



Presents

**KY-SPIN's Tuesday Tips Webinar:
Compensatory Education and Extended
School Year (ESY) COVID-19 Guidance &
other Updates
8/11/20**

KY-SPIN

(Special Parent Involvement Network)
Parent Training & Information (PTI)
Center

Funded by the U.S. Dept. of Education under IDEA since 1988 when Kentucky first received a PTI. KY-SPIN Parent Center provides training, information and support for children and youth with all types of disabilities (birth through 26 years old), their parents, families, and professionals.



We do NOT:
Act as Attorneys

We DO:



- ♥ Empower Families to Effectively Advocate for their Children
- ♥ Provide peer support to help families access needed information and resources
- ♥ Lend a listening ear

Together we can accomplish great things for our children!



None of us have all the answers, we are all working through this pandemic and adjusting as we go.

Gov. Beshear Provides Update on COVID-19 8/10/20

School Opening Guidance

Gov. Beshear and administration officials, in consultation with Kentucky teachers and school administrators, on Monday announced new guidance for schools that are planning for the fall semester.

“Our recommendation today is that schools wait to begin in-person classes until Sept. 28,” the Governor said. “Yes, that’s six weeks from now, but it’s also six weeks from what I hope is the peak of this virus, six weeks from the last three weeks where we have been at an all-time high week in and week out, six weeks from a time when we just had a 6% positivity rate. Let’s face it, we’re trying really hard and we’ve taken good steps. Masks are working. But we do not have control over this virus. And to send tens of thousands of our kids back into in-person classes when we don’t have control of this virus, it’s not the right thing to do for these kids, it’s not the right thing to do for their faculty and it’s not the right thing to do as Governor.”

He said the decision was driven by four factors: Kentucky’s cases being near a peak, an increase in infection rates among children across the U.S., the experience of school districts in other states and families continuing to travel to hotspots for vacations against the advice of health officials.

“I think what all of the health care specialists said when we talked about reopening, is we need to be looking at a decline. In other words, we need to get our positive rate down,” the Governor said. “On top of that, what we’re seeing are more outbreaks and more infections in kids. The two hardest things I do every day is read the deaths and the number of kids infected under 5. And it’s not just kids under 5. We’re having record numbers of children that are infected, and it shows this infection spreads to them when we still don’t know the long-term impact. What we do know is children have a harder time social distancing. And we can’t put a whole bunch of them in a classroom with a teacher right now. Other states that have tried to open this new school year are now having to close. We don’t want to start and stop. That may be more difficult on our children.”

Federal Laws: Individuals with Disabilities Education Act (IDEA), Section 504 and Title II of the ADA



& State Law Kentucky

Administrative Regulations (KAR)
laws/regulations, which includes
timelines they set in place, have
not changed, **but.....**

the laws did not address what to do
in a pandemic.

“...The IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease....”

U.S. Department of Education: [Questions and Answers on Providing Services to Children with Disabilities During the COVID-19 Outbreak](#) (March 12, 2020)

“...The Individuals with Disabilities Education Act (IDEA) does not specifically address a situation in which elementary and secondary schools are closed for an extended period due to exceptional circumstances, including a pandemic...” **Kentucky Department of Education (KDE)** [Non-Regulatory Guidance Regarding the Implementation of the Non-Traditional Instruction Program \(NTI\) for Students with Individual Education Programs \(IEPs\) During Novel Coronavirus Pandemic](#)



“....If a local school district elects to utilize Kentucky’s NTI program to provide educational opportunities to the general student population then the district must also ensure that students with disabilities have equal access to the same opportunities, including the provision of FAPE.

Districts must ensure that, to the greatest extent possible, each student is provided the special education and related services identified in the student’s IEP developed under IDEA.

If a student does not receive IEP services, the Admissions and Release Committee (ARC) must make an individual determination to decide whether the student requires compensatory education to make up for any skills that may have been lost because the student did not receive educational benefit.

