when in-person priority policies were first proposed. At this time schools—whether due to lack of resources, abruptness of school closures, or lack of preparation—were providing minimal services. While “[s]tates need not provide every conceivable supplementary aid or service,” the material failure to implement FAPE would fall short of this standard.¹⁹⁶ This analysis weighs in favor of introducing more robust accommodations and related services before resorting to a segregated setting.

Next, courts would evaluate a student’s capacity to benefit from the integrated, virtual classroom.¹⁹⁷ While this analysis would be case specific, an inability to provide satisfactory online learning in the mainstream classroom would be dispositive of a failure to provide FAPE. Once schools provide supplementary and related services virtually—such as assistive technology or behavioral therapy—some students with disabilities will be able to utilize virtual platforms in a satisfactory manner and therefore will not need in-

192. *Id.* at 1404.

193. *Daniel R.R.*, 874 F.2d at 1048.

194. *Id.*

195. *See id.* (“At the outset, we must examine whether the state has taken steps to accommodate the handicapped child in regular education.”).

196. *Id.*; *see also supra* Parts II.A-B (describing the failure to implement FAPE).

197. *See Daniel R.R.*, 874 F.2d at 1049.

person learning. Others may have certain visual, auditory, or intellectual disabilities that make satisfactory virtual learning impossible, necessitating a shift to in-person learning.

Courts would also compare a student's "overall educational experience" in the integrated, virtual classroom with that of the in-person, more segregated classroom.¹⁹⁸ This broader analysis includes social and interpersonal factors, such as whether a student "may benefit enormously from the language models that his nonhandicapped peers provide for him. In such a case, the benefit that the child receives from mainstreaming may tip the balance in favor of mainstreaming, even if the child cannot flourish academically."¹⁹⁹ In virtual learning, students with disabilities who have integrated placements in their IEPs would be in the same virtual classroom as general-education students, allowing for engagement via chat or interactive portions of class. During in-person learning, on the other hand, there are opportunities for physical interaction with other students. However, under the narrower in-person priority policies, the only other students returning to classrooms were students with disabilities and ELLs. Interaction within that limited population does not provide the same benefits as integrated social interaction with other general-education students. The benefits differ for each student, but a categorical approach to returning all students with disabilities prevents this case-specific analysis.²⁰⁰

Ultimately, making a blanket determination that all students with disabilities need to be taught in person is not consistent with the requirements of the IDEA or with judicial interpretation of the LRE requirement. The provision of in-person priority should be fact specific and tailored to the abilities and needs of each individual student. For many students with disabilities, in-person learning is the best environment, but the next part of the *Daniel R.R.* test cautions the use of overly restrictive classroom settings.

Next, we "ask whether the child has been mainstreamed to the maximum extent appropriate."²⁰¹ For those students who require in-person learning because they cannot be satisfactorily served in the mainstream virtual classrooms, the question turns to which form of in-person priority is integrated to the maximum extent appropriate. The narrow forms of in-person priority do not allow for maximum integration because there are broader, more integrated options. In-person services may be superior for some

198. *Id.*

199. *Id.*

200. Courts would also consider the impact a student has on the integrated, general-education classroom, but this Note will not address this factor as it is necessarily individual to each student. *See id.*

201. *Id.* at 1050.

students, but it is essential to determine whether those same services could be provided in a less segregated setting. Since in-person learning could be offered in more integrated, inclusive cohorts, the narrowest proposals providing in-person priority to only students with disabilities and ELLs are unlikely to pass muster under the LRE standard. Consequently, school districts should explore options that individually identify in-person priority students, ranging from students with disabilities, to ELLs, to early childhood, to transition years, and others who could benefit the most.

2. Harms of segregating students with disabilities

Beyond the statutory implications, there are clear pedagogical and ethical reasons to avoid segregated settings. First, research shows that segregated settings have clear academic and social consequences for students with disabilities. Second, through its recognition that racism is endemic—and therefore a normal and ubiquitous feature of society²⁰²—critical race theory calls for an analysis of the racialized history of special education. Both features of this analysis reinforce a core tenet of DisCrit, which “renounces imposed segregation and promotes an ethic of unqualified belonging and full inclusion in schools and society.”²⁰³

Segregation by disability status has well-documented effects on academic performance. Studies repeatedly show that students with disabilities who are integrated into general-education classrooms for larger portions of the day exhibit stronger language, reading comprehension, and mathematical skills.²⁰⁴ These positive effects start as early as prekindergarten.²⁰⁵ Inclusion has long-term benefits as well. One study found that students with high-incidence disabilities taught in fully inclusive classrooms were nearly five times more likely to graduate high school on time than their segregated peers.²⁰⁶ Another

202. DELGADO & STEFANCIC, *supra* note 29, at 7.

203. Annamma et al., *supra* note 30, at 15.

204. See, e.g., THOMAS HEHIR, TODD GRINDAL & HADAS EIDELMAN, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., REVIEW OF SPECIAL EDUCATION IN THE COMMONWEALTH OF MASSACHUSETTS 27-29 (2012), <https://perma.cc/WQQ6-GBFR> (analyzing a study of over 68,000 students with disabilities in Massachusetts and finding significant improvements in language and mathematics in integrated students); HEHIR et al., *supra* note 171, at 14 (indicating that analysis of the Special Education Elementary Longitudinal Study found increased reading comprehension and mathematical skills among students in more general-education classes).

205. Laura M. Justice, Jessica A.R. Logan, Tzu-Jung Lin & Joan N. Kaderavek, *Peer Effects in Early Childhood Education: Testing the Assumptions of Special-Education Inclusion*, 25 PSYCH. SCI. 1722, 1723, 1727-28 (2014) (finding improved language skills among students in mainstream classrooms in a study of 670 preschoolers).

