

Standards for Extended School Year (ESY)

TO: Special Education Teachers

FR: Nissan B. Bar-Lev, Director of Special Education

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Please review this memo and use it as a resource guide in determining ESY services

Legal Basis

The principle that each student with a disability is entitled to an individually designed education was established in a series of court cases that led to the adaptation, in 1975, of the federal law now known as IDEA. A subsequent series of court cases and policy clarifications established that providing special education services beyond the usual school year is a part of the guarantee of the free, appropriate public education (FAPE) clause of the IDEA. These decisions have prescribed the basic requirements for ESY program eligibility and defined some related ESY elements, such as the length and type of the ESY program, and funding matters, including transportation.

In addition, the Office for Civil Rights (OCR) of the Department of Education ruled that even students regarded as disabled under Section 504 of the 1973 Rehabilitation Act, and not eligible for services under IDEA, have to be considered for ESY services. A letter of finding, issued by OCR regarding the Baltimore city public schools, states that "Section 504 regulations require that the individual needs of every child be examined, considered, and met. While 180 days of school may be adequate for some handicapped students, it may not be adequate for others..."

Eligibility for ESY services at no cost to parents is determined by the child's Individual Education Program (IEP) team. This IEP team must consider, as appropriate, whether a child needs extended school year services in order to receive a free appropriate public education (FAPE). Clearly, this determination must be done on an individual basis.

The program of ESY as part of the IEP is not simply an extension of time in school, nor is it required for every student. Nevertheless, it is the function of the school district to evaluate the need for ESY services correctly and fairly. This issue is made more difficult by the fact that there are no comprehensive eligibility criteria in the law, and only general standards have been mentioned by the courts for including ESY in the student's program.

What follows is a compilation of ESY standards discussed by various federal courts throughout the country (At the time of this writing, no ESY case has been decided by the Court of Appeals for the 7th Circuit which includes Wisconsin). These ESY standards could become part of the school district's comprehensive staff training on this issue.

STANDARD #1: NO SINGLE CRITERION

The first standard that has been mentioned by many federal courts is that no single criterion can be used as a sole qualifying factor. For example, the Tenth Circuit Court of Appeals (*Johnson v. Independent School District No. 4*) concluded that a single standard could not be used as the sole criterion for the provision of ESY services.

Also, in a recent case, [Reusch V. Fountain \(1994\)](#), cited a Maryland school district for "...the use of a standard for ESY eligibility which was incorrectly limited to a regression / recoupment analysis and did not consider other factors which were relevant in the ESY determination." The decision said that this standard may be used, but only as one part of a multi-faceted inquiry.

STANDARD #2: REGRESSION / RECOUPMENT

Judicial decisions have outlined various areas of considerations for determining eligibility, starting with the concept of regression / recoupment first established in *Battle v. Commonwealth of Pennsylvania* (1980).

Regression refers to a decline in knowledge and skills that can result from an interruption in education; **recoupment** is the amount of time it takes to regain the prior level of functioning. The issue is whether the benefits derived by the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.

This criterion for eligibility, although it is a primary consideration to be used by IEP teams, is still only one of several criteria to be considered in making ESY decisions. It covers both instructional and related services for the prevention (or reduction) of academic and physical regression.

For some students, the skill regression during the summer months, coupled with their limited recoupment ability, is such that their basic educational needs cannot be met in a traditional 180 day program.

As one example or reference point, the IEP committee could determine that more than 45 school days (9 weeks) will be required to return the student to the former level of achievement because of the interruption of summer vacation.

The determination of ESY eligibility must be **based on empirical and qualitative data** collected by the IEP committee for individual skills. The IEP committee must take into account not only retrospective data, but also **predictive data on recoupment abilities** (will the recoupment take 9 weeks or more?). The key question before the IEP committee is whether the child needs services in the summer in order to secure the minimum benefits of a free and appropriate public education in the fall.

STANDARD #3: EMERGING SKILLS

A more recent case, [Reusch v. Fountain \(1994\)](#), noted that "... 'emerging skills' and 'breakthrough opportunities' (as when a child is on the brink of learning to read) - can and should be incorporated into the eligibility analysis." The child is in a critical stage of developing a skill which has great potential for increasing his/her self-sufficiency. If such a skill is not completely acquired and mastered, it is likely that the current level of acquisition will be lost due to the interruption of summer vacation.

STANDARD #4: NATURE AND SEVERITY OF THE CHILD'S DISABILITY

Another criterion usually included in the eligibility determination is the nature and severity of the child's disability. Although no disability category may be excluded from consideration for ESY, the nature and severity is a key factor in the ESY eligibility determination. Children with severe disabilities are more likely to be involved in ESY programs, since their regression may be more significant, and their recoupment abilities may extend over longer time.

