



♥ Ensuring a Place at the Table for Every Family

November 8, 2021

Katherine Neas
Acting Assistant Secretary
Office of Special Education and Rehabilitative Services
US Department of Education
Washington, DC

Dear Acting Assistant Secretary Neas:

On behalf of the National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE), we are submitting these comments in response to the US Department of Education (US ED) Office of Special Education and Rehabilitative Services' (OSERS) Return to School Roadmap: Development and Implementation of Individualized Education Programs (IEPs). The mission of National PLACE is to educate and empower families and family-led organizations and support them to advocate for enhanced, meaningful parent involvement and leadership in all policy decision-making that impacts services to services for children and families. Our 70 national, state and local members are all family-led, family-serving organizations, including Family-led organizations (Parent Training and Information Centers and Community Parent Resource Centers), Family to Family Health Information Centers and Family Voices Affiliate Organizations, Federation of Families (formerly Federation of Families for Children's Mental Health) state organizations and chapters including Statewide Family Networks, Parent to Parent USA affiliates, Early Start Family Resource Centers, and Family Empowerment Centers, among others. National PLACE and our member organizations are committed to ensuring that families and family-led organizations are at the table when decisions regarding children and families are being made, and that our voices, experiences, and perspectives meaningfully influence those decisions. In particular, National PLACE and our members advocate on behalf of families whose children face the greatest challenges and have the poorest outcomes, including children with disabilities, children of color, immigrant children, low-income children, and LGBTQ+ children, and their families across systems including early childhood, education, health, human services, child welfare, etc.

We have reviewed OSERS' IEP guidance and include our thoughts below.

General Comments

In general, National PLACE and our members appreciate the contents of the IEP guidance. While the document is long, it combines into one document earlier guidance from US ED and expands in areas where there was previously lack of clarity and/or where there have been additional developments requiring further clarification since issuance of the first set of guidance. We eagerly await the promised translation of the guidance, at least into Spanish. We thank OSERS for listening to family-led organizations, including parent centers, and the stories from families and youth/young adults we have shared via US ED listening sessions and other forums in issuing guidance that addresses the most important questions and the areas that lead to the most disputes/disagreement. We also appreciate the fact that the guidance places decision-making responsibilities directly on IEP teams, including families, who are in the best position to identify what services, including any compensatory services, needed by a student with disabilities to ensure they receive a free, appropriate public education (FAPE) in the least restrictive environment (LRE). The guidance clarifies each student's right to FAPE in LRE regardless of [school] setting and encourages states and districts to implement intervention and support strategies that protect student health. It addresses key topics such as how to consider special factors (e.g., assistive technology and social, emotional, and behavioral needs); how to make educational placement decisions; utilizing evidence-based practices; addressing school-related health needs (including mask-wearing during COVID-19); and, how to consider the need for compensatory services, as well as the reality that both IDEA Part B and federal K-12 stimulus funds can be used to support meeting the IEP-determined needs of students.

Specific Comments

1. Family-led, family-serving organizations appreciate the guidance informing IEP teams that needed compensatory services can be included in the IEP; see Section D pages 24-31. National PLACE strongly agrees with the guidance that IEP teams, including families, have the right (and responsibility) to include compensatory services in the IEP if a student was denied needed services due to COVID and requires such services in order to receive a free, appropriate public education.¹ National PLACE strongly disagrees with the position of the Council of Administrators and Supervisors (CASE) et al that only a court can order compensatory services.

2. Family-led, family-serving organizations appreciate the clarification in the guidance of each student's right to a free, appropriate public education in the least restrictive environment regardless of school setting, and its encouragement to states and districts to implement intervention and support strategies that protect student health. Particularly important is how the guidance addresses key topics such as how to consider special factors (for example, assistive technology and social, emotional and behavioral needs); how to make educational placement decisions; using evidence-based practices; addressing school-related health needs (including mask wearing during COVID); and how to consider the need for compensatory services.

¹ We note that in the states and territories covered by the Third Circuit Court of Appeals, students are essentially entitled to an hour of compensatory services for every hour of IEP services that were not provided. There is no requirement to consider or demonstrate whether there was any loss of knowledge/skills that need to be recouped.

3. Family-led, family-serving organizations appreciate the clarification that both IDEA Part B funds and federal K-12 stimulus dollars can be used to support students with IEPs.

4. Family-led, family-serving organizations appreciate the comment in the introduction to the document that "The Department recognizes that some parents may have specific health and safety concerns about sending their children back to in-person instruction because of the health risk to **the student, the student's immediate family, and to other household members**" and urge the US ED Office for Civil Rights (OCR) to issue detailed guidance indicating that schools must provide accommodations not just to students but also to parents, and the disability and health conditions of parents related to the possibility of contracting COVID if their children return to in-person schooling must be considered and accommodated in making decisions about in-person vs. virtual learning for those children.

