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Executive Director

April 21, 2020

Via Electronic Mail at Tony.Dearman@BIE.EDU

Tony L. Dearman, Director
Bureau of Indian Education
Department of the Interior
1849 C Street, NW
MS-3609-MIB
Washington, DC 20240

Re: Guidance for Education Services During School Closure

Dear Mr. Dearman:

The Native American Disability Law Center (Law Center) is a nonprofit organization that protects the legal rights of Native Americans with disabilities. The Law Center represents members of Native communities across New Mexico, Arizona, Utah, and Colorado. A large portion of our advocacy ensures students with disabilities have access to appropriate education services. To that end, we represent the interests of students with disabilities enrolled in Bureau of Indian Education (BIE) schools throughout the Southwest.

We understand that all BIE schools have closed for the remainder of the 2019-20 School Year because of the urgent COVID-19 health crisis.

We are writing to urgently request that the BIE, as the State Educational Agency (SEA) for its schools, act quickly to ensure that Native American students, particularly those with disabilities, have access to education and essential services they were receiving in school. Additionally, the BIE must utilize the significant spending stream appropriated in the CARES Act to meet students' learning needs during this unprecedented time.

First, we ask the BIE proactively ensure students are not denied critical education services; any deprivation of service can result in non-compensable harm to Native American students with disabilities attending BIE schools. Specifically, we are asking the BIE, as the SEA, to immediately issue written directions to schools to provide uniform, consistent guidance concerning the actions BIE schools can and should take to meet the needs of students attending BIE schools across the country. To date, this guidance has not been provided.

The physical closure of schools creates additional barriers to traditional notions of education and delivery of special education services. However, the BIE's failure to provide guidance to its schools regarding the implementation of strategies to support students with disabilities is extremely concerning. We understand that certain BIE schools are informing parents that no educational services will be provided to students during the

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The Protection & Advocacy System for Native Americans with Disabilities.

Funding provided by the Administration on Intellectual & Developmental Disabilities, the Rehabilitation Services Administration, the Center for Mental Health Services, the Social Security Administration, the Arizona Developmental Disabilities Planning Council, the New Mexico Civil Legal Services Commission, the New Mexico Administrative Office of the Courts, the New Mexico Access to Justice Commission

school closure. This is concerning given the BIE's obligation to provide education to Native American students across the country¹.

Further, unlike the BIE, many SEAs across the country have issued guidance to local educational agencies (LEAs) concerning the development of continuous learning, remote learning or distance learning plans for students during school closures. Some, such as the New Mexico Department of Public Education (NMPED), required LEAs to submit these plans for approval by April 8, 2020 and began implementation within a week. Schools are finding ways to offer remote learning services, provide laptops and Internet to students who otherwise have no access, provide teletherapy, and work directly with families through virtual meetings or teleconferences to ensure students' needs are met. As the SEA for 183 schools across the country, it is vital that the BIE provide support and guidance such that BIE students are not denied educational opportunities offered to their peers. We specifically urge the BIE's guidance take into consideration the technological and Internet access needs of the students it serves. The BIE must require its schools to provide appropriate equipment, such as tablets or laptops, with Internet access to every family that needs one in order to access education services.

Unique Needs of Students with Disabilities

As you are aware, Congress has not waived any of the requirements of the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act. The law clearly holds that BIE schools must continue to provide special education and related services to students with disabilities and develop a plan for providing compensatory education should they be unable to fully implement Individualized Education Plans (IEPs) or 504 plans. For students with disabilities, school is often a source of nursing, physical and occupational therapy, social emotional learning, and mental health therapy. Without school, these students are unlikely to access alternative resources, including Indian Health Service (IHS), for these critical services. Parents and caregivers are not equipped to provide the specialized educational services these students require, potentially resulting in significant regression and decompensation. Students with disabilities are at high risk of disproportionate harm without therapies and supports schools provide, which can also have a far greater and longer lasting impact. It is critical the BIE take into the account the needs of its students with disabilities when developing written guidance for its schools and protect students with disabilities from this disproportionate harm.

Utilization of CARES Act funding

Second, the BIE, through the Secretary of the Interior, was allocated over \$153 million dollars under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was signed into law on March 27, 2020. Please publicize the BIE's plans to distribute this significant funding stream to BIE schools given they have been closed for nearly a month. As you know, Native American students perform at lower achievement levels than their non-Native peers². The achievement gap widens when you consider that many BIE students include children living in poverty, children with disabilities, English-language learner children, and children in foster care. It is not difficult to imagine that these children will fall further behind their peers as education services move from in-school to out-of-school models - and fall even further if the BIE provides no educational services.

¹ See 25 C.F.R. § 38.11 (The length of the regular school term shall be *at least 180 student instructional days*[.])(Emphasis added).

