



Education Rights Counsel

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Re: School Reopening & Students with Disabilities

Dear Governor Ricketts and Commissioner Blomstedt:

The undersigned write to you in light of the start of the new academic year and your critical leadership in the education of Nebraska students with disabilities. Nebraska must plan with great care how to support students with disabilities and to meet their unique and urgent needs. And we must, like other states, recognize that our disabled students need additional services during this time, and have the right to those services.¹

This letter outlines the foundational principles for disability education and recounts challenges students with disabilities experienced during distance learning in the spring. It closes with policy recommendations to address the most urgent needs facing students with disabilities as they transition back to school.

Principles Governing Education for Students with Disabilities

Enshrined in *Brown v. Board of Education* and codified in the Americans with Disabilities Act is the idea that every student must have an equal opportunity to get an education. Under the

¹ See, e.g., State of New Hampshire Office of the Governor, *Emergency Order No. 48: Special Education Requirements to Support Remote Instruction*, https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-48.pdf?fbclid=IwAR19XD7cb4Dycyuj2-HZpm9kRdh7lNSEUgMXgxxPOfbcW5Vz_3r41cgpTbk; Florida Department of Education, *Emergency Order No. 2020-EO-06* (Jul. 16, 2020) <http://www.fldoe.org/core/fileparse.php/19861/urlt/DOE-2020-EO-06.pdf>.

Individuals with Disabilities Education Act (IDEA), school districts have a duty to undertake the following affirmative steps to best serve this under-resourced population:

- Identify students with disabilities and appropriately assess them to determine the best services to support their education;
- Create Individualized Educational Programs (IEPs) to ensure that students with disabilities receive an education that meets their needs;
- Strive to place students with disabilities in the general education classroom with the appropriate supports, and avoid placement in alternate settings unless absolutely necessary for their educational progress;
- Provide related services so that students with disabilities may be able to obtain a meaningful educational benefit from their schooling;
- Involve parents in the process of planning an education for their child that complies with federal requirements; and
- Provide procedural safeguards to allow parents to enforce their and their children's rights under the law.

Disappointingly, several of these bedrock principles were violated during remote instruction in the spring.

Children with Disabilities and Their Experience During Distance Learning

More than 55,000 children with disabilities live in Nebraska. Under ordinary circumstances, disabled students are a vulnerable population. However, the challenges they face have multiplied during the pandemic. Many students with disabilities have other lived experiences that exacerbate the inequities they already experience. Many are Hispanic/Latinx, Black or African American,² English Language Learners, from low-income families, in the foster care or juvenile justice systems, or are experiencing homelessness. These intersectional identities have exacerbated their vulnerabilities during the pandemic, as COVID-19 has ravaged these underserved communities.

Already lagging behind, not only with academics but also with behavior, speech, motor skills and other areas essential to their long-term success, students with disabilities faced unique challenges during the COVID-19 pandemic. During the initial school closures and subsequent distance learning, they lost access to many of their federally-mandated services and supports, such as occupational therapy or one-to-one aides. With the absence of speech and language therapy, children with communication delays have regressed in their language development and ability to interact with other children. As a result, many have fallen even further behind compared to their nondisabled peers.

The obligation of districts to provide services to students with disabilities, as discussed above, is not lessened by the pandemic. In the spring, some districts mistakenly believed that COVID-19 lessened their obligations under federal law, or allowed them to unilaterally modify student plans without notice to parents. Parents have not received their right to meaningful parental

² <https://osep.grads360.org/services/PDCService.svc/GetPDCDocumentFile?fileId=20423>

participation in deciding what services, technology, and accommodations their children with disabilities required in order to access their education. As a result, children with behavioral, medical, and communication needs have been denied access to specialized instruction and related services, adaptive equipment, assistive technology, and effective communication. Pandemic or no pandemic, students with disabilities have the right to an education that is reasonably calculated to enable them to make progress in light of their own individual and unique needs.³

Recommendations for the Upcoming Academic Year

Children with disabilities have fallen behind and continue to experience regression.⁴ We must learn from the lessons of the spring and do better this fall. These below recommendations—formed with input from students, parents, special educators, and advocates across the country—are described in more detail in the attached document. It would not be only in the best interests of these children, but also administratively and economically wise, for the State to take the following steps to support children with disabilities as they transition back to schools:

