

**NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION**

**SUPPLEMENT #2 - PROVISION OF SERVICES TO STUDENTS WITH DISABILITIES
DURING STATEWIDE SCHOOL CLOSURES DUE TO
NOVEL CORONAVIRUS (COVID-19) OUTBREAK IN NEW YORK STATE**

Questions and Answers June 20, 2020

The following is a continuation and supplement to the questions and answers contained in the March 27, 2020 guidance (#1-21) and April 27, 2020 guidance (#22-38) on the provision of services to students with disabilities during the COVID-19 outbreak in New York State.

Planning for the Provision of Services for the 2020-21 School Year

Following school closures due to COVID-19, Committees on Preschool Special Education and Committees on Special Education (hereinafter referred to as Committee) will need to consider newly identified needs when determining the appropriate special programs and services to be recommended for the 2020-21 school year. Committees may consider some or all of the following questions in their decision-making process (Adapted, from LRP Publications, "Serving a student after a COVID-19-related school closure: questions the individualized education program (IEP) team should ask," March 24, 2020):

- How long was the student's school closed?
- Was the student provided instruction or services via an alternative method (e.g. online math instruction, online speech therapy, or instruction provided telephonically) during the closure? To what extent?
- Were alternative methods of instruction (continuity of learning) and services provided to the student beneficial for the student? Was the student engaged and able to access the instruction and services?
- Is there clear documentation of the amount of instruction and services the student was provided during the closure (including dates, times, and duration)? If so, what amount of instruction and services did the student receive?
- Have there been changes in the student's educational progress and achievement, including progress toward meeting his/her IEP goals, and ability to participate in the general education curriculum? What are those changes?
- Are there indications that the student regressed during the closure? Has the student lost any specific skills?
- Is there a possibility that the student will require extended school year services due to regression?
- Did school closure due to the COVID-19 pandemic result in any new needs for the student (e.g. emotional, medical, academic) such that the student should be provided with additional special education or related services or be reevaluated?

Utilizing the following information derived from these questions, the 2020-21 school year recommendations for appropriate special education programs and services for each student with a disability must be informed by the following Committee considerations:

- Extended School Year (ESY) Services;
- Revisions to the IEP to ensure the continued provision of a free appropriate public education (FAPE) due to the student's changing needs; and
- Compensatory Services.

Extended School Year (ESY) Services

39. What are ESY services?

ESY services (i.e., 12 month service and/or program) are special education services and/or programs provided on a year-round basis, for students determined to be eligible in accordance with sections 200.6(k)(1) or 200.16(i)(3)(v) of Commissioner's Regulations whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression. Substantial regression means a student's inability to maintain developmental levels due to a loss of skill or knowledge over the summer months of such severity as to require an inordinate period of review at the beginning of the school year (e.g., eight weeks or more) in order to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year. A student's need for services during the months of July and August must be made by the Committee on an individual basis.

40. Have school closures due to COVID-19 changed the criteria for determining whether ESY services are required to be provided?

No, the eligibility for ESY has not changed from prior school years. However, some students who may not have been eligible for ESY services in past years may now meet the eligibility criteria due to the extended school closures.

41. What is the difference between compensatory services and ESY?

While both compensatory services and ESY must be determined by the Committee on an individualized basis for each student, ESY services and compensatory service recommendations are made based on different criteria.

Compensatory services are educational programs and services awarded or recommended to remedy the past denial of appropriate services that were not originally provided to enable the student to make appropriate progress in light of his or her circumstances, including any loss in skills that occurred as a result of a student not receiving education or services due to school closures during COVID-19

ESY is not a form of compensatory services. ESY is 12 month service or program for students determined to be eligible in accordance with sections 200.6(k)(1) or

200.16(i)(3)(v) of Commissioner's Regulations whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression.

42. Could ESY be provided to students who substantially regressed during school closure due to COVID-19, but did not previously have ESY on their IEP?

Yes, some students who may not have been eligible for ESY services in past years may now meet the eligibility criteria due to the extended school closures. However, ESY services are not a form of compensatory education. Therefore, the Committee's ESY recommendation is not based on the absence of the provision of program(s) or service(s) during school closure due to COVID-19 but rather that such absence caused the student to substantially regress making him or her eligible for ESY services pursuant to Commissioner's Regulation sections 200.6(k) or 200.16(i)(3)(v), even though the student was not previously considered for ESY.

Revising the IEP to Ensure the Continued Provision of FAPE

43. When should a Committee consider revising a student's IEP to ensure the continued provision of FAPE?

The student's Committee must review the student's IEP and determine whether any changes in the IEP are needed as a result of changes in a student's educational progress and achievement, including progress toward meeting his or her IEP goals, and ability to participate in the general education curriculum. The Committee should consider all relevant information available pertaining to the student including but not limited to progress monitoring, concerns of the parent, and other documentation maintained during school closure due to COVID-19 to assist the Committee in determining whether the student's IEP needs to be changed for the appropriate provision of special education programs and services.

