



COVID-19 Considerations for Reopening Schools

July 20, 2020

Compensatory Education and Extended School Year Services

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Overview

On March 12, 2020, Gov. Andy Beshear recommended that all Kentucky school districts cease in-person classes for an extended period to slow the spread of COVID-19. Following the governor’s recommendations, all 172 local school districts transitioned to a remote learning instructional model using Kentucky’s Non-Traditional Instruction (NTI) Program.

The NTI program began in school year 2014-2015 as a method to continue instruction on the days local districts were closed due to health or safety concerns. The program was originally designed to allow the commissioner of education to grant districts with a waiver for up to 10 school days to be counted as student attendance days in the district calendar. Senate Bill (SB) 177 (2020) granted the flexibility needed to allow all Kentucky school districts, including the Kentucky School for the Blind and Kentucky School for the Deaf, to swiftly transition to remote instruction using the NTI model beyond the original 10 school days while allowing students and staff to remain healthy at home during this unprecedented time.

Free Appropriate Public Education (FAPE) During Remote Instruction

Regardless of the instructional delivery model, local school districts remain responsible for providing a Free Appropriate Public Education (FAPE) to students with disabilities. As a result of a quick transition to remote instruction coupled with the uncertainty of how to safely reopen schools for the 2020-2021 school year, local districts have been, and continue to be, faced with finding creative ways to ensure students with disabilities are being provided a FAPE while also ensuring that the health and safety of all students and staff are top priorities.



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As a result of the inability to provide face-to-face instruction, there may be certain special education and related services that are difficult, or even impossible, to provide during times of remote instruction.

When special education and related services are not provided in accordance with the Individual Education Program (IEP), regardless of the reason why, it may result in a denial of FAPE. The remedy for failing to provide FAPE is compensatory education services. The goal of compensatory education services is to place the student in the position he or she would have otherwise been in had there not been a denial of FAPE.

Recently, there have been discussions within the education community that using the term “compensatory education” feels like local districts are being blamed for doing something wrong and may jeopardize relationships with families. As a result, alternate terms have been introduced as ways to discuss missed services without using the term, compensatory education.

Terms such as “unfinished learning,” “lost learning,” and “post-COVID instruction” often are being used as synonyms for “compensatory education.” While the Office of Special Education and Early Learning (OSEEL) discourages districts from shying away from compensatory education discussions, some district staff may feel more comfortable using alternate language during these conversations.

However a district chooses to address the conversations, it is important to acknowledge that any services designed to place the student in a position he or she otherwise would have been in, but for the lack of educational benefit resulting from a denial of FAPE, are indeed compensatory education services.

Compensatory Education

Compensatory education is not defined in the Individuals with Disabilities Education Act (IDEA) or [Kentucky Administrative Regulations on Special Education Programs](#) (August 2008). Compensatory education has been shaped by case law as well as nonregulatory guidance from the United States Department of Education’s (USED) Office of Special Education Programs (OSEP).

Compensatory education may be awarded to a student as a result of an IDEA dispute or by the student’s Admissions and Release Committee (ARC) as a voluntary remedy for failing to provide a FAPE. When designing compensatory education services owed to a student, the student’s ARC, which includes the student’s parents and guardians, must make specific decisions regarding the type, location and amount of services to be provided.

As schools reopen and begin to resume face-to-face instruction, ARCs must review the status of special education and related services and ongoing progress monitoring on a case-by-case basis



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to make individualized determinations whether, and to what extent, compensatory education services are required. The ARC should consider whether the student received all IEP services during NTI, discuss whether a denial of a FAPE occurred and if so, how to remedy the noncompliance of the IDEA. A compensatory education award must be “reasonably calculated” to provide educational benefit and can extend a student’s eligibility beyond graduation or age 21 ([Letter to Riffel](#), August 22, 2000).

Punishment of the local district is not the purpose of compensatory education. Rather, compensatory education should “aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA” (*Reid v. Dist. of Columbia*, 43 IDELR 32 (D.C. Cir. 2005)).

A student with a disability can receive compensatory education services at any age, including while the child is still in school or past the maximum age for eligibility under the IDEA (*Lester H. v. Gilhool*, 16 IDELR 1354 (3rd Cir. 1990)). However, the IDEA “does not authorize a school district to provide a student with compensatory education through the provision of instruction or services at the postsecondary level” ([Letter to Riffel](#), August 22, 2000).

Extended School Year

It is critical not to confuse compensatory education with extended school year (ESY) services. ESY is defined in [707 KAR 1:002, Section 1 \(26\)](#) as “specially designed instruction and related services that are provided to a student with a disability beyond the normal school year in accordance with the child’s IEP at no cost to the parents.”

