



Legal Issues in Determining Extended School Year (ESY) Services under IDEA

Presented by

Jose L. Martín, Attorney

Richards Lindsay & Martín, L.L.P.—Austin, Texas

Wyoming Department of Education 2019 WAVE Conference

Copyright © 2019 Richards Lindsay & Martín, L.L.P.

Current Regulations

- **Federal Regulation—34 C.F.R. §300.106**

ESY services must be made available as necessary to provide FAPE

ESY must be provided only if IEP team determines, on an individual basis, that it is necessary for providing FAPE

Schools cannot limit ESY to specific disabilities, or unilaterally limit type, amount, or duration of services

Current Regulations

- **Wyoming DE Rules—Ch. 7, §5(c)**

Restates substance and language of Federal regulation

Requires a “multi-factor approach” in determining need for ESY

Current Regulations

- **Note**

Neither IDEA nor its regulations establish a standard for determining a child's need for ESY services (*Letter to Myers*, 213 IDELR 255 (OSEP 1989)).

Thus, States have discretion to establish standards for ESY, as long as they comport with the IDEA regulation's base requirements

Current Regulations

- **USDOE Commentary to Regulations**

“The requirement to provide ESY services to children with disabilities who require such services in order to receive FAPE reflects a longstanding interpretation of the Act by the courts and the Department. The right of an individual child with a disability to receive ESY services is based on that child's entitlement to FAPE....”

“Some children with disabilities may not receive FAPE unless they receive necessary services during times when other children, both disabled and nondisabled, normally would not be served.”

Current Regulations

- **USDOE Commentary to Regulations**

“Typically, ESY services are provided during the summer months. However, there is nothing in Sec. 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 school vacations, if the IEP Team determines that the child requires ESY services during those time periods in order to receive FAPE.” 71 Fed. Reg. 46,582 (August 14, 2006).

Evolution of Caselaw on ESY

- **First, Federal courts established that neither States nor schools could limit educational services to the regular school year period**

Crawford v. Pittman, 555 IDELR 107 (5th Cir. 1983)

Georgia Ass'n of Retarded Citizens v. McDaniel, 555 IDELR 251 (11th Cir. 1983)

Evolution of Caselaw on ESY

- **Rationale was that such limits precluded individualized decisions as to what services were necessary for FAPE**

Point—Some students will regress so substantially over a summer that they will lose much of what they learned the school year before

Some students will need services beyond the regular school year to receive FAPE

Evolution of Caselaw on ESY

- **Next, courts began to set forth standards for determining the need for ESY on an individualized basis**

Alamo Heights Ind. Sch. Dist. V. State Bd. of Educ., 557 IDELR 315 (5th Cir. 1986)

“If a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services.”

Evolution of Caselaw on ESY

Alamo Heights Ind. Sch. Dist. V. State Bd. of Educ., 557 IDELR 315 (5th Cir. 1986)

“The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.”

Evolution of Caselaw on ESY

Johnson v. Independent Sch. Dist. No. 4 of Bixby.,
17 IDELR 170 (10th Cir. 1990)

Controlling legal authority in Wyoming

Student with Autism, moderate ID, and seizures

First, Court noted that regression and recoupment are key considerations

Johnson v. Independent Sch. Dist. No. 4 of Bixby,
17 IDELR 170 (10th Cir. 1990)

“The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child’s need for continuation of his or her structured educational program in the summer months.”

The court noted, and adopted, the Fifth Circuit’s analysis in the *Alamo Heights* case.

Johnson v. Independent Sch. Dist. No. 4 of Bixby,
17 IDELR 170 (10th Cir. 1990)

But, the Court noted that regression-recoupment is not the sole measure to be used

“In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an ‘appropriate’ educational program under the Act.”

Johnson v. Independent Sch. Dist. No. 4 of Bixby.,
17 IDELR 170 (10th Cir. 1990), at n. 9

Court's list of possible factors:

- Degree of impairment
- Degree of regression
- Recoupment time
- Parent's ability to provide education at home
- Child's rate of progress
- Behavior and physical problems
- Availability of alternate resources
- Ability to interact with nondisabled peers
- Areas that need continuous attention
- Vocational needs
- Relevance of ESY services requested

Johnson v. Independent Sch. Dist. No. 4 of Bixby.,
17 IDELR 170 (10th Cir. 1990), at n. 9

Court agreed that child should not have to actually experience severe regression on one occasion in order to be eligible for ESY.

Analysis “should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child’s parents as well as circumstantial considerations of the child’s individual situation at home and in his or her neighborhood and community.”

Cordrey v. Euckert, 17 IDELR 104 (6th Cir. 1990)

ESY services warranted when they prevent significant regression of skills or knowledge that would seriously affect a child's progress toward self-sufficiency.

Noting, with approval, other Circuit's analyses

Note—See more recent case of *Board of Educ. of Fayette Cty. v. L.M.*, 47 IDELR 122 (6th Cir. 2007), *cert. denied*, 110 LRP 48155 (2007)), reaffirming the Circuit's ESY standard.

Cordrey v. Euckert, 17 IDELR 104 (6th Cir. 1990)

Note—USDOE has indicated its approval of regression/recoupment (plus other factors) as a valid ESY analysis.

