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April 17, 2020

Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Ave, SW  
Washington, DC 20202

Dear Secretary DeVos:

The National School Boards Association (NSBA) urges you to support public school districts as they strive to serve all students in this extraordinary time.

For over seven decades, NSBA has advocated for equity and excellence in education. NSBA is committed to serving all students including those with special needs. We have championed the Individuals with Disabilities Education Act and advocated for full funding of IDEA for years.

The recently enacted Coronavirus Aid, Relief, and Economic Security Act (CARES Act) requires the U.S. Secretary of Education to report to Congress with recommendations for needed flexibilities on the Individuals with Disabilities Education Act (IDEA), as well as the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) and other federal statutes within thirty days. To assist you in that effort, we provide insights from school districts across the nation. Public schools are implementing distance learning at unprecedented levels due to the pandemic, while maintaining their efforts to provide meals and other critical supports to students and families. School boards are supporting the efforts by school staff to design instruction and services to meet all students' needs to the extent feasible.

Mandated school closures and health and safety recommendations outside the school's control have changed the delivery of services to all students – those with and those without disabilities. Some components of special education – such as occupational or physical therapy that involved teaching by manipulating a student's hands or limbs – simply cannot be performed without violating state and local stay-at-home orders and placing students, staff, and their families at risk of contracting the virus.



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The guidance recently provided by the U.S. Department of Education (ED) regarding students with disabilities is limited in scope and does not fully address all the challenges school districts are facing to continue services for children with disabilities. School districts are fielding concerns and complaints because of difficulties caused by the pandemic and need these issues to be addressed by the Secretary through narrowly tailored and temporary targeted flexibilities during this unprecedented situation.

Below are a few examples of the challenges not addressed by the previous guidance:

- School districts are struggling to provide the appropriate number of therapy minutes prescribed in Individualized Education Programs (IEP). For instance, under normal circumstances, a speech-language pathologist might see four kindergarten students in group therapy if the students have the same articulation issue. Teletherapy may not be appropriate, or possible, for a group and may have to be delivered individually. Flexibility on the number of minutes of therapy provided under these circumstances is necessary.
- Numerous services provided within an IEP cannot be provided currently because of public health directives. Students with disabilities can be the most vulnerable during this health emergency. Any possible exposure from outside individuals such as special education professionals conducting home visits could risk the health of the students, their family, and the staff. School districts are encountering challenges that are interrupting the delivery of certain special education services such as confidentiality protections for students regarding services delivered online; public health directives preventing certain physical therapies and home-based services; shortages of qualified staff caused by health and safety concerns; closure of school buildings where certain equipment and technology is housed and cannot be relocated; and lack of Internet access and/or necessary hardware to connect service providers and instructional staff to students.
- Free Appropriate Public Education (FAPE) looks very different when students are not in school buildings. We ask the Department to provide clear confirmation that the standard for FAPE used by state education agencies and courts -- providing services that are “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances” -- necessarily must take into account the context of this national emergency. Consistent with the Department’s March 21, 2020, guidance stating “schools may not be able to provide all services in the same manner they are typically provided,” NSBA asks that the Secretary make clear that school districts will not be liable for failure to provide FAPE during the period of COVID-19 shut downs if they are making good faith efforts to provide it.
- School districts are struggling to meet IDEA timelines, particularly those for evaluations and re-evaluations, without in-person access to students. Many standardized testing methods cannot be completed with validity over electronic platforms. Evaluations that require classrooms observations, such as Functional Behavioral Assessments, cannot be completed



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while students are participating in remote instruction. School districts need flexibility to extend initial and re-evaluation deadlines to complete these evaluations with fidelity. To that end, many school districts have asked whether they can reach mutual agreements with parents to extend the evaluation timelines. We request clarification from the Department of Education that such mutual extensions are acceptable under IDEA.

- The lack of adequate home internet access by millions of children, including students with disabilities, adds to the challenging situation schools face as they try to deliver quality learning to all students during the pandemic. This inequity of access, commonly known as the homework gap, has existed for years, but it is now being exacerbated by the COVID-19 pandemic. There are many students with disabilities that lack crucial home access making it impossible for them to receive online learning being provided by school districts. For some disabled students, it is the lack of internet access, and not their specific disability, that makes these services difficult to provide under these extraordinary circumstances.