1. Take proactive steps to provide compensatory education for all students with disabilities.
2. Ensure continued access to special education and related services during school breaks and next summer for all students with disabilities.
3. Suspend expulsion and suspension policies and implement mechanisms to support reintegration of students with behavioral, emotional, and mental health disabilities.
4. Require districts to temporarily set aside age eligibility limits in continuing to provide special education services to all children with disabilities, and to continue their obligation to locate, identify, and serve students with disabilities.
5. Toll and extend administrative statute of limitations for special education complaints.
6. Protect all students by implementing rigorous safety and hygiene protocols for in-person instruction.
7. Ensure effective virtual participation for students remaining in distance learning if in-person instruction resumes.

We also attach in a second document key recommendations for distance learning that will benefit all students—but especially those who were left behind during districts’ first attempts at remote instruction during the spring.

Moving Forward

The existence of a public health crisis, no matter how daunting, does not suspend students’ civil rights. We urge you to act now—quickly, decisively, and with every resource at your disposal—to ensure our students receive the equal access to education to which they are entitled.

³ See *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

⁴ Even without COVID-19, children with disabilities are so vulnerable to regression that there are regulatory and statutory rights to extended school year services designed to attempt to prevent it. See Neb. Rev. Stat. § 79-318; Neb. Rev. Stat. § 79-319; Neb. Rev. Stat. § 79-1160; Neb. Rev. Stat. § 1127.

The American Civil Liberties Union of Nebraska and the Education Rights Counsel urge the Administration to adopt the attached recommendations as part of Nebraska's COVID-19 response and relief efforts to ensure that children with disabilities fall no further behind.

Sincerely,

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Encl. Attachment A: Recommendations to Support Children with Disabilities
Attachment B: Recommendations for Distance Learning

ATTACHMENT A: Detailed Recommendations to Support Children with Disabilities

Recommendation No. 1: Take affirmative steps to provide compensatory education for all students with disabilities (with IEPs and IFSPs)

Because many Individualized Education Program (IEP)/Individualized Family Service Plan (IFSP) services were unavailable, difficult to provide, or of a lesser quality⁵ during distance learning in the spring, the State must make affirmative efforts to protect the rights of these children to compensatory services and to make up for these losses.

Under federal law, children with disabilities are eligible for compensatory services to make up for any failures to provide an appropriate education. But, the burden falls to the parent to demonstrate regression or lost skills – which not only takes time, but also presents a significant barrier for many parents who are already stressed, who rely on schools for necessary data, and who are not experts on the IEP/IFSP system. Continuing such an approach creates costs and delays, and often results in unnecessary conflict between the district and families.

In order to prevent this harm, we recommend that state officials take the following actions:

1. Direct school districts to offer compensatory services to all children with disabilities, including those children whose districts did not provide distance learning opportunities to any students at any point during COVID-related school closures. These compensatory services should be:
 - a. Automatic for any parent who opts in for their child. Parents should not have to file a complaint and prove regression. Regression should be presumed.
 - b. Extended into a second year, should one year of services be insufficient.
 - c. Extended past age 21 if the student needs it.⁶
 - d. Provided at flexible times—during the regular school day, before or after school, over the summer, and during holiday breaks.⁷
2. Require school districts and regional centers to develop uniform assessment procedures to determine the type and extent of compensatory services to which disabled students are entitled, including:
 - a. A structured interview with parents and teachers within 30 days of school reopening to determine the extent of regression. The interview questions for

⁵ Special day class programs and center-based programs were unavailable; physical or occupational therapy were difficult to provide; social skills programs were of a lesser quality.

⁶ Students are eligible for special education services under the IDEA, and in Nebraska, students are no longer eligible for IDEA services when they reach the age of 21.

⁷ Some parents may want a full range of options for their students to receive compensatory services while others may prefer to have services delivered during the regular school day.

parents should be in plain language and should be sent to the parent ahead of time, together with the contact information for each parent’s local Parent Training and Information Center (PTI).

