

# Assessing COVID-19 Impact for Eligible Students with Disabilities as a Requirement of FAPE

Rev. Sept. 9, 2020

This document clarifies prior AOE guidance issued on July 28, 2020, entitled “[Determining COVID-19 Recovery/Compensatory Education Services](#)”. The July 28 guidance was interpreted to create a new entitlement for eligible students with disabilities under IDEA, which was not the intention of the Agency of Education.

## Purpose

The Agency of Education (AOE) offers the following guidance to clarify differences in supports for students with disabilities (SWDs) due to extended periods of remote learning resulting from Vermont’s response to COVID-19. This document is an update to guidance originally issued on July 28; it has been revised for clarity, and to incorporate new information developed in response to questions from Vermont educators.

By law and by design, special education addresses the unique needs of a child with a disability to ensure access to the general curriculum, so the child can meet the educational standards that apply to all children. While a majority of students likely incurred a loss of skill or experienced regression during school closure and the 2019-2020 school year Continuity of Learning period, this guidance document focuses on the needs of students who qualify for supports as expressed within an Individualized Education Program (IEP).

Topics covered in this document include:

- What are the Free Appropriate Public Education (FAPE) obligations of school systems in response to COVID-19?
- Assessing the impact of COVID-19 as a part of providing FAPE.
- Time frames for the assessment of COVID-19 impact on students’ needs.
- Documentation recommendations for changes in IEPs resulting from a COVID-19 needs assessment.

## Background

As Local Education Agencies (LEAs) reopen, many stakeholders are considering what supports may be necessary to address regression, loss of skills or students’ lack of progress in their distance learning plans (DLPs). This loss may have been due to services and supports that could not be provided during school closure, or were provided, but were not as effective as they had been when delivered on school sites. LEAs may also be considering or providing Extended School Year (ESY) services and supports, and may have received requests for compensatory education from parents.

This document will address considerations for revisiting the provision of FAPE for a student, given the educational landscape of COVID-19, and contrast that with compensatory education services.

## **What are Schools' FAPE Obligations to Students in a COVID-19 context?**

Given the impact of COVID-19, schools will need to revisit their existing FAPE obligation to *students who are eligible for special education*. This re-visitation may be necessary as a result of:

- Gaps in service delivery;
- A decrease in core instruction;
- A decrease in the provision of effective services or supports;
- Lack of access to effective remote learning, including specially designed instruction reflecting Individualized Education Program (IEP) requirements.

IEPs should be reexamined, and potentially revised, to address lack of general education or to address the ineffective provision of special education during the 2019-2020 school year Continuity of Learning period. IEP revisions must be based on a student-specific determination that is made by that student's IEP team, based on reliable data—examples of possible data sources are provided below.

Due to the nature of a pandemic and the unprecedented circumstances of this interruption to the typical operations of brick and mortar schools, the following guidance cannot provide an answer to every circumstance that may arise once students return to public school campuses. This guidance also does not substitute for legal advice, and LEAs are always encouraged to consult with their legal counsel when deciding how to proceed in a specific factual scenario.

## **Revisiting IEPs in a COVID-19 Context as a Part of an Existing FAPE Entitlement**

Under the Individuals with Disabilities Education Act (IDEA), the LEA is responsible for providing a student with a FAPE. During the 2020-2021 school year the FAPE obligation includes:

- a. Reviewing the appropriateness of the IEP in effect when a change in service delivery model occurs or when student progress monitoring indicates a lack of progress; and
- b. The continuation of existing responsibilities to address FAPE.

Educators across the country have struggled to deal with the unprecedented impact that COVID-19 has had both on school operations and its resultant impact on rates of learning of all students, as well as the challenge this poses on programming decisions going forward. While loss of skills may have occurred through no fault of the LEA, the obligation to provide a student with a FAPE remains, and the student may need remediation, an increase in services or services of an entirely different nature. The entitlement to FAPE, however, already contemplates – and remains - a review and revision of an IEP to determine need based on the child's current

educational circumstances. Those circumstances are also within the context and experience of COVID-19. During the 2020-2021 school year, the FAPE obligation will include safety planning and a review of the appropriateness of the IEP in effect when a change in service delivery model occurs or when progress monitoring indicates a lack of progress; and addressing the need for lost skills to ensure FAPE (SBE VT 2363; 34 CFR §300.324).

While the AOE is attempting to assist teams in their approach to this work by employing such terms as “regression” and “recoupment”, it must be emphasized that revising an IEP for lack of progress towards annual goals or progress in general education is not akin to announcing a new LEA obligation, or something which IEP teams don’t do in the normal course of a school year. This is already required by SBE Rule 2363.6 (Development, Review and Revision of IEP), which states:

- (c) Each LEA shall ensure that the IEP team:
  - (1) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
  - (2) Revises the IEP as appropriate to address:
    - (i) A lack of progress toward the annual goals;
    - (ii) A lack of expected progress in the general curriculum, if appropriate;
    - (iii) The results of any re-evaluation;
    - (iv) Information about the child provided to, or by, the parents;
    - (v) The child’s anticipated needs; or
    - (vi) Other matters.

