



March 23, 2020

The Honorable Tom Wolf
Governor of Pennsylvania
225 Main Capitol Building
Harrisburg, PA 17120

Pedro A. Rivera, Secretary
Pennsylvania Department of Education
333 Market Street
Harrisburg, PA 17126

RE: *Ensuring Educational Services for All Students, Including Students with Disabilities and English Learners, During COVID-19 School Closures*

Dear Governor Wolf and Secretary Rivera:

We write on behalf of community organizations, parents, advocates, and attorneys across Pennsylvania who work to advance the educational rights of children and their families. Signatories include disability rights, child welfare, immigrant, and educational advocacy organizations. We are gravely concerned that children, particularly children with disabilities, English Learners, and children living in poverty, will be irrevocably harmed if they do not receive services that address their educational needs while schools are physically closed due to COVID-19 for an extended period of time. We are writing to request your leadership and assistance to ensure that these fears do not become our reality and that Pennsylvania revises its current guidance in response to new supplemental guidance issued by the U.S. Department of Education on March 21st.

The COVID-19 crisis has underscored the deep disparities in educational resources between well-funded and underfunded school districts and the inequities in educational access available to the students within these districts. While many students in Upper Darby and the School District of Philadelphia are currently receiving no educational services at all, students in Lower Merion have full access to an online curriculum developed and supplemented by trained faculty. Teachers in Lower Merion are also modifying instruction and providing accommodations for students with disabilities based on individual student plans while special education case managers interact directly with these students.

In sharp contrast, Upper Darby, Philadelphia, Pittsburgh, Erie, and many other districts are providing no remote instruction during school closures, sometime citing their inability to provide equitable access.¹ These districts include large numbers of Pennsylvania schoolchildren who are most underserved by our education system: students living in poverty, students with disabilities, students of color, students in foster care, the juvenile justice system, the mental health system, as well as students experiencing homelessness, and English Learners. These stark disparities will further widen achievement gaps, undermine educational equity, and deprive hundreds of thousands of students of their right to an education.²

We recognize that this is an unprecedented situation and we applaud the Pennsylvania Department of Education for promptly responding to the COVID-19 crisis by issuing guidance to local educational agencies (“LEAs”),³ most recently on March 23rd and facilitating technical assistance through Intermediate Units to support the development of continuity plans.⁴ We also understand that the Department’s guidance comports with prior guidelines endorsed by the U.S. Department of Education on this emerging topic.⁵ However, we assert that this guidance is legally incorrect. And we are concerned that in response to the guidance, many school districts across the state – even those which began to provide online resources and study guides to students – have now rescinded earlier notices and stated that no students will receive any educational

¹ See e.g., *Lower Merion School District Prepares for Remote Learning; Upper Darby Puts Plan on Hold*, Phila. Inquirer, Mar. 15, 2020, at <https://www.inquirer.com/health/coronavirus/live/coronavirus-covid19-philadelphia-pennsylvania-new-jersey-news-confirmed-case-updates-20200314.html#card-1594995750>; *How Schools Are Meeting Student Needs During Two Weeks Of Closure*, Mar. 16, 2020, at <https://www.wesa.fm/post/how-schools-are-meeting-student-needs-during-two-weeks-closure>; *Philly Schools Forbid Graded ‘Remote Instruction’ During Shutdown for Equity Concerns*, WHYY, Mar. 18, 2020, at <https://whyy.org/articles/philly-schools-forbid-remote-instruction-druing-shutdown-for-equity-concerns/>. See also Pittsburgh Public Schools website at <https://www.pghschools.org/Page/5355>; School District of Philadelphia website at <https://www.philasd.org/faqs/#1563289860501-3eda379a-ce52>.

² PA. CONST. art. III, § 14.

³ LEAs include school districts, charter schools, intermediate units and preschool early intervention agencies. 22 Pa. Code § 14.103.

⁴ See *School Guidance, Answers to Common Questions* (March, 20, 2020) available at <https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/Pages/AnswersToFAQs.aspx>.

⁵ *Questions and Answers on Providing Services to Students with Disabilities During the Coronavirus Disease Outbreak of 2019*, available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>; but see c.f. *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (Mar. 21, 2020), at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelive&utm_term=.

services while schools are closed due to COVID-19. Clearly, this is not in the best interest of Pennsylvania students.