The Institute of Education Sciences (IES), an arm of the National Center for Education Statistics, released a report in 2017 focused on student broadband access when they were away from school and at home. The report found large gaps in both home connectivity and access depending on the racial and ethnic background, economic status, and location of a students' family. Further, the study found there were pockets of poor or no access in urban, suburban, and rural areas with remote rural areas being particularly impacted. Historically underserved students such as those from lower income families and minority students had worse connectivity on average than other students. This inequity that has existed for many years makes it impossible to provide some services during the move to online learning without major assistance from the federal government. This digital divide is not the fault of school districts, it is the fault of society and government for failing to adequately build out this important connectivity for all Americans.

- School districts are attempting to provide services to private school students pursuant to their Individualized Service Plans during the term of the school closures, but there are difficulties in accessing these students. School districts would like clarification as to their responsibilities for implementing Individualized Service Plans during the school closures and the alternatives available to public school districts, non-public schools, and families because of extenuating factors from this pandemic that have inhibited the scope of activities regularly provided via Individualized Service Plans during this time.

School districts do not have guidance on legal standards that will apply to claims for additional services once school buildings are open. NSBA requests that the Department stress the need for clear standards, avoiding the use of the phrase "compensatory education" in describing the obligation where a state-mandated change in school operation occurs due to a public health emergency. Compensatory education is given when a student's IEP services are not provided or if there is a denial of FAPE. It is a remedy for a failure on the part of the school system. That is not the case here. Some students may not be able to access online learning during the closure period and their FAPE will be imperfect. But every student's

  
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education will be imperfect for some time period, through no fault of the local schools. As our districts work diligently to recover from this pandemic -- and work to ensure the safety and wellbeing of both students and employees – recovery efforts for special education services is a priority.

- We believe that guidance and flexibility is necessary to clarify that: (1) compensatory education will be the exception and not the rule; (2) there will not be an assumption that students were denied FAPE because of lack of instruction/service during the closure; (3) IEP team meetings for determining compensatory education will be required only if school staff have reason to suspect that the student did not receive meaningful educational benefit in light of the student's unique needs and circumstances because of the COVID-19 shut down; (4) when determining whether compensatory education is needed, school officials and IEP teams should consider the student's overall progress during the entire IEP year and not just whether the student received services during a move to virtual learning; and (5) compensatory education does not require minute-for-minute make up for time or services not provided during a closure.

We ask the Department to determine that **the standard should be whether the LEA made a good faith effort** to provide special education and related services to the extent possible given the extraordinary measures that are being taken by public health authorities to stop the spread of COVID-19. To expect LEAs to provide every element of a child's IEP is not possible under the circumstances; and, to allow parents and attorneys to flood the system with due process complaints when the whole country, including LEAs, is going to be resource challenged next year when school resumes will overwhelm the system.

While this list is by no means exhaustive, it represents the types of issues those on the front lines are confronting every day.

**We urge the Department to provide school districts targeted, temporary, and narrowly tailored flexibility that takes into consideration the realities of dealing with the COVID-19 pandemic as they continue to act in good faith to provide appropriate special education and related services to students with disabilities to the extent feasible during this crisis.**

Upon the resumption of normal school operations, school districts look forward to uninterrupted delivery of special education and related services in the amount and type required by a student's Individualized Education Plan. Targeted flexibility to districts would be discontinued following any federal, state, and local clearances needed for a district to resume its normal schedule and delivery of education services.

NSBA and our state associations applaud the resiliency of our school boards, educators, students, families and school districts during this challenging time. Our school boards appreciate the diligence of our educators and staff to ensure that many of our students are receiving online instruction and nutritious meals, as well as other supports to continue numerous educational

  
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services. Public school districts are committed to the success of our students, have worked quickly to transition to online learning, and have gone above-and-beyond to provide homework packets to students who lack access to the internet and adequate technology. We have learned about many educators working all hours to continue communications with students, especially those served through IDEA. This steadfast commitment of our educators and school districts is extraordinary.

Sincerely,



Thomas J. Gentzel  
Executive Director & CEO  
National School Boards Association