



## **Key IDEA Part B Provisions and Waiver Requests**

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**Stephanie Smith Lee**

**National Down Syndrome Congress**

The Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, also known as the CARES Act, or COVID-19 #3, became law on March 26, 2020. It is intended to address the economic fallout of the 2020 Coronavirus pandemic. A provision in this law requires the Secretary of the U. S. Department of Education to report to Congress, within thirty days of the bill becoming law, regarding any waivers the Secretary thinks are necessary to the Individuals with Disabilities Education Act (IDEA), the Every Student Succeeds Act (ESSA), the Rehabilitation Act of 1973 (Section 504), and the Carl D. Perkins Career and Technical Education Act, in order to “provide limited flexibility to States and local educational agencies to meet the needs of students during the emergency...”

This document provides an analysis of current provisions of IDEA Part B and relevant U.S. Department of Education (ED) guidance and policy letters, with proposals submitted by various organizations to waive those provisions. A previous law granting a few very limited timeline extensions during regional disasters, with protections against waivers of due process and civil rights, is also referenced. This document is not intended as a legal opinion or advice, but rather as a source of information as policy makers and advocates consider this reporting requirement in COVID-19 #3.

A number of organizations are requesting waivers, with a few requesting broad waivers of IDEA. Sufficient flexibility exists under current law and in U.S. Department of Education (ED) guidance and such waivers are not necessary and would diminish fundamental civil rights. Requests to waive all due process protections for children and families, overturn ED guidance to eliminate compensatory education opportunities, and drastically reduce the standard for a free appropriate public education (FAPE), which has been a fundamental right in the law since 1975, would cause significant harm to students with disabilities and their families.

TOPIC	POLICY ISSUE	SOURCE	PROPOSAL	ANALYSIS/COMMENTS
General waiver authority	In general, ED has no authority to waive IDEA Part B. Department cannot extend timelines for evaluations, placements, annual review meetings, due process hearings and resolution sessions.	Geary		
Flexibility in use of Part B Funds	Prior to and during a COVID-19 outbreak, "IDEA Part B funds may be used for activities that directly relate to providing, and ensuring the continuity of, special education and related services to children with disabilities." Example: developing emergency plans for SWD.	ED Q&A pg 6		Current flexibility in use of Part B funds during COVID-19.

Creating a contingency plan prior to school closure	“IEP teams may, but are not required to, include distance learning plans in a child’s IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the child’s home.”	ED Q&A pg 5		Allows flexibility for IEP Teams to create distance learning plans for use during a school closure. Such plans may be included in an IEP during COVID-19 closure and may include alternate locations and methods of instruction.
Services to SWD if school closed and no education for anyone.	“If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time.”	ED Q&A		Current guidance says if no educational services for general student body, then no education required for SWD.
	If no ed services to general population then services to SWD not required. Once reopened, “LEA must make every effort” to provide IEP services.	Geary & ED 2017 Guidance pg 13		
	“If a school district closes its schools and does not provide any educational services to the general student population, then a school would not be required to provide services to students with disabilities during that same period of time.”	OCR FAQ		
			COPAA FAQ	COPAA disagrees with the recent guidance and their research indicates that previous ED guidance and a number of court cases over

				the years found that students with disabilities have a right to receive an education during school closures.
No requirement to stop education for all because of IDEA	<p>“To be clear, ensuring compliance with the Individuals with Disabilities Education Act (IDEA)... should not prevent any school from offering educational programs through distance instruction.”</p> <p>School districts must provide FAPE, consistent with health and safety. ...Circumstances may affect how provided and flexibility will be provided. “...although federal law requires distance instruction to be accessible to students with disabilities, it does not mandate specific methodologies” May provide “equally effective alternate access to the curriculum or services.”</p>	ED Sup FAQ pg 1 & 2		Guidance says no need to cancel educational services for all students due to IDEA. Flexible ways to provide FAPE to SWD.
Schools closed but educational opportunities offered.	<p>“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.... and schools must ensure that, <b>to the greatest extent possible</b>, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA...and 300.201 (IDEA)”</p>	ED Q&A		To greatest extent possible, FAPE must be provided during COVID-19. Some flexibility allowed.
	<p>“If an LEA continues to provide educational opportunities to the general student</p>	2017 ED Guidance		If educational opportunities continue, school must

