



Disability Rights

WASHINGTON

Washington's protection and advocacy system

March 19, 2020

Governor Jay Inslee
State of Washington Office of the Governor
P.O. Box 40002
Olympia, WA 98504-0002

Superintendent Chris Reykdal
Office of Superintendent of Public Instruction
Old Capitol Building
P.O. Box 47200
Olympia, WA 98504-7200

Director Susan Birch
Health Care Authority
P.O. Box 45502
Olympia, WA 98504

RE: Protecting Students with Disabilities During COVID-19 School Closures

Dear Governor Inslee, Superintendent Reykdal and Director Birch,

As the Protection and Advocacy System for the State of Washington, Disability Rights Washington protects the rights of people with disabilities statewide, including students with disabilities. As a statewide Civil Liberties and Civil Rights organization for Washington, the American Civil Liberties Union of Washington works in the courts, the legislatures, and in our communities to protect and extend basic rights for everyone. As the statewide Legal Services organization for Washington, the Northwest Justice Project represents clients in a wide range of cases, including special education.

We are writing to urgently request that the Office of Superintendent of Public Instruction (OSPI) and the Health Care Authority (HCA) work together, along with your school districts and contractors, to proactively ensure students with disabilities are not denied access to essential services that they have been accessing at school. While we appreciate that this may be challenging to implement, we are concerned that these students will experience non-compensable harm if they are denied access to treatments that they need to grow into healthy adults.

As we face this historic moment, we appreciate all the considerations of how to mitigate the harm that many citizens will disproportionately suffer as a result of the COVID-19 related closures, isolation, and restricted access to social and health services. For students with disabilities, school is often also a crucial source of nursing, physical and occupational therapies, speech therapy, social emotional learning, Applied Behavioral Analysis (ABA) therapy, and mental health therapy. Without school, these students may have no available alternative resources for these critical services. As described in the following examples that have been reported to DRW's office in the last few days, having to forgo these services for many weeks or possibly months will result in significant regression, if not dangerous decompensation that could risk further destabilizations:

One ten-year-old student just changed placement after struggling for a year and half. She had started to make progress at the beginning of this year with a new evaluation, neuropsychological testing, autism diagnosis, a new individualized education plan, and an improved behavioral intervention plan. When school closed, the teacher provided some learning materials, but without any consultation or training, the student's parent does not know how to adapt these materials for her daughter's benefit.

A six-year-old student with a genetic chromosomal deficiency and developmental delay was receiving occupational therapy, physical therapy, speech therapy, and behavioral supports at his school. In addition, the student had weekly applied behavioral analysis (ABA) therapy at home for 8 hours, which he is also no longer able to access. Because his insurance is denying coverage for telehealth, his in-home ABA is not available even on a remote basis. Without the stimulation from being in school with activities such as circle time, or song time with other students, he is struggling even more to practice social skills and is having a much more difficult time with his sleep disorder. At minimum, he needs for his services to continue to prevent even further regression, but his family has been provided no information about where to turn.

Another student in a developmental preschool program was receiving physical therapy, occupational therapy, speech therapy, and ABA therapy three times a week. With these therapies, and the social emotional curriculum and structured social interactions with other students, she was working on kindergarten readiness so that she could join a general education kindergarten classroom next year. Without any of these key therapies, this child is at much greater risk of being placed in a self-contained classroom when she begins kindergarten, and perhaps for many years thereafter.

The prolonged suspension of key services and instructional programming is going to have far greater and longer lasting consequences for these and countless other students who rely on schools to provide them with medically necessary skilled therapies in addition to the education and socialization that all children need. Students who need essential services cannot afford to lose the learning skills and behaviors that enable them to benefit from the instructional program guaranteed to all students under Article IX of the Washington State Constitution and RCW 28A.150.220. If closures extend much longer than the currently set date of April 24, 2020, students may need additional or modified educational programming to continue. For example, one teenage student with developmental delay and agoraphobia does not typically leave the house, except to attend school, where the student accesses speech, social emotional learning, and vocational training working in the school store. At home, the student's parent is reporting more self-harm and aggressive behaviors and is afraid of how a prolonged loss of structure and training will impact her child.

School districts must look for ways to protect students with disabilities from the disproportionate harm of losing the therapies and supports they access through schools. Although this COVID-19 pandemic is unprecedented, continuing to deliver maintenance services to students with disabilities while school is otherwise closed is not. Just as Extended School Year (ESY) provisions protect students from regression over summer breaks, schools can provide critical supports even when school is not in session, for "maintenance of the student's learning skills or behavior." See WAC 392-172A-02020. If schools do not

look for ways to provide students with the therapies they need to maintain their physical and mental health, far more students will need compensatory and ESY services to address the regression and decompensation they will experience while schools are closed. See *Daniel Lawyer v Chesterfield School Board* 19 IDELR 904 (VA E. Dist. 1993); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1027 (10th Cir. 1990).

