

Massachusetts Special Education Attorneys
c/o 55 Chapel Street Suite 301
Newton, MA 02458

March 20, 2020

Senior Associate Commissioner Russell Johnston
Massachusetts Department of Elementary and Secondary Education
75 Pleasant Street
Malden, MA 02148

Dear Commissioner Johnston:

We are a group of attorneys who represent students with disabilities and their families in matters related to their eligibility for, and receipt of, special education services as provided under the federal law, IDEA 20 USC 1400 et seq., and Mass Gen. Law GL ch. 71B, and their related regulations, as well as under Section 504 of the Rehabilitation Act. We are writing on behalf of the families and students we represent, as well as in the interests of all children and families in the Commonwealth whose access to special education services has been impacted by the current statewide closure of public schools, as well as the closure of a growing number of special education day programs and some residential schools.

We appreciate the magnitude of the task facing school district administrators in the face of the unprecedented public health crisis caused by the COVID-19 pandemic. Many of us are parents, and many are the parents of children with special needs. We have a great deal of respect for teachers, both general and special educators, and all of the professionals who work with children with disabilities. We understand that the need for social distancing in the effort to slow the advance of the coronavirus requires sacrifices by all of us, and also requires each person in a child's life to contribute in assisting our children to develop resilience and maintain daily lives that are as rich as possible.

We also greatly appreciate the leadership and commitment demonstrated by you and others at DESE, marshalling efforts to respond to the needs of children with disabilities during this crisis. With all that said, however, as advocates for children with special needs, we are quite concerned by the Commonwealth's approach thus far to addressing the educational needs of this population of students. We were very pleased to learn that DESE is considering revisions to its most recently published DESE FAQ guidance document, published on March 17, 2020. We have grave concerns about the state's adoption of the standard endorsed by the U.S. Department of Education in its March 2020 "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak". In that document, the DOE states as follows:

If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be

required to provide services to students with disabilities during that same period of time. . . . (emphasis added).

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. 34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA). (emphasis added).

As of now, we are extremely concerned that DESE, in adopting the analysis of the United States Department of Education, as expressed in the March 13, 2020 guidance, is adopting a position that is a fundamental alteration of the **entitlement** to special education created by IDEA and Chapter 766. These statutes do not merely create access to public education for students with disabilities – they mandate the delivery of effective services and supports. Both IDEA and Chapter 766 have consistently been upheld by Courts as establishing an entitlement to a free and appropriate education – not merely access to schools. Thus, courts have found that the closure of schools, whether due to labor actions or regulatory concerns, mandates that the state educational agency provide services to eligible special education students or provide compensation. See, e.g. *Allen v. School Committee of Boston*, 400 Mass.193, 508 N.E.2d 605 (1987) (upholding payment to families for special education services missed during 1986 bus driver strike). The FAQ answer radically alters the description of the nature of a student’s right to special education. We should not be driven by the exigencies of this terrible emergency to adopt policies that threaten the very nature of our special education guarantees.

Based upon the federal guidance, DESE has taken the position that districts are not required to provide services to students with disabilities if educational services are not being provided to the general student population, based on DESE’s determination that (assuming schools reopen on April 7th) there will be sufficient instructional days remaining in the school year (e.g., 185). On the other hand, the Department is encouraging school districts to provide “enrichment” activities to students, and to remain in contact with families of students with disabilities. Unfortunately, however, the Department’s position is that public schools are not required to try and provide the services described in a student’s IEP grid.

Additionally, we wish to emphasize that our Massachusetts Constitution, unlike the Federal document, extends an affirmative obligation upon the Commonwealth to provide an “adequate educational opportunity” to its children. See Mass. Constitution Part II, c. 5 § 2; *Doe v. Sec’y of Educ.*, 479 Mass. 375, 387 (2018). Along with the robust protections for children with disabilities embedded in Chapter 71B, the Massachusetts Constitution requires that the Commonwealth meet the educational needs of all children, including those with disabilities, and even during this extraordinary moment in our history.

The DOE’s statement as adopted by DESE, is not only grounded in an incorrect analysis of special education rights but is also simply bad policy. It is evident from looking at the websites of school districts across the state that there is a wide variation in what is being offered to general education students and whether they are engaging the assistance of their special educators. Some

districts are interpreting this statement as a directive not to provide any services to any students during the closure period, for fear of needing to provide all special education services.

DESE must issue a stronger mandate to meet the needs of children with disabilities to help prevent the gap between children with special needs and those without from growing even more. We understand the need for flexibility based upon maintaining the health of everyone as much as possible. We also believe that, just as school districts are - to their credit - making efforts to deliver lunches to families in need of access to meals, they also have an obligation to commit resources and creativity to meeting kids with disabilities where they are.

Other concerns we have include a lack of more proactive leadership on the issue of closure of day and residential special education schools. We appreciate the Department's guidance and realize the very difficult decisions that need to be made. We believe that the Department should continue to exercise oversight over the decisions, including by requiring schools to submit their justifications to the Department and that no closure should take place until the Department has reviewed the justification and if the department agrees with the closure, that it then ensure districts develop and implement plans to meet the urgent needs of these students when they return home. We recognize that DESE will likely need to coordinate with state human service agencies to ensure the safety and well-being of these students. This is particularly true for residential special education schools that serve students with severe needs. As you acknowledged during the March 17 phone call, sending these children home presents many issues. For some children, it may be dangerous for them to return to their homes without proper professional help. The Department should be clear in its communications with these schools and we would urge the Department to exercise its oversight authority over these schools to prevent closures. We would also point out that closures of private and public special education schools may be violations of 603 CMR 18.00

We also believe that the Department should be mandating that school districts provide transportation to private and public special education schools that remain open. Leaving this to the discretion of school districts is an inadequate protection of the right of our most vulnerable students. Again, we understand that there are many practical problems in securing and maintaining transportation. However, we believe that the rights of students can best be protected by requiring such transportation while announcing that the Department will provide waivers when difficulties are documented.

Finally, we are concerned with the FAQ's statements regarding compensatory services and the new concept of "additional services". This guidance ignores the regulatory obligation pursuant to 603 CMR 28.05(7) to implement an IEP and the long-standing policy that districts must report to parents when they are unable to implement the IEP and develop a plan to make up missed services. The FAQ response does not properly state legal requirements concerning compensatory services and will confuse Team determinations concerning those services. The policy as stated in the FAQ will result in contentious team meetings and most likely extensive appeals at the BSEA. Districts should simply be directed to make up services lost due to the closure. A clear mandate to deliver missed services will more clearly adhere to the law concerning the

entitlement to special education. With a clear mandate of making up missed services, districts can put into place plans administratively without the need for a team meeting for every student.

We know you and your Department are working to address many of these areas, and we stand ready to work with you collaboratively towards solutions that acknowledge the unprecedented nature of this pandemic, the related need for flexibility, and with the shared goal of ensuring that the educational needs of children with disabilities are addressed appropriately. We appreciate the transparency that the Department is demonstrating in these matters and thank you for your consideration of our comments and the many comments that you are receiving in this process. We look forward to the updated guidance that will be forthcoming from both U.S. DOE and your Department. We have many other questions, but the concerns presented in this correspondence are fundamental to the students we work with. We hope that we can work together to address these concerns.

Sincerely yours,

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