Extended School Year Services

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I. THE PROVISION FOR EXTENDED SCHOOL YEAR SERVICES: IS IT IN THE IDEA OR THE COURT DECISIONS?

The Individuals with Disabilities Education Act (IDEA) itself does not contain any requirement for the provision of Extended School Year (ESY) services to students with disabilities. Rather, the concept of ESY began as a "court-created" phenomenon, as many federal circuit courts recognized an entitlement early on to ESY services for some students with disabilities. It was not until 1999 that the IDEA regulations, for the first time, specifically provided for the consideration of the provision of ESY services to all children with disabilities on an annual basis. 34 C.F.R. § 300.106.

A. The IDEA's Regulatory Provisions

Under the IDEA regulations first appearing in 1999, each public agency must ensure that extended school year services are available as necessary to provide FAPE and extended school year services must be provided only if a child's IEP team determines, on an individual basis that the services are necessary for the provision of FAPE to the child. 34 C.F.R. § 300.106(a). In implementing these requirements, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or
(ii) Unilaterally limit the type, amount, or duration of those services.

34 C.F.R. § 300.106(a)(3).

The IDEA regulations also define "extended school year services." ESY means special education and related services that—

(1) Are provided to a child with a disability—
  (i) Beyond the normal school year of the public agency;
  (ii) In accordance with the child's IEP; and
  (iii) At no cost to the parents of the child; and
(2) Meet the standards of the SEA.

34 C.F.R. § 300.106(b).

B. Wyoming's ESY Provisions

In general, Wyoming's Special Education Rules adopt the provisions of the IDEA regulations regarding ESY services. However, there is a slight "enhancement" of the provisions and the following language has been added to the Wyoming Rule: "In implementing the requirements of this section, the school district or public agency must consider a multi-factor approach in determining whether ESY services are necessary…." (Chapter 7 Rules, p. 7-18).

C. The Relevant Early Court Decisions

1. Categorical policy limitations were found to be violative of the Act and courts rejected such limitations

    a. Common facts in the early cases:

        i. Policy that no children will be provided with ESY services
        ii. Failure to discuss issue with parents
        iii. Instruction to LEA not to include programming beyond 180 days in IEP
        iv. Action amounted to implied policy

2. Earliest cases establishing notion of ESY as part of FAPE

    a. Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979); Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980). Pennsylvania's policy was to limit all children to 180-day school year. Circuit Court considered only the policy limitation and struck it down as a violation of the Act.

    b. Rettig v. Kent City Sch. Dist., 539 F. Supp. 768 (N.D. Ohio 1981). Must evaluate need for ESY annually and for every student.

    c. GARC v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981), aff'd, 716 F.2d 1565 (11th Cir. 1983). Fact that no child has ever been found to require ESY services required a finding of an *implied* policy against provision of ESY. [Class of students was limited to severely/profoundly retarded students].

    d. Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983). Rowley standard applies to ESY issue and *individualized* consideration of ESY is required for each disabled child.

D. Judicially-created Standards for Determining Need for ESY

Since the inception of the ESY notion, many courts struggled to create a standard for IEP Teams to use in determining the need for ESY services.

1. Armstrong v. Kline, supra. ESY is needed if regression is such that it is impossible or unlikely that the child would become as self-sufficient as he/she would otherwise be expected to become.

2. Garrity v. Gallen, 552 F. Supp. 171 (D. N.H. 1981). If regression would negate the benefits of child's special education program, then district must provide ESY.

3. Georgia Association of Retarded Citizens v. McDaniel, supra. LEAs are free to determine ESY criteria as long as individual need is considered.

4. Crawford v. Pittman, supra. Set forth "some educational benefit" standard as the requirement.

5. Lee v. Thompson, 554 EHLR DEC. 249 (D.C. Haw. 1983). Applied regression/recoupment standard and held that if recoupment time is longer than 3 months, ESY must be provided.

6. Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986). Affirmed district court decision that if child experiences *substantial regression*, the child is entitled to ESY services, even though there was evidence that the recoupment time was limited to 3-4 weeks. Focus is on benefits accrued during the regular school year that will be affected as a result of the summer break. Regression-recoupment issues triggering the need for ESY services occur when a child suffers an inordinate or disproportionate degree of regression during that portion of the hear in which the customary 180-day school year is not in session and it takes an inordinate or unacceptable length of time for the child to recoup those lost skills (academic, emotional or behavioral) upon returning to school.