It is therefore expected that the IEP team will consider both (2)(i) and (2)(ii) when revising an IEP. In this way teams should be having a discussion about levels of service, accommodations and supports which would naturally flow from the impact of COVID on all students.

In short, this reexamination of IEPs is not a new LEA obligation, but rather a necessary re-application of previously existing obligations, in a COVID-19 context.

## **Compensatory Services and Denial of FAPE**

“Compensatory services” or “compensatory education” is a remedy created by judges and hearing officers as one form of legal remedy when there has been a denial of FAPE under the IDEA. The denial of FAPE can come in many forms, but compensatory services are commonly understood as an offer to “make up for” certain services that were not provided as outlined in the student’s IEP. Determining whether there has been a denial of FAPE requires an analysis of the particular facts related to a student and is based on credible and reliable data. Put simply, a student is denied FAPE when the LEA does not implement the student’s IEP, which is created

and designed to ensure FAPE based on the particular student's needs to access general education.

**The transition to remote learning as a result of COVID-19 does not automatically equate to a denial of FAPE**, as the educational environment and delivery of education have changed for all students.

### **When Compensatory Education May Be Appropriate**

If the LEA's offer of FAPE was not appropriate for the student, the IEP team should consider compensatory services for the student.

If the LEA's offer of FAPE was effective and accessible by the student, but the student was not able to make progress on IEP goals or demonstrates regression or loss of skills, the IEP team should consider reviewing and revising the IEP as appropriate.

IEP review and revisions are necessary if the student did not receive sufficient core instruction or sufficient quantity/quality of special education services, or was unable to access IEP services during remote learning due to technological/logistical reasons and/or the nature of the disability and the student's unique circumstances. An example of this would be a student who requires full-time para or BI support to access learning materials, but who could not receive that support due to prohibitions on in-person instruction.

Depending on the IEP team's determination, supplemental services may be provided through school-wide systems designed to address the impact of COVID-19 on the delivery of general education for all students during the Continuity of Learning period.

### **Timeframes for Assessing Student Need as a Result of COVID-19 Impact**

In alignment with AOE guidance from Sept. 2, 2020, titled "[A Strong and Healthy Start-- Reopening and Assessment](#)", the primary intervention for students, at this time, is reopening. Schools will have an extended window to make determinations about student needs, given the limited student performance data that they currently have available.

It is generally anticipated that Vermont LEAs may need up to 12 weeks – or a complete grading period - to collect the necessary, reliable data to make determinations around regression of skills, including engaging in related IEP Team discussions. This timeframe may well need to be expanded given ongoing developments related to the pandemic.

It is generally hoped that the LEA could seek to address COVID-19 impacts within the next 12 months, but this timeframe may well need to be altered given ongoing, unfolding circumstances related to the pandemic (such as ongoing limitations in service provision due to safety measures).

A variety of factors may affect the timing of IEP reviews and revisions. Teams must first consider whether they have sufficient information to assess the impact of COVID-19 interruptions and changes and resulting educational impacts. With the ongoing impact of the

pandemic on school operations, it may require some time before valid and reliable data is available for educators to consider when determining IEP content and programming priorities. Each LEA should exercise its discretion in ensuring that there is both appropriate data to make thoughtful decisions, and no unreasonable delay in serving students.

If an IEP team anticipates focusing on COVID-19 impacts beyond the next twelve months, this decision and the basis for the decision should be included as part of the documentation of the team's related discussions. As always, an individualized decision must be made for each student, with respect to the period of time over which the services will be provided.

## **Documentation of an IEP Team's Consideration of COVID-19's Impact on Student Progress and Objectives**

As with all team decisions, LEAs should use the same documentation processes they have traditionally employed to capture determinations related to student progress and objectives (including Form 7, where consensus is not achievable). However, it will be especially important to document that the parent or caregiver, and those responsible for implementing the relevant and related parts of the IEP, are meaningfully informed of the basis for these determinations.

## **Determining the Need for IEP Revisions**

IEP revisions are dependent on assessing a student's progress, and on assessing the efficacy of the services that were provided during the school facility closure, and during the SY 19-20 Continuity of Learning period.

As a general rule, teams should collect data, convene, discuss, decide and document, regardless of whether or not they adopt the approach below.