If a district is unable to provide services to a student with a disability in accordance with the student’s IEP, the student’s ARC must determine which services can be provided to appropriately meet the student’s needs. The ARC may meet by teleconference or other means to determine if some, or all, of the identified services can be provided through alternate or additional methods. NTI days are considered instructional days and must be included for purposes of determining compliance with IDEA timeline requirements including those related to special education and outlined in 707 KAR 1:320 and 707 KAR 1:340....”

Kentucky Department of Education (KDE) [Non-Regulatory Guidance Regarding the Implementation of the Non-Traditional Instruction Program \(NTI\) for Students with Individual Education Programs \(IEPs\) During Novel Coronavirus Pandemic](#) {Please review additional non-regulatory guidance previously provided by US ED’s Office of Special Education Programs. [ED Non-Regulatory Guidance issued in 2018 & additional information](#)} (March 11, 2020)

If you answered

A. Is your child's school closed for all students, in which no students are any doing work?

“If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.....”

In Kentucky the State Educational Agency (SEA) is the Kentucky Department of Education (KDE). The LEA is the Local Educational Agency which is your local public school district.

U.S. Department of Education: [Questions and Answers on Providing Services to Children with Disabilities During the COVID-19 Outbreak](#) (March 12, 2020)

Non-Traditional Instruction (NTI) Program



“Dear Parents and Families of Students with Individual Education Programs (IEPs):.....

What will happen to my child’s services when a school is closed but educational services continue to be provided through the Non-Traditional Instruction (NTI) Program?

1. If a local school district elects to utilize Kentucky’s NTI Program to provide educational opportunities to the general student population, then the district also must ensure that students with disabilities have equal access to the same opportunities, including the provision of a Free Appropriate Public Education. Districts should be communicating with parents and guardians prior to, during and after NTI days regarding their child’s IEP services. Districts and schools will work to ensure that all students receive services to the most appropriate extent possible.
2. Although special education or related services may need to be adjusted, districts must provide IEP services during NTI days. Districts may provide IEP services through an alternative means, such as curriculum-based schoolwork packets, online learning or some other learning adapted to the student’s needs and location.
3. ARCs are responsible for reviewing how the closure impacted the delivery of special education and related services to students with IEPs. Each student’s ARC must make an individual determination to decide whether the student requires compensatory education to make up for any skills that may have been lost because the student did not receive educational benefit due to missed IEP services.
4. If annual IEP reviews or eligibility reviews are due during NTI days, please work closely with your school to meet as soon as school is back in session or through alternate means, such as video or audio conference calls.....

Kentucky Department of Education ([KDE’s OSEEL Letter to Parents of Students with IEPs During COVID-19](#)) (Reference in the letter: [OSEP Letter to Pergament, December 2013](#)) (March 17, 2020)

Coronavirus Aid, Relief and Economic Security (CARES) Act

Two parts of it provides funds to helps schools:

1. Governor's Emergency Education Relief (GEER) Fund
2. Elementary and Secondary School Emergency Relief (ESSER) Fund

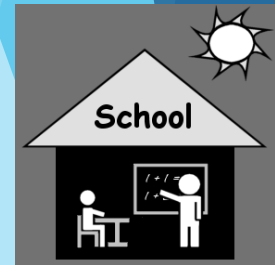


KDE releases guidance on GEER Fund to aid remote learning, food service Press

Considerations for Special Education

LEAs must ensure students with disabilities continue to receive a free, appropriate public education (FAPE) during remote learning. One way of ensuring Individual Education Programs (IEPs) are implemented during school closures, such as during the COVID-19 pandemic, is through the development of contingency plans. Admission and Release Committees (ARCs) must develop each child's contingency plan as part of the IEP. The GEER Fund may be used to support the implementation of IEPs, including contingency plans, in the following ways:

- Providing specially designed instruction;
- Providing supplemental aids and services;
- Reimbursing travel costs incurred by employees when providing services to students with IEPs;
- Distributing necessary materials to facilitate remote learning;
- Providing interpreting services;
- Expanding access to mental health services as determined by the ARC;
- Facilitating summer learning programs as specified in the IEP or contingency plan;
- Establishing or expanding access to lending libraries of materials or assistive technology;
- Providing access to technology that enables students with IEPs to access the general curriculum; and
- Providing any services or supports included in the IEP.



