

# Guidance to Address Foregone Learning for Students with IEPs as a Result of the COVID-19 Pandemic

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Michigan Department of Education Office of Special Education



## Table of Contents

Introduction: .....	3
Foregone Learning for All: .....	5
District Considerations: Recovery Services for Students with IEPs: .....	5
Feedback: .....	12



## Guidance to Address Foregone Learning for Students with IEPs as a Result of the COVID-19 Pandemic

### **Introduction:**

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On March 11, 2020, Governor Whitmer issued a public health emergency ordering the temporary closure of all school buildings for in-person pupil instruction and extracurricular activities, beginning March 16, 2020. Subsequent executive orders specified the conditions under which the 2019-2020 school year would be completed. During the school building closure, due to the COVID-19 pandemic, Michigan Department of Education (MDE) encouraged intermediate school districts (ISDs) and member districts to provide options for learning at a distance in order to ensure students continue to make educational progress. Additional guidance provided by MDE Office of Special Education (OSE), issued April 10, 2020, encouraged districts to develop contingency learning plans in accordance with each student's current or most recent Individualized Education Program (IEP).

Districts are not obligated to follow the guidance contained in this document. MDE OSE believes this guidance to be a proactive approach to better serve children and families, and in addition potentially mitigate the need for remedies under the *Individuals with Disabilities Education Act (IDEA)*.

MDE recognizes the significant effort districts have made in following their continuity of learning plans during this time, and the variety of approaches they have taken to support their students' educational needs. MDE also recognizes some specially designed instruction, related services, and supplementary aids and supports may not have been provided and may have resulted in a regression of skills or affected the student's ability to make progress in the general curriculum. Therefore, in some cases, students with IEPs may benefit from recovery services due to the COVID-19 pandemic. Throughout this document, the MDE OSE will refer to recovery services due to COVID-19 pandemic as "recovery services."

Recovery services are not a mandatory requirement nor are they a remedy identified under IDEA or the Michigan Administrative Rules for Special Education (MARSE). Recovery services are supplemental to the offer of Free Appropriate Public Education (FAPE) and are in response to foregone learning that may have occurred as a result of the COVID-19 pandemic and subsequent school building closures and the potential additional impact of the loss for a student with an IEP. Recovery services are also intended to support achievement of the annual goal(s) and allow the student to make progress in the general curriculum without further delay.



To be clear, recovery services are not the same as nor replace any future compensatory education award required by 20 U.S.C. § 1415(i)(2)(C)(iii) of the IDEA. Compensatory education is part of due process complaint procedures and is a possible remedy when it is determined that a school district denied a FAPE to an individual student.

Compensatory education is typically awarded as a result of an educational loss identified in a state complaint final decision by an administrative law judge in a due process hearing, or due to identified noncompliance as a result of State monitoring activities.

Any decisions made by an ISD or member district pertaining to recovery services, including the extent and duration of services, must be made on an individual basis and in a collaborative manner. Recovery services must supplement and not supplant the student's existing educational program. In making these decisions, recovery services should not be replicated minute by minute.

Furthermore, while MDE encourages ISDs and member districts to consider making recovery services available, recovery services are not automatically warranted simply because a student failed to receive any of the services as specified in the student's IEP as a result of school buildings closures. Rather, it is an individualized determination based on the recovery services warranted to address regression in skills, and to accelerate a student's progress to account for the additional impact of COVID-19 and the resulting interruption of instruction. When determining whether and to what extent recovery services are warranted, it is recommended that the ability of the student to regain skills should be primarily considered.

School buildings were closed by executive order as a result of the public health emergency. Recovery services may, therefore, be warranted to address the interruption of instruction due to the COVID-19 pandemic, specifically [Executive Order 2020-05](#) and [Executive Order 2020-65](#).

These closures led to foregone learning for all children. Foregone learning is the learning which could have occurred in the absence of the COVID-19 Pandemic. Recovery services are specific to the additional foregone learning that student's with IEPs may have experienced. This type of instructional loss associated with the COVID-19 pandemic differs from the educational loss experienced when a district fails to provide FAPE.

