

Wyoming Department of Education
Special Programs Division

Reference Guide:
Extended School Year

Under Part B of the Individuals with Disabilities Education Act (IDEA), each State must ensure that a free appropriate public education (FAPE) is made available to all children with disabilities. FAPE includes the provision of special education and related services that meet Wyoming education standards and Part B requirements. For some IDEA-eligible children, FAPE includes the right to receive special education services beyond the typical school day or school year, or Extended School Year (ESY) services. 34 C.F.R. §300.106. The Wyoming Department of Education Rules applicable to ESY are located in Chapter 7, Section 5(c).

The Mandate

Pursuant to the Federal Regulations implementing the IDEA, extended school year services are addressed at 34 C.F.R. §300.106 as follows:

- (a) *General.* (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
- (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.
- (3) In implementing the requirements of this section, a public agency may not—
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.
- (b) *Definition.* As used in this section, the term extended school year services means 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.

In its Comments to the Federal Regulations, the United States Department of Education explained that it is necessary for public agencies to understand their obligation to ensure that children with disabilities who require ESY services in order to receive FAPE have the necessary services available to them and that individualized determinations about each disabled child's need for ESY services are made through the IEP process. Further, ESY 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. 71 *Federal Register* 46582.

ESY in Relation to FAPE

In order to understand the ESY mandate, it is necessary to have a clear understanding of the concept of FAPE. The Federal Regulations directly address FAPE in 34 C.F.R. §§300.17 and 300.101. However, it is the hallmark United States Supreme Court decision in *Board of Education of the Hendrick Hudson Central Sch. District v. Rowley*, 553 IDELR 656 (1982) that

established a two-part test to decide IEP appropriateness:

1. Has the public agency complied with the procedures set forth in the IDEA?
2. Is the IEP developed through IDEA's procedures **reasonably calculated to enable the child to receive educational benefit?** (Emphasis added.)

If this two-part test is satisfied, the public agency has complied with the obligation to provide FAPE, and the courts can require no more. This standard has been litigated repeatedly in the years since *Rowley*. The litigation affirms that FAPE is measured by a *reasonably calculated* standard, and all efforts to raise the FAPE legal standard beyond that have failed. See *Klein Indep. Sch. Dist. v. Hovem*, 59 IDELR 121 (5th Cir. 2012); *Woods ex rel. T.W. v. Northport Pub. Sch.*, 59 IDELR 64 (6th Cir. 2012); *Barron ex rel. D.B. and N.B. v. South Dakota Bd. of Regents*, 57 IDELR 122 (8th Cir. 2011); *A.B. v. Montgomery County Intermediate Unit*, 56 IDELR 3 (3rd Cir. 2011). See also *Thompson R2-J Sch. Dist. v. Luke P.*, 50 IDELR 212 (10th Cir. 2008), *cert. denied*, 110 LRP 798 (2009):

[T]he intent of the [IDEA] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside. *Rowley*, 458 U.S. at 192. So, for example, the Court found no support in the text or history of the [IDEA] for the proposition that Congress sought to guarantee educational services sufficient to "maximize each child's potential." *Id.* at 198. Instead, we are told, Congress sought only to require a "basic floor of opportunity," *Id.* at 200, aimed at providing individualized services sufficient to provide every eligible child with "some educational benefit," *Id.*

As applied to the ESY determination, ESY services are only required when necessary in order for the student to receive FAPE, or according to the Supreme Court, to provide the student with an IEP reasonably calculated to provide educational benefit. ESY services are not intended to maximize a student's potential or progress. The need for ESY services must be considered for **every** student, but ESY services are not necessary for all students. When determined to be a necessary component of FAPE for a student, the IEP must address ESY services with the same level of specificity as those provided during the regular school year.

ESY services serve as an "extension" of the IEP for an IDEA eligible student. An IEP must include special education, defined as specially designed instruction pursuant to 34 C.F.R. §300.39. In addition, an IEP may include related services if necessary in order for a student to benefit from special education. The Federal Regulations clearly state that a student who needs only a related service is **not** an eligible child under the IDEA. 34 C.F.R. §300.8(a)(2). A recent decision of the Tenth Circuit Court of Appeals regarding a private school placement clearly articulated that related services are only available to an IDEA eligible student who receives special education. "The [IDEA's] definition of related services expressly contemplates that a child is receiving some type of special education. Therefore, a parental placement which does not provide the child with specially designed instruction is not reimbursable even if some services provided at the placement might otherwise be classified under the [IDEA's] definition of related services." *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 60 IDELR 91 (10th Cir. 2012). In summary, related services are only available to support specially designed instruction.

Therefore, students who need ESY services must receive specially designed instruction. A student who receives specially designed instruction would also be eligible to receive related services, if needed. If ESY services are provided during breaks when school is not in session, an appropriate ESY plan would need to include special education and if needed, related services. If ESY services are provided beyond a normal school day, it may be possible to support the provisions of specially designed instruction occurring during the normal school day

with ESY related services provided beyond the school day. Conversely, if a student is **not** receiving specially designed instruction, that student is not eligible to receive only a related service.

