
March 30, 2020

The Honorable Phil Murphy, Governor
Office of the Governor
P.O. Box 001
Trenton, New Jersey 08625

The Honorable Lamont Repollet, Commissioner
New Jersey Department of Education
P.O. Box 500
Trenton, New Jersey 08625

Re: COVID-19 Equity Issues for Public School Students

Dear Governor Murphy and Commissioner Repollet:

New Jersey Special Education Practitioners (NJSEP), an association of 100 attorneys and advocates who represent parents and students in special education cases, Education Law Center (ELC), a leading advocate for New Jersey public school children, and the SPAN Parent Advocacy Network (SPAN) request your attention to four critical issues that are impeding the delivery of essential educational services to New Jersey's public school students, particularly those with disabilities.

We commend the State for its early guidance to school districts directing the development of plans to provide "equitable access to instruction for all students" during this period of school closure. See N.J. Dep't. of Educ., Guidance Regarding Requirements for Public Health-Related School Closure (Mar. 5, 2020).¹ We see good faith efforts being made in many school districts to meet this requirement, but we have also identified several areas where further guidance from the State is urgently needed.

1 Available at:
<https://www.nj.gov/education/broadcasts/2020/mar/05/Guidance%20Regarding%20Requirements%20for%20Public%20Health-Related%20School%20Closure.pdf>

Telepractice

As we drafted this letter, we learned that the New Jersey Department of Education will be adopting an emergency regulation, effective April 1, which authorizes the use of telepractice for students with disabilities. See N.J. Dep't. of Educ., Notice of Rule Waiver/ Modification/Suspension Pursuant to Executive Order No. 103 (Murphy) March 9, 2020) Covid-19 State of Emergency.² Having previously heard from multiple sources that the State had been advising districts they could not use telepractice to serve their students with disabilities, this action came as welcome relief. We strongly believe that this emergency action is necessary for the State to seek to comply with its legal obligations to students with disabilities and ask that the Department immediately issue guidance to all New Jersey school districts and charter schools that appropriate telepractice may be used to serve students during school closure.

We offer two caveats. First, we urge you to clarify that implementation of the emergency regulation will not, in and of itself, "ensur[e] school districts and educational agencies are meeting their legal obligation to provide a free and appropriate public education, as required by the Individuals with Disabilities Education Act." Id. As directed by federal guidance, IEP teams "must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations." 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 (Mar. 21, 2020).³

Second, to ensure that telepractice is used appropriately, we also ask the State to remind school districts and charter schools of the need to make individual determinations about its use, since telepractice may not be effective for all services or for all students. To assist school districts and charter schools as they implement telepractice, we recommend that the State obtain and disseminate effective practices from the professional associations whose providers serve students with disabilities in the areas of

2 Available at:
<https://nj.gov/education/sboe/meetings/agenda/2020/April/public/5d%20Item%20D%20Special%20Education.pdf>

3 Available at:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

speech-language, behavioral, occupational, and physical therapies. As noted in federal guidance, there are circumstances where it may be "unfeasible or unsafe" to provide "hands-on physical therapy" or "occupational therapy" through remote instruction. Id. At the same time, the federal guidance affirms that "[m]any disability-related modifications and services" may be "effectively provided online" such as "through video conferencing." Id. It is the responsibility of the State to ensure that all of New Jersey's school districts and charter schools have the information needed to implement telepractice appropriately during this period of school closure.

Conditioning Services on Waivers

Second, we request that the State immediately notify all public school districts and charter schools that they cannot condition the provision of remote educational services during school closure on the signing of broad waivers by the parents of their students. We have already seen some districts asking parents to free them of any potential liability prior to implementing services. These broad waivers can be interpreted as eliminating future claims to compensatory education for students with disabilities, in contradiction to the requirement of federal guidance for "individualized determination[s] whether and to what extent compensatory services may be needed when schools resume normal operations," see U.S. Dep't. of Educ., Supplemental Fact Sheet, supra.

Furthermore, school district insistence on waivers of rights is inappropriate and flies in the face of the constitutional and statutory obligations to provide a public education that is thorough and efficient, N.J. Const. Art. 8, § IV, ¶ 1, as well as free and appropriate for students with disabilities, 20 U.S.C. §§ 1400 to 1482. For the same reasons that we would never allow school districts and charter schools to seek a broad waiver of rights before serving students within school buildings, they must be prohibited from doing so when serving students remotely.

