

BY ELECTRONIC MAIL

Dr. Betty A. Rosa  
Interim Commissioner  
New York State Education Department  
89 Washington Avenue  
Albany, NY 12234

September 21, 2020

Dear Interim Commissioner Rosa,

We appreciate your new leadership of the New York State Education Department (“NYSED”) in this time of unprecedented crisis and your expressed commitment to ensuring the health and well-being of all the residents of the state, including those who are most vulnerable to the effects of COVID-19.

As school districts start the new academic year, NYSED must plan with great care how to support students with disabilities and to meet their unique and urgent needs. Other states have recognized that their students with disabilities need additional services during this time, and have the right to those services.<sup>1</sup> We urge you to follow their lead to ensure that students with disabilities do not fall behind any further.

This letter outlines the foundational principles for disability education and recounts challenges students with disabilities experienced during remote 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 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 (“IEP”) to ensure that students with disabilities receive an education that meets their educational needs;

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<sup>1</sup> 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-HZpm9kRdh7INSEUgMXgxxPOfbcW5Vz\\_3r41cgpTbk](https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-48.pdf?fbclid=IwAR19XD7cb4Dycyuj2-HZpm9kRdh7INSEUgMXgxxPOfbcW5Vz_3r41cgpTbk);

Pennsylvania Department of Education, *Guidance and Answers to FAQ on COVID-19 Compensatory Services* (Jun. 30, 2020) [https://www.education.pa.gov/K-](https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx)

[12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx](https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx); 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>.



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- Strive to place students with disabilities in a general education classroom with the appropriate supports<sup>2</sup>, and avoid placement in alternate settings unless absolutely necessary for their educational progress;
- Provide related services so that students with disabilities can 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.<sup>3</sup>



### Children with Disabilities and Their Experience During Distance Learning

Over 467,000 children with disabilities live in New York State.<sup>4</sup> 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 students of color, English Language Learners, immigrants, undocumented, from low-income families, in the foster care or juvenile justice systems, or lack permanent housing. These intersectional identities have exacerbated their vulnerabilities during the pandemic, as COVID-19 has ravaged these underserved communities.

Students with disabilities faced unique challenges during the COVID-19 pandemic. During the initial school closures and subsequent remote 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.<sup>5</sup>

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<sup>2</sup> Recent reporting indicates that the New York City Department of Education may be violating the law with respect to the provision of Integrated Co-Teaching classes. Michael Elsen-Rooney, *NYC Education Dept. 's remote learning plan for some special education students flouts state law: advocates*, New York Daily News, Sept. 10, 2020, [https://www.nydailynews.com/new-york/education/ny-remote-learning-students-with-disabilities-20200910-seqwrwngu5dirfodsir2wioatu-story.html?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=cb\\_bureau\\_ny](https://www.nydailynews.com/new-york/education/ny-remote-learning-students-with-disabilities-20200910-seqwrwngu5dirfodsir2wioatu-story.html?utm_source=newsletter&utm_medium=email&utm_campaign=cb_bureau_ny).

<sup>3</sup> In May 2020, the NYCLU collected more than 500 survey responses from across the state regarding New Yorkers' experiences with remote learning during the ongoing COVID-19 crisis. Ten percent of respondents indicated that their children received no special education, occupational therapy, or speech therapy. Twenty-two percent of respondents indicated that students with disabilities were not having their needs met.

[https://www.nyclu.org/sites/default/files/field\\_documents/nyclu\\_edsurvey\\_factsheet\\_5.04.2020.pdf](https://www.nyclu.org/sites/default/files/field_documents/nyclu_edsurvey_factsheet_5.04.2020.pdf).

<sup>4</sup> NYSED, NY State Public School Enrollment (2018 - 19), <https://data.nysed.gov/enrollment.php?year=2019&state=yes> (last visited September 1, 2020).

<sup>5</sup> Alex Zimmerman, Lauren Constantino, Rebekah Ward, Veronica Penney, Yoav Gonen, *How Remote Learning Upended NYC Students with Disabilities and Their Families*, Chalkbeat and The City, June 17, 2020, <https://www.thecity.nyc/education/2020/6/17/21295189/nyc-special-education-students-remote-learning-struggles>.

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 across the country mistakenly believed that COVID-19 lessened their obligations under federal law, or allowed them to unilaterally modify student plans without notice to parents.<sup>6</sup> Parents have not received their right to meaningful parental 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.<sup>7</sup>



## Recommendations for the Upcoming Academic Year

Children with disabilities have fallen behind and continue to experience regression.<sup>8</sup> 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 NYSED 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.<sup>9</sup>
4. Require districts to temporarily set aside age eligibility limits in continuing to provide special education services to all children with disabilities<sup>10</sup>, and to continue their obligation to locate, identify, and serve students with disabilities.

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<sup>6</sup> See e.g., *Lower Merion School District Prepares for Remote Learning; Upper Darby Puts Plan on Hold*, The Phila. Inquirer, Mar. 15, 2020, <https://www.inquirer.com/health/coronavirus/live/coronavirus-covid19-philadelphia-pennsylvania-new-jersey-news-confirmed-case-updates-20200314.html#card-1594995750>. It is critical for NYSED to identify any school districts in New York that mistakenly believed they were not obligated to comply with the IDEA during remote learning and ensure that the impacted children receive appropriate services.

<sup>7</sup> See *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-I*, 137 S. Ct. 988 (2017).

<sup>8</sup> Even without COVID-19, children with disabilities are so vulnerable to regression that there are regulatory and statutory rights in New York and federal law to extended school year services designed to attempt to prevent it. See 34 C.F.R. 300.106; 8 NYCRR § 200.6(k).

<sup>9</sup> The NYCLU was one of nearly 70 organizations to sign onto an open letter to NYSED asking for a statewide moratorium on suspensions to “minimize the long-term traumatic impact of the COVID-19 health pandemic on students and school communities.” Rachel Silberstein, *Advocates to New York: Ban K-12 school suspensions during COVID-19 pandemic*, Albany Times Union, Sept. 1, 2020, <https://www.timesunion.com/news/article/Advocates-ask-state-to-ban-suspension-in-K-12-15527935.php>.

<sup>10</sup> We appreciate that NYSED issued a guidance letter in June 2020 encouraging school districts to allow students who aged out of school to continue to attend school during the 2020-21 school year. However, we

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 remote learning that will benefit all students—but especially those who were left behind during districts’ first attempts at online 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.

The New York Civil Liberties Union and the American Civil Liberties Union jointly urge NYSED to adopt the attached recommendations as part of New York State’s COVID-19 response and relief efforts to ensure that children with disabilities fall no further behind.

Sincerely,

A handwritten signature in black ink, appearing to read "Stefanie D. Coyle".

Stefanie D. Coyle  
Deputy Director  
Education Policy Center  
NYCLU

A handwritten signature in black ink, appearing to read "West Resendes".

West Resendes  
Skadden Fellow  
Disability Rights Program  
American Civil Liberties Union

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encourage NYSED to explicitly require and authorize districts to provide special education services to these students. June 18, 2020 Letter from John L. D’Agati on *Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic*, <http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-memo-over-age-students.pdf>.