In *Kenton Co. School District v. Hunt* (384. F. 3d 269, 2004), the Sixth Circuit Court of Appeals was asked to decide whether parents of a student with multiple disabilities should be financially reimbursed by the local public school district under the concept of ESY in regard to services provided to the student by a private program over the summer.

The Sixth Circuit used prior analysis from a 1990 case (*Cordrey v. Euckert*, 917 F. 2d 1460) to explain that ESY, as part of an IEP for students, is integrally linked to the provision of a FAPE to the student. According to the court, to establish that ESY is necessary to provide a student with FAPE, “it is incumbent upon those proposing an ESY for inclusion in the child’s IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than an adequately recoupable regression. More specifically, it must be shown that an ESY is necessary to permit the child to benefit from instruction”. This benefit must be more than “de minimus progress” as has now been established by the U.S. Supreme Court under *Endrew F.*

The Sixth Circuit stated that the following would need to be considered in terms of establishing the district’s requirement to provide ESY services to the student to attain a FAPE: “tendency to



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regress, prior regression, ability to recoup lost skills, and progress toward educational goals”. In other words, does the student need ESY to receive a FAPE?

Nearly all students regress after summer or extended breaks. Students who qualify for ESY have a likelihood of significant regression and slow recoupment. They take a longer period than usual to recoup skills they have learned. For a student to receive ESY services, the ARC must document evidence the student regressed in his or her progress over a break in instruction and was unable to recoup those skills in a reasonable period when school was in session.

Not all students with disabilities qualify for ESY services. Students who qualify for ESY typically have severe disabilities and have a difficult time learning and retaining IEP skills.

Each local school district must ensure that ESY services are available to students with disabilities as necessary to provide a FAPE. As with compensatory education, the ARC is responsible for planning the type, location and amount of services to be provided to each student. Decisions made by the ARC must be made on an individual, case-by-case determination. Local school districts may not limit the provision of ESY services to specific categories of disability or unilaterally limit the type, amount or duration of those services.

The table on the next page illustrates the similarities and differences between compensatory education and ESY.



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Compensatory Education v. Extended School Year (ESY)

Question	Compensatory Education Services	Extended School Year (ESY) Services
What it is NOT:	<ul style="list-style-type: none"> • Compensation for a personal injury • A means for childcare services • A continuation of the IEP • Used to maximize student potential 	<ul style="list-style-type: none"> • Based on a specific category of disability • Limited to level of services or type of placement • Used for childcare service • An automatic program that extends from year to year • Summer school, compensatory education or enrichment services • Required to be provided in traditional classroom setting • A continuation of the entire IEP • Used to maximize student’s potential • Used to remove the student from age-appropriate general education classrooms solely because he or she requires modifications to the general education curriculum
When and how can services be provided?	<ul style="list-style-type: none"> • Provided before or after regular school hours (outside of the instructional day, including during school breaks) • May occur as assistance in the form of tutoring • Provided by school staff, a contracted service provider or private service provider 	<ul style="list-style-type: none"> • Provided before or after regular school hours (outside of the instructional day, including during school breaks) • May occur during school breaks • Designed to increase recoupment and retention of skills



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Question	Compensatory Education Services	Extended School Year (ESY) Services
When is a student eligible for services?	Compensatory education services are necessary when a student has experienced a denial of a FAPE that may have occurred as a result of any of the following circumstances: <ul style="list-style-type: none"> • Failure to conduct appropriate IDEA child-find responsibilities • Failure to evaluate a student in a timely manner • Failure to develop an appropriate IEP • Failure to implement an IEP • Failure to address behavior issues 	ESY services are: <ul style="list-style-type: none"> • Determined annually by the ARC in accordance with IEP and as close as possible to student’s normal placement • Designed so that a student can more readily maintain previously acquired or learned skills
How are the amount of services determined?	<ul style="list-style-type: none"> • Through a review and analysis of data • Begins to accrue from the time the school district knew or should have known the student experienced a denial of a FAPE • Minute per minute calculation¹ or a qualitative calculation² 	<ul style="list-style-type: none"> • Determined annually • Through a review and analysis of quantitative and qualitative data • On a case-by-case basis • Decided upon by the ARC
How should it be documented?	During the ARC - in the ARC conference summary notes	During the ARC - in the IEP

¹ *Board of Education of Fayette County, Kentucky v. T.D.* (2007), there is no obligation to provide a day-for-day compensation for time missed.

