

Attorneys For Education Rights

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May 19, 2020

Dear Superintendent Reykdal,

Our nonprofit group, Attorneys for Education Rights, advocates on behalf of Washington students with disabilities and their families. We write to request that you immediately issue stronger directives to public schools to meet their ongoing obligations under the Individuals with Disabilities Education Act (IDEA).

Schools have been closed, by order of Governor Inslee, since at least March 17. Yet there are still IDEA-eligible students who are not receiving any services at all from school districts. Others are served minimally.

We appreciate that OSPI directed school districts to have a plan to provide a free appropriate public education (“FAPE”) to these students. We hear from families and the community, however, that planning has lacked the necessary urgency. As a result, too many families are left to plan and deliver educational services themselves, without the training or tools to do so. Students with severe behavioral issues, who need support from behavior technicians in order to access an education, are cut off from learning. Worse, the loss of science-based behavior support is exacerbating risks of self-harm. Students with intellectual disabilities also are unable to access the resources suggested by OSPI for distance learning, and they will be at the greatest disadvantage when trying to catch up. Older students

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needing transition services are without the programming intended to allow them to gain employment, live independently, and participate in the community.

We are requesting that you exercise proactive oversight of services to students with disabilities, including: 1) setting a firm deadline for implementation of Individualized Education Plans (IEPs) to the extent possible, as outlined in continuous learning plans; 2) ordering school districts to provide compensatory education to the extent that IEP implementation is not possible; and 3) involving all stakeholders – including the parent and disability communities - in development of OSPI guidance during school closures. Further, we ask OSPI to clarify that school districts should *not* amend IEPs to reflect services during the closure, and not seek IDEA waivers from parents

OSPI Has the Legal Authority to Oversee, Not Just Guide, School Districts

As a threshold matter, we address your public statement on April 17, 2020, indicating that OSPI's role is merely advisory, and that parents should turn to local school boards regarding the enforcement of their children's IEPs. We disagree, and we urge you to communicate clearly that school districts are still accountable.

While school districts in Washington do have local control over the provision of educational services, OSPI retains the authority to exercise oversight over school districts' compliance with federal and state special education law. By statute, the Superintendent of Public Instruction has supervision over all matters pertaining to the public schools of the state. RCW 28A.300.040(1). OSPI also represents the state in the receipt and administration of federal funds, which includes IDEA funds made available by Congress. RCW 28A.300.070. OSPI shall require each school district in the state to ensure a FAPE for all children with disabilities between the ages of three and twenty-one. RCW 28A.155.020. The administrative officer employed by OSPI to coordinate and supervise special education shall ensure that school districts provide a FAPE to all children with disabilities in need of special education and related services. RCW 28A.155.030. OSPI also has the power to apply sanctions to school districts which do not comply with special education laws. RCW 28A.155.100.

The special education auditing procedure set forth by regulation in our state also belies the premise that OSPI's role is merely advisory towards school districts. WAC 392-172A-07010. OSPI must monitor school districts to ensure that they comply with federal and state special education law. This includes the identification of noncompliance and implementing a systemic corrective action plan if the noncompliance is systemic. WAC 392-172A-07010(3). OSPI's role is not only to provide technical assistance to school districts; it has the power to withhold, in whole or part, a specified amount of state and/or federal special education funds, to address noncompliance. WAC 392-172A-07010(4)(b).

OSPI's communications to school districts unfortunately reflect an "advisory" posture. For example, the publication entitled "Questions and Answers: Provision of Services to Students with Disabilities During School Facility Closures for COVID-19", updated on May 5, 2020, still largely contains recommendations rather than directives. OSPI "recommends" that school districts document if a student is not accessing special education and related services, but

does not mandate that they do so (nor does OSPI require districts to identify and address whatever barriers are preventing access). See P2. Also, districts are “encouraged” to think about ways to provide and individualize services for students with significant behavioral difficulties, but are not directed to do so. See P4. Answer A-3 references OSPI Bulletin 240-20 issued March 23, 2020, stating that education must continue during school closures, yet inexplicably states that specially designed instruction is required only if a district’s students are receiving general education instruction and student support services. P5.

