

LAUNCH NEBRASKA



Nebraska Department of Education • Effective June 8, 2020

Learning Guidance for Students with Disabilities

for Summer Programming and Beyond



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Unfinished Learning Due to COVID-19 Specific to Students with Disabilities

This is a difficult and complicated time. With school closures across the country, many children and families are experiencing particularly challenging circumstances. Schools and districts continue to respond to the rapid and ever-changing needs of the communities they serve. During the COVID-19 pandemic schools have emerged once again as central pillars for their communities. The monumental challenge of reopening school buildings requires an unprecedented level of planning, preparation, resources, and coordination.

On March 12, 2020, the U.S. Department of Education (USDOE) issued a fact sheet to states providing informal guidance stemming from its 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,

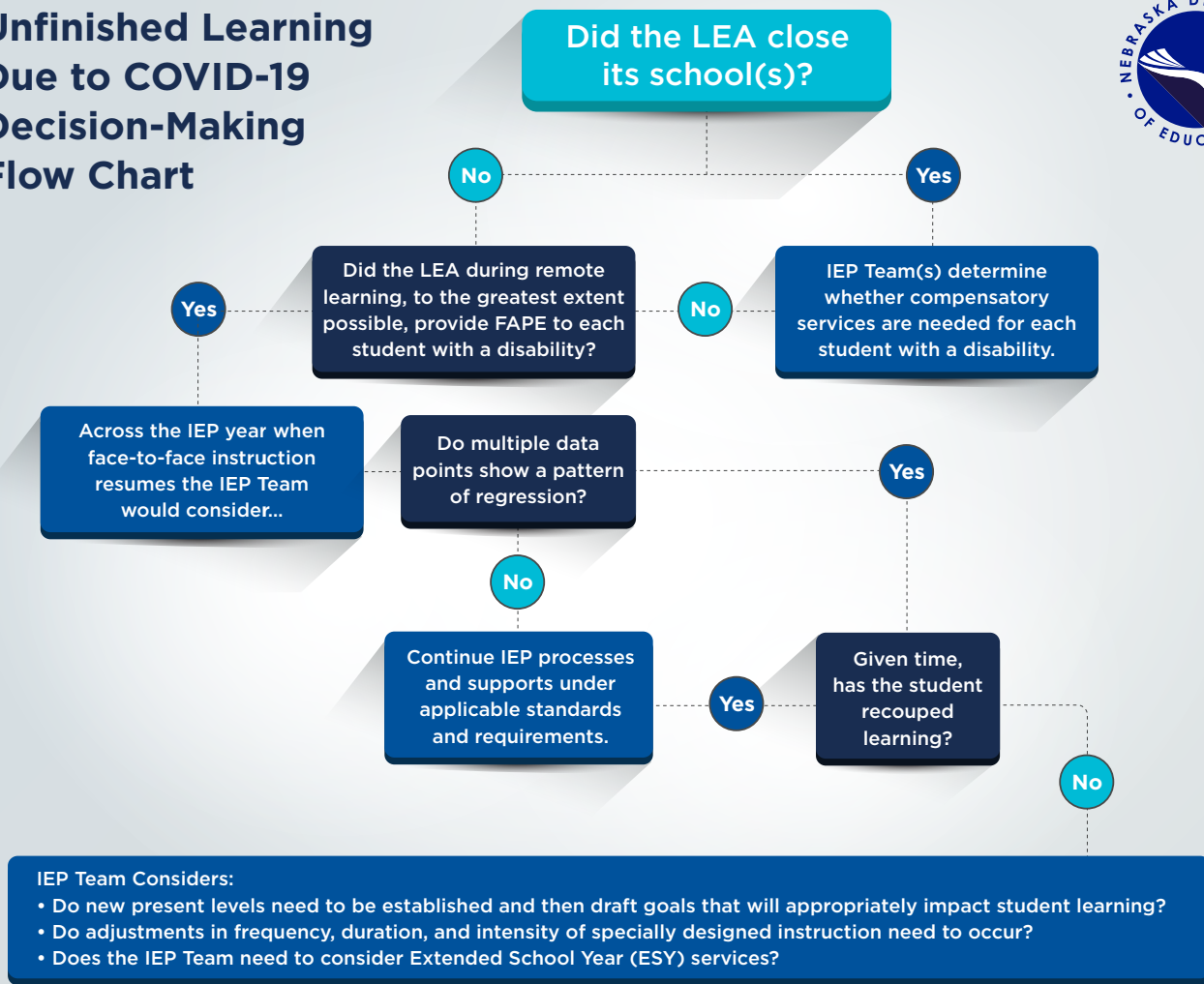
“If a [local educational agency, typically a school district (LEA)] continues to provide educational opportunities to the general student population during a school closure [i.e. by providing online learning], the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of [free appropriate public education (FAPE)]. (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.”

