

SCHOOL LEADER VOICES

*Concerns and Challenges to Providing
Meaningful IDEA-related Services
During COVID-19*



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Introduction

As schools prepare to reopen in the fall, there is a growing concern that school districts and educational service agencies will face unparalleled rates of litigation for their inability to meet requirements under the Individuals with Disabilities in Education Act (IDEA) during the COVID-19 pandemic. This concern is well-founded. IDEA guarantees eligible students with disabilities a “free appropriate public education” (FAPE) and a right to pursue a complaint through a due process hearing and federal court. Similarly, Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA) require equal access to educational opportunities for students with disabilities. Also, the regulations implementing Section 504 require FAPE. However, during this unprecedented pandemic, FAPE comes with tremendous costs to budgets and additional burdens on personnel that challenge school districts trying their best under the circumstances to meet the requirements.

To gauge the degree of concern, the Association of Educational Service Agencies (AESA) surveyed a subset of its members in 28 states between May 20 and June 16, 2020. AASA, the School Superintendents Association, also surveyed school leaders nationwide on the school response to the coronavirus pandemic in May of 2020. The National School Boards Association (NSBA) has been collecting examples of IDEA-related concerns across the country since the beginning of COVID-19. The data gathered by these organizations informs our understanding of how potential and actual special education litigations related to meeting the IDEA requirements during the pandemic may impact the budgets and operations of schools.

Background

America's special education system is woefully underfunded. Congress' stated obligation to pay for 40% of the additional cost to educate a student with a disability has never come close to being fulfilled in the 45 years of IDEA's existence.¹ Each year, the encroachment of special education expenditures on school budgets² concerns many school districts. The devastating economic impact of the COVID-19 pandemic will reduce state and local revenue, so there will be fewer dollars to cover the mandated services districts must provide students with disabilities under IDEA.

Special education is the most active area of litigation for school districts. In the 2016-17 school year, 18,000 special education due process complaints were filed.³ The financial cost of a due process proceeding may run as high as \$50,000 per hearing, with an average cost running between \$8,000 and \$12,000.⁴ But the cost is not limited to dollar figures. A majority of districts do not encounter due process proceedings. However, those that do find they produce disappointing results for both parents and district personnel. They also take an emotional toll on both parties' personal and professional lives.⁵

What are some main concerns, according to the surveys?

An Educational Service Agency (ESA) refers to a regional, public multi-service agency authorized by state law to provide general and/or special education services for school districts. ESAs are known by many different names depending on their state. Educational service districts, intermediate units, or cooperatives are just a few names used to describe them. ESAs serve students in urban, suburban, and rural areas, but the majority assist districts that describe themselves as rural.

The AESA surveyed a wide range of ESAs, including ESAs in the poorest and wealthiest areas of the country and ESAs serving higher or lower numbers of special education students than the national average. The results of this survey are consistent with the findings from the AASA survey. Despite differences in student population and geography, the surveyed ESAs are equally concerned about lawsuits. These lawsuits that have been filed or are likely to be filed will require them to justify the quality and quantity of special education services provided to students with disabilities during the COVID-19 pandemic.

The data from both AESA and AASA (Figure 1) show that IDEA-related legal challenges are serious concerns now and in the future. Almost **four out of 10 ESAs** and **three out of 10 school districts** anticipated at least one due process complaint related to the inability to meet requirements in students with disabilities' individualized education programs (IEPs) during the pandemic. Further information includes:

- **Approximately three out of four school districts** found that the most difficult educational service to provide during COVID-19 was equitable education and related services for students with disabilities.
- **About one in three school districts** are most concerned about the costs of providing special education and related services during COVID-19. When asked how much they typically budget for each special education litigation, **almost one in four ESAs** indicated they would budget \$50,000 or more— an amount that could be used to hire one experienced teacher.⁶
- **More than half of the ESAs** indicated that they would encounter complaints based on a child not receiving the same quantity of specialized instructional support services as indicated in the child's IEP during the pandemic. This could include having the same level of access to school personnel such as speech-language pathologists, school psychologists, and occupational or physical therapists. Specifically, 16% of the ESAs indicated forthcoming litigation against the district would be based on a child not meeting the IEP goals that were set forth at the beginning of the 2019-20 school year.

- **About three in 10 ESAs** predicted that they would have to find the resources to respond to at least five due process complaints.
- **Nearly one in 10 ESAs** said they already received a due process complaint related to special education delivery during the pandemic.