206. Laura A. Schifter, *Using Survival Analysis to Understand Graduation of Students with Disabilities*, 82 EXCEPTIONAL CHILD. 479, 491 (2016).

study found that mainstreamed students with intellectual disabilities were almost two times more likely to begin postsecondary education than their peers in segregated settings.²⁰⁷

In addition, segregation is known to hinder social-skill and behavioral development. One study found that “children in Self-Contained Special-Education classes report a lower quality of friendship, experience more loneliness, and have more behavior problems than their counterparts in Inclusion programs.”²⁰⁸ Another study based on data from the National Longitudinal Transition Study-2 found that the more time a student spends in general-education classrooms, “the more likely he or she is to belong to groups and the less likely he or she is to be subject to disciplinary actions”—all factors indicating stronger social adjustment.²⁰⁹

In the context of in-person priority policies proposed only months into the COVID-19 pandemic, an early return to school—before districts were properly prepared with personal protective equipment—presented physical risks for low-income students of color with disabilities. In the United States, the most marginalized students have always been taught in inferior facilities that jeopardize their health and safety. For example, three of the cases consolidated into *Brown v. Board of Education*²¹⁰ involved nearly uninhabitable conditions—ranging from buildings lacking basic necessities like a cafeteria or infirmary,²¹¹ to students using one single toilet connected to the space where both lunches and janitorial equipment were stored,²¹² to a lack of school buses, which forced students to walk up to eight miles to get to class.²¹³

207. Robert M. Baer, Alfred W. Daviso III, Robert W. Flexer, Rachel McMahan Queen & Richard S. Meindl, *Students with Intellectual Disabilities: Predictors of Transition Outcomes*, 34 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 132, 138 (2011).

208. Judith Wiener & Christine Y. Tardif, *Social and Emotional Functioning of Children with Learning Disabilities: Does Special Education Placement Make a Difference?*, 19 LEARNING DISABILITIES RSCH. & PRAC. 20, 29 (2004).

209. Camille Marder, Mary Wagner & Carl Sumi, *The Social Adjustment of Youth with Disabilities*, in THE ACHIEVEMENTS OF YOUTH WITH DISABILITIES DURING SECONDARY SCHOOL: A REPORT FROM THE NATIONAL LONGITUDINAL TRANSITION STUDY-2 (NLTS2) 5-1, 5-16 (2003).

210. 347 U.S. 483 (1954).

211. *Davis v. Cnty. Sch. Bd.*, 103 F. Supp. 337, 340 (E.D. Va. 1952), *rev'd sub nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

212. *Belton v. Gebhart*, 87 A.2d 862, 870 (Del. Ch.), *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom Brown*, 349 U.S. 294.

213. *Briggs v. Elliott*, 98 F. Supp. 529, 530-31 (E.D.S.C. 1951), *vacated*, 342 U.S. 350 (1952); THE BROWN FOUND. FOR EDUC. EQUITY, EXCELLENCE & RSCH., RECOVERING UNTOLD STORIES: AN ENDURING LEGACY OF THE *BROWN V. BOARD OF EDUCATION* DECISION 60-62 (2018), <https://perma.cc/69KD-WV7V> (describing the racial disparities at issue in *Briggs*, including a lack of access to transportation that forced African American students to “walk as far as eight miles each way in order to attend their public schools”).

Today, egregious disparities in facilities persist. Although infrastructure challenges are widespread among all U.S. public schools, schools with 75% or more students eligible for free or reduced-price lunch—a proxy for lower-income schools—have the highest rates of unsatisfactory environmental conditions, including problems with ventilation, water quality, indoor air quality, heating, and natural lighting in permanent buildings.²¹⁴ Considering that improving ventilation and air filtration are key mitigation measures that reduce the spread of COVID-19,²¹⁵ the return to school could impose the greatest risks on the least privileged communities, whose schools face reduced air filtration compared to wealthier school districts. The decision to give in-person priority to only the most marginalized could reinforce these disparities and perpetuate the history of exposing racial minorities, low-income students, and students with disabilities to hazardous learning conditions.

For over thirty years, advocates of segregated placements have argued that self-contained classrooms enable students with disabilities to receive the benefits of specialized instruction, more personal attention, and the flexibility to advance through material at their own pace.²¹⁶ These arguments echo the touted benefits of in-person priority, which affords unique access to in-person instruction, renewed availability of paraprofessional support, and the removal of barriers inherent in online instruction. Yet the IDEA has made it a point to create—and the Supreme Court has made it a point to affirm—a strong statutory preference for mainstreaming.²¹⁷ More inclusive, mixed cohorts, including students in the early and transition years, could accomplish the same goal of reducing population density while mitigating the segregation concerns.

Opposition to segregation is also driven by longstanding concerns about the disproportionate placement of students of color into special education. Since its inception, advocates for students with disabilities have owed a debt to

214. DEBBIE ALEXANDER, LAURIE LEWIS & JOHN RALPH, U.S. DEP'T OF EDUC., *CONDITION OF AMERICA'S PUBLIC SCHOOL FACILITIES: 2012-13*, at 11 (2014), <https://perma.cc/EAB2-2Q3W>.

215. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 4, at 59-60 (recognizing that “ventilation and air quality” are among “[k]ey strategies” for combatting COVID-19 transmission and that “poor air quality and outdated HVAC systems may be particularly problematic for under-resourced schools”).

216. Norman J. Bauer, *The Politics of Inclusion: A Dissenting Perspective*, Annual Conference of the New York State Association of Teacher Educators 19-23 (Apr. 21, 1994) (conference paper), <https://perma.cc/J4NU-PEAQ>; *see also* Sheryle Dixon, *Inclusion—Not Segregation or Integration Is Where a Student with Special Needs Belongs*, 39 J. EDUC. THOUGHT 33, 35-37, 47 (2005) (describing arguments for both segregated and integrated classrooms, while ultimately advocating for fostering inclusion through designing “one unified education system that encompasses all members equitably” rather than requiring assimilation into dominant cultures).

217. 20 U.S.C. § 1412(a)(5)(A); *see also* Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 202 (1982) (referring to a “mainstreaming” preference”).

the strategic insight and moral consciousness-raising of the fight for racial justice.²¹⁸ In fact, racial disparities lay at the heart of *Mills v. Board of Education*,²¹⁹ a case brought by seven Black plaintiffs²²⁰ that gave rise to the first iteration of the IDEA.²²¹ As early as the 1960s, scholars in the nascent field of special education were already warning of the overrepresentation of racial and language minority students.²²²

Current data reinforces the persistence of these racial disparities in special education. The most recent data available from the U.S. Department of Education shows that in 2018, Black or African American students were more likely to receive special education in categories such as intellectual disability and emotional disturbance than those of all other racial identities combined.²²³ American Indian or Alaska Native students were classified as developmentally delayed at a rate four times that of all other racial identities combined.²²⁴ Even among students already identified for special education, these same groups are more likely to be taught in segregated settings than their white or Asian and Pacific Islander peers.²²⁵ This data raises the specter of racial segregation, causing some scholars to call special education a “legalized form of structural segregation and racism.”²²⁶

Racial disparities in special education are the product of subjectivity in multiple aspects of the special education identification and placement process.²²⁷ Identification for special education begins with a referral. Teachers

218. See Russell J. Skiba, Ada B. Simmons, Shana Ritter, Ashley C. Gibb, M. Karega Rausch, Jason Cuadrado & Choong-Geun Chung, *Achieving Equity in Special Education: History, Status, and Current Challenges*, 74 EXCEPTIONAL CHILD. 264, 264 (2008).

