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**SUBCOMMITTEE ON EARLY CHILDHOOD, ELEMENTARY, AND SECONDARY
EDUCATION**

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Addressing the Impact of COVID-19 on Students with Disabilities

Good afternoon Chair Sablan, Ranking Member Owens, and members of the subcommittee. My name is Ron Hager and I am the managing attorney for education and employment at the National Disability Rights Network (NDRN) where I have worked as an attorney since 2007. Thank you for the opportunity to appear before you to discuss the impact of COVID-19 on K-12 students with disabilities.

NDRN is the voluntary membership association for Protection & Advocacy (P&A) and Client Assistance Program (CAP) agencies. The P&A and CAP agencies are a nationwide network of congressionally mandated, cross disability organizations operating in every state, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands). There is also a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations located in the Four Corners region of the Southwest.

There are nine separate P&A programs which provide the federal funding streams for our Network to advocate with and on behalf of people with disabilities. The nine programs give our Network the ability to advocate for all people with disabilities including those with developmental disabilities¹, mental illness², and traumatic brain injury¹. Additionally, the programs allow the Network to conduct advocacy on the acquisition and utilization of assistive technology¹, ensuring individuals with disabilities

¹ State Protection & Advocacy Systems | ACL Administration for Community Living. (2021). Retrieved from <https://acl.gov/programs/aging-and-disability-networks/state-protection-advocacy-systems>

² Welcome to Benefits.gov | Benefits.gov. (2021). Retrieved from <https://www.benefits.gov/benefit/774>

can participate in the electoral process¹, and regain or secure employment³. Much of the Network's work focuses on educational advocacy for students with disabilities at both a systemic and individual level despite the absence of a dedicated funding stream for education work. In practice, this means that funds from other P&A programs must be utilized in order to meet the needs of students with disabilities seeking assistance from the P&As.

NDRN believes in the right of all students, including those with disabilities, to an equitable and appropriate education in a safe environment, based on access to the general education curriculum. NDRN seeks to accomplish this goal through federal policy work and through the Protection and Advocacy (P&A) Network, who enforce our nation's education laws at the state and territorial level. We believe this work has become even more important in the face of the COVID-19 pandemic.

Students with disabilities already faced many challenges in the educational environment, and the COVID-19 pandemic has presented several additional challenges for students with disabilities especially related to delivery of services under the Individuals with Disabilities Education Act (IDEA)⁴ and Section 504 of the Rehabilitation Act. As schools transition back to in-person learning, education issues have come to the forefront including efforts to ensure compensatory education⁵ is provided. Unfortunately, parents of children with disabilities currently have few resources to help them understand and navigate the education system. This lack of understanding has been exacerbated by the COVID-19 pandemic as much of the country has transitioned to distance or hybrid learning models. The P&A / CAP network works with staff, students, families, and education personnel to ensure students receive the supports and services they are entitled to receive under IDEA, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA).

While COVID-19 has certainly illuminated many issues facing students with disabilities, we must acknowledge that the pandemic has largely exacerbated existing inequities. For far too long, students with disabilities have faced barriers to receiving appropriate educational services. For example, in the 2018-2019 school year, 14 percent of all public school students, or 7.1 million students, received services under IDEA.⁶ Of these 7 million students, only 73 percent graduate with a high school diploma⁶ which is below the graduation rate for students without disabilities. While the path to recovery is long,

3 Client Assistance Program (CAP) | Rehabilitation Services Administration. (2021). Retrieved from <https://rsa.ed.gov/about/programs/client-assistance-program>

4 U.S. Government Accountability Office. (2020, November 19). Distance Learning: Challenges Providing Services to K-12 English Learners and Students with Disabilities during COVID-19. Retrieved from <https://www.gao.gov/products/GAO-21-43>

5 Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020). (2020). Retrieved from <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>

6 The Condition of Education - Preprimary, Elementary, and Secondary Education - Elementary and Secondary Enrollment - Students With Disabilities - Indicator May (2020). (2020). Retrieved from https://nces.ed.gov/programs/coe/indicator_cgg.asp

we know that we owe it to students with disabilities and all students, to rebuild a system that is inclusive, individualized, and responsive to the needs of all students.