In a similar vein, some school districts have improperly notified parents that the recording of any instruction or therapy sessions would be a violation of New Jersey Wiretapping Law, N.J.S.A. 2A:156A, which makes it a crime to intercept or record conversations unless one party consents. As New Jersey is a one-party consent state, any such notification is entirely misleading and should not be permitted. Districts should likewise not prohibit parents from being present during all instruction and related services, as some have, since parental presence may be

beneficial when parents are needed to reinforce skills at home, and, in some cases, may be necessary, due to the family's living arrangements or child's ability to focus.

We have enclosed a sample, with the school district's name redacted, of the Release of Liability and Hold Harmless Agreement that some parents have been asked to sign.

Disparities in Educational Services

Third, the State's decision to leave the design of educational services during school closure completely up to the discretion of each of the State's approximately 600 school districts can be construed as a violation of the constitutional requirement for "a thorough and efficient **system** of free public schools", N.J. Const. Art. 8, § IV, ¶ 1 (emphasis added), and must be corrected. The disparities in services offered by different school districts have been startling, ranging from the mere distribution of work packets to the provision of direct instructional services via video conferencing.

The State's leadership is desperately needed to ensure that New Jersey's significant number of vulnerable students - including students with disabilities, English language learners, and students living in poverty or experiencing homelessness - are not left behind during school closure. Districts should not be expected to reinvent the wheel in offering online instruction, when there exist evidence-based practices for successful online instruction. Using research on effective practices, such as U.S. Department of Education's "Evaluation of Evidence-based Practices in Online Learning" (Sept. 2010),⁴ the State must set forth the standards under which online instruction will be provided to all New Jersey students.

Moreover, the State must take affirmative action to improve access to technology and the internet for all students, such as through partnering with local providers and private industry and offering grants to meet any outstanding need. Disparities are evident, as some districts have distributed laptops and WiFi hotspots to students who need them for access to their teachers and assignments, while others have asked parents to pick up and administer paper packets. And, at least one district has announced

4 Available at:
<https://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf>

that it no longer has the capacity to print paper packets for its students who lack internet access.

The State must also ensure that all online instruction is accessible to those with disabilities, such as students who are blind, deaf, or motor-impaired, and those with limited English proficiency. This is necessary to prevent unlawful discrimination, yet has not been consistently implemented.

Electronic Dispute Resolution

Finally, we regret to report that our State's Office of Administrative Law (OAL) lags behind the judiciary in adopting electronic means of resolving disputes about educational services during the COVID-19 emergency. OAL has not yet embraced video or telephone conferencing to conduct mediation sessions in special education cases,⁵ nor is it regularly using technology to conduct settlement conferences or hearings in special education due process hearings or general education controversies and disputes. To the contrary, OAL has adjourned all hearings (except emergent matters) until April 30. See OAL, An Updated Message to the OAL Community (Mar. 23, 2020).⁶ Delays already plague special education dispute resolution, so it is imperative that the State prevent a further backlog of cases from developing. Our experience, to date, is that school districts are successfully using video conferencing to conduct meetings with parents, and there is no reason that OAL cannot do the same. We therefore ask that the State direct OAL, and its partner SPDR, to immediately implement mediation and settlement conferences via video conferencing.

ELC, NJSEP, and SPAN stand ready to assist. We thank you for your consideration of this urgent request and are available to answer any questions or address any concerns. Please do not hesitate to reach out to me at 973-624-1815, ext. 20, or at eathos@edlawcenter.org. We look forward to your response.

5 While New Jersey's special education mediators are OAL employees, OAL works through the Department of Education's Office of Special Education and Dispute Resolution (SPDR) to schedule mediation. SPDR has thus far failed to offer mediation by video or telephone conferencing, apparently putting all mediation on hold.

6 Available at: <https://www.state.nj.us/oal/home/letter.html>

Sincerely,



Elizabeth Athos, Esq.
NJSEP Moderator
ELC Senior Attorney

Via Electronic Mail
(Plus Overnight Mail to Governor and Commissioner)

Encls.

Cc: Assistant Commissioner Peggy McDonald, Student Services
Matt Platkin, Governor's Counsel
George Helmy, Governor's Chief of Staff
Laura Console, Governor's Education Policy Advisor
Deborah Cornavaca, Deputy Chief of Staff of Outreach