Recently, the Office for Civil Rights and Office for Special Education and Rehabilitative Services expressly rejected this approach, cautioning that schools must *not* opt to decline to provide distance learning “at the expense of children” due to perceived barriers in educating students with disabilities. It is critical that the Department and the Governor’s office make this point to school districts. And additionally, schools must provide a free, appropriate, public education to students with disabilities consistent with broader health and safety considerations.⁶

The Department’s current guidance recognizes a right to equal access for students with disabilities; however, its directive disregards students’ fundamental legal entitlement to a free appropriate public education (“FAPE”) as guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, Chapter 14 of the Pennsylvania School Code, 22 Pa. Code § 14.101 *et seq.*, and Chapter 711 of the Pennsylvania School Code, 22 Pa Code § 711.1 *et seq.* This contravenes the Department’s clear obligation as state educational agency (“SEA”) to ensure that every child with a disability within the state receives this entitlement. 20 U.S.C. § 1412(a)(1). During any period when schools are not operating, children with disabilities may require necessary educational services. 71 Fed. Reg. 46582 (Aug. 14, 2006). There is nothing in federal and state law that allows the SEA to unilaterally deny educational services for an extended period of time (longer than 10 days) for students with disabilities. Rather, legal precedent clearly instructs that local educational agencies have a continuing duty to provide a FAPE even during school closures.⁷ Furthermore, denying all students educational services because an

⁶ “To be clear: ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction.” *Supplemental Fact Sheet* (Mar. 21, 2020), at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

⁷ Administrative rulings and court decisions have repeatedly held in other contexts, such as teacher strikes and closures due to fiscal crises, that districts must continue to provide a FAPE to students with disabilities. *See, e.g., In re Reynoldsburg City Schools*, CP 0160-2014, 65 IDELR 27 (Ohio SEA, Dec. 12, 2014) (failure to implement Student’s IEP during one-month teachers’ strike violated the IDEA); *In re Student with a Disability*, No. 2002-05, 108 LRP 24552 (Montana SEA, Jan. 31, 2003) (failure to implement Student’s IEP during 14-school-day teachers’ strike violated the IDEA; “IDEA does not contain a waiver whereby the District is excused of its statutory and regulatory duties in this context during a strike”); *In re Student with a Disability*, No. 02-23, 102 LRP 23997 (Hawaii SEA, Oct. 30, 2001) (“The Education Authority had a duty to implement the instruction stated in the IEP during the [three-week] teacher’s strike and failed.”); *N.D. ex rel. v. Haw. Dep’t. of Educ.*, 600 F.3d 1104, 1117 (9th Cir. 2010) (“A school district’s failure to provide the number of minutes and type of instruction guaranteed in an IEP could support a claim of

LEA is unwilling to provide equal access to educational opportunities for students with disabilities constitutes discrimination under Section 504 of the Rehabilitation Act of 1973.

In addition, the guidance fails to fully address the obligations of LEAs to English Learners (“ELs”). Schools are required to ensure equal access to education for ELs and ensure the participation of limited English proficient parents in compliance with federal law.⁸ At present, many school districts and charter schools are offering educational resources in English only and providing no language instruction resources.⁹ Denying a student access to participate in educational opportunities – including those offered as “optional” – such as access to online learning guides and other resources constitutes a form of discrimination by depriving a student of an “education benefit” and “equal educational opportunities” under the EEOA.¹⁰ Schools must provide access to translated materials and English language instruction programming to ensure ELs receive equal access to the instructional content and opportunities available to all students.¹¹

Finally, the Department’s guidance is shortsighted. We should be providing educational services during this period to prevent regression and other loss of critical skills to mitigate the need for compensatory education services and remedial instruction and support students in making academic progress. We should avoid replicating the mistakes of Puerto Rico where students with disabilities in particular as well as others suffered significant long-term consequences due to extended educational disruptions triggered by Hurricane Maria and the subsequent closing of 250 schools.¹²

material failure to implement an IEP”). Notably, it is this denial of a FAPE which authorizes the awarding of compensatory education services recognized in both federal and state guidance.