Education Law Overview

The Individuals with Disabilities Education Act⁷ was passed in 1975 as the Education for all Handicapped Children's Act and went into effect in 1978. The Legislative History noted that at the time 1.75 million students with disabilities were not receiving any educational services and 2.5 million students were not receiving an appropriate education.⁸ The right of students with disabilities to access an appropriate education is rooted in the Equal Protection Clause of the 14th Amendment and subsequently reaffirmed in several court cases. IDEA also recognizes that states and school districts would need additional funds to fully meet the needs of educating students with disabilities. While funding is one component of IDEA, there are some basic principles that are afforded to students and families under IDEA:

- IDEA applies to all students with disabilities.
- Students are entitled to a Free Appropriate Public Education (FAPE) designed to meet their unique individual needs.
- Students must have an Individualized Education Program (IEP) with the school and parents being equal participants in the process.
- Students should be educated in the Least Restrictive Environment (LRE) with their nondisabled peers to the maximum extent appropriate.
- Parents have the right to due process in order to question the decisions of the education agency through a formal hearing.

The parallel law to IDEA is Section 504 the Rehabilitation Act⁹. Section 504 was passed in 1973 and prohibits discrimination on the basis of disability in any program or activity receiving federal funds and by the U.S. Government. Senator Hubert Humphrey was one of the main proponents of Section 504 and he viewed this as the disability equivalent of the Civil Rights Act. Section 504 became the basis for the Americans with Disabilities Act (ADA). Regulations promulgated by the U.S. Department of Education largely parallel those under IDEA. The main difference between Section 504 and IDEA is in the flexibility of the procedures. There are less specific procedural criteria that govern the requirements of the establishment of a plan for services under Section 504. Eligibility under Section 504 is generally open to students with disabilities not eligible under IDEA. These students generally have less significant disabilities, but still require support.

7 20 U.S.C. Section 1400 et seq

8 Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176, 191 (1982)

9 29 U.S.C. Section 794

Work of the Protection & Advocacy Agencies During COVID-19

As mentioned earlier, throughout the pandemic the P&A Network has been working to ensure students receive the supports and services they are entitled to. This work has included meeting with state agencies to develop policies to support students with disabilities in conjunction with other stakeholders, including the Parent Training and Information Centers (PTIs). Our network has prepared informational materials for parents, fielded questions via intake systems, and represented clients in state complaints such as in California and Maine.

At NDRN, we helped facilitate a webinar with the Council of Chief State School Officers that highlighted the successful policies and practices that both Kentucky and Nebraska had embraced to ensure that students with disabilities receive appropriate education during school closures as a result of COVID-19.¹⁰ NDRN also facilitated regular calls with our Network to discuss issues facing students with disabilities out in the field and provide technical assistance to the P&As. While the P&A Network has risen to the challenge, they have done so without any additional dedicated funding from Congress in any of the COVID relief bills to date.

Issues Facing Students with Disabilities

While students with disabilities have faced particular challenges during the pandemic, the students most negatively impacted by the pandemic are those at the intersection of disability and other marginalized identities. These identities include students with disabilities who are also students of color, students from low-income households, English Language Learners, students experiencing homelessness, and students in institutional settings such as juvenile detention centers and residential treatment facilities.

Throughout the pandemic, some schools failed to provide individualization for students with disabilities. For example, some schools that recently re-opened were unwilling to allow immunocompromised students to continue to learn from home and receive services at home. Similarly, some schools that were closed refused to provide in-person instruction to students who needed it.

As we all know, parents and families have been expected to be far more involved in their children's education by necessity during the pandemic. Schools expected parents to serve as education supports even though it became clear early on that certain categories of students could not benefit fully in a remote environment. For example, students with significant disabilities struggled in the remote learning environment and students with attention deficit hyperactivity disorder (ADHD) in particular also struggled in the remote learning environment. To make matters worse, we continued to encounter overly punitive discipline imposed on students with disabilities during remote learning.

¹⁰ State Success in Educating Students with Disabilities during COVID-19 – Highlighting Collaboration in Kentucky and Nebraska. Retrieved from <https://www.ndrn.org/resource/educating-students-during-covid-19/>

Students with behavioral, emotional, and mental health needs were “suspended” from virtual instruction and in one instance a student with a disability became involved with the juvenile justice system and was detained as a result of failing to complete her online school work.¹¹ Finally, a number of P&A agencies also encountered schools changing IEP services through distance learning plans without changing the IEP. This has been the subject of several complaints and findings of violations initiated by P&As.

