

# **EXTENDED SCHOOL YEAR SERVICES**

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## INTRODUCTION

Extended school year (ESY) services are services provided beyond the regular school year that are necessary in order for a student to make educational progress during the school year. These services must be individually designed to meet specific objectives included in a student's individualized education program (IEP) and are part of what constitutes a free appropriate public education for the student who receives them. ESY services are not simply an extension of time in school, an automatic summer school placement, or a summer enrichment program.

## II.

### FEDERAL LAW AND POLICIES

#### 8. Individuals with Disabilities Education Act (IDEA)

The statute is silent regarding ESY services.

#### B. IDEA Regulations

9. Regulations were issued in 1999 to implement the 1997 reauthorization of the IDEA. These regulations define "extended school year services" for the first time (34 C.F.R. 300.309(b)):

"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.

2. Every public agency must ensure that ESY services are available to students whose IEP teams determine that such services are necessary for the provision of a free appropriate public education. 34 C.F.R. 309(a)(2).

10. The regulation specifically prohibits public agencies from limiting ESY services to particular categories of disability and from unilaterally limiting the type, amount, or duration of the services. 34 C.F.R. 300.309(a).

11. United States Department of Education Office of Special Education Programs (OSEP) Policy Rulings (selected)

1. *Letter to Baugh* (July 2, 1987), 211 EHLR 481: When extended school year services are an issue, they must be discussed at an IEP meeting. Limiting extended school year programs to students with severe and profound disabilities is contrary to the requirements of the statute that special education and related services be designed to meet the unique needs of individual students. Extended school year programs may not be limited in duration for all students. An extended year program, including related services needed, may differ from the regular school year program. It is not necessary to make a separate showing of regression and poor recoupment for related services; rather, it is only necessary to show that the service is needed to benefit from the special education provided in summer programs.
2. *Letter to Gramm* (July 25, 1988), 213 EHLR 149: Extended school year programs must be made available when they are necessary to provide a free appropriate public education to a child.
3. *Letter to Myers* (August 30, 1989), 213 EHLR 255: The IEP team determines the amount of services that the student needs for an appropriate extended school year program. In most states, the fundamental concern is that extended school year services be designed to address regression and recoupment problems. It is reasonable that an IEP developed for an extended school year program will differ from the IEP developed for the student's regular school program. It is also reasonable for an extended school year IEP to concentrate on the areas in which the child may experience regression or on the skills or programs that are not academic but are needed so that regression does not occur in academics. Least restrictive environment requirements do apply when an IEP is developed for extended school year services. School districts do not have to establish public programs for students without disabilities for the sole purpose of being able to implement the least restrictive environment provision for children with disabilities who require an extended year program. However, a school district must meet the least restrictive environment requirement by alternative means, such as private placements, when it is determined that a student with a disability must have interaction with students without disabilities.
4. *Letter to Harkin* (September 15, 1989), 213 EHLR 263: The ultimate determination of whether or not a student needs extended school year services to

receive a free appropriate public education must be made by the IEP team. Parents have the right to request a due process hearing at any time to resolve a disagreement with a school district regarding extended school year services.

5. *Letter to Myers* (December 18, 1989), 16 EHLR 290: Options on the continuum of services must be made available to the extent necessary to implement a student's IEP. A student's IEP for extended school year services will probably differ from the student's regular IEP, since the purpose of the ESY program is to prevent regression and recoupment problems. If a determination is made that a private school placement is the appropriate placement in which to implement an IEP for extended school year services, federal funds can be used to pay for the services. The statute does not address obligations of school districts to modify existing programs to ensure that a student's IEP for extended school year services is implemented in the least restrictive environment; such matters are left to the discretion of the state and local educational authorities. Modification necessary to implement a student's IEP for extended school year services must be determined on a case-by-case basis.
  
6. *Letter to Libous* (November 15, 1990), 17 EHLR 419: Determinations regarding eligibility for extended school year services must be based solely on each student's unique educational needs, rather than the category of the student's disability. Students may require related services as the sole component of their special education program during the summer months to enable them to benefit from the special education and related services included in their IEPs during the school year. Further, it is permissible for states to designate any related service as special education.
  
7. *Letter to Anonymous* (November 15, 1993), 22 IDELR 980: Children who turn three during summer months must be provided with extended school year services if needed for the provision of a free appropriate public education. Part B of the IDEA and its implementing regulations do not include standards for determining when a student must be provided with an ESY program in order to receive a free appropriate public education, the regulations and federal courts provide two basic guidelines that apply to making the decision. First, the determination of what constitutes a free appropriate public education for a student, including ESY, must be made on an individualized basis as part of the IEP process. Second, a state may not have a policy that excludes any disability category from eligibility for ESY services. States have the discretion to establish policies and procedures regarding the determination of need for ESY services. Many states use evidence of regression and slow recoupment as a factor in determining the need for ESY. The evidence appropriate to meet the state standard must be determined on a case-by-case basis depending on the needs of the individual student.

