

## Updated Guide to Addressing the Impact of the COVID-19 Pandemic on Students with Disabilities

February 2021/Updated July 2021

**[ADDED July 2021]** This document is updated July 2021 to incorporate special education recovery services and supports as outlined in the Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, section 1. Effective July 1, 2021, Minnesota state law requires the commissioner of education, school districts, and charter schools to collaborate with families of students with disabilities to address the impact of disruptions to in-person instruction on students' access to a free appropriate public education related to the COVID-19 pandemic.<sup>1</sup> Specifically, school districts and charter schools must invite the parents of a student with a disability to an Individualized Education Program (IEP) team meeting as soon as practicable but no later than December 1, 2021, to determine whether special education services and supports are necessary to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic.<sup>2</sup>

This document is intended to assist school districts, charter schools, and parents in making equitable and individualized determinations of appropriate extended school year (ESY) services, general education recovery services, revised IEP services, and COVID-19 compensatory services for students with disabilities related to their disrupted education or inability to access appropriate special education and related services during the COVID-19 pandemic. The information in this document is based on existing law and federal guidance and does not impose new or additional obligations on school districts and charter schools.<sup>3</sup> The Minnesota Department of Education (MDE) recognizes that current public health and safety needs may change, and the U.S. Department of Education could release additional guidance that may require MDE to update this document.<sup>4</sup> MDE continues to encourage school districts and charter schools and parents to frequently visit the [Centers for Disease Control and Prevention \(CDC\) website](#) and the [Minnesota Department of Health \(MDH\) website](#) for updates on public health and safety guidance.<sup>5</sup>

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<sup>1</sup> Laws of Minnesota 2021, 1st Special Session, chapter 13, article 5, section 1, subd. 1.

<sup>2</sup> *Id.* at subd. 2(a).

<sup>3</sup> The document was developed, in part, following review of MA, CA, IN, LA, and CO state educational agency guidance.

<sup>4</sup> In February 2021, the U.S. Department of Education, Office of Planning, Evaluation and Policy Development, released its [ED COVID-19 Handbook, Volume 1: Strategies for Safely Reopening Elementary and Secondary Schools](#). The document indicated that future volumes of the ED COVID-19 Handbook may include “research-based and practitioner informed strategies and examples” on topics such as “meeting the social, emotional, mental health, and academic needs of students” and “addressing lost instructional time for students.”

<sup>5</sup> See, e.g., [CDC, Operational Strategy for K-12 Schools through Phased Mitigation](#) (updated Feb. 12, 2021).

As school districts and charter schools reopen for in-person learning, school districts and charter schools must continue to prioritize equity, think creatively, collaborate with parents/guardians and other education partners, and remain flexible to respond to students' emerging needs. As stated in *Preparing to Reopen: Six Principles that Put Equity at the Core*, "We must prepare in a way that is flexible enough to respond to an uncertain future under COVID-19, yet robust enough that all students—including students with disabilities—have an equal opportunity to succeed over the long term. Doing so can help ensure that equity is built into the foundation of a new era of education."<sup>6</sup>

## **Equity, FAPE, Creativity, Collaboration, and Flexibility Remain Critical in Meeting the Needs of Students with Disabilities<sup>7</sup>**

During the 2020-21 school year, each school district and charter school was tasked with creating equitable programming for all students under the three learning models identified in [Minnesota's Safe Learning Plan](#): in-person learning, hybrid learning, and distance learning. Further, the U.S. Department of Education and MDE expected that programming in all learning models would continue to be designed and implemented by school districts and charter schools to provide the full benefit of educational opportunities for all students and will meet the requirements of federal civil rights laws, including Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>8</sup> and Title II of the Americans with Disabilities Act (ADA).<sup>9</sup> School districts and charter schools must continue to ensure that students with disabilities have equal access to the same opportunities, while taking into consideration the health, safety, and well-being of all their students and staff.<sup>10</sup>

During the 2020-21 school year, school districts and charter schools were to make available to each eligible student a free appropriate public education (FAPE), consisting of special education and related services that are provided in conformity with the student's IEP, individualized distance learning plan (IDL) and/or individualized contingency learning plan (CLP),<sup>11</sup> or Section 504 Plan,<sup>12</sup> even when the school district or charter school was operating in a distance or hybrid learning model or when the student's family opted for the student to receive distance learning instruction.<sup>13</sup> Further, school districts and charter schools that operated in a distance or hybrid

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<sup>6</sup> Eric Tucker and Lindsay Kruse (May 20, 2020), available at: <https://www.gettingsmart.com/2020/05/preparing-to-reopen-six-principles-that-put-equity-at-the-core/>.

