



## **NEA OGC Update on Guidance from the U.S. Department of Education that Addresses Special Education and Social Emotional Learning Issues**

**April 28, 2021**

NEA, along with many others, have been pushing the U.S. Department of Education (ED) to take action on special education. In addition to *NEA's 2020 Policy Playbook* and the joint *NEA/AFT Learning Beyond COVID-19* report, another major avenue for this advocacy is the petition for guidance filed with ED by multiple NEA local affiliates, including UTLA, Madison, Milwaukee, Ed Austin and Juneau, that NEA has supported (the "UTLA petition"). The UTLA petition makes multiple specific requests for guidance, including how American Rescue Plan Act (ARP Act) funds should be spent, how schools should address social emotional needs, and how to ensure that learning recovery programs are accessible to all students. Since the filing of that petition on March 23, 2021, ED has issued two significant guidance documents, an interim final rule and a handbook on COVID-19 school reopening, that address some of the guidance requests raised in the UTLA petition. The below update summarizes the newly issued ED guidance and where it addresses the guidance requests in the UTLA petition.

### **INTERIM FINAL RULE REGARDING ARP FUNDS**

On April 21, 2021, ED published an interim final rule in the federal register discussing the requirements that state and local educational agencies (SEA's and LEA's) must abide by in creating their plans to receive the remainder of the ARP Act Elementary and Secondary School Emergency Relief (ESSER) funds. 86 Fed. Reg. 21195 (Apr. 21, 2021), available [here](#). Of note, the interim final rule requires LEA's to prioritize equity in their use of ARP funds and to engage stakeholders including educators and their teachers – both issues that NEA and the UTLA petition have called for action on. Petition at ¶ 131; NEA Policy Playbook: Education Funding.

The interim final rule requires LEA's to use ARP ESSER funds for "evidence-based interventions" that "respond to the academic, social, emotional, and mental health needs of all students, and particularly those students disproportionately impacted by the COVID-19 pandemic, including . . . students of color . . . [and] children with disabilities." 86 Fed. Reg. 21201. It also requires SEA's and LEA's to engage in "meaningful consultation with

stakeholders" including "educators and their unions" as well as disability rights organizations and other special education advocacy groups in developing their ARP ESSER plans. *Id.*

## **COVID-19 HANDBOOK**

On April 9, 2021, ED released Volume 2 of its reopening guidance, entitled ED COVID-19 Handbook: Roadmap to Reopening Safely and Meeting All Students Needs ("ED Volume 2"), available [here](#). ED Volume 2 addresses several of the issues that NEA has been pressing and on which the UTLA petition requests guidance, including guidance on social emotional learning, addressing student mental health needs, school discipline, trauma-informed care, professional development, and appropriate uses of technology. Throughout ED Volume 2, various programs are noted as examples and hyperlinked to provide more in-depth information.

### Social Emotional Learning

The trauma of the past year has been significant for students, particularly those in communities heavily impacted by COVID-19 and for students with disabilities. As a result, NEA has been emphasizing the importance of focusing on the social and emotional needs of students, as highlighted in the Learning Beyond COVID-19 report, available [here](#). This concern is also raised in the UTLA petition which requests that ED issue guidance for "developing and implementing plans, anchored in stakeholder engagement, for assessing and meeting the social and emotional needs of students" and that ED make clear that ARP funds can be used to ensure a "focus on social emotional learning for all students." Petition at ¶ 158. ED Volume 2 contains a lengthy section on meeting students' social and emotional needs and discusses the need to have an intersectional lens in dealing with these issues. ED Volume 2 at 8. It notes that "school-based mental health professionals, such as counselors, social workers, and psychologists might need to provide additional and more intensive support to students with the most urgent needs that have been caused or exacerbated by the pandemic." *Id.* The guidance discusses positive behavioral interventions and supports and provides numerous examples of how to engage in social emotional practices which include ideas for classroom activities. It also notes that "[s]chools are microcosms of society; therefore, culturally responsive practices, intentional conversations related to race and social emotional learning, and helping students understand the skills they are building in school, are the foundation for participating in a democracy and should be anchor tenets in building a schoolwide system of educational opportunity." *Id.* It discusses the need to provide professional development for all school staff and states that ED will be providing additional information on how to meet student social emotional needs in future guidance and technical assistance documents.