	<p>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 <sup>SEP</sup> §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). SEAs, LEAs, and schools must ensure that, <b>to the greatest extent possible</b>, 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))....</p> <p>If schools are providing educational opportunities to the general student population, SEAs and LEAs are required to provide the services and accommodations needed for students with disabilities to have an equal opportunity to participate in a distance-learning program.”</p>	pg 13		ensure students with disabilities have equal access to same opportunities, including FAPE.
Must IEP team determine services when school closed?	<p>If a school continues to provide instruction to the general school population during an extended closure due to a disaster, but is not able to provide services to a student with a disability in accordance with the student’s IEP, the student’s IEP Team determines which services can be provided to appropriately meet the student’s needs....IEP team not required to meet in person.</p>	2017 Guidance pg 13 & 14		IEP team decides what services to offer during a disaster.
		School requests	Requests “Waiving any consent requirements when a school district must adjust a student’s Individual	If States wish to require parent consent for IEPs that is their option under IDEA and some states do so. This

			Education Program (IEP) for virtual and/or adjusted instruction.”	request would unnecessarily override State laws/regulations to waive that State consent requirement.
	COPAA states, “Some states, like Connecticut and Massachusetts, do not believe that an IEP meeting is needed before the school can begin to offer students virtual learning opportunities under the current emergency which requires changes in delivery of services for all students.”	COPAA Q & A pg 1		States should be complying with ED guidance.  COPAA’s says some States think IEP decisions on services not necessary during disaster.
When School Resumes	Once school resumes, the school must return to providing special education and related services to students with disabilities in accordance with the student’s IEP....  “The student’s IEP Team also must review the student’s IEP and determine whether any other changes to the IEP are needed as a result of the extended absence from school. (34 CFR <sup>[11]</sup> § 300.324(b)(1)).”	OCR FAQ pg 3		When school resumes, IEP services must resume. IEP Team must determine if any changes are needed to an IEP for an individual child.
	“Once school resumes, the LEA must <b>make every effort</b> to provide special education and related services to the child in accordance with the child’s individualized education program (IEP)”	ED SUP FAQ		
Compensatory Services after School Reopens	“Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services - IEP teams (as noted in the March 12, 2020 guidance) must make an individualized determination whether and to what extent compensatory services may be	ED Sup FAQ pg 2		After school resumes, IEP teams must consider compensatory services on an individual basis.

	needed when schools resume normal operations.”			
		School requests	Requests “Waiving the right to compensatory education claims resulting from the required transition to virtual and/or adjusted instruction when the exact services cannot be provided that were provided in the previous IEP in place prior to school closings. “	<b>This request to waive compensatory education after school resumes is in direct contradiction to the ED guidance and would have a long-term damaging impact on many children with disabilities.</b>
	IEP Team required to make an individualized determination as to whether compensatory services are needed to make up for any skills that may have been lost.	ED 2017 Guidance pg 13, 14, 15 and OCR FAQ pg 3		
Evaluation Deadline	IDEA provides that initial evaluations must be conducted within 60 calendar days of receiving parental consent, or within a State-established timeframe. (with certain exceptions) 34 CFR §300.301(l)(i)  IDEA allows this timeline to be “extended by mutual written agreement of the child’s parents and a group of qualified professionals” for evaluation for Specific Learning Disabilities – the largest category of identification. 34 CFR §300.309	Geary		States can set their own evaluation deadline, if within federal deadline.  Evaluation deadline for LD students may be extended by mutual agreement.
	Secretary authorized to extend the 60 calendar deadline up to 30 days for the initial evaluation of children to determine their eligibility for services under IDEA in	CRS Report pg 33		Katrina law allowed up to 30 day extension of initial evaluation timeline.