8. *Letter to Kleczka* (September 29, 1998), 30 IDELR 270: There is no federal requirement that if a student does not meet the goals of the IEP the student must participate in extended school year services.
  
9. *Letter to Sims* (June 27, 2002), 38 IDELR 69: Although the IDEA Part B “at no cost” requirement does not preclude incidental fees that are normally charged to students without disabilities or their parents as part of the regular education program, it would be inconsistent with the requirements of 34 C.F.R. 300.309 for a public agency to charge parents a fee for extended school year services if summer school services, for which incidental fees are charged, are not a part of the extended school year services provided to the student.
  
12. United States Department of Education Office for Civil Rights Rulings (selected)
  1. *Abington (PA) School District* (November 26, 1979), 257 EHLR 115: School district violated Section 504 by failing to provide a summer remedial program for students with disabilities who had not met the expectations of their IEPs. District may not preclude students from receiving services in excess of 180 days.
  
  2. *New Hampshire Department of Education* (January 18, 1980), 257 EHLR 59: Class action complaint. OCR held that local school districts and the state board of education violated Section 504 by restricting children’s access to programs of more than 180 days and by denying them programs designed to meet their individual needs. OCR ruled that other restrictions violated children’s right to an individualized appropriate education, including presumption that extended programs are the exception to the regular school year, that extended programs cannot involve summer camps, related services in isolation, or changes of placement, and that newly classified students cannot attend extended classes.
  
  3. *Hoover Schrum (IL) School District No. 157* (June 3, 1980), 257 EHLR 136: Decision to provide extended program must be based on individual requirements of each child and must be decided by those who are most knowledgeable of the student’s needs. District violated Section 504 by allowing the school board to decide, based on funding considerations, that student was not eligible for extended school year services. Additionally, by providing a CETA-funded summer program offering reading and math to students with disabilities, the district became responsible for providing equal educational opportunity for students with disabilities.
  
  4. *Seattle (WA) School District No. 1* (June 14, 1983), 257 EHLR 424: District violated Section 504 by having policy of not evaluating students with disabilities

to determine if extended school year services are necessary for the provision of a free appropriate public education, since such a policy ignores consideration of individual educational needs.

5. *Baltimore (MD) City Public Schools* (April 18, 1986), 352 EHLR 185: Class complaint. District violated Section 504 because it did not determine provision of extended school year programs and services based on students' individual needs. Only severely disabled students in special day schools or residential facilities were considered for extended school year programs.
6. *Seattle (WA) School District No. 1* (March 25, 1987), 352 EHLR 375: District violated Section 504 by failing to ensure that ESY eligibility decisions were based on individual needs, by failing to have a group of persons knowledgeable about the student or placement options make eligibility and placement decisions for ESY programs, by failing to consider the need of students with disabilities for contact with nondisabled students in ESY programs, and by failing to give parents of students with moderate and severe disabilities similar notice of summer school programs as that provided to parents of nondisabled students and students with mild disabilities.
7. *Clark County (NV) School District* (November 2, 1989), 16 EHLR 311: The district violated Section 504 by failing to consider the appropriateness of ESY services as a part of a free appropriate public education for all eligible students and by its policy of limiting summer school enrollment on the basis of disabling condition. Additionally, the district violated Section 504 by charging some families fees for summer services that should have been provided as part of a free appropriate public education.
8. *Highline (WA) School District No. 401* (November 3, 1989), 16 EHLR 364: OCR found that the district provided students with disabilities with an equal opportunity to participate in regular summer school programs. OCR also found that the educational needs of the students in the ESY program required a separate facility and that the district had not violated Section 504 even though these students had limited opportunity for integration.
9. *Rockwood (MO) R-VI School District* (November 8, 1989), 16 EHLR 506: District did not violate Section 504 by having policy that ESY programs were generally one-half the amount of services received during the regular school year. OCR emphasized that the purpose of an ESY program is to prevent recoupment and regression problems and that the district's general statement of the amount of

ESY services that would be provided did not preclude the provision of a free appropriate public education.