219. 348 F. Supp. 866 (D.D.C. 1972).

220. See *id.* at 869-70.

221. Skiba et al., *supra* note 218, at 264.

222. *Id.* at 265 (citing Lloyd M. Dunn, *Special Education for the Mildly Retarded—Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5 (1968)).

223. *Key Findings at the National Level from the 42nd Annual Report to Congress on IDEA, Parts B and C. 2020*, *supra* note 45 (“Black or African American students ages 6 through 21 were more likely to be served under IDEA, Part B, than were students ages 6 through 21 in all other racial/ethnic groups combined for the following disability categories: autism (1.1), developmental delay (1.6), emotional disturbance (1.9), intellectual disability (2.2)” (emphasis omitted)).

224. *Id.*

225. EDUC. POL’Y & PRAC. DEP’T, NAT’L EDUC. ASS’N, DISPROPORTIONALITY: INAPPROPRIATE IDENTIFICATION OF CULTURALLY AND LINGUISTICALLY DIVERSE CHILDREN 2 (2008), <https://perma.cc/F4GE-3LW2>.

226. Wanda J. Blanchett, *Disproportionate Representation of African American Students in Special Education: Acknowledging the Role of White Privilege and Racism*, 35 EDUC. RESEARCHER 24, 25 (2006).

227. See Nanda, *supra* note 35, at 298 (describing how implicit bias and stereotypes color the way that Black and Latinx children are perceived).

have an outsized role in this process, as they initiate 75% of referrals nationwide and their judgment shapes school psychologists' decisions.²²⁸ Such influence can be problematic because "bias, attitude, and expectations can actually cloud the decision-making process in regard to objective measures of genuine learning needs."²²⁹ This can include teachers reading Black students' body language as indicative of "aggression, low achievement, and potential for special education referral."²³⁰ These racialized readings can lead to over-referral—and, conversely, ascribing reduced academic expectations to students of color may also lead to under-referral.²³¹ The evaluation process can also be shaped by bias in testing itself. Evaluations may include IQ tests, which sometimes embed racial and cultural bias in their questions and fail to account for social inequalities that systematically disadvantage students of color.²³²

Artificially constructed disability categories contribute to disproportionality as well. Scholars distinguish high-incidence disabilities—which are highly subjective and include learning disabilities, emotional behavioral disability, and intellectual disability—from low-incidence disabilities, which involve medical diagnoses and include visual and auditory impairments, physical disabilities, and autism.²³³ The overidentification of Black and Latinx students into highly subjective, high-incidence categories due to bias or expectation ultimately places these students into restrictive, self-contained classrooms at higher rates.²³⁴ The presence of such subjectivity in referral, evaluation, and disability categorization all shape an eligibility determination process that scholars argue is "the result of social forces that intertwine to construct an identity of 'disability' for children whom the regular education system finds too difficult to serve."²³⁵

228. Rachel Elizabeth Fish, *The Racialized Construction of Exceptionality: Experimental Evidence of Race/Ethnicity Effects on Teachers' Interventions*, 62 SOC. SCI. RSCH. 317, 319 (2017).

229. Gwendolyn Cartledge & Charles Dukes, *Disproportionality of African American Children in Special Education: Definition and Dimensions*, in THE SAGE HANDBOOK OF AFRICAN AMERICAN EDUCATION 383, 389 (Linda C. Tillman ed., 2009).

230. BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? UNDERSTANDING RACE AND DISABILITY IN SCHOOLS 58 (2d ed. 2014).

231. Fish, *supra* note 228, at 329.

232. Cartledge & Dukes, *supra* note 229, at 388 (arguing that issues in IQ tests result from "cultural loading," wherein "the items [in IQ tests] are developed and normed on one cultural group and given to children in another culture").

233. HARRY & KLINGNER, *supra* note 230, at 3.

234. See Ferri & Connor, *supra* note 101, at 454.

235. HARRY & KLINGNER, *supra* note 230, at 13.

The persistent influence of subjectivity and bias is why DisCrit scholars contend that disability is a social construct rather than a biological deficit.²³⁶ Consequently, special education identification and placement reflects “a racialized construction of exceptionalities in which academic expectations and interpretations of behavior, and subsequent perception of a medicalized label of difference, vary by race/ethnicity.”²³⁷ In light of these well-documented racial disparities in special education, policymakers should pause before further segregating students with disabilities for in-person learning.

3. Likelihood of exacerbating discipline disparities

Finally, bringing a narrow subset of students—those with disabilities and ELLs—back to school under strict behavioral guidelines could risk further exacerbating disproportionate disciplinary action. This disparity can be more fully appreciated through the critical race theory tenet of intersectionality, which recognizes that multiply-marginalized groups experience overlapping forms of oppression that interact in ways that constitute a “unique compoundedness” distinct from any individual form of oppression.²³⁸ Just as Kimberlé Crenshaw emphasizes that “the intersectional experience [of Black women] is greater than the sum of racism and sexism,”²³⁹ so too does this Note consider the ways in which the intersectional experience of racism and ableism is distinctly magnified. The DisCrit framework further illuminates how “racism validates and reinforces ableism, and ableism validates and reinforces racism.”²⁴⁰ Together, critical race theory and DisCrit call for an analysis of how the overlapping oppressions of racism and ableism generate heightened disciplinary disparities for students of color with disabilities.

Multiple schools explicitly indicated that School Resource Officers (SROs), police, or school officials would be tasked with enforcement and discipline of

236. Annamma et al., *supra* note 30, at 5-6 (arguing that “the social construction of dis/ability depends heavily on race and can result in marginalization, particularly for people of color and those from non-dominant communities”).

237. Fish, *supra* note 228, at 318.

238. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150 (1989) [hereinafter Crenshaw, *Demarginalizing*]; see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1993) (expanding on the idea “that the intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately”).