<sup>7</sup> Technical updates were made to this section in response to schools resuming normal operations.

<sup>8</sup> 34 C.F.R. §§ 104.4 and 104.33. Section 504 is a federal civil rights statute protecting students with an impairment that substantially limits one or more major life activities.

<sup>9</sup> 28 C.F.R. § 35.130. Title II of the Americans with Disabilities Act (ADA) applies to State and local government entities and protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. See also OCR, [Questions and Answers for K-12 Public Schools](#) (Sept. 28, 2020).

<sup>10</sup> See U.S. Dept. of Ed., Office for Civil Rights (OCR), [Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment](#) (Sept. 28, 2020), and U.S. Dept. of Ed. Office of Special Education and Rehabilitative Services (OSERS), Office of Special Education Programs (OSEP), [IDEA Part B Service Provision](#) (Sept. 28, 2020).

<sup>11</sup> 34 C.F.R. §§ 300.17 and 300.101; Minn. Stat. § 125A.08(b)(1).

<sup>12</sup> 34 C.F.R. § 104.33.

<sup>13</sup> OSERS, [IDEA Part B Service Provision](#) (Sept. 28, 2020).

learning model that are providing in-person services in accordance with public health guidelines must prioritize providing in-person instruction and services to students with disabilities whose IEP called for intensive services that could not be provided in a distance learning model.<sup>14</sup>

The U.S. Department of Education and MDE encouraged parents, educators, and administrators to collaborate and think creatively to continue to meet the unique needs of students with disabilities, to ensure that students were able to access instruction, and to ensure that delivery of instruction were effective.<sup>15</sup> MDE continues to recommend that school districts and charter schools focus on authentic engagement of students with disabilities and their families in determining students' need for services and support in order to mitigate the impact of extended school facilities closures related to COVID-19 on their learning. These determinations will require school districts and charter schools to encourage and fully consider information provided by parents regarding their student's ability to access remote learning and the student's progress during periods of distance learning.

## **[ADDED July 2021] Special Education Recovery Services and Supports<sup>16</sup>**

Effective July 1, 2021, Minnesota law entitled Special Education Recovery Services and Supports requires IEP teams to meet as soon as practicable but no later than December 1, 2021,<sup>17</sup> "to determine whether special education services and supports are necessary to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic."<sup>18</sup> Similar to this MDE guidance document, the law states that such services and supports may include but are not limited to "extended school year services, additional IEP services, compensatory services, or other appropriate services."<sup>19</sup>

This new law states, in determining whether a student is eligible for special education recovery services and supports, and what services and supports are appropriate for the student, the IEP team must consider, in conjunction with relevant guidance from MDE and U.S. Department of Education, the following:

1. services and supports provided to the student before the disruptions to in-person instruction related to the COVID-19 pandemic;
2. the ability of the student to access services and supports;
3. the student's progress toward IEP goals, including the goals in the IEP in effect before disruptions to in-person instruction related to the COVID-19 pandemic, and progress in the general education curriculum;
4. the student's regression or lost skills resulting from disruptions to instruction;

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<sup>14</sup> [Minn. Exec. Order No. 20-94](#) (Nov. 5, 2020—June 30, 2021).

<sup>15</sup> OSERS and OCR, [Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities](#) (March 21, 2020).

<sup>16</sup> This section of the guide is new and it incorporates Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, section 1, effective July 1, 2021.

<sup>17</sup> This meeting may occur in an annual or other regularly scheduled IEP meeting pursuant to Laws of Minnesota 2021, 1st Special Session, chapter 13, article 5, section 1, subd. 2(a).

<sup>18</sup> Laws of Minnesota 2021, 1st Special Session, chapter 13, article 5, section 1, subd. 2(a).

