
A Successful Launch of the 2020-2021 School Year

Recovery Efforts and the Provision of FAPE for Students with Disabilities during the Re-Opening of Schools from Covid-19

Overview

COVID-19 has presented districts, charter schools, and families with many questions and concerns regarding student learning and progress. The Delaware Department of Education (DDOE) has collaborated with national and local stakeholders to engage in difficult conversations regarding how to measure students' learning and progress, as well as how to plan for a safe and rigorous return to learning. This will be an ongoing discussion and planning effort on the part of all stakeholders to ensure that the educational community can best serve the children of Delaware.

The provision of education during the pandemic continues to be an evolving situation. This document is the DDOE's interpretation of applicable Individuals with Disabilities Education Act (IDEA) and State statutory and regulatory requirements in the context of Local Education Agency (LEA) recovery efforts, based on the most recent guidance from the United States Department of Education (USDOE). If further USDOE guidance is released, or as other relevant information becomes available, this guidance document may be revised. This document is simply guidance and should not be considered legally binding. **LEAs are encouraged to consult with their legal counsel on specific issues that arise because of this pandemic.**

On March 12, 2020, the USDOE issued a fact sheet to states providing informal guidance on the provision of free, appropriate public education (FAPE). This guidance stemmed from USDOE's interpretation of federal special education law, in light of the special circumstances imposed by the COVID-19 outbreak. Relevant to the issue of what education is due to students with disabilities during this public health crisis, the USDOE stated:

"If an LEA (local educational agency, typically a school district or charter) continues to provide educational opportunities to the general student population during a school closure (i.e. by providing virtual or remote learning), the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE (Free Appropriate Public Education). (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). State Educational Agencies (SEAs), LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's Individualized Education Program (IEP) developed under The Individuals with Disabilities Education Act (IDEA), or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)). If a child does not receive services during a closure, a child's IEP Team (or appropriate personnel under Section 504) must make an individualized determination whether and to

what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost.”

Please see: Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease Outbreak March 2020 -

https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/599/200312_faq_on_providing_services_to_children_with_disabilities.pdf

The COVID-19 outbreak has resulted in unique challenges never faced by our nation’s schools. The DDOE recognizes the challenges associated with serving students with disabilities during a time of heightened health and safety needs and continues to reaffirm that special education is driven by a child-specific approach. DDOE recognizes the significant efforts that each LEA is making to allow for continuity of learning and the provision of FAPE during this unprecedented time and that a variety of methods are being used to support students with disabilities in the delivery of specially designed instruction and related services.

Unfinished Learning

It is anticipated that all students, both general and special education, will return to school with some level of unfinished learning. Unfinished learning can be described as portions of education missed by individual students due to school closure. Ongoing disruptions mean students will struggle with content and skills they’ve been introduced to, but not yet had the chance to master at grade level.

(Achievement Network). A student with unfinished learning has not necessarily been denied a FAPE. However, it is vital for LEAs to act proactively to address unfinished learning in order to avoid a future denial of FAPE.

LEAs need to look at each student **individually** when making decisions about unfinished learning and determining next steps.

IEP Services and Supports

During the global pandemic, IEP teams across the country are beginning the 2020-2021 school year with an unprecedented task of re-identifying the individualized needs of each student with a disability. There needs to be an acknowledgement that assessing and determining individual needs will take time. Teachers can maximize instructional time by using a variety of assessments closely connected to their instructional materials with the goal of continuously refining and adjusting instruction and providing useful, just-in-time information for moving all students forward on their grade-level. In addition, some students may have new needs when they return to school.

When school is back in session, LEAs will need to convene IEP teams to collaborate with families and students to assess individual needs, progress, and/or loss of skills and ultimately determine if each IEP should be revised to reflect appropriate changes to services and supports. The sudden and unexpected shift to remote learning at the end of the 2019-2020 school year may have impacted some of the special education and related services provided to students with disabilities and, as a result, may require a revision to the IEP to ensure the student continues to access the general education curriculum and receives FAPE.