7. Johnson v. Indep. Sch. Dist. No. 4 of Bixby, 921 F.2d 1022 (10th Cir. 1990), cert. denied, 500 U.S. 905 (1991). Certain factors should be considered in determining whether ESY should be offered, including degree of regression, recovery time, ability of parents to supplement in the summer, the child's rate of progress, the child's behavior and physical problems, availability of alternative resources, peer relationships, continuous educational needs, vocational needs, and whether the requested services are extraordinary given the child's disability.

8. Cordrey v. Eukert, 917 F.2d 1460 (6th Cir. 1990). Empirical proof of regression is not necessary to find that ESY services are needed, but need *may* be shown by empirical data, as well as expert opinion based upon professional assessment.

9. M.M. v. School Dist. of Greenville County, 37 IDELR 183, 303 Fl3d 523 (4th Cir. 2002). ESY is sufficient if the amount of services offered are enough to prevent the gains made by the child during the school year from being "significantly jeopardized." The mere fact of likely regression is not enough to warrant ESY services because all students "may regress to some extent during lengthy breaks from school."

10. Reinholdson v. School Bd. of Indep. Sch. Dist. No. 11, 46 IDELR 63 (8th Cir. 2006). District court's decision that the school district fully complied with procedural requirements regarding ESY services is upheld. The purpose of ESY services is to prevent regression and recoupment problems, rather than advance the educational goals outlined in the student's IEP. (citing *Letter to Myers,* 16 EHLR 290 (OSEP Dec. 18, 1989)). As a result, ESY services may differ from those provided during the school year. The IEP team's decision in December to defer until spring the specifics of the ESY services necessary to help the student maintain the skills he learned during the school year was reasonable under the circumstances.

11. Casey K. v. St. Anne Community High Sch. Dist. No. 302, 46 IDELR 102 (C.D. Ill. 2006). District's proposed ESY program is appropriate. ESY services have "a limited purpose, which is to prevent regression in the summer, not produce significant educational gains."

12. McQueen v. Colorado Springs Sch. Dist. No. 11, 419 F.Supp.2d 1303, 45 IDELR 157 (D. Colo. 2006). School district's policy, based upon Colorado Department of Education guidelines, that requires ESY services to address only maintenance and retention of skills already mastered, rather than acquisition of new skills, is not in violation of the IDEA. Clearly, the relevant case law and OSEP guidance support endorsing the "significant jeopardy" standard as the basis for the content of ESY services.

E. The Johnson Case and the "Multi-factored" Approach

In Wyoming, perhaps the most important ESY case is the Tenth Circuit's decision in the Johnson case, supra. The Johnson Court held that the district had violated the IDEA by not examining sufficient information in determining whether the student needed ESY services. Specifically, the administrative and judicial record contained only information on the student's past regression and recoupment issues. However, the Court adopted a "multi-factored" approach, indicting that other factors, in addition to regression-recoupment data are to be considered in determining a need for summer services:

1. Degree of regression suffered in the past.
2. Exact time of the regression.
3. Ability of the parents to provide educational structure at home.
4. Student's rate of progress.
5. Student's behavioral and physical problems.
6. Availability of alternative resources.
7. Ability of the student to interact with nondisabled children.
8. Areas of the student's curriculum that need continuous attention.
9. Student's vocational needs.
10. Whether the requested services are extraordinary for the student's disabling condition, as opposed to an integral part of a program for populations of students with the same disabilities.

II. PRACTICAL "NO-NO'S" REGARDING EXTENDED SCHOOL YEAR

A. Failing to Train School Staff on the ESY Requirement and Policies/Procedures

"ESY? What's that?"

It is vital that school teachers and other service providers be aware of and trained with respect to the requirement for making ESY determinations.

B. Failing to Address/Adequately Consider the Issue of Extended School Year Services (ESY) Altogether

"I don't think we need to consider ESY for this student. So, what's next on the Agenda?"

The mere failure to properly consider ESY services, in itself, can lead to a finding of a denial of FAPE. See, e.g., Bend Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Ore. 2005).

"I'm just going to check the 'no' box for ESY services because the overall data does not indicate that he needs ESY. Does anyone else have a problem with that?"

The issue of ESY eligibility must be thoroughly discussed and considered as part of the procedural requirement to ensure parental participation in all aspects of educational decisionmaking.

C. Failing to Distinguish between ESY and Summer School Services

"Of course we provide for ESY. Anyone can participate in summer school."

"Sorry, we don't have ESY anymore since the school board cut our summer school program."

"Since he's going to be eligible for summer school, we don't need to address ESY."

Although traditional summer school services/programs may be utilized to meet ESY needs for students with disabilities, summer school and ESY are not the same. Teams must still be sure to analyze the need for ESY using the correct standard for doing so.