10. *Mesa (AZ) Public Schools* (November 9, 1989), 16 EHLR 316: District violated Section 504 by limiting ESY services to self-sufficiency areas and, thereby, serving mainly students with severe cognitive impairments. This policy discriminated against other students with disabilities by failing to consider their unique needs.
11. *Fairfax County (Va) Sch. Dist.* (undated), 31 IDELR 247: OCR found insufficient evidence to substantiate a violation of Section 504 and Title II with regard to an allegation that the school district isolated students with moderate mental retardation by “warehousing” them in separate ESY programs for administrative convenience. Because the district’s summer school program does not duplicate the regular school program at all schools in the district, Section 504 does not require such duplication for special education services either.
12. *Greenwich (CT) Pub. Schs.* (2000), 34 IDELR 69: Class action complaint challenging district’s elimination of public or private camp placement as an extended school year services option on basis that elimination of that option would deny students who were included in general education settings during the year access to extended school year services in an inclusive setting. OCR found in favor of the families. District agreed to continue the camp option and to take other corrective actions.
13. Significant Caselaw (Selected)
  1. Early cases successfully challenged strict 180 school day per year policies:
    - a) *Armstrong v. Kline*, 476 F.Supp. 583 (D. Pa. 1979), *aff’d* as *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981)
    - b) *Yaris v. Special School District of St. Louis County*, 558 F.Supp. 545 (E.D. Mo. 1983), *aff’d*, 728 F.2d 1055 (8<sup>th</sup> Cir. 1984)
    - c) *Crawford v. Pittman*, 708 F.2d 1028 (5<sup>th</sup> Cir. 1983)
    - d) *Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp. 1263 (N.D. Ga. 1981), *aff’d* 716 F.2d 1565 (11<sup>th</sup> Cir. 1983)

2. *Rettig v. Kent City School District*, 539 F. Supp. 768 (N.D. Ohio 1981), *aff'd in pertinent part and partially vacated on other grounds*, 720 F.2d 463 (6<sup>th</sup> Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984).

A summer program is a necessary component of an appropriate education if it would prevent significant regression of skills or knowledge so as to seriously affect the student's progress towards self-sufficiency.

3. *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5<sup>th</sup> Cir. 1986)

"The some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought 'to a virtual standstill.' If a child will experience "severe or substantial regression" during the summer months without a summer program, the student may be entitled to year-round services. The question 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." (citations omitted).

4. *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990)

The court held:

- a) Regression-recoupment analysis is not the only factor used to determine the necessity of a structured summer program. Other factors to be considered include the degree of impairment and the ability of the child's parents to provide the educational structure at home, the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nondisabled children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested service is extraordinary to the child's condition or an integral part of a program for those with the child's condition.
  - b) This list is not intended to be exhaustive and it is not intended that each element impact planning for each child's IEP.
  - c) The analysis of whether or not a child's level of achievement would be jeopardized by a summer break in services should include the application not only of retrospective data such as past regression and rate of recoupment, but also "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." 921 F.2d at 1028.
5. *Cordrey v. Euckert*, 917 F.2d 1460 (6<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 938 (1991).



The legal standard for determining eligibility of a student for extended school year services is “significant skill losses of such degree and duration so as seriously to impede his progress toward his educational goals.” A student need not demonstrate past regression in order to prove his or her need for a summer program. Where there are no such empirical data available, need may be proven by expert opinion, based upon a professional individual assessment.

6. *Reusch v. Fountain*, 872 F. Supp.1421 (D.Md. 1994)

Class action lawsuit resulted in order that the school district cease and desist from its IDEA violations and provide:

- a) notice to parents regarding the consideration of ESY services at each annual review meeting;
- b) determination of ESY services early enough so that parents can appeal a denial in time to obtain ESY services if their child is found eligible;
- c) establishment of six eligibility criteria including regression, recoupment, degree of progress, emerging skills/breakthrough opportunities, interfering behavior, nature and/or severity of the disability, and special circumstances;
- d) individualized ESY services, and
- e) written summary of ESY discussion within 10 working days after the meeting.

14. *LIH v. New York City Board of Education*, 103 F. Supp.2d 658 (E.D.N.Y. 2000)

The procedural safeguards, including the discipline requirements, of the IDEA apply equally to summer school programs. The IDEA applies to every school day, which is defined as “any day, including a partial day, that children are in attendance at school for instructional purposes.” 34 C.F.R. 300.9. Summer school days satisfy that definition.

15. *M.M. v. School District of Greenville County*, 303 F.3d 523 (4<sup>th</sup> Cir. 2002)

ESY services are necessary for the provision of a free appropriate public education when the benefits gained by the child during the regular school year will be “significantly jeopardized” if he or she does not receive an educational program during the summer. A showing of actual regression is not required; the need for ESY services may be established by expert testimony based on a professional individual evaluation. The mere fact of likely regression is not sufficient. Rather, ESY services are required under the IDEA only when such regression will “substantially thwart the goal of meaningful progress” (cite omitted).