KY Dept of Education: [KDE releases guidance on GEER Fund to aid remote learning, food service](#) May 12, 2020 Press Release

Guidance Document: [COVID-19 Governors Emergency Education Relief Fund Guidance for LEAs May 11, 2020](#)

GEER funds also may be used for the additional costs of providing compensatory education services to students who failed to receive a FAPE during remote learning that occurred as a result of the COVID-19 pandemic. The amount and type of compensatory education required for each student must be determined by the student's ARC.

Additionally, LEAs may use GEER Funds to purchase assistive technology to ensure students with disabilities are able to access the curriculum during periods of remote learning. Assistive technology is defined by 707 KAR 1:002, Section 1 (3) as: “any item, piece of equipment, or product system, whether acquired commercially, off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not mean a medical device that is surgically implanted, or the replacement of such a device.”

Assistive technology can include both high-tech and low-tech tools. Some examples of assistive technology include, but are not limited to:

- Computer software and hardware, such as voice recognition programs, screen readers and screen enlargement applications to help people with mobility and sensory impairments use computers and mobile devices;
- Adaptive switches and utensils to allow those with limited motor skills to eat, play games and accomplish other activities;
- Tools such as automatic page turners, book holders and adapted pencil grips to help students with disabilities participate in educational activities; and
- Communication devices and programs to help students with limited language skills communicate.

For more information about how to access and appropriately use assistive technology, LEAs may wish to review this [National Institute of Health's article on assistive devices](#) or [this resource page provided by the national nonprofit Understood](#).

KY Dept of Education:

[KDE releases guidance on GEER Fund to aid remote learning, food service](#)

May 12, 2020 Press Release

Guidance Document: [COVID-19 Governors Emergency Education Relief Fund Guidance for LEAs May 11, 2020](#)

KDE COVID-19 Elementary and Secondary School Emergency Relief (ESSER) Fund Guidance for LEAs” Guidance

Special Education

LEAs must ensure that students with disabilities have equal access to the same opportunities as students without disabilities, including the provision of a free, appropriate public education (FAPE). LEAs must continue to ensure each student is provided the special education and related services identified in the student’s Individual Education Program (IEP) developed under the IDEA.

LEAs may use ESSER Funds to implement special education and related services to educate students with Individual Education Programs (IEPs) during periods of remote learning. As stated previously in this guidance, LEAs must continue to maintain local or state and local funds previously spent to provide special education and related services to meet the IDEA’s maintenance of effort requirements.



ESSER Fund:

Compensatory Education

The OSEEL advises LEAs to consider reserving a portion of the ESSER Fund to pay the cost of providing compensatory education services to students with disabilities.

Under IDEA, compensatory education services are necessary whenever a LEA is unable to provide a free appropriate public education (FAPE) to a student with a disability as described in the IEP. Compensatory education services are those special education and related services to which the child is entitled under the FAPE provisions of the IDEA that the LEA failed to provide. The purpose of compensatory education is not to punish LEAs for denying the student FAPE, rather, the goal is to place the student in the position he or she would be in had the LEA provided the appropriate services as prescribed in the IEP.

During extended periods of remote learning, a student with a disability may not be able to receive full implementation of the services specified in the IEP. ARC's must review the status of services on a case-by-case basis and make individualized determinations whether, and to what extent, compensatory education services are needed. The ARC should consider if the student received all IEP services during distance instruction through the COVID-19 pandemic, discuss whether a denial of a FAPE has occurred and whether compensatory education services are necessary.