	P.L.109-148 (Katrina law)	Katrina		
		School requests	<p>“...we ask that the Secretary be given the authority to hold that all timelines under the Act be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order and also be computed thereafter only in accordance with the definition of “school day” during the time of the national emergency. These definitions are set forth under 34 C.F.R. § 300.11</p>	<p>Requests waiving all deadlines when school is closed and physical contact not allowed. Not clear if the clock would “start clicking” again when school resumes.</p> <p>Not clear what impact of “school day” request would be.</p>
		NASDSE /CASE CEC	<p>Requests 60-day timeline requirements be paused from the day schools closed due to the pandemic and extended for <i>not more than 45 school days</i> after regular school year in-person instruction has resumed.</p>	<p>Blanket waiver request with no differentiation for situations when face-to-face assessments are already completed and only a meeting is needed.</p> <p>Katrina law allowed only a 30 day extension of this timeline. This request would allow a pause in timeline from the time the school closed (generally March 2020) until 45 days after schools reopen many months later.</p>



	<p><u>(c)</u> Each affected LEA will participate in transition planning conferences arranged by the designated lead agency under section 635(a)(10) of the Act.</p> <p><i>Timelines [34 C.F.R. § 300.124]</i></p>			
		School requests	Requests all “timelines under IDEA be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order.”	Not clear if the clock would “start clicking” again when school resumes. Broad waiver request without indication of what would happen to children needing services.
Reevaluations	<p>“A reevaluation of each child with a disability must be conducted at least every three years, unless the parents and the public agency agree that a reevaluation is unnecessary 34 C.F.R. § 300.303(b)(2). However, when appropriate, any reevaluation may be conducted through a review of existing evaluation data, and this review may occur without a meeting and without obtaining parental consent, unless it is determined that additional assessments are needed. 34 C.F.R. §300.305(a).”</p>	ED Sup FAQ pg 5		<p>Re-eval may be a review of existing data and may occur without a meeting and without parental consent, unless additional assessments needed. (Although parents would not want decisions without them.)</p> <p>This could be an issue for children identified under Developmental Delay who must transition to another IDEA eligibility category by a certain age.</p>
Evaluations/Re-evaluations during disasters	If an evaluation of a student with a disability requires a face-to-face meeting or observation, the evaluation would need to be delayed until school reopens. Evaluations and reevaluations that do not require face-to-face assessments or observations may take	2017 Guidance pg. 14 and OCR FAQ pg 3		Delay face-to-face contact. If face-to-face not needed, evals and re-evals may take place if parent consents.

	place while schools are closed, if the parent consents.			
		NASDSE /CASE CEC	Requests reevaluation triennial due dates be paused from the day schools closed due to the pandemic and extended for <i>not more than 45 school days</i> after regular school year in-person instruction has resumed.	Would students continue to be considered a SWD in need of special education and related services? Not clear why this would be needed in light of recent ED guidance.
		School requests	Requests all “timelines under IDEA be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order.”	Not clear why this would be needed in light of recent ED guidance.
General IEP requirement	§ 300.323 When IEPs must be in effect. (a) <i>General</i> . At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.	IDEA: § 300.323(a)		
IEP Development	Must be developed within 30 days of determining child needs sped. Can meet via alternate means. 34 CFR §300.323©	ED Sup FAQ pg 4 & Geary		
		School requests	Requests all “timelines under IDEA be waived during the times where schools are closed and physical contact with students is prohibited	Not clear if the clock would “start clicking” again when school resumes.

			under federal, state or local order.”	
		NASDSE /CASE CEC	Not clear if specifically requesting to waive initial IEP development timeline although there is a general request to pause timelines.	
IEP Services Start Time	Services start “as soon as possible” after IEP developed. Can have leeway in isolated circumstances such as storms, power outages.	Geary		Current flexibility allowed in start of IEP services during a disaster.
IEP reviews	Periodic review, at least annually. 34 CFR §300.324(b). After annual review can be amended with an agreed upon document (not full IEP re-write). 34 CFR §300.324(a)(4).	ED Sup FAQ & Geary		Do not need a full IEP meeting to amend the IEP.
		School requests	Requests all “timelines under IDEA be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order.”	Not clear under this proposal what would happen to students transitioning between schools in the Fall – elementary to middle, middle to high school, or students 18 to 21 and still eligible for ID going to transition programs or postsecondary programs for students with ID. An IEP is needed to determine placement. These students must not be overlooked.
		NASDSE /CASE CEC	Requests IEP annual review timelines paused from the day schools closed due to the pandemic and extended for <i>not more than 45 school</i>	Same as above.