5. Family-led, family-serving organizations appreciate that the Department has included the following language for parents about contacting their parent center as well as the link to find their parent center: "Parents who would like to request additional support in understanding IDEA's requirements may wish to contact their local regional parent training and information centers (PTIs) for direct assistance and referrals to other organizations and to gain skills to effectively participate in the education and development of their children. There are over 100 PTIs and Community Parent Resource Centers in the United States and Territories that provide training, resources, and support on a wide variety of topics. Parents can locate the appropriate PTI for their area at <https://www.parentcenterhub.org/find-your-center/>."

6. Family-led, family-serving organizations welcome the language in the answer to Question B-1: "An LEA must initiate and conduct meetings periodically, but at least once every twelve months, to review a child's IEP, in order to determine whether the annual goals for the child are being achieved, and to revise the IEP, as appropriate. Although the LEA is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. ***If the LEA refuses the parent's request to reconvene the IEP Team, it must provide written notice to the parents of the refusal, including an explanation of why the LEA has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the child. 34 C.F.R. § 300.503.*** If a child's teacher feels that the child's IEP or educational placement is not appropriate for the child, the teacher should follow the LEA's procedures with respect to (1) calling or meeting with the parents; or (2) requesting that the LEA hold another IEP Team meeting to review the child's IEP," and that " It is important to note that an amendment to an IEP cannot take the place of an annual IEP Team meeting."

7. Family-led, family-serving organizations appreciate the language in the answer to Question C-1 regarding assistive technology: "One component of assistive technology services is training or technical assistance for a child with a disability or, if appropriate, ***that child's family. The IEP Team could also consider whether parent counseling and training should be provided as a related service under IDEA to help the child's parent acquire the necessary skills that will allow them to support the implementation of the IEP, including the assistive technology device,***" and the answer to Question C-1: "Circumstances related to the COVID-19 pandemic exacerbated existing difficulties with equitable access to technology and digital learning for all learners. Barriers to access include factors such as the price of procuring services and devices privately (e.g., home internet service and

mobile data); lack of broadband access in rural areas; and lack of parent understanding and familiarity with use of technology, including assistive technology to support their child's learning. ***With the recent influx of Federal funds, particularly those under the American Rescue Plan Act of 2021 (ARP Act), Congress specifically authorizes SEAs and LEAs to purchase educational technology (including hardware, software, and connectivity) for children who are served by the LEA that aids in regular and substantive educational interaction between children and their classroom instructors, including low-income children and children with disabilities, which may include assistive technology or adaptive equipment.*** Section 2001(e)(2)(K) of the ARP Act. See also Question C-19 of the Department's Frequently Asked Questions on the Elementary and Secondary School Emergency Relief (ESSER) Programs and Governor's Emergency Education Relief (GEER) Programs (May 2021 FAQ). Additionally, under Section 2014(a) of the ARP Act, Congress provided supplemental IDEA Part B and Part C funds for Fiscal Year 2021 to States and LEAs. These funds may also be used to address technology needs of children with disabilities."

8. Family-led, family-serving organizations particularly welcome the section in the Guidance on meeting the social, emotional, behavioral, and mental health needs of students, especially the answer to Question C-6: "Children who return to school, including those with disabilities and those who demonstrate challenges that were not evident before the school closure, may have new disability-related needs, regression of skills or a lack of expected progress toward attaining the child's annual IEP goals, or social, emotional, behavioral, or mental health needs due to the impact of the COVID-19 pandemic. If new or different social, emotional, behavioral, or mental health needs arise after a child has been determined to be eligible for special education and related services and an IEP has been developed, the IEP Team must reconvene to consider these needs, including whether there is a need for additional related services and positive behavioral interventions and supports to ensure the child's access to FAPE. In the alternative, the parent and the LEA may agree in writing to amend the IEP to address the child's needs through the addition of such interventions and supports." Family-led organizations also appreciate the guidance and resources in Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs.

9. Family-led, family-serving organizations welcome the section in the guidance on addressing the health needs of students with disabilities: "Some children with disabilities have underlying medical conditions, such as genetic, neurologic, or metabolic conditions, or congenital heart disease, that place them at increased risk of severe illness if they contract COVID-19. Parents have raised questions about whether and how IEP Teams should consider school-related health or medical information for children with disabilities. This is especially the case in States or local jurisdictions that have enacted State or local laws, rules, regulations, or policies that are inconsistent with CDC's COVID-19 prevention and risk reduction strategies. Therefore, in the questions and answers below, the Department reaffirms IDEA's requirements that IEP Teams are responsible for identifying the services." The answer to Question C-8 is particularly useful: "For example, the provision of FAPE in the LRE for some children with disabilities may require that the IEP address, and educational placement include, appropriate preventative and risk-reducing strategies, such as wearing masks or other personal protective equipment, and sanitizing; or, when necessary, avoiding shared use of personal and educational items, such as markers, rulers, and classroom materials. See 34 C.F.R. § 300.116(d). As with eligible children with disabilities who have severe food allergies, health plans may be included as part of the child's IEP to ensure that the health and safety of the child in the school environment is properly addressed. When health plans are included in the child's IEP, it is

especially important that the IEP be accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation, consistent with IDEA requirements. Further, LEA staff responsible for implementing the IEP must be informed of the specific accommodations, modifications, and supports to be provided for the child in accordance with the child's IEP," as is the answer to Question C-10: "IEP Teams and the group deciding the educational placement must be able to appropriately address the in-person school-related health needs of a child with a disability with underlying medical conditions, including using COVID-19 prevention and risk reduction strategies."