- b. A review of the child’s current level of performance within 30 days of school reopening, using a variety of assessment tools to gather relevant functional, developmental, and academic information about the child. Such tools include: parent and teacher input; brief observation of the student; and measuring of each child’s progress toward their IEP goals (with comparison to their progress prior to the start of distance learning, and their anticipated progress had there been no distance learning).
 - c. For children who demonstrate significant regression, a full re-evaluation in all areas of eligibility.
3. Encourage school districts to begin providing compensatory services that need to be provided in person as soon as it is safe to do so, even if school buildings have not fully reopened. Necessary compensatory services should be prioritized in terms of services that will be provided in person, and only with the agreement of the student and their parents.

Recommendation No. 2: Ensure continued access to special education and related services during school breaks and next summer (Extended School Year) for all students with disabilities (with IEPs and IFSPs)

Because IEP/IFSP services have been unavailable or sharply diminished during the pandemic, the State must take affirmative steps to prevent further regression by ensuring access to special education and related services during school breaks and next summer.

Students are entitled to these Extended School Year (ESY) services under federal law if necessary for their receipt of an appropriate education.⁸ ESY services differ from compensatory education services as IEP teams must implement ESY services outside of the school day or school year to prevent likely regression that students would experience when school is out of session. This is in contrast to compensatory education services, which are typically provided after the district has failed in its obligation to appropriately educate a child with an IEP. Where there is a dispute with the school district with regard to ESY services, the need to demonstrate necessity places a significant burden upon the parent, takes time, and requires parents to undertake legal action, causing further delays.

In order to prevent this unnecessary harm, we recommend that state officials take the following action:

1. Direct school districts to offer ESY services to all children with disabilities, including those children whose districts did not provide distance learning opportunities to any students.

⁸ 34 C.F.R. § 300.106.

- a. Any parent who opts in should be entitled to ESY services.
- b. The number of minutes and the services that will be provided may be reached through an individualized fact-specific determination similar to the assessment plan in Recommendation No. 1, element 2.

Recommendation No. 3: Suspend expulsion and suspension policies and implement mechanisms to support reintegration of students with behavioral, emotional, and mental health disabilities.

All students, especially students with disabilities, will struggle to return to the educational environment. Students with behavioral and mental health issues will struggle with this transition and students previously without such issues may develop them. Attending school with the stress of social distancing protocols and the fear of COVID-19 will likely further exacerbate behavior and mental health struggles. In order to smooth this transition for all students, including students with disabilities, we recommend that state officials take the following action:

1. Suspend expulsion and suspension policies for *all* students for six months except where inconsistent with Section 4141 of the Gun Free Schools Act.
2. Suspend districts' ability to discipline students during virtual instruction by excluding students from virtual instruction or prohibiting students from participating in class discussion, logging on to lectures, and participating in group projects.
3. Direct school districts to hold Student Assistance Team (SAT) meetings and offer special education assessments and behavior intervention plans (BIPs) for students without IEPs and 504 plans who exhibit aggressive behaviors.
4. Direct school districts to develop and utilize evidence-based approaches in lieu of suspensions and expulsions, such as restorative justice, positive behavioral interventions and supports (PBIS), evidence-based therapy modalities, Dialectical Behavior Therapy, Trauma-Focused Cognitive Behavior Therapy, and mindfulness.
5. Prohibit schools from requiring students who otherwise would be suspended or expelled to remain home and participate in school via virtual tools.
6. Suspend districts' ability to place students with disabilities into interim alternative educational settings (IAES) for six months.
7. Direct districts to conduct assessments and provide appropriate services and supports for children with behavior difficulties and mental health issues who need extra support to transition back to school.
 - a. Such assessments should be conducted at least twice—once before the district reopens, to develop a plan for reintroducing the student to the educational

environment, and again 30 days after school has started to address ongoing behavior and mental health struggles.

- b. The assessment prior to reopening should include a structured interview with parents similar to that described in Recommendation No.1, element 2, and a review of the student's Behavior Intervention Plan (BIP). The assessment should consider and implement additional behavior services and mental health services and supports, including additional counseling. The interview questions for parents should be in plain language and should be sent to the parent ahead of time, together with the BIP.
- c. The assessment following reopening and reintegration of the student into the school environment should determine additional supports and services students need to address ongoing problem behaviors and mental health struggles. The district should use a variety of assessment tools to gather relevant functional, developmental, and academic information about the child, including: parent and teacher input, brief observation of the student, and other informal measurements to develop present levels of performance.
- d. Where behaviors and mental health struggles are severe, the district should conduct a Functional Behavioral Assessment and/or Educationally Related Mental Health Services assessment.