ESSER Fund:

All the information needed to make this determination likely will not be known until in-person classes resume. Thus, the most appropriate time for the ARC to decide on compensatory education services for the student may be when schools return to normal operations. However, LEAs should continue ongoing communications with parents regarding the implementation of the IEP. Virtual ARC meetings should be occurring during periods of remote learning.

The OSEEL encourages LEAs to consider the use of ESSER Funds to provide compensatory education services that are needed as a result of impact of the COVID-19 pandemic. However, the LEA should make sure that it is continuing to spend from local or state and local funds to provide special education and related services, an amount necessary to meet the maintenance of effort (MOE) requirements of the IDEA, before it supplants those funds with ESSER Funds. While using the ESSER Fund will not increase the LEA's amount of local or state and local funds it needs to maintain in future years, if ESSER funds supplant local or state and local funds, it could result in the LEA failing to meet the MOE requirements of the IDEA.

In planning for the use of ESSER Funds, the OSEEL cautions LEAs to be aware of the potential impact of not spending the amount necessary to meet the IDEA's MOE requirements from local or state and local funds to provide special education and related services to children with disabilities.



Kentucky Department of Education (KDE):
[KDE releases new COVID-19 reopening guidance documents on exceptional learners, compensatory education, daily participation for NTI](#)
7/20/20 Press Release

The Kentucky Department of Education (KDE) released three new COVID-19 reopening guidance documents on July 20 on special education and preschool students, compensatory education and student participation for non-traditional instruction (NTI).

Our focus today is [KDE 7-20-20 COVID Guidance Compensatory Education and Extended School Year Services](#)



KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20

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.

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.



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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 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.



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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 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.*

...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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 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.



...Continued KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20



COVID-19 Considerations for Reopening Schools
July 20, 2020

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

SERVICES



...Continued KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20



COVID-19 Considerations for Reopening Schools

July 20, 2020

Question	Compensatory Education Services	Extended School Year (ESY) Services
When is a student eligible for services?	<p>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:</p> <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 	<p>ESY services are:</p> <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."

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.

Remember!!!

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.

Remember

Questions and Answers



Q&A: Compensatory Education

Question A-1

What definition should we use for compensatory education services resulting from COVID19?

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.

...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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 Deal4 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 Endrew5 . 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 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.



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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.



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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?

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)



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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.

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.



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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.



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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.



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KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20

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



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

Question B-3

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

Answer B-3

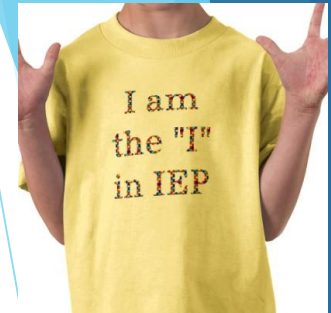
No. Each student's ARC determines whether the individual student needs ESY services based on individualized data. The ARC must analyze the student's tendency to regress, prior regression, ability to recoup lost skills, and progress toward educational goals. If the ARC determines a student needs ESY,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



...Continued [KDE COVID Guidance Compensatory Education and Extended School Year Services 7-20-20](#)

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

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.



See additional Q&A in Guidance

KDE Reopening Considerations for Exceptional Learners and Preschool Students 7-20-20 **Least Restrictive Environment**

Local school districts are planning for a variety of instructional delivery models for the 2020- 2021 school year, including traditional in-person instruction, periods of complete virtual learning through non-traditional instruction (NTI) and days of blended in-person and remote delivery. Regardless of the district's chosen delivery model, schools should be cognizant of the effects social distancing may have on a student's Least Restrictive Environment (LRE). In a small number of cases, long-term remote instruction may have caused a need for the student's LRE to be reviewed by the ARC. Some students may need a more restrictive environment upon their return. Other students may have done well during remote instruction and will need a less restrictive environment upon their return.