Among those ESAs that expressed concerns about IDEA-related litigation:

- **More than one third** said that their concerns were growing. Initially, some ESAs felt there was cooperation and understanding of the limitations they face in meeting IEPs during the pandemic. They now believe parents are intending to file a complaint or have filed one already.
- **Approximately 29%** said their concern was high, as they worried that special education litigation would consume much of their time and resources in the 2020-21 school year. Twelve percent of the ESAs described their concern about litigation as relatively high, as they regularly have one or two due process complaints filed annually. They are prepared for more parents to use the due process system because they are unhappy with the quality or quantity of services their child is receiving during the pandemic.

Figure 1. IDEA-related concerns from the AESA survey and the AASA survey: 2020

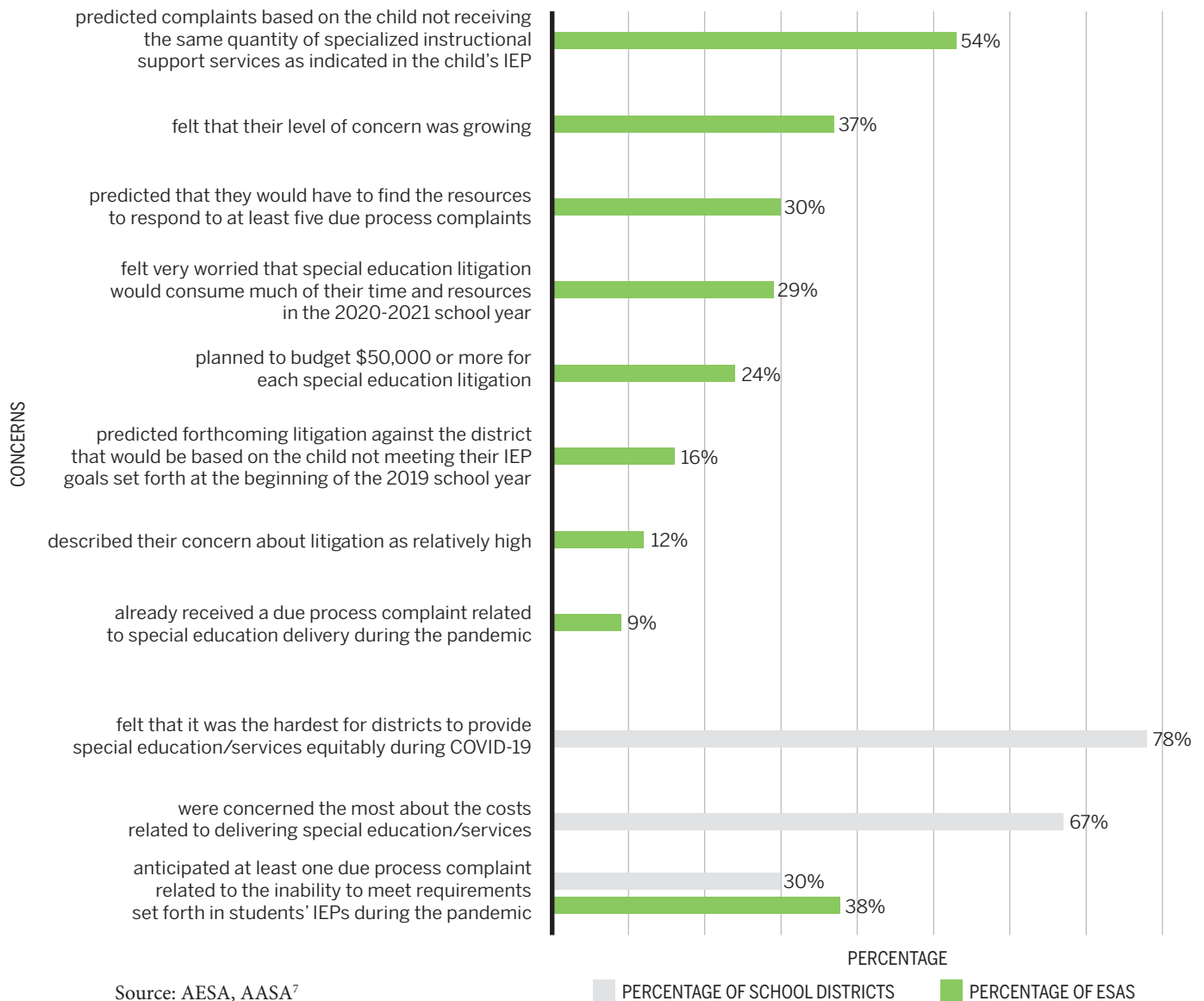


Figure 2. The layout algorithm⁸ of responses in the AESA survey to the question how special education litigation would impact the district financially in the fall 2020.