Questions and Answers on Providing services to Children with Disabilities during the Coronavirus Disease Outbreak March 2020, USDOE, March 12, 2020.

In sum, the USDOE advised in mid-March that if learning is halted for general education students across a school district, then the district would have no obligation to provide individualized education program (IEP) services for students with special needs. However, once education is provided to the general education population, the education opportunity must then be made accessible to students with disabilities. If a district was unable to provide such services, then once school resumes, decisions around unfinished learning would need to take place. Before a school district can make a determination on compensatory education, a district should look at the “unfinished learning” that may exist for a student.

Unfinished Learning Due to COVID-19 Decision-Making Flow Chart



Per both state and federal guidance and the implementing regulations, local educational agencies (LEAs) are required to provide both equitable access to general education opportunities and to continue to provide a free and appropriate education (FAPE) to students with disabilities to the maximum extent possible. Many students will receive a FAPE during this period of closure; however, it is acknowledged, that despite best intentions, efforts, and creative solutions, there are some students who will not receive a FAPE over the course of the school closure. Therefore, LEAs will need to make an **individual** determination, for each student around their unfinished learning.

Questions to Ask to Determine Unfinished Learning:

Did the LEA during remote learning, to the greatest extent possible, provide FAPE to each student with a disability?

- **If the answer is Yes, then when face-to-face instruction resumes the IEP Team would consider...**
 - » Do multiple data points show a pattern of regression?
 - ◇ It will take the IEP Team time across the IEP/school year to consider this question.
- **If the answer is No then continue the IEP processes and supports under applicable standards and requirements.**
- **If the answer is Yes, that given time, the student has recouped learning?**
 - » Then continue the IEP process and supports under applicable standards and requirements.
- **If the answer is No, The IEP team should consider:**
 - » Do new present levels need to be established and then draft goals 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?

Extended School Year

Another key consideration in understanding “unfinished learning” is that of Extended School Year (ESY). The purpose of an extended school year 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. It is not to enhance the present levels of educational performance exhibited by children with disabilities at the end of the regular school year. The need for ESY services is based on a construct of skill regression and a child’s limited capacity for recoupment. An extended school year may be provided only when it is determined that a child might 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. 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.

All children with disabilities who have a current IEP must be considered for ESY services at least **annually**. A school district may not limit ESY services to particular categories of disability, or unilaterally limit the type, amount, or duration of those services. A child’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 (3) through the age in which the child remains eligible for special education services. When it is determined that a child is in need of extended school year services, it will be provided as a related service at no cost to the parents and must be provided under the auspices of an IEP.

As part of the IEP process, the IEP team must determine if a child needs a program of special education and related services extending beyond the normal school year. In such a child, restricting services to a standard number of school days per year would not allow development of an education program that is truly individualized.

Not all children with disabilities need ESY services nor do the provisions of ESY mean the child needs such services each year. Children with disabilities, like their peers without disabilities, benefit from breaks in a school schedule. Breaks in formal programming allow most children to generalize school-learned skills and behaviors to their home and community settings. 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?” This may be a critical question during the COVID-19 “school closure.”

In addition to the valuable information already being gathered to determine progress toward annual goals and short-term objectives, a child's IEP team should address the following points in determining the need for ESY services:

- Consider information from a variety of sources.
- Measurement should be sensitive to small changes that may occur during short breaks in services.
- Measurement information should be gathered during the child's performance after long week-ends, vacations, and previous summer breaks.
- Consider both prior experience with regression/recoupment and predictive information.

