

EXTENDED SCHOOL YEAR & FAPE

Presented by:

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THE AUTHORITY

- 34 C.F.R. §300.106(a)
 - Each public agency must ensure that extended school year services are available as necessary to provide FAPE.
 - 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.
 - The public agency may not:
 - Limit extended school year services to particular categories of disability; or
 - Unilaterally limit the type, amount, or duration of those services provided.

THE DEFINITION

- 34 C.F.R. §300.106(b)
- The term extended school year services means special education and related services that –
 - Are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP, and at no cost to the parents of the child, AND
 - Meet the standards of the SEA.

THE STANDARDS OF UTAH

Determining Eligibility: (R277-751-3)

- Students eligible for ESY services are:
 - Students who have been determined as eligible under USBE Special Education Rules and Part B of the IDEA; AND
 - Students who's IEP team has determined, based upon a review of multiple data sources and factors, on an individual basis, an ESY is required to receive FAPE.
- The student's IEP shall reflect the IEP team's decision regarding need for ESY services.
 - Parents shall be provided with written prior notice of proposal or refusal to provide ESY services.
 - If determined eligible for ESY services, the IEP team shall determine the appropriate ESY program, based on the student's individual needs.
 - ESY eligibility decisions and written prior notice of ESY programs shall be provided to parents in sufficient time to permit accessing dispute resolution options of the Procedural Safeguards in the event of a dispute.

THE STANDARDS OF UTAH

ESY Program Standards (R277-751-4)

- The primary goal for a student requiring ESY services is to maintain the current level of the student's academic and functional skills and behavior in areas identified by the student's IEP in order to provide FAPE.
- LEAs may not:
 - Limit ESY to particular categories of disabilities or particular ages or grade levels of students.
 - Unilaterally limit the type, amount, or duration of ESY services provided for students.
 - Limit data consideration by IEP teams to only an analysis of regression and recoupment.
- LEAs shall ensure that:
 - ESY student programs are provided in the LRE.
 - ESY teachers and paraprofessionals meet IDEA's highly qualified requirements.

USOE Guidance

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WHAT IS ESY?

- ESY is an entitlement if the IEP team determines that the student could not receive FAPE without it.
- ESY services are different from regular school enrichment/tutoring programs and/or summer school and are not just an extension of time or duplication of the regular school year services. **ESY services focus on specific goals selected by the IEP team from the student's current IEP.**
- ESY services may consist of special education OR special education and related services in areas such as academic, social/behavior, motor, and/or communication instruction, based on the individual needs of the student.

WHAT IS THE PURPOSE OF ESY SERVICES?

- The purpose of ESY services is to maintain student skills on IEP goals to ensure a FAPE. ESY needs and services are determined and documented by the student's IEP team, based on the student's individual needs.
- ESY **is not** required to or meant to address the needs of students who do not meet IEP goals or maximize educational benefit.

WHO MAY BE ELIGIBLE FOR ESY SERVICES?

- Student's (aged 3 – 21) eligible for ESY services are those with an IEP whose IEP team has determined, based upon review of multiple data sources and factors, on an individual basis, that an ESY is required for that student to receive FAPE.
- IEP teams, including input from the parent(s), must consider the need for ESY for each student with a disability at least annually and must document and provide Written Prior Notice of the decision regarding ESY eligibility to the parent(s).
- LEAs may not refuse to provide ESY services or limit ESY services to students who have a particular disability, or to students with a particular level of severity of disability.

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HOW DO IEP TEAMS DETERMINE A NEED FOR ESY SERVICES?

The IEP team will consider several sources of educational data (both predictive and retrospective) as part of a multifactor approach to determining the need for ESY services:

- Predictive data
 - Expert opinion on data, including those such as:
 - The degree and nature of the student's disability
 - The student's rate of progress on IEP goals
 - Any physical or behavioral concerns regarding the student
 - The areas of the student's curriculum that need continuous attention
 - Emerging skills
 - The student's vocational and transition needs

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HOW DO IEP TEAMS DETERMINE A NEED FOR ESY SERVICES?