Recommendation No. 4: Require districts to temporarily set aside age eligibility limits in continuing to provide special education services to all children with disabilities, and to continue their obligation to locate, identify, and serve students with disabilities.

During the State's distance learning period, some children with disabilities have aged out of eligibility for special education services provided under the IDEA. In Nebraska, districts must provide services under Part B of the IDEA to students through the academic year when students turn 21. But pandemic-related school closures during the spring prevented students who aged out of Part B services this past year from meeting their IEP goals and/or gaining critical life skills necessary for independent living.

Part C of the IDEA provides services for children with disabilities from birth until age 21. The IDEA requires districts to ensure that all of the children enrolled in Part C and eligible for Part B have Part B services in place by each child's third birthday. Because of the State's quarantine orders, districts may not have conducted initial evaluations by the child's third birthday to determine Part B eligibility and develop a transition plan. Districts may have also not conducted activities required to comply with Child Find obligations.

In order to ensure uninterrupted services for eligible children with disabilities and to ensure that these students have the tools they need to successfully transition out of schools, we recommend that state officials take the following additional actions:

1. Extend for 6 months the IDEA Part B eligibility of students who age out this academic year to ensure that they are able to meet their IEP goals.
2. Require districts to work as quickly as possible to provide services to students who received early intervention services under Part C of the IDEA, but who aged out of these services during state and county shelter in place orders.
 - a. Presume eligibility for Part B services for these students until the district can conduct a comprehensive in-person assessment when in-person instruction resumes.
 - b. In determining which services to provide these students, districts should conduct a preliminary assessment of the student's needs using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent and the student's regional center.
3. Emphasize that districts must still abide by their Child Find duty to locate, identify and provide services to children who may be disabled and may need special education and related services, including children who did not previously receive services under Part C of the IDEA.
 - a. In complying with Child Find, districts must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child during the shelter in place orders, including information provided by the parent, virtual observation sessions, and social distance friendly home visits.
 - b. Once educational services are allowed to continue in person, parents must have the option of either requesting an independent educational evaluation or allowing the district to reassess students to gain more accurate information about students' needs.

Recommendation No. 5: Toll and extend administrative statute of limitations for special education complaints.

Even if Nebraska has implemented best educational practices, students have experienced disruptions or barriers to their education, including access to special education services. One of the most cost-effective and powerful tools that parents of children with disabilities have to protect their children's rights is a due process complaint. Although administrative due process cases and mediations may still be occurring, there are many reasons why a parent may choose not to seek these dispute resolution options during the pandemic, including their inability to access records in a timely manner, their inability to gain appropriate assessments requiring face-to-face testing, the general unavailability of witnesses, or the demands on parents of child care and distance learning during the pandemic.

While the IDEA sets default limitations periods for due process complaints and court complaints, states are permitted to change them.⁹ Specifically, we urge you to suspend all timelines for filing a special education complaint and toll the statute of limitations for such actions for the duration of the pandemic.

Recommendation No. 6: Protect all students by implementing rigorous safety and hygiene protocols for in-person instruction.

While many families may prefer distance learning during the pandemic, there are students who need to return to school in order to learn effectively. They may come from families who are unable to provide home instruction due to work obligations, language barriers, educational experience, disability, daycare expenses, or family care duties. During distance learning, students with disabilities have exhibited academic and behavioral regression and the need for more guided instruction, 1:1 aides, para-educators, more attentive case managers, routine and structure to access learning, socialization, and better technology.

To ensure the continued safety of students who elect to return to in-person learning, we recommend that state officials implement the following safety and hygiene protocols and practices at schools to prevent the spread of COVID-19:

1. “Social distancing” practices by staff and students both at school and on buses;
2. Provision of instruction outdoors;
3. Adequate ventilation in campus buildings;
4. Regular cleaning and disinfecting of school property throughout the school day, including but not limited to, desks, shared supplies, and bathrooms;
5. Requiring staff and students to wear masks;
6. Provision of separate supplies to each student;
7. Provision of personal disinfectants, such as hand sanitizer and antibacterial wipes;
8. Required daily temperature checks of all students and staff;
9. Regular testing of staff;
10. Limiting staff interactions to a core group of students;
11. Prompt notification to parents when staff or students test positive; and
12. Adequate staffing of nurses at every school site.