<sup>19</sup> *Id.*

5. other significant influences on the student’s ability to participate in and benefit from instruction related to the COVID-19 pandemic, including family loss, changed family circumstances, other trauma, and illness; and
6. the types of services and supports that would benefit the student and improve the student’s ability to benefit from school, including academic supports, behavioral supports, mental health supports, related services, and other services and supports.<sup>20</sup>

Any identified services must be included in the student’s IEP, and the IEP team must determine when and how the special education recovery services and supports should be provided.<sup>21</sup> Specifically, the IEP team must take into account the timing and delivery method most appropriate for the student, such as the time of day, day of the week, or time of year, and the availability of other services accessible to the student to address learning loss.<sup>22</sup> The IEP team may determine that providers in addition to school district or charter school staff are most appropriate to provide the special education recovery services and supports.<sup>23</sup>

School districts or charter schools must make available the special education recovery services and supports as included in the student’s IEP until the IEP team determines that the services and supports are no longer necessary to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic.<sup>24</sup> Further, school districts providing special education services on a shared time basis to a student enrolled in a nonpublic school must offer special education recovery services and supports as outlined above.<sup>25</sup> The services and supports provided to students with disabilities under this law, including the cost of providing the services, must be reported to the commissioner of MDE.<sup>26</sup>

**[UPDATED July 2021] What follows in this guidance are services and supports that IEP teams must consider, as advised by MDE, in determining whether a student is eligible for special education recovery services and supports and what services and supports are appropriate for a student, as mandated by Laws of Minnesota 2021, 1st Special Session, chapter 13, article 5, section 1, subd. 2(b). Additionally, school districts and charter schools must consider providing students with disabilities some or all of the following types of services, as part of the ongoing responsibility to provide a free appropriate public education to Minnesota students:**

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<sup>20</sup> *Id.* at subd. 2(b)(1)-(6).

<sup>21</sup> *Id.* at subd. 2(a).

<sup>22</sup> *Id.* at subd. 2(c).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at subd. 2(d).

<sup>25</sup> *Id.* at subd. 2(e).

<sup>26</sup> For more information about this process, please contact MDE’s School Finance Division, Special Education Funding, at [mde.spedfunding@state.mn.us](mailto:mde.spedfunding@state.mn.us).

## General Education Recovery Services<sup>27</sup>

As schools resume normal operations, students will need help to recover and catch up on learning. School districts and charter schools will need to address the needs of all students, including students with and without disabilities, who return to in-person learning with signs of regression, gaps in their learning, or indicators of trauma as a result of the closure of schools to in-person learning and other impacts of the COVID-19 pandemic. Some general education recovery services may be provided to students through core instruction in general education classes, while other general education recovery services may be provided through the district or school's multi-tiered system of support (MTSS) or other framework to direct more intensive services to students who demonstrate a greater need.<sup>28</sup> Access to general education recovery services does not need to be provided through a student's IEP team and instead should be available to students with and without disabilities in the same way. General education recovery services do not take the place of special education recovery and supports, including ESY services, revised IEP services, or COVID-19 compensatory services, for students with disabilities but may be provided in addition to those services.

General education recovery services should focus not only on educational gaps in students' learning but also on social-emotional wellbeing and new mental health needs that students may have when they return to school. As stated in Executive Order 20-94, "Student access to mental health services is all the more critical during this pandemic. At a time when many Minnesotans are experiencing increased trauma and challenges to mental well-being due to isolation, worries about the health of family and friends, racial trauma or injustice, economic struggles, and other concerns, access to mental health services is more complex than before."<sup>29</sup> While Executive Order 20-94 and the Safe Learning Plan were rescinded on July 1, 2022, MDE still encourages school districts and charter schools prioritize student mental health services.

Executive Order 20-94 prioritized student mental health needs by directing school districts and charter schools to implement the [MDE 2020-21 Planning Guidance for Minnesota Public Schools](#) on mental health and well-being, school climate, trauma-informed practices and social-emotional learning.<sup>30</sup> In order to provide appropriate supports to students, school districts and charter schools are encouraged to continue to think creatively and collaborate with parents and other education partners, communicating openly regarding the scope, frequency, and type of general education recovery support needed by students.

General education recovery services may include:

- summer programming, including partnerships with community organizations and neighborhood programs.
- tutoring or other small group instruction models, such as after-school homework help.
- high-quality core curricular materials and instruction.
- culturally-responsive practices and teaching.
- Multi-Tiered System of Support (MTSS).
- social and emotional learning (SEL) programs.