16. *JH v. Henrico County School Board*, No. 02-1418 (4<sup>th</sup> Cir., April 28, 2003)

The court vacated the district court’s decision in light of the *M.M.* decision. The district court had applied a broader ESY eligibility standard, finding that the

purpose of ESY services is to make reasonable progress on unmet goals rather than simply maintaining gains already made. The family had presented evidence that there is a window of opportunity for children with autism such as JH to learn effectively to overcome their deficits and that using ESY services simply to maintain skills already gained, rather than using the time to foster continued development of such skills would limit the child's ability to participate and benefit from a regular classroom setting. In remanding the case to the district court for remand to the hearing officer, the 4<sup>th</sup> Circuit ordered that the hearing officer consider the "window of opportunity" evidence to the extent it is relevant to the determination of whether the ESY services that had been provided to the student were sufficient to prevent the gains he had made during the school year from being significantly jeopardized.

### III.

#### GENERAL ELIGIBILITY CRITERIA FOR ESY SERVICES

The general standard of eligibility for extended school year services is that the student will not be able to continue to make meaningful educational progress during the school year unless extended school year services are provided. Some states may apply this standard to "critical life skills" which are not defined in federal law and may be interpreted differently within states. Generally, the following factors must be considered:

##### A. Regression/Recoupment

1. Regression: All students lose some skills during the summer. In determining eligibility for ESY services, it is necessary to show that the student would regress more than the amount that would be expected for any student.
2. Recoupment: All students need some time at the beginning of a school year to re-learn the skills they have lost during the summer. In determining eligibility for ESY services, it is necessary to show that it would take longer for the student with disabilities to regain skills than it would for students without disabilities.

NOTE: It is NOT necessary for a student actually to regress or take a long time to recoup skills before being determined to be eligible for ESY services. The

LIKELIHOOD of regression or lengthy recoupment period, either of which would jeopardize the student's ability to make educational progress, is sufficient to establish eligibility. Also note that the regression-recoupment standard should include consideration of additional factors; generally, courts that have adopted a regression-recoupment standard have warned against "converting what should [be] a multifaceted inquiry into application of a single, inflexible criterion." *See, e.g., Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1029 (10<sup>th</sup> Cir. 1990), *cert. denied*, 500 U.S. 905 (1991).

B. Other factors (as determined through cases and policy rulings):

1. nature and/or severity of disability
2. degree of progress (if progress is very slow, student may need ESY services in order to continue to make progress)
3. emerging skills/breakthrough opportunities (e.g. student just beginning to communicate, accomplish self-care skills, read or write)
4. interfering behaviors (e.g., student's behavior has an impact on his or her ability to make educational progress)
5. special circumstances (e.g., student missed significant amount of time because of illness, surgery or other personal circumstances, student at risk of more restrictive placement, student moving from restrictive placement to inclusive program, etc.)

NOTE: This list is not all-inclusive. *See: Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990), *cert.denied*, 500 U.S. 905 (1991); *Reusch v. Fountain*, 872 F.Supp. 1421 (D.Md. 1994); *JH v. Henrico County School Board*, No. 02-1418 (4<sup>th</sup> Cir., April 28, 2003)

C. Examples:

1. Fifteen year old student with mental retardation who has almost learned to cross a street safely and will likely regress and have to learn this skill over again in the fall;
2. Student with autism who has met a social/behavioral objective on his IEP designed to reduce the frequency of self-injurious behavior and who is likely to resume that behavior at the previous level unless he receives extended school year services to enable him to maintain his behavior.
3. Ten year old student with cerebral palsy and learning disabilities who has just learned to activate an augmentative communication device to answer basic questions and will not retain this skill unless it is practiced consistently in a structured setting;
4. Student with deafness who has received a cochlear implant and needs education services and speech therapy in order to process sounds effectively so she will be able to obtain academic information orally;
5. Seven year old student with vision impairment, cerebral palsy, and learning disabilities who is moving from a day placement at the state school for the blind with a functional curriculum to a placement at her neighborhood school with a combination of general education classes and special education classes who needs special education services during the summer to maintain her skills so she will make a smooth transition to her new school;
6. Three year old student with developmental delays who is on a toileting schedule with verbal prompts at school and who may regress significantly over the summer

- and require considerable retraining in the fall if the toileting program does not continue;
7. Eight year old student with mental retardation who has spent most of the school year learning one or two basic language or math concepts and whose rate of progress is so slow that she needs extended opportunities to learn and practice skills;
  8. Twenty year old with developmental disabilities who recently obtained paid supported employment in the community and would likely lose the position without continued transition services during the summer;
  9. Ten year old student with blindness who is academically above grade level in all areas except math who is moving from a separate special education school to a regular education placement and who needs math instruction in order to catch up and begin the school year in a general education math class;
  10. Student with developmental and physical disabilities who had major surgery during the school year, was unable to participate in educational activities for several months because of pain and post-surgery complications, and who needs extended school year services to make up for lost time.