Examples

In New Hampshire, the Disability Rights Center of New Hampshire, the P&A, in collaboration with a network of other stakeholders was successful in obtaining guidance from the governor that despite school closures students with disabilities would be eligible for in-person services if they needed them. Nevertheless, the P&A was forced to initiate advocacy in several school districts who refused to provide needed in-person services.

Disability Rights California, the P&A in California conducted successful systemic advocacy against two school districts. In the first, the district was found out of compliance with the IDEA for failing to provide FAPE based on the individual needs of the students and for changing the services provided through distance learning plans instead of amending the IEPs. The second district was found to be out of compliance for failing to conduct timely evaluations or hold timely IEP meetings during the period of school closure.

Disability Rights Maine, the P&A in Maine, had successful systemic state advocacy which found the district did not follow the IEP process to change the services students were to receive but adopted remote learning plans. It also failed to provide FAPE to the students based on their individual needs.

Disability Rights Maryland, the P&A in Maryland advocated against the state itself, seeking to ensure that parents would have the ability to seek compensatory education services to remedy instructional loss during COVID.

Recommendations

The most pressing concern for students with disabilities, and all students, is the fact that a large share of instruction has been lost and how should schools and districts go about making up for that lost time. To address this issue we recommend the following:

- If they have not already, schools and districts should implement the multi-tier system of supports (MTSS) model.¹² The model provides a floor for remedial

11 ProPublica. (2021, January 29). A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention. Retrieved from <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention>

12 Every Student Succeeds Act, Pub. L. No.114–95—DEC. 10, 2015

services that will benefit all students by deploying appropriate supports and training. MTSS also lends itself to higher levels of support the greater the needs of the students, regardless of whether the student has a disability or not. Finally, students with disabilities may need to be considered for additional individualized services pursuant to the IEP process, or what we would call compensatory education. Compensatory education is an equitable remedy established by the courts to make up for the loss of services to students with disabilities who have not received a FAPE.

- Provide an extended year of eligibility for services under IDEA. This is under consideration in several states including Illinois, Virginia and Maryland.
- Schools and districts should consider the emotional and behavioral needs of all students and anticipate how to address these needs. This should be a seamless process for schools since certain students should already be identified through the IEP process. However, we anticipate more students becoming eligible for services under IDEA and 504 as more students return to in person learning after extended periods out of the classroom as a result of the pandemic.¹³
- We urge Congress to pass dedicated additional funding for the P&A Network to address the educational needs of students with disabilities impact by COVID-19. As the push for school reopening continues, education issues will come to the forefront and the P&A Network would be better positioned to meet the needs of students with disabilities with the appropriate federal funding supports.

Lessons Learned

While we are all still evaluating the lessons learned from the COVID-19 pandemic, and we will all most likely continue to do so for some time, there are a few general takeaways at this point. In our Network's experience, parents have been tremendously patient with school districts, and districts that were willing to work with parents and other stakeholders have particularly been given the benefit of the doubt. As a result, there has not been a wave of litigation against districts for failure to provide services which is important given the time and resource dedication required by litigation.

In terms of distance learning, the pandemic has revealed that in some cases the delivery of services virtually can be particularly beneficial for remote areas where specialists are scarce. This is a particularly promising model especially if school personnel can be with the student in person during the delivery of remote services. Additionally, conducting IEP meetings remotely could be a convenient option for parents who do not have the flexibility to take a large amount of time off to attend a meeting at the school. These options should be considered and examined more rigorously moving forward.

¹³ Losen, D. J., Martinez, P., & Shin, G.H.R. (2021). Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies, The Center for Civil Rights Remedies at the Civil Rights Project, UCLA: Los Angeles, CA.

U.S. Department of Education Role

While education is typically thought of as a state and local issue, there is a role for the U.S. Department of Education in addressing issues facing students with disabilities. We would urge the Department to issue guidance on making up instruction loss and how to best utilize the MTSS model. While we are grateful for the influx of money for education as part of previous COVID-19 relief bills, we would urge the Department to issue guidance on uses of this money and in particular how states can utilize the money to provide more resources to under resourced schools and districts. One of the other lessons learned was that students from low-income backgrounds and students in very rural areas did not have the ability to connect remotely due to lack of internet service, no cell phone coverage or inability to afford a computer or internet connection. There is a need to address this issue through guidance.

I hope the committee finds this information informative and useful in addressing the impact of COVID-19 on students with disabilities and has shed some light on potential lessons we can take from the pandemic. I appreciate the opportunity to appear and I look forward to answering any questions you have.