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Commissioner

State of Rhode Island
DEPARTMENT OF ELEMENTARY AND SECONDARY
EDUCATION
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Dear Colleagues:

Over the last two years, we have worked closely with school districts in ensuring that our children receive the services and supports they need despite facing many unprecedented challenges resulting from the COVID 19 pandemic. As part of our continued efforts, we recently assessed the present impact of the COVID 19 pandemic on the learning and progress, including: (1) identifying students with disabilities who have experienced learning loss or significant skill regression as a result of distance learning and/or other unexpected consequences brought on by the pandemic and who may be entitled to COVID related compensatory services, and then (2) providing appropriate compensatory services when required. Thus, in an effort to further support parents and districts alike, I am taking the opportunity to provide some guidance, and summarize the guidance that the U.S. Department of Education's (the "DOE's") Office of Special Education and Rehabilitative Services ("OSERS") published last September. *See Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Act ("Roadmap")*, OSEP QA 21-06 (September 30, 2021).¹

RIDE has established an expectation through guidance and ESSER planning that schools will be offering opportunities for all students to address learning loss through their ESSERS III plan and addressing the recommendations of the Learning, Equity & Accelerated Pathways ("LEAP") Task Force Report. We fully expect that, due in part to the district's consistent efforts, students who receive special education and related services will have the support and opportunity to fully participate in each school district's goal to address learning loss. For some students, this level of support may be sufficient to address the learning loss experienced during the pandemic. Some students who receive special education and related services may require more individualized services to address learning loss. Higher risk populations of students, including students who receive special education and related services, may have had access to in-person learning before all students returned to in-person learning which may have mitigated some of the learning loss they experienced. We credit the many local education agencies ("LEAs") that have already begun conversations with students and parents about measurable learning loss and developed plans for addressing the students needs. As such, this guidance is

¹ Available at <https://sites.ed.gov/idea/files/rts-iep-09-30-2021.pdf>.

intended to reinforce the importance of addressing the needs of students who receive special education and related services as we all work together toward COVID recovery.

Compensatory services are “an equitable remedy to prospectively address the past failure or inability of the LEA to provide appropriate services, including those that were identified on the child’s [individualized education program (“IEP”).” *Roadmap* at Question D-3. Such services are intended to address learning loss and thus are to be provided *in addition to* the services required by the child’s IEP. Therefore, LEAs should not restrict the provision of compensatory services to the typical school day or existing summer programming but may, instead, provide such services by extending the school day, offer a wider array of summer programming, create alternative transitional and community programming and opportunities, and deliver special education services beyond the age of 22. *See id.* at Questions D-10, E-2.

OSERS has determined that providing compensatory services is appropriate to enable the child to recoup lost learning opportunities “after a failure or inability to provide FAPE over a given period of time.” *See id.* at Question D-3. Specifically, “[a] child’s IEP Team may determine that compensatory services are necessary to mitigate the impact of disruptions and delays in providing appropriate services to the child,” including as a result of implications brought on by the COVID-19 pandemic. *See id.* at Question D-6.

I therefore want to emphasize the following points.

1. Districts have an affirmative duty to review all IEPs to determine the need for, and extent of, compensatory services.

It is RIDE’s responsibility, through its general supervisory responsibilities, to “ensure that [all] LEAs take appropriate action to mitigate the adverse impact of any failure to provide appropriate services, such as lost skills and lack of progress, for children with disabilities.” *See id.* at Question D-8; *see also* 34 C.F.R. §§ 300.149, 300.600. In accordance with this authority, RIDE takes the position that LEAs have an *affirmative duty* to review all IEPs at the next-scheduled team meeting to ensure “appropriate individualized determinations of the need for, and extent of, compensatory services are made.” *See Roadmap* at Question D-8.

The US DOE’s “longstanding position has been that IEP Teams are the appropriate vehicle for addressing the need for, and extent of, compensatory services to address the child’s needs based on any failure or inability to provide appropriate services due to circumstances such as . . . pandemics.” *See id.* at Question D-7. Moreover, “many of the same types of individualized and child-centered deliberations that are appropriate for an IEP Team meeting, discussing the child’s IEP, would be appropriate when considering the need for, and extent of, compensatory services.” *Id.* at Question D-4. Thus, IEP Team meetings provide the most conducive setting for discussing and addressing a child’s potential learning loss as a result of the

COVID-19 pandemic, how students will access opportunities for all students through a district's ESSER III services and, if appropriate, the provision of compensatory services. During these meetings, the IEP Team is specifically encouraged to consider: whether a student's disability prevented or impeded their access or meaningful participation in any remote services; whether the remote services were accessible to the student with a disability; and whether there were other barriers to the student accessing remote services, such as language and Internet access.

By addressing whether, and to what extent, compensatory services are needed at the next-scheduled IEP Team meeting, the LEA may satisfy its affirmative duty in reviewing and, as necessary, updating all IEPs. RIDE encourages IEP teams to document the discussions of compensatory services to ensure that all members of the team are clear about expectations and agreements.

2. Parents shall be involved in all discussions related to whether or not the child should be provided with compensatory services.

As delineated above, all discussions related to the provision of compensatory services shall take place at IEP meetings, which necessarily requires parental involvement under the Individuals with Disabilities Education Act ("IDEA"). *See* 34 C.F.R. § 300.322. Therefore, LEAs shall include parents in all discussions regarding compensatory services, which will in turn allow the IEP Teams to better assess "the child's present levels of academic achievement and functional performance." *See Roadmap* at Question D-5. During the pandemic, many students received their education virtually, and often their parents had the opportunity to directly observe their children's successes and struggles with the remote educational experience. Their observations should be given serious consideration in IEP Team discussions.

3. Districts should provide parents with notice of the IEP Team's determination of whether or not a child is entitled to compensatory services as well as the parents' procedural rights.

"[L]ike any other IEP Team decision or proposal, the parent has a right to disagree with the IEP Team's decision" regarding compensatory services. *See id.* at Question H-1. Thus, if a parent disagrees with the IEP Team's determination regarding the need for, and/or extent of, compensatory services, the parent has a right to pursue the State complaint procedures pursuant to 34 C.F.R. §§ 300.151-300.153; mediation procedures pursuant to 34 C.F.R. § 300.506; and the due process complaint and due process hearing procedures pursuant to 34 C.F.R. §§ 300.507-300.516. *See id.*

Accordingly, in order to enable parents to pursue their procedural rights under the IDEA, LEAs should notify parents, in writing, within 30 days of their determination of whether or not to provide compensatory services to the child, as well as expressly set forth the parent's right to appeal the IEP Team's decision in the manners set forth above.

As we all work together to address the needs of our students and navigate through the pandemic recovery, clear and honest communication in IEP team meetings will help educators and families reach mutually agreeable plans for our students. I hope this guidance document has been helpful in this regard. Thank you for keeping our children first.

Sincerely,

A handwritten signature in cursive script that reads "A. Infante-Green".

Angélica Infante-Green,
Commissioner