ESY Decision Making

The concepts of “recoupment” and “likelihood of regression or retention” have formed the basis for many standards that States use in making ESY decisions and are derived from well-established judicial precedents. *71 Federal Register 46582*. The Tenth Circuit Court of Appeals has ruled that a regression-recoupment analysis is not the only measure used to determine the necessity of ESY services. In so holding in the case of *Johnson v. Independent School District No. 4 of Bixby*, 17 IDELR 170 (10th Cir. 1990), *cert. denied*, 110 LRP 38025 (1991), the Tenth Circuit adopted a standard requiring a broad test for ESY eligibility determinations:

However, the regression-recoupment analysis is not the only measure used to determine the necessity of a 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 [IDEA]. These 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 non-handicapped 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 those with the child’s condition.

It is important to note that the court explicitly stated:

Under the [IDEA], both documentation concerning past regression and predictions of future regression should be considered, an analysis which requires investigation into many aspects of the child’s educational, home, and community life. *Id.*

Key Considerations

IEP teams should be familiar with the following considerations:

- ESY must be considered at least annually at an IEP team meeting. *Letter to Baugh*, 211 IDELR 481 (OSEP 1987). However, the IEP team may decide to wait until later in the school year to specify ESY services. *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 46 IDELR 63 (8th Cir. 2006).
- ESY services may not be reserved for a certain category of disability. *34 C.F.R. §300.106*.
- The key question is not whether a student would *benefit* from ESY services, but whether ESY services are *necessary* in order for the student to receive FAPE. *Jackson Johnson v. District of Columbia*, 59 IDELR 101 (D.D.C. 2012).
- Although often provided in the summer months, there is nothing in the IDEA that would limit the provision of ESY during times other than the summer, such as before and after regular school hours or during school vacations if the IEP determines that the child requires ESY

- services during those time periods in order to receive FAPE. *71 Federal Register 46582.*
- ESY services are not designed to develop new skills not already identified in a student's IEP. However, it is possible for ESY to address only some skill areas of a student's IEP. *Letter to Myers*, 213 IDELR 255 (OSEP 1989).
 - Based on the specific goal(s) to be addressed, ESY services may include academic instruction, social/emotional services, speech-language services, motor services, orientation and mobility, and transportation if needed to benefit from special education. *34 C.F.R. §300.106.*
 - ESY must also be considered for students transitioning from a preschool program before the start of kindergarten in a school district. *Letter to Anonymous*, 22 IDELR 980 (OSEP 1995). *See also S.H. v. Plano Indep. Sch. Dist.*, 59 IDELR 183 (5th Cir. 2012). For students not yet enrolled in a school district, the preschool program would be responsible for ESY until the student exceeds the age of preschool eligibility or enrolls in kindergarten. ESY services become the responsibility of the school district once the student enrolls.
 - Students who do not meet IEP goals do not automatically require ESY services. Need for ESY is an individualized IEP team determination. *Letter to Kleczka*, 30 IDELR 270 (OSEP 1998).
 - When truancy is the underlying reason for a student's lack of progress, ESY services are typically not necessary for the student to receive FAPE. *Jackson Johnson v. District of Columbia*, 112 LRP 36774 (D.D.C. 2012), *and Jackson Johnson v. District of Columbia*, 59 IDELR 101 (D.D.C. 2012) (adopting Magistrate's decision).
 - Because the IDEA does not guarantee the best possible education, ESY programming should not be provided for the purpose of maximizing a student's educational opportunities. *Cordrey v. Euckert*, 17 IDELR 104 (6th Cir. 1990).
 - OSEP does not interpret the LRE provision to mean that school districts must establish general education classrooms for nondisabled children for the sole purpose of being able to implement the LRE provision during ESY. Community placements may be used to provide the LRE. *Letter to Myers*, 213 IDELR 255 (OSEP 1989). A school district is not obligated to create a general education classroom to satisfy the LRE requirements of IDEA while providing ESY. *T.R. v. Kingswood Township Bd. of Educ.*, (3rd Cir. 2000), *and T.M. v. Cornwall Central School District*, 59 IDELR 286 (S.D.N.Y. 2012). If available and appropriate, general education classrooms and community settings should be considered by the team when planning ESY services.
 - ESY is not the same as summer school. A summer school environment may serve as the LRE setting for summer ESY services in some cases. The IEP team must determine the type, amount, frequency, duration, and location of services. *34 C.F.R. §300.106.*
 - Students with disabilities must be given the same level of access to summer school programs as that afforded to students without disabilities. To that end, students with disabilities cannot be excluded from summer school opportunities based on the need for special education services or supplementary aids and services.
 - Personnel providing ESY services must meet the same requirements that apply to personnel providing special education and related services during the school year. *Letter to Copenhagen*, 50 IDELR 16 (OSEP 2007).
 - ESY services must be documented in the student's IEP. Typically, the frequency, duration, location and start date are different than services provided during the regular school year. The Special Education Services section of the model IEP provides space for documenting the specially designed instruction to be provided during ESY. Related services, supplementary aids and services, and program modifications during ESY would also have unique frequency, duration, location and start dates for services, and would be documented in the respective sections of the IEP.

ESY Dialogue Guide

This Dialogue Guide is designed to help IEP teams make compliant ESY decisions.