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<sup>27</sup> Technical updates were made to this section to incorporate Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, section 1 and in response to schools resuming normal operations.

<sup>28</sup> See *Id.* at subd. 2(a) (stating, "services and supports may include but are not limited to . . . other appropriate services."

<sup>29</sup> [Minn. Exec. Order No. 20-94](#) (Nov. 5, 2020—June 30, 2021), p. 3.

<sup>30</sup> [2020-21 Planning Guidance for Minnesota Public Schools](#) is also available at MDE's COVID-19 website.

- behavior plans, counseling, school social work services, and other social-emotional support.
- resources and support for staff in implementing trauma-informed practices, restorative practices, relationship building, and providing instruction for children with adverse childhood experiences.
- continuity of care with school-linked mental health or collaboration with community organizations to streamline referrals and resources for students in need of mental health supports.
- information and resources for students and families on mental health and available mental health services and supports.
- resources and support for school teachers and staff in identifying signs of mental health distress and options for supporting student mental wellbeing and access to supports.
- wraparound services.
- support for following current health and safety protocols (e.g., face coverings, handwashing, social distancing, etc.).
- other evidence-based interventions (including, for example, academic interventions and behavioral strategies) and other strategies to engage learners and address factors that impact student learning.

## Extended School Year Services<sup>31</sup>

Extended school year (ESY) services are special education instruction and related services for students with disabilities who demonstrate the need for continued service on days when school is not in session for all students, as a necessary component of a free appropriate public education (FAPE).<sup>32</sup> School districts and charter schools must ensure that ESY services are available if a student’s IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the student.<sup>33</sup> Further, the school district or charter school may not limit ESY services to particular categories of disability or unilaterally limit the type, amount, or duration of ESY services.<sup>34</sup> The federal comments to IDEA emphasize that a student’s need for ESY services must be an individualized determination.<sup>35</sup>

Further, the federal comments to IDEA grant IEP teams flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual student, and ESY services may be provided during times other than summer, such as before and after regular school hours or during other breaks in instruction.<sup>36</sup> Further, a student’s entitlement to ESY services continues to apply even if school districts and charter schools are closed to in-person instruction due to COVID-19.<sup>37</sup>

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<sup>31</sup> Technical updates were made to this section to incorporate Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, section 1 and in response to schools resuming normal operations.

<sup>32</sup> [Minn. R. 3525.0210, subp. 19](#). See also 34 C.F.R. § 300.106(b) (Extended school year (ESY) services are defined by 34 C.F.R. § 300.106(b) as special education and related services that are provided to a student with a disability beyond the normal school year, in accordance with the student’s IEP, at no cost to the parents of the student, and meet the standards of the state education agency (SEA).)

<sup>33</sup> 34 C.F.R. § 300.106(a)(1) and (2).

<sup>34</sup> 34 C.F.R. § 300.106(a)(3).

<sup>35</sup> See 71 Fed. Reg. 46582. See also, OSERS, [IDEA Part B Service Provision](#) (Sept. 28, 2020).

<sup>36</sup> See 71 Fed. Reg. 46582.

<sup>37</sup> See OSERS, [IDEA Part B Service Provision](#) (Sept. 28, 2020).

[Minnesota Rule 3525.0755](#) requires the student’s IEP team to, at least annually, determine a student’s need for ESY services if the student meets the conditions of either: A) there will be significant regression of a skill or acquired knowledge from the student’s level of performance on an annual goal (regression); B) services are necessary for the student to attain and maintain self-sufficiency because of the critical nature of the skill addressed by an annual goal (self-sufficiency); or C) the IEP team otherwise determines, given the student’s unique needs, that ESY services are necessary to ensure the student receives a FAPE (unique needs). While IEP team determinations regarding ESY services are prospective and not intended to make up for past denials of FAPE, unique needs that emerged due to disruptions to the student’s education and other circumstances that occurred during the COVID-19 pandemic could be considered by the student’s IEP team when determining whether the student demonstrates a need for ESY services.<sup>38</sup>

The IEP team must determine ESY eligibility using information including: prior observation of the student’s regression and recoupment over the summer, observation of the student’s tendency to regress over extended breaks in instruction during the school year, and experience with other students with similar instructional needs.<sup>39</sup> Further, the following factors must also be considered by the IEP team where relevant: the student’s progress and maintenance of skills during the regular school year, the student’s degree of impairment, the student’s rate of progress, the student’s behavioral or physical problems, the availability of alternative resources, the student’s ability and need to interact with nondisabled peers, the areas of the student’s curriculum which need continuous attention, or the student’s vocational needs.<sup>40</sup>