### **Step 1: Collecting Data (4th Quarter/Summer/ESY/Fall)**

IEP teams should collect data from a variety of data sources, including but not limited to:

- The amount of instruction and special education services provided during the Continuity of Learning phase;
- Information and observations from parents (family members) about the student's ability to access, and engagement in, remote learning opportunities;
- The students' level of academic and functional performance, including levels of performance on all IEP goals prior to school closure as compared to the student's current level;
- The extent to which the student continued to make progress toward meeting IEP goals during the Continuity of Learning phase;
- The student's progress in the general education curriculum in comparison to age/grade peers;
- Teacher observations during the Continuity of Learning phase;

- The student’s prior need for, and receipt of, ESY services, and information about the efficacy of any ESY services that were provided;
- Any additional or new social-emotional health issues that arose during school closure and re-entry.

### **Preparing Data**

- Synthesize or summarize student performance data into a presentable format to ensure universal understanding.

### **Schedule Meeting with Prior Written Notice**

- The prior written notice should reflect the purpose of the meeting: to analyze individual student data and determine the need for IEP revisions or compensatory education, as appropriate.

### **Data Review Meeting**

- As reflected in the data sources above, ensure parental input on the student’s ability to access, and engagement in, remote learning opportunities.
- Share student performance data and identify deficit areas.

Using the data, ask these additional questions:

- What was the impact of the school closure on the student?
- What does the student need in order to make progress in our current educational environment?

## **Step 2: Determine if the Deficit is a Result of Loss or Denial of FAPE**

For each deficit identified consider if the following are true:

2. Does the student have an amended IEP for distance learning, or a Distance Learning Plan (DLP)?
3. Is that amended IEP or DLP reasonably calculated to ensure a student’s educational benefit through special education and related services and to allow access to the district’s established general education learning environment through the Continuity of Learning period?
4. Was the student able to effectively access those special education and related services?
5. Was the identified deficit a result of the district’s established general education learning environment through the continuity of learning period insufficiently addressing the student’s individual needs?

If the answer to all of the above questions is yes, the deficit is not a result of loss or denial of FAPE, [follow Step 2A](#).

If the answer to any of the above questions is no, the deficit is a result of loss or denial of FAPE, [follow Step 2B](#).

Please note that a district's failure to provide in-person services does not necessarily constitute a denial of FAPE.

### **Step 2A: If the Deficit is Not a Result of Loss or Denial of FAPE, Revise the IEP**

Examine the effect of COVID-19 and the special education and related services provided during spring 2020 school facility closures and the Continuity of Learning period on the student's overall progress and engagement, including progress toward their IEP goals.

Documentation of the degree to which services were offered and accessed during the closure will assist the IEP team in determining if IEP revisions are needed.

Discuss with the team: What is needed to best correct this deficit?

### **Supplemental Services Deduction Planning**

The team can also consider deductions on what services may be appropriate based on the student's reasonable recovery of progress. Deductions can also be made in the context of exceptional/unreasonable conduct. Typically, this would look like parents rejecting services offered, or a student placing themselves at risk while an attempt is being made to provide services. In this case teams should make allowances for contextual factors surrounding social distancing and remote working challenges such as accessibility and connectivity issues, competing needs of parents and families for phone, computer and internet usage, as well as scheduling conflicts in the event that parents were required to support student instruction.

### **Options for Supplemental Services**

Supplemental services could be provided outside of the district's school day or be reflected in the student's IEP.

These services could include, but are not limited to:

- Behavior skills/training for families
- Coaching from a Speech and Language Pathologist (SLP) around the use of a Picture Exchange Communication System (PECS) or other augmentative communication device
- Online or in-person tutoring
- Facilitated social skills opportunities
- Services provided by a contracted specialist in the home or community settings
- Districts may utilize federal IDEA funds, state special education funds, state basic education funds, district-allocated Elementary and Secondary School Emergency Relief (ESSER) funds, and/or a combination to support the provision of supplemental services.

Proceed to [Step 3: Confirm](#).

## **Step 2B: If the Deficit is a Result of Loss or Denial of FAPE: Provide Compensatory Education**

Discuss with the team:

- What are the specific compensatory measures (education or services) needed to best correct this deficit?
- What would restore educational benefit and ensure student progress toward meeting IEP goals?

### ***Supplemental Services Deduction Planning***

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### ***Options to Restore Educational Benefit***

Compensatory educational services can be provided:

- Compensatory educational services may be provided during the regular school day, over school breaks, in intensive, targeted, individualized programs or by outside service providers.
- If compensatory educational services are to be provided during the school day, the student's least restrictive environment cannot be altered due to the provision of the compensatory educational services.
- Because the provision of compensatory educational services is an equitable remedy, LEAs are encouraged to be creative in designing a plan to deliver compensatory educational services that meet the needs of individual student in remedying the failure or inability of the LEA to provide FAPE.

Proceed to [Step 3: Confirm](#).

## **Step 3: Confirm**

Based on the decisions above, provide either compensatory or supplemental services to support the student in making progress toward IEP goals. These services should be reflected in an amended IEP document.

Through this process a parent retains their right to pursue mediation, due process or an administrative complaint.