

ATTACHMENT A: Detailed Recommendations to Support Children with Disabilities

Recommendation No. 1: Take affirmative steps to provide compensatory education for all students with disabilities (with IEPs and IFSPs)

Because many Individualized Education Program (IEP)/Individualized Family Service Plan (IFSP) services were unavailable, difficult to provide, or of a lesser quality¹ during distance learning in the spring, NYSED must make affirmative efforts to protect the rights of these children to compensatory services and to make up for these losses.

Under federal law, children with disabilities are eligible for compensatory services to make up for any failures to provide an appropriate education. But, the burden falls to the parent to demonstrate regression or lost skills – which not only takes time, but also presents a significant barrier for many parents who are already stressed, who rely on schools for necessary data, may have language barriers, and who are not experts on the IEP/IFSP system. Continuing such an approach creates costs and delays, and often results in unnecessary conflict between the district and families.

In order to prevent this harm, we recommend that state officials take the following actions:

1. Direct school districts to offer compensatory services to all children with disabilities, including those children whose districts did not provide distance learning opportunities to any students at any point during COVID-related school closures. These compensatory services should be:
 - a. Automatic for any parent who opts in for their child. Parents should not have to file a complaint and prove denial of educational progress. This denial should be presumed.
 - b. Extended into a second year, should one year of services be insufficient.
 - c. Extended past age 21 if the student needs it—as already recognized in recent guidance issued by NYSED’s Office of Special Education.²
 - d. Provided at flexible times—during the regular school day, before or after school, over the summer, and during holiday breaks.³

¹ Special day class programs and center-based programs were unavailable; physical or occupational therapy were difficult to provide; social skills programs were of a lesser quality.

² See NYSED Office of Special Education, Supplement #2 – Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State: Questions and Answers June 20, 2020, 5, <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf> (“a student’s attainment of age 21 or graduation with a regular high school diploma (i.e., local or Regents diploma) does not affect his/her right to compensatory education.”). In New York, children are eligible for special education and related services under the IDEA from age 3 to the end of the school year in which the student turns age 21. 8 NYCRR § 200.1(zz).

³ Some parents may want a full range of options for their students to receive compensatory services while others may prefer to have services delivered during the regular school day.

2. Require school districts and regional centers to develop uniform assessment procedures to determine the type and extent of compensatory services to which disabled students are entitled, including:
 - a. A structured interview with parents and teachers within 30 days of school reopening to determine the extent of regression. The interview questions for parents should be in plain language and should be sent to the parent ahead of time, together with the contact information for each parent’s local Parent Training and Information Center (“PTI”).
 - b. A review of the child’s current level of performance within 30 days of school reopening, using a variety of assessment tools to gather relevant functional, developmental, and academic information about the child. Such tools include: parent and teacher input; brief observation of the student; and measuring of each child’s progress toward their IEP goals (with comparison to their progress prior to the start of distance learning, and their anticipated progress had there been no distance learning).
 - c. For children who demonstrate significant regression, a full re-evaluation in all areas of eligibility.
3. Encourage school districts to begin providing compensatory services that need to be provided in person as soon as it is safe to do so, even if school buildings have not fully reopened. Necessary compensatory services should be prioritized in terms of services that will be provided in person, and only with the agreement of the student and their parents.

Recommendation No. 2: Ensure continued access to special education and related services during school breaks and next summer (Extended School Year) for all students with disabilities (with IEPs and IFSPs)

Because IEP/IFSP services have been unavailable or sharply diminished during the pandemic, NYSED must take affirmative steps to prevent further regression by ensuring access to special education and related services during school breaks and next summer.

Students are entitled to these Extended School Year (ESY) services under federal law if necessary for their receipt of an appropriate education.⁴ ESY services differ from compensatory education services as IEP teams must implement ESY services outside of the school day or school year to prevent likely regression that students would experience when school is out of session. This is in contrast to compensatory education services, which are typically provided after the district has failed in its obligation to appropriately educate a child with an IEP. Where there is a dispute with the school district with regard to ESY services, the need to demonstrate necessity places a significant burden upon the parent, takes time, and requires parents to undertake legal action, causing further delays.

⁴ 34 C.F.R. § 300.106.