⁸ Title VI of the Civil Rights Act prohibits programs receiving federal funds, such as school districts, from discriminating on the basis of race or national origin, 42 U.S.C. § 2000d, and courts have long recognized the failure to address language barriers as discriminatory. *See Lau v. Nichols*, 414 U.S. 563, 568 (1974); *New York by Schneiderman v. Utica City Sch. Dist.*, 177 F.Supp.3d 739, 752 (N.D.N.Y. 2016). The Equal Educational Opportunity Act also prohibits the denial of equal educational opportunities on the basis of race or national origin and requires state educational agencies and school districts to take action to overcome language barriers that impede English Learners from participating equally in educational programs. 20 U.S.C. § 1703(f).

⁹ *See e.g.*, Erie School District where instructional packets are offered in English only, <https://www.eriesd.org/Page/18536>.

¹⁰ *See e.g.*, *Issa et al v. Sch. Dist. of Lancaster*, 847 F.3d 121, 137-140 (3d Cir. 2017). *See also* Stamford Public Sch. Dist. Settlement Agreement, Dept. of Justice (D. Conn. 2014), at <https://www.justice.gov/sites/default/files/crt/legacy/2014/04/09/stamfordsettle.pdf> (requiring district to ensure ELs have access to and are integrated in all school functions, including extracurricular activities).

¹¹ *See* 20 U.S.C. § 1703(f).

¹² *See e.g.*, *Hundreds of Puerto Rican Schools Closed After Maria. Special Needs Kids Got Left Behind*, Miami Herald, Sept. 21, 2010, at <https://www.miamiherald.com/news/nation-world/national/article218228870.html>.

In many towns and cities across our state, children are in their homes all day, receiving no educational services at all. At present, there is no plan for this to change even if school closures are extended. This deprivation of services disproportionately impacts our most at-risk students, particularly students with disabilities and English Learners.¹³ For this reason, we are asking for your help. Similar to initiatives across the country, we are asking Governor Wolf to issue an Executive Order that: ensures that the COVID-19 crisis will not deprive all students of educational services; renews the Governor's strong commitment to educational equity; upholds the right of students with disabilities to a free, appropriate, public education; and upholds the right of English Learners to equal access. We recognize that this is an unprecedented and challenging situation; however, we believe that the goal of educating our students and ensuring their progress is critical to our state, our children, and the future of our Commonwealth.

To this end, we propose that the Governor issue an Executive Order that requires all LEAs which have physically closed schools for over ten days in response to COVID-19 to do the following:

- Continue to deliver educational opportunities to all students through distance learning, independent study, or other options utilizing local or state funding, including granting districts the ability to use their category-restricted funding such as transportation funds as needed for this purpose;
- Undertake best efforts to minimize inequities in access to technology and internet connectivity in implementing distance learning, following models from other

¹³ For example, 2018 data for students with disabilities and English Learners reveals that these cohorts lagged far behind peers in both state standardized subject testing and graduation rates. While a small percentage of students overall scored below basic in each area (14.06% Science; 28.61% Math; 7.82% English Language Arts) these rates were far higher for students with disabilities and English Learners. The percentages of students with disabilities scoring below basic for that same year were 33.8% Science, 57.5% Math, 24.06% ELA, compared to nondisabled students scoring below basic at 9.64% Science, 22% Math, and 4.14% ELA. The percentages of English Learners scoring below basic were: 40.16% in Science; 57.37% in Math and 26.57% in ELA. See *ESSA Dashboard 2018, State Student Assessment Measures*, at https://public.tableau.com/profile/padepstofed#!/vizhome/ESSA_Dashboard_2018/AnnualMeaningfulDifferentiationCSITSII. The 2017-18 Cohort Graduation rate for students with disabilities was 70.24% and for ELs was 65.84%, compared to statewide graduation cohort rate 85.85%. See *2017-18 Pennsylvania 4-Year Cohort Graduation Rates*, available at <https://www.education.pa.gov/Documents/Data%20and%20Statistics/Cohort%20Graduation%20Rates/2017-2018%20Pennsylvania%204-Year%20Cohort%20Graduation%20Rates.xlsx>.

large urban school districts such as in Miami-Dade County and New York City¹⁴ and jurisdictions within Pennsylvania;¹⁵

- Ensure students with disabilities receive a free, appropriate, public education consistent with their disability-related needs based on individualized decisions responsive to changes in the mode of delivery of educational services and in accordance with federal and state laws.
- Ensure equal access to the curriculum and all educational opportunities provided during COVID-19 school closures for English Learners in accordance with federal and state laws;
- Continue to compensate school employees;
- Safely provide school meals to eligible students, consistent with the requirements of the U.S. Department of Agriculture.