D. Failing to Establish ESY Programs that are based upon Individual Needs

"Oh, how I wish we could provide more ESY because he really needs more. However, our budget has been cut and we can't afford to provide those. I'm sure you understand."

"Our ESY program runs from June 16 until July 19 for everyone."

"But all of our LD students get ESY in the form of home packets."

E. Failing to Consider Eligibility for *all* Students with Disabilities

"Because your child is only mildly LD, we know he won't qualify for ESY, so we don't need to address it. Only our severe and profound students get ESY."

F. Failing to Consider all Educational Needs in Making ESY Decisions

"We don't think that he will severely regress academically, so that ends the ESY discussion."

Educational performance includes more than just academics and, where appropriate, may include social, emotional and/or behavioral needs. See e.g., A.D. v. Sumner Sch. Dist., 48 IDELR 191 (Wash. Ct. App. 2007) (district required to provide compensatory education to a 15-year-old student because it failed to consider his behavior problems when determining need for ESY).

G. Failing to Ensure that the IEP Team Decides ESY

"We should defer the decision on ESY to the Special Education Director. Let's just complete the IEP for the upcoming school year."

Reusch v. Fountain, 21 IDELR 1107, 872 F. Supp. 1421 (D. Md. 1994). Where parents had questions about ESY programming at IEP team meetings, Act was violated when district policy contemplated referring summer program discussions to the field office supervisor/assistant supervisor of special education.

H. Failing to Ensure all Proper IEP Team Members are Present to Participate in the ESY Decision

Under the IDEA, the public agency shall ensure that the IEP team, including those that make ESY determinations, for each child with a disability includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if appropriate, the child.

Staff attending IEP meetings must ensure that all required school personnel are there to participate. Often, school systems fail to ensure that the appropriate "LEA representative" of the

school system attends the IEP meeting. This person may often be someone *in addition to* the child's teachers. However, the federal regulations indicate that the LEA representative can be one of the other agency members listed as long as that person also meets the qualifications of an LEA representative. In addition, a regular education teacher of the child must participate in IEP development and review/revision when the student is or may be participating in the regular education environment.

The IDEA also now provides that a member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA **consent** to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent to any excusal must be in writing.

> **"Yes, I am the LEA Rep., but I don't *do* special education and don't know anything about ESY. You'll have to ask someone else because I really know nothing about it."**

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."

> **"Sorry I'm an hour late, but the principal just told me I needed to be here because I'm the only regular education teacher in the building. I'm not really sure what help I can give, since I don't teach special education and don't have anything to offer on ESY. So, can I go now?"**

Arlington Cent. Sch. Dist. v. D.K. and K.K., 37 IDELR 277 (S.D. N.Y. 2002). The absence of a general education teacher at an IEP meeting for LD student denied him FAPE and supported award of tuition reimbursement for private placement. The presence of the teacher at the meeting might have illuminated the extent to which visual instruction was offered as a part of the district's mainstream curriculum and the likelihood that he could ever be integrated successfully into it general education program.

M.L. v. Federal Way Sch. Dist., 387 F.3d 1101 (9th Cir. 2004). The failure of the school district to have a regular education teacher at the IEP meeting for an autistic and intellectually

impaired student was sufficient to find a denial of FAPE. The District's omission was a "critical structural defect" because there was a possibility of placement in an integrated classroom and the IEP recommended might have been different had the general education teacher been involved. When the general education teacher was unable to attend, District should have cancelled the meeting and not proceeded without the benefit of input from the general education teacher regarding curriculum and environment there.

"Since he's in a private school right now and won't be with us until next year, we don't need to invite the private school teacher to the IEP meeting."

S.H. v. Plano Indep. Sch. Dist., 54 IDELR 114 (E.D. Tex. 2010). District's failure to invite a representative from the preschooler's private school resulted in a loss of educational opportunity for the student. Though the district knew that the child fell on the severe end of the autism spectrum, it did not offer ESY because it lacked data regarding the possibility of regression for the new student—data the private program representative would have provided.

I. Failing to Consider Parentally-provided Information/Input as Part of the ESY Determination

Failing to provide parents a meaningful opportunity for input into educational decisionmaking and placement determinations can be the death knell for a district's case and can, in some circumstances, amount to a denial of FAPE in and of itself. With respect to ESY services, this would include evidence of a predetermination of eligibility for such services or a refusal to consider information submitted by the parents, including the results of independent educational evaluations obtained by them.

"But in our staff meeting yesterday, I thought that we decided that he would not qualify for ESY."

