



April 10, 2019

Superintendent Kathy Hoffman  
Arizona Department of Education  
1535 West Jefferson Street  
Phoenix, Arizona 85007  
[Kathy.Hoffman@azed.gov](mailto:Kathy.Hoffman@azed.gov)

Re: Protecting the Rights of Students with Disabilities Following COVID-19 School Closures

Dear Superintendent Hoffman:

This letter is sent by the Arizona Center for Disability Law, and is joined by the following agencies:

- The Arc of Arizona
- The Arizona Center for Law in the Public Interest
- The American Civil Liberties Union of Arizona
- The Native American Disability Law Center
- The William E. Morris Institute for Justice



The Arizona Center for Disability Law (ACDL) is the protection and advocacy agency for persons with disabilities in the state of Arizona. As a result of this designation, we provide a variety of legal services to people with mental, physical, psychiatric, and sensory disabilities.



The Arc of Arizona advocates for the rights and full community participation of all people with intellectual and developmental disabilities. Together with our network of members and affiliated chapters, we improve systems of supports and services, connect families, inspire communication and influence public policy.

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The Arizona Center for Law in the Public Interest (ACLPI) is a nonprofit law firm dedicated to ensuring government accountability and protecting the legal rights of Arizonans. ACLPI has represented the people of Arizona on issues that affect us all, including access to education and healthcare.



The American Civil Liberties Union (ACLU) of Arizona is a nonprofit, nonpartisan, public interest organization dedicated to the defense and expansion of civil liberties and civil rights in Arizona.



The Native American Disability Law Center is a private nonprofit organization that advocates for the legal rights of Native Americans with disabilities. The Law Center represents members of Native communities across northern Arizona, especially when ensuring access to appropriate education services.



Morris Institute for Justice

The William E. Morris Institute for Justice is a non-profit program that works on issues of importance to low-income and other vulnerable populations, including access to medical and educational services for children and federally required services for persons with disabilities.

We are writing to commend the Arizona Department of Education (ADE) for its efforts toward meeting the needs of Arizona's students during the COVID-19 pandemic. We appreciate that from the beginning of this crisis, ADE has sent the message that schools should continue to deliver educational opportunities to all students. The information and guidance ADE has provided thus far regarding the rights of students with disabilities to receive a Free Appropriate Public Education (FAPE) during school closures resulting from this crisis has been valuable. The webpage responding to frequently asked questions about the obligations of local education agencies (LEAs) to students with disabilities on the ADE Exceptional Student Services website includes particularly important information. This guidance describes the types of remote services that may be provided to students with disabilities to provide FAPE during a school

closure, and the distance-learning opportunities that do not constitute specially designed instruction necessary to provide FAPE, resulting in a need for compensatory services for special education students when schools reopen.

Both ADE and the United States Department of Education (DOE) have issued guidance making clear that if students cannot be provided the specially designed instruction or related services in their Individualized Education Programs (IEPs) during a school closure for safety or feasibility reasons, then IEP teams should consider compensatory education on an individual basis once school resumes. However, neither ADE nor DOE has issued recommendations for when or how IEP teams should consider compensatory education for students with disabilities who are denied FAPE during school closures. This lack of guidance may result in major inconsistencies in how the issue of compensatory education is addressed across the state.

### **Issue Guidance on When and How LEAs Must Make Compensatory Education Determinations**

While we agree with ADE and DOE that students who have not received FAPE during school closures due to COVID-19 are entitled to compensatory education, we fear that access to that compensatory education will vary between LEAs. Without technical assistance from ADE on when and whether schools and parents must meet to consider the need for compensatory education, some LEAs may initiate meetings for all enrolled students with disabilities to determine if compensatory education is needed and develop a plan for providing it, while other LEAs may wait for parents to request a meeting for this purpose. This will likely result in widespread denial of FAPE and inequity, and place an undue burden on parents. Furthermore, many LEAs are geographically located within the boundaries of the Navajo and Hopi reservations, where high numbers of COVID-19 cases have been reported. Local curfews, restrictions on travel, and the inability of students to access the internet in these areas create additional barriers for students needing special education and related services. Thus, guidance from ADE would assist LEAs in better serving native communities.