ESY services are not general education recovery services or COVID-19 compensatory services. A student’s need for ESY services is a separate and individualized determination that must be made by the student’s IEP team, at least annually, in order to ensure the provision of FAPE to a student, but may also be part of the solution to addressing the developing needs of students impacted by the COVID-19 pandemic.<sup>41</sup>

## Revised IEP Services<sup>42</sup>

Under the IDEA and Minnesota laws, the student’s IEP team must ensure the student has access to all special education and related services necessary for the student to receive FAPE.<sup>43</sup> IEP teams are required to meet to review and revise, as appropriate, a student’s IEP to address the results of any reevaluation; information provided to, or by, the parents; the student’s anticipated needs; or other matters.<sup>44</sup> IEP teams must continue to monitor students’ educational progress and to review and revise a student’s IEP, as appropriate, to address any lack of expected progress toward the student’s annual goals and in the general education curriculum.<sup>45</sup>

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<sup>38</sup> See OSERS, [IDEA Part B Service Provision](#) (Sept. 28, 2020).

<sup>39</sup> [Minn. R. 3525.0755, subp. 4.](#)

<sup>40</sup> [Id. at subp. 5.](#)

<sup>41</sup> 34 C.F.R. § 300.106; see Laws of Minnesota 2021, 1st Special Session, chapter 13, article 5, subd. 2(a) (stating, “services and supports may include but are not limited to extended school year services . . .”).

<sup>42</sup> Technical updates were made to this section to incorporate Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, section 1 and in response to schools resuming normal operations.

<sup>43</sup> 34 C.F.R. §§ 300.17 and 300.101 and Minn. Stat. §§ 125A.03 and 125A.08.

<sup>44</sup> 34 C.F.R. § 300.324(b).

<sup>45</sup> *Id.*

Additionally, a parent or school staff person may request an IEP team meeting at any time to review and revise a student's IEP to address any disability-related needs, including new areas of need or areas of regression.<sup>46</sup>

Under Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, section 1, subdivision 2(a), special education services and supports may include additional IEP services.<sup>47</sup> Students may have new disability-related needs, areas of regression, or social-emotional needs due to the impact of the COVID-19 pandemic that will require new or increased services and supports necessary for the student to receive a FAPE. Based on Minnesota law, IEP teams must invite families to an IEP team meeting to discuss possible revisions to students' IEPs as soon as practicable but no later than December 1, 2021.<sup>48</sup> This may include new or increased specially designed instruction and academic supports, positive behavioral interventions and other supports for a student whose behavior impedes learning,<sup>49</sup> and other "supportive services as are required to assist a child with a disability to benefit from special education," such as counseling, parent counseling and training, psychological services, school health services and school nurse services, and social work services.<sup>50</sup> Any new or increased amounts of services must be documented in the student's IEP,<sup>51</sup> and parents must be provided prior written notice prior to any change in the provision of FAPE to their student.<sup>52</sup>

In making changes to a student's IEP outside of the annual IEP team meeting, the parent and school district or charter school may agree not to convene an IEP team meeting for the purpose of making changes, and instead may develop a written document to amend or modify the student's current IEP.<sup>53</sup> However, the school district or charter school must ensure that due process procedures are followed when amending a student's IEP, including providing parents with prior written notice, informing the student's IEP team of any changes to the IEP, and providing parents with a copy of the amended IEP upon request.<sup>54</sup> Remember that an amendment to a student's IEP cannot take the place of an annual IEP team meeting.

The student's IEP team needs to ensure that the student's present levels of academic achievement and functional performance are up-to-date in order to inform appropriate programming and placement.<sup>55</sup> The IEP team may decide that additional data is needed to determine the student's current educational or related services needs or the student's present levels of academic achievement and functional performance. If that occurs, or the parent requests a reevaluation, the school district or charter school must conduct a reevaluation of the student, including identifying all of the student's special education and related service needs, whether or not commonly linked to the disability area in which the student's eligibility has been classified.<sup>56</sup>

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<sup>46</sup> See, generally, 34 C.F.R. §§ 300.320 through 300.324.