- Circumstantial considerations based on information about unique situations in the student's home, neighborhood, or community, including those such as:
 - The ability of the student's parent(s) to provide the needed educational structure at home.
 - The availability of alternative resources.
 - The ability of the student to interact with nondisabled students.
- Anecdotal reports from teachers, parents, caregivers, and related service providers.
- Data from measures of daily performance such as Criterion Referenced Test (CRT) data, norm-referenced test data, checklists, work samples, and others.

HOW DO IEP TEAMS DETERMINE A NEED FOR ESY SERVICES?

- Retrospective data, such as:
 - Regression and recoupment data; that is, behavioral or academic data gathered at the end of instruction before a break, at the beginning of subsequent instruction after a break, and at the time of recoupment of the skill to its former level.
 - Data that currently exist, verified through observation, data collection and review, or written reports of academic or other performance.
 - Past regression on targets that demonstrate significant regression on learned skills during a break in services (e.g., degree of regression and exact time of regression).
 - Rate of recoupment of skills that is significantly delayed or skills only recouped to a limited degree after services resume.
 - Other data that meets the standard of significant skill losses of such degree and duration as to seriously impede progress toward educational goals and loss of educational benefit.

WHEN CAN ESY SERVICES BE DELIVERED?

Timelines for delivery of ESY services are determined by the IEP team based upon the individual needs of the eligible student. Options may include, but are not limited to:

- Summer vacations
- Before or after regular school hours
- School vacations

HOW CAN ESY SERVICES BE DELIVERED?

ESY services provided to address current goals may differ from the IEP special education and related services provided to the student during the typical school year; however, LEAs may not unilaterally limit the type, amount or duration of ESY services. ESY services may be modified to enhance generalization and maintenance of academic and behavior skills. Service model and delivery options may include, but are not limited to:

- School-based programs.
- A cooperative program with another agency (e.g., LEA or State agency).
- Limited in-person student contact.
- Week(s) of review prior to school starting.
- Contracted services.
- Community-based programs.
- Services provided by parent(s) and supported by LEA personnel.
- Services in conjunction with a summer school program of the LEA.
- Direct instruction, consultation, and/or supervision.
- Special education or special education and related services.

WHAT AMOUNT OF ESY SERVICE IS NEEDED?

- The IEP team determines the need for ESY services, as well as the type, amount, location, and duration, based upon data specifying the amount and types of services needed to reduce skill reduction and the student's individual needs. LEAs may not unilaterally limit the type, amount or duration of ESY services.

WHO CAN DELIVER ESY SERVICE?

- Personnel providing ESY services must satisfy the Highly Qualified (HQ) requirement set forth in the IDEA regulations (i.e., anyone who can deliver specialized instruction during regular school year), including:
 - Appropriately and adequately trained and prepared special education teacher.
 - Appropriately and adequately trained and prepared related service provider.
 - Appropriately trained and supervised paraeducator.
 - Appropriately trained and supervised general educator.

ESY DOCUMENTATION REQUIREMENTS

- The IEP team must document the consideration of ESY and data-based decision of whether ESY is needed on each IEP and provide Written Prior Notice to parent(s).
- If the ESY decision is postponed at the annual IEP meeting, the IEP team must revisit the issue and document the final ESY decision in the IEP and the LEA must provide Written Prior Notice to the parent(s) in sufficient time to permit access to Procedural Safeguards dispute resolution options.
- If the IEP team determines the student needs ESY services in order to receive a FAPE, the IEP team shall determine the ESY program needed based on the student's needs, and then provide the parent(s) with Written Prior Notice of the IEP team decisions regarding:
 - Data used to make the decision
 - Which goals/skills will be reinforced (for maintenance).
 - Amount, type, and location of special education or special education and related services.
 - The personnel responsible for providing the ESY service(s).