			days after regular school year in-person instruction has resumed.	
Documentation of FAPE & IEP Meeting Procedures	[34 C.F.R. § 300.323(c)(1); 34 C.F.R. §300.324(b)(1); 34 C.F.R. §300.324(a)(4)(i); 34 C.F.R. §300.328]	NASDSE /CASE	Recommend all IEPs in effect before school closure stay in effect. Request allowing a separate document to be created such as a 'distance/continual learning plan.' "The plan should be clearly communicated after consultation with the parent. In addition, team meeting requirements should be flexible during the development of the documentation of the new plan. The development of the plan would maintain IEPs and placements to avoid a stay-put placement (in the home environment) under a due process complaint during this national crisis. No IEPs would need to be amended under this plan." <sup>[1]</sup> <sub>[SEP]</sub>	They interpret ED's Q&A to mean "that every school district in the country will be changing a child's placement after ten days of school closure". Not clear why this is their interpretation.  Apparently under their request, plans would be created in consultation with the parent, but it appears the intent is to tell the parent what will be provided, not use the IEP team as the guidance requires.  <b>The guidance is clear that decisions about distance/continual learning plans are IEP Team decisions that include parents in the decision making – not just inform them – and this requirement should not be waived.</b>
	[34 C.F.R. § 300.323(c)(1); 34 C.F.R. §300.324(b)(1); 34 C.F.R. §300.324(a)(4)(i);	CEC	Recommends that all IEPs written before the closure of schools during the	NOTE the difference between NASDSE/CASE and CEC recommendations on

	34 C.F.R. §300.328].		pandemic be maintained. Services in these crisis circumstances should be reflective of the IEP to the extent possible, carried out in consultation with the parents, and continually documented.	this topic. See above.
60 Day State Complaint Dispute Resolution Timeline	“Absent agreement by the parties, a state may be able to extend the 60-day timeline for complaint resolution if exceptional circumstances exist with respect to a particular complaint. 34 C.F.R. § 300.152(b)(1). Although the Department has previously advised that unavailability of staff is not an exceptional circumstance that would warrant an extension of the 60-day complaint resolution timeline, the COVID-19 pandemic could be deemed an exceptional circumstance if a large number of SEA staff are unavailable or absent for an extended period of time. “	ED Sup FAQ pg 4		Flexibility already allows for State complaint resolution if large number of SEA staff unavailable.
		School requests	Requests all “timelines under IDEA be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order.”	
		NASDSE /CASE CEC	Requests complaint timelines be paused from the day schools closed due to the pandemic and extended for <i>not more than</i>	ED Supplemental FAQ already gives flexibility if SEA staff are unavailable.

			45 school days after regular school year in-person instruction has resumed.	
		School requests	Requests all “timelines under IDEA be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order.”	ED Supplemental FAQ already gives flexibility if SEA staff are unavailable.
	<p><b>20 U.S. Code § 1415. Procedural safeguards.</b> This section of IDEA “ensures that children with disabilities and their <a href="#">parents</a> are guaranteed procedural safeguards with respect to the provision of a <a href="#">free appropriate public education</a> by such agencies.” See: <a href="https://www.law.cornell.edu/uscode/text/20/1415">https://www.law.cornell.edu/uscode/text/20/1415</a></p>	School requests  Katrina bill	Requests waiving “the due process requirements under 20 U.S. Code § 1415 under <i>very limited</i> circumstances.”	<p><b>This appears to be a request to waive all due process protections in the law. These civil rights have never been waived before and are essential to protecting children.</b></p> <p><b>The Katrina law states nothing in the law should be construed to allow waiving IDEA Procedural safeguards.</b></p>
	<p><b>20 U.S.C. § 1415(f)(E)(ii), (E) Decision of hearing officer (i) In general</b></p> <ul style="list-style-type: none"> <li>▪ Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.</li> </ul>	School requests	“The Secretary should be able to conclude that, pursuant to 20 U.S.C. § 1415(f)(E)(ii), any failure to provide in-person instruction pursuant to a student’s IEP during this national emergency is a technical contravention of the IDEA and therefore not	Guidance already states that Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based