<sup>47</sup> Laws of Minnesota 2021, 1st Special Session, chapter 13, article 5, section 1, subd. 2(a).

<sup>48</sup> *Id.* at subd. 2(a).

<sup>49</sup> 34 C.F.R. § 300.324(a)(2).

<sup>50</sup> 34 C.F.R. § 300.34.

<sup>51</sup> 34 C.F.R. § 300.320.

<sup>52</sup> 34 C.F.R. § 300.503(a).

<sup>53</sup> 34 C.F.R. § 300.324(a)(4)(i). See also OSERS, [IDEA Part B Service Provision](#) (Sept. 28, 2020).

<sup>54</sup> 34 C.F.R. §§ 300.324(a)(4), 300.324(a)(6), and 300.503.

<sup>55</sup> 34 C.F.R. § 300.320(a).

<sup>56</sup> 34 C.F.R. §§ 300.303 through 300.305. See also MDE's [Q&A: Reevaluations under Part B of the Individuals with Disabilities Education Act \(IDEA\)](#) (Dec. 17, 2020).

## COVID-19 Compensatory Services<sup>57</sup>

“Compensatory services” is a term used in IDEA regulations to refer to remedies in resolving a complaint<sup>58</sup> or a due process hearing<sup>59</sup> in which a failure to provide appropriate services has been found. Compensatory services are independent of any current right to FAPE.<sup>60</sup> Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, also includes the term “compensatory services,” as an option for IEP teams to use to provide special education services and supports to address the impact of disruptions to in-person instruction on students’ access to a FAPE related to the COVID-19 pandemic.<sup>61</sup>

The purpose of compensatory services is to remedy the failure to provide the services that the student should have received. Compensatory services must be the type of educational and related services that are part of elementary and secondary school education.<sup>62</sup> There is no universal formula for determining the amount of compensatory services to be awarded to a student who was denied appropriate services.<sup>63</sup>

Compensatory services as a remedy for the failure to provide appropriate services is available even after the right to FAPE has terminated. Therefore, compensatory services may be awarded to students who have reached the age at which the right to FAPE ends or who have graduated with a regular high school diploma.<sup>64</sup>

The term compensatory services is also used by the U.S. Department of Education in its COVID-19 related guidance to describe the obligation of school districts and charter schools to address the needs of student who did not receive services as a result of school facilities closures and other exceptional circumstances related to the COVID-19 pandemic.<sup>65</sup> Specifically, the U.S. Department of Education stated:

“The Department understands there may be exceptional circumstances that could affect how a particular service is provided. 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.”<sup>66</sup>

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<sup>57</sup> Technical updates were made to this section to incorporate Laws of Minnesota, 2021, 1st Special Session, chapter 13, article 5, section 1 and in response to schools resuming normal operations.

<sup>58</sup> 34 C.F.R. § 300.151.

<sup>59</sup> 34 C.F.R. § 300.513.

<sup>60</sup> OSERS, [Letter to Riffel](#) (Aug. 22, 2000).

<sup>61</sup> Laws of Minnesota 2021, 1st Special Session, chapter 13, article 5, section 1, subds. 1 and 2(a).

<sup>62</sup> OSERS, [Letter to Riffel](#) (Aug. 22, 2000).

<sup>63</sup> *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (finding in every case the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place).

<sup>64</sup> OSERS, [Letter to Riffel](#) (Aug. 22, 2000)(finding because the basis of compensatory services remedy is the past denial of educational and related services that were not originally provided, compensatory services as a remedy is available even after the right to FAPE has terminated).

<sup>65</sup> [Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak](#) (March 12, 2020).

<sup>66</sup> *Id.* at p. 4.

In subsequent guidance, the Office of Special Education and Rehabilitative Services (OSERS) clarified:

“These exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. . . The Department understands that during this national emergency, schools may not be able to provide all services in the same manner they are typically provided. . . [F]ederal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency. . . FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students. Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services—or even making decisions about how to provide services—IEP teams. . . must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.”<sup>67</sup>

Due to delays in providing services or the inability to provide some IEP services due to the emergency closure of school facilities and other exceptional circumstances related to the COVID-19 pandemic, school districts and charter schools may not have been able to provide all special education and related services described in students’ IEPs. Also, despite efforts by school districts and charter schools to develop and implement individualized distance learning plans (IDLPs) and contingency learning plans (CLPs) to adapt the special education and related services provided to students with disabilities during the different learning models, some students may not have been able to access the special education and related services necessary for them to make effective progress toward their IEP annual goals or in the general education curriculum.