#### IV.

#### BUILDING A CASE FOR EXTENDED SCHOOL YEAR SERVICES

## A. Measurable Goals and Objectives on IEP

The decision regarding eligibility for extended school year services should be based on data and other information about the student's progress. At the outset, it is critical to ensure that the IEP contains measurable goals and objectives so that information about the student's progress may be collected. In evaluating an IEP's measurability, it may be helpful to ask the following questions:

1) Does the goal reflect a starting point and a proposed ending point?

*Example: Jane will increase her reading level from 3<sup>rd</sup> grade, 3 months to 4<sup>th</sup> grade, 3 months.*

*Example: Steven will increase his current 150 word reading vocabulary by learning to read 60 new words.*

*Example: Samantha will correctly answer one-digit addition questions 9 out of 10 times by choosing the correct answer from a choice of four.*

A goal that has a starting point and a proposed ending point is measurable. It is possible to measure how many months Jane gains in reading skills over the course of a year. It is easy to measure how many new words Steven learns. Likewise, whether Samantha is able to answer basic addition questions correctly 90% of the time can be readily measured.

2) Are the objectives or short term benchmarks linked to the goal in a logical way? In other words, if the student achieves each of the objectives, will the goal be accomplished?

*Example: Annual goal—Ellie will independently drink from a cup, taking the cup from table to mouth and returning the cup to the table.*

*Objectives: a) Ellie will take a  $\frac{3}{4}$  full cup from table, take a drink, and return cup to table with verbal prompts and hand over hand assistance.*

*b) Ellie will take a  $\frac{3}{4}$  full cup from table, take a drink, and return cup to table with verbal cues and tactile cuing.*

*c) Ellie will independently pick up a  $\frac{3}{4}$  full cup from table, take a drink and return cup to table with verbal cuing and tactile cue to initiate.*

It is important to recognize, however, that not every measurable goal is appropriate. For instance, a goal that requires a student who is blind to avoid obstacles in her path with 80% accuracy is not appropriate if the obstacle happens to be a car.

3) Are the short-term benchmarks or objectives easily measured? School districts should maintain data regarding a student's progress towards IEP goals and should collect data periodically. This is more likely to happen if the data can be collected and compiled easily.

*Example: Every month, Jane's teacher administers an informal reading test to Jane to measure her reading skills and keeps this information both for the quarterly progress report she must prepare and for purposes of determining Jane's possible eligibility for ESY services.*

*Example: Steven's teacher maintains a list of each new word Steven learns to recognize and pronounce correctly. Knowing that he should be learning about 15 new words a quarter, since his annual goal is to learn 60 new words, she can easily determine if Steven is on track to accomplish the goal.*

*Example: Every week, Samantha's teacher gives the class a math quiz with 10 problems. While the rest of the class is progressing to multiple digit addition and subtraction, Samantha's test consists of one-digit addition problems. Samantha's teacher keeps all of Samantha's quizzes in a folder and adds the results to a chart every month. This gives her the information she needs for Samantha's quarterly progress report as well as information that can be used in determining whether or not Samantha is eligible for ESY services.*

**B. Identification of goals/objectives as critical life skills**

Some states require the provision of extended school year services based on the criteria discussed above as applied to those goals and objectives on the IEP that reflect critical life skills, or skills that are critical to the student's overall educational progress. School systems do not necessarily have a uniform view about what constitutes a critical life skill, and state statutes may or may not provide definitions. Some districts view critical life skills as only functional skills of daily living; others consider academics to be critical life skills. However, what constitutes a critical life skill for a particular student must be determined individually, based on the student's age, disability, and other circumstances.

It could be argued that a student's entire IEP addresses critical life skills and that, therefore, the entire IEP must be implemented for an ESY program. While this may be true for some students, the eligibility criteria must still be applied to the goals and objectives on the IEP; even if an objective addresses a critical life skill, ESY will only be required if the regression/recoupment or other criteria are met. Generally, in practice, certain portions of the IEP will be selected for focus during the ESY program. A separate



ESY IEP is clearly contemplated by OSEP. *See, e.g., Letter to Myers* (August 30, 1989), 213 EHLR 255.

C. Data collection/reporting of data

It is important to ensure that the measurable goals and objectives of the student's IEP are actually measured, i.e., that the data are collected and reported. This information will be crucial to the determination of eligibility for ESY services. In addition to periodic data collection during the school year, the IEP team should test the student or measure his or her status at the beginning of the school year to determine if there has been regression and, if so, how long it takes the student to recoup lost skills. Sound data and information collection practices are particularly important for students with severe disabilities, since their progress may be measurable only in minute steps.

