

Guidance on “Additional Services” Released by the Department of Public Instruction

On May 29, 2020, the Department of Public Instruction (DPI) issued much-anticipated and much-needed guidance regarding the provision of “additional services” to students with disabilities who regressed or made insufficient progress during extended school closures such as those caused by the COVID-19 pandemic. It is significant that DPI chose to refer to these services as “additional services” as opposed to “compensatory education.” DPI accurately notes that compensatory education is generally a consequence of a district’s failure to provide a free appropriate public education to a student with a disability. In the current situation, districts were forced to close school buildings resulting in a “disruption of educational services” for some students. DPI’s distinction in terms (additional services versus compensatory education) does not absolve districts from the need to provide additional services to students negatively affected by school closures, but it does acknowledge that those effects are not the fault of districts. DPI’s guidance will be a valuable resource as districts transition back to in-person instruction and seek to address the effects of school closures on students with disabilities. The recently-released guidance may be reviewed here: <https://dpi.wi.gov/sped/laws-procedures-bulletins/bulletins/20-01>

A Data-Driven Process for Identifying Students Who May Require Additional Services

A student’s Individualized Education Program (IEP) team must determine whether a student requires additional services, and if so, what services are necessary. Some members of the IEP team may advocate for a formulaic, minute-for-minute approach to determining what additional services are required. However, DPI’s guidance makes clear that minutes missed is not the appropriate standard for establishing what, if any, additional services are required. Districts cannot reasonably replicate lost services minute-for-minute and a student does not automatically require additional services merely because they did not receive all IEP services. Instead, a student’s need for additional services is dictated by an individualized analysis, conducted by a student’s IEP team, of whether the student experienced regression in academic skills or functional performance or failed to make progress on IEP goals or in the general education curriculum during the period of school closures.

DPI’s guidance establishes a data-driven process to determine whether students experienced regression or failed to make adequate progress during school closures. Initially, the IEP team must review relevant data in order to establish a baseline of the student’s academic and functional performance prior to the school closures. The IEP team may review first semester progress reports, present levels of academic achievement and functional performance (PLAAFP) contained within in a student’s IEP, observations from teachers and related service providers, informal and formal assessments, and any other data demonstrating a student’s pre-closure skill levels.

Next, the IEP team must review data regarding the student’s progress and activities during the period of school closures. Such data should include the amount of instruction, both regular and special education, provided to and accessed by the student during the closure. The IEP team should also review data regarding progress on IEP goals and in the general education curriculum in comparison to regular education peers. The IEP team may also review parent observations or, if the student is in a day care setting, observations from day care providers. DPI notes that regular education teachers may have a significant amount of valuable information to contribute regarding a student’s

educational engagement and progress during the school closures. Regular education teachers will likely have knowledge of the instruction that has been provided to all students, observations of both regular and special education students, and the ability to compare the rate of progress for a student with a disability with the rate of progress of their regular education peers.

The IEP team should also include in its review any data generated after in-person instruction resumes. Such data could include information from a special education reevaluation. Either the district or the parent may initiate a reevaluation if the student's disability-related needs have changed or the IEP team needs additional data regarding the student's current levels of academic achievement and functional performance.

Once the IEP team has analyzed the data listed above, the team can compare the student's pre-closure academic skills and functional performance to their post-closure skill levels to determine areas in which the student experienced regression or failed to make adequate progress. If no progress data is available, DPI counsels that IEP teams should review the student's current skill levels and compare that level to grade-level expectations.

The next step in the process requires the team to determine what, if any, additional services are required to address identified areas of regression or insufficient progress. To engage in this analysis, DPI recommends that IEP teams review a student's prior need for ESY and data related to the student's ability to "recoup skills and make progress after extended breaks." For example, a student who has a history of experiencing regression during breaks but quickly returns to baseline once instruction resumes may require only limited or no additional services. IEP teams should further review activities, including multi-level systems of support, that are being provided to all students in efforts to mitigate the impact of the school closures.

DPI recommends that IEP teams also consider whether students might need "new services" to address any difficulty in "re-entering the school environment." Such services may be necessary for students who have mental health needs or who have become "significantly disengaged in the learning process during the extended school closure."