As part of the IEP process, IEP teams are required to make annual decisions regarding Extended School Year (ESY) services. It is important to note that the purpose of an ESY is to ensure that the student with a disability, who might regress otherwise, receives FAPE. IEP Teams will need to address the individual student present levels and may need to consider specific goals and services that could be appropriate for ESY.

Decision Making Considerations

LEAs should continue to engage in the following activities to determine student-specific needs regarding unfinished learning and facilitate collaboration to address those needs:

- ongoing progress monitoring of each student,
- ongoing communication with families, teachers and service providers and
- ongoing documentation of the student progress and services delivered.

It is the IEP team's responsibility to assess each student, engage in the IEP process under IDEA requirements and create or revise the student's IEP to ensure that the student's educational program is reasonably calculated to enable that student to make progress appropriate in light of their individual circumstances.¹ In this pursuit, the IEP team should consider the following questions:

- Do multiple data points show a pattern of regression as a result of school closures?
- Given time, did or will the student recoup? Does the student need additional services in order to recoup? If so, what services are needed?
- Do new present levels need to be established? Do new goals need to be drafted that will appropriately impact student learning?
- Do adjustments in frequency, duration, and intensity of specially designed instruction need to occur?
- Does the IEP Team need to consider Extended School Year (ESY) services?
- Was the student provided a FAPE during school closures?

Extended School Year Services

Extended School Year (ESY) services are special education and related services that are provided to students with disabilities beyond the normal school year; in accordance with the student's IEP and provided at no cost to parents.² If an LEA provided a student with FAPE and the student has still regressed, the LEA should make a determination of whether ESY is necessary. **Keep in mind that ESY services can be provided any time during the IEP year. ESY services do not have to be provided only during the summer.**

The purpose of ESY services is to prevent, or slow severe skill regression caused by an interruption of special education services during extended periods when school is not in session. ESY services may be provided only when it is determined that a child did/will regress in a critical skill area to such an extent that recoupment of the skill loss would require an unusually long period of time to recoup or make it unlikely or impossible to recoup the present level of educational performance. The critical question that each IEP team must ask is **"Will the learning that occurred during the regular school year be significantly jeopardized if ESY services are not provided?"** For such a student, restricting services to the normal school year would not provide the student with a FAPE. IEP teams must determine the need for ESY services by fully considering the educational needs of each student and the following factors to determine whether without ESY services the student would not receive a FAPE:

- Degree of Impairment

¹ Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335 (2017).

² 34 C.F.R. § 300.106 and 14 Del. Admin. C. § 923.6.0.

- Regression and recoupment
- Breakthrough opportunities
- Vocational factor
- Other rare and unusual extenuating circumstances.³

In considering the above factors, IEP teams should gather and review information from a variety of sources; and data collected regarding the student's performance after previous long weekends, vacations, and summer breaks, if available. Within the categories marked by a severe disability, it is not appropriate to assume that a significant regression/recoupment factor exists. Some children with severe disabilities may consistently demonstrate a limited array of skills, but not demonstrate a significant regression/recoupment factor in any of the skills. Therefore, these children would not be appropriate candidates for ESY services.

An LEA may not limit ESY services to particular categories of disability, or unilaterally limit the type, amount, or duration of those services. A student's involvement in ESY services one year does not automatically guarantee services in following years. Similarly, the fact that no ESY services were provided in a prior year does not mean ESY services are not needed in the current year. These requirements apply to all children with a disability between the ages of three through the age in which the child is no longer eligible for special education services. When it is determined that a child is in need of ESY services, it will be provided at no cost to the parents and must be provided under the auspices of an IEP.