In order to prevent this unnecessary harm, we recommend that NYSED take the following action:

1. Direct school districts to offer ESY services to all children with disabilities, including those children whose districts did not provide distance learning opportunities to any students.
 - a. Any parent who opts in should be entitled to ESY services.
 - b. The number of minutes and the services that will be provided may be reached through an individualized fact-specific determination similar to the assessment plan in Recommendation No. 1, element 2.

Recommendation No. 3: Suspend expulsion and suspension policies and implement mechanisms to support reintegration of students with behavioral, emotional, and mental health disabilities.

All students, especially students with disabilities, will struggle to return to the educational environment. Students with behavioral and mental health issues will struggle with this transition and students previously without such issues may develop them. Attending school with the stress of social distancing protocols and the fear of COVID-19 will likely further exacerbate behavior and mental health struggles. In order to smooth this transition for all students, including students with disabilities, we recommend that state officials take the following action:

1. Permanently withdraw all suspensions pending at the time remote instruction began. There is no value in having students return to school this fall serving a suspension, only extended harm.
2. Impose a moratorium on new suspensions during the 2020-2021 school year, except where inconsistent with Section 4141 of the Gun Free Schools Act. While schools work to minimize chronic absenteeism, it is equally important that policies and procedures focus on the academic consequences of lost instructional time due to exclusionary discipline.
3. Suspend districts' ability to discipline students during virtual instruction by excluding students from virtual instruction or prohibiting students from participating in class discussion, logging on to lectures, and participating in group projects.
4. Direct school districts to hold Committee on Preschool Special Education (CPSE) and Committee on Special Education (CSE) meetings and offer special education assessments and behavior intervention plans (BIPs) for students without IEPs and 504 plans who exhibit aggressive behaviors.
5. Direct school districts to develop and utilize evidence-based approaches in lieu of suspensions and expulsions, such as restorative justice, positive behavioral interventions and supports (PBIS), evidence-based therapy modalities, Dialectical Behavior Therapy, Trauma-Focused Cognitive Behavior Therapy, trauma-sensitive plans for students, and mindfulness.

6. Suspend districts' ability to place students with disabilities into interim alternative educational settings (IAES) for the 2020-2021 school year.
7. Direct districts to conduct assessments and provide appropriate services and supports for children with behavior difficulties and mental health issues who need extra support to transition back to school.
 - a. Such assessments should be conducted at least twice—once before the district reopens, to develop a plan for reintroducing the student to the educational environment, and again 30 days after school has started to address ongoing behavior and mental health struggles.
 - b. The assessment prior to reopening should include a structured interview with parents similar to that described in Recommendation No.1, element 2, and a review of the student's Behavior Intervention Plan ("BIP"). The assessment should consider and implement additional behavior services and mental health services and supports, including additional counseling. The interview questions for parents should be in plain language, in a language the parent understands, and should be sent to the parent ahead of time, together with the BIP.
 - c. The assessment following reopening and reintegration of the student into the school environment should determine additional supports and services students need to address ongoing problem behaviors and mental health struggles. The district should use a variety of assessment tools to gather relevant functional, developmental, and academic information about the child, including: parent and teacher input, brief observation of the student, and other informal measurements to develop present levels of performance.
 - d. Where behaviors and mental health struggles are severe, the district should conduct a Functional Behavioral Assessment and/or Educationally Related Mental Health Services assessment.

Recommendation No. 4: Require districts to temporarily set aside age eligibility limits in continuing to provide special education services to all children with disabilities⁵, and to continue their obligation to locate, identify, and serve students with disabilities.

During the State's distance learning period, some children with disabilities have aged out of eligibility for special education services provided under the IDEA. In New York State, districts must provide services under Part B of the IDEA to students through the academic year when students turn 21. But pandemic-related school closures during the spring prevented students who

⁵ We appreciate that NYSED issued a guidance letter in June 2020 encouraging school districts to allow students who aged out of school to continue to attend school during the 2020-21 school year. However, we encourage NYSED to explicitly require and authorize districts to provide special education services to these students. June 18, 2020 Letter from John L. D'Agati on *Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic*, <http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-memo-over-age-students.pdf>.

aged out of Part B services this past year from meeting their IEP goals and/or gaining critical life skills necessary for independent living.

