

Compensatory Education Guidance

Don't let what you can't do stop you from doing what you can do.

-John Wooden

Do what you can, with what you have, where you are.

-Theodore Roosevelt

The New Hampshire 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 public school campuses.

This guidance also does not substitute for legal advice and LEAs are always encouraged to consult with their legal counsel when deciding how to proceed in a specific factual scenario.

Why is this being discussed?

- The USDOE introduced the concept of Compensatory Education in their March 2020 Q&A document as a result of school closures due to the COVID-19 pandemic
- Executive order #48 mandates a conversation at the IEP team level to make a determination
- Districts have asked for guidance

But, is it really Compensatory Education?

Compensatory Education is ordinarily provided as a result of an order (either through a hearing or through a finding of non-compliance) and there is no precedent for a pandemic in terms of what districts can expect in terms of hearings that may result from the denial of FAPE.

Therefore, to what extent districts may provide compensation in anticipation of, and to avoid, due process hearings is not clear.

- IDEA references Compensatory Education in the "Adoption of State Complaint Procedures" section of the regulations 34 CFR 300.151.
- NH Education Laws: RSA 186-C:5 "Program Approval, Monitoring, and Corrective Action" section states specifically that, when a district fails to comply with the orders in a written report of findings, the Commissioner of Education shall consider "Directives ordering specific corrective or remedial actions including compensatory education" (R A 186-C:5,V,(d)(4)).
- The NH Standards for the Education of Children with Disabilities does not address compensatory education.

Definition of Compensatory Education:

"Compensatory Education" is a term that is generally used to describe the equitable remedy for the denial of a student's right to a FAPE."

The Bureau strongly encourages districts attempting to determine when compensatory education is appropriate:

- Document district efforts to provide services to each student including:
 - Services that were and were not provided
 - The reason why the missed services did not occur.
- Seek the advice of their school district Counsel as necessary

Common Understandings around Services during Remote Instruction

- Not a deliberate failure to provide FAPE
- Not a court ordered remedy
- Teachers and related staff have been working hard to provide FAPE
- In some cases, in-person services were not feasible; we had no other options

Are LEAs required to make a determination of the need for compensatory education services?

YES, LEAs are required to provide equitable access to general education opportunities and continue to provide FAPE to students with disabilities to the maximum extent possible.

HOWEVER, it is acknowledged that, despite best intentions, efforts, and creative solutions, there are some students in which the LEA did not have the ability to provide a FAPE over the course of the remote learning.

THEREFORE LEAs will need to make individual determinations, for each student, as to whether compensatory education will be owed due to the LEAs failure or inability to provide a FAPE.

Do all students with IEPs require Compensatory Education?

NO. An individual determination must be made related to whether a FAPE was provided to the student and whether or not Compensatory Education are necessary to remedy the LEAs failure or inability to provide a FAPE.

Does an IEP meeting need to be held for each student to determine the need for Compensatory Education?

YES. According to the Governor's Emergency Order #48, IEP teams do need to meet to determine if a student requires compensatory education. Parental input should be solicited and considered when determining the need for compensatory education and how those services will be provided.

What must be done within 30 days of the start of school?

According to the emergency order:

- IEP teams must meet within 30 days of the start of school.
- IEP teams will need to make a determination regarding compensatory education for each student with a disability and an IEP.
- IEP teams may determine they do not have enough information to make a proposal for compensatory education.
 - If this is the case schools will need to develop a proposal as to when they will determine compensatory education needs. This proposal can be documented on a Written Prior Notice (WPN).

What Should the IEP Team Consider When Determining the Need for Compensatory Education?

- The need for compensatory education 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.
- An IEP team meeting is required to make a determination of the need for and the amount or delivery of compensatory education. 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 education 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 remote learning that would constitute a FAPE for that student.

For the amount of service delivery time that did not occur, are LEAs required to remedy the denial of FAPE on a "minute for minute" basis?

NO, Compensatory Education is not a contractual remedy, but an equitable remedy.

WHY? Decisions for delivery of compensatory education 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).

What Information Should the IEP Team Review to Make an Individualized Determination?

In making an individualized determination as to whether a student is owed Compensatory Education, the LEA 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 remote learning

- Regression in skills
- Progress or lack of progress made on IEP goals
- Parental input
- Input from service providers and teachers

Questions to Consider:

Each student's circumstances are unique. Here are some questions you may consider when determining Compensatory Education:

1. What services were provided to the student during remote learning?
2. What was the ability of the student to access the services provided?
3. Was there regression of skills related to IEP goals that is not typically seen with this student?
4. Was there progress or lack of expected progress on IEP goals?
5. Where does the student need to be in order to make progress once the student returns to the school campus?
6. What was the impact of remote learning on the student?
7. What was the level of engagement for the student?
8. What parent input do you have?

This is not an exhaustive list.

What Data Should IEP Teams Use to Determine Services?

- In determining whether a FAPE was provided during the time of remote learning, the best source of data may be **grading period progress reports** as this data is most likely to capture student performance during remote learning.
- If progress reporting is not available, nothing in this guidance would prohibit an LEA from **collecting data to assess the need for Compensatory Education during the summer break** if it was safe and feasible to do so.
- Data collected on a tracking sheet could be used.
- Student's grades could be considered.
- In any event, it is recommended that **IEP teams collect data and solicit parental input. LEAs must hold meetings no later than 30 days after students return to the school campus**, to determine the need for compensatory services.

