



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

Presented by

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# 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

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

**Note**—Translated to the modern *Endrew* FAPE standard, ESY is needed if the child's appropriate progress in light of their circumstances will be lost without ESY services.

# Current Regulations

- **Wyoming 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.

- **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 (5<sup>th</sup> Cir. 1983).

*Georgia Ass'n of Retarded Citizens v, McDaniel*, 555 IDELR 251 (11<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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.”

Note—ESY is not meant to maximize progress.

# Evolution of Caselaw on ESY

***Reinholdson v. Sch. Bd. of Ind. Sch. Dist.*  
No. 11-, 46 IDELR 63 (8<sup>th</sup> Cir. 2006)**

ESY services are intended to prevent regression rather than advance educational skills (i.e., ESY's focus is on maintenance of skills gained and progress made in the prior year).

See, e.g., ESY denied to work on new goals (*Glynn Co. Sch. Dist.*, 114 LRP 46669 (SEA GA 2014); ESY denied to ease transition to middle school (*Upper Darby Sch. Dist.*, 116 LRP 33469 (SEA PA 2016)).

# Evolution of Caselaw on ESY

***Johnson v. Independent Sch. Dist. No. 4 of Bixby*, 17 IDELR 170 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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.”

For one, analysis should attempt to predict whether the student will experience regression, even if they have not to this point.

# ***Johnson v. Independent Sch. Dist. #4 Bixby., 17 IDELR 170 (10<sup>th</sup> Cir. 1990)***

Court's list of possible factors:

- Degree of impairment
- Degree of regression
- Recoupmment 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
- ESY services should not be “extraordinary” to the disability

# ***Johnson v. Independent Sch. Dist. #4 Bixby., 17 IDELR 170 (10<sup>th</sup> Cir. 1990).***

ESY services must be *relevant* to the student's disability:

Factors include “whether the requested service is ‘extraordinary’ to the child’s condition, as opposed to an integral part of a program for those with the child’s condition.”

**Note**—ESY services should thus focus on the critical skill areas most impacted by the student’s disability.

# ***Johnson v. Independent Sch. Dist. No. 4 of Bixby, 17 IDELR 170 (10<sup>th</sup> Cir. 1990)***

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 recoulement, 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 (6<sup>th</sup> Cir. 1990)***

ESY services warranted when they prevent significant regression of skills or deprive a child of learning to the point of seriously affecting a child's progress toward self-sufficiency (or other transition goals).

Court noted, with approval, other Circuits' ESY analyses.

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

# ***Cordrey v. Euckert, 17 IDELR 104 (6<sup>th</sup> 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 (4<sup>th</sup> Cir. 2002)***

Fourth Circuit adopts 10<sup>th</sup> 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.

*Note*—This is because *all* students experience some regression over summer months.

- 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? Not necessarily.

- 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 (5<sup>th</sup> 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 (4<sup>th</sup> 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.

- 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.

(Cites the regression/recoulement plus additional factors standard of the 4<sup>th</sup> Circuit Court in *M.M. v. Greenville*).

Note—Of course, lack of progress on IEP goals must be addressed, in some manner, by the IEP team.

- Then, courts addressed other issues in ESY determinations

***T.M. v. Cornwall CSD, 63 IDELR 31  
(2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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.”

# **T.M. v. Cornwall CSD, 63 IDELR 31 (2<sup>nd</sup> 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.

# 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.

ESY can focus on only some skill areas. *Letter to Myers*, 213 IDELR 255 (OSEP 1989).

# 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, past regression after a summer with no ESY, or expected regression (e.g., prognosis of declining skills due to worsening of condition).

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 *Johnson* 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 to disability

- **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)?

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.

- **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 for a significant period.

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, intellectual disability, and severe physical conditions are populations most likely to experience severe regression without structured programming.

But, ESY cannot be limited to certain eligibility categories; other students may need them.

- **Guiding Questions on Need for ESY:**

Does student exhibit significant regression after school breaks?

Is the regression in key or critical skill areas?

Can the regression be recouped in a short time?

Is regression compromising progress made during the year (too much time spent on recouping)?

Are there skill areas that appear to need continuous attention in order for student to progress in them?

Are parents able to provide helpful activities during school breaks?

- **Guiding Questions on Need for ESY:**

Does student make limited progress as is?

Are there physical or behavioral problems that will result in substantial regression and unreasonable time to recoup?

Will student have opportunities for interaction with nondisabled children during school breaks?

Are there vocational/transition goals that cannot be met without ESY services

- **Guiding Questions on Makeup of ESY Services:**

What are the key and critical skill areas most likely to regress substantially?

What services will address these areas?

Will student need related services during ESY to benefit from their ESY sp ed services?

How many weeks of summer ESY services will be needed to prevent regression than cannot be recouped reasonably? How many days per week of services? How many hours per day?

# More ESY Legal Issues

- **Timing of ESY Determination**

Can take place later in the school year but must be determined in a timely fashion (sufficient to allow for ESY to be provided).

IEP teams that postpone the ESY determination must make sure to reconvene in a timely fashion to address ESY.

# More ESY Legal Issues

- **What do ESY Services Contain?**

Must contain special education services (i.e., specially designed instruction).

They cannot merely consist of related services, as those are necessary for the student to benefit from their special education.

# More ESY Legal Issues

- **Must the IEP team consider ESY due to significant truancy?**

Generally no. See *Jackson Johnson v. District of Columbia*, 112 LRP 36774 (D.D.C. 2012).

But, truancy is a behavior that should be addressed with functional behavioral assessments (FBAs), BIPs, counseling, or other IEP services.

# More ESY Legal Issues

- **Is ESY Always a Summer Program?**

No. It can be possible for a student to need ESY services outside of the school day or during extended holidays.

That will be rare, but some students may have very high regression potential.

Generally, however, most student's ESY needs are met during the most extended school break in the annual schedule—summer break.

- **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.

On the other hand, summer school is a non-individualized 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.

- **Additional Questions for Discussion**

What if parents do not want ESY services?

Social skills and behavior skills in ESY?

How should staff collect data on regression after school breaks?

What if the IEP team decided ESY was not needed, and then the student exhibits severe regression at the beginning of the school year?

- **Additional Questions for Discussion**

What if student does not attend ESY services?

What about related services during ESY?

What about disciplinary removals during ESY?

How should schools logically organize ESY terms?

- **Follow-up Questions?**

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