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David Cantrell, Acting Director
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U.S. Department of Education
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Re: Serving Students with Disabilities in the Pandemic and Beyond

Dear Dr. Cantrell:

We appreciated the opportunity to meet with you and your team to discuss areas of challenge for public schools and families of students with disabilities in this extraordinary era of pandemic-related school closures. Here, we add some details to our discussion, building on our members' main concerns and the questions you raised. We look forward to working with the Department as it provides technical assistance and guidance to the field in this area.

**Pandemic-Related Recovery Services for Students with Disabilities:
Realities and Proposed Solutions**

NSBA urges the Department to inform states of their ability to use state ARP funds to innovate and create programs at the state level that fund compensatory services with the aim of ensuring prompt service delivery to children while at the same time trying to insulate schools from prospective litigation. To that end, NSBA asks the Department to:

1. Encourage collaboration between schools and families;
 2. Describe what “FAPE” means in the pandemic era; and
 3. Promote state-based routes to recovery services so that funds are used to educate children, not litigation.
1. Messaging from the Department should focus on collaboration between families and schools, how to meet the child’s current needs, and how to use federal funding support to do it.

Public schools across the nation are collaborating with families of students with disabilities to address their current needs after a very unusual year. Now that federal funding is available to help students resume in-person education, families and schools should be working together to deploy those dollars as quickly as possible to meet students where they are, and to get them the services they need now. We believe the Department can model and encourage a forward-looking approach that stresses collaboration between schools and families, not litigation.


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With strong messaging and meaningful guidance from the Department, we believe this positive momentum can be sustained. Schools and families, encouraged by federal and state policy, can revise IEPs and Section 504 plans that focus on services to be provided in the coming year and beyond, and can dedicate financial resources to those efforts. When families are satisfied with the services provided and efforts made by their school districts, they are unlikely to pursue due process complaints and litigation, which drain local districts of their own scarce resources.

We ask that, as the Department issues guidance on uses of new funds and services to be provided, it consider terminology. The services students need now and going forward, in the wake of unprecedented school closures, are crucial. School leaders, their attorneys, and even some attorneys working with families of students with disabilities now refer to these crucial services as “recovery,” not “compensatory.” The latter is a legal term of art developed in the case law based on one sentence in the IDEA statute permitting a court hearing an IDEA case to “grant such relief as the court determines is appropriate,”¹ and mentioned in the regulations as one way a state could order a remedy for a FAPE violation.² We speak in terms of “recovery” because “compensatory” by definition connotes services ordered by a hearing officer or court to make up for a district’s failure to provide FAPE. It is a remedy for a legal deficiency³ and carries with it the potential for attorney’s fees, that, unlike special education funds, flow from a school district’s general revenue. Litigation over “compensatory” education or services⁴ could therefore have the unintended adverse impact of decreasing school funds generally available to deliver educational services to all students.

We urge the Department to issue guidance and technical assistance that encourages innovative approaches to providing services to students and discourages disputes and due process as a means to obtain services. The less resources school districts must dedicate to dispute resolution, the more they have to serve students.

2. The Department should encourage states to apply a pandemic-era FAPE standard that holds LEAs responsible for good faith efforts to provide special education and related services given the extraordinary circumstances.

Since the pandemic began, the Department has recognized the challenge schools faced in providing services to students with disabilities amid state and local closure orders, and has stressed that it “does

¹ 20 U.S.C. §1415(i)(2)(C)(iii).

² 34 C.F.R. §300.141(b)(1).

³ A member of the Counsel of Parent Attorneys and Advocates urged that group’s members not to rely on the “compensatory education” concept “to remedy the damage done to our kids during the period of COVID-19 school closure. ‘Comp Ed’ are fighting words. By talking that language, we are creating a confrontational posture with school districts and we are misleading our clients. Compensatory education is not the right analytic framework for this situation. School districts and courts generally regard compensatory education as a remedy for a denial of a free appropriate public education, either in the design of the educational program or in its implementation. The term is freighted with notions of fault and wrongdoing. Although the statutory basis for compensatory education does not support this connotation, it clearly exists...” <https://www.copaa.org/blogpost/895540/COPAA-Blog>.

⁴ “Compensatory education” and “compensatory services” are used interchangeably here, as most courts refer to either or both in reference to the same remedy.

not want to stand in the way of good faith efforts to educate students on-line.”⁵ The Department has reminded LEAs through guidance that FAPE is still required, but it may be achieved through distance instruction.