D. IEP Team Meeting:

IEP team members sometimes discuss ESY services in general terms, rather than with reference to the particular IEP goals and objectives on the student's IEP. Parents and advocates should call the IEP team's attention to the student's IEP, goal by goal, and discuss both progress towards each goal and the student's need for ESY services. Using the applicable standards for eligibility, the team should evaluate the student's need for ESY services for each goal and objective. If the governing state statute discusses ESY services in the context of "critical life skills," then the team should examine each goal and objective to determine if it is related to a critical life skill.

It is crucial that accurate and complete IEP meeting minutes be prepared. Any points of importance, such as insufficient data, the student's lack of progress, or any other issues regarding eligibility for ESY services or the substance of an ESY services program

should be documented in the minutes. This document may be essential if the parent chooses to appeal an IEP team decision regarding ESY eligibility or services. If the minutes do not accurately reflect the substance of the meeting, the parent can ask that the minutes be revised. While IDEA regulations permit a hearing regarding a school system's refusal to amend its records, a faster and easier way to address the issue is for the parent to document the requested corrections, additions, or deletions and ask that the parent's document be released any time the original document is released. *See* 34 C.F.R. 300.567-569.

E. Reports and evaluations by school system personnel/independent evaluations

As with determinations of eligibility for IDEA services and the development of a school-year IEP, decisions about ESY eligibility and services will depend on the information provided by a student's teachers and related service providers. Sometimes, these anecdotal reports or evaluations and recommendations will be sufficient to support the student's need for ESY. On occasion, the IEP team may not recommend ESY but an astute analysis of the school district's evaluations and other documents pertaining to the student, in combination with effective legal advocacy, may result in the team's recommendation of ESY services.

Other times, it may be necessary to obtain an independent evaluation regarding the student's need for ESY services. The process is the same for ESY as it is for any other independent evaluation. In accord with 34 C.F.R. 502, parents have the right to obtain an independent evaluation at public expense if they disagree with an evaluation done or obtained by the school system. Similarly, although not specifically addressed in the regulations, if a school system fails to obtain an evaluation recommended by the IEP

team, parents have generally been able to obtain an independent evaluation at public expense. If the school system believes its evaluation is appropriate and refuses to fund the independent evaluation, the school system must initiate a due process hearing to show that its evaluation is appropriate.

Parents always have the right to obtain an independent evaluation at their own expense. If they do so, the IEP team must consider the results of the evaluation but is not required to adopt the results. In situations in which the team does rely on the results or recommendations of the privately-funded independent evaluation, families should consider seeking reimbursement from the school system. Failure of the IEP team to consider an independent evaluation constitutes a procedural violation of the IDEA but, at least in one circuit, not one that results in a substantive denial of a free appropriate public education. *See, DiBuo v. Board of Education of Worcester County*, 309 F.3d 184 (4<sup>th</sup> Cir. 2002)( IEP team refused to look at private recommendations for ESY eligibility for young child with autism).

It is essential that any outside professionals understand the purpose of and eligibility criteria for ESY services. Rather than focusing on what is “best” for the student or on what will enable the student to learn new skills during the summer, outside professionals should focus on what services are necessary in order for the student to be able to maintain skills and continue to make educational progress when the school year resumes. Professionals should base their opinions about a student’s need for ESY on the student’s specific IEP goals and should discuss the eligibility criteria as they relate to the student. Recommendations that do not relate to IEP goals and objectives are likely to be dismissed by the IEP team as “medical” or otherwise irrelevant recommendations. A report that

simply notes that a student would benefit from ESY services is not sufficient. Rather, the professional should reference relevant eligibility criteria and explain why ESY is necessary in order for the student to continue to make educational progress and what the likely consequences are to the student if ESY services are not provided.

## V.

### DUE PROCESS CHALLENGES TO DENIAL OF ESY SERVICES

Development of a case for due process on the issue of ESY services is similar to the development of any other case. The key aspect of preparing for an ESY services due process hearing is that of timing. Ideally, the IEP team should consider a child's eligibility for ESY services early enough in the school year so that there is time, if necessary, for a family to resolve the matter through due process prior to the beginning of the summer. Otherwise, families may be forced to expend their own funds to ensure that their child receives summer services or stand by and watch their child suffer harm without services while the procedural process runs its course. *See, e.g., Reusch v. Fountain*, 872 F. Supp. 1421 (D.Md. 1994) (determination of ESY services must be made early enough so that parents can appeal a denial in time to obtain ESY services if their child is found eligible).

For a variety of reasons, of course, it may not be possible to resolve an ESY matter prior to the beginning of the summer. In this situation, if families have the resources and the ability to obtain services for their child, they can seek reimbursement. While the IDEA does not address the issue of notice regarding a family's intent to seek private ESY services, it would be wise to be cautious and have families give notice to the school

system in accord with the requirements of 34 C.F.R. 300.403 regarding unilateral private placement when a free appropriate public education is at issue.