Spielberg v. Henrico County, 441 IDELR 178, 853 F.2d 256 (4th Cir. 1988). Placement determined prior to the development of the child's IEP and without parental input was a *per se* violation of the Act and sufficient to constitute a denial of FAPE in and of itself.

N.L. v. Knox County Schools, 38 IDELR 62, 315 F.3d 688 (6th Cir. 2003). The right of parental participation is *not* violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made.

Doyle v. Arlington County Sch. Bd., 19 IDELR 259, 806 F. Supp. 1253 (E.D. Va. 1992). School officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind.

IDEA Regulatory clarification: The IDEA requires that parents be afforded an opportunity to participate in meetings with respect to-- (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child. However, a meeting does not include informal or unscheduled conversations involving public agency

personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b).

A.E. v. Westport Bd. of Educ., 46 IDELR 277 (D. Conn. 2006). Nothing in IDEA requires the parents' consent to finalize an IEP. Instead, IDEA only requires that parents have an opportunity to participate in the drafting process. In addition, the parents participated extensively in the placement, attending all IEP meetings and being represented by a qualified parent advocate. They submitted letters, recommendations and proposed IEPs. It is important to note that, aside from the proposed placement in the district's chosen program, the parents' proposed IEP was substantially similar to the IEP that was revised and many of the parents' suggestions were adopted. As the hearing officer pointed out regarding predetermination of placement, there is a difference between being "open-minded" and "blank-minded." While a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.

"I have read the report that you brought in, Mrs. Jones, and you've got to be kidding me! This guy is a 'quack' and we're not even going to consider his recommendations for ESY services."

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester County, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

J. Failing to Determine the Need for ESY Services in a Timely Fashion

"We will make the ESY determination at the end of May."

Reusch v. Fountain, 21 IDELR 1107 (D. Md. 1994). The Court concludes that MCPS has violated the IDEA by delaying many ESY decisions so long as to infringe the procedural rights of disabled students. The delays have, in effect, fostered the overall scheme of MCPS to minimize the availability of ESY to disabled children. However, to the extent that delays past April 15 are truly necessary for making an informed ESY decision for a given child, MCPS should be permitted to defer particular decisions. However, the deferral of decisions on a systematic basis must cease. Because of the academic year calendar, decisions must be made---on the best available data if complete information is not available---sufficiently early to preserve

the ability of the child to pursue procedural rights of review. Disabled children can no longer have their right to obtain appropriate ESY during the summer recess blocked by MCPS delays in making decisions.

K. Failing to Use the Proper Standard for Determining ESY Eligibility

"It is clear that he needs ESY services in order to continue to progress over the summer or at least to maintain the skills he has right now."

L. Failing to Recognize that the ESY Analysis may not be Limited to the Summer Break

"ESY services are only provided during the summer break."

Although all of the relevant court authority establishing the concept of ESY address the issue within the context of analyzing the need during the summer break in instruction, some may argue that, because of the broad scope of the IDEA regulatory language, the analysis of need should be required relative to other breaks during the school year (e.g., the Winter Break, Spring Break, weekends, etc.). Even the U.S. Department of Education left this question open when finalizing the 2006 IDEA regulations. Though the provision for ESY services in 300.106 did not change in 2006, the U.S. DOE commentary to the final regulations notes that "[t]ypically, ESY services are provided during the summer months. However, there is nothing in §300.106 that would limit a public agency from providing ESY services to a child with a disability during times other than the summer, such as before and after regular school hours or during summer vacations, if the IEP Team determines that the child requires ESY services during those time periods in order to receive FAPE. The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child." 71 Fed. Reg. 46582.

M. Failing to Ensure the Provision of ESY Services by Highly Qualified Providers

"We can't find a highly qualified special education teacher for the summer, but we'll find someone who will be there."

OSEP has indicated that ESY teachers are not exempt from the IDEA's HQT requirement. Regardless of whether services are provided during the school year or the summer, teachers and paraprofessionals providing services must satisfy the qualifications set forth in Part B of the regulations. Letter to Copenhaver, 50 IDELR 16 (OSEP 2007).

N. Failing to Follow-up on Commitments

"Uh-oh. We forgot to order those materials for the ESY program."

"I just forgot to submit the ESY forms."

S.S. v. Howard Road Academy, 51 IDELR 151, 585 F.Supp.2d 56 (D. D.C. 2008).

Charter school that neglected to submit ESY forms to the district must provide compensatory education where oversight resulted in a material implementation failure and his IEP reflected "serious regression" during school closings.