The MDE OSE recognizes circumstances can change due to the unpredictability of COVID-19, in particular with any local, state, or national surge in the virus impacting future Executive Orders. As a result, the United States Department of Education (USDOE) could release further guidance on the impact of COVID-19 to the requirements of the IDEA that may necessitate revisions to this document.

This document is not intended to provide legal advice. For legal advice, ISDs and their member districts should consult with counsel. MDE staff are not permitted to provide legal advice.

## **Foregone Learning for All:**

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Data recently shared by the [Northwest Evaluation Association \(NWEA\)](#) have projected students will retain approximately 50% of the math content learned prior to the public health emergency and approximately 70% of the reading content learned prior to the public health emergency. The added impact for students with IEPs needs to be considered as districts determine the appropriate type and amount of services for individual students. This information will be helpful when comparing any foregone learning an individual student may have in relation to peers.

When determining whether recovery services are warranted for students with IEPs, districts should consider the additional impact COVID-19 may have had for a student with an IEP as compared to all students, respecting the universal foregone learning.

## **District Considerations: Recovery Services for Students with IEPs:**

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As districts consider the additional foregone learning for students with IEPs due to the COVID-19 pandemic, they may consider the need for recovery services for individual students.

Recovery services:

- are not mandatory,
- must align with the IEP,
- must supplement, not supplant, the services provided as part of the current offer of FAPE,
- may not necessarily replicate services currently specified in the IEP, including the frequency, duration, and type of service,
- are intended to support achievement of the annual goal,
- are an effort to support the student in making progress in the general curriculum without further delay, and
- can be provided within the course of the typical school day.

## **1. What factors should districts consider when determining whether recovery services are warranted for students with IEPs?**

When determining whether recovery services may be warranted for students with IEPs, IEP teams should consider whether there has been a regression in skills and the extent to which the student failed to make progress toward their IEP goals as well as the general education curriculum.

The most effective way to determine whether a student has regressed or failed to make progress and the need for recovery services is to:

- consider the individual student’s progress compared to the progress of same grade peers during the interruption of instruction due to the COVID-19 pandemic.
  - In the event the student’s regression is at the same rate of the regression of all students, no further consideration for recovery services is warranted.
- examine the individual student’s progress on IEP goals from the last source of data before the interruption of instruction due to the COVID-19 pandemic and compare the data to the student’s current level of performance as determined by the district.

When progress is slower than peers the district should consider whether the student requires recovery services and/or interventions through an equitable multi-tiered system of supports. When there is no progress data available, the district should review the student’s current skill level as compared to grade level expectations or performance prior to the interruption of instruction.

When determining whether and to what extent recovery services may be provided, the IEP team should consider whether or not it is reasonable for the student to regain the skill and make appropriate progress within a reasonable period of time, without the need for the services. However, if the student’s level of performance is significantly below where it was when schools were closed due to the emergency order, recovery services may be warranted.

The IEP team should also consider whether the student requires new services and supports which were not previously provided, to assist in reducing the impact of any foregone learning. These recovery services are designed to enable the student to resume making progress in the general curriculum without further delay. New services may be necessary, for example, if a student with an IEP has emerging mental health needs or has become significantly disengaged in the learning process while learning from a distance.

Much of the data to be analyzed is contingent upon whether the student was able to learn effectively through remote instruction. In addition, the extent and quality of the special education services provided during the interruption of instruction due to the COVID-19 pandemic must be considered, as well as whether the IEP goals were addressed through learning from a distance.

The IEP team should also consider the amount of review and other activities which may be provided to all students in order to address foregone learning; and consideration of information from the district's equitable multi-tiered system of supports will also be vital in making these determinations.

## **2. How is the determination for recovery services different from an extended school year (ESY) analysis?**

Although regression and ability to recoup are important factors for determining both ESY and recovery services warranted due to the COVID-19 pandemic, ESY is a *predictive analysis* based on how the student has fared in the past during periods of breaks in instructional time.

