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March 19, 2020

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Via email: _____

Re: Flexibility for K-12 Public Schools in the Wake of Coronavirus National Emergency

Dear Secretary DeVos:

The National School Boards Association (NSBA) represents through our state association members approximately 13,800 school boards nationwide. In the midst of the national emergency we now face to contain the spread of the novel coronavirus, NSBA urges you to clarify how the Department will provide flexibility and support to K-12 public schools regarding services for students with disabilities.

In the guidance released March 12, 2020, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*,¹ the Department indicates that if school districts² offer general education during a prolonged school closure, they must serve students with disabilities.

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).

¹ <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

² "School district" and "LEA" (local educational agency) are used interchangeably.

In short, the guidance appears to allow school districts *not* to make up services for students with disabilities if schools are closed completely for regular education, but require schools to provide services if regular education proceeds even on a limited basis. Once school is back in session, compensatory services must be provided for those students who did not receive special ed or related services during the closure, and individual determinations must be made about what services should be provided. Some states are taking the position that an e-learning day constitutes an instructional day, which means special education including related services must be provided, and all timelines for assessments and the like continue to run.

Public school boards and their attorneys are now working to schedule thousands of IEP meetings via phone or other electronic means to determine how to provide the services either virtually or as compensatory education once schools re-open. But many questions remain, as it is currently unknown how long school buildings will remain closed, and how much support for re-building infrastructure will be forthcoming from all levels of government and private concerns.

With this uncertainty surrounding this unprecedented national emergency, NSBA asks that the Department consider flexibility for LEAs. School board members, administration, and staff share the stressors many Americans face as they attempt to work remotely (some without robust internet access or devices), while attending to family responsibilities including care for children and elderly relatives. NSBA proposes that mandates required by the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973, including the level of service necessary to provide a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE), be substantially waived as schools act in good faith to serve all students, including those with disabilities. Such a waiver would include any requirement to make up services through compensatory education after schools re-open.

NSBA and its members stand ready to work with the Department to formulate a framework under which schools could operate to serve students with disabilities during these extraordinary times. This framework could include criteria or formulae for waivers or extensions, sample written notices, and templates for Individualized Education Program amendments.

1. Will the Department penalize school districts prioritizing health and safety efforts in the short term?

Local school districts across the country are working hard to get what services they can to all students, but many variables affect their ability to provide services and remote access to those services from students' homes. Some school districts need to focus on health concerns such as providing meals and child care in the short term. Will they be penalized for dedicating limited resources to that effort, rather than providing some limited educational services?

2. Will the Department approve intermediate measures school districts are taking to arrange for some level of services for students with disabilities while schools are closed?

School districts and their attorneys are taking a variety of intermediate measures to meet the educational needs of students with disabilities during the novel coronavirus crisis. Inevitably, these measures will not result in assessments, meetings, and services that would be provided under normal circumstances. It would be extremely helpful if schools heard from the Department that

efforts such as those outlined below will be recognized as appropriate, and that schools will not be penalized for any failure to provide the support normally expected.

- Entering into agreements with parents regarding the provision of compensatory services in advance (i.e., before it is known how long the closure will be).
- Providing prior written notice explaining that an evaluation or particular assessment cannot be completed at the present time because school is closed and the evaluation takes in person interaction with the student, and explaining that the evaluation will be completed as soon as in person contact between evaluation staff and the student is allowed.
- Conducting assessments, or portions of them, virtually, and then opening a designed facility to complete assessments that cannot be done virtually, but incorporating recommended safety protocols.
- Sending written notice to all families of students with disabilities whom the districts is serving, amending IEPs and possibly Section 504 plans to allow for "remote" or "virtual" instruction. For families who do not agree to that amendment, the LEA would schedule individual (remote) IEP meetings.
- Providing academic services remotely if that is possible, and holding related services that must be done in person (OT, for example) in abeyance until school reopens.
- Using the model currently in place for Extended School Year (ESY) services for compensatory education once schools are back in session. This process would seek to provide appropriate services to recoup any lost progress.

3. How do LEAs proceed regarding students who are in private day or residential placements, or receiving homebound services?

As conditions change daily with the spread of the novel coronavirus, NSBA members are facing myriad questions regarding students currently placed in private schools and facilities at public expense. NSBA urges the Department to allow flexibility for LEAs who face situations including the following.

- A private placement facility closes during the crisis.
- A student in a residential placement contracts COVID-19 and needs additional care or transfer to a medical facility.
- Public school-provided transportation to a day placement, or family transportation to a residential placement, is no longer feasible due to public health guidance.
- Staff members providing homebound services to a student now are unable to provide services in the home due to public health guidance

4. Will LEAs be penalized for failure to provide services if they face a shortage of providers like occupational therapists, psychologists, speech therapists, and the like?

If the novel coronavirus spreads as some models predict, there is a real possibility that school districts will face staff shortages, including among credentialed providers of special education and related services. Schools will need guidance from the Department about how they can remain compliant with federal requirements to provide services to students with disabilities in the midst of a shortage of qualified staff.

5. In light of the National Emergency, will IDEA timelines be extended for “child find,” evaluations, referrals, annual IEP meetings, and due process hearings?

We understand that the Department is working on guidance to address timelines required under federal law. If timelines are extended, we urge the Department to clarify the difference for timelines based on school days (i.e., evaluations) as compared to calendar days (i.e., annual IEP meetings every 365 days).

6. Will the Department offer waivers for testing required under the Every Student Succeeds Act?

If schools are closed for the remainder of the school year, most will miss testing dates usually held in the spring.

7. Will full funding be forthcoming?

Now more than ever, local school districts across the country will be forced to redirect more money from their general education budgets to cover the federal shortfall for special education. The average federal support per student under the Individuals with Disabilities Education Act (IDEA) has remained at approximately 16 percent for years, far short of the 40 percent Congress promised when the statute was enacted. Although costs for special education services will continue to increase as school districts provide compensatory services to students with disabilities, many districts have extremely limited flexibility to generate the funding to meet them.

Sincerely,



Thomas J. Gentzel
Executive Director & CEO

C: Mark Schultz, Commissioner, Rehabilitative Services Administration, Delegated the Duties of Assistant Secretary, Office of Special Education and Rehabilitative Services
The Honorable Ken Marcus, Assistant Secretary, Office for Civil Rights
Laurie VanderPloeg, Director, Office of Special Education Programs