If families are unable to obtain services for their child, they can seek compensatory services to make up for the school system's denial of services during the summer. Families can use the IDEA complaint process or a due process hearing to challenge the failure of the school system to provide ESY and to seek compensatory services as a remedy. It is natural, if a student is owed compensatory services for the school system's failure to provide ESY, to accept an ESY program the following summer as the compensatory service. Likewise, if a student misses a service during the school year, a program during the summer might seem to be a reasonable way to provide compensatory services.

However, care should be taken to ensure that compensatory services are truly compensatory, rather than a substitution for services to which the student is already entitled. For instance, if a student needs an ESY program as part of a free appropriate public education, the student should receive an ESY program regardless of any entitlement to compensatory services. The compensatory services should be over and above what the student already has a right to receive. On the other hand, if a student ordinarily would not be entitled to an ESY program, compensatory services could take the form of a summer program. Advocates and families should be careful not to call this kind of summer program ESY, however, because to do so blurs the definitions of ESY and compensatory services.

## VI.

### PRACTICAL ISSUES

A. Least restrictive environment/location of services:

Despite the fact that the IDEA's least restrictive environment requirements apply to extended school year services, many extended school year service programs are self-contained and serve only students with disabilities. This is because extended school year services are designed for students with disabilities and occur outside of the regular school schedule when students without disabilities generally do not attend school.

However, there are a variety of ways in which school districts can meet their obligation to provide students with disabilities extended school year services in less restrictive settings. First, as OSEP has noted, the school system could place the student in a private setting to obtain services. Second, if the school district operates a summer school program for students, a student with disabilities could receive the summer school program as his or her extended school year services or as a component of the extended school year services. For example, a student who is in self-contained reading and math classes but included in general education for all other classes during the school year could receive part of her extended school year services in a self-contained "ESY program" and part of her services in a general summer school program. Students could also receive extended school year services at a camp or other recreational facility.

Generally, advocacy efforts probably will be necessary to ensure that these types of arrangements are made to facilitate the least restrictive environment requirements of the IDEA. See, for example, *Greenwich (CT) Pub. Sch.* (2000), 34 IDELR 69.

In some circumstances, a family might seek an ESY program that is more restrictive than the program the student receives during the school year. In this situation, it will be

necessary to explain how the student's unique needs necessitate a more restrictive environment for the provision of ESY.

B. Cookie-cutter, one-size-fits-all programs:

Despite the requirement that extended school year services be individualized to meet a student's unique needs, school districts often tend to be rigid, offering generic programs for a set period of time that does not span the break between the end of one school year and the beginning of the next. It is not at all unusual for parents to be told, for instance, that the district's extended school year services for third and fourth graders will be at a particular site, or that the students with severe disabilities are served at a particular school. Additionally, the school system might limit services to 2 ½ hours or 5 hours per day for five weeks. While a standard program might meet the needs of some students with disabilities, families and their advocates should not feel constrained by these types of artificial parameters imposed by the school system. Depending on the student's needs, it may be possible to obtain services to supplement the standard program. For instance, a student who benefits from the district's standard five week program, offered during July and the first week of August, but who will regress with no services for the remaining weeks before school starts, might receive tutoring at home or at a camp or recreational program. Students who use assistive technology devices might qualify for extended school year services on the basis that they need to continue to use the devices in a structured setting, so they will not lose valuable academic time in the fall focusing on re-learning mechanics such as keyboarding. Even if formal extended school year services are not necessary for a student, assistive technology devices and, perhaps, some or all of a

student's physical therapy equipment, may be needed during the summer for home use, whether or not the student receives extended school year services.

C. Narrow eligibility criteria:

Often, even though multiple eligibility criteria must be considered, IEP teams will look only at regression/recoupment or will interpret other eligibility criteria restrictively. For example, while many situations might constitute "special circumstances" that would qualify a student for ESY services, some school systems define "special circumstances" in a particular way, such as lack of services during the year because of extended illness, and refuse to consider a student as eligible unless he or she meets that particular definition. Strong advocacy may be needed to persuade the IEP team to broaden its perspective. If a state has clear regulations or guidelines about ESY eligibility criteria, consideration could also be given to filing an IDEA complaint with the state education agency. If the law in a particular state is not clear, consideration could be given to litigating a case similar to those discussed in the first section of this document.

D. Transportation:

If a student needs transportation in order to attend an extended school year services program, then the school district is responsible for providing transportation as a related service, as it would be during the school year. *See, e.g., Brent v. San Diego Unified District*, No. 96-1377 (S.D. Ca. 1996) (25 IDELR 1)(temporary restraining order issued to require transportation of students to IEP recommended day treatment programs during the summer).