Recovery Services/Compensatory Education

Recovery Services/Compensatory Education are educational services offered to students as a result of missed or disrupted services during the COVID-19 school building closures. Recovery Services/Compensatory Education will vary tremendously based on the unique circumstances of each LEA, school and student. **But, at minimum, LEAs should gather new baseline data and use tiered supports in accordance with 14 Del. Admin. Code § 925.12.0.**⁴ By way of example, Recovery Services/Compensatory Education would be used as follows in the scenarios below:⁵

- A student with a disability returns to school with new needs as result of the COVID-19 pandemic. In this scenario, the IEP team would identify the student's new need; assess for present level of performance; develop a new goal for the student; and record any Recovery Services/Compensatory Education on the IEP. LEAs should ensure that the student's educational program is reasonably calculated to enable that student to make progress appropriate in light of their individual circumstances.⁶
- A student with a disability was provided FAPE during school closures. However, after the assessment process, it was determined that he has shown some regression of a particular skill. In this scenario, the IEP team should revise the IEP to include Recovery Services/Compensatory Education supports reasonably calculated to recoup the student's skill regression. In addition, the IEP team should consider if Extended Year Services are appropriate.

³ 14 Del. Admin. C. § 923.6.5.

⁴ The DDOE proposed new regulation 14 DE Admin. Code § 508 to take the place of 14 DE Admin. Code § 925.12.0, but the regulation has not yet been approved.

⁵ These are not the only scenarios that will present themselves to LEAs and schools.

⁶ Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335 (2017).

- A student with a disability was not provided FAPE. This scenario is most likely to occur when a student's IEP prior to the COVID-19 school closures required hands-on person services such as physical therapy. LEAs should focus on authentic engagement of families and students in order to achieve mutually agreeable decisions on Recovery Services/Compensatory Education that determine and correct educational deficits that resulted from the student's loss of FAPE during COVID-19.

Please note: Recovery Services/Compensatory Education is **NOT** the same as traditional compensatory education. Traditional compensatory educational services are not expressly defined in the IDEA; however, courts have long awarded traditional compensatory educational services as an appropriate equitable remedy for the denial of FAPE. The fact that a student has missed or disrupted services due to COVID-19 school building closures does not necessarily mean that the student has been denied FAPE.

Conclusion

DDOE encourages all LEAs to act proactively, collaboratively and creatively to identify and address unfinished learning and, if necessary, denials of or inability to provide FAPE for all students with disabilities. The DDOE welcomes the opportunity to assist you in this unprecedented time.

Questions and Answers

The DDOE offers the following questions and answers to assist LEAs in fulfilling their obligation to provide a FAPE to students with disabilities. However, due to the nature of a pandemic and the unprecedented circumstances of this interruption to the typical operations of brick and mortar schools, this guidance cannot provide an answer to every circumstance that may arise once students return to the traditional school environment. This guidance is not legally binding and does not substitute for legal advice and LEAs are always encouraged to consult with their legal counsel when deciding how to meet the needs of each child

Q1. Must an IEP Team meeting be held once school resumes if a student's needs have changed or new needs are identified, as the result of the school closure?

Yes. Prior to scheduling an IEP meeting, the IEP team must assess the student and gather data to determine academic, social/emotional, and/or behavioral needs. If a student's needs have changed to the degree that the student's ongoing services or supports are no longer sufficient to provide FAPE, the student's IEP team should meet to determine if the current IEP requires revision to reflect the student's current needs. For example, a student, who did not have behaviors that impeded learning when learning was happening within a school building, has now developed behaviors that impede his/her progress or a child has become markedly more anxious or depressed or has lost core academic skills previously learned. As a reminder, this is a student-centered process, driven by data with the goal of continued learning for the student. All services should begin as soon as possible to prevent the student from falling behind and ensure continued progress on the student's IEP goals.

Q2. If a LEA provided some services during the school closure, or only enrichment opportunities, must it assess the needs of individual students for Recovery Services/Compensatory Education?

Yes. During the period of school closure related to COVID-19, remote learning has been provided to all students according to LEA Remote Learning Plans. Per state and federal guidance, LEAs are required to provide equitable access to general education opportunities and continue to provide FAPE to students with disabilities to the maximum extent possible. It is acknowledged, that despite best intentions, efforts, and creative solutions, students will have unfinished learning, regression and a possibly a loss of FAPE. LEAs will need to make **individual** determinations, as to whether Recovery Services/ Compensatory Education are necessary to address those issues.

Q3. Does an LEA have to provide the same amount (minute for minute) of service time missed from the IEP as Recovery Services/Compensatory Education?