The following are some AESA survey responses related to budget and funding issues:

- “With districts projecting a decrease in state funding, the cost of litigation will have an impact on the entire educational community for a district.”
- “When we are looking to cut budgets and staff, the thought of spending \$50,000 and more per case will certainly take away from our ability to educate all of our students. One case could pay a teacher’s salary. We are under-funded in special education already.”
- “I fear that the cost of litigation could potentially bankrupt our district.”
- “We are a very small independent district, and a single due process hearing could, in reality, close down the district.”
- “One due process complaint will cost the district at least \$50,000, even if it is settled at mediation. As a small school district, this greatly impacts the budget and the ability to provide services to all students, including students with disabilities.”

The following are some AESA survey responses about issues related to school personnel:

- “These legal proceedings tie up staff, administrators, related service providers, etc... pulling records, meeting with attorneys, having mediation, preparing for litigation, ongoing efforts to try to resolve complaints. These events are extremely time-consuming in addition to monetarily consuming. All the while, these staff are tied up and unable to complete services and duties for other assignments and students with disabilities.”
- “Aside from the costs, the irreparable damage is actually to the staff—they work so diligently to serve each and every child that when these lawsuits are filed, the staff feel impotent and lose the confidence and joy in their work. We have lost staff due to this kind of litigation—some of the most dedicated staff I ever worked with. That is a price none of us should have to pay.”

The following are some AESA survey responses about issues related to programs and services:

- “We are currently having to cut programs by as much as 20% for the coming school year. Any fees from legal matters would further deplete our funds, causing the need for more cuts and a loss of services for students with special needs.”
- “Advocates and lawyers are already reaching out to parents of students with special needs; our budget is already compromised; services cannot be provided in the same manners as in the classroom; some parents are not making any connection with the school sites, and others are already asking for compensatory services; students will regress. Districts did not create this problem and should not be penalized for trying to do the best they can to serve our most vulnerable population.”

- “Special education due process complaints are a very real threat to education entities at this time. Although it would be wonderful to live in a world where the possibility of litigation around uncontrollable circumstances such as a pandemic was remote, that is not the circumstance schools or educational cooperatives find themselves. Litigation around special education timelines and individualized education plans is almost certain. Despite the best efforts of educators, services have been disrupted.”
- “In addition to expected litigation for current special education students, as parents have had months of instructing their children at home, we are expecting an onslaught of initial referrals due to learning gaps because of COVID-19. Due process hearings result in hours of work for compilation, witness preparation, securing expert witnesses, staffing, and evidence gathering, which means students receive less direct attention from their teachers, and they could miss related services during the process.”

The following comments from the AESA survey are related to policy issues:

- “This pandemic has brought upon increased liability. Districts are making every effort to meet timelines and the needs of students, but the restrictions and limitations make us all very vulnerable.”
- “Given that this was not a student-specific denial of FAPE, but a school closure that impacted ALL students, this could spiral out of control quickly. If one parent ‘wins’ a complaint, it would essentially mean that all families can file and expect the same outcome.”

In the AASA survey, 78% of superintendents indicated that ensuring equitable access to special education and related services was a major challenge for their districts.⁹ In the same survey, 84% percent of school leaders indicated federal flexibility around IDEA would be incredibly helpful. The evidence collected by AESA and AASA supports the call for Congress to take actions to ensure that districts do not face enormous new litigation challenges related to IDEA because of the pandemic.

What IDEA-related complaints are school districts receiving?

During the school closures caused by the COVID-19 pandemic, schools are limited in their ability to provide all education services required in students' IEPs, regardless of what efforts have been made by districts. According to the AESA and AASA surveys, school leaders anticipated a rush of IDEA-related complaints. They worried that the increasing cost of handling the special education litigation might deplete funds used to improve curriculum, instruction, and programs. Unfortunately, the concerns are becoming visible in at least 27 states, as shown in the cases collected by NSBA.