	<p><b><u>(ii) Procedural issues</u></b></p> <ul style="list-style-type: none"> <li>▪ In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies— <ul style="list-style-type: none"> <li>▪ <u>(I)</u> impeded the child’s right to a free appropriate public education;</li> <li>▪ <u>(II)</u> significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or</li> </ul> </li> <li>○ <u>(III)</u> caused a deprivation of educational benefits.</li> </ul> <p>See: <a href="https://sites.ed.gov/idea/statute-chapter-33/subchapter-ii/1415/f">https://sites.ed.gov/idea/statute-chapter-33/subchapter-ii/1415/f</a></p>		subject to IDEA’s due process requirements.”	instructional activities, and may identify which special education and related services, if any, could be provided at the child’s home.”
Due Process: 15 days to convene meeting	“When a parent files a due process complaint, the LEA must convene a resolution meeting within 15 days of receiving notice of the parent’s complaint, unless the parties agree in writing to waive the meeting or to use mediation. 34 C.F.R. § 300.510(a).	ED Sup FAQ Pg 4		
	If a parent files a complaint, school must convene a resolution meeting within 15 days	Geary		May meet by phone, internet to resolve dispute.

	of receiving complaint. 34 CFR §300.510(a)(t). If parent can't meet then, LEA can offer alternate participation (phone, etc.). 34 CFR §300.510(a)(3).			
Due Process: 30 days resolution period	"While the IDEA specifically mentions circumstances in which the 30-day resolution period can be adjusted in 34 C.F.R. § 300.510(c), it does not prevent the parties from mutually agreeing to extend the timeline because of unavoidable delays caused by the COVID-19 pandemic."			Parties may mutually agree to extend this timeline.
	If not resolved within 30 days of receiving complaint, due process hearing may occur. 34 CFR §300.510(b). Regs allow change in time to resolve. 34 CFR §300.510(c)	Geary		Regulations allow flexibility in the deadline to resolve disputes.
Due Process Hearing Decision	"Additionally, although a hearing decision must be issued and mailed to the parties 45 days after the expiration of the 30-day resolution period or an adjusted resolution period, a hearing officer may grant a specific extension of time at the request of either party to the hearing." 34 C.F.R. § 300.515(a) and (c).	ED Sup FAQ pg 4		Hearing officer may grant time extension for final decision.
	Final decision on due process complaint required "not later than 45 days after the expiration of the 30-day resolution period (or extended time allowed by regs). " A hearing officer may grant specific extensions of time beyond the timelines ...at the request of either party. 34 CFR §300.515(c)."			
SPP/APR Reporting	"Katrina law", P.L. 109-148, extended time for up to 60 days to finalize State Performance Plan (SPP) and up to 60 days to submit Annual Performance Plan (APR) for	Katrina law CRS		Katrina law extended SPP and APR deadlines up to 60 days



		CEC	"It is essential that the standards set forth under the IDEA related to district and state performance plans be reconsidered under the circumstances"	Less specific than NASDSE/CASE.
Waiving State MOE	<p>"The Secretary may waive, one fiscal year at a time, the requirement under Part B of the IDEA that States not reduce the amount of State financial support for special education and related services for children with disabilities if doing so would be equitable due to exceptional or uncontrollable circumstances, such as a disaster or unforeseen decline in the financial resources of the State. (34 CFR § 300.163(c)(1))."</p> <p>In subsequent years following a waiver, level of support is amount in preceding year. (34 300.163 (d))</p> <p>Some State MOE waivers granted in 2009-10 and 2010-11. See <a href="https://www2.ed.gov/policy/speced/guid/idea/monitor/smfs-partb-waivers.html">https://www2.ed.gov/policy/speced/guid/idea/monitor/smfs-partb-waivers.html</a></p>			Secretary may waive State MOE due to a disaster, but not LEA MOE. States must submit a request to the Secretary to waive State MOE.
	<p>"The Individuals with Disabilities Education Act (IDEA) grants the Secretary authority to waive state maintenance of effort (MOE) requirements and requirements to supplement, not supplant, federal funds under certain circumstances." No authority to grant LEA MOE. "For FY2006, the Secretary used this authority under IDEA Section 612(a)(18)(c) to waive Louisiana's state level MOE requirements."</p>	CRS Report pg 1 & 13		
Waiving LEA MOE	IDEA does not provide for a waiver of LEA	NASDSE	Requests LEA MOE	Should Congress provide for

