

MEMORANDUM

TO: Superintendents, Special Education Directors
FROM: Agency of Education
SUBJECT: Initial Considerations for Compensatory Education and Extended School Year (ESY) Services
DATE: May 8, 2020

Background

The Agency of Education's Special Education Team has been asked to address the issue of initial considerations for compensatory education services and extended school year (ESY) services during Vermont's Continuity of Learning phase. This initial guidance is intended to provide some general considerations that should assist special education directors in planning for and communicating with families about these services.

Differences Between Compensatory Education Services and Extended School Year

ESY and compensatory services are legal concepts which serve different purposes; these legal concepts are not synonymous or interchangeable.

"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 Free Appropriate Public Education (FAPE). Compensatory services are commonly understood as an offer to "make up for" certain services which were not provided as outlined in the student's Individualized Education Program (IEP).

ESY services, on the other hand, are only required if the student's IEP Team determines that the progress a student has achieved would be severely jeopardized by the failure to provide special education and related services *beyond the normal school year*.

ESY and compensatory services are determined by the student's IEP team on a case-by-case basis. It is anticipated IEP Teams will discuss the effect of the extended school closure on the student's progress toward their IEP goals and the impact of the transition to remote learning. However, any IEP Team analysis of these impacts on the student must be based on what constitutes FAPE during the Continuity of Learning phase. *All* students in Vermont have transitioned to remote learning, and the specifics of that learning vary from district to district.

Compensatory services and ESY determinations will require comprehensive factual analysis and

Contact Information:

If you have questions about this document or would like additional information, please contact:
Jacqueline Kelleher, State Director of Special Education, at Jacqui.kelleher@vermont.gov.

discussion by the IEP team. They should be supported by credible and reliable data for each student, including all data from the period of remote learning. This data will not be fully available until the period of remote learning has ended, and normal school operations have resumed, bearing in mind that “normal school operations” may continue to be affected by COVID-19 in the fall of 2020. **It is AOE’s recommendation that IEP teams should only make decisions about whether to provide compensatory services or new ESY services that were not already included in an IEP after normal school operations resume.**

Compensatory Education Services

Compensatory services occur when a student with a disability has not been provided FAPE. 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.

COVID-19 and the transition to remote learning does not automatically equate to a denial of FAPE as the educational environment and delivery of education has changed for all students. FAPE begins with what the district is providing to all students and then the IEP is revised to provide the student with the necessary supports and services to access the remote learning provided by the district. Special education and related services are fundamentally different when school was in session from special education and related services needed to support access to remote learning. There may be some cases where the student, due to the nature and presentation of their disability, is not able to access the remote learning in the manner offered by the district because the student required a higher level of support than could be provided to participate virtually or complete paper work packets (i.e., student with intensive needs requiring in-person behavioral supports which were simply not available because of the prohibition on in-person instruction.) In addition, where due to the COVID-19 outbreak and resulting closures of schools, there has been an interruption in providing IEP services and the IEP was *not* amended or revised to support remote learning, IEP teams must make an individualized determination whether and to what extent compensatory services may be needed *when schools resume normal operations*.

Based on the Secretary’s determination that normal school operations will not resume this school year, districts should wait until the fall to make these determinations. At that time, the deficits the student presents must be linked to either the failure to provide FAPE or the failure to provide services as required by the IEP, including any amendments made in the transition to remote learning. Deficits for purposes of compensatory education should not be determined solely from the lack of appropriate instruction during school closure, because all students were likely subjected to a degree of lack of appropriate instruction, and will likely show similar loss of skills or deficits.

The information that IEP teams will rely upon will likely not be known until after the transition back to a normal educational environment, at which time the IEP team can collect appropriate data to support decision-making, with all team members present. Compensatory education should not be determined until there is appropriate and credible progress data – quantitative and qualitative -

and clear documentation of deficits resulting from a denial of FAPE during the Continuity of Learning phase.

The IEP team will meet and determine whether or not additional services are necessary to “compensate” the student for the denial of FAPE or loss of particular services included in the IEP, which were necessary to provide the student with access to their general education.

The form, amount and extent of compensatory services are determined on a case-by-case basis by the IEP team and individualized for the student and are not reduced to a minute-for-minute formula.

Extended School Year

Extended school year services are defined in both federal and state special education regulations as “special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child’s IEP and at no cost to the parents of the child” (34 C.F.R. § 300.106(b)). ESY must be provided only if an IEP team determines, on an individual basis when developing, revising, or reviewing the IEP, that the services are necessary for the provision of FAPE to the child with a disability (34 C.F.R. § 300.106(a)(2)).

Unlike compensatory services, the need for ESY is not triggered by a failure to provide FAPE. Rather, the purpose of ESY is to provide special education and related services beyond the duration of a school year or school day to a child with a disability who would be likely to significantly regress when school is not in session.

In-person instruction will not resume this school year, but some, limited in-person services may be possible during the summer, prior to the start of the 2020-2021 school year. If AOE determines, based on public health data, that it is safe to provide limited in-person services during the summer, you will receive additional guidance regarding the in-person delivery of ESY services. In general, be aware that if a student was previously determined to need ESY services prior to school closure on March 18, 2020, then the student would continue to need ESY and eligibility should continue without the need to make a new determination of eligibility.

ESY services must be provided in accordance with each child’s IEP that requires ESY services and must be based on data of regression and recoupment over previous school breaks. The need for ESY services is a student specific determination and, as such, each child’s IEP Team will need to determine whether there has been “significant regression and recoupment did not occur within a reasonable amount of time.” The data on recoupment will likely not be determined until the school transitions away from remote learning and resumes “normal” school operations. Again, likely all students will experience regression and loss of skills. However, what constitutes *significant* regression and what is considered a *reasonable time* for recoupment requires credible and reliable data considered by the student’s IEP team.

Additional Considerations

- The AOE does not anticipate that SU/SDs will find a large increased need for ESY eligibility because *all* students are impacted by the school closure and transition to remote learning.
- If a district determines that it will offer supplemental instruction to all general education students, an eligible child with a disability does not have to be eligible for ESY to receive supplemental instruction. Special education services supplement and are embedded in general education, including any supplemental education provided as a result of extended school closures.
- It may not be an appropriate consideration to extend remote learning for all students with disabilities during the summer months as part of ESY, as it would be an extension of supplemental instruction and not in alignment with ESY requirements.
- Keep in mind that recoupment cannot be accurately measured during remote learning, and regression analysis based on data obtained since school closure will likely lead to unreliable and invalid decisions. Further, likely *all* students – special education and general education - have some degree of regression. When there are no services for all students, as in the case of school closure, we look at regression and recoupment differently. Often IEP Teams do not have enough information to make these determinations for students who were not considered eligible prior to school closure. However, as stated above, if districts previously determined students were eligible for ESY before school closure, then these students should continue their eligibility for ESY.
- Additional guidance will be forthcoming regarding if the CARES Act will support supplementary education for all students. Keep in mind that supplemental instruction that a district may choose to provide to all students, as opposed to compensatory or ESY services, would not be funded with special education dollars.