239. Crenshaw, *Demarginalizing*, *supra* note 238, at 140.

240. Annamma et al., *supra* note 30, at 6.

health policies including mask usage and social distancing.²⁴¹ Take Huntsville, Alabama for example, which deployed SROs to all district schools and indicated that their responsibilities would include “[e]nforcing wear[ing] of face coverings, social distancing, and other COVID-related protocols as directed.”²⁴² And Dallas, Texas indicated that if “a student intentionally coughs, sneezes, or spits on another student . . . a Dallas [Independent School District police] officer would need to be dispatched to the campus.”²⁴³ These policies threaten the safety and security of students of color with disabilities.

Data from the U.S. Department of Education reveals long-standing disparities in exclusionary discipline, such as suspensions, expulsions, and law enforcement referrals, against students with disabilities. While students with disabilities comprised roughly 12% of K-12 students in 2015-16, they received 26% of out-of-school suspensions and 24% of expulsions.²⁴⁴ During that same year, students with disabilities constituted 71% of students subjected to physical or mechanical restraints and 66% of students involuntarily confined in a secluded space.²⁴⁵ Policies invoking police officers and SROs as enforcement mechanisms are particularly concerning because students with disabilities, though only 12% of the national student population, account for 25% of students arrested at school or referred to law enforcement by school officials.²⁴⁶

Racial disparities in school discipline are also glaring. Black students are suspended at rates “three times higher than white students.”²⁴⁷ In 2015-2016, only 8% of students were Black boys, yet they received a quarter of out-of-school suspensions.²⁴⁸ Additionally, Black girls have even experienced “the fastest growing suspension rates of all students . . . [with] discipline rates 6 times higher than White girls”²⁴⁹ Black boys and girls are both particularly

241. *See, e.g.*, NW. LOC. SCH. DIST., USE OF FACE MASKS/COVERINGS 2 (2020), <https://perma.cc/6BAP-27VY> (indicating that “students who violate this policy shall be subject to disciplinary action” and “will immediately be assigned to Online Learning”); TORRES-RODRIGUEZ, *supra* note 160, at 9 (calling for administrators to “[c]ommunicate accountability/discipline for staff and students who refuse to or cannot wear a mask”).

242. HUNTSVILLE CITY SCHS., HUNTSVILLE CITY SCHOOLS RESET PLAN 89 (2020), <https://perma.cc/BA3W-GPCJ>.

243. DALL. INDEP. SCH. DIST., DALLAS ISD REENTRY PLAYBOOK FOR PARENTS 21 (2020), <https://perma.cc/M7GV-SYKY>.

244. OFF. FOR C.R., U.S. DEP’T OF EDUC., 2015-2016 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 14, 16 (rev. 2019), <https://perma.cc/W4JR-ZHTX>.

245. *Id.* at 12.

246. OFF. FOR C.R., U.S. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <https://perma.cc/UCL9-AWXZ>.

247. *Id.*

248. OFF. FOR C.R., *supra* note 244, at 13.

249. Annamma et al., *Black Girls*, *supra* note 31, at 214 (citations omitted).

likely to be suspended or expelled for only a minor infraction.²⁵⁰ Here too, Black students are disproportionately subject to law enforcement referrals and school arrests, comprising nearly a third of all students subjected to these punishments.²⁵¹ This rapid escalation of disciplinary measures has clear consequences for the policing of mandatory mask and social-distancing policies.

These disparities are only compounded for multiply-marginalized students of color with disabilities. Strikingly, with the exception of Latinx and Asian-American students, over one in four boys of color with disabilities and nearly one in five girls of color with disabilities receive an out-of-school suspension during their education.²⁵² According to a report by the U.S. Commission on Civil Rights, nearly 40% of Black students with disabilities received multiple notices of suspension within the 2015-2016 school year alone.²⁵³ This same report found that students with disabilities who identify as multiracial received expulsions without educational services at a rate five times higher than their white peers.²⁵⁴ One of the many harmful consequences of such exclusionary discipline is that it removes students from the classrooms where they are meant to learn. The result of these disparities is heartbreaking: “Black students with disabilities lost approximately 77 more days of instruction compared to white students with disabilities.”²⁵⁵

Narrow in-person priority models are likely to exacerbate these disparities even further because marginalized students would be the only ones subject to these policies and to the disciplinary procedures reserved for in-person attendance. This data highlights the imperative to adopt trauma-informed and nonexclusionary disciplinary practices before bringing students back to school.

250. Russell J. Skiba, Robert H. Horner, Choong-Geun Chung, M. Karega Rausch, Seth L. May & Tary Tobin, *Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85, 102 (2011) (“African American students have almost four times the odds, and Hispanic students twice the odds, of being suspended or expelled for a minor infraction at the elementary school level.”); see also Annamma et al., *Black Girls*, *supra* note 31, at 214 (citing research that Black girls are most commonly punished for minor infractions including dress-code violations, profanity, and aggressive behaviors).

251. OFF. FOR C.R., *supra* note 246, at 1.

252. *Id.* at 1.

253. U.S. COMM’N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 67 (2019), <https://perma.cc/2C5M-CUQR>.

254. *Id.* at 65-66.

255. *Id.* at 11.

IV. Recommendations

These benefits and critiques of in-person priority models inform four equity-minded policy responses that more fully account for the systemic inequalities facing students of color with disabilities. First, this Part argues for a more comprehensive and accessible foundation for virtual learning. This would ensure that placement into in-person learning can be individualized, rather than categorical, and based on demonstrated need. Second, schools should adopt trauma-informed and nonexclusionary discipline policies before any student sets foot on campus. Third, for students who require an in-person option, schools should modify the scope of existing in-person priority models in order to mitigate the potential for segregation. And finally, districts must recognize that in-person priority is not a sufficient response to widespread COVID-19 learning loss and denial of FAPE. Instead, districts should expand access to both compensatory education and extended school year services in order to truly compensate for the inadequate education provided during the 2019-2020 and 2020-2021 academic years.