	<p>Maintenance of Effort (MOE). It provides for MOE reduction in limited circumstances, which do not include “exceptional or uncontrollable circumstances” (34 C.F.R. §300.203-205)</p> <p>See:  <a href="https://www.law.cornell.edu/cfr/text/34/300.203">https://www.law.cornell.edu/cfr/text/34/300.203</a></p>	<p>/CASE</p> <p>Boundy letter</p>	<p>requirement to be “waived” for 2019-2020 (actually not a waiver process but rather a blanket waiving)</p>	<p>such waiving of LEA MOE, it should be made clear that in subsequent years the level would be the same as in the year preceding (in this case 2018-2019) See Letter to Boundy.</p>
<p>Proportionate Share</p>	<p>School districts are required to set aside IDEA funds under <i>Comprehensive Coordinated Early Intervening Services (CCEIS)</i> procedures toward addressing disproportionality. [34 C.F.R. § 300.133]<sup>[L]</sup><sub>[SEP]</sub> [34 C.F.R. §300.205; 34 C.F.R. §300.326]<sup>[L]</sup><sub>[SEP]</sub></p>	<p>NASDSE /CASE</p>	<p><sup>[L]</sup><sub>[SEP]</sub> Requests unspent CCEIS and proportionate share dollars are carried over to the 2020-2021 school year.</p>	
<p>Andrew F. and misinterpretation of “Child’s circumstances”</p>	<p>Supreme Andrew F. decision. Justice Roberts wrote: The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”</p>	<p>COPAA FAQ</p> <p>Andrew F. Q&amp;A</p>	<p>“To be clear, this applies to the child’s abilities and potential – not to the closure of schools.” (COPAA FAQ).</p> <p>Some organizations are referencing the term “child’s circumstances” in Andrew F. to refer to the pandemic and as a reason to limit services. An ED Q &amp; A on Andrew F. further explains that this refers to the child: “the Court stated that the IEP Team, which must include the child’s parents (8) as</p>	

			Team members, must give “careful consideration to the child’s present levels of achievement, disability, and potential for growth.”	
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Most bold emphasis is author’s.

## RESOURCES AND REFERENCES

The following resources were reviewed in developing this document and most are cited in the chart, listed in order referenced and followed (in parentheses) by the abbreviation used in the “source” column in the chart.

US Department of Education (ED), Office of Special Education and Rehabilitation Services (OSERS), Office of Special Education Programs (OSEP) policy letter to Ms. Geary and Mr. DeLorenzo at the New York State Education Department. November 20, 2012. <https://sites.ed.gov/idea/idea-files/policy-letter-november-20-2012-to-pat-geary-and-james-p-delorenzo/> (Geary)

Questions and Answers on Providing Services to Children with Disabilities (SWD) During the Coronavirus Disease 2019 Outbreak, OSERS fact sheet on providing services to SWDs, US Department of Education. March 2020 <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/ga-covid-19-03-12-2020.pdf> ( ED Q & A)

Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters, U.S. Department of Education (ED). September 2017. <https://safesupportivelearning.ed.gov/sites/default/files/disaster-guidance.pdf> (ED 2017 Guidance)

Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students, US Department of Education (ED) Office of Civil Rights (OCR). March 16, 2020. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf> (OCR FAQ)

Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, OSERS supplemental fact sheet, US Department of Education, OSERS. March 21, 2020. <https://www2.ed.gov/about/offices/list/ocr/frontpage/fag/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> (ED Sup FAQ)

Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, P.L. 109-148. (Katrina law) See Appendix B.