Practices such as placing all students with disabilities in the same classroom in response to the pandemic may result in a denial of a FAPE. According to [707 KAR 1:350, Section 1](#), which outlines the requirements for placement decisions, the district shall ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. A child with a disability shall not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. Placement decisions must be made by the ARC and based on the individual needs of students.

It is important to note, an ARC may not be required to determine a change in placement if the district is practicing non-traditional instruction. Because the instructional setting of the regular classroom becomes remote, the extent to which a student participates in the regular education environment does not change. Therefore, it would be considered a change of location, not a change of placement.



...Continued

KDE Reopening Considerations for Exceptional Learners and Preschool Students 7-20-20



Question 8

Should ARCs develop a contingency plan?

Answer 8

During this unprecedented time, it may be impossible to predict when and if schools may need to close again to in-person instruction due to a COVID-19 outbreak. ARCs may choose to develop contingency plans to address students' needs during NTI. According to the U.S. Department of Education's ["Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak,"](#) ARCs may include distance learning plans in a student's IEP that could be implemented during a closure due to COVID-19. In this case the contingency plan may include information regarding the provision of special education and related services through an alternate location or through alternate means.

Developing a contingency plan provides an opportunity for staff and parents to clearly communicate the expectations for NTI and to document how special education and related services will be provided during these unique circumstances. Establishing a contingency plan early minimizes questions that may arise regarding how to implement a student's IEP if changes occur and schools quickly transition to NTI.

Overview Maximum class sizes established in statute, [KRS 157.360](#), apply equally to in-person classes and virtual classes. The latest [research](#) on appropriate class sizes for virtual programs and courses primarily targets postsecondary; however, the recommendations are clear and should be considered applicable to K-12 education as well. Specifically, current research suggests a targeted enrollment, where feasible, of 15-20 students per virtual course. The research also suggests that the lower the virtual course enrollment, the more quality interactions and engagement reported by both teachers and students.

Although not legally mandated, KDE strongly recommends keeping enrollment in virtual classrooms the same as or less than enrollment in in-person settings considering the above-cited research. Additionally, when considering how to best staff virtual courses to produce highly effective digital instructional strategies, the familiarity and professional learning needed for staff to be most successful should be considered.

Special Education Class Sizes

[707 KAR 1:350](#) sets the requirements for placement decisions for students who have Individual Education Programs (IEPs). Regardless of whether an SBDM governs the school, the district must provide special education for each child with a disability in accordance with the maximum caseloads for special classes as specified in Section 2.

When special education teachers are operating outside of State requirements for certain types of circumstance, including class size requirements set forth under 707 KAR 1:350, districts must request a waiver. Additional information about the special education waiver process may be found [here](#). Questions may be directed to [Stacy Liguori](#) in the Office of Special Education and Early Learning.