10. Family-led, family-serving organizations look forward to the proactive approach noted by the Department in the following Q&A: "Question C-11: In what ways can the Department ensure that children with disabilities who require school-related health services receive them in the LRE? Answer: ***Under its monitoring authority, the Department intends to review publicly available information and stakeholder input, including concerns shared by parents and other stakeholders, and based on this may conduct additional monitoring to determine whether specific States are complying with IDEA in addressing the school-related health care needs of children with disabilities during the COVID-19 pandemic. The Department will provide technical assistance where needed. In situations where the Department finds noncompliance and voluntary compliance cannot be readily achieved, the Department will consider all its enforcement options, including a referral to the United States Department of Justice.***"

11. Family-led, family-serving organizations strongly agree that students may be entitled to both compensatory education and Extended School Year (ESY) services (Question E-2). We note that ESY services are included in a student's IEP when the student's IEP team decides that a student cannot receive FAPE if services are only provided for the usual 180 days and/or during the hours of a typical school day. In contrast, compensatory education services are to make up for an inappropriate IEP or to make up for services in the student's IEP that were either not fully or appropriately provided. Compensatory education is for a past failure to provide a FAPE while ESY is to ensure that a child has a FAPE going forward. We find very useful that language in the IEP guidance stating, "it is important to remember that IEP Team determinations regarding ESY services are prospective and not intended to make up for past denials of FAPE."

12. Family-led, family-serving organizations appreciate the answer to Question G-1 regarding Least Restrictive Environment (LRE): "As a result of the changes in instructional delivery approaches for children with disabilities caused by the COVID-19 pandemic and the potential impact on ensuring LRE, the Department recommends that SEAs review their existing policies, technical assistance activities, and procedures for monitoring their LEAs' compliance with IDEA's LRE requirements to ensure they are sufficient in scope and include information on instructional delivery approaches that were not typically contemplated prior to the COVID-19 pandemic and the potential impact on providing FAPE in the LRE." Many of our members have reported to us that during virtual/remote instruction, student with disabilities whose IEPs indicated that services were to be delivered in the general education classroom with non-disabled peers found themselves excluded from the virtual/remote instruction that was provided to general education classrooms and instead lumped into segregated virtual/remote classes for instruction.

However, family-led, family-serving organizations are concerned about the answer to Q G-2: "Under IDEA, is an LEA obligated to provide special education and related services through virtual instruction upon the parent's request? Answer: It will depend on whether virtual instruction, in-person attendance, or a hybrid approach are available to all students. These decisions are made by State and local education leaders. If virtual instruction is available to all students in an LEA, the LEA must ensure that a child with a disability whose needs can be met through virtual learning has an IEP implemented that provides all the services and supports necessary for the child to receive FAPE through such service delivery. IDEA also includes "home instruction" in the continuum of alternative placements an LEA must make available to ensure FAPE is available to children with disabilities C.F.R. § 300.115(b). Home instruction also could be delivered through a virtual, in-person, or hybrid approach." National PLACE's concern is that there may be students who by virtue of their own special healthcare needs or those of others in their household cannot safely attend in-person instruction. Now that schools have demonstrated the capacity to do virtual instruction, and not just home instruction, we believe that schools must provide virtual instruction and not just home instruction to those students, both to comply with the LRE provisions of IDEA and to meet the school's requirements under Section 504. Home instruction is not just a very restrictive placement, but also in many states provides a very minimal amount of instruction. For example, in New Jersey, the "minimum" amount of Home instruction for a student with disabilities is 10 hours a week; that is usually the maximum that is provided and does not provide sufficient instruction to enable the student with disabilities to learn the content across all subject areas.

Conclusion

In conclusion, we appreciate OSERS' IEP guidance and strongly support most of its provisions, but urge a reconsideration of this guidance, or the issuance of additional guidance, providing greater clarification on the rights of students to virtual instruction – and not home instruction – if they cannot safely return to in-person schooling due to their own health issues or those of their parent(s) and/or others in their home. We appreciate that this guidance values and integrates the importance of informed and involved parent/family engagement, and the availability of parent centers, which are family-led, family-serving organizations that help families navigate through and advocate in these systems, for additional information and support. We note that many of our other members, including Family to Family Health Information Centers, Parent to Parent Programs, Federation of Families members, and others, also work with families whose children have IEPs and thus they, too, benefit from this guidance. It is family-led, family-serving organizations, who are generally staffed by individuals with lived experience in the systems families must navigate, who provide diverse families and youth/young adults with the information and support they need, and who can most effectively take the information learned from hearing from tens of thousands of families and share it with monitoring and enforcement agencies such as US ED. For any questions or for additional information about this letter and its recommendations, please contact me at dautin@parentsatthetable.org.

Sincerely,



Diana Autin, Executive Director