### Mental Health/Trauma Informed Care

In addition to social emotional needs, schools also need to increase mental health supports and engage in trauma-informed care. UTLA's Petition at ¶ 155 discusses the importance of mental health services for students and seeks "guidance for educators and parents on addressing trauma . . . including providing high quality professional development," guidance for all educators on "trauma-sensitive responses, trauma identification trainings," and using ARP funds to "creat[e] trauma-informed care for all students" and to hire additional support staff.

Petition at ¶ 158. ED Volume 2 discusses both trauma-informed practices as well as supporting student mental health. On mental health, ED notes that low-income students, students of color, and students with disabilities face barriers to diagnosis and treatment and that “[f]or students of color, mental health issues are often more likely to be met with discipline rather than to be treated.” *Id.* at 10. The guidance advises that,

These students are most likely to be living in communities that have been hit hardest by COVID-19, and their schools are more likely to have been closed longer for in-person learning versus schools in more affluent communities, leading to even greater needs for supports. Thus, it will be especially important for school communities reopening to develop and operationalize a plan for conducting mental health first aid, mental health screenings, and procedures for referral. To support these efforts, district and school leaders are encouraged to examine the ratio of school counselors, social workers, and psychologists to students in schools and develop a plan to meet recommended ratios for each if they are not met already. Schools can spend ARP funds to meet any of these needs.

*Id.* ED Volume 2 makes clear that students with disabilities, regardless of disability classification, can receive mental-health services (counseling, social work services, etc) in schools if it is included in their IEP or 504 plan. *Id.* at 11. The guidance also discusses recommendations from the American Psychological Association on actions school leaders and educators can take to reduce stigma and ensure students access mental health programs and states that further guidance from ED will be forthcoming on how to support student mental health needs. *Id.*

With respect to trauma-informed practices, Volume 2 recommends “adopting a schoolwide trauma-informed approach” and states that this should begin by providing “high-quality professional development for all educators and staff on trauma-informed care and teaching practices.” *Id.* at 14. The guidance links to resources on trauma-informed practices at the Department’s Safer Schools and Campuses Best Practices Clearinghouse. *Id.* at 15.

### School Discipline

NEA’s 2020 Policy Playbook, available [here](#), discusses the problem of disparate school discipline and asks the Biden-Harris Administration to reissue the 2014 school discipline guidance that was rescinded by the previous administration. The UTLA Petition highlights how students with disabilities are frequently disciplined for manifestations of disability and also requests a reinstatement of the rescinded 2014 school discipline guidance. Petition at ¶ 160.

While ED Volume 2 does not reissue the discipline guidance, it does discuss school discipline issues generally. First, the guidance discusses how schools should handle students who have been chronically absent during the pandemic by providing numerous examples of successful programs and notes that any actions should be non-punitive in nature and that punitive actions include “not promoting students to the next grade, failing them in a course, directing parents to truancy court.” ED Volume 2 at 13. It discusses the importance of personal outreach to

reengage students and that it “should be conducted by a school official rather than law enforcement or school-based police because the presence of law enforcement or school-based police might cause confusion or be unintentionally intimidating.” *Id.*

ED Volume 2 also states that “[f]or some Black students, pre-pandemic school exclusion, among other factors, may impact Black families’ willingness to return students to in-person instruction. Pre-pandemic, Black students made up 15% of the public school population but represented 39% of students suspended, an overrepresentation of 23 percentage points.” *Id.* at 14. It goes on to make clear that while students are protected from racial discrimination in school under federal law, many students still experience racism and implicit bias and that schools should work to address students’ and families’ feelings of distrust. ED recommends doing so through outreach and by reexamining the use of exclusionary discipline practices. Instead of exclusionary practices, schools should consider “wraparound services, mental health counseling, social emotional learning, culturally and linguistically inclusive curriculums, and a schoolwide multi-tiered system of support.” *Id.*

### Professional Development

For educators to be equipped to handle the varied social, emotional, and mental health needs of students, they need high-quality professional development that is available to all educators, as highlighted in the NEA/AFT Learning Beyond COVID-19 report. The UTLA petition asks ED to issue guidance on professional development, including the “development and guidance for all educators” on implicit bias, multicultural competency, restorative justice, trauma-sensitive responses, and trauma identification. Petition at ¶ 158.