If the LEA provided FAPE and there is still regression, the LEA would need to make an ESY determination. Keep in mind that ESY services can be provided any time during the IEP year, this does not have to be provided only during the summer. Additional Information regarding extended school year can be found on the Nebraska Department of Education, Office of Special Education webpage at: <https://cdn.education.ne.gov/wp-content/uploads/2020/04/Extended-School-Year-Guidance-Doc-Aug-2018.pdf>

Once a district has determined that all unfinished learning needs have been met, the district may have additional decisions that need to be made around compensatory education services.

Compensatory Education/Services

Compensatory educational services are not expressly defined in the IDEA; however, courts [under the authority granted them in 20 U.S.C. § 1415(i)(2)(C)(iii) and 34 C.F.R. § 300.516(c)(3)] have long awarded compensatory educational services as an appropriate remedy under the IDEA when a student has been denied a FAPE. In the present circumstances, the purpose of compensatory educational services is to remedy the districts (LEA) inability to provide a child with a disability with appropriate services during the time that the child is (or was) entitled to a free appropriate public education. See for example Letter to Lipsitt outlining the purpose of a compensatory educational services award. Compensatory educational services are not a contractual remedy, but an equitable remedy. It is designed to ensure the student is appropriately educated within the meaning of the IDEA and as such “[t]here is no obligation to provide day-for-day or minute for minute compensation for time missed.” See *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496-97 (9th Cir.1994).

Compensatory educational services should be determined by looking at the totality of the circumstances for each student and determining the amount of service needed to remedy the educational deficits resulting from a failure to provide a FAPE. Because compensatory educational services are an equitable remedy, parental input is important and parent information and concerns should be considered in determining whether or not compensatory educational services are owed, how much service time is needed, and how the services will be delivered. Schools have flexibility and can be creative in fashioning compensatory education awards. See *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011) (Courts have been “creative in fashioning the amount and type of compensatory education services to award”).

The Nebraska Department of Education offers the following guidance 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 also does not substitute for legal advice and districts are always encouraged to consult with their legal counsel when deciding how to proceed in a specific factual scenario.

Questions and Answers

If a local education agency (LEA) provided some services during the school closure, or only enrichment opportunities, must it assess the needs of individual students for compensatory education?

Not necessarily. Compensatory educational services are designed to remedy the progress lost by students with disabilities because they were previously denied a FAPE (Blanck et al., 2013; Zirkel, 1991). Districts that provided some but not all services are more likely required to make decisions around progress lost by individual students and determine if compensatory services for the services that they did not provide during the alternate learning environment due to Covid-19 are needed.

During the period of school closure related to COVID-19, emergency remote learning is being provided to all students as outlined in the **Nebraska COLP Guidance** and the Governor's executive orders. Per state and federal guidance and implementing regulations, LEAs are required to provide equitable access to general education opportunities and continue to provide a free and appropriate education (FAPE) to students with disabilities to the maximum extent possible. It is acknowledged, that despite best intentions, efforts, and creative solutions, there are some students who will not receive a FAPE over the course of the school closure. Therefore, LEAs will need to make individual determinations, for each student, as to whether compensatory educational services will be owed.

Why must compensatory educational services be considered if the LEA provided some educational opportunities to students with disabilities?

Compensatory educational services are not expressly defined in the IDEA; however, courts [under the authority granted them in 20 U.S.C. § 1415(i)(2)(C)(iii) and 34 C.F.R. § 300.516(c)(3)] have long awarded compensatory educational services as an appropriate remedy under the IDEA when a student has been denied a FAPE. In the present circumstances, the purpose of compensatory services is to remedy the LEA's inability to provide a child with a disability with appropriate services during the time that the child is (or was) entitled to a free appropriate public education.

Does a LEA have to provide the same amount (minute for minute) of service time missed from the IEP as compensatory educational services?

No. Compensatory educational services are not a contractual remedy, but an equitable remedy. It is designed to ensure that the student is appropriately educated within the meaning of the IDEA and as such “[t]here is no obligation to provide day-for-day or minute for minute compensation for time missed.” See *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496-97 (9th Cir.1994). Compensatory educational services should be determined by looking at the totality of the circumstances for each student and determining the amount of service needed to remedy the educational deficits resulting from a failure to provide a FAPE.

How should a LEA determine whether a student with a disability should receive compensatory education services?