Language such as “encourage,” “recommend” and “guide” does not effectively convey OSPI’s authority and oversight over school districts, and leaves the impression that school districts have the discretion to provide either vastly reduced services or none at all. This lack of direction has resulted in children currently receiving different services depending on where they live, which is not equitable. The latitude given school districts has also opened the door to teacher’s union agreements determining what level of special education services students are receiving. Currently, students are receiving little to no speech and language pathology, occupational therapy, or physical therapy services, with no direction from the state.

Compensatory Education Must be Provided

OSPI guidance to school districts does not communicate that they must provide compensatory services to students who have not received a FAPE during school closures. OSPI has stated that “districts will likely need to look at each individual student to determine whether compensatory services are needed.” May 5 Q&A P 9, A-10. Districts are given the discretion to determine whether and to what extent compensatory services are needed at all. P 10. While we do not dispute that compensatory education should be individualized to student need, it is not appropriate to suggest that school districts can choose not to provide compensatory education.

This lack of clear direction to school districts will likely result in an increase in parents turning to the administrative courts to obtain compensatory education for their children. While due process is an important right of parents under federal and state law, it does not promote the goal of timely and appropriate access to education to place the burden of enforcing the IDEA on parents.

OSPI Should Include all Stakeholders in Planning for Students With Disabilities

Parents of students with disabilities in our state have not received a clear, direct communication from OSPI about what to expect from schools during this time. One example of such a letter is what the Massachusetts Department of Elementary and Secondary Education has provided to families, in multiple languages:

<http://www.doe.mass.edu/covid19/sped/family-letter/>.

The disability community, including parents, guardians, students, nonprofit organizations advocating for students with disabilities, and parent attorneys, have not been formally consulted regarding such communications to families,

nor on guidance communicated to school districts. In contrast, Massachusetts specifically identified parents, advocates, and attorneys representing families as stakeholders and included them in developing implementation recommendations for special education to school districts:

<http://www.doe.mass.edu/covid19/sped.html>, See “Zoom Meeting Presentation for Special Education Directors,” March 26, 2020, Powerpoint Presentation p. 8.

School Districts Should Not Amend IEPs to Reflect the Reduction in Services

OSPI should stop suggesting that schools amend IEPs to reflect reduced services during school closures. Such amendments are not reasonably designed to enable progress and are contrary to requirements for FAPE. They also effectively wipe out “stay put” rights and the ability to obtain compensatory services once schools reopen. IEPs must be developed according to the individualized needs of the student and in accordance with WAC 392-172A-03110, not the administrative concerns of the school district.

The “Questions and Answers” guidance updated on May 5, 2020, states the following:

If the annual IEP is being completed during the school facility closure, then the service matrix could document the services that will be provided during the facility closure, as well as the anticipated services that will occur when traditional school resumes... For students whose annual IEPs will not be completed during the school facility closures, then the IEP team could consider the need for either a temporary IEP amendment or an optional Continuous Learning Plan, particularly if the services to be provided to the student during the closure are significantly different from what the IEP indicates. The current IEP, however, should still reflect decisions made by the IEP team regarding services prior to school facility closures for consideration once normal school operations resume...

P 3. This guidance sends the dangerous message that the IEP is no longer based on individual student needs, and that services can be “significantly different” even if the student’s disability-related needs have not changed. The law says otherwise.