NSBA welcomes this flexibility and urges the Department, as it guides LEAs into the post-emergency pandemic era, to continue to recognize school districts’ good faith efforts to serve students in the midst of unprecedented operational challenges, and to encourage states to do the same. State-level due process hearing officers should approach pandemic-era complaints with pragmatic standards rather than overly legalistic ones, just as schools employed practical and innovative approaches to ensure continuity of learning when school buildings were physically closed.

Below are examples of some of the pragmatic solutions schools and families employed during pandemic-related closures that should be recognized as good faith solutions aimed at providing FAPE in a manner consistent with the current safety requirements:

- As early as spring and summer of 2020, school districts in several states provided in-person learning opportunities to students with disabilities, focusing on those with the most involved needs. In Indiana, this occurred as early as August 2020 after some schools determined that the remote learning approaches, while successful in the short term, needed to shift to in-person learning for students facing intense behavioral challenges to continue to ensure the required outcomes.
- In Wisconsin, as in many states, a number of school districts faced challenges serving students whose medical conditions precluded them from coming to a school building, and also precluded outside aides coming to the students’ home for in person services. Many of these students also could not participate virtually without a parent next to them. This made it almost impossible for such students to receive services when parents were working during the day. Those districts brainstormed solutions so students would continue to receive services.

⁵ U.S. Department of Education Office for Civil Rights and Office of Special Education and Rehabilitative services, Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, March 21, 2020, <https://sites.ed.gov/idea/idea-files/supplemental-fact-sheet-addressing-risk-covid-19-preschool-elementary-secondary-schools-serving-children-disabilities-march-21-2020/>. “In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.” *Id.*

See also, U.S. Department of Education Office of Special Education and Rehabilitative services, Office of Special Education Programs, OSEP QA 20-01, September 28, 2020, <https://sites.ed.gov/idea/idea-files/part-b-implementation-idea-provision-services-current-covid-19-environment-qa-document-sept-28-2020/>. “However, OSEP reminds SEAs and LEAs that no matter what primary instructional delivery approach is chosen, SEAs, LEAs, and individualized education program (IEP) Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities.”

- One district used flex time so that a paraeducator, who was working under the supervision of the special education teacher, could meet virtually with the student and parent before and after the parent's work hours and on the weekends. As part of their time together, the paraeducator and student would watch recorded lessons done by the special education teacher. This allowed the paraeducator to stop the lesson, talk about it, interact with the student, etc. It kept the students progressing even when they could not participate virtually during school hours.
- Another district found a solution to serve students who could come into school but could not participate with other students. In those cases, the district kept one room sanitized and without other students. The student with medical needs spent time in that room zooming into the class or small group lesson with a paraeducator in the same room, often behind plexiglass, helping the student with his or her participation. This worked especially well when students who faced challenges with expressive and receptive language, as the paraeducator could be there to explain and assist immediately.
- We also note that many districts found it particularly challenging to educate students with behavioral disabilities in school using the methods described in pre-pandemic IEPs, especially when students could not keep masks on or maintain social distance, and when they had frequent behavioral outbursts. To keep the children in school as much as possible, school districts employed options such as separate, sanitized spaces at the school from which students could zoom into class for all or part of the day, or attend school at least part-time as they transitioned back to the classroom so that the students could continue to make progress. When students were outside for recess or in a large gym, the student was able to be with peers. Transitioning a student into the school environment sometimes took time, and solutions such as a shortened school day carried some legal risk for districts, as hearing officers or courts could view that as a violation of the letter of a child's IEP. But some schools chose to take the risk so that students could achieve even a small amount of progress.
- School districts also sent school staff to the homes of students with disabilities. During the earlier months of pandemic-related school closures, staff would not go into the house but would sit in the garage, driveway, yard, or other ventilated open area. After COVID tests became available widely, some districts began to allow in home direct services.

We urge the Department to issue guidance identifying these and similar scenarios as examples of good faith attempts to provide FAPE, of which hearing officers and courts should take notice.

At the same time, we urge the Department to make clear that parent unilateral placement of students in private schools, especially those not accredited by the state, must be assessed under IDEA's current requirements and case law precedent. We urge the Department to issue guidance discouraging hearing officers and courts from requiring, or awarding reimbursement for, private placements – especially to unaccredited institutions – absent a showing that there was no good faith effort to serve the student pursuant to his IEP.

Finally, we recognize that challenges remain. While schools remain ready to provide services, the reality is that there continues to be a shortage of qualified staff to provide services to students with disabilities. The pandemic has exacerbated this shortage. In some states, collective bargaining agreements negotiated pre-pandemic have limited the ability of school districts to build the necessary

recruitment pools from which to access qualified special needs staff during the summer. Even so, in many places, teachers and other staff are understandably exhausted from the trials of the last year and need the summer break. Retired teachers can fill some of these staffing needs, but certainly not all. Guidance from the Department noting the challenges and reiterating that the pandemic-era standard is “good faith” will reassure districts that their creative approaches to staffing and other challenges will be recognized, not punished.