Compensatory educational services should be determined by looking at the totality of the circumstances for each student, including parental input, and determining the amount of service, if any, needed to remedy the educational deficits resulting from a failure or inability to provide a FAPE. A formal IEP meeting is not required to make a determination of the need for the amount or delivery of compensatory educational services. However, in looking at the totality of the circumstances, parental input should be solicited and considered. It is then incumbent upon the LEA to make an offer of compensatory educational services when the determination has been made that an individual student was not provided with, or the LEA was unable to provide services during the period of school closure that would constitute a FAPE for that student. In determining whether a FAPE was provided during the time of school closure, the best source of data may be fourth quarter progress reports as this data is most likely to capture student performance during the closure itself. If fourth quarter progress reporting is not available, nothing in this guidance would prohibit a LEA from collecting data to assess the need for compensatory educational services during the summer break if it was safe and feasible to do so. In any event, it is recommended that LEAs collect data and solicit parental input to determine the need for compensatory services. In making an individualized determination as to whether a student is owed compensatory educational services, schools should consider 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,

How should a LEA determine the amount of compensatory educational service time that is needed?

In making an individualized determination as to whether a student is owed compensatory educational services, schools should consider 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 or lack of progress made on IEP goals, and parental input. Compensatory educational services should be offered that will allow the student to continue to make progress in the general education setting, or to progress at an appropriate pace in light of the child's circumstances, once students may safely return to the school campus.

Must parents be involved in the determination of compensatory educational service provision?

Yes. LEAs should solicit and consider parental input to determine whether compensatory educational services are needed and if necessary and how those services will be delivered.

Can a LEA offer all students summer school as compensatory educational services?

LEAs must ensure that individualized determinations are made related to the extent to which a student may require compensatory services. Schools should not create blanket rules offering a set amount of compensatory services to all students, or to subsets of students with disabilities, when they return to school campuses. In order to provide a FAPE, schools have an obligation to consider compensatory education for each student with a disability without the need for parents or guardians to file a state administrative complaint or a due process request for hearing.

Must all students with disabilities be provided with compensatory educational services?

No. LEAs must ensure that individualized determinations are made related to the extent to which a student may require compensatory educational services. In the present circumstances, the purpose of compensatory educational services is to remedy the LEA's failure or inability to provide a student with a disability a FAPE during the time that the child is (or was) entitled to a FAPE.

If a parent refused the IEP services provided by the LEA in an alternative format during the period of school closure, must the LEA determine whether the student should receive compensatory educational services when the student did not participate or attend the services available?

LEAs are advised to document all efforts to provide a FAPE to students during the period of school closure as well as document parent and student contact and communication. Please consult your legal counsel with advice on the best way to proceed in this specific circumstance.

Can parents refuse compensatory services?

Yes, parents can refuse an offer of compensatory educational services. It is recommended that LEAs document parental input in the determination of the need for compensatory educational services and the proposed plan to provide the services, as well as the parent's refusal of the services offered. Prior written notice may be sent to document an offer of compensatory educational services and the parent's refusal. If a parent refuses the offer, the LEA has met its obligation by making the compensatory educational services available.

If a parent refuses an offer of compensatory educational services, does the LEA have any further obligation?

Once the LEA has made the offer of individualized compensatory educational services, the parent should make the student available to receive the services offered. If a parent refuses the offer, the LEA has met its obligation by making the compensatory educational services available. It is recommended that districts (LEAs) document parental input in the determination of the need for compensatory educational services and the proposed plan to provide the services as well as the parent's refusal. This may be done through a prior written notice.

Can the service minutes provided in the current IEP be reduced, if compensatory educational services are offered, to account for additional service time provided as compensatory educational services?

No. Compensatory educational services cannot interfere with the services the student is to receive under a current IEP. Compensatory services must be provided in addition to the services implemented in a current IEP. The delivery of the compensatory educational services cannot change the student's least restrictive environment.

Must an IEP meeting be held once school resumes if a student's needs have changed as the result of the school closure?

If a student's educational, social/emotional, or behavioral needs have changed to the degree that the student's ongoing services or supports are no longer sufficient to provide a FAPE, the student's IEP team should meet to determine if the current IEP requires revision to reflect the student's current needs. (i.e. 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 or her progress or a child has become markedly more anxious or depressed or has lost core academic skills previously learned). This is not the same as, or a substitute for, compensatory educational services nor will it be necessary in all cases.