E. Lack of service providers:



Sometimes IEP teams may make decisions about ESY services that are patently based on the availability of services and service providers, rather than on the needs of the individual student. Clearly, this is illegal. In the context of placement in the least restrictive environment, OSEP has repeatedly stated in policy letters that placement cannot be based on administrative convenience or the availability of service providers. *See, e.g., Letter to Earnest* (July 18, 1986), EHLR 211:417 (1978-87 Rulings, Policy Letters); *Letter to Boschwitz* (September 26, 1988), 213:215. Additionally, question 31 in Appendix A of the IDEA regulations specifically states that a public agency must ensure that all services set forth in a student's IEP are provided, consistent with the child's needs as identified in the IEP. As with other IEP-based services, the school district is obligated to provide needed ESY services. The district can do this by contracting for those services, purchasing them from another school program, or hiring staff, for example. *See, e.g. 34 C.F.R. Part 300, Appendix A, question 31.* While the issue of ESY services based on service provider availability is certainly an issue that could be addressed in a due process hearing, if the student lives in a state with a viable complaint resolution process, consideration could be given to filing an IDEA complaint on behalf of the student or on behalf of the student and all other similarly situated students.

F. Lack of assistive technology or therapy equipment:

If a student's ESY program requires the provision of assistive technology devices or therapy equipment, the devices and pieces of equipment must be provided to the student. If a student's ESY services are provided at a location other than the school the student attends during the year, there may be a delay transferring the required items to the ESY

program site or a subsequent delay transferring them back to the student's regular school site. It is good practice to identify an IEP team member or other school district staff member who will be responsible for ensuring that necessary equipment and devices are transferred to and from the ESY or that duplicate items are provided during the ESY program.

It is also important to ensure that the ESY service providers are familiar with and trained to use whatever assistive technology devices or pieces of equipment are required for a student's ESY program. Particularly if a school district has an assistive technology specialist who is not a full-time employee, the IEP team will need to ensure that ESY service providers are appropriately trained and knowledgeable enough to permit the student to use the devices or equipment safely and effectively.

G. Consultative versus direct services:

Sometimes, school districts attempt to shift the provision of ESY related services from a direct service model to a consultative model, in which the therapist consults with the special education providers, who then implement the related service. While consultative services are often provided during the school year and a continuation of consultative services might be perfectly appropriate during an ESY program, it is important to determine if goals or objectives that have been delivered by a related services provider during the school year are being recommended for consultative service provision for the summer. This is not necessarily illegal, but it may be a way for the school system to try to cover the fact that it does not have sufficient staff to provide necessary services.

As a general rule of thumb, a parent or advocate should ask if there is something about the objective or goal that requires it to be provided by a licensed related services provider

for safety, clinical judgment, or other reasons. For example, a student whose IEP calls for her to learn to climb stairs might have an objective requiring her feet and hips to be aligned at a certain angle as she steps up or down a stair. If this objective is implemented by a physical therapist during the school year, but is recommended as an objective to be implemented by the ESY program teacher in consultation with the physical therapist during the summer, the parent or advocate may be able to argue successfully for direct service provision by the physical therapist by pointing out that the child could potentially be harmed by incorrect implementation of the objective. Improper alignment might lead to hip problems, or the child could be hurt if her weight is not balanced properly. These are issues that fall within the physical therapist's area of expertise and require a level of experience and clinical judgment that a special educator is unlikely to possess.

#### H. ESY services v. summer school:

Often, school districts run summer school remedial academic programs for students. These programs generally charge a fee and are open to students who have failed a course or are otherwise in need of summer services. These programs are separate from the ESY services offered by the district, and students with disabilities, if permitted to take summer school classes, do not have IEPs and are charged the same fee other families are charged. This practice begs the question, however, of whether or not the summer school program is an appropriate component of ESY for a student with disabilities. If so, the student must have an IEP and must be afforded the program at no cost because it is part of what constitutes a free appropriate public education for the student. A school district cannot have a blanket policy or practice that denies students with disabilities access to regular summer school programs or that denies ESY to students who attend regular summer

school programs. The key, as with every other aspect of ESY and a free appropriate public education in general, is to determine what the individual needs of the student are and to design a program that meets those needs.

## VII.

### CONCLUSION

Advocating for ESY services for a student is similar to advocating for a regular school year IEP for a student. The program must be individualized to meet the student's needs and it must be provided at no cost to the family. The salient question to be answered, however, is a little different. In developing an IEP, the team must design a program of services that are intended to enable the student to make meaningful educational progress. In addressing a student's need for ESY services, the team must first determine, by looking at multiple factors, if services beyond the regular school year are necessary for the student to continue to make progress during the school year. If so, the team must then design an ESY IEP to accomplish that purpose. While strenuous advocacy efforts may be necessary, it is possible to design creative, individualized ESY programs for students with disabilities.