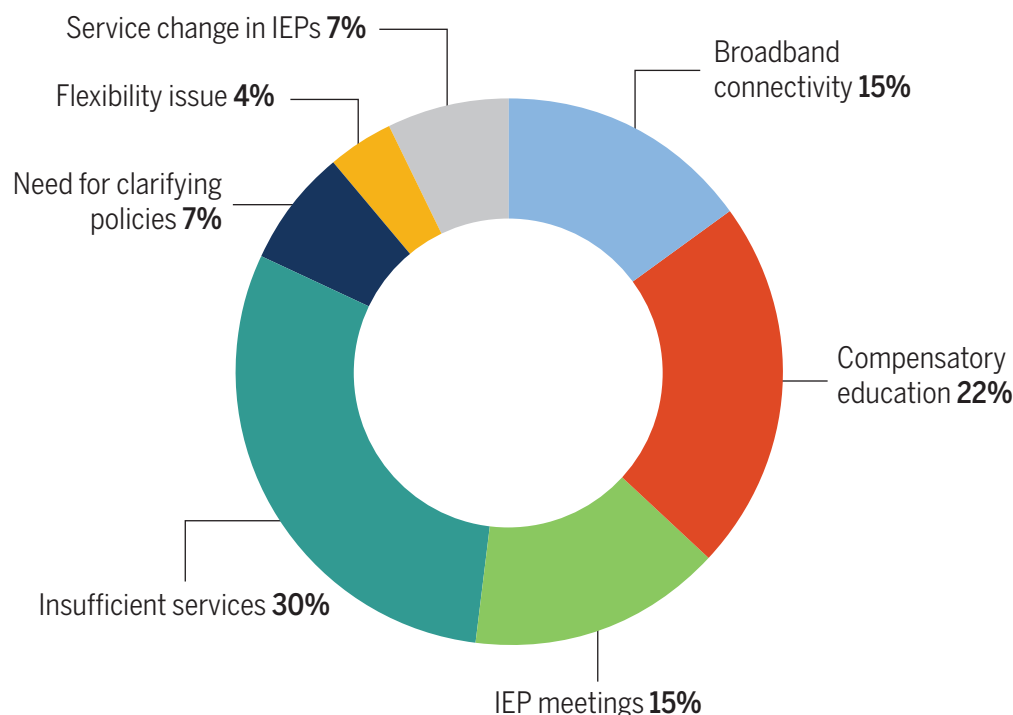
While students with disabilities have different conditions, and the IDEA-related complaints differ, the cases collected thus far can be grouped into seven categories (Figure 3). Consistent with the survey results from AESA and AASA, the evidence collected by NSBA shows that so far, the complaints have focused on:

- The inability of schools to provide the education services required in the student's IEP during COVID-19, including insufficient services (30%) and parents' requests for compensatory education (22%).
- Lack of technology access or broadband connectivity commonly called the "homework gap."
- Failure in arranging an IEP meeting or reaching agreement on service changes in IEPs between parents and schools.

Note that some complaints came from the ambiguity of policies. For instance, in one state, districts were confused about whether to give prior written notice of the services they could provide during COVID-19 or whether to develop an amendment to an IEP. School leaders are concerned about the following scenarios:

- If parents do not agree with the amended IEP, what should happen? What services should schools provide?
- Assuming there is a request (or complaint) for compensatory education after the pandemic, should school districts provide a prior written notice that specifies the amount of compensatory education and related services?
- If districts could mitigate in the interim by providing certain remote education and services, should they?

Figure 3. Percentage of IDEA-related complaints, by category: 2020



Source: NSBA¹⁰ (2020)

In one high-profile example, the Chicago Teachers Union (CTU) filed a suit against the U.S. Department of Education (ED) and the Board of Education of the City of Chicago, challenging the failure to waive IDEA requirements. CTU reasoned that ED should exercise its authority granted by Congress to consider and appropriately waive the requirements under the IDEA and Section 504. Those requirements impose impossible regulatory burdens on large school districts during the remote learning caused by the pandemic. Without the waiver, teachers and service providers in special education must redraft roughly 60,000 existing IEPs and Section 504 plans for children in the Chicago public schools, according to CTU. The suit sought an injunction for CTU members. The federal court denied the injunction on June 19, but noted “That the Court is unable to grant the relief their representatives seek should be read neither to discredit their substantive views on remote learning nor to call into question their manifest dedication to duty.”

Policy implications

“School board members and other public school leaders have managed a herculean task to serve students during the pandemic,” said Anna Maria Chávez, the NSBA Executive Director & Chief Executive Officer, in a recent national reopening collaboration document¹¹ released by the National Labor Management Partnership (NLMP).

“We all agree that FAPE is important, but the legal understanding of FAPE during a pandemic cannot be the same thing as FAPE under normal educational circumstances. ESAs and school districts are doing the best they can to ensure all students are appropriately served when schools are closed due to a pandemic. Flexibility at the federal government to shield districts from frivolous lawsuits is essential to putting ESAs and districts on a path towards a successful next school year,” according to Joan Wade, AESA Executive Director.

