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TO: School District Superintendents
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School District Business Officers
Charter School Leaders
Special Education Directors
Directors of Pupil Personnel Services
Chairpersons of Committees on Special Education
Chairpersons of Committees on Preschool Special Education
Administrators of Nonpublic Schools with Approved Special Education Programs
Organizations, Parents and Individuals Concerned with Special Education
Preschool Providers of Special Education Programs and Services
Superintendents, Special Act School Districts
Superintendents, State-Operated Schools
Superintendents, State-Supported Schools

FROM: Christopher Suriano

SUBJECT: Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic

The New York State Education Department (NYSED) recognizes the unique and unprecedented challenges school districts faced in ensuring students with disabilities continued to receive a free appropriate public education (FAPE) consistent with the changing health and safety conditions that have existed during the COVID-19 pandemic. Where, as a result of COVID-19, there has been a delay or disruption in the provision of special education programs and services, Committees on Preschool Special Education and Committees on Special Education are reminded of their responsibility to make an individualized determination as to whether and to what extent compensatory services may be needed for a student with a disability to make up for any skills that may have been lost when FAPE could not be provided. In follow-up to the guidance regarding compensatory services contained in NYSED's Office of Special Education (OSE) [June 20, 2020 Supplement #2](#), OSE has developed the attached policy brief, *Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic*, to assist school districts and parents in making this determination.

Additional resources are available on OSE's [Special Education Resources and Guidance related to Coronavirus \(COVID-19\) webpage](#). This webpage also includes the guidance on compensatory services provided by the U.S. Department of Education Office of Special Education Program in its March 2020 [Questions and Answers on Providing Services to Children with Disabilities During the COVID-19 Outbreak](#). School districts are strongly encouraged to use the guidance provided in the policy brief and the [June 20, 2020 Supplement #2](#) to assist them in meeting their responsibilities relating to compensatory services for students with disabilities as a result of COVID-19.

Questions regarding this memorandum may be directed to speced@nysed.gov and/or the Special Education Policy Unit at (518) 473-2878.

Attachment: *Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic*



The University of the State of New York
New York State Education Department
Office of Special Education

**June
2021**

**Compensatory Services for Students with Disabilities as a Result
of the COVID-19 Pandemic**

This document is one in a series of policy briefs prepared by the New York State Education Department (NYSED) on topics pertaining to the implementation of the Individuals with Disabilities Education Act (IDEA) in New York State and Part 200 of the Regulations of the Commissioner of Education relating to students with disabilities. It is intended to assist school districts and parents/guardians in making an individualized determination as to whether and to what extent compensatory services may be needed for a student with a disability as a result of the COVID-19 pandemic. The information in this document is based on applicable laws and regulations and the most current guidance released from the United States Department of Education (USDE) Office of Special Education Programs (OSEP). School districts are encouraged to review all the federal and State resources available on NYSED's [Special Education Resources and Guidance related to Coronavirus \(COVID-19\) webpage](#). The guidance provided in this document is not intended to and does not provide legal advice. School districts should also consult with their own legal counsel regarding student specific facts and circumstances.

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 a free appropriate public education (FAPE) and was denied appropriate services [OSEP [Letter to Lipsitt](#), April 2018].

Compensatory services do not have to be provided in exactly the same mode as the student's denied individualized education program (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.

How should a Committee on Preschool Special Education/Committee on Special Education (herein after referred to as "Committee") determine compensatory services?

The compensatory services offered must be directly linked to the denial of educational benefit, 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 COVID-19.

What compensatory services can a Committee consider for a student with a disability?

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.

Is a student automatically entitled to compensatory services because his/her special education programs and services provided through remote and/or hybrid instruction did not mirror the offer of FAPE on his/her IEP?

No. During the COVID-19 pandemic, schools may not have been able to provide all education and related services in the same mode as typically provided. As such, during this period the provision of FAPE could include, as appropriate, special education and related services provided through remote and/or hybrid instruction 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.

For students who did not receive full in-person instruction, must compensatory services be considered for those whose needs are so complex that they were not able to participate in or benefit from remote and/or hybrid instruction?

Yes. For students with needs so complex that they were not able to participate in or benefit from special education programs and services in learning modalities other than full in-person instruction, the Committee must determine the type and extent of compensatory services that may be necessary to address a loss of skills.