² BIE Study Group: Blueprint for Reform, BIE Progress Report 2015 at 3, <https://www.bie.edu/cs/groups/xbie/documents/document/idc1-030931.pdf> (2015); BIE, Synopsis of the Reprogramming, <https://www.bie.edu/BFRI/index.htm> (2017).

The pre-existing achievement gap is likely to be exacerbated due to inequities that these children all too often experience, such as lack of access to computers and Internet, in addition to the effects of COVID-19 hot spots on reservations like the Navajo Nation. Despite these challenges, the funding available to schools through the BIE is designed to support the needs of students, families, and schools to address these concerns. The options for funding are very broad, but we urge you to take steps to ensure this money is used to support the specific needs of Native American youth and their families.

Specifically, from the list of authorized expenditures enumerated in the CARES Act, Sec. 18003(d), the following allowable expenses can be used to meet these needs:

- (A) Any activity authorized by:
 - The ESEA of 1965
 - The Individuals with Disabilities Education Act (IDEA)
 - The Adult Education and Family Literacy Act
 - The Carl D. Perkins Career and Technical Education Act of 2006 (the Perkins Act), or
 - Subtitle B of title VII of the McKinney-Vento Homeless Assistance Act.

- (B) Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population.

- (C) Planning for and coordinating during long-term closures, including for how to provide meals to eligible students, how to provide technology for on-line learning to all students, how to provide guidance for carrying out requirements under the Individuals with Disabilities Education Act and how to ensure other educational services can continue to be provided consistent with all Federal, State, and local requirements.

- (D) Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the local educational agency that aids in regular and substantive educational interaction between students and their classroom instructors, including low-income students and students with disabilities, which may include assistive technology or adaptive equipment.

- (E) Providing mental health services and supports.

- (F) Planning and implementing activities related to summer learning and supplemental after-school programs, including providing classroom instruction or online learning during the summer months and addressing the needs of low-income students, students with disabilities, English learners, migrant students, students experiencing homelessness, and children in foster care.

In sum, the BIE must continue to deliver educational opportunities to all students, including those with disabilities, while its schools are closed. Schools need clear directives that they must continue to work individually with students to plan ways to safely offer special education and related services during the school closure so they do not find themselves further behind when schools re-open. While we appreciate that many challenges lie ahead as we work to understand and respond to the current public health emergency, we fully expect the BIE to act quickly to utilize the CARES Act funds to support the needs of all Native American students, including those with disabilities, attending BIE schools across the country.

We look forward to hearing from you on how the BIE plans to meet the needs of its students during this extraordinary time. The Law Center stands ready to assist in the BIE's efforts and can bring a range of local and national expertise, including emerging best practices from SEAs around the country, to support the BIE in this effort.

You may contact me at (505) 635-9288 or tyanan@natedisabilitylaw.org. Thank you for your prompt attention to this important matter for all Native American students attending your schools.

Sincerely,

Therese E. Yanan

The organizations listed below are also interested in the rights of Native American students attending BIE schools and seek to protect their civil right to education by supporting this request.

National Protection & Advocacy System

Arizona Center for Disability Law	Disability Rights New York
Alabama Disabilities Advocacy Program	Disability Rights North Carolina
Disability Law Center of Alaska	Disability Rights Pennsylvania
Disability Law Center - Massachusetts	Disability Rights Oregon
Disability Law Center - Utah	Disability Rights Rhode Island
disAbility Law Center of Virginia	Disability Rights Vermont
Disability Law Colorado	Disability Rights Wisconsin
Disability Rights Arkansas	Disability Rights Washington
Disability Rights California	Disability Rights of West Virginia
Disability Rights Connecticut	Indiana Disability Rights
Disability Rights Center of Kansas	Kentucky Protection & Advocacy
Disability Rights Idaho	Michigan Protection & Advocacy Service
Disability Rights Maine	Minnesota Disability Law Center/Mid-Minnesota Legal Aid
Disability Rights Mississippi	National Disability Rights Network
Disability Rights Montana	North Dakota Protection & Advocacy Project
Disability Rights Nebraska	Protection & Advocacy for People with Disabilities – South Carolina
Disability Rights Center of New Hampshire	Puerto Rico Protection & Advocacy System
Disability Rights New Jersey	Oklahoma Disability Law Center
Disability Rights New Mexico	Wyoming Protection & Advocacy System

Other Civil Rights Organizations

ACLU of Arizona	NAACP
ACLU of New Mexico	National Center for Youth Law
Children's Law Center	National Center for Learning Disabilities
Disability Rights Education & Defense Fund	National Women's Law Center
Equal Justice Society	Pegasus Legal Services for Children