Part C of the IDEA provides services for children with disabilities from birth until age 3. The IDEA requires districts to ensure that all of the children enrolled in Part C and eligible for Part B have Part B services in place by each child's third birthday. Because of the State's quarantine orders, districts may not have conducted initial evaluations by the child's third birthday to determine Part B eligibility and develop a transition plan. Districts may have also not conducted activities required to comply with Child Find obligations.

In order to ensure uninterrupted services for eligible children with disabilities and to ensure that these students have the tools they need to successfully transition out of schools, we recommend that state officials take the following additional actions:

1. Extend for 6 months the IDEA Part B eligibility of students who age out this academic year to ensure that they are able to meet their IEP goals.
2. Require districts to work as quickly as possible to provide services to students who received early intervention services under Part C of the IDEA, but who aged out of these services during state and county shelter in place orders.
 - a. Presume eligibility for Part B services for these students until the district can conduct a comprehensive in-person assessment when in-person instruction resumes.
 - b. In determining which services to provide these students, districts should conduct a preliminary assessment of the student's needs using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent and the student's regional center.
3. Emphasize that districts must still abide by their Child Find duty to locate, identify and provide services to children who may be disabled and may need special education and related services, including children who did not previously receive services under Part C of the IDEA.⁶
 - a. In complying with Child Find, districts must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child during the shelter in place orders, including information provided by the parent, virtual observation sessions, and social distance friendly home visits.

⁶ We applaud that NYSED has already included this important concern in its reopening guidance and we reiterate it here. See NYSED, *Recovering, Rebuilding, and Renewing: The Spirit of New York's Schools*, 115, <http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf>.

- b. Once educational services are allowed to continue in person, parents must have the option of either requesting an independent educational evaluation or allowing the district to reassess students to gain more accurate information about students' needs.

Recommendation No. 5: Toll and extend administrative statute of limitations for special education complaints.

Even if New York State has implemented best educational practices, students have experienced disruptions or barriers to their education, including access to special education services. One of the most cost-effective and powerful tools that parents of children with disabilities have to protect their children's rights is a due process complaint. Although administrative due process cases and mediations may still be occurring, there are many reasons why a parent may choose not to seek these dispute resolution options during the pandemic, including their inability to access records in a timely manner, their inability to gain appropriate assessments requiring face-to-face testing, the general unavailability of witnesses, or the demands on parents of child care and distance learning during the pandemic.

While the IDEA sets default limitations periods for due process complaints and court complaints, states are permitted to change them.⁷ Specifically, we urge you to suspend all timelines for filing a special education complaint and toll the statute of limitations for such actions for the duration of the pandemic.

Recommendation No. 6: Protect all students by implementing rigorous safety and hygiene protocols for in-person instruction.

While many families may prefer distance learning during the pandemic, there are students who need to return to school in order to learn effectively. They may come from families who are unable to provide home instruction due to work obligations, language barriers, educational experience, disability, daycare expenses, or family care duties. During distance learning, students with disabilities have exhibited academic and behavioral regression and the need for more guided instruction, 1:1 aides, para-educators, more attentive case managers, routine and structure to access learning, socialization, and better technology.

To ensure the continued safety of students who elect to return to in-person learning, we recommend that state officials implement the following safety and hygiene protocols and practices at schools to prevent the spread of COVID-19:

1. Provision of separate supplies to each student with no shared supplies;
2. Regular testing of staff;
3. Limiting staff interactions to a core group of students;
4. Adequate staffing of nurses at every school site; and
5. Clear guidance for situations where students with disabilities cannot tolerate wearing a mask.

⁷ For example, California has adopted two years and 90 days, respectively.

Recommendation No. 7: Ensure effective virtual participation for students remaining in distance learning if in-person instruction resumes.

As districts restart in-person instruction—either on a full-time basis or as a blended option—there are families who will choose to have their children remain home. Some students may be immunocompromised, and medically vulnerable parents may fear contracting COVID-19 from their children, especially if there are concerns about the district’s ability to enforce social distancing and other safety protocols. To accommodate the needs of families and students who choose fully remote learning, we recommend that state officials:

1. Require school districts that offer in-person learning to maintain, refine, and incorporate distance learning policies and practices that enable students to virtually participate to the fullest extent possible in instruction and extracurricular activities.
2. Ensure that if before- and after-school program are resumed, they are accessible to all students, regardless of which educational option they participate in.