Letters from representatives of various school groups requesting broad waivers. See Appendix A. (school requests). See Appendix A. Council of Administrators of Special Education (CASE) and National Association of State Directors of Special Education (NASDSE) letter to Office of Special Education and Rehabilitative Services (OSERS) and Office of Special Education Programs (OSEP). March 31, 2020. <https://drive.google.com/open?id=1SaXyHldrF6h3OXuIMYGyY06o13ZYbDF8> (NASDSE/CASE)

Council for Exceptional Children (CEC) letter to ED requesting “flexibilities”. [https://cec.sped.org/news/CEC-Response-CARES-Act?\\_zs=rFndW1&\\_zl=q3Me6](https://cec.sped.org/news/CEC-Response-CARES-Act?_zs=rFndW1&_zl=q3Me6) (CEC)

FAQ on Impact of COVID-19, Council of Parent Attorneys and Advocates (COPAA). March 31, 2020. [https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/2020\\_docs/faq\\_final-3-31-2020.pdf](https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/2020_docs/faq_final-3-31-2020.pdf) (COPAA FAQ)

ED OSERS/OSEP policy letter to Ms. Boundy. April 4, 2012. <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep-04-04-2012.doc> (Boundy)

*Special Education and COVID-19 School Closures*, K. Bakken, E. Katz, W. Matthews, L. Shifter, The Century Foundation, April 7, 2020, <https://tcf.org/content/commentary/special-education-covid-19-school-closures/> (school closure article)

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## APPENDIX A

### Letters to Members of Congress Requesting Broad IDEA Waivers from Representatives of School Organizations

Language requesting broad waivers of IDEA requirements is included in letters from representatives of organizations in various states. These State-level organizations include superintendents, school administrators, unions, school boards, principals and others. This statement is not intended to imply that all such organizations in all the states support this request. See examples of the language below.

The following identical language is included in various letters to Congress:

“In particular, we urge you to ensure that any forthcoming COVID-19 relief package grants the Secretary of Education the authority to waive the due process requirements under 20 U.S. Code § 1415 under *very limited* circumstances. The Secretary should be able to conclude that, pursuant to 20 U.S.C. § 1415(f)(E)(ii), any failure to provide in-person instruction pursuant to a student’s IEP during this national emergency is a technical contravention of the IDEA and therefore not subject to IDEA’s due process requirements. Furthermore, the Secretary should be able to declare that timelines under IDEA be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order.

Our request is rooted in a need for practicality in the face of a national emergency that was never foreseen when IDEA was written in 1975. School districts across the country are now closed—likely for the remainder of the school year—for public health reasons, with no established date to resume instruction in many states. In most cases, the only alternative for districts is to provide students with instruction through virtual means. For a small portion of students with disabilities, however, it will be impossible to comply with their IEP due to the inability of our personnel to interact physically with the student. While we will implement IEPs to the best of our ability during the pandemic and most certainly ensure that services will resume once this emergency passes, during the emergency school districts must not be held liable under the procedural due process requirements provided by the Act for a failure to meet IEPs that is beyond their control.”

Some letters also request the following:

- Waiving all time lines, including but not limited to child find/eligibility, evaluations, annual IEPs, and transitions from Part C to Part B, during the times where schools are closed and physical contact with students is prohibited under federal, state or local order.
- Waiving any consent requirements when a school district must adjust a student’s Individual Education Program (IEP) for virtual and/or adjusted instruction.

- Waiving the right to compensatory education claims resulting from the required transition to virtual and/or adjusted instruction when the exact services cannot be provided that were provided in the previous IEP in place prior to school closings.

**This following proposed language is also being circulated.**

<sup>1</sup>Because of the national emergency, school districts across the country have been closed for public health reasons, with no currently established date to resume instruction. In most cases, the only alternative to provide students with instruction will be through virtual means. For some students, however, it will be impossible to implement the IEP with fidelity due to the inability to interact physically with the student. Services will resume once the emergency passes, however school districts must not be held liable under the procedural due process protections provided by the Act.

Accordingly, we ask that the Secretary be given the authority to waive the due process procedures under 20 USC 1415 under very limited circumstances and hold that, pursuant to 20 U.S.C. § 1415(f)(E)(ii), any failure to provide in-person instruction pursuant to a student’s IEP during the time of the national emergency be a mere technical contravention of the IDEA and not subject to the due process procedures provided for under the Act.