² *Reid v. District of Columbia* (2005), rejected a mechanical counting approach for compensatory education, requiring instead an equitable approach qualitatively based on “specific educational deficits resulting from the student’s loss of FAPE.”



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Important Things to Remember:

1. Compensatory Education:

- Compensatory education is the remedy provided to a student when a denial of FAPE has occurred. It is designed to put the student in the place he or she would have otherwise been in had there not been a denial of FAPE.
- The ARC must develop an individualized implementation plan for compensatory education services and document the decisions in the ARC Conference Summary.
- Ongoing progress monitoring should be collected.
- The district assumes all costs of providing compensatory education services.
- A special education teacher must provide the specially designed instruction and the appropriate related service provider must provide the related services.
- The district must provide transportation for the student.
- A service log should be maintained by the district to document when compensatory education services were provided and by whom.
- For preschool students, if the compensatory education is provided during a different preschool session, the session cannot exceed a class size of 20.
- Districts should maintain a detailed log of compensatory education services as they are provided to the student, including ongoing progress monitoring. This should be maintained in the student's due process folder.

2. ESY:

- ESY services provide the student with instruction and support so that he or she can more readily maintain previously acquired or learned skills.
- ESY services are determined annually by the ARC.
- A special education teacher must provide the specially designed instruction required and the appropriate related services provider must provide the related services.
- The district must provide transportation.
- The ARC must develop an ESY plan to include when and how services will be provided.
- Districts should maintain a detailed log of ESY services as they are provided to the student and maintained in the student's due process folder.
- ESY must be individualized and cannot be a one size fits all approach for all students in the district who qualify.



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Questions and Answers

Q&A: Compensatory Education

Question A-1

What definition should we use for compensatory education services resulting from COVID-19?

Answer A-1

The definition of compensatory education has not changed because of COVID-19. The IDEA case law allows for districts, state agencies, hearing officers and courts to award compensatory education to a student with a disability as an appropriate remedy when the educational authority has failed to provide the student with FAPE (*Lester H. v. Gilhool*³, 16 IDELR 1354 (3d Cir. 1990)). While it is typical for compensatory education to be awarded through the dispute resolution process, there is nothing to prevent local ARCs from determining and acknowledging that a denial of FAPE has occurred and offering compensatory education as a viable remedy. Doing so may prevent initiation of the dispute resolution process or an award of compensatory education and possibly attorney fees if such a process were initiated.

Question A-2

Must districts provide compensatory education for missed services that were solely due to COVID-19, forcing districts to move to remote instruction? Districts did nothing wrong, so why are we saying there has been a denial of FAPE?

Answer A-2

Yes. Beginning with the *Deal*⁴ case in the 6th Circuit, the FAPE standard was set to confer “meaningful educational benefit” to all students with disabilities. The Supreme Court heightened the standard for FAPE in *Endrew*⁵. ARCs are required by *Endrew* to construct IEPs that are “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

When reasonably calculating the student’s IEP, the student’s ARC determined specific services were necessary to provide the student a FAPE and ensure the student was able to make progress in light of their circumstances. While COVID-19 may have caused some IEP

³ *Lester H. v. Gilhool* (1990), concluded that Congress gave courts the power to grant compensatory remedy.

⁴ *Deal v. Hamilton County Dept. of Educ.* 259 F. Supp. 2d 687 At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child.

⁵ *Endrew F. v. Douglas County School District* 798 F.3d 1329 A district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.



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services to cease, that does not change the obligation of the district to provide a FAPE to that student.

When a student with an IEP does not receive a FAPE, regardless of the reason why, the district shall provide a remedy for the IDEA noncompliance. The ARC shall make an individualized determination as to whether a student requires compensatory education and determine the specific plan for providing services to those students who are owed compensation.

Question A-3

What special education and related services must be provided to students with IEPs during times of brief school closures when schools are not yet providing educational services to any students?

Answer A-3

When a school is closed due to a COVID-19 outbreak and is not yet providing any services to the general student population, the school is not required to provide IEP services.

Question A-4

If a student with a disability has needs that are too complex for the district to reasonably provide through remote instruction and the district is unable to conduct face-to-face instruction as a result of the threat to public health, what should the district do?

Answer A-4

Districts should provide the IEP services it feasibly can through remote instruction. Districts must make a good-faith effort to provide comparable, alternate IEP services. If the district is unable to provide these types of services through virtual learning or other alternative means available to the student, the ARC must determine the extent to which compensatory services, if any, will need to be provided once the district has resumed standard operations and face-to-face services can be provided.