Resources

- ▶ Kentucky Department of Education (KDE) [Non-Regulatory Guidance Regarding the Implementation of the Non-Traditional Instruction Program \(NTI\) for Students with Individual Education Programs \(IEPs\) During Novel Coronavirus Pandemic](#) (Please review additional non-regulatory guidance previously provided by US ED's Office of Special Education Programs. [ED Non-Regulatory Guidance issued in 2018](#) & [Additional information](#)) (March 11, 2020)
- ▶ U.S. Department of Education: [Questions and Answers on Providing Services to Children with Disabilities During the COVID-19 Outbreak](#) (March 12, 2020)
- ▶ U.S. Department of Education: [Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students](#) (March 16, 2020)
- ▶ U.S. Department of Education: [OCR Short Webinar on Online Education and Website Accessibility Webinar \(Length: 00:07:08\)](#) (March 16, 2020)
- ▶ Kentucky Department of Education: [KDE's OSEEL Letter to Parents of Students with IEPs During COVID-19](#) (Reference in the letter: [OSEP Letter to Pergament, December 2013](#)) (March 17, 2020)
- ▶ US Department of Education: [Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities](#) (March 21, 2020)
- ▶ KDE [COVID-19 Governors Emergency Education Relief Fund Guidance for LEAs May 11, 2020](#)
- ▶ KDE [COVID-19 Considerations for Reopening Schools \(KDE\) 5-15-20](#)
- ▶ [KDE COVID-19 Elementary and Secondary School Emergency Relief Fund Guidance for LEAs 5-18-20](#)
- ▶ KDE "[COVID-19 Considerations for Reopening Schools Supporting Student and Staff Wellness](#)" – addresses planning considerations for the social and emotional well-being of students and staff during the transition when schools reopen.
- ▶ [KDE COVID-19 Considerations for Reopening Schools Evaluating Students' Academic Readiness 6-1-20](#)
- ▶ [KDE COVID-19 Considerations for Reopening Schools Academic Re-entry, Stage One: Drafting an Adjusted Curriculum 6-1-20](#)
- ▶ KY Dept of Education: [KDE releases guidance on alternative learning strategies for reopening schools](#) Press Release 6/8/20 Document: [COVID-19 Considerations for Reopening Schools: Alternative Learning Design Strategies 6/8/20](#)
- ▶ KY Dept of Education: [KDE issues guidance on how to facilitate conversations about race-based stress and trauma](#) Press Release 6/3/20 Document: [KDE Guidance on How Districts Can Facilitate Conversations About Race-based Stress and Trauma 6/3/20](#)
- ▶ [KDE's Commissioner's Parent Advisory Committee provides insight on reopening schools](#) Press Release 6/12/20

....Continued Resources

- **KY Dept of Education:** [KDE releases COVID-19 guidance on class size, libraries](#) Press Release 8/10/20
Guidance Document [KDE: COVID-19 Considerations for Reopening Schools: Class Sizes in Virtual Programs and Courses](#) 8/10/20
- **KY Dept of Education:** [KDE releases COVID-19 reopening guidance on assigning staff in instructional settings](#) 7/28/20
Press Release - Guidance Document: [KDE COVID-19 Considerations for Reopening Schools Flexibility for Assigning Staff in the COVID-19 Instructional Setting 7-24-20](#)
- **KY Dept of Education:** [KDE virtual town hall answers Kentucky teachers' questions about reopening](#) 7/23/20 Press Release - Teachers and staff submitted more than 250 questions in advance, and panelists answered as many as they could that concerned state-level decisions and policy. Questions they ran out of time for (and that are related to state-level decisions and policy) will be answered online on KDE's [COVID-19 FAQ Spreadsheet](#)
- **KY Dept of Education:** [KDE releases new COVID-19 reopening guidance documents on exceptional learners, compensatory education, daily participation for NTI](#) 7/20/20 Press Release
Guidance Documents:
 - ▶ [KDE Reopening Considerations for Exceptional Learners and Preschool Students 7-20-20](#)
 - ▶ [KDE Participation Guidance: Daily Participation and Non-Traditional Instruction 7-20-20](#)
 - ▶ [KDE 7-20-20 COVID Guidance Compensatory Education and Extended School Year Services](#)
- ▶ **KY Dept of Education:** [KDE releases guidance on gauging COVID-19 learning gaps](#) 7/13/20 Press Release
Guidance Document [KDE Academic Re-entry, Stage Two Meeting Learners' Academic Needs 7-13-20](#)
- ▶ **OSEP COVID-19 Questions & Answers: Implementation of IDEA Part B and Part C Procedural Safeguards** 6/30/20 OSEP Press Release **Guidance Documents:** [IDEA Part B Procedural Safeguards June 30, 2020](#) & [IDEA Part C Procedural Safeguards June 30, 2020](#)
- ▶ **OSEP COVID-19 Questions & Answers: Implementation of IDEA Parts B and C Dispute Resolution Procedures** 6/22/20 (Part B is 3-21 & Part C is Birth-3 years old): [OSEP COVID-19 Questions & Answers: Implementation of IDEA Parts B Dispute Resolution Procedures 6-22-20](#) & [OSEP COVID-19 Questions & Answers: Implementation of IDEA Parts C Dispute Resolution Procedures 6-22-20](#)