STANDARD # 5: NOTICE AND TIMING

Another point made by the court in the [Reusch v. Fountain case](#) was the importance of making a decision about ESY early enough in the year to allow the parents adequate time to exercise their right to administrative review or appeal in a timely fashion.

That [decision of the U.S. District Court in Maryland](#) prescribed very specific requirements relative to ESY procedures. The court found that the explanation about ESY contained a brochure distributed to all students was not sufficient and ordered additional explanation to be provided to parents.

The court also ordered that the student's eligibility for ESY be considered at each annual review meeting, and that parents sign a form acknowledging their receipt of this information. The district must document the discussion and the decision reached after consideration of ESY eligibility at each annual review meeting.

STANDARD #6: CONTENT AND DURATION OF ESY SERVICES

Some ESY services may extend over the summer, while others provide only for periodic contact with professionals, or assistance to parents in providing instruction or reinforcement to their children.

OSEP issued a policy letter stating that limiting the duration of summer programs for students with disabilities "...would violate the basic requirement that programs be designed to meet the individual needs of each child" (Letter to Baugh, 211 IDELR 481, 1987).

Requirements for specifying the content and duration of ESY programs were also strongly stated in the [Reusch v. Fountain decision](#). The court mandated "...individualized determinations of the number of weeks, days per week, and hours per day that each student receiving ESY should be provided".

Also, the content of the child's ESY program must be determined on an individual basis. In response to an inquiry: "May LEAs refuse to provide related services, including transportation and therapy services, to students who are in need of and receiving such services during the regular school year?" OSEP responded: "No".

STANDARD #7: ABILITY OF PARENTS TO PROVIDE AN EDUCATIONAL STRUCTURE AT HOME

A number of federal courts (*Johnson v. Bixby*, 10th federal circuit court, 1990; *Battle v. Pennsylvania*, 3rd federal circuit court, 1980) mentioned that one of the standards that needs to be considered in determining need for ESY is the ability of the parents to provide an educational structure at home. If parents can provide the proper structure at home, the regression and recoupment issue will not be as severe, thus ESY services through the school staff may not be necessary.

Interventions during the summer may be provided by other than school staff. For example, parents may be able to provide structured opportunities for their children to practice specific skills. Perhaps the student's utilization of a computer software program will be sufficient to maintain a critical skill. Perhaps accessing an existing community resource, such as a summer recreation program, will meet the need. If so, the provision of such parental services will not necessitate an ESY program.

The IEP committee may recommend ESY services after concluding that (a) parents are not able or willing to provide home structured opportunities, or (b) the involvement of EEN staff during the summer is necessary to offset the impact of regression and recoupment.

EXTENDED SCHOOL YEAR (ESY) IS:

- Based only on the individual student's specific critical skills that are critical to his/her overall educational progress as determined by the IEP committee.
- Designed to maintain student mastery of critical skills and objectives represented on the IEP and achieved during the regular school year.
- Designed to maintain a reasonable readiness to begin the next year.
- Based on multi-criteria and not solely on regression.
- Considered as a strategy for minimizing the regression of skill, thus shortening the time needed to gain back the

same level of skill proficiency that existed at the end of the school year.

- Deliverable in a variety of environments and structures such as:
 - (a) Home with the parent teaching, and staff consulting
 - (b) School based
 - (c) School based with community activities
 - (d) Related services alone or in tandem with the above.

EXTENDED SCHOOL YEAR (ESY) IS NOT:

- It is not a mandated 12-months service for all students with disabilities.
- It is not required for the convenience of the school or parents and, therefore, cannot serve as a day care or respite care service.
It is not required or intended to maximize educational opportunities for any student with disabilities.
- It is not necessary to continue instruction on all of the previous year's IEP goals during the ESY period; rather, the focus should be on those specific, critical skills where regression, due to an extended vacation period, may occur.
- It is not to be considered to help students with disabilities advance in relation to their peers.
- It is not for those students with disabilities who exhibit regression, which is solely related to medical problems resulting in degeneration, or transitional life situations such as divorce or death of a family member. This type of regression is not due to the interruption of summer vacation.
- It is not required solely when a child fails to achieve IEP goals and objectives during the school year.
- It is not to provide a child with education beyond that is prescribed in his/her IEP goals and objectives.

Our thanks to Nissan Bar-Lev and the staff of [Cooperative Educational Service Agency #7](#) for permission to use this article.

URL: <http://www.cesa7.k12.wi.us/sped/issues-esy/esymemo.html>

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