When determining whether recovery services are warranted, the IEP team must consider the *actual impact* of the interruption of instruction due to the COVID-19 pandemic, on the student's ability to retain skills and make progress toward their IEPs goals and in the general education curriculum. In doing so, the previous provision of ESY services may be critical information in determining the intensity of recovery services which may be warranted.

However, a student may still benefit from recovery services due to the interruption of instruction even if the student has not previously received ESY services. The need for ESY and the need for recovery services are two separate determinations. A student may need both recovery services and ESY services.

## **3. What considerations should districts make regarding recovery service decisions?**

Just as IEPs are focused on a student's individual needs, a determination of whether and to what extent recovery services are warranted should be based on specific facts about the individual student and their circumstances. IEP teams should consider information and data collected prior to and during the interruption of instruction, including observations and information provided by parents, and on-going data collected after the student is able to receive in person instruction and assessment. This may include selecting tools that can be used more frequently and are more sensitive to small changes over shorter periods of time.



A reevaluation may also be warranted if the district or parent believes the student's disability-related needs have changed due to the interruption of instruction, or to gather additional information on the student's present levels of academic achievement and functional performance.

Information and data collected from a variety of sources will guide the IEP team in determining whether recovery services are warranted, and if so, will promote the development of an individualized education plan (IEP). Important information to collect and consider includes the following:

- The amount of instruction and special education services provided to the student during the interruption of instruction, and information from any data collection or tracking of student progress during this time. This may also involve collecting information for pre-school age children.
- Information and observations from parents and other family members about the student's ability to access learning from a distance options and special education services during the interruption of instruction, and the level of student engagement. Districts may consider using an optional tracking sheet for parents to document this information.
- The student's level of academic achievement and functional performance, including levels of performance on all IEP goals prior to the interruption of instruction, as compared to the student's current level of performance. Information from sources such as progress reports, informal and formal assessments, and observations from teachers, parents, and related services providers may be used to collect this information.
- The student's progress in the general education curriculum in comparison to age/grade level peers. The general education teacher's input will be important as they will have observations and data for all students. The general education teacher will also have information about review and other activities provided to all students to address the impact of the interruption of instruction, and the district's equitable multi-tiered system of supports.
- The student's prior need for and extent of ESY services, and information about the student's previous ability to recoup skills and make progress in the general curriculum after breaks in instruction, such as during the summer.

Finally, IEP teams should be prepared to discuss possible scheduling options, which may include providing the recovery services during the summer, during the school day, or any other time the IEP team, including the parent, deems appropriate and whether, as a result, transportation services may be warranted. The IEP team should also ensure the recovery services are provided in the least restrictive environment for the particular student.

#### **4. What are the procedures districts should follow when determining whether recovery services are warranted?**

In effort to be transparent regarding the district's commitment of resources in clear and understandable language for the parent, districts are encouraged to conduct an IEP team meeting to determine whether and to what extent recovery services may be warranted for a student with an IEP.

Districts and parents may also agree to add recovery services to the IEP through a revision amendment without an IEP team meeting. Parent input is required when discussing recovery services and agreement is required to complete an amendment.

Recovery services are **supplemental** to current programs and services and can be appropriately identified in:

- supplementary aids and services,
- anticipated needs, or
- related service
- Notice of the offer of FAPE

Recovery services must be clearly labeled "recovery services due to COVID-19" in the IEP and include the frequency, amount, location, and duration of the services, so as **not to supplant** programs and services which are the current offer of FAPE.

Duration of the recovery services should be provided within the timeframe of the annual IEP, which may include during the summer.

#### **5. What is the timeframe for determining whether recovery services are warranted?**

The timeframe pertaining to the consideration of the foregone learning is limited to the mandatory school closure outlined in [Executive Order 2020-05](#) and the additional conditions for completing the 2019-2020 school year outlined under [Executive Order 2020-65](#).