3. The Department can encourage states to adopt innovative approaches to dispute resolution for pandemic-period claims.

A few due process claims and federal lawsuits (including the putative “class action” suit dismissed by the U.S. District Court for the Southern District of New York now before the Second Circuit), have suggested that school districts owe “compensatory education” or “compensatory services” including private placements for any in-person instruction or services missed while schools were closed or operating remotely due to health and safety concerns. If this black-and-white, minute-for-minute approach is widely adopted by hearing officers and courts, school districts face insurmountable time and resource hurdles to serving students.

Below are examples of recent due process claims, federal litigation, and threatened claims we have observed.

- In a purported class action lawsuit naming as defendants all school districts and SEAs in the nation, attorneys claiming to represent students in several states allege schools have failed to provide FAPE to students with disabilities during pandemic-related school closures. The complaint alleges, “There is no ‘pandemic exception’ to the IDEA and if a student’s educational program becomes unavailable, then the school district must find a comparable alternative placement.” The complaint sought an injunction ordering the immediate reopening of schools to provide a program substantially similar to the students’ previous program, or vouchers for parents to obtain such a program, reevaluations to determine the students’ regression and their current needs, and compensatory damages. The U.S. District Court for the Southern District of New York dismissed all claims as to all defendants without prejudice, and the plaintiffs have appealed to the U.S. Court of Appeals for the Second Circuit.
- In Missouri, parents with children in the Springfield Public Schools sought a temporary restraining order and permanent injunction against the school district’s re-entry plan, claiming it violated the children’s rights under the Fourteenth Amendment, Title VI, and Section 504/ADA. The TRO was denied in late summer 2020.
- A new trend appears to be that parent attorneys are filing due process complaints to get a quicker resolution through settlement of the case. This appears to be a result of the increased caseloads of parent attorney practitioners who may not have had time to work through the process and attend IEP meetings, and therefore opt for formal proceedings instead to preserve their clients’ rights. The resulting increase in litigation presents a challenge to collaborative efforts to provide students with recovery services. In the fall of 2020, for instance, many schools proactively began working with parents and counsel to revise IEPs and arrange for supplemental services as necessary. Very quickly, however, some school districts experienced an uptick in due process filings, even where the schools had been

collaborating with parents and counsel, and there was no prior warning that the parents were dissatisfied.

- In Nevada, in September 2020, parents of students served under IDEA brought a purported class action suit against the Clark County School District (CCSD) in federal court, alleging that CCSD had failed to provide their children with FAPE during COVID-19 school closures. The complaint asserted, “CCSD has either ignored or instructed parents with special need children that their only course of educational relief is to use the same screen-based distance learning program as other children.” The plaintiff sought an order to reopen schools and allow students with special needs to go back to the classroom.
- Some parent attorneys and advocates continue to urge a “compensatory services” approach. See, e.g., <https://nicolejosephlaw.com/compensatory-services-after-covid/>, <https://www.wrightslaw.com/covid/2020.0813.COPAA.CompEd.FAQ.pdf>.

If these trends hold, these kinds of claims will continue to accrue as in-person hours are replaced with virtual ones, up to the IDEA’s two-year statute of limitation period.

As schools prepare for almost universal in-person instruction in the fall of 2021, the fear of increased litigation for “compensatory” services remains. This fear is understandable: under a strict “compensatory” model, schools might be bound to provide the number of service minutes missed, plus services aimed at bringing students within range of their previous IEP goals. The fear is further supported by the willingness of attorneys representing families to bring such claims, incentivized by the ability to recoup fees from school districts if they are successful. Thus, a focus on “compensatory education” claims, rather than “recovery” services, could have the unintended consequence of forcing districts to direct resources away from crucial efforts to serve students with disabilities to defending claims related to missed in-person services during the pandemic.

An alternative path to resolution of pandemic-related claims from the Department would go a long way in dampening the incentive towards litigation while supporting the collaboration between schools and parents which Congress intended for the delivery of prompt and appropriate services to special needs students.

Moving forward

The pandemic has created a situation in which every public school student in the nation lost important experiences associated with attendance in person. As you continue your process of issuing guidance on these challenges, please feel free to reach out to us at NSBA and the expertise of our school attorneys who regularly advise school officials on special education matters.

Sincerely,

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