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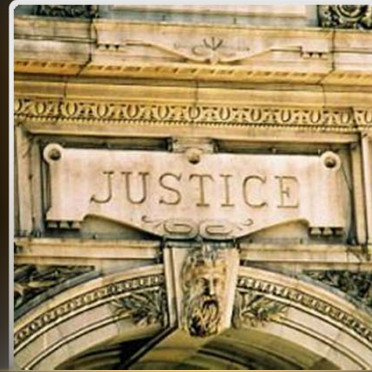
WHERE CAN ESY SERVICES BE DELIVERED?

- A student's ESY placement may differ from the regular school year placement but must be provided in the least restrictive environment (LRE) appropriate to meet the student's needs.
- LEAs must maintain or utilize the necessary placement options to implement the student's IEP and meet the requirements of the LRE for ESY services.
- An LEA is not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings if the school does not provide services for its nondisabled students at that time. LRE requirements may be met through the use of LEA-funded alternative means (e.g., private placements, community settings), if the IEP team determines that the student requires interaction with nondisabled students during the provision of ESY.
- An LEA is not prohibited from providing ESY services in a noneducational setting, if the student's IEP team determines that the student could receive appropriate services in that setting.

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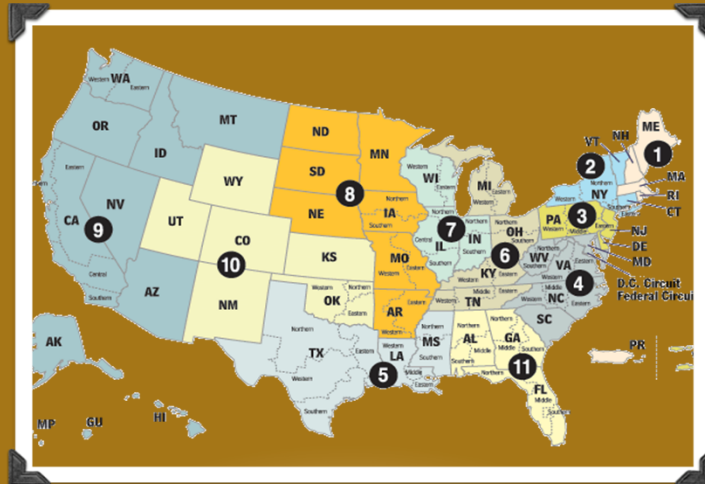
Judicial Guidance and OSEP Guidance



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CIRCUIT COURT MAP



DETERMINING THE NEED FOR ESY & THE LAW IN YOUR LAND

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

- Finding that both the administrative proceedings and the District Court relied on insufficient information of past regression to determine whether a child with disabilities needed an ESY program, the court remanded the case for further consideration of multiple factors, such as the probability of future regression, the degree of the child's impairment, and the child's need for interaction opportunities and vocational skills.
- 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 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.**

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JOHNSON V. BIXBY

- However, the regression-recoupment analysis is not the only measure used to determine the necessity of structured summer program. 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.
 - 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 behavioral and physical problems;
 - The availability of alternate 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 as opposed to an integral part of a program for similar children.

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JOHNSON V. BIXBY

- Turning to the case before us, a thorough review of the entire administrative record reveals it to be focused exclusively on a limited regression-recoupment analysis, which itself is vigorously disputed with opposing competent testimony and evidence.
- Because of the conflict in evidence concerning Natalie's past regression, other factors, including some or all of those discussed above, should have been considered as part of the evaluation of whether Natalie's IEP is "appropriate" for her individual circumstances.
- Because the record focuses so completely on only one component of Natalie's education, we do not have sufficient facts to make an informed disposition on the merits of this case, and we therefore express no opinion as to whether Natalie's IEP is "appropriate" under the Act's mandate.
- We do hold, however, that those who conducted the administrative review, the administrative appeal, and the federal district court review of that administrative process erred by converting what should have been a multifaceted inquiry into application of a single, inflexible criterion.