A. Build Accessible Virtual Learning Programs

Before contemplating an in-person priority model, school districts should commit to providing full instruction and all related services possible in an online format for students who can utilize them. This might include providing support to enable teachers to teach synchronous, online classes or offering online activities and enrichment for full school days, rather than a few hours a week as some students experienced in the spring of 2020.²⁵⁶ Further, providing complete online instruction would require district-wide commitments to eliminate the digital divide by ensuring internet access and necessary devices for all students in need. To do so, districts might take measures such as contracting with private vendors like PresenceLearning, which offers speech, occupational, and physical therapy online.²⁵⁷

The crucial obstacle is cost, so the expansion of these services would require an infusion of state and federal funding. For example, one estimate by the Learning Policy Institute calculates that schools would need to dedicate \$500 per student to fully fund devices, internet access, and other necessary software and training.²⁵⁸ Another report co-authored by Boston Consulting Group, Common Sense, and the Southern Education Foundation, estimates that it would cost up to \$11 billion in year one and up to \$8 billion per year

256. *See supra* notes 76-78 and accompanying text.

257. Nadworny, *supra* note 66.

258. Michael Griffith, *What Will It Take to Stabilize Schools in the Time of COVID-19?*, LEARNING POL'Y INST. (May 7, 2020), <https://perma.cc/9CWL-R52V>.

after that to close the digital divide for the roughly 12 million students without internet access nationwide.²⁵⁹ School districts made efforts to narrow this gap during the pandemic, reaching “an estimated 20% to 40% of the national K-12 digital divide for students who lacked adequate high-speed connection and 40% to 60% of the divide for students who lacked access to an e-learning device as of December 2020.”²⁶⁰ However, these efforts are only a temporary starting point as over three-quarters of these initiatives will lose funding within three years.²⁶¹ This research demonstrates the importance of significant and sustainable investment in technology that can close the digital divide for public school students. Yet even these estimates are incomplete because achieving comprehensive accessibility for students with disabilities would require additional investments in related services available through virtual platforms. At least one state is taking longer-term steps to mitigate this barrier as well. In August 2021, the Wyoming Department of Education applied for a federal grant to invest \$9 million over 5 years in a teletherapy pilot program for roughly 1,900 students across three school districts.²⁶² Scaling up initiatives like these would be a valuable step toward greater accessibility of virtual learning for students with disabilities.

Such a commitment to more comprehensive online services would ensure that students are not forced to use in-person learning only because the district is not providing needed services in any other format. By creating a baseline virtual environment with the basic instruction and services included in each student’s IEP, in-person learning could be available only for students who cannot benefit from full virtual learning, rather than as a categorical default for all students with disabilities and ELLs. With some students able to benefit from this more robust and accessible online learning, the decision to place a student in person could be tailored to the student’s particular needs. Further, as more and more students return to physical classrooms, the likelihood of community spread increases and so does the likelihood of new waves of school closures.²⁶³ Making a proactive commitment to virtual learning would prepare districts for the possibility of future closures in years ahead.

259. TITALAYO TINUBU ALI ET AL., BOS. CONSULTING GRP., COMMON SENSE & S. EDUC. FOUND., LOOKING BACK, LOOKING FORWARD: WHAT IT WILL TAKE TO PERMANENTLY CLOSE THE K-12 DIGITAL DIVIDE 11, 16 (2021), <https://perma.cc/D3LE-22F5>.

260. *Id.* at 12.

261. *Id.*

262. Morgan Hughes, *Wyoming Vies for Federal Money to Launch Teletherapy Program in Select School Districts*, CASPER STAR TRIB. (updated Sept. 6, 2021), <https://perma.cc/ADE5-5ZPM>.

263. In August 2020, multiple districts considered or required closures after just days or weeks of reopening. *See, e.g.*, Sarah Mervosh & Shawn Hubler, *As the Coronavirus Comes to School, a Tough Choice: When to Close*, N.Y. TIMES (updated Aug. 13, 2020), <https://perma.cc/L6RS-38R9> (reporting closures shortly after schools reopened in
footnote continued on next page

B. Adopt Trauma-Informed and Nonexclusionary Disciplinary Policies

Before any student sets foot on campus, districts must adopt policies that eliminate exclusionary discipline practices and replace them with a trauma-informed approach. Parents have recognized that behavioral problems are already increasing as students return to in-person learning as a result of the isolation and trauma that has occurred during quarantine.²⁶⁴ Rather than compounding this harm, disciplinary policies “must respond to students from a trauma informed perspective as observed by a shift in discipline procedures to reflect principles that are focused on learning rather than punishment, inclusion rather than exclusion, and an increase in proactively supporting the emotional and mental health needs of all students.”²⁶⁵ At least four states explicitly called for the reduction or elimination of exclusionary discipline and the adoption of trauma-informed practices in their statewide school reopening plans.²⁶⁶ This should be a universal practice, especially before districts consider narrow in-person programs that leave marginalized students uniquely vulnerable to disciplinary procedures.

This shift in disciplinary policy would appropriately recognize the trauma and upheaval that students have experienced in quarantine.²⁶⁷ Eliminating exclusionary disciplinary policies that remove students from the classroom would preserve student learning time, which is the very point of providing in-person priority. And finally, it would avoid widening the already expansive disparities in application of punishment for marginalized students, including

Georgia, Indiana, and Mississippi); Tawnell D. Hobbs, *Schools Are Reopening, Then Quickly Closing Due to Coronavirus Outbreaks*, WALL ST. J. (Aug. 17, 2020, 5:48 PM ET), <https://perma.cc/6JRQ-YNHF> (reporting that schools in Indiana, Louisiana, Oklahoma, Tennessee, and Georgia were forced to close shortly after reopening due to new COVID-19 cases).

264. See *COVID-19 Pandemic: Helping Children Transition Back to School*, CDC, <https://perma.cc/H9C9-9URM> (last updated Sept. 23, 2021) (“Many families report increased behavior problems in their children, including anxiety and acting out.”).

265. SHAWNEE MISSION SCH. DIST., *EARLY CHILDHOOD/ELEMENTARY PLAN FOR REOPENING SCHOOLS 26*, <https://perma.cc/7MU5-AC7E> (archived Nov. 4, 2021).

266. See ARIZ. DEP’T OF EDUC., *ROADMAP FOR REOPENING SCHOOLS 19* (2020), <https://perma.cc/9Y99-YHA5>; CONN. STATE DEP’T OF EDUC., *ADAPT, ADVANCE, ACHIEVE: CONNECTICUT’S PLAN TO LEARN AND GROW TOGETHER 32* (2020), <https://perma.cc/TJ2H-28F3> (“Revisit school discipline policies with a focus on re-engaging students in their building rather than removing them from school. Consider the unique circumstance students are facing returning to the structure of school after a period of disruption, and potentially factors such as grief or trauma that might influence behavior.”); VA. DEP’T OF EDUC., *RECOVER, REDESIGN, RESTART: A COMPREHENSIVE PLAN THAT MOVES VIRGINIA LEARNERS AND EDUCATORS FORWARD 54* (2020), <https://perma.cc/VCL6-XEBD>.