We further urge the Pennsylvania Department of Education to issue corresponding guidance providing resources to support schools and directing local educational agencies to:

- **Develop general education “distance learning plans” to ensure continuity of educational services for all students.**¹⁶ Such plans shall provide access to the curriculum required under Chapter 4 of the PA Code for each grade and be subject aligned with the PA Common Core Standards, 22 Pa. Code 4.1 *et seq.*, and procedures to ensure both a FAPE for students with disabilities and equal access to educational opportunities for English Learners.¹⁷

¹⁴ New York City Department of Education is loaning internet-enabled iPads to students. <https://www.schools.nyc.gov/school-life/health-and-wellness/coronavirus-update>. Miami-Dade County Public Schools is conducting a system-wide survey of K-12 students and teachers to determine mobile instructional access needs and checking out school devices as needed. <http://icp.dadeschools.net/#!/fullWidth/2943>.

¹⁵ For example, Mars Area School District is partnering with local providers to supply free Internet services and offering District-issued devices to students who lack the means to access online instruction. See Message From Superintendent Regarding Online Instruction at https://www.marsk12.org/apps/pages/index.jsp?uREC_ID=1690724&type=d&pREC_ID=1847923.

¹⁶ “Distance learning” refers to a teacher and student being in different locations and may encompass online technology or other modalities. In choosing a plan, an LEA should consider to what extent students with disabilities will be able to attain educational benefit. Distance learning plans may also involve consultation with local officials and private partners to meet the needs of a school community in light of this unprecedented COVID-19 pandemic. Written notice of distance learning plans must be provided to parents in a language that they can understand.

¹⁷ We recognize that there will be a waiver of the minimum 180-day/hours (990/900/450) requirements as a result of COVID-19 response efforts. Accordingly, failure to participate in distance learning would

- **Minimize inequities in access to educational services.** Many students do not have access to technology necessary to participate in e-learning educational service delivery. In developing distance learning strategies to continue delivering educational services during a school closure, LEAs should assess how all students will be able to access e-learning, including access to technology, internet connectivity, and familiarity with navigating a device.

- **Develop an individualized distance learning plan that ensures provision of a free, appropriate, public education for students with disabilities.** In order to address the educational needs of students with disabilities, LEAs shall convene virtual IEP meetings to develop an individualized distance learning plan, ensure equal access to education, and a FAPE for students with disabilities. The IEP team shall consider the following factors:
 - **Individualized Instruction in Distance Learning Settings**
An LEA shall consider how its distance learning placement or other options can be adapted for a student with a disability. Students with disabilities shall be provided with supplementary aids and services to access the distance learning options if needed. Depending on a student’s particular needs and the distance learning options available, LEAs may also need to develop plans to provide compensatory education services to students with disabilities when regular school operations resume.¹⁸

 - **Related Services**
To the greatest extent possible, LEAs should continue providing related services consistent with the student’s IEP. This may involve providing services, consistent with social distancing guidelines and accounting for the health needs of students and staff.

 - **Assistive Technology**
LEAs should also be flexible in providing access to school-purchased assistive technology devices when necessary, consistent with law, to ensure children have access to devices they typically use at school.


not subject students to compulsory school attendance requirements. See 24 P.S. §§ 13-1326 –13-1354. In addition, truancy enforcement proceedings would be halted during this COVID-19 school closure period.

¹⁸ The need to consider compensatory services is consistent with current state and federal guidance. See *School Guidance, Answers to Common Questions* (March, 20, 2020) available at <https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/Pages/AnswersToFAQs.aspx>.

