
April 6, 2020

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202-7100

Mark Schultz
Acting Assistant Secretary, OSERS
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202-7100

Dear Secretary DeVos and Acting Assistant Secretary Schultz:

We submit this letter on behalf of New Jersey Special Education Practitioners (NJSEP), an association of 100 attorneys and advocates who represent parents and students with disabilities in special education matters, and NJSEP's founder and moderator, Education Law Center (ELC), an educational advocacy organization dedicated to school funding equity and the protection of student rights. We address the directive that the Secretary of Education submit, within 30 days of enactment of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a report to Congress with recommendations of any additional waivers the Secretary deems necessary under the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act of 1973 (Rehab Act) and other education laws. NJSEP and ELC stand unified that **NO waivers are needed under either the IDEA or the Rehab Act.**

NJSEP and ELC recognize that school districts, parents and students across the country are dealing with a new reality due to the unprecedented global crisis brought on by COVID-19. This is not the time, however, to give school districts the right to unilaterally waive IDEA or Rehab Act timelines or other requirements.

Students with disabilities are always best served when school leaders, teachers, specialized instructional support personnel, parents, students and advocates work as a team to address complex issues. The COVID-19 crisis is challenging, but all the more reason why parents, schools and advocates need to use the collaboration and flexibility offered by IDEA to determine how to meet the individual needs of students. NJSEP and ELC believe firmly that this is not the time to roll back civil rights protections for students with disabilities. **We therefore**

request that the Secretary of Education refrain from asking Congress to provide her office with waiver authority under IDEA or the Rehab Act.

Instead, the U.S. Department of Education must enforce, and Congress must uphold, the following principles:

1. Local School Districts must continue to provide Free Appropriate Public Education (FAPE) to students with disabilities.

Case law has established that the obligation to provide FAPE continues when schools are closed for teachers' strikes or other reasons, and we believe that obligation extends to school closure due to COVID-19. Existing federal disabilities law already provides flexibility in determining how to meet the unique needs of students with disabilities. Given the COVID-19 crisis, school districts may not be able to provide services in the same manner they did in the past. Under these circumstances, the law allows districts to provide services virtually or telephonically.¹ School districts need to ensure students have the technology and internet access necessary to engage in virtual learning. If access to virtual learning is not feasible despite best efforts, then school staff can reach out by telephone and send paper materials home for students. In all cases, the child's Individualized Education Program (IEP) team, including the parent, will need to determine once school reopens whether compensatory services are warranted.

2. Parents should continue to be involved in decisions pertaining to initial evaluations, reevaluations and implementation of, or changes to, their child's IEP.

IDEA requires parent involvement in decisions pertaining to evaluations and the provision of special education services. IDEA anticipates that it may not always be feasible for parents to participate in-person and that the parties may agree to alternate means of participation, including through conference calls and video conferencing. IDEA also allows for parents and school districts to agree to amendments to an IEP without the need for a meeting as long as the parent agrees to the amendment and a written document is created, signed by the parent, and attached to the IEP document.

With regard to conducting initial evaluations or reevaluations, any concerns in this area may also be addressed through cooperation between parents and school districts. Some assessments can be conducted remotely. Parents and school districts can agree to go forward with the assessments that can be conducted remotely and once they are completed, the parties

¹ See U.S. Dep't. of Educ., Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities (March 21, 2020), available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.

can meet remotely to discuss findings and develop or revise IEPs as needed. When schools reopen, other needed assessments can be conducted and the IEP revised if necessary.

Thus, IDEA already allows for needed flexibility for parents and schools to work together during this time, whether remotely or through written agreements. There is no need for U.S. Department of Education to seek waivers for school districts. Rather, it is more important than ever that parents be a part of any decisions regarding their child. Parent participation is a key component of IDEA and must remain intact.

We understand that some have interpreted current information from your office (*Questions and Answers on Providing Services to Children with Disabilities During the Corona Virus Disease 2019 Outbreak, March 12, 2020*) to require that every school district change the child's placement to the home after ten days of school closure. We do not believe this is warranted and are concerned that it would cause confusion as to whether the home environment is the stay-put placement once schools reopen. We instead support leaving the IEP that existed before the school closure in place. If there is concern that the IEP document does not sufficiently describe how services will be provided while school buildings are closed, a virtual or telephonic meeting with IEP team, including the parent, can be held and a separate document prepared to address only the remote learning. Of course, when an IEP cannot be fully and effectively implemented when schools are closed, the IEP team including the parents must subsequently decide whether compensatory services are needed.

3. Parents' due process and mediation rights must remain intact.

Whenever possible, we urge all parents and school districts to work together to resolve issues that arise during this crisis. No one wants to see unnecessary and time-consuming litigation. There is absolutely no justification, however, for extending complaint timelines. It is ironic to even consider extending timelines in New Jersey as even before this crisis, the U.S. Department of Education found New Jersey non-compliant with respect to IDEA's requirement for completing due process hearings within 45 days.

Mediations, resolution sessions and due process hearings can all be conducted remotely. In fact, it may even be more efficient to conduct them remotely as there is less travel time for the participants.

4. Use of Federal education funds must adhere to the IDEA, the Rehabilitation Act, the American with Disabilities Act and other civil rights laws.

Some districts in New Jersey are better equipped and able to provide the technology and internet access needed to educate students virtually. Others lack the financial resources. Rather than seeking waivers, please ask Congress to protect the civil rights of students and provide additional funding to states and public school districts so they can make every effort to educate students appropriately during this time of crisis.

In sum, NJSEP and ELC urge you not to seek any waivers of IDEA and the Rehab Act, but rather continue to protect the civil rights of students with disabilities.

Sincerely,

A handwritten signature in blue ink that reads "Elizabeth Athos". The signature is written in a cursive style with a large initial "E".

Elizabeth, Athos, Esq.
NJSEP Moderator
ELC Senior Attorney

Via Electronic Mail

cc. Laurie VanderPloeg, Director, Office of Special Education