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 COVID-19 and the student's educational progress and achievement.

The Committee must consider documentation of the services that were and were not provided due to the COVID-19 pandemic. 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 learning modality/modalities made available to the student and the IEP services provided to the student during the COVID-19 pandemic 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 the learning modalities where necessary, to examine the student's academic performance over time and evaluate the effectiveness of instruction during the COVID-19 pandemic.

School districts should maintain documentation of all attempts to provide IEP programs and services that were available to students through learning modalities other than full in-person learning as well as all contact and communication with parents and students. Documentation of parental refusal to have their child participate in the learning modality/modalities offered should be considered in determining whether there was a denial of FAPE.

Documentation to determine the provision of FAPE and student progress during the COVID-19 pandemic will assist the Committee when determining whether and to what extent compensatory services are needed to make up for any delay or disruption in educational programs and services due to this health crisis.

What information should Committees consider in making an individual determination of whether and to what extent compensatory services may be needed?

Committees may consider some or all of the following questions in their decision-making process:

- How long was the school closed and/or not providing full in-person learning?
- Was the student provided instruction or services in a learning modality/modalities other than full in-person learning (e.g., remote synchronous and/or asynchronous instruction and/or related services? To what extent?
- What documentation is there to demonstrate that the student benefited from the learning modality/modalities described above? Was the student engaged and able to access the instruction and services?
- Is there documentation of the amount of instruction and services the student was provided during the learning modality/modalities described above (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 IEP goals, and ability to participate in the general education curriculum? What are those changes?

- Are there indications that the student regressed during the time the student was not receiving full in-person learning? What specific skills regressed?
- Is there a possibility that the student will require extended school year services due to regression?
- Did any new needs develop for the student (e.g., emotional, medical, behavioral, academic) such that the student should be provided with additional special education or related services?

(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).

This list is not exhaustive. Each student's circumstances will differ and the determination of compensatory services must be made on a student-specific individual basis.

How can districts pay for compensatory services?

Compensatory services provided to remedy a past denial of FAPE may be paid for with IDEA Part B funds, including supplemental IDEA Part B LEA allocations under the federal American Rescue Plan (ARP) Act. In addition, such services are an eligible use of LEA allocations of federal Elementary and Secondary School Emergency Relief (ESSER) and Governor's Emergency Education Relief (GEER) funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSA Act) and ARP Act.

Should parents be involved in the determination of compensatory services?

Yes. Committees should obtain and consider parental input in determining whether compensatory services may be needed, and, if determined necessary, how those services will be delivered.

If a Committee determines a student is entitled to compensatory services, where are these services 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. 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 Committee's proposal or refusal to provide compensatory services, including the type, frequency, and location of compensatory services to be provided to the student, must be provided to the parent pursuant to Commissioner's Regulation section 200.5(a).

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 are 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 services. 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].

What options do parents have if they disagree with a Committee's decision not to provide compensatory services or with the amount and/or type of services recommended?

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 IDEA. A parent may file a State complaint directly with NYSED 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).

Can parents decline a school district's offer of compensatory services?

Yes. A parent can refuse an offer of compensatory services. School districts should document compensatory services offered as well as the parent's refusal of the services. Prior written notice may be used to document an offer of compensatory services and the parent's refusal of this offer. The prior written notice must be provided in the parent's native language or other mode of communication unless it is clearly not feasible to do so.

What is the difference between compensatory services and Extended School Year (ESY) services?

While both compensatory services and ESY services must be determined by the Committee on an individualized basis for each student, the recommendations for compensatory services and ESY services 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 the COVID-19 pandemic.

ESY services are not a form of compensatory services. ESY services are a 12-month service and/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.

It is important to remember that determinations regarding ESY services are prospective and not intended to make up for past denials of FAPE. (See Question #4 of USDE's [Questions and Answers on IDEA Part B Provision of Services](#) - September 28, 2020.)

**Relevant Laws/
Regulations/ Federal
Policy**

OSEP [Questions and Answers on Providing Services To Children With Disabilities During The Coronavirus Disease 2019 Outbreak](#) (March 12, 2020)

OSEP [Letter to Lipsitt](#)

OSEP [Letter to Riffel](#)