In 2006, USDOE stated that concepts of regression and recoupment “have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents.” 71 Fed. Reg. 46,582 (August 14, 2006).

- **Then, courts addressed other issues in ESY determinations**

M.M. v. School Dist. Of Greenville., 37 IDELR 183 (4th Cir. 2002)

Fourth Circuit adopts 10th Circuit's analysis in *Johnson*

But, it clarifies that the “mere fact of likely regression” is not a sufficient basis to compel ESY, unlike argued by the student

- **Then, courts addressed other issues in ESY determinations**

Annette K. v. State of Hawaii, Dept. of Educ.,
60 IDELR 278 (D. Hawaii 2013)

Teen with severe dyslexia was denied ESY

But, evidence showed student would regress even over short breaks

Court found that the student's "rapid regression strongly supports his need for continuous educational programming."

And, student had been routinely provided ESY in previous years.

- **Then, courts addressed other issues in ESY determinations**

Annette K. v. State of Hawaii, Dept. of Educ.,
60 IDELR 278 (D. Hawaii 2013)

Note—Schools may want to document whether students have regressed abnormally after Christmas and Spring breaks, as that can be data relevant to the ESY determination (see also, *C.H. v. Goshen Cent. Sch. Dist.*, 61 IDELR 19 (S.D.N.Y. 2013)).

Question—Does provision of ESY in one year mean ESY must be provided every year thereafter?

- **Then, courts addressed other issues in ESY determinations**

L.F. v. Houston Ind. Sch. Dist., 55 IDELR 10 (S.D.Tex. 2010), *aff'd*, 58 IDELR 63 (5th Cir. 2012), cert. denied (2012),

Another court case indicating that IEP teams can examine regression by assessing whether, and to what degree, a student lost ground during school breaks

Court noted that the opinions of teachers that know the child's learning best are most valuable

- **Then, courts addressed other issues in ESY determinations**

Grants Pass Sch. Dist. v. Student, 65 IDELR 207 (D. Or. 2015)

School's regression data analysis does not have to meet the highest statistical standards

Court held that while the data analysis proposed by the parents' experts might be "better" than those used by the school, there is nothing in IDEA requiring use of best data analysis methods.

- **Then, courts addressed other issues in ESY determinations**

M.M. v. School Dist. of Greenville., 37 IDELR 183 (4th Cir. 2002)

“The mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from schools.”

Thus, regression that can be recouped within a reasonably short timeframe is tolerated, as it does not jeopardize overall FAPE.

- **Then, courts addressed other issues in ESY determinations**

Letter to Klecka, 30 IDELR 270 (OSEP 1998)

Students who do not meet their IEP goals are not automatically entitled to ESY services

Need for ESY must be addressed individually.

Johnson v. District of Columbia, 112 LRP 36774 (D.D.C. 2012)

If the reason for lack of progress is truancy, ESY services are typically not required

- **Then, courts addressed other issues in ESY determinations**

Letter to Given, 39 IDELR 129 (OSEP 2003)

Lack of progress cannot be the sole criterion for determinations of need for ESY services

(Citing the regression/recoupment plus additional factors standard of the 4th Circuit Court in *M.M. v. Greenville*)

- **Then, courts addressed other issues in ESY determinations**

Letter to Copenhaver, 50 IDELR 16 (OSEP 2007)

Personnel who provide ESY must meet the same credentials and qualifications requirements that apply to personnel providing services during the school year

- **Then, courts addressed other issues in ESY determinations**

Upper Darby Sch. Dist., 116 LRP 33469 (SEA PA 2016)

Parents' desire to ease child's transition from 5th to 6th grade was not proper basis for awarding ESY services

- **Then, courts addressed other issues in ESY determinations**

T.M. v. Cornwall CSD, 63 IDELR 31 (2nd Cir. 2014)

AU child is normally mainstreamed with supports during school year, but was offered sp ed class for ESY

Court held LRE applies equally to ESY, even if school does not offer regular summer programs

Court stated that districts do not have to *create* regular summer programs for this purpose; they can contract with other public or private schools

- **Then, courts addressed other issues in ESY determinations**

T.M. v. Cornwall CSD, 63 IDELR 31 (2nd Cir. 2014)

“For ESY programs as for academic year programs, a child’s LRE is primarily defined by the nature of the child’s disabilities rather than by the placements that the school district chooses to offer.”

Question—Does a school have to offer the continuum of placements it normally offers during year?...Would that be cost-effective? Is that question irrelevant?

T.M. v. Cornwall CSD, 63 IDELR 31 (2nd Cir. 2014)

“If practical issues make it objectively impossible or impracticable to provide a disabled student an ESY program in the LRE, the equitable calculus may weigh against reimbursement.”

Note—Court seems to acknowledge the practical implications of its own holding... There are likely many situations where summer mainstreaming alternatives are “impracticable.” Does this not undermine the Court’s ESY LRE holding? Does LRE really apply equally or not?

T.M. v. Cornwall CSD, 63 IDELR 31 (2nd Cir. 2014)

Case has problematic implications—Is contracting with a neighboring public school for regular Summer school mainstreaming really a feasible option?