Determinations about whether and to what extent recovery services are warranted should be made as soon as possible after sufficient data has been obtained to make the determination and no later than December 2020. In prioritizing these determinations, districts should first consider students who did not receive special education services, were unable to access special education services during learning from a distance or have newly identified needs which require recovery services for a successful return to school.



For these students, if the IEP team has sufficient data to make a determination regarding recovery services, the IEP team may consider meeting prior to the beginning of the school year, and if feasible, starting the services during the summer.

For other students, the determination regarding recovery services may need to be made when students are able to receive in-person instruction. ([USDOE, March 21, 2020, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities](#)). In the event in-person instruction is not an option, districts will need to consider other modes of service delivery. This will provide an opportunity for the district to collect data, either informally or formally, on the student's present level of academic achievement and functional performance. It will also be an opportunity to regain skills and measure progress before determining whether and to what extent the student needs recovery services.

**6. Should districts consider whether recovery services are warranted based on a delay in determining eligibility for special education due to the COVID-19 public school closure?**

Yes. Upon completion of an evaluation, where the IEP team determines the student is eligible for special education, the IEP team should consider whether the student would benefit from recovery services, as well. When determining the need for recovery services due to the delay in evaluation, the IEP team should consider the additional impact of the delay on the student's ability to make progress in the general education curriculum.

**7. May districts use funding available under the [Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\)](#) in providing these services?**

Yes. In addition to the standard special education funding sources available to school districts, [CARES Act: Elementary and Secondary School Emergency Relief Fund \(ESSER\)](#) formula funds may also be used for special education costs incurred to prevent, prepare for, and respond to the coronavirus. Accordingly, districts may use these funds for the following expenses:

- Activities to address the unique outreach and service delivery needs of students with disabilities. (H.R.748 § 18003[d][4]).
- Planning for and coordinating during long-term closures to ensure special education services continue to be provided consistent with federal, state, and local requirements. (H.R.748 § 18003[d][8]).
- Educational technology (including hardware, software, and connectivity) for students with disabilities who are served by the district that supports regular

and substantive education interaction between students and instructors (which may include assistive technology or adaptive equipment). (H.R.748 § 18003[d][9]).

- Planning and implementing activities related to summer learning and supplemental after school programs, including providing classroom instruction or online learning during the summer months to address the needs of students with disabilities. (H.R.748 § 18003[d][11]).

These funds will remain available through September 30, 2021. Therefore, districts may use these funds any time prior to September 30, 2021, including when school would not normally be in session such as during evenings, weekends, summer months, or other breaks.

### **8. What considerations are there if the parent and the district disagree about recovery services?**

There is no entitlement or requirement for districts to provide recovery services under the IDEA or MARSE. If parents disagree with the district's decision regarding whether and to what extent recovery services are warranted, there is no legal remedy.

Parents and districts should work together to determine the impact of any foregone learning during the timeframe outlined in this document for the individual student. Where recovery services cannot be agreed upon, or if the parent believes there was a denial of FAPE, due process provisions under IDEA and MARSE are available.

### **9. What options are available when a district fails to provide the identified recovery services?**

Recovery services are not a mandatory requirement and are intended to support achievement of the annual goal and allow the student to make progress in the general curriculum without further delay.

If a district fails to provide agreed upon recovery services the parent may:

- contact the district's Director of Special Education to express concerns,
- request a facilitated IEP team meeting, which allows a neutral third-party to facilitate further discussion,
- request mediation,
- file a state complaint, or
- request a due process hearing.



For more information regarding IEP facilitation or mediation, please visit the [Special Education Mediation Services \(SEMS\)](#) website.

More information regarding dispute resolution options please visit the [MDE Office of Special Education](#) website.

**10. Can MDE provide talking points on the difference between compensatory education and recovery services and extended school year services?**

Yes. Please see the [Comparison of Compensatory Education and Recovery Services Due to COVID-19](#) document.

**Feedback:**

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If you have additional questions or topics you want to see addressed in this or future guidance documents, complete our [feedback form](#).