

## ***Department of Public Instruction Updates COVID-19 Special Education Guidance***

Boardman Clark previously reported on the Department of Public Instruction’s (“DPI”) guidance document *COVID-19 Special Education Question and Answer Document* (“*Question and Answer Document*”): <https://www.boardmanclark.com/publications/school-law-fyi/guidance-for-public-school-districts-serving-students-with-disabilities-during-the-current-closure-related-to-covid-19> and <https://www.boardmanclark.com/publications/school-law-fyi/department-of-public-instruction-updates-covid-19-special-education-guidance>. DPI published several recent updates to the *Question and Answer Document* with new information regarding compensatory or recovery services, requests for education records, evaluations, extended school year, use of the “I-10,” planning for additional school closures, and in-home special education services. The updates to the *Question and Answer Document* are summarized below and the full version of DPI’s guidance may be found here: [https://dpi.wi.gov/sites/default/files/imce/sped/pdf/Extended\\_School\\_Closure\\_due\\_to\\_COVID.pdf](https://dpi.wi.gov/sites/default/files/imce/sped/pdf/Extended_School_Closure_due_to_COVID.pdf)

### COMPENSATORY OR RECOVERY SERVICES

In a prior version of the *Question and Answer Document*, DPI introduced the concept of “additional services.” “Additional services” are services provided by school districts to address lack of progress or regression experienced by students with disabilities due to districts’ inability to provide services during the period of March 18, 2020, through June 30, 2020, the period of mandatory, state-wide school closures due to the public health emergency. (*Information Update Bulletin 20.01: Additional Services due to Extended School Closures* located here: <https://dpi.wi.gov/sped/laws-procedures-bulletins/bulletins/20-01>) (“*Bulletin 20.01*”) DPI created this new category of service to distinguish the services necessitated by the mandatory school closures from “compensatory education,” which generally refers to a remedy a hearing officer or court awards when a district fails to provide a free appropriate public education (“FAPE”) to a student with a disability.

As of the start of the 2020-2021 school year, the state-wide school closures were no longer in effect and DPI’s recent guidance makes clear that the “additional services” grace period (i.e., March 18, 2020 – June 30, 2020) is now over. Consequently, any failure or inability to provide FAPE to a student with a disability during the current school year (2020-2021) must be remedied by providing “compensatory or recovery services.”

While the name of the services has changed from “additional services” to “compensatory or recovery services”, the analysis remains the same. Indeed, DPI notes that the analysis set forth in *Bulletin 20.01* (see above) may also be used to determine if a student requires compensatory or recovery services. Specifically, “IEP teams should consider whether there has been regression in skills and the extent to which the student

failed to make progress toward their IEP goals and in the general education curriculum.” Because the analysis has not changed, districts may use the Additional Services Worksheet: [https://www.boardmanclark.com/assets/newsletters/Additional\\_Services\\_Worksheet.pdf](https://www.boardmanclark.com/assets/newsletters/Additional_Services_Worksheet.pdf) previously developed by Boardman Clark to document data related to a student’s progress or regression during the current school year. If the IEP team determines that compensatory or recovery services are necessary, those services should be “clearly labeled in the program summary [of the IEP] . . . and include the frequency, amount, location and duration of the services.”

The updated *Question and Answer Document* provides three examples of instances in which compensatory or recovery services stemming from the 2020-2021 school year may be warranted. The first example involves students who did not receive or were unable to access special education services even after the state-wide school closure order was lifted. Another example involves students who were provided virtual services, but those services were ineffective. The final example of students who may require compensatory or recovery services involves students who had their eligibility for special education and related services delayed because “evaluations were not completed.” While DPI’s list of examples is not exhaustive, districts should be particularly vigilant to identify any student in situations consistent with those examples and apply the appropriate analysis to determine whether compensatory or recovery services are warranted.

DPI also notes that students with disabilities who have turned 21 or graduated with a regular education diploma during the 2020-2021 school year may be eligible for compensatory or recovery services. In determining eligibility for 21-year-old or graduated students, DPI advises that IEP teams should pay particular attention to a student’s progress in the areas of “transition to postsecondary education or training, employment, and independent living.”

Finally, the *Question and Answer Document* provides guidance on funding for compensatory or recovery services. DPI notes that services, including compensatory or recovery services provided to graduated students or students who have aged-out, may be funded by Part B flow-through grants and federal stimulus funds “available under the Elementary and Secondary Schools Emergency Relief Fund (ESSERF), Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA Act), and the American Rescue Plan Act (ARPA).”

## PLANNING FOR ADDITIONAL SCHOOL CLOSURES

While more and more individuals are getting vaccinated against COVID-19, future school closures are still a possibility. The *Question and Answer Document* provides a mechanism to proactively address subsequent closures and transitions from in-person to virtual or hybrid instruction by developing “contingency plans” to be incorporated into a student’s IEP. DPI notes that contingency plans must still be individualized to the student’s unique needs, provide a free appropriate public education, and, generally, include the same “ambitious and achievable goals” that would be present in a student’s IEP to be implemented during in-person instruction. The *Question and Answer Document* includes examples of how districts might document a contingency plan in an IEP.

If a district does not incorporate contingency plans in IEPs, any changes to an IEP required by a transition to virtual or hybrid instruction will need to be made at an IEP team meeting or by use of DPI Form I-10 (please see the “Use of the I-10” section below). If either of those mechanisms are used to revise a student’s IEP, districts must provide a copy of the revised IEP or I-10 prior to implementation. Finally, DPI notes that if a parent elects to receive special education documents via email, the revised IEP or I-10 may be provided by email.