Other COVID Updates

An Update from Kentucky Medicaid's 1915(c) Home and Community Based Services Waiver Programs



This notice (8/10/20) applies to the Participant-Directed Services (PDS) program in the following 1915(c) Home and Community Based Services (HCBS) waivers:

- ▶ Home and Community Based (HCB) waiver
- ▶ Supports for Community Living (SCL) waiver

Due to confusion over the process during the COVID-19 state of emergency, the Department for Aging and Independent Living (DAIL) is suspending all family member exemption (FME) reviews until the state of emergency ends. Please do not submit FMEs to DAIL for review unless otherwise notified. If you are currently waiting on a review submitted previously, DAIL is disregarding the request and you should follow the directions below.

Any immediate family member wishing to provide PDS services due to provider gaps or other issues related to COVID-19 may still be added to the participant's plan by using the [PDS Immediate Family Member Request Approval Letter](#). The process below is in effect until the state of emergency is lifted, for which at least 48-hours of advanced notice will be given.

- ▶ If an immediate family member wishes to provide services, please initiate all required pre-employment and background check paperwork and simultaneously have the individual begin working as soon as possible. Submit the required background checks and any pre-employment requirements that can be fulfilled. For requirements that cannot be fulfilled, please enter a case note indicating that due to COVID-19, it is not possible to complete that requirement (i.e. First Aid and CPR classes, TB Skin Tests.)

An Update from Kentucky Medicaid's 1915(c) Home and
Community Based Services Waiver Programs



- ▶ If the background check information comes back with a result of substantiation or conviction of past abuse, neglect, exploitation, and/or a violent felony (in accordance with regulation language), the individual must immediately cease working and another employee must be found. KARES is not currently performing fingerprinting. If you have someone who has previously resided out-of-state, you will need to have the state check completed that is equivalent for our Administrative Office of the Courts (AOC) check in the state where they resided.
- ▶ Complete all other requirements as they are able to be completed.
- ▶ If this is to alleviate a situation due to COVID-19, there will be no need to submit an FME. If, after COVID-19 is resolved, the individual wishes to remain a PDS Employee, the FME process will then need to be completed.
- ▶ Submit the form letter below for Immediate Family Members who will be providing services temporarily during the emergency period and upload in the Medicaid Waiver Management Application (MWMA). You will continue to enter the relationship as Immediate Family Member and upload the form letter until the emergency is over.

[Immediate Family Member Request Approval Letter](#)

DAIL has already made a modification to the DAIL Monthly Report to track the added employees. Please continue utilizing the modified report.

If you have questions about this process, please contact DAIL at (502) 564-6930.

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Department for Aging and Independent Living (DAIL) & the Kentucky Transportation Department are partnering to assist individuals with disabilities obtain transportation services for COVID testing appointments. Individuals with disabilities who need this service can contact the Aging and Disability Resource Center (ADRC) at 877-925-0037 to learn more about how to access this service.



DAIL Commissioner Victoria Elridge has posted a video to YouTube that can be accessed [here](#).

This service will cover individuals who may not qualify for Medicaid to get the transportation they need to local, free, drive-thru testing sites.

“KY-SPIN’s Tuesday Tips” webinars
will be every Tuesday at 11:00 am. (EST)
They will include latest information and guidance.
Topics will vary...

Join us every Thursday for additional webinars on a
variety of topics!

For most up-to-date information/resources for
individuals with disabilities, their families and
professionals during COVID-19,
please visit our [webpage](#)

We also will have our [KY-SPIN eNews](#) that goes out on
a regular basis to our listserv.



Questions??



Questions are the path to learning



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Please complete our evaluation at the end of
the webinar.

Thank you!