267. See *supra* Part I.D (discussing the increased trauma and mental health concerns experienced in quarantine).

students with disabilities, students of color, ELLs, and multiply-marginalized students at the intersection of these identities.²⁶⁸ If these are the populations that return to classrooms first, then they would be the only students subject to discipline for their physical interactions with other students. This disparity in treatment is of particular concern because some students with intellectual disabilities are already exhibiting behavioral regression including hitting,²⁶⁹ which would violate school disciplinary and social-distancing protocols. As a result, they would be most vulnerable to exclusion from the classroom, while general-education students would not experience the same consequences from behind their computer screens. It is essential that schools adopt policies that would prevent widening disciplinary disparities.

C. Develop an Individualized Approach to In-Person Priority

Schools should only consider implementing in-person priority once they have established equitable access to online learning and dismantled exclusionary discipline. At that point, districts should then determine whether they can commit to a few key stipulations before they pursue in-person priority models for any students.

First, districts should not use disability, ELL, or low-income status itself as a proxy for need. Instead, in-person priority should be an individualized decision based on the student's ability to benefit from virtual learning. For students with disabilities, only this individualized method is consistent with the IDEA's mandate that students are only removed from mainstream general-education classrooms when their particular disability makes it necessary.²⁷⁰ Some students with disabilities will be able to benefit from an online education that actually includes related services, and others will not due to the nature of their disability. Differentiating in this way is consistent with the IDEA. The same logic applies to ELLs, low-income students, and other marginalized populations. Providing Wi-Fi and tablets or other devices would ensure accessibility for some students, while others may not have stable living situations that allow them to learn even with an internet connection. Here too, an individualized assessment by a student's IEP team would allow those most in need or those who would benefit the most from in-person learning to have access to a physical classroom.

268. See *supra* Part III.C.3 (discussing disproportionate rates of discipline for students of color and students with disabilities).

269. See Courtenay & Perera, *supra* note 97, at 232-33 (describing how students with disabilities may face greater anxiety and mental health strain as a result of the pandemic); Adely, *supra* note 88 (describing academic and behavioral regression among students).

270. 20 U.S.C. § 1412(a)(5)(A).

Second, this individualized assessment should be used to create mixed cohorts of students to mitigate the effects of segregated settings. These cohorts should include both students with disabilities and general-education students, along with both marginalized students and students in early or transition years. Overly narrow groupings necessarily create segregated settings that disadvantage students with disabilities. By selecting students with a variety of needs beyond disability status—including low-income students, students experiencing homelessness, students in detention facilities, among others—districts could create more integrated settings consistent with judicial interpretations of the LRE requirement of the IDEA.²⁷¹

Introducing mixed cohorts of students to in-person learning only on the basis of marginalized status, however, does not address the concern of testing in-person learning on only the most marginalized. Including early learners and students in transition years would serve to mitigate this concern as well. These students would be chosen on the basis of their developmental levels (i.e., those who could benefit the most from in-person learning) rather than on the basis of marginalized identities. Early learners, for example, are still learning how to pay attention and regulate their own behavior, making it particularly difficult for them to benefit from online learning.²⁷² In addition, the stakes are especially high when it comes to literacy. Studies have shown that students who cannot read competently by third grade are up to four times more likely not to graduate high school.²⁷³ By including these students, who have a great deal to gain from in-person learning, districts could ensure that the students returning to campus represent a wider cross-section of identities and backgrounds. This approach essentially combines the third and fourth categories of in-person priority identified in Part II.A, using the more expansive understanding of “vulnerable” students under the Prince William County, Virginia, plan along with the inclusion of early childhood and transition years from plans like that of Montgomery County, Maryland.²⁷⁴

271. *Id.*; see also *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (emphasizing “the Act’s requirement that handicapped children be educated alongside non-handicapped children to the *maximum extent appropriate*” (emphasis added)).

272. NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 4, at 30 (“Elementary-aged children may struggle with distance learning, especially if an adult is not available to support them. This is the case especially for children in grades K-3, who are still developing the skills needed to regulate their own behavior and emotions, maintain attention, and monitor their own learning.” (citations omitted)); see also Nicole Wetzel, Andreas Widmann, Stefan Berti & Erich Schröger, *The Development of Involuntary and Voluntary Attention from Childhood to Adulthood: A Combined Behavioral and Event-Related Potential Study*, 117 CLINICAL NEUROPHYSIOLOGY 2191, 2201 (2006).

273. DONALD J. HERNANDEZ, ANNE E. CASEY FOUND., *DOUBLE JEOPARDY: HOW THIRD-GRADE READING SKILLS AND POVERTY INFLUENCE HIGH SCHOOL GRADUATION 3* (2011), <https://perma.cc/MM4A-PZ4J>.

274. See *supra* notes 160-61 and accompanying text.

Expanding in-person priority to a wider range of students might mean waiting longer to return to in-person instruction to ensure the safety of larger groups, but it is essential to create more integrated and inclusive learning environments.

Third, at a minimum, districts must guarantee an opt-out for all students offered in-person priority. Parents of medically fragile students and others may feel that in-person learning is unsafe for their child. These parents should be afforded the option to make that determination for themselves. Again, the commitment to more accessible virtual learning platforms would make this decision more feasible for some families.

Other factors also weigh in favor of an individualized approach to in-person priority. First, a student's IEP team is a natural venue that has already been constituted to make individualized determinations. Decisions between in-person and virtual learning require an assessment of how the pandemic is affecting a student's academic and behavioral progress. Aptly, the IDEA indicates that IEP teams are designed to evaluate "the academic, developmental, and functional needs of the child" and periodically review and revise IEP goals.²⁷⁵ Placement determinations are precisely within the scope of their review. Second, requiring an IEP team meeting in advance of the return to school could provide an important touchpoint facilitating communication between families and school districts. Any academic or behavioral regression could inform IEP goals or the addition of supports and services that reflect the new circumstances. Even for students who remain at home, this meeting could allow the family to share what has or has not been working in the virtual environment and propose accommodations to enhance continued virtual learning.²⁷⁶ Ideally, setting a statutory timeline, such as requiring districts to convene IEP teams within thirty days from the announcement of in-person priority, would prevent delays in the transition to in-person learning.²⁷⁷

One counterargument for the individualized approach is that a bright-line approach to identifying students for in-person learning could prevent abuse of the system. By removing the potential for subjectivity, a bright-line rule could limit the influence of bias and prevent inappropriate denials of services to

275. 20 U.S.C. § 1414(d)(3)(A).