When states accept Individuals with Disabilities Education Act (IDEA) Part B funds, they agree to comply with IDEA's requirements. Regardless of how the state administratively organizes its school system and distributes its IDEA Part B funds, the State Educational Agency (SEA) ultimately remains responsible for ensuring LEAs comply with IDEA. If the issue of compensatory education in the wake of COVID-19 school closures is not addressed by LEAs, ADE will bear ultimate responsibility for any failures of LEAs to comply with IDEA. Therefore, we encourage ADE to provide unequivocal guidance to LEAs on what processes must take place in the aftermath of COVID-19 to protect the rights of students with disabilities.

We agree with ADE's statement in its online guidance: "A general compensatory service plan for all students with disabilities is inappropriate. Compensatory education is dependent upon the individual needs of the student and cannot be one size fits all. If comp education is needed, it must be determined on an individual basis once school resumes." Because each student has

individual needs, service determinations must be individualized. However, the promise of IDEA is that while the substance of an IEP is individualized and varies from student to student, there are uniform procedures in which all IEP teams must engage when making decisions about a student's special education.

We propose that, at a minimum, the following points be included in forthcoming ADE guidance on this topic:

- **LEAs must hold meetings with parents to discuss compensatory education for all students with IEPs.** ADE should issue guidance requiring all Arizona LEAs to schedule meetings with parents of students with existing IEPs within a set amount of time (we recommend within 45 calendar days) of schools being deemed safe to reopen (so these could take place over the summer if safe, and need not wait until the fall 2020 semester begins) to discuss the discrete question of compensatory education.
- **LEAs must not amend IEPs to reduce service minutes during school closures.** ADE has already issued guidance to LEAs stating that addenda to IEPs are not necessary in order to provide services remotely during school closures. However, to reduce their obligation to provide compensatory services once schools reopen, some LEAs may move forward with amending IEPs to reduce service minutes. ADE must warn LEAs that this course of action is a clear IDEA violation because it is a change based on LEA resources rather than the individual child's needs. ADE must advise LEAs that ADE will issue findings of noncompliance and will order corrective action should ADE receive administrative state complaints alleging this unlawful action.
- **Technical assistance for LEAs regarding determining compensatory education.** ADE should provide technical assistance to LEAs on what data should be considered at meetings where compensatory education determinations are made. For example, one piece of data that should be considered is the difference between the services listed in the student's IEP and the services that were provided to the student during school closures. Another consideration when calculating compensatory education is how much a student has regressed, which can be measured by comparing student progress toward IEP goals as measured before schools closed to performance measures taken after schools reopen. Although some students may require less than minute-for-minute compensatory education to be provided FAPE, many will need more than minute-for-minute compensatory education to address the extreme levels of regression likely being experienced by students with disabilities during these closures.
- **Technical assistance for LEAs regarding effective methods of delivering compensatory education.** We agree with ADE's statements in its online guidance that extended school year services are not a substitute for compensatory services and that a general compensatory service plan for all students with disabilities is inappropriate.

However, we foresee LEAs struggling to provide the amount and type of compensatory education that will be necessary to provide all students with FAPE. We recommend ADE assist LEAs in creating systems for the provision of compensatory education, including, if safe and feasible, schedules for providing compensatory services over the summer. Although extended school year services and compensatory services are different, a system for providing compensatory services over the summer can be modeled on an LEA's extended school year system. ADE should work with LEAs and teachers' unions to determine how teacher contracts can be modified or extended so that there are enough service providers available over the summer to meet the needs of students. Furthermore, smaller LEAs, especially charter schools, may not have the staff or capability to provide adequate compensatory services. Adequate staffing will also be an issue for LEAs located in rural areas and on the Navajo Nation, where many schools already struggle with a lack of service providers. ADE should facilitate collaboration between LEAs, so that smaller LEAs can pay larger neighboring LEAs to provide their students with necessary compensatory services. Similarly, ADE should help guide partnerships between public LEAs and private schools and service providers so that students can be provided with the compensatory education needed to receive FAPE.

By outlining what processes LEAs should implement when making decisions about compensatory education, ADE will reduce the likelihood that students will be denied FAPE without imposing one-size-fits-all requirements on what compensatory education should look like.

### **Provide Guidance Targeted at Parents/Guardians on Right to Compensatory Education**

Thus far, the majority of ADE's guidance on what constitutes FAPE during COVID-19-related school closures has been directed toward LEAs, teachers, and administrators, and not toward families. In fact, the ADE Exceptional Student Services team has been hosting weekly digital "check-in" meetings for LEAs, where it provides guidance and answers questions about special education during school closures. These meetings have not been advertised or opened to families of students with disabilities.