In addition, we ask that the Secretary be given the authority to hold that all timelines under the Act be waived during the times where schools are closed and physical contact with students is prohibited under federal, state or local order and also be computed thereafter only in accordance with the definition of “school day” during the time of the national emergency. These definitions are set forth under 34 C.F.R. § 300.11

(a) *Day* means calendar day unless otherwise indicated as business day or school day.

(b) *Business day* means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in § 300.148(d)(1)(ii)).

(c)

(1) *School day* means any day, including a partial day that children are in attendance at school for instructional purposes.

(2) *School day* has the same meaning for all children in school, including children with and without disabilities.

(Authority: 20 U.S.C. 1221e-3)

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<sup>1</sup> R.E. v. N.Y.C. Dept. of Educ., 694 F.3d, 167, 190 (2d. Cir. 2012) see also A.D., 2013 U.S. Dist. LEXIS 38757, at \*17; E.F., 2013 U.S. Dist. LEXIS 117143 at \* 36.

## APPENDIX B

# DEPARTMENT OF DEFENSE, EMERGENCY SUPPLEMENTAL APPROPRIATIONS TO ADDRESS HURRICANES IN THE GULF OF MEXICO, AND PANDEMIC INFLUENZA ACT, 2006 P.L. 109-148 (Referred to as the bill”

### Sections relevant to IDEA waivers follow:

#### Subtitle C—Education and Related Programs Hurricane Relief

#### SEC. 301. AGREEMENTS TO EXTEND CERTAIN DEADLINES OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT TO FACILITATE THE PROVISION OF EDUCATIONAL SERVICES TO CHILDREN WITH DISABILITIES.

(a) **AUTHORITY.**—The Secretary of Education may enter into an agreement described in subsection (b) with an eligible entity to extend certain deadlines under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) related to providing special education and related services, including early intervention services, to individuals adversely affected by a Gulf hurricane disaster.

(b) **TERMS OF AGREEMENTS.**—An agreement referred to in subsection (a) is an agreement with an eligible entity made in accordance with subsection (e) that may extend the applicable deadlines under one or more of the following sections:

(1) Section 611(e)(3)(C)(ii) of such Act, by extending up to an additional 60 days the 90 day deadline for developing a State plan for the high cost fund.

(2) Section 612(a)(15)(C) of such Act, by extending up to an additional 60 days the deadline for submission of the annual report to the Secretary of Education and the public regarding the progress of the State and of children with disabilities in the State.

(3) Section 612(a)(16)(D) of such Act, by extending up to an additional 60 days the deadline for making available reports regarding the participation in assessments and the performance on such assessments of children with disabilities.

(4) Section 614(a)(1)(C)(i)(I) of such Act, by extending up to an additional 30 days the 60 day deadline for the initial evaluation to determine whether a child is a child with a disability for purposes of the provision of special education and related services to such child.

(5) Section 616(b)(1)(A) of such Act, by extending up to an additional 60 days the deadline for finalization of the State performance plan.

(6) Section 641(e)(1)(D) of such Act, by extending up to an additional 60 days the deadline for submission to the Governor of a State and the Secretary of Education of the report on the status of early intervention programs for infants and toddlers with disabilities and their families operated within the State.

(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed—

(1) as permitting the waiver of—

(A) any applicable Federal civil rights law;

(B) any student or family privacy protections, including provisions requiring parental consent for evaluations and services;

(C) any procedural safeguards required under section 615 or section 639 of the Individuals with Disabilities Education Act; or

(D) any requirements not specified in subsection (b) of this section; or

(2) as removing the obligation of the eligible entity to provide a child with a disability or an infant or toddler with a disability and their families—

(A) a free appropriate public education under part B of the Individuals with Disabilities Education Act; or

(B) early intervention services under part C of such Act.

(d) DURATION OF AGREEMENT.—An agreement under this section shall terminate at the conclusion of the 2005–2006 academic year.

(e) REQUEST TO ENTER INTO AGREEMENT.—To enter into an agreement under this section, an eligible entity shall submit a request to the Secretary of Education at such time, in such manner, and containing such information as the Secretary may require.