COVID-19 compensatory services awarded by students’ IEP teams, as directed by the U.S. Department of Education in its COVID-19 related guidance, should seek to make up for any loss in a student’s skills, including academic, functional, or behavioral skills, and any lack of expected progress in the general education curriculum or toward the student’s IEP annual goals, that resulted from the school district’s or charter school’s delay or inability to provide IEP services, or the student’s inability to access appropriate IEP services, during the COVID-19 pandemic.<sup>68</sup> COVID-19 compensatory services are based on a student’s need to make up for lost skills and to regain progress, regardless of the specific cause for the delay or disruption to the student’s IEP services.<sup>69</sup>

The student’s IEP team is responsible for determining COVID-19 compensatory services.<sup>70</sup> Just like ESY services, school districts and charter schools may not unilaterally limit the type, amount, or duration of COVID-19 compensatory services. IEP teams must exercise flexibility to determine when it is most appropriate to provide

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<sup>67</sup> [Supplemental Fact Sheet](#) (March 21, 2020).

<sup>68</sup> U.S. Dept. of Ed., [Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak](#) (March 12, 2020).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

COVID-19 compensatory services, depending on the circumstances of the individual student, including during summer, other school breaks or vacation periods, and/or before or after school.<sup>71</sup>

COVID-19 compensatory services may be provided in many different ways, including but not limited to additional special education and related services, small group or individual tutoring (including reimbursement to parents for outside tutoring or programs, when agreed to by the school district or charter school), or additional academic or enrichment services necessary to compensate for the student's loss of skills or lack of progress. The nature and amount of the special education and related services that are to be provided as COVID-19 compensatory services is an individualized determination made by the student's IEP team.<sup>72</sup>

COVID-19 compensatory services are in addition to the special education and related services provided by a student's IEP. Just as there is no universal formula for determining the amount of compensatory services to be awarded to a student who was denied appropriate services, there is no universal formula for an IEP team to determine the amount of COVID-19 compensatory services.<sup>73</sup> COVID-19 compensatory services should be documented in the student's IEP, along with a description of the type of services to be provided and the frequency, location, and duration of the services.<sup>74</sup>

School districts and charter schools should continue to prioritize determining the need for COVID-19 compensatory services to students with disabilities whose IEP calls for intensive services that were not provided when alternative learning models were in place.<sup>75</sup> Other students with disabilities who did not receive or had difficulty accessing special education services during the suspension of in-person education are likely to require COVID-19 compensatory services and should also be prioritized, including students from communities disproportionately impacted by distance and hybrid learning, students in historically underserved communities, students with disabilities who are also English learners, students experiencing homelessness, students in foster care, and students with post-secondary transition needs.<sup>76</sup>

**[UPDATED July 2021]** COVID-19 compensatory services are to be considered as soon as practicable but no later than December 1, 2021, as outlined in Minnesota Laws, 2021, 1st Special Session, chapter 13, article 5, section 1, subd. 2.

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<sup>71</sup> See, e.g., 34 C.F.R. § 300.106. See also, OCR, [Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment](#) (Sept. 28, 2020) (Section 504 requires individual decision-making regarding the type, frequency, and manner in which special education and related services will be provided to students with disabilities. As such, State-wide or district-wide policies that reduce or limit services specifically for students with disabilities in a particular jurisdiction, without regard to any reasonable modifications, or services that may be necessary to meet the individualized needs of those students, run afoul of Section 504. See, 34 C.F.R. §§ 104.33 – 104.35.).

<sup>72</sup> 34 C.F.R. §§ 300.320-300.324.

<sup>73</sup> See, e.g., *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (in every case the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place).

<sup>74</sup> 34 C.F.R. § 300.320(a)(7).

<sup>75</sup> [Minn. Exec. Order No. 20-94](#) (Nov.5, 2020—June 30, 2021).

<sup>76</sup> See [Minnesota's Safe Learning Plan](#) for the 2020-21 School Year (updated Feb. 17, 2021); U.S. Department of Education, Office of Planning, Evaluation and Policy Development, [ED COVID-19 Handbook, Volume 1: Strategies for Safely Reopening Elementary and Secondary Schools](#) (Feb. 2021).