- **Designate a liaison to facilitate agency coordination and engagement.** Many medical, behavioral health, and other health-related agencies provide critical programs and related services to students with disabilities. The Department should encourage LEAs to work with these agencies to take advantage of services that can be offered for those that elect to continue to provide services during school closures.¹⁹
- **Ensure equal educational access for English Learners.** In developing its distance learning plan, an LEA should also have a plan for providing language development instruction and services for English Learners, aligned to the LEA's language acquisition program.²⁰

We understand this is a time of uncertainty and crisis. And, given the likely reality that schools are physically closed for an extended period of time, we are urging you to advise districts to provide educational services to all of our Commonwealth's students in accordance with newly released federal guidance. We also welcome the opportunity to work with the Department to address how schools can meet the needs of all students, including providing a FAPE to students with disabilities during this challenging time.

Sincerely,



Maura McInerney, Esq.
Legal Director



Margie Wakelin, Esq.
Staff Attorney

Education Law Center
1800 JFK Boulevard Suite 1900-A
Philadelphia, PA 19103

¹⁹ In addition, LEAs and health-related agencies should work collaboratively to ensure continuity of services for students currently served pursuant to the IEP or Section 504 Plan, including exploring options related to distance learning. To facilitate collaboration and communication about these coordinated efforts with parents, LEAs should designate a liaison who can answer questions and serve as a resource for families navigating multiple systems.

²⁰ While many English Learners may benefit from accessing learning through alternative learning platforms, it is important to consider the unique learning needs and supports that are necessary for language development, ways to modify instruction if applicable, and use of ESL texts and materials.

On behalf of:

A+ Schools
Acculturation for Justice, Access and Peace Outreach (AJAPO)
American Civil Liberties Union of Pennsylvania
Anderson, Converse and Fennick
The Arc of Philadelphia
The Arc of Pittsburgh
Art-Reach
ARYSE (Alliance for Refugee Youth Support and Education)
Asian Americans United
Autism Sharing and Parenting
Batchis Nestle & Reimann LLC
Berney & Sang
Bradley Goldsmith Law
Bridges From School to Work
BUILD T/E
Cambodian Association of Greater Philadelphia (CAGP)
CASA of Philadelphia County
Center for Disability Law & Policy/Client Assistance Program
Chinatown Disability Advocacy Project
CHOP Violence Intervention Program
City of Philadelphia, Office of Mayor James F. Kenney
Community Integrated Services
Community Legal Services
Community Vocational Services, Inc.
Cuddy Law Firm, PLLC
Delaware County Advocacy & Resource Organization
Disability Rights Pennsylvania
Eddie's House
Empowering Lives Foundation
Fine, Kaplan and Black
Freeman Law Offices, LLC
Hispanos Unidos Para Ninos Excepcionales (HUNE)
Husic Law Office
One PA
Institute on Disabilities, Temple University
Islamic Center of Pittsburgh
J Badger Consulting, Inc.
Jacobson & John LLP
Jewish Family and Community Services
Juvenile Law Center
La Puerta Abierta (The Open Door)
Law Office of Benjamin J. Hinerfeld

Law Office of Lisa Isaacs P.C.
Law Office of Tanya A. Alvarado, LLC
Law Offices of Frederick M. Stanczak
Liberty Resources Inc.
Main Line Special Needs Parents
McAndrews, Mehalick, Connolly, Hulse & Ryan
McKinley & Ryan, LLC
Montgomery Down Syndrome Interest Group
Murphy & Murphy, P.C.
Need in Deed
PA APSE
PaRC
Parent Involved Network
PARENT POWER
The PEAL Center
Pennsylvania Immigration and Citizenship Coalition
Pennsylvania Youth Congress
Philadelphia Chinatown Development Corporation
The Philadelphia Suns
Public Citizens for Children and Youth (PCCY)
Public Health Management Corporation
Public Interest Law Center
Puentes de Salud
Radnor Committee for Special Education
Raffaele & Associates
Reilly Education Law LLC
Reisman Carolla Gran & Zuba LLP
Ruder Law
Special Education Advocacy Services of Luzerne LLC
Special Education Alliance of Methacton Coordinating Council
Steele Schneider
Support Center for Child Advocates
Thalheimer & Palumbo, P.C.
The Law Offices of Caryl Andrea Oberman LLC
Timoney Knox LLP
Transition Consults, LLC
Vision for Equality
Women's Law Project
World Affairs Council of Pittsburgh
World Institute on Disability
Young Adult Leadership Committee
Youth United for Change