DETERMINING THE NEED FOR ESY

- Lack of progress cannot be the only factor considered by the team. See *Letter to Given*, 39 IDELR 129 (OSEP 2003).

ESY IS NOT FOR MAXIMIZING BENEFIT

- ESY programming cannot be provided or ordered for the purpose of maximizing a disabled student's educational opportunities.
- A parent is not absolutely required that a child demonstrate that he has regressed in the past to the serious detriment of his educational progress in order to prove his need for a summer program. Instead, where there is no such empirical data available, need may be proven by expert opinion, based upon a professional individual assessment.
- An appropriate education is not synonymous with the best possible education. . . . It is also not an education which enables a child to achieve his full potential: "Even the best public schools lack the resources to enable every child to achieve his full potential." *Rowley v. Board of Education*, 103 LRP 31848 (1982).
- Plaintiff's parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they nor any other parents have the right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense.
- See *Cordrey v. Euckert*, 17 IDELR 104 (6th Cir. 1990).

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GOOD QUESTIONS

(ADAPTED FROM THE MICHIGAN DEPARTMENT OF EDUCATION)

- Is there one or more current annual goal(s) that address skills which need to be maintained without interruption for the student to benefit meaningfully from a FAPE?
 - There must be at least one current IEP goal where significant concerns exist regarding skill maintenance during a break in services. Goal areas of concern should represent skills essential to the progress of the student.
 - The determination of the need for ESY services must be based on data. The IEP team needs to evaluate the data to determine which, if any, goals represent areas of concern that may present significant difficulties in maintaining skills during breaks.
- **If no, ESY is not needed for a FAPE.**

GOOD QUESTIONS

- If yes, for each goal area of concern, answer the following questions:
 - Is there information that indicates to the IEP team that in this goal area there is a serious potential for regression of skills beyond a reasonable period of recoupment? What data support this?
 - Is there information regarding the nature or severity of disability of the student that indicates to the IEP team that there is a need to provide services in the identified goal area of concern during breaks in the school year? What data support this?
 - Is there information that indicates to the IEP team that in the identified goal area of concern the student is at a critical stage of learning or in a critical area of learning where failure to provide a service beyond the normal school year or school day will severely limit the student's capacity to maintain essential skills?

GOOD QUESTIONS

- Is there a skill that needs to be mastered immediately? If the student does not master the skill immediately, is the degree of mastery likely to be permanently reduced? What data support this?
- Is the student at a critical stage of development where there is a window of opportunity that will be lost if services are not provided? What data support this?
- Are there changes in the student's medical, physical, or sensory status that makes it possible to predict an accelerated rate of learning during the ESY period (critical stage)? What data support this?
- Is the skill in a critical area of learning and will a break in services result in the loss of a window of opportunity for mastering the skill? What data support this?

ESY AND LRE

- Since the purpose of ESY (prevention of regression and recoupment problems) is different than the purpose of FAPE during the normal school year (opportunity for progress and educational benefit), an ESY placement will likely look different than a student's placement during the normal school year. See *Letter to Myers*, 16 IDELR 290 (OSEP 1989).
- Districts must maintain placement options for ESY services that are necessary to implement the student's IEP and to meet the requirements of LRE. Thus, even though Part B of the IDEA does not address the district's obligation to provide a full range of alternative placements, the district must meet the LRE requirement by alternative means, such as private placements, if it is decided that disabled children must have interaction with nondisabled children. See *Letter to Myers*, 213 IDELR 255 (OSEP 1989).

ESY AND HIGHLY QUALIFIED TEACHERS

- Regardless of whether services are provided during the school year or over the summer, the teachers and paraprofessionals providing ESY services must satisfy the highly qualified requirements. See *Letter to Copenhaver*, 50 IDELR 16 (OSEP 2007).

Thank you!

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