Question A-5

Can compensatory education be awarded past a student's 22nd birthday?

Answer A-5

Yes. The purpose of compensatory education is to place the student in a position he or she would have been, had there been no IDEA violation. If the student was between the ages of 3–21 when the denial of FAPE occurred, the student still is eligible for compensatory education as a remedy, even if the student is past the age of 21.

Question A-6

Can students who graduated during the COVID-19 outbreak be awarded compensatory education?



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Answer A-6

Yes. Graduation does not automatically relieve the district of its obligation to remedy its past failure to provide FAPE. Compensatory education can assist a student in the broader educational purposes of the IDEA, including obtaining a job or living independently. However, compensatory education must be the type of educational and related services that are part of elementary and secondary school education offered by the district, not postsecondary education.

([Letter to Riffel](#), August 22, 2000)

Question A-7

Can an ARC award compensatory education services to students in preschool if they did not receive their IEP services during the NTI period?

Answer A-7

Yes. Compensatory education is available to all students with an IEP. Please refer to *Answer A-1*.

Question A-8

Are districts required to provide compensatory education if ARCs miss the deadline and do not determine a student's eligibility through an initial evaluation, reevaluation or a review of existing data during the NTI period?

Answer A-8

Compensatory education must be provided based on the date the evaluation should have been completed. Neither OSEP nor OSEEL has the authority to waive or extend any timeline requirements for initial evaluation or a three-year re-evaluation as stipulated under the IDEA. If the district is in the process of completing the initial evaluation during the NTI period, the district should diligently complete all the components of the evaluation that can safely be done. If an initial evaluation or a three-year re-evaluation of the student is needed, the district should document its good-faith efforts to complete the three-year reevaluation or initial evaluation within the required timelines as specified under the IDEA and Kentucky regulations ([707 KAR 1:300, Section 4](#)).

The requirement for completing a 3-year re-evaluation does not always necessitate conducting full evaluations. If the ARC determines it has enough current evaluative data and information to confirm the student's initial eligibility or continued eligibility as a student with a disability who needs special education and related services, and has enough information to write an appropriate IEP for the student, then the ARC could agree to make the student's eligibility determination based upon a review of existing assessment data and educational records.



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If, due to COVID-19, the ARC is unable to make a determination of the student's eligibility and, as a result, is unable to appropriately develop, update or revise the student's IEP, the ARC may decide that the student has experienced a denial of FAPE.

Question A-9

Can an ARC award compensatory education services if there is an IEP implementation delay during a student's move from Part C to Part B?

Answer A-9

Yes. Districts shall implement IEPs for students transitioning to Part B as soon as possible, ideally leaving no discontinuity between the termination of Part C services and the commencement of Part B services. The inability to implement the IEP without a gap in services could lead to a failure to provide FAPE. However, U.S. Department of Education Secretary Betsy DeVos requested a waiver from Congress that would extend the evaluation timeline for children making the transition from federal special education services for infants and toddlers under Part C of the IDEA to Part B of the IDEA. At this time, Congress has not acted upon the request.

Question A-10

How do districts determine the amount of compensatory education awarded?

Answer A-10

There are two approaches to determining a compensatory education award. One method is a minute for minute approach. Another way to award compensatory education is a qualitative approach. In the qualitative approach, the analysis for determining whether a student needs compensatory education, and how much, may be determined by the effect of the loss of educational benefit the student experienced based on their unique situation. This may require the ARC to examine both the qualitative and quantitative benefits the student would have received had the student been offered FAPE.

There is no cookie-cutter approach to the analysis of data since each student's educational needs are specialized and his or her educational program is uniquely designed for the student. ARCs must determine which approach is most appropriate based on the individual circumstances of each student. ARCs should consider whether a student has made progress, and how much, while receiving NTI services as part of its individualized determination into the student's potential need for compensatory education.



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Question A-11

Should all students with IEPs receive compensatory education services once face-to-face instruction resumes?

Answer A-11

No. The ARC must make decisions on a case-by-case basis. Compensatory education only is provided when a denial of FAPE occurs and changing the location of special education and related services to remote instruction does not automatically equal a denial of FAPE.

Question A-12

When should the ARC meet to discuss compensatory education services?

Answer A-12

Information needed to make this determination may not be known until after the interruption in services has ended. Thus, the most appropriate time for the ARC to decide on compensatory education for the student would be when schools return to face-to-face instruction. Districts may consider prioritizing meetings based upon student needs and progress.

Question A-13

What if the district and the parent cannot agree on compensatory education decisions?