276. This is consistent with the Department of Education's recommendation that schools update IEPs to reflect changes in the method of providing special education or services. OFF. FOR C.R., *supra* note 155, at 5-6 ("School districts should therefore continue to make individualized determinations as to whether students' IEPs or Section 504 plans need to be revised . . . including by identifying how the special education or related aids and services . . . may be provided through a variety of instructional methods and settings.").

277. This timeframe is comparable to the requirement that IEP teams convene to develop an IEP within thirty days of determining that the student is eligible for special education services under the IDEA. 34 C.F.R. § 300.323(c)(1) (2020).

students who truly require in-person classes to learn. This is an important consideration, but it must be weighed against the fact that this is a categorical move toward a more segregated environment. In-person learning may be essential for many students with disabilities, but these students also deserve the opportunity to interact with their general-education peers. This method of removing subjectivity is not an automatic improvement. An individualized determination would facilitate the diversification of in-person cohorts, creating more integrated learning environments that benefit all students.

D. Expand Compensatory Education and Extended School Year Services

Finally, districts must recognize that providing selective in-person learning does not compensate for learning loss accrued throughout spring 2020 and the 2020-2021 school year. In-person priority policies may have served as an attempt to mitigate the continuation of learning loss, but compensation still needs to take place. In fact, the IDEA grants courts the authority to issue “such relief as the court determines is appropriate” when a school district does not provide FAPE to students with disabilities.²⁷⁸ Compensatory education and extended school year (ESY) services are two such forms of relief that districts must be prepared to provide in coming years as the full effects of COVID-19 school closures continue to manifest.

Compensatory education developed as a concept through case law.²⁷⁹ It has been defined as prospective services provided to compensate for past deficits in the provision of FAPE.²⁸⁰ Compensatory education can take many forms including increased frequency of related services,²⁸¹ reimbursement for additional tutoring,²⁸² extended school year services,²⁸³ and continuing to

278. 20 U.S.C. § 1415(i)(2)(C)(iii).

279. Pete Wright & Pam Wright, *Compensatory Education Case Law from the Beginning Through Draper in 2008*, WRIGHTSLAW, <https://perma.cc/4KDY-FLUW> (last updated Jan. 3, 2021).

280. Hogan v. Fairfax Cnty. Sch. Bd., 645 F. Supp. 2d 554, 571 (E.D. Va. 2009); *see also* RG *ex rel.* G v. Fort Bragg Dependent Schs., 343 F.3d 295, 309 (4th Cir. 2003).

281. *See, e.g.*, Diatta v. District of Columbia, 319 F. Supp. 2d 57, 68 (D.D.C. 2004) (issuing a compensatory-education order including “direct provision . . . of one-on-one ABA service therapy for 40 hours per week and any other reasonable costs and fees that are necessary for the provision of these services”).

282. *See, e.g.*, Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 669 F. Supp. 2d 80, 87 (D.D.C. 2009) (conferring an “award of 950 hours of tutoring in broad math and 950 hours of tutoring in broad reading, in addition to the tutoring already received by Nesbitt”); M.P. v. Campus Comm. Sch., No. 16-151, 2018 WL 4926448, at *8 (D. Del. Oct. 10, 2018) (calculating a compensatory-education award for both specialized and nonspecialized tutoring services).

283. *See, e.g.*, Hogan v. Fairfax Cnty. Sch. Bd., 645 F. Supp. 2d 554, 575 (E.D. Va. 2009) (granting “an award of eight weeks of summer-level education” based on the IEP team’s
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provide education beyond the standard age of eligibility.²⁸⁴ Federal guidance on COVID-19 has indeed called on districts to make individualized evaluations of need for compensatory education.²⁸⁵ Such assessments are subject to established precedent. Courts have held that determination of compensatory education must be individualized and fact specific.²⁸⁶ That inquiry should result in services designed “not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.”²⁸⁷ The Eleventh Circuit, for instance, has held that such compensation “should place children in the position they would have been in but for the violation of the Act.”²⁸⁸ Timely and meaningful access to compensatory education will be essential in the year ahead given the extent of deficiencies in the provision of FAPE during the COVID-19 school closures.

ESY services can be included in an IEP as a component of providing FAPE or utilized as a form of compensatory education designed to remedy denial of FAPE. They are services provided to students with disabilities beyond the typical school year at no cost to the child’s parents.²⁸⁹ ESY emerged from *Battle ex rel. Battle v. Pennsylvania*, where a class of children with intellectual and physical disabilities alleged a denial of FAPE due to the state’s policy limiting class time to 180 days.²⁹⁰ This case considered both demonstrated loss of skills along with the extended time it would take to recoup the loss, establishing the foundational regression/recoupment analysis that ESY cases have continued to build upon since.²⁹¹ Since then, the factors used to justify ESY have expanded

determination that “the Student ‘will regress in her academic skills’ if not enrolled in an extended school year program” (quoting the record)).

284. See, e.g., *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) (“In order to give meaning to a disabled student’s right to an education between the ages of three and twenty-one, compensatory education must be available beyond a student’s twenty-first birthday.”); see also Robert K. Crabtree, *Compensatory Education when IEP Services Are NOT Delivered*, WRIGHTSLAW, <https://perma.cc/F82L-LAKA> (archived Nov. 4, 2021).

285. See OFF. FOR C.R., *supra* note 7, at 3 (“If a student does not receive services after an extended period of time, the student’s IEP Team . . . must make an individualized determination whether and to what extent compensatory services are needed . . .”); U.S. DEP’T OF EDUC., *supra* note 6, at 2 (“In addition, an IEP Team . . . would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.”).

286. See, e.g., *Reid ex rel. Reid v. District of Columbia.*, 401 F.3d 516, 524 (D.C. Cir. 2005).

287. *Davis ex rel. B.D. v. District of Columbia.*, 817 F.3d 792, 798 (D.C. Cir. 2016).

288. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1289 (11th Cir. 2008).

289. 34 C.F.R. § 300.106(b) (2020).

290. 629 F.2d 269, 270-71 (3d Cir. 1980).