When can compensatory educational services 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 meets the needs of the individual student in remedying the inability of the LEA to provide a FAPE.

Must an IEP meeting be held to determine the need for compensatory educational services?

No, this is not a requirement, but it is certainly a recommended way to address compensatory education. Anytime an IEP team meets, they should discuss a student's strengths and needs, the goals based on the students' needs, and the services that student needs to meet their goals. If an IEP team adjusts future services based on a student's present needs, they are addressing how to compensate for the disruption in FAPE caused by the COVID 19 pandemic.

IEP teams **do not have to meet** to determine if a student requires compensatory services, however parental input should be solicited and considered when determining the need for compensatory educational services and how the compensatory educational services will be provided.

Can a LEA provide ESY to all students as the only way of offering compensatory educational services?

No. Compensatory services should not be confused with extended school year services (ESY). ESY is designed to maintain skills over school breaks and prevent degradation of skills that will not be recouped within a reasonable time once school has resumed. The determination of the need for ESY services is a separate determination made in a student's IEP meeting. Compensatory educational services are delivered when the LEA has failed or was unable to provide a FAPE to a student. In the current circumstance the failure or inability to provide a FAPE was due to school closure related to the COVID-19 pandemic.

What happens if a LEA does not have the time, forgets, or fails for any reason, to make individualized determinations of the need for compensatory educational services to the students it serves?

Parents retain their procedural safeguards and may file a state administrative complaint or file for a request for a due process hearing if their child is denied a free and appropriate public education, including the failure or inability of the LEA to provide a FAPE to the student during the time of an extended closure. However, it is not advised that LEAs wait until a parent submits a state administrative complaint or files a request for a due process hearing as this may further delay the provision of a FAPE and result in the need for additional compensatory educational services.

What happens if a parent disagrees with the LEA's offer of compensatory educational services?

Parents retain their procedural safeguards in the event they believe their child has been denied a FAPE. Parental rights under the IDEA have not been waived. Communication is key when it comes to decisions of services for students with disabilities. It is always encouraged for parents to request the IEP team reconvene to discuss additional considerations. Additionally, it is recommended that an alternative dispute resolution process such as mediation be used to resolve disagreements related to the need for compensatory educational services or the amount of compensatory educational services offered.

What obligation does a LEA have to a student who was enrolled during school closure but has since withdrawn from school?

The provision of compensatory educational services is an equitable remedy that is appropriate when a LEA either failed or was unable to provide an enrolled student with a disability a FAPE. It would fall to the LEA in which the student was enrolled at the time of the failure or inability to provide a FAPE to make a determination as to whether or not compensatory educational services need to be provided to the student and to deliver those services as appropriate.

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?

The provision of compensatory educational services is an equitable remedy that is appropriate when a LEA either failed or was unable to provide an enrolled student with a disability a FAPE. It would fall to the LEA in which the student was enrolled at the time of the failure or inability to provide a FAPE to make a determination as to whether or not compensatory educational services need to be provided to the student and to deliver those services as appropriate. School districts have flexibility and can be creative in fashioning compensatory educational services offers and the unique needs of the student should be considered. However, please consult with your legal counsel for advice related to specific factual circumstances.

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 compensatory educational services or make an offer of compensatory educational services?

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. Because the compensatory educational services framework is founded on the failure or inability of the LEA to provide a FAPE, a parent's refusal of services may excuse the district LEA of its obligation to consider compensatory educational services. However, please consult with your legal counsel for advice related to specific factual circumstances.

Is a LEA responsible to consider the provision of compensatory educational services if a student is newly enrolled (start of next year) and was not in the district during the time of closure?

No. The provision of compensatory educational services is an equitable remedy that is appropriate when a LEA either failed or was unable to provide an enrolled student with a disability a FAPE. Compensatory services provision falls to the LEA in which the student was enrolled at the time of the failure or inability to provide a FAPE to make a determination as to whether or not compensatory educational services need to be provided to the student and to deliver those services as appropriate.

What forms could Compensatory Education take?