ED Volume 2 briefly addresses this issue as follows:

Professional development for all educators and school staff should support individuals in identifying and addressing bias in themselves and in their communities, and help school teams to replace exclusionary discipline practices with social and emotional supports best suited to address the impacts of COVID-19, including restorative justice approaches, social emotional learning, and positive behavioral intervention and supports. Positive discipline practices should acknowledge the lived experience of all students, including implementing culturally inclusive dress codes that do not perpetuate gender stereotypes, and creating an environment that promotes belonging.

*Id.* at 15. The guidance links to resources on restorative justice and positive behavioral interventions and supports.

### Accessibility of Learning Loss Programs

The ARP funds are a significant investment in education, but it is important that the funds are used to assist students and schools who most need help. The UTLA Petition asks ED to

ensure that ARP funds are used equitably to assist students with disabilities, including by ensuring that learning recovery programs are available to students with disabilities. Petition at ¶ 158. ED Volume 2 discusses learning recovery programs in detail and notes that any summer programs must be made available to students with disabilities. ED Volume 2 at 23. It also makes clear that tutoring, after school programs, summer learning, and the like are not substitutes for an IEP and any additional services required under federal disability law. *Id.* at 24. The guidance says:

Similarly, these types of strategies cannot replace the special education and related services and other supports included in an IDEA-eligible student’s IEP as determined by the student’s IEP Team or the regular or special education and related aids and services documented in a 504 plan, or the decisions made by a group of people who are knowledgeable about the child, the meaning of evaluation data, and placement options as required by Section 504.

In addition, inclusion of students with disabilities in district or schoolwide interventions to address lost instructional time does not relieve a district of its responsibility to make individualized decisions required under the IDEA about needed special education and related services for a student with a disability. These could include providing extended school year services as defined in IDEA when determined necessary to ensure that the student maintains the skills necessary for the student to receive a free appropriate public education (FAPE) if educational services are not continued during periods when school is not in session, such as the summer. Similarly, Section 504 requires schools to make individualized decisions about services needed for a student with a disability. Consistent with IDEA and Section 504 and respective applicable standards, students with disabilities might be entitled to additional instruction and services, often referred to as compensatory services to make up for any skills that might have been lost if it is individually determined that the student was unable to receive FAPE, as a result of the closure of school buildings during the COVID-19 pandemic.

*Id.*

### Technology

The COVID-19 pandemic and switch to virtual education has made clear the importance of accessible technology for all. Many students, and particularly students with disabilities, have been unable to access education due to technology barriers. The UTLA Petition requests that ED issue guidance on special education in a remote environment and redressing disparate impacts faced during the pandemic, including because of a lack of access to technology. Petition at ¶ 147, 148, 150. ED Volume 2 contains a lengthy discussion of technology issues, and specifically discusses the digital access divide in detail. ED Volume 2 at 25. The guidance provides numerous recommendations for how schools can close the digital access divide including through professional development and family engagement. *Id.* at 26. It also specifically discusses issues specific to students with disabilities and English learners, noting that federal law requires

that students with disabilities have equal and effective access to technology benefits. It suggests that:

Schools can build accessibility features for students with disabilities into their technology by ensuring that websites and documents are compatible with screen reader software and providing accurate captioning or embedded sign language interpreting for video content. This might also include leveraging technology for IEP Team meetings to ensure that parents understand the proceedings at the meeting if, for example, a parent requires a sign language interpreter or printed materials in accessible formats for someone with visual impairments. Further, when developing, reviewing, or revising an IEP for a student with a disability, the IEP Team must consider whether the child requires assistive technology devices or services in order to receive a free appropriate public education. States and school districts must ensure that assessments are compatible with assistive technology devices.

*Id.* at 27.

If you have any questions regarding the recent guidance from ED, please reach out to Lubna Alam (lalam@nea.org) at the NEA Office of General Counsel.