AASA Executive Director Daniel Domenech stated that *“Congress must act swiftly to provide liability protection to districts around IDEA. District leaders need to be focused on addressing learning loss, not preventing litigation. This is not a free pass for districts to stop serving students with disabilities appropriately. Instead, this is an opportunity to provide reasonable, temporary, litigation protection for the vast majority of districts that are doing everything feasible to meet IDEA during the pandemic, but simply cannot meet every requirement exactly as intended for every single child.”*

Although the U.S. Department of Education recognized that exceptional circumstances may affect how special education and related services/supports are provided to students with disabilities and would offer flexibility¹², the policy support has been inadequate. The data from AESA, AASA, and NSBA suggest the flip side of flexibility, that is, the ambiguity of federal or state policies could lead to legal challenges for school practitioners.

Conclusions

Evidence and data are imperative for policymakers to make sound policies. The information presented in this paper, while including both qualitative and quantitative facts, cannot cover every aspect of IDEA-related legal challenges. Yet, the report gives insight into the hardship that school leaders are experiencing when making all efforts to serve every special education student during the pandemic.

“School districts must provide a free and appropriate public education (FAPE) to students with disabilities, and the provision of FAPE may include, as appropriate, special education and related services that can be provided via computer, internet, or phone,” according to the U.S. Department of Education¹³. However, not every special education service can be accomplished via computer, internet, or phone. In fact, every eligible student with disabilities receives education services in a unique environment specifically designed to meet the student’s needs through an IEP.

Simply put, school leaders care deeply about providing meaningful services to students with disabilities. They are concerned that, without further federal action, their budgets will not support the services students with disabilities need. School leaders are aware that it is difficult to provide special education services equitably for a variety of reasons. In the AESA survey, one respondent said, “I worry about equity... the more that parents file, the less time staff have to provide quality education for everyone. If teachers and providers have to constantly be preparing for litigation, who is with the children?”

Endnotes

¹ <https://www.nsba.org/Advocacy/IDEA>

² <https://csrcmich.org/a-budget-increase-for-special-education-not-really>; <https://www.edweek.org/ew/articles/2020/01/15/why-the-feds-still-fall-short-on.html>

³ <https://www.gao.gov/assets/710/702514.pdf>

⁴ <https://journals.sagepub.com/doi/full/10.1177/2158244015577669>

⁵ Mills, G.E. and K. Duff-Mallams. (1999). "A Mediation Strategy for Special Education Disputes." *Intervention in School and Clinic* 35, 2: 87-9

⁶ https://nces.ed.gov/programs/digest/d17/tables/dt17_211.20.asp

⁷ <https://aasa.org/policy-blogs.aspx?id=44802&blogid=84002>

⁸ Note: The layout algorithm method is from <https://www.jasondavies.com/wordcloud/about/>

⁹ AASA survey

¹⁰ <https://www.nsba.org/Services/Council-of-School-Attorneys>

¹¹ <https://districtadministration.com/reopen-schools-safety-recommenations-teachers-union-superintendents-coronavirus-covid/>

¹² <https://www.ed.gov/news/press-releases/urging-states-continue-educating-students-disabilities-secretary-devos-publishes-new-resource-accessibility-and-distance-learning-options>

¹³ *Ibid.*

About

The National School Boards Association (NSBA) is a federation of state associations and the U.S. territory of the Virgin Islands that represent locally elected school board officials serving approximately 50 million public school students regardless of their disability, ethnicity, socio-economic status or citizenship. Working with, through, and for our state association members, NSBA advocates for equity and excellence in public education through school board leadership. We believe that public education is a civil right necessary to the dignity and freedom of the American people and that each child deserves equitable access to an education that maximizes their individual potential. For more information, visit www.nsba.org/About.

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AASA, the School Superintendents Association, founded in 1865, is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA members are the chief education advocates for children. AASA members advance the goals of public education and champion children's causes in their districts and nationwide. As school system leaders, AASA members set the pace for academic achievement. They help shape policy, oversee its implementation and represent school districts to the public at large. Learn more at www.aasa.org

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AESA is a national organization for ESAs and proudly supports over 500 regional educational service agencies in 45 states. ESAs and their staff support school districts in their regions with services such as staffing, professional development, and various other resources. ESAs significantly contribute to educating our nation's students in the grades Pre-kindergarten through grade 12 and beyond. For more information visit www.aesa.us

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