What if a parent refused to produce the child for remote learning or the child was not in attendance for remote learning?

- As stated in previous guidance, it is recommended that LEAs record contact and communications with parents and students.
- LEAs needed to make every attempt to provide services that were accessible to students, through alternative or virtual formats.
- If a student and parent were not able to participate in one format, that does not necessarily mean they were unable to participate in different formats, therefore the district should use documentation to demonstrate their efforts for the provision of services.
- The NHDOE encourages the district to use caution when using remote learning attendance as a determining factor in the need for compensatory education.

What methods can be used to provide compensatory education services?

When- Compensatory education services may be provided during the regular school day, over school breaks, in intensive, targeted, individualized programs or by outside service providers.

Where- If Compensatory Education is to be provided during the school day, ***the student's least restrictive environment cannot be altered*** due to the provision of the compensatory education services.

How- Because the provision of compensatory education is an equitable remedy, LEAs are encouraged to be creative in designing a plan to deliver compensatory education that meet the needs of the individual student in remedying the failure or inability of the LEA to provide a FAPE.

What could compensatory education “look like”?

In cases where the decision is made for a district to provide compensatory education, examples of compensatory education have included:

- Compensatory Hours (session-for-session of a special education service)
- Training for school district personnel
- Reimbursement for past services

As there is no regulation that defines or addresses what a district must do to plan for the provision of compensatory education, the NHDOE cannot provide a specific statement as to when or how compensatory education should be planned for or provided by a district.

Schools have flexibility and can be creative and innovative in fashioning offers of compensatory education. Think outside the box.

Should LEAs provide ESY instead of compensatory education services?

NO- Compensatory education should not be confused with extended school year services (ESY).

Compensatory education services are- delivered when the LEA has failed or was unable to provide a FAPE to a student. In the current circumstances, the failure or inability to provide FAPE was due to remote learning related to the COVID-19 pandemic.

ESY decisions- IEP teams that convene for the purpose of an annual review or amendment to the IEP are reserved for ESY decisions.

Please refer to FY'18 memo #24 regarding ESY, as well as guidance on [NHlearnsRemotely.com](https://www.nhlearnsremotely.com) comparing ESY and Compensatory Services

Compensatory education services decisions- IEP teams that convene to determine compensatory education services is separate a purpose.

Can a Parent Refuse an Offer of Compensatory Education?

YES. A parent can refuse an offer of compensatory education. It is recommended that LEAs document the offer and parental input into the need for compensatory services, as well as the parent's refusal of the services offered. Written Prior Notice (WPN) may be used to document an offer of compensatory education services and the parent's refusal. If the parent refuses the offer, the LEA has met its obligation by making the compensatory services available. Teams should understand that the determination of compensatory education is ordinarily made by someone other than the district (i.e.: SEA or at a hearing). We do not have precedent for compensatory education as an offer to which parents are asked for consent.

What happens if a parent disagrees with the offer of compensatory education?

Parents retain their procedural safeguards in the event their child has been denied FAPE.

Parental rights under IDEA have not been waived.

Parents or Districts can request an IEP Facilitator from the Bureau.

It is recommended that an alternative dispute resolution process such as mediation (Ed 1122.01) be used to resolve disagreements related to the need for compensatory education services or the amount of compensatory education services offered.

Must an IEP team meeting be held once school resumes to determine compensatory education services or changes in the student's needs as a result of remote learning?

Per NH Emergency Order #48 “Each school district must ensure that they hold IEP team meetings for every student identified for special education services no later than 30 calendar days after the first day of the school district's 2020-2021 school year. At the meeting, the IEP team will consider what Compensatory Education Services, if any, are required to be provided to make up for services not provided during period of remote instruction and support, student regression, or student's failure to make expected progress as indicated in the student's IEP”.

Districts may also meet if the 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. Teams will need to determine if the current IEP requires revision to reflect the student's current needs.

This is not the same as, or a substitute for, Compensatory Education, nor will it be necessary in all cases.

What happens if an IEP team does not make individualized determinations of the need for compensatory education to the students it serves?

Parents retain their procedural safeguards and may, if their child is denied a FAPE, including the failure or inability of the LEA to provide a FAPE to the student during the time of extended remote learning seek redress through the dispute resolution process (Ed 1122.02) which includes:

- filing a complaint with the DOE; or
- filing a request for a due process hearing.

However, it is not advised the LEAs wait until a parent takes action through the dispute resolution process as this may further delay the provision of a FAPE and result in the need for additional compensatory education services.

What obligation does the LEA have to a student with a disability who was enrolled at the time of remote learning but:

- graduated or 'aged out' before students return to campus for the 2020/2021 school year?
- or has since withdrawn?
 - The provision of compensatory education is an equitable remedy that may be appropriate when an LEA either failed or was unable to provide an enrolled student with a disability a FAPE.
 - **It would fall on the LEA in which the student is enrolled at the time of the failure or inability to provide a FAPE to make a determination as to whether or not compensatory education needs to be provided to the student and to deliver those services as appropriate.**
 - LEAs are still responsible for these services even if the student turns 21.
 - School Districts have flexibility and can be creative in developing compensatory education proposals, and the unique needs of the student should be considered. However, **LEAs are encouraged to consult with legal counsel for advice related to specific factual circumstances.**

Resources:

[Memo re: ESY FY'18 #29](#)

[Governor's Emergency Order 48](#)

[Special Education Update re: ESY v. Compensatory Education](#)

[OSEP GUIDANCE](#)