No. Given the unique circumstances surrounding the COVID-19 pandemic, LEAs should determine Recovery Services/Compensatory Education by looking at the totality of the circumstances for individual students. The type and quantity of Recovery Services/Compensatory Education should address unfinished learning as a result of school closure. The purpose of Recovery Services/Compensatory Education should be to allow students to continue to make progress in the general education curriculum, or to progress at an appropriate pace in light of the child's circumstances, once students may safely return to the school campus.

In considering the totality of the circumstances, LEAs schools should review a variety of factors, including but not limited to, services provided during the period of school closure, ability of the student to access any services provided during the period of school closure, regression in skills, progress made on IEP goals, and importantly, parental input.

However, an LEA may decide that providing minute for minute Recovery Services/Compensatory Education is most appropriate for an individual student given the student's needs.

Q4. Must all students with disabilities be provided with Recovery Services/Compensatory Education?

No. LEAs must ensure that **individualized** determinations are made related to the extent to which a student may require Recovery Services/Compensatory Education.

In the present circumstances of COVID-19, the purpose of Recovery Services/Compensatory Education is to provide additional educational support to students to address any unfinished learning as a result of school closures and ensure a successful start to the 2020-2021 school year. If a student does not have unfinished learning, or does, but will recoup the learning without additional services, the student does not need to be provided with Recovery Services/Compensatory Education.

Q5. How should a LEA determine whether a student with a disability should receive Recovery Services/Compensatory Education?

The decision about whether the student is owed Recovery Services/Compensatory Education is driven by information and data collected from a variety of sources. This information will guide the IEP decision-making process. Important information for the IEP Team to collect and consider includes:

- Data on the student’s progress prior to and during the school closure to assess academic and/or behavioral progress in the general education curriculum and on the student’s IEP goal(s). **Data may take the form of grades, progress reports, classwork, informal/formal assessment tools, teacher/service provider observation(s), parent feedback, comparison to the progress of all students, and interdisciplinary consults.**
- Data on the student’s ability to recoup skills and make progress on IEP goals upon the return to school. This data should include multiple data points in order to make appropriate decisions.
- Documentation of accommodations and/or services provided (e.g., amount of instruction and services including dates, times, and duration), as well as accommodations and/or services the LEA was unable to provide during the extended school closure and re-opening of school.
- Length of school closure (e.g., time without any instruction, time with virtual and/or remote learning, etc.), including information related to the general education curriculum provided to all students and the student’s ability to access virtual and/or remote learning opportunities.

The LEA must consider what Recovery Services/Compensatory Education can be provided to the student to help address new concerns and/or recoup the lack of progress due to school closure.

Q6. What obligation does the LEA have to a student with a disability who was enrolled at the time of the school closure but graduated or “aged out” before students return to campus for the 2020/2021 school year?

Once a student with a disability graduates from high school or “ages out,” LEAs are no longer obligated to provide that student with FAPE. However, it would be the responsibility of the LEA in which the student was enrolled prior to graduating or “aging out” to make a determination as to whether or not Recovery Services/Compensatory Education needs to be provided to the student to address unfinished learning during school closures and to deliver those services as appropriate. LEAs have flexibility and can be creative in fashioning Recovery Services/Compensatory Education. The unique needs of the student should be taken into consideration when making these decisions. However, please consult with your legal counsel for advice related to specific factual circumstances.

Q7. If a parent refused services that were provided during the period of school closure, must the LEA make a determination as to the need for Recovery Services/Compensatory Education or make an offer of Recovery Services/Compensatory Education?

It is strongly recommended that LEAs document attempts to provide services that were accessible to the students, through alternative or virtual formats, and to record contact and communications with parents and students. A parent's refusal of services during school closures, will not excuse the LEA from assessing the student's need for Recovery Services/Compensatory Education upon re-opening.

Q8. What happens if a parent disagrees with an offer Recovery Services/Compensatory Education?

If an agreement cannot be reached with the parent regarding Recovery Services/Compensatory Education, the LEA must document the decision, and the parent must be provided with PWN of the decision so that the parent has the opportunity to exercise the procedural safeguards to resolve any dispute.