Recommendation No. 7: Ensure effective virtual participation for students remaining in distance learning if in-person instruction resumes.

As districts restart in-person instruction—either on a full-time basis or as a blended option—there are families who will choose to have their children remain home. Some students may be immunocompromised, and medically vulnerable parents may fear contracting COVID-19 from their children, especially if there are concerns about the district’s ability to enforce social distancing and other safety protocols. To accommodate the needs of families and students who choose fully remote learning, we recommend that state officials:

⁹ For example, California has adopted two years and 90 days, respectively.

1. Require school districts that offer in-person learning to maintain, refine, and incorporate distance learning policies and practices that enable students to virtually participate to the fullest extent possible in instruction and extracurricular activities.
2. Ensure that if before- and after-school programs, such as day-care, are resumed, they are accessible to all students, regardless of which educational option they participate in.

Attachment B: Recommendations for Distance Learning

Districts proceeding with in-person instruction must be prepared to transition back to distance learning, this time with improved supports, especially if a school is forced to do so after a positive COVID-19 test in their community. The following recommendations are based on challenges that students experienced during distance learning in the spring, and should be implemented in either blended learning or full remote learning situations.

Recommendation No. 1: Instructional changes

- 1. Longer and more frequent instruction time:** Teachers spent limited time providing direct instruction during distance learning. Students were instead provided with homework packets, which placed a disproportionate burden on parents to provide instruction and on students to self-educate. We recommend that teachers provide instruction more frequently and for more minutes to provide students guidance, routine, and stability.
- 2. Collaborative learning:** Students' social skills and engagement with schoolwork deteriorated without interaction with their peers. We recommend that teachers provide students with more opportunities for collaborative and project-based learning to increase exposure to other students.
- 3. Concrete lesson plans:** Families often felt overwhelmed by homework and instructional packets because they were not provided in advance with schedules for lectures, homework, and special education services, which made it difficult for families to plan around their work schedules. We recommend that teachers develop concrete and comprehensive lesson plans before the Fall semester to help families plan for the semester.
- 4. Diverse schedules to meet family needs:** Some families have the need for flexible class schedules to accommodate their jobs while others need routine and stability. We recommend school districts provide students the option to participate in fixed and flexible class schedules with live instructions and pre-recorded lessons.
- 5. Better tracking of student progress:** There were reports that districts did not track their students' progress toward IEP goals and grade-level curriculum. This made it difficult for some families to track their students' regression and provide support. We recommend that districts resume tracking students' progress communicate that progress more frequently with families.

Recommendation No. 2: Individual support and communication

- 1. More individual support and check-ins:** Students who require one-on-one instruction and guidance experienced a lack of individual supports during distance learning. We recommend that teachers and other educational providers schedule more frequent check-ins with both parents and students, especially during lessons.

- 2. Use of instructional aides:** The absence or severely limited interaction with 1:1 aides and para-educators during distance learning destabilized students who relied on their services. We recommend that instructional aides and para-educators provide individual support virtually and in-person, especially during instructional time.

Recommendation No. 3: Technological support

- 1. Better internet connectivity:** Many families have poor internet connections, which made receiving special education services impractical. We recommend school districts contract with internet providers if they have not already done so to ensure all families can access services.
- 2. More accessible technology:** Some students found it difficult to use certain technology or technology at all because of their disability. We recommend districts conduct assistive technology assessments on all students with IEPs to provide them with technology or alternatives to technology that meets their disability-related needs.
- 3. Consistent online platforms:** Families felt overwhelmed by having to navigate multiple online platforms to access lectures, homework, and special education services. We recommend districts limit the number of platforms to deliver services.
- 4. Training:** Families experienced difficulty navigating technology and unfamiliar online platforms. We recommend districts provide trainings tailored to students' disability-related needs directly or through third-party providers such as the Center for Assistive Technology, and computer programs such as Computing Without Tears for parents and students to improve computer literacy skills.