## RESPONDING TO REQUESTS FOR EDUCATION RECORDS

DPI advises that during the pandemic, Districts must find ways to provide access to education records to parents who ask to inspect or review such records. As a reminder, the Family Educational Rights and Privacy Act (“FERPA”) requires public school districts to provide a parent or guardian the opportunity to inspect and review education records “without unnecessary delay and before any meeting regarding an IEP, or any hearing. . . and in no case more than 45 days after the request has been made.” (34 C.F.R. § 300.613) The Wisconsin Pupil Records Law, Wis. Stat. § 118.125, provides parents additional rights related to pupil records and requires districts to provide, upon request, a copy of a student’s progress or behavioral records. Finally, board policies may address additional procedures for requesting and disclosing education records.

## EVALUATIONS

The updated *Question and Answer Document* makes clear that “in most cases,” districts will be able to, and should, conduct special education evaluations within 60 days of receipt of parental consent. Only in limited circumstances may districts use the exception applicable when parents fail or refuse to make the student available for testing due to the current pandemic. DPI notes the following circumstances that may justify using that exception:

- The parent refuses to make the student available for in-person evaluation and, after an individualized determination, the district determines that it is impossible to conduct the evaluation virtually or by alternative means;
- The student is under a quarantine or medically unable to be evaluated and it is impossible to conduct the evaluation virtually or by alternative means;
- The district is under a state or local health order prohibiting an in-person evaluation and it is impossible to conduct the evaluation virtually or by alternative means.

Given the increasing number of districts that are open for in-person instruction, the scenarios listed above should be infrequent and districts should anticipate conducting special education evaluations consistent with applicable timelines.

## EXTENDED SCHOOL YEAR

Generally, extended school year (“ESY”) services are for the purpose of addressing regression that cannot be recouped within a reasonable period of time. DPI has previously advised that if ESY is an issue raised by an IEP team member, including a parent, the IEP team must determine a student’s need for ESY services by engaging in a “multifactorial determination of eligibility.” While not an exhaustive list, DPI cites the following as potential factors to consider:

- the degree of impairment;
- the degree of regression suffered by the child;
- the recovery time from this regression;
- the ability of the child’s parents to provide the educational structure at home;
- the child’s rate of progress;
- the child’s behavioral and physical problems;

- the availability of alternative resources;
- the ability of the child to interact with non-handicapped children;
- the areas of the child’s curriculum which needs continuous attention;
- the child’s vocational needs; and
- whether the requested service is extraordinary for the child’s condition, as opposed to an integral part of a program for those with the child’s condition.

(*Information Update Bulletin 10.02*, located here <https://dpi.wi.gov/sped/laws-procedures-bulletins/bulletins/10-02>)

According to the *Question and Answer Document*, it is business as usual with regard to ESY services. IEP teams are still required to meet and determine if a student requires services “beyond the limits of the school term” in order to receive FAPE. DPI does note that if a health order prohibits in-person services, ESY “must be provided through virtual learning.”

## USE OF THE I-10

The *Question and Answer Document* notes that Wisconsin law does not typically allow districts to use the I-10 (Notice of Changes to IEP Without an IEP Meeting) for the purpose of changing placement. However, during the pandemic DPI continues to permit districts to use the I-10 form to make both minor adjustments to a student’s IEP as well as changes in placement. That permission comes with some limitations. DPI notes that the “changes in placement” referred to are those required “due to interruptions caused by school closures or changes from in-person to distance learning.”

When using an I-10, districts must observe the following:

- The I-10 may only be used when the parent and the district agree to make changes without an IEP team meeting. If either the district or the parent disagrees, the district must convene an IEP team meeting;
- If the district is unable to contact the parent to obtain agreement to use the I-10, the I-10 cannot be used;
- Any changes made via an I-10 will be for the same dates as the original IEP;
- The I-10 must list the changes to the IEP, the reasons for the changes, other options considered and, if the student’s placement was changed, include an updated placement page; and
- The I-10 process does not and cannot replace the annual IEP requirement.

(*See also Clarification on the use of I-10 Document* located here: <https://dpi.wi.gov/sped/clarification-use-i-10-document>)

## IN-HOME SERVICES

On February 12, 2021, DPI updated the *Question and Answer Document* to remind districts that even during the pandemic, districts must “ensure that a continuum of placements is available to meet the needs of students with disabilities.” DPI further emphasized that homebound services are a part of that continuum and districts may not have a policy or practice that precludes a student who requires in-person services in the home from receiving FAPE. If a student’s IEP team determines that in-person homebound services are required, unless a local or state order prohibits such services, districts must find a way to provide those

services in that setting. IEP teams may also need to consider if additional precautions (e.g., personal protective equipment, health checks, cleaning protocols) are necessary to provide such services. Finally, if parents are concerned about school staff entering the home environment during the pandemic, they may reject in-person homebound services or initiate any of the dispute resolution processes set forth in the Individuals with Disabilities Education Act (“IDEA”). If parents do reject an offer of in-person homebound services, it is advisable for a district to document that rejection in a prior written notice and fully document the need for the offered services and placement in the prior written notice. (See <https://www.boardmanclark.com/publications/school-law-fyi/prior-written-notice-reminders-1>).

## CONCLUSION

Many districts have been able to increase the amount of in-person instruction being provided to students. However, challenges still exist. Districts may still have to endure shutdowns, quarantines, and sporadic transitions to virtual instruction. Those sudden changes have made it difficult to ensure that every student with a disability receives FAPE. By following the DPI’s updated guidance in the *Question and Answer Document*, districts can start to remedy some of the effects of those transitions and challenges. The Boardman Clark School Law Team is also available and prepared to assist districts in working through those challenges.

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