

Legislative Forecast: DeVos Recommends Precious Few Education Waivers

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A new education report required by the CARES Act details what the U.S. Department of Education is prioritizing in its response to the COVID-19 pandemic.

Department Secretary Betsy DeVos submitted [the report](#) to Congress on Monday. It recommends legislative action to waive certain requirements of education laws.

The CARES Act gives the department the authority to waive certain assessment and funding requirements under federal education laws. Acknowledging that additional department requirements may be impossible or unnecessary during the pandemic, Congress requested a report from DeVos recommending legislative authority to waive other specific statutory provisions.

Multiple constituencies appealed to DeVos over the course of the past 30 days regarding waivers of requirements to receive federal funding. The two major areas of focus have been special education compliance and remote learning challenges, like inequities in access and program development.

What the Report Does: Establishes the following waivers pursuant to the secretary's existing authority for which legislative action is not required:

- Every Student Succeeds Act, Title I, Part A
- Authorizes state education agencies to waive the 15% carryover limitation for local education agencies more than once every three years
- Every Student Succeeds Act, Title IV, Part A. The following, which typically apply to recipients of \$30,000 or more, are waived:
 - Needs assessment for FY 2019-2020
 - Needs assessments are due every three years. The waiver is only for this year.
 - Content specific spending requirements for FY 2019 funds and available funds carried over from FY 2018
 - "Not less than 20%" must be spent on certain activities including but not limited to: STEM; post-secondary college and career counseling; drug, violence, or mental health programs; bullying and harassment programs, school-wide positive behavior support interventions and supports.
 - A "portion" must be spent on technology and related activities to achieve academic growth and digital literacy of all students;
 - Spending restrictions on technology infrastructure.

- Professional development
- Waives the definition to prioritize quick training on distance learning and other relevant techniques. The definition included language about continuous learning and not having short sessions.

What the Report Recommends for a Future Law: These requirements cannot be waived unless Congress passes another law, and DeVos has recommended these waivers for a future law:

- Evaluations
- Extend timeline for Early Intervention (Part C) to School Age (Part B) evaluation
- Timeline would resume when face-to-face meetings allow the toddler to be evaluated
- With parental consent, early intervention services would be permitted to continue prior to a school-age evaluation and eligibility determination
- Funding for these continued Part C services would be provided by CARES Act funding or Part B funding
- Extending periods of availability, obligation, or expenditure of certain FY 2019 funds
- Vocational Rehabilitation funds originally allotted for FY 2019 that could not be expended and can be carried over to FY 2020 may be obligated and expended in FY 2020 and FY 2021
- Vocational Rehabilitation 15% minimum expenditure requirement
- "Tydings Amendment" waivers under section 421(b) of the General Education Provisions Act for Perkins and Adult Education and Family Literacy Act funds from FY 2018 will remain available for obligation and liquidation beyond the 27-month requirement
- McKinney Vento Homeless Assistance Act Tydings Amendment (waiver not explicitly sought from Congress, but noted in the ESEA section of the report)
- Scholarships
- Personnel Development Scholarships: seeking similar treatment as TEACH Grants, which were addressed in the CARES Act, by waiving service obligation requirements that could not be completed due to the pandemic
- Rehabilitation Long-Term Training (RLTT) Program employment obligations that could not be completed due to the pandemic would not trigger repayment

What the Report Omits: Despite being well-publicized by constituent groups, DeVos' report is silent on numerous issues, which may be interpreted by Congress as a recommendation not to take legislative action to modify these obligations

- Timelines for evaluations and re-evaluations
- Address impacts on evaluations that were consented to but not started, started but not completed and referred during or immediately prior to the pandemic
- Address impacts on eligibility, placement, and IEP formation
- Address triennial reviews due during the pandemic and parental requests for evaluation during the

pandemic

- Address the resources necessary for completing evaluations that are backlogged and due after the pandemic such as timeline extension, additional funding for contractors or additional employees
- E-Grant or other solution to lack of technology
- Deficiencies with and lack of access to broadband internet and adequate devices presents a barrier to education for many students
- IEPs and IEP Team Meetings
- Considerations for creating the IEP that must be in place at the start of next school year
- Parental participation and equitable access issues with remote meetings
- Accounting for the pandemic in required documentation (prior written notice, present levels, possibility of remote instruction in Fall 2020 and beyond and progress monitoring)
- Due process hearing considerations
- Extending timelines for hearings during the pandemic
- Terminology for describing the present situation such as CoE-FAPE vs. FAPE, CoE-Evaluation vs. Comprehensive Evaluation, levels monitoring vs. progress monitoring and pendent eligibility determination vs. eligibility determination
- Addressing practical limitations of remote adjudications
- Lack of remedies immediately available during the pandemic and uncertainty of future circumstances
- Remedies
- Establishing placement during the pandemic as a unique inquiry regarding the site change of a current placement, and that is separate from the placement decision made by an IEP team
- Compensatory education model is meant for times when a school does not delivery FAPE, a baseline measure. Here, schools would have been delivering FAPE at the level provided prior to March 13 *but for* the emergency caused by the pandemic. The school continued to provide FAPE under those emergency circumstances, but FAPE under those circumstances looked different than FAPE prior to March 13. The school did not lower its provision of FAPE; rather, it raised its efforts to provide a reasonable opportunity to access FAPE under the circumstances.
- Future services calculation, cost, timing, and staffing concerns
- Limits on Independent Educational Evaluations for in-person assessments and evaluations that could not be reliably completed during the pandemic
- Extended School Year
- What level of services must be delivered this summer?
- Eligibility for more students? If so, how do schools measure potential make-up services from the COVID-19 disruption?

- What if summer school is offered to all students?

The legal issues that DeVos omitted from the report are just as important for LEAs to understand as the recommended waivers. All of these issues, whether included in the Report or not, have been significantly burdened by the pandemic. Schools must be aware of the potential for liability exposure and seek legal advice when doing so is prudent. **Most items in the report require Congress to legislate a solution, and this is only a summary of certain notable student services issues. Schools should consult an attorney before modifying compliance practices.**

We will continue to provide updates on the status of these recommendations when they are considered by Congress. If you have any questions on Monday's report, please contact me or any member of the [Barley Snyder Education Group Practice](#).

This video is a part of a webinar presented on April 28, 2020 by the Special Education Advisory Council (SEAC).

DISCLAIMER: As we face an unprecedented time of legal and business uncertainty, we are working to provide updates on the status of important legal news related to COVID-19. It is important to note that the situation is changing rapidly and the information provided in our alerts is not intended to create an attorney-client relationship. The information contained in our alerts is for general informational purposes only and should not be construed as legal advice or a substitute for legal counsel. If you have questions about your legal situation or about how to apply information contained in this alert to your situation or about how any other information found on our website may affect your business, you should reach out to one of our attorneys. We assume no responsibility for the accuracy or timeliness of any information provided herein or by any linked site. As information changes rapidly, users are strongly advised to verify any information before relying upon it.