- Extended-day programs
- Extended school-year services
- Summer school
- Tutoring
- Compensatory “related services” (e.g. OT, PT)
- Smaller group more intensive services

Does a LEA have a responsibility to determine a need for compensatory services for infants/toddlers on an IFSP/Part C services?

Yes, if the following applies: If offices are closed for an extended period and services are not provided for an extended period, the IFSP team must meet under 34 CFR § 303.342(b)(1) to determine if changes are needed to the IFSP **and to determine whether compensatory services are needed to address the infant or toddler’s developmental delay.**

If the above scenario applies, must parents be involved in the determination of compensatory services for infants/toddlers served under Part C?

Yes. The IFSP team must meet under 34 CFR § 303.342(b)(1) to determine if changes are needed to the IFSP and to determine whether compensatory services are needed to address the infant or toddler’s developmental delay. Parents are required to attend IFSP meetings per IDEA Part C regulations and must provide written consent to IFSP service provision, including compensatory services.

Must all infants/toddlers with disabilities be provided with compensatory services for those districts in which the offices were closed and IFSP services were not provided for an extended period of time?

No. IFSP teams must ensure that individualized determinations are made related to the extent to which each infant/toddler may need compensatory services to address the individual child’s developmental delay. Thus, the IFSP team may decide for one infant/toddler to provide compensatory services to address the child’s delay while determining for another infant/toddler that compensatory services are not needed due to the child demonstrating sufficient developmental progression.

Can parent refuse compensatory services within Part C?

Yes, parents can refuse an offer of compensatory services. The IFSP team will need to document the offer of compensatory services on the IFSP service page and parents will enter information and signatures on the following section of the IFSP parental consent page:

I/We do not agree with the proposed IFSP as written. However, I/we do consent to the following services/frequency:

Prior written notice may be sent by the district to document an offer of compensatory services and the parent's refusal. If a parent refuses the offer, the LEA/district/IFSP team has met its obligation by making the compensatory services available.

Must an IFSP meeting be held once a district opens and IFSP service provision resumes if an infant/toddler's needs have changed as the result of the closure/inability to provide IFSP services for an extended period of time?

Yes. Once the offices re-open, the services coordinator and EIS providers for each child must determine if the child's service needs have changed and if so, then the IFSP team, including the parent(s), will need to meet to review the child's IFSP to determine needed changes to the IFSP. If offices are closed for an extended period and services are not provided for an extended period, the IFSP team **must** meet under 34 CFR § 303.342(b)(1) to determine if changes are needed to the IFSP and to determine whether compensatory services are needed to address the infant or toddler's developmental delay.

Must an IFSP meeting be held if the district offices remain open and the district continues to provide IFSP services, but it cannot provide services in a particular location as stated within the IFSP (such as the child's home), in order to address whether the infant's/toddler's needs have changed?

Per the OSEP guidance, a district could provide IFSP services in an alternate location, or through alternate means, such as consultative service to the parent, during the COVID-19 outbreak. However, once services are fully resumed, the services coordinator and EIS providers for each child must assess the child to determine if the child's service needs have changed and to determine whether the IFSP Team needs to meet to review the child's IFSP to identify whether changes to the IFSP are needed. If it is determined that the IFSP team needs to meet and review potential changes to the IFSP in order to address the child's developmental needs, then an IFSP meeting must be scheduled and held in order to make necessary changes to the IFSP.

Does a LEA have responsibility to determine a need for compensatory education for non-public students on IEP's? On Equitable service plans?

LEAs should consult with their contracted service providers and their nonpublic schools in developing a plan to provide services to students consistent with each student's individual service plan, as applicable utilizing the same approach to unfinished learning stated above.

Resources

NDE Guidance and Updates

- NDE – Office of Special Education Website
- NDE – Office of Special Education, Questions and Answers
- Communication for Families/Parents of Students with Disabilities During Covid-19

Council of Administrators of Special Education

- Novel Coronavirus 2019: Considerations for Special Education Administrators

Council of Parent Attorneys and Advocates

- COPAA Statement on Student Rights Under IDEA During the COVID-19 Outbreak

US Department of Education

- COVID-19 (“Coronavirus”) Information and Resources for Schools and School Personnel:
Includes information regarding the rights of students with disabilities

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