291. *Id.* at 275; see, e.g., *Cordrey ex rel. Cordrey v. Euckert*, 917 F.2d 1460, 1474 (6th Cir. 1990) (modifying the regression/recoupment analysis to allow individual professional assessment to prospectively inform whether ESY is “necessary to prevent significant regression”); *Johnson ex rel. Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1027-29

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considerably. *Reusch v. Fountain* offers the most expansive view, adding five other factors to the regression and recoupment analysis: (1) progress on life skills; (2) the presence of emerging skills; (3) the existence of interfering behaviors; (4) the nature or severity of the disability; and (5) special circumstances that would prevent educational progress during the school year.²⁹² These criteria have been so influential that they are now used by most courts.²⁹³

Considering that the abrupt elimination of instruction and services along with extraordinary learning loss for many students present such a strong case to establish a denial of FAPE, districts should be prepared to implement both compensatory education and ESY in coming years. Consistent with federal guidance, some states have issued emergency orders requiring team meetings for all students with an IEP to consider whether compensatory education or ESY is warranted.²⁹⁴ However, states should go further to ensure that these services are provided to all students with disabilities in an expedient manner.

First, because compensatory education is frequently subject to delays and rejections,²⁹⁵ states should address procedural issues in the approval and assessment process. This should include proactively developing data collection protocols to calculate progress or regression for all students and thereby ensure accurate calculation of compensatory education and ESY services.²⁹⁶ States could also consider establishing a presumption that all students with disabilities receive compensatory and ESY services to account for COVID-19-

(10th Cir. 1990) (building on regression/recoupment analysis to include both predictive and retrospective data); *N.B. ex rel. C.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1210-1212 (9th Cir. 2008) (affirming the district court's use of regression/recoupment analysis).

292. No. 91-3124, 1994 WL 794754, at *4-5 (D. Md. Dec. 29, 1994).

293. Phyllis E. Brown, *Educating Students with Disabilities*, in 2 EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 6.8 (Ronna Greff Schneider ed., 2019).

294. See, e.g., State of N.H. Off. of the Governor, Emergency Order #48: Special Education Requirements to Support Remote Instruction (2020), <https://perma.cc/243A-JJRB>; State of Fla. Dep't. of Educ., DOE No. 2020-EO-06, Emergency Order (2020), <https://perma.cc/WPG3-LFLZ>.

295. See Heather J. Hult, *The Problem with Compensatory Education as an IDEA Remedy and the Solution*, LEGAL INTELLIGENCER (Mar. 18, 2020), <https://perma.cc/EW7Z-NYPK> (highlighting the importance of greater data collection to target resources where they are most needed).

296. See Beth Tarasawa, *COVID-19 School Closures Could Have a Devastating Impact on Student Achievement*, NWEA: TEACH. LEARN. GROW. THE EDUC. BLOG (Apr. 9, 2020), <https://perma.cc/FZ6X-38W2>.

related denial of FAPE.²⁹⁷ Such a policy would guarantee that all students with disabilities seeking these services will receive some support, while preserving an individualized determination of what services are provided and the amount of hours. Rather than requiring individualized demonstration of regression, this would recognize the widespread failure to provide complete educational services during 2020 and 2021 school closures and focus attention on the specific needs of each student. Ultimately, implementing a presumption of entitlement to compensatory and ESY services would reduce time, expense, and stress for families already struggling to cope with a global pandemic. Next, states should address inefficiencies in the implementation process after compensatory education and ESY services have been determined. This could include establishing a separate staff position tasked specifically with implementing compensatory education and ESY services, relieving the burden from special education coordinators who already have increased workloads as they attempt to meet the FAPE requirement in a COVID-19 environment.²⁹⁸

A significant practical concern in implementing these changes is the additional funding needed to enable more students to access these services commensurate with increased demand. In the short term, the American Rescue Plan Act of 2021 provides an influx of funding that could contribute to these efforts. The American Rescue Plan directs \$122.8 billion toward the Elementary and Secondary School Emergency Relief Fund.²⁹⁹ Of that funding, LEAs must spend at least \$22 billion on strategies that respond to “lost learning time,” and states are required to dedicate an additional \$6.1 billion “to address learning loss” as well.³⁰⁰ Dedicated funding to expand access to compensatory education and extended school year services would be one meaningful way to allocate these new funds. Ultimately, while these proposals put additional financial and administrative burdens on states and school districts, in the words of the *Reusch* court, “[i]n any contest between systemic efficiency and the provision of a FAPE to a disabled child, Congress and the Supreme Court have made clear that the child must prevail.”³⁰¹ With that call to action in mind, policymakers must proceed with an unwavering commitment to meet the educational needs of each child.

297. See Letter from Malhar Shah, Staff Att’y, Disability Rts. Educ. & Def. Fund, et al. to California Governor Gavin Newsom et al. (Aug. 21, 2020), <https://perma.cc/Z8Q4-9JEB>.

298. Hult, *supra* note 295 (“[U]sually it is the director of special education who directly handles requests for compensatory education payments from parents . . . on top of all of their other duties . . .”).

299. Griffith, *supra* note 22.

300. *Id.*

301. *Reusch v. Fountain*, 872 F. Supp. 1421, 1432-33 (D. Md. 1994).

Conclusion

The unprecedented effects of COVID-19 school closures will have consequences for years to come. In the face of extraordinary challenges and uncertainty, schools have sought to develop new strategies to serve students with disabilities more equitably. Indeed, some districts have identified in-person priority for select populations as one avenue to pursue. These efforts to provide in-person learning for students facing the most significant barriers to virtual learning have intuitive appeal. Undoubtedly, the goal of returning multiply marginalized students to physical classrooms should remain a high priority. However, by interrogating “the historical, social, political and economic interests of limiting access to educational equity to students of color with dis/abilities” pursuant to dis/ability critical race studies, this Note has identified crucial inequities in existing proposals.³⁰² The segregated environments that schools create violate the least restrictive environment requirement of the Individuals with Disabilities Education Act, impose academic, social, and physical harm on students removed from mainstream classrooms, and threaten to exacerbate disciplinary disparities. To correct these flaws, this Note has recommended strategies to improve access to virtual learning, eliminate exclusionary discipline, create individualized forms of in-person priority, and expand access to compensatory education and extended school year services. Through these policies, schools can develop more equitable school reopening models that enable students with disabilities to achieve their fullest potential.

302. Annamma et al., *supra* note 30, at 7.