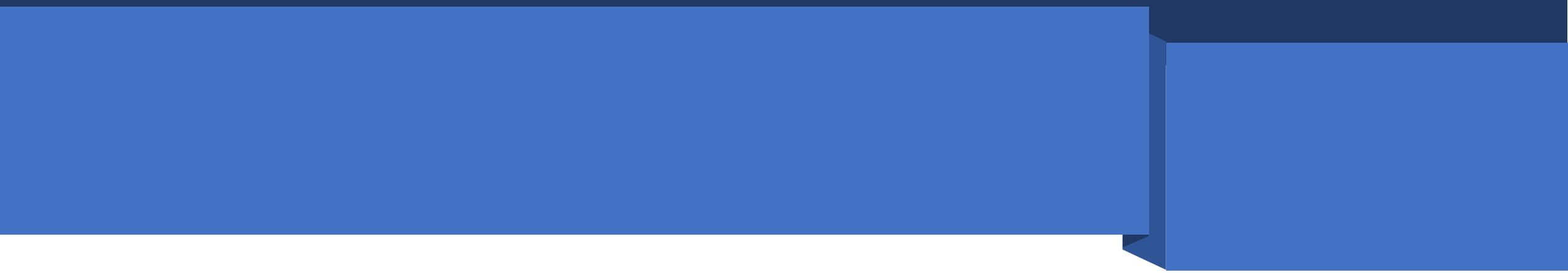


No Waivers of IDEA
Congress (still) hasn't
acted

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WHAT DISPUTE RESOLUTION IS SEEING

- State complaints: 9 out of 63 SC alleged an issue related to COVID
 - Service delivery and timelines most common
- Due Process hearing requests: 4 mentioned an issue related to COVID but none were exclusively based upon a COVID related issue
 - Issues relate to online not providing a FAPE

OCR Updates

- UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS
- September 28, 2020
- Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment

OCR Q & A #1:

- Question 1: May a school district require parents to sign waivers before the district delivers online services to students with disabilities under Section 504?
- Answer: No. Public school districts may not require parents of students with disabilities to waive any rights afforded to students under Section 504 as a condition of receiving a FAPE.

What does this mean?

Waivers, either those specifically asking a parent to waive their rights or the rights of the child under Section 504 or IDEA are not allowed.

By extension, if a district is asking parents of all students to sign a “waiver” of liability before coming onto a campus for learning, and if a parent refuses to sign and the child is denied access to services / their IEP then the waiver provision is a barrier to a FAPE.

HAS NOT BEEN LITIGATED

OCR Q & A #3:

- Question 3: Under what circumstances must a school district waive a face covering requirement for a student with a disability?
- Answer: In recent guidance, the Centers for Disease Control and Prevention (CDC) has advised school districts to address adherence to behaviors that prevent the spread of COVID-19 as a part of their reopening plans, including the appropriate use of cloth face coverings. **The Department understands that using a face covering can be challenging for some students, teachers, and staff, especially those students with special educational or other healthcare needs. And in some instances, such as where a child with a disability has extreme sensory issues and cannot tolerate wearing a face covering in school or at all, OCR also recognizes that enforcing a face covering requirement could impede the child's ability to receive the FAPE required by Section 504.**
- School districts should therefore make reasonable modifications in their policies, practices, or procedures—including any addressing the use of face coverings—when those modifications can be made consistent with the health, safety, and well-being of all students and staff, and are necessary to avoid discrimination on the basis of disability. For tips and suggestions for helping younger students safely use face coverings, OCR encourages school districts to consult the Office for Special Education Program's resources related to COVID-19.

BOTTOM LINE

If a student cannot wear a face mask, then a “work around” should be found. (face shield, behavior plan, teacher wearing more effective PPE, desk shield, etc.)

Health and safety is still a priority

Class Action Cases

- At least three class action lawsuits have been filed alleging that the IDEA was violated when IEPs were not fully implemented as written during school closures due to the pandemic.
- One of the lawsuits was filed against every state and local school district in the country on July 28, 2020 in New York Federal District Court. See J.T. v. De Blasio. Other class action lawsuits were filed in Hawaii (W.G. v. Kishimoto), Pennsylvania (James v. Wolf) and California (Brach v. Newsom)
- Outcome in NY: Judge DISMISSED the case as to all defendants, both in and out of state.

TRENDS

- Attorneys bypassing the traditional due process procedures and requesting injunctions or restraining orders in federal court.
- Claims based not on the IDEA but on the 14th amendment or state constitutional provisions related to the provision of education.
- More attempts at class action or multi plaintiff (petitioner) claims