Are these alternate options generally available in rural areas?

Practical Implication—Schools that have regular summer school will have to consider integrating IDEA students for ESY whose IEPs call for mainstreaming during school year

T.M. v. Cornwall CSD, 63 IDELR 31 (2nd Cir. 2014)

This court's position represents a recent shift...

Years ago, USDOE acknowledged that a student's ESY placement may differ from his regular school year placement since the specific purpose of the services is preventing severe regression in particular skill areas (see *Letter to Myers*, 16 IDELR 290 (OSEP 1989)).

E.g., California law specifically exempts schools from meeting mainstreaming requirements during ESY if they do not offer regular summer programs (*San Francisco USD*, 53 IDELR 31 (SEA CA 2009)).

Howard Cty. Pub. Schs., 24 IDELR 719 (SEA PA 1996)

9-year-old with Autism and significant social skills needs

School proposed ESY program with no nondisabled peers, no opportunities to model appropriate behavior and social skills

“I agree with counsel for the parents that children with autism have distinct unique needs that intermesh with academics and behavior. Nondisabled peers apparently allowed [] to model behavior and this would appear to necessitate at least a partially inclusive program.”

Howard Cty. Pub. Schs., 24 IDELR 719 (SEA PA 1996)

Questions—Does it matter if the District offers any regular summer programs for that inclusion to take place? Would that inclusion be feasible in another public school or a private program? Would the child's difficulties with transitions not factor into whether having him attend two different programs in the summer makes sense?

Howard Cty. Pub. Schs., 24 IDELR 719 (SEA PA 1996)

Note—Hearing Officer states that “the IEP for ESY is not designed for educational *progress* but rather to maintain the child at a level minimizing the recoupment time necessary. The purpose of ESY IEP is to bring the level of regression and time for recoupment neared to that seen in nondisabled peers.”

HO sees prevention of abnormal recoupment time as the goal of ESY, not progress on goals (see, e.g., *Reinholdson v. School Bd. of Ind. Sch. Dist. No. 11*, 44 IDELR 42 (D.Minn. 2005), *aff'd*, 46 IDELR 63 (8th Cir. 2006)).

Ideas for IEPT ESY Determinations

- **Criteria for ESY**

Most States use a regression-recoupment analysis plus consideration of additional factors

In States that promulgate ESY criteria, the LEAs will have an easier time both deciding ESY and defending the decisions

Criteria should focus on prevention of substantial regression (unrecoupable within a few weeks) in critical skill areas

Ideas for IEPT ESY Determinations

- **Criteria for ESY**

Thus, the main criteria could be a documented potential for substantial regression in critical skill areas that cannot be recouped within the first few weeks of the school year

Documentation could include regression after school breaks, or past regression after a summer with no ESY

The criteria would need to track the requirements in the case of *Johnson v. Bixby*, which is controlling authority in Wyoming



- **Criteria for ESY**

Then, IEPT must also consider the following factors in finalizing the ESY determination:

- Degree of impairment
- Parent's ability to provide help at home
- Child's rate of progress
- Behavior and physical problems
- Availability of alternate resources
- Ability to interact with nondisabled peers
- Areas that need continuous attention
- Vocational needs (if relevant at the age)
- Relevance of ESY services requested



- **Criteria for ESY**

Should not the IEP team identify the specific goals that will be targeted in ESY (i.e., those that represent critical skill areas where regression potential is highest or most damaging)?

Should not the timeline for reasonable recoupment be related to the critical nature of the skill that could be lost?

What is a critical skill? If its loss would mean a more restrictive environment, loss of self-sufficiency, loss of access to community-based instruction or on-the-job coaching, for example

- **Criteria for ESY**

See, e.g., State ESY Regulations:

California—5 CA ADC §3043

Texas—19 Tex. Admin. Code §89.1065

Pennsylvania—22 Pa. Code §14.132(a)(2) and §711.44(a)(2))

Minnesota—Minnesota Administrative Rules §3535.0755



- **Summer School Programs and ESY**

ESY is an individualized program for an IDEA student, based on IEP goals and Federal and State special education requirements

Summer school is a non-individualized (generally) regular education program

Participation of an IDEA student in a summer school program could be part of an IEPT-determined ESY program (particularly for social skills, compliance with LRE)

But, summer school, without individualized sp ed services is not ESY

• **Determining Need for ESY**

When is the regression substantial, so that it cannot be recouped within a reasonable time?

An indicator will be data indicating that after a school break, most material from the previous weeks will have to be retaught

Which of the additional factors for consideration are likely to be most important?

- Child's rate of progress (the lower the rate, the more that regression will cause damage)
- Ability to interact with nondisabled peers (especially for students with social skills needs)
- Areas that need continuous attention
- Alternate services from other agencies
- Relevance of ESY services requested



- **Determining Need for ESY**

Schools should resist the tendency to standardize amount of ESY services—some students may need significant ESY, while others may need a modest amount of services in a particular area

Students with moderate-to-severe autism are a population likely to experience severe regression without structured programming

But, other types of students may also require ESY