Answer A-13

If the district and parent are unable to agree on compensatory education decisions, the district should make the determination and provide the parent with prior written notice. The parent or the district may initiate dispute resolution procedures to resolve the disagreement.

Question A-14

How can districts fund compensatory education services for students who did not receive FAPE during the COVID-19 NTI period?

Answer A-14

Districts have the option of using a variety of funding sources to pay the cost of providing compensatory education services. These sources include state and local funds, IDEA funds, funds available under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, including Elementary and Secondary School Emergency Relief (ESSER) and Governor's Emergency Education Relief (GEER) funds. While it may be tempting for a district to use the CARES funding to pay for these services, OSEEL cautions local districts to review their maintenance of effort (MOE) requirements to ensure the district continues to spend from state and local sources an amount necessary to maintain effort and be in compliance with the fiscal requirements of the IDEA.



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Question A-15

What if the parent asks to discontinue or declines services?

Answer A-15

The ARC must convene to discuss, plan and agree to compensatory education services before the district initiates providing such services. After the district has begun providing compensatory education services to the student, the ARC will need to reconvene prior to discontinuing the services.

The ARC must document the discussion and decline of compensatory education services in the ARC conference summary.

The service provider should be included in the ARC meeting that is convened with the purpose of deciding whether to discontinue compensatory education services.

Question A-16

As schools reopen and consider a hybrid model of face-to-face and remote instruction, should schools amend IEPs to reflect the environmental change?

Answer A-16

Any change to a student's IEP must be made by the ARC. The ARC can consider alternate ways to provide specially designed instruction and related services during this time, however, the IEP must be based on individual needs. IEPs cannot be developed to accommodate scheduling needs or administrative convenience.

Q&A: Extended School Year

Question B-1

Should an ARC add extended school year (ESY) services to every child's IEP to provide compensatory services when school resumes normal operations next school year?

Answer B-1

No. The purpose of ESY is not to provide compensatory education services.

Question B-2

How should schools address the provision of ESY services for students whose IEPs require ESY during the summer of 2020?

Answer B-2

ESY services must be provided in accordance with the student's IEP. ESY services are not automatically cancelled if scheduled summer school programs are cancelled. Districts should take diligent steps to implement ESY services as closely as possible to what is specified in the student's IEP during the summer break to the greatest extent possible. The inability to



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implement ESY services provided for in the IEP may be a denial of FAPE resulting in compensatory education.

Question B-3

Do districts need to provide all students with ESY Services due to the COVID-19 outbreak?

Answer B-3

No. Each student's ARC determines whether the individual student needs ESY services based on individualized data. The ARC must analyze the student's tendency to regress, prior regression, ability to recoup lost skills, and progress toward educational goals. If the ARC determines a student needs ESY, it must specify those services in the student's IEP.

Question B-4

What factors should the ARC consider when determining whether a student needs ESY service?

Answer B-4

The ARC, with parental involvement and input, makes the determination of ESY on an individual basis after a thorough review of the individual student's progress on goals and objectives. The ARC may consider several factors when determining whether a student requires ESY services. A common factor ARCs will consider when deciding a student's need for ESY is the amount of regression the student experienced over long breaks in instruction (e.g., summer break) and the length of time the student took to recoup skills after instruction has resumed.

For further guidance, please consult the [IEP Guidance Document \(Page 64\)](#).

Question B-5

For students with already identified ESY service needs, how will the NTI period related to COVID-19 impact the provision of these services?

Answer B-5

The need for ESY services is a student-specific determination and, as such, each student's ARC must determine whether a student qualifies for ESY services because of school closures related to COVID-19. If a student was determined to need ESY services prior to NTI due to COVID-19, then the district still is obligated to provide those services.

Question B-6

May a student receive both compensatory education and ESY during the same school year?

Answer B-6



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Yes. The need for ESY and compensatory education services are independently determined by the student's ARC. If a student is eligible to receive one of the services, that does not preclude them from receiving the other.



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Question B-7

What if the parent asks to discontinue or declines services?

Answer B-7

The ARC develops the student's IEP with parental input and involvement, including determining the student's need for ESY services. When needed, ESY services become a part of the student's IEP. The ARC must reconvene to discuss barriers regarding ESY service implementation and, if appropriate, amend the student's IEP to meet the student's needs when concerns arise. The ARC must document any discussion relating to discontinuation of ESY services in the ARC conference summary. The service provider should be included in the ARC that is convened with the purpose of discussing ESY services.

(SL:SS:CM:GH)(COMMS:TM)