While IEP teams may consider a variety of sources of information in determining COVID-19 compensatory services, the sample questions below may assist IEP teams in determining whether and to what extent a student needs COVID-19 compensatory services:<sup>77</sup>

- What services did the student receive while the school district or charter school was operating in alternative learning models due to the COVID-19 pandemic?
- Were there services in the student’s IEP, IDLP, or CLP that the student did not receive, regardless of the cause, during the COVID-19 pandemic?
- How do the student’s current levels of academic and functional performance compare to the student’s levels of performance on all IEP annual goals prior to the mandatory school facility closures?
- To what extent has the student experienced a loss in skills—including academic, functional, or behavioral skills—while the school district or charter school was operating in alternative learning models due to the COVID-19 pandemic?
- What does data collected through progress monitoring, progress reports, report cards, classwork, and informal and formal assessments and screenings show about the student’s progress toward IEP annual goals and in the general education curriculum?
- Did the student make expected progress toward each of the student’s annual goals and in the general education curriculum?
- What did teachers, related services providers, parents, caregivers, and other family members observe about the student’s attendance, engagement, attention, behavior, progress, and home experience during the COVID-19 pandemic?
- Is the student receiving general education recovery support that will address the student’s loss of skills or lack of progress, or the impact on the student’s emotional well-being, caused by the suspension of in-person education and other circumstances that occurred concurrently with the COVID-19 pandemic, such as racial trauma or injustice, economic struggles, and other concerns?
- How are new disability-related needs, areas of regression, or social-emotional needs due to the impact of the COVID-19 pandemic addressed in the student’s current IEP?
- What information is available from previous school years about the student’s ability to recoup lost skills or make effective progress after extended breaks in instruction, such as following summer break?
- What would be the most appropriate and effective way to make up for lost skills and address gaps in the student’s knowledge or to accelerate the student’s progress in areas in which the student regressed or did not progress as expected?
- Are there other unique needs of the student or other sources of information to consider in determining the student’s need for COVID-19 compensatory services?

Not all students are entitled to COVID-19 compensatory services; whether, and to what extent, a student needs COVID-19 compensatory services is an individual determination made for each student with a disability whose IEP services were impacted by the COVID-19 pandemic.<sup>78</sup> If an IEP team decides not to provide COVID-19

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<sup>77</sup> See also Massachusetts Department of Elementary and Secondary Education, [Coronavirus \(COVID-19\) Special Education Technical Assistance Advisory 2021-1: COVID-19 Compensatory Services and Recovery Support for Students with IEPs](#) (last updated Sept. 3, 2020).

<sup>78</sup> See, e.g., OSERS, [Letter to Pergament](#) (Dec. 20, 2013) (stating that “the decision to provide ‘make up’ or compensatory education when there is a disruption in the provision of educational services, and the nature and amount of the special education and related services that are to be provided as compensatory education, is an individualized determination made by the [IEP] Team”).

compensatory services to a student with a disability and the parent believes that his or her child is entitled to those services, or if the parent disagrees with the type or amount of COVID-19 compensatory services proposed by the school district or charter school, the parent may pursue dispute resolution options provided under Part B of the IDEA and [Minnesota Statutes Section 125A.091](#), including requesting a conciliation conference, mediation, or facilitated team meeting or initiating a due process complaint or a special education state complaint.<sup>79</sup>

**Questions:** For questions related to the guidance, please contact MDE’s Assistance and Compliance, Dispute Resolution Team by emailing [mde.assistance-compliance@state.mn.us](mailto:mde.assistance-compliance@state.mn.us) or by calling 651-582-8689. For more guidance and information related to special education during the COVID-19 pandemic, please visit [MDE’s webpage](#).

**Questions:** For questions related to special education funding, please contact MDE’s School Finance Division, Special Education Funding, at [mde.spedfunding@state.mn.us](mailto:mde.spedfunding@state.mn.us).

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<sup>79</sup> 34. C.F.R. §§ 300.151 - 300.153 (state complaint procedures); 34 C.F.R. § 300.506 (mediation); 34 C.F.R. §§ 300.507 - 300.518 (due process complaints and hearings); [Minn. Stat. § 125A.091](#) (alternative dispute resolution and due process hearings).