Currently, OSPI is advising schools “If the district is not providing educational services to students during the closure, then there is not a requirement to provide special education services during the same time period. Districts will want to consider special education needs on a case-by-case basis during the closure to address health and safety needs of students with disabilities.” (OSPI Bulletin No. 019-20).¹ Although previous OSPI guidance to schools has noted the need to “communicate proactively with parents and guardians regarding their child’s IEP services prior to and during a closure” as well as impact of closure on “the delivery of special education and related services to students eligible for special education services” (OSPI Bulletin NO 014-20), schools need clearer directives that they must continue working individually with students to plan ways to safely offer therapies during this school closure so that when education services resume, they will have had a chance to retain the skills necessary to re-engage in learning. See e.g. *Office of Special Education and Rehabilitative Services, Preparing for Infectious Disease: Ebola: Department of Education Questions and Answers on Providing Services to Children*² at 3 (stating that in the event of prolonged closure, schools “must determine whether the child is available for instruction and could benefit from homebound services”). For instance, even if office or clinic-based appointments are not feasible, schools should be authorizing and providing necessary technical supports for remote sessions or telehealth appointments for online therapy or parent/caregiver consultations that can minimize regression, even if provided on a more limited or modified basis.

Furthermore, schools should be coordinating with HCA to make all school-based therapies funded through Medicaid accessible outside of school. Students with Medicaid insurance are entitled to all necessary treatment under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) mandate of the Medicaid Act. 42 U.S.C. § 1396a (a)(10), § 1396d (a)(4), §1396d (r). Medicaid law requires that state Medicaid agencies “make services available so that young people can receive medical care before health problems become chronic and irreversible damage occurs.” *Emily Q. v. Bonta* 208 F. Supp. 1078, 1090 (2001). This includes any therapies recommended by clinicians within the scope of their practices that are necessary to correct or ameliorate a child’s condition. *Rosie D v. Romney*, 410 F. Supp.2d 18 (D. Mass. 2006), and *Katie A. v. Bonta*, 481 F.3d 1150 (C.A. 9th Cir. 2007). We greatly appreciate HCA providing coverage for telehealth encounters and believe that students and their families must be given information about how to benefit from this option.

OSPI must clearly instruct school districts to reach out to students to ensure they will be offered necessary therapies that can be covered under Medicaid. Students should not have to switch from school-based providers to new providers, which can result in long delays to establish care, disrupt important rapport, and require stressful changes in adapting to a new provider. Furthermore, while

¹ See also <https://www.k12.wa.us/about-ospi/press-releases/novel-coronavirus-covid-19-guidance-resources/special-education-guidance-covid-19>.

² Available at https://rems.ed.gov/Docs/DoE_Questions_and_Answers_on_Providing_Services_to_Children.pdf.

some families may be able to navigate the Medicaid system well enough regain access to services, many families may not even have enough information about providers and their Medicaid benefits to even know where to begin. To effectively serve students with disabilities and help them continue maximizing their potential to function as independently as possible, HCA and school districts must commit to systematically coordinating with one another to deliver care as consistently as possible during this difficult time for students and their families.

We appreciate that many challenges lie ahead as we respond to a novel threat. And, we greatly appreciate all that your staff have been doing to work through a maze of new and complicated questions. Our fellow advocates have spoken highly of staff from both HCA and OSPI going above and beyond to offer support for students with disabilities. With this level of dedication and commitment, we have every reason to hope we will be able to find ways to ensure public health and safety while also continuing to meet ongoing needs of children with disabilities. We request that OSPI and HCA establish clear guidance and protocols for schools, students, and families that will ensure that all children can continue receiving therapies they need to avoid severe regression, heightened risk of restrictive placements, or loss of learning skills that will put them further behind in achieving graduation standards with their peers.

If you have any questions or would like any further feedback about how to continue delivering services to students, please do not hesitate to contact any of our organizations.

Sincerely,



Andrea Kadlec, Attorney
Disability Rights Washington

_____/s/_____

Michele Storms, Executive Director
American Civil Liberties Union of Washington

_____/s/_____

Debbie Dorfman, Managing Attorney
Northwest Justice Project

CC: Mark Stroh, Disability Rights Washington Executive Director
Glenna Gallo, OSPI Assistant Superintendent
MaryAnne Lindeblad, HCA Medicaid Director
Gail Krieger, HCA Section Manager