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 **disABILITY**
LAW CENTER
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Protection & Advocacy for Virginians with Disabilities


Virginia **Autism** Project
virginiaautismproject.org

Project
Save
Child-
hood


The Arc.
Northern Virginia


MINERVA
SPECIAL EDUCATION
CONSULTING


FACES


Advocating 4 Kids Inc


parents of autistic
children
of northern virginia
families helping families: education, community, support.

April 24, 2020

Honorable Betsy DeVos via betsy.devos@ed.gov
United States Secretary of Education
Department of Education Building
400 Maryland Ave, SW
Washington, DC 20202

Honorable Artif Qarni via artif.qarni@governor.virginia.gov
Virginia Secretary of Education
P.O. Box 1475
Richmond, VA 23218

Re: Opposition to waivers of Civil rights of students with disabilities

Dear Secretaries DeVos and Qarni,

The Commonwealth has been busy since the end of March. Citizens from all walks of life have risen to the disorienting occasion that is the COVID-19 pandemic. Healthcare workers have exhibited heroic acts of care and selflessness in questionable working conditions. From fine dining to neighborhood cafes, business owners are figuring out creative ways to feed people and stay in business. Dusty sewing machines have been dragged out of closets and everyday folks are making masks in the hopes of helping stop the spread of COVID-19. Even insurance companies have approved greater flexibility to ensure continued access to healthcare.

However, we continue to struggle with educating our children. Following Governor Northam's order to close schools for the remainder of the year, our students with disabilities and their families were left without the services and supports so vital for their

growth and development. It is especially disheartening that, rather than follow in the open-minded and positive footsteps of the above examples, there was an immediate push from national education administrative organizations to begin waiving numerous provisions of IDEA. We strongly oppose any blanket waivers of the IDEA, Section 504 of the Rehabilitation Act of 1973, or Virginia's implementing regulations thereof.

It would be unprecedented and counter to the purpose of IDEA and the Rehabilitation Act to issue a blanket waiver that deprives thousands of children the essential services and accommodations under their IEPs and 504 plans. In prior school closures due to disaster, OSEP has held that school divisions must make every effort to ensure continuation of special education and related services.¹ As in prior disaster-related school closures, schools have the opportunity to explain why it may not have been able to meet particular deadlines when they file Annual Performance Plans (APP). Any waiver must be based on an individual student's circumstances, with a statement by the LEA that justifies why the law or regulation in question cannot be met within a given time frame.

Virginia can continue to provide special education to students with disabilities in accordance with the IDEA, Virginia's implementing regulations, and Section 504 of the Rehabilitation Act of 1973

The IDEA and the Rehabilitation Act already offer sufficient flexibility to parents and school teams to enable them to work together to provide a child with a Free Appropriate Public Education (FAPE) during and after the COVID-19 school closure. If parent and school teams wish to extend deadlines or forego meetings, they may do so under current laws and regulations. Indeed, the Virginia regulations implementing IDEA are replete with individual opportunities for parents to agree to waive the regulatory requirements.² The requested Waivers would wrest that right away, and would allow unilateral changes to a child's educational program.

¹ See, e.g., Letter to Geary (11/20/12), OSEP Director Melody Musgrove stated that LEAs must make every effort to make special education and related services available in the wake of Hurricane Sandy; Letters to Jarvis and Bounds (10/25/05), OSPE Director Troy R. Justesen stated that LEAs in Louisiana and Mississippi must continue to provide special education following Hurricane Katrina.

² See, e.g., 8 VAC 20-81-60(B); 8 VAC 20-81-110(B)(9), (D)(1), E(4).

It is inappropriate for LEAs to seek elimination or reduction of Virginia's parental consent requirements now, when many parents are now their child's primary "educator." The research clearly shows that "the education of children with disabilities can be made more effective by... strengthening the role and responsibility of parents and ensuring that families ... have meaningful opportunities to participate in the education of their children at school and at home."³

LEAs should aim to follow the IDEA framework to the greatest extent possible. Certainly, schools and IEP teams will need to think creatively about how to deliver services virtually, particularly to low-income or rural students who do not have internet access. Indeed, Virginia has existing regulations for students to continue to receive special education services when unable to attend school on-site, through homebound and home-based services, with reduced hours due to the change in delivery model.⁴

Nearly all IEPs can be delivered either in full or in part, with appropriate modifications to service delivery and service hours to reflect the realities educators are facing. In making these alterations, LEAs must still seek parental consent, which is especially important given the role of the parent in facilitating their child's education at home. It would be contrary to the intent of IDEA to permit learning plans to be disconnected entirely from the IEPs that have been so carefully crafted by teams.

Other states impacted by COVID-19 closures have developed assurances that Extended School Year and Compensatory Education Services will be considered on an individual basis for each student.⁵ Virginia, and indeed all states, should follow suit.

Virginia must continue to provide special education to students with disabilities in accordance with the IDEA, Virginia's implementing regulations, and Section 504 of the Rehabilitation Act of 1973

³ Section 601(c)(5), Findings, Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004

⁴ 8 VAC 20-81-130 (C)(2),(3)

⁵ Examples of Prior Written Notice documents from Texas and Massachusetts are enclosed with this letter as examples.

If Virginia and other states are allowed to waive these vital protections for children with disabilities, the repercussions will be felt for years to come. Reduction or elimination of a legal requirement to educate students with disabilities will necessarily lead to school divisions reducing or eliminating the staff who provide those services. Even before the COVID-19 pandemic, Virginia, along with the rest of the nation, faced a shortage of special education teachers.⁶ If these educators leave the Commonwealth, Virginia school divisions will be ill equipped to provide services and supports when schools reopen, and students with disabilities will be left behind.

Waiver of administrative oversight matters, such as the deadline on an APP report to the USDOE, may well be appropriate in these unprecedented circumstances. However, it is not appropriate to waive of rules that safeguard a child's right to an equitable and appropriate education. The Center for Medicare and Medicaid Services has issued waivers aimed at facilitating the delivery of care to the people they are charged with serving. The same should be true of the USDOE. USDOE should not sanction states abandoning the education of students with disabilities in times of crisis.

Sincerely yours,



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⁶ <https://www2.ed.gov/about/offices/list/ope/pol/bteachershortageareasreport201718.pdf>

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Cc:

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