Compensatory Services

44. What are compensatory services?

Compensatory services are provided to students with disabilities to remedy the school district's failure to provide a student with a disability with "appropriate services" during the time the student was entitled to FAPE and was denied appropriate services [United States Department of Education (USDE's) Office of Special Education Programs Letter to Lipsitt, April 2018]. Compensatory services do not have to be provided in exactly the same mode or manner as the student's denied IEP services but rather must be provided in a form of education and/or services that would address the services that were denied during the period of entitlement to FAPE. In its Questions and Answers on Providing Services To Children With Disabilities During the Coronavirus Disease 2019 Outbreak – March 2020, the USDE discussed providing compensatory services to make up for a lack of educational programs and services during school closures due to COVID-19.

- 45. Is a student automatically entitled to compensatory services because his/her special education programs and services provided through distance instruction provided virtually, online or telephonically did not mirror the offer of FAPE on his/her IEP?**

No. During the period of time schools are closed pursuant to NYS Governor Executive Order, schools may not be able to provide all education and related services in the same manner as they are typically provided. As such, the provision of FAPE may include, as appropriate, special education and related services through distance instruction provided virtually, online, or telephonically at a frequency and/or duration that may differ from the IEP (see Question #1 of the March 27, 2020 guidance). Additionally, school districts were provided guidance that it was not necessary to amend IEPs because an alternate mode of instruction is used to provide special education and related services (see Questions #3 and #4 of the March 27, 2020 guidance). Alternative options for instruction and related service delivery, even when provided in a different mode, frequency and/or duration of services from the IEP recommendation, would not necessarily result in a denial of FAPE.

- 46. What documentation should a Committee consider when determining whether a student requires compensatory services?**

Documentation to support a Committee's compensatory service recommendation must include the school district's provision of FAPE during school closure and the student's educational progress and achievement.

For the provision of FAPE during school closure, the Committee must consider documentation of the services that were provided to the greatest extent possible during school closure due to COVID-19. Question #27 of the Supplement #1 guidance reminded districts that documentation must be maintained on the instruction and services that were provided to each student so that these activities may be communicated to the Committee. While no standardized documentation form is required, each school district's documentation of services must at a minimum describe the continuity of learning activities made accessible to the student and the IEP services provided to the student during school closure along with any applicable related communication, agreement with or consent from the parent.

For the student's educational progress and achievement, Committees must continue utilizing progress monitoring, adapted to address virtual instruction where necessary, to examine the student's academic performance over time and evaluate the effectiveness of instruction during school closure due to COVID-19.

Documentation to determine the provision of FAPE and student progress during school closure will assist the Committee when determining whether and to what

extent compensatory services are needed to make up for a lack of educational programs and services during school closures due to COVID-19.

47. What compensatory services can a Committee consider for a student with a disability when schools reopen?

The compensatory services offered must be directly linked to the denial of educational progress and achievement, including lack of progress toward the student's IEP goals and ability to participate and progress in the general education curriculum, and must be reasonably calculated to enable the student to make appropriate progress in light of his or her circumstances, including any loss in skills that occurred as a result of a student not receiving education or services due to school closures during COVID-19. If appropriate, compensatory services could be provided in a number of ways, such as extending the school day, providing tutoring before and after school, or providing additional services during regular school hours.

48. What if a student with a disability has needs that are so complex that he/she was not able to receive special education programs and services through distance instruction provided through virtual, online or telephonic methods?

If special education programs and services needed to ensure FAPE cannot be reasonably provided through a virtual learning platform or other alternative means available to students and there has been an interruption in the student's educational programs and services, then the Committee must determine the type and extent of compensatory services that will be provided to the student once school reopens.

49. Can a student continue to receive compensatory services after his/her entitlement to FAPE ends (i.e., the student attained the age of 21 or earned a regular high school diploma)?

Yes. Because compensatory services is a remedy for the past denial of educational and related services that were not originally provided, they are available even after the right to FAPE has ended. Therefore, a student's attainment of age 21 or graduation with a regular high school diploma (i.e., local or Regents diploma) does not affect his/her right to compensatory education. The compensatory services, however, must be the type of educational and related services that are part of an elementary or secondary school education and not the provision of instruction or services at the postsecondary level. [USDE's Office of Special Education Programs, Letter to Riffel, August 22, 2000].

50. If the Committee determines that a student requires compensatory services, where are these documented?

Compensatory services may be documented as an amendment or modification to the IEP. The parent and school district may agree not to convene a Committee meeting for the purpose of making changes to a student's IEP after the annual review meeting for the school year has already occurred. Instead, they may decide to address changes such as the provision of compensatory services by developing a written document to amend or modify the student's current IEP, in accordance with Commissioner's Regulation section 200.4(g). If the latter occurs, and the parents and the school district agree to changes to the student's IEP to provide for compensatory services, the school district must ensure that the student's Committee is informed of those changes. Additionally, prior written notice of the changes to the IEP must be provided to the parent pursuant to Commissioner's Regulation section 200.5(a).

51. What if a Committee decides not to provide compensatory services to a parent and the parent disagrees with that decision?

Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the Individuals with Disabilities Education Act (IDEA). A parent may file a State complaint directly with the New York State Education Department in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h) or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).