If the IEP team identifies areas of regression or lack of progress and additional or new services are required to remedy those negative effects of school closures, the IEP team must identify the frequency, amount, location and duration of those services in the program summary of the student's IEP. The additional services must also be described in detail and be capable of being provided within the timeframe of the IEP. When determining the placement in which the additional services are provided, IEP Teams must also adhere to the Individuals with Disabilities Education Act's (IDEA) requirement to provide services in the least restrictive environment (LRE). Finally, those services must be specifically labeled as "additional services due to extended school closure."

DPI also provides the option of forgoing an IEP team meeting and utilizing the DPI I-10 form (Notice of Changes to IEP without an IEP Meeting) to document additional services. If, after a meaningful discussion regarding the additional services to be provided, the parent and the district agree upon the "nature and extent" of the additional services the district may utilize the DPI I-10 form to document that agreement. If the use of the DPI I-10 is appropriate, the District must identify the frequency, amount, location, and duration of those services on the form. The additional services must also be described in detail, be capable of being provided within the timeframe of the underlying IEP, and be labeled as "additional services due to extended school closure."

Timeline for Identifying Students Who May Require Additional Services

DPI recommends that additional service determinations be made "as soon as possible" after sufficient data to make such determination has been obtained, "but no later than the first six months of the 2020-2021 school term." DPI further recommends prioritizing additional service determinations for students who did not receive or were unable to access special education services, students who have newly identified needs requiring additional services in order to successfully return to school, and students who graduated or reached the maximum age of eligibility during the school closures. For students not in those three categories, determinations should be made when students are able to receive "in-person instruction." The window of time in which determinations can be made will allow districts to gather necessary data and allow students to recoup skills prior to making additional service determinations.

Unique Circumstances: Students Graduating, Ageing Out and Extended Evaluation Timelines

Students with disabilities who are either graduating or attaining the age of 21 during the school closures or prior to the beginning of the upcoming school year may similarly have experienced regression and a lack of progress. However, students who have reached those milestones are not subject to compulsory attendance and may not be willing or available to participate in additional services. Consequently, DPI recommends consulting with the student to gauge their willingness to engage in additional services. If they are unwilling, the district should document the former student's wishes and need not take any further action. If the student is willing to engage in additional services, the district should convene an IEP team meeting and determine whether additional services, particularly in the area of transition, are required. DPI notes that if additional services are necessary, the provision of those services does "not create a new or additional period of IDEA eligibility for the student."

Due to school closures, many initial special education evaluations have been delayed until in-person assessments can be completed. Once completed, and if the student is determined eligible for special education and related services, the IEP team should also consider whether additional services are required to address the delay in completing the evaluation. Specifically, the IEP team should analyze the impact of that delay on the student's progress in the general education curriculum.

Funding for Additional Services

DPI notes that districts may use state categorical aid and Part B flow-through grants to fund additional services. Districts may also use CARES Act monies, including money from the Elementary and Secondary School Emergency Relief Fund (ESSERF) to fund additional services. ESSERF funding can be spent through September 30, 2022.

DPI has provided significant guidance regarding making additional service determinations for students with disabilities. Districts should start to gather relevant information now in order to make appropriate and data-driven decisions once schools reopen. Our firm is available to provide further guidance and assistance to school districts in interpreting and applying DPI's guidance.

PRIMARY AUTHOR

Matthew W. Bell

(608) 286-7239

MBELL@BOARDMANCLARK.COM

■ Michael J. Julka	(608) 286-7238	■ Steven C. Zach	(608) 283-1736	■ Matthew W. Bell	(608) 286-7239
■ James K. Ruhly	(608) 283-1738	■ Richard F. Verstegen	(608) 283-7233	■ Christopher T. Schmidt	(608) 286-7157
■ William L. Fahey	(608) 286-7234	■ David P. Weller	(608) 286-7235	■ Brian P. Goodman	(608) 283-1722
■ JoAnn M. Hart	(608) 286-7162	■ Jennifer S. Mirus	(608) 283-1799	■ Daniel T. Fahey	(608) 286-7216
■ Eileen A. Brownlee	(608) 822-3251	■ Rhonda R. Hazen	(608) 283-1724	■ Eric B. Hagen	(608) 286-7225
■ Doug E. Witte	(608) 283-7529	■ M. Tess O'Brien-Heinzen	(608) 283-1798		

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