In light of ADE's historical commitment to local control vested in LEAs, it is likely that many students will only be provided with compensatory education if their parents and other adults in their lives understand that students with disabilities are entitled to receive FAPE during school closures and may be entitled to compensatory education once schools reopen. Only if parents understand this right will they be able to advocate for their children.

Therefore, we request that ADE disseminate guidance directed at parents and families of students with disabilities on the topic of FAPE and students' right to compensatory education following an extended school closure. It is particularly important that parents understand their right to request a meeting to discuss the provision of compensatory education, and to file an administrative state complaint with ADE if their child's school fails to discuss compensatory

education with them. It is also important that parents understand that their child can be provided distance learning services during school closures without an IEP amendment. If parents agree to changes in their children's IEPs reducing service minutes, their claims for compensatory education will be impacted. Parents must be made aware that if their child's school proposes to reduce services in the child's IEP during school closures, the LEA is making FAPE determinations based on available resources, which violates IDEA. Parents should be reminded of their right to file an administrative state complaint with ADE if their child's LEA engages in this practice.

We recommend this guidance be provided to parents in multiple formats. Written documents on ADE's website will be helpful, but ADE should also consider hosting town hall-style meetings where families can call or log in to have their questions answered live, just as school administrators are able to do during the current weekly check-ins ADE is offering to LEAs. Resources should be provided to parents in easy-to-understand language, and should be translated into multiple languages so that limited English proficient families are able to access it. This should include the provision of information in American Sign Language. Again, consideration should be given to those families living in areas more seriously affected by COVID-19 and where internet service is sparse. ADE should consider offering guidance to LEAs on the need to communicate with these families through regular mail instead of posting information on websites.

### **Considerations Regarding CARES Act Stimulus Funds**

With the passage of Part 3 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the federal government is providing \$13.5 billion in funding directly to states to help schools respond to coronavirus and related school closures. Ninety percent of that funding will go to school districts and public charter schools. The federal law describes a variety of different ways the funding can be spent, and leaves much up to the discretion of states and school districts.

We encourage ADE to take into account the needs and opinions of the individuals who will be impacted by how this funding is spent: teachers, schools, service providers, students, parents, and other stakeholders. ADE should consider developing and administering a statewide needs assessment regarding the state of education following COVID-19. ADE should also consider hosting a public comment period, during which stakeholders, including parents and students, can share where they think the extra funding is most needed. ADE should then provide best practice guidance to LEAs on how this funding should be used to avoid a distribution that discriminates against students with disabilities and other marginalized groups.

We recommend funding be focused on ameliorating the negative impact of school closures on our most vulnerable students, particularly students with disabilities. The current situation represents a significant barrier to providing students with disabilities the education to which they are entitled because there exists so little clarity about effective methods of remotely

providing specialized instruction and therapies, off-campus access to instructional technology, and availability of teachers or other personnel to provide individual support. CARES Act funding could make a significant improvement in this situation if targeted to meeting the challenges faced by students with disabilities during school closures. A commitment of these funds to support LEAs' special education needs for technology, equipment, and personnel during and immediately after the crisis would significantly improve outcomes.

Additionally, the Act itself specifically states that funding can be used to help with the costs associated with making up lost learning time. Therefore, we hope that this funding will be utilized in part to ensure the provision of appropriate compensatory education services to all entitled students.

Furthermore, we foresee many students with behavioral health and emotional disabilities facing even greater challenges once they return to school. The stressors these students already face have likely been compounded by school closures, changes in routine, financial difficulties faced by families, illness, anxiety around the pandemic, and more. Therefore, in order to meet the needs of these students when they transition back to a classroom setting, funding should be directed toward increased resources around behavioral and mental health needs. This might include an increased number of counselors and social workers, training for existing staff on trauma-informed teaching, reduced class sizes/increased teacher-student ratio, and district-wide screenings for social/emotional needs.

We appreciate your attention to these matters during this challenging time. We are hopeful that you will seriously consider these recommendations as the state prepares to reopen schools. Should you wish to consult with our offices on these or other matters, please do not hesitate to contact us.

Sincerely,



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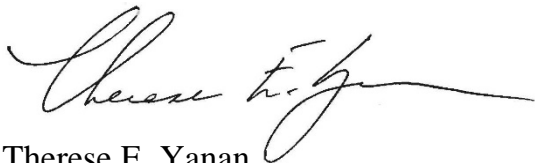
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