By law, a student’s needs are identified in an evaluation. WAC 392-172A-03020. IEP revisions are to be based on lack of expected progress, reevaluations, or new information from parents. WAC 392-172A-03110(3). There is no authority to remove needed services and accommodations from an IEP because of circumstances unrelated to the student, such as a snowstorm or a global pandemic. In general, any IEP decision must be based on the strengths of the student, parent concerns for enhancing the student’s education, the most recent evaluation of the student, and the student’s academic, developmental and functional needs. WAC 392-172A-03110(1). OSPI’s guidance transforms the IEP from a student-centered plan to a staff-centered plan, effectively erasing the obligation to plan for an appropriate education reasonably designed to enable progress in a general education curriculum. This is legally wrong and, more importantly, it is harming students. Schools

for the most part have stopped offering truly individualized services, leaving the state's most vulnerable students with generic offerings or nothing at all.

We recognize the practical limitations on service delivery during the school closure. The proper way to address these limitations is to *require* Continuous Learning Plans for each student eligible for special education. We ask that OSPI stop calling these plans optional, and immediately issue guidance clarifying that Continuous Learning Plans are to document which IEP services can be delivered using alternate methods during the closure and which IEP services will be subject to compensatory education requirements once schools reopen. Continuous Learning Plans are not to reinvent services based on union agreements or on available resources; they are solely to document the impact of the stay-home order on IEP services. OSPI must clearly direct school districts to include parents in the development of a Continuous Learning Plan. We are aware that many parents were not consulted on the development of Continuous Learning Plans for their children and at least one parent cannot resolve her disagreement with that Plan.

As it is, OSPI guidance is not only stripping away student rights to an appropriate education, it is jeopardizing parental participation rights as well. The May 5 Q&A says:

With regard to IEP amendments, remember that the amendment does not have to be a change to the full IEP document. If the district and parent agree to the change, the district needs to provide documentation of the amendment to the parent and those involved in implementing the amended area(s). IEP amendments do not require parent consent (i.e., written parent signature), and the changes need to be incorporated into the full IEP document only if the parent requests. Since teachers and families should be communicating frequently during this time, the conversation could include a discussion of how special education services will be provided during the closures, and if the parent agrees, the amendment could take the form of a prior written notice (PWN) sent to the parent after the conversation is conducted.

P 4. This guidance runs afoul of IDEA and related regulations. Parents must consent to amending the IEP without an IEP team meeting. WAC 392-172A-03110 (c). OSPI should not be encouraging school districts to materially change a student's IEP via an informal conversation between parents and teachers, rather than in an IEP team meeting. *Letter to Green*, 22 IDELR 639 (OSEP 1995). The IDEA does permit districts and parents to agree not to have an IEP meeting to make changes to a student's IEP, as long as the annual review meeting has been held. 20 U.S.C. § 1414(d)(3)(D). This is not meant to supplant the requirement that the review and development of a child's IEP take place within the IEP meeting context with required team members. 20 U.S.C. §1414(d)(1)(B); (d)(4).

The statement that an amendment to an IEP "could" be documented in a Prior Written Notice to the parent also is concerning. Prior written notice is not optional. WAC 392-172A-05010(1)(a). This notice must contain a description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the

proposed or refused action, and a statement that the parents have protection under procedural safeguards and how to obtain them. WAC 392-172A-05010(2). We ask that OSPI refrain from weakening parent participation rights.

We have also learned that at least one school district in Washington state has proposed to contract with a parent to provide a child's educational services and to waive district liability under IDEA for such services. This is completely unacceptable and should be strongly condemned. The message must be communicated that school districts are not to seek ways to avoid their obligation to provide special education and related services, and frustrate the due process rights of parents to disagree with the provision of FAPE to their children and enforce their rights under the IDEA.

Washington must ensure that all children with disabilities have the opportunity to obtain the appropriate education guaranteed by the IDEA. RCW 28A.155.010. It is our sincere hope that OSPI will take stronger action to ensure the rights of children with disabilities are protected in our state. Thank you for your leadership and thoughtful consideration of these pressing requests.

Sincerely,

Board of Directors

A handwritten signature in black ink, appearing to read 'Charlotte D. Cassady', written in a cursive style.

Charlotte D. Cassady, Board President
Attorneys For Education Rights

cc: Governor Jay Inslee
Assistant Superintendent Glenna Gallo