

Tri-State Regional Special Education Law Conference

Special Education Services Beyond the School Day

November 2013

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I. Introduction

This session will explore the legal developments and practice implications for providing students with disabilities services beyond the regular school day and school year. The law, initially established through judicial decisions, is now part of the IDEA regulations based on the IDEA's statutory FAPE section.

II. Legal Basis for ESY services

A. IDEA Regulations (34 Code of Federal Regulations 300.106)

Extended school year services. (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.

B. United States Department of Education Comments To the IDEA Regulations (Federal Register, Vol.71, No.156, Page 46582 (2006))

The United States Department of Education published the following comments when the 2006 IDEA regulations were issued in the Federal Register.

The requirement to provide ESY services to children with disabilities who require such services in order to receive FAPE reflects a longstanding interpretation of the Act by the courts and the Department. The right of an individual child with a disability to receive ESY services is based on that child's entitlement to FAPE under section 612(a)(1) of the Act. Some children with disabilities may not receive FAPE unless they receive necessary services during times when other children, both disabled and nondisabled, normally would not be served. We believe it is important to retain the provisions in Sec. 300.106 because it is necessary that public agencies 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.

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.

Legal Standard for ESY

The concepts of "recoupment" and "likelihood of regression or retention" have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents.

States may use recoupment and retention as their sole criteria but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations. However, whatever standard a State uses must be consistent with the individually-oriented requirements of the Act and may not limit eligibility for ESY services to children with a particular disability category or be applied in a manner that denies children with

disabilities who require ESY services in order to receive FAPE access to necessary ESY services.

III. Significant Judicial Decisions

- A. In a class action lawsuit, the Court, in affirming the District Court, held that the state's law regarding the number of days of instruction in a regular school year did not limit what a particular student needed under the IDEA in order to receive a FAPE. This was the first legal authority requiring that IEP Teams consider extended school year services for students on IEPs.

The Court held that:

...the inflexibility of the defendants' policy of refusing to provide more than 180 days of education to be incompatible with the Act's (then referred to as The Education for all Handicapped Children Act or Public Law 94-142, now the IDEA) emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 days rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This, the Act will not permit.

Battle v. Commonwealth of Pennsylvania 629 F.2d 269, 551 IDELR 647(United States Court of Appeals, 3rd Circuit (1980)).

- B. Under the IDEA, both documentation concerning past regression and predictions of future regression should be considered. This analysis requires investigation into many aspects of the student's education, home and community life.

Other factors in addition to regression and recoupment should be considered in determining the need for ESY services. In a footnote (footnote 9) to the decision, the Court stated:

The list of possible factors includes:

- the degree of impairment;
- the degree of regression suffered by the child, the recovery time from this regression;
- the ability of the child's parents to provide the educational structure at home;
- the child's rate of progress;

- the child's behavioral and physical problems;
- the availability of alternative resources;
- the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention;
- the child's vocational needs; and
- whether the requested services is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition.

This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP. Johnson v. the Independent School District No. 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d. 1022, 17 IDELR 170 (U.S. Court of Appeals, 10th Circuit (1990)). Appeal denied by the United States Supreme Court.

- C. Extended school year (ESY) services are only necessary to a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he/she is not provided with an educational program during the summer months. 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. However, the mere fact of likely regression is not a sufficient basis because all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of "meaningful progress." M.M. v. School District of Greenville County, 37 IDELR 183 (United States Court of Appeals, 4th Circuit (2002)).
- D. The parents of a student with an intellectual disability challenged the IEP alleging that the failure to provide ESY services denied the student a FAPE. The Court in upholding the IEP cited the legal standard to be applied: "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." (citing M.M. v. School District of Greenville County)
The Court concluded that the parents failed to point to any evidence that would support the necessary finding that ESY services were necessary. The evidence did not establish either that the student was making gains, or that

gains would be significantly jeopardized (or even partially jeopardized) without the reinforcement that a summer program would provide. ESY services are not recommended in any of the IEPs, and there is no indication that the parent suggested ESY or disagreed with the recommendation of no ESY. Moreover, the record indicated that the student's lack of progress is largely attributable to her truancy, and there is nothing in the record to indicate that ESY would remedy that.

The parent's expert did testify that the student has not made academic progress and would "benefit from ESY" but that is not sufficient to establish that it is "necessary" to provide a FAPE. Furthermore, "all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of 'meaningful progress.'" (citing Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, (United States Court of Appeals, 3d Circuit (1988)). Jackson v. District of Columbia, 873 F.Supp.2d 382, 59 IDELR 101 (United States District Court, District of Columbia (2012)).

IV. Least Restrictive Environment and ESY Services

- A. The United States Department of Education issued a guidance letter stating that each child who receives a FAPE, including children receiving ESY services, must be educated in the least restrictive setting in which the child's IEP can be implemented. Because ESY services are provided during a period of time when the full continuum of alternative placements is not normally available for any students, "the Department does not require States to ensure that a full continuum of placements is available solely for the purpose of providing ESY services". However, the IDEA does require that options on the continuum be made available to the extent necessary to implement a child's IEP.

If interaction with students who are non-disabled is the issue for the student who requires ESY services and the school district does not have a program for students who are non-disabled over the summer, the school district would be "required to purchase private school placements in a regular education setting if they are required to implement a child's IEP". However, the Department recognizes that a child's IEP for ESY services will probably differ from the child's regular IEP, since the purpose of the ESY program is to prevent regression and recoupment problems. Therefore, the placement needed to implement the child's IEP for ESY services may differ from the child's placement during the regular school year. Letter to Myers

16 IDELR 290 (United States Department of Education, Office of Special Education Programs (1989))

- B. The United States Department of Education has taken the position that ESY services must be provided in the child's LRE, although a school district that does not provide services to nondisabled children when school is not in session is not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings. Comments to the IDEA Regulations (Federal Register Volume 64, No. 12, Page 12577 (1999)).
- C. An IEP for a student with autism called for a six week extended school year program which would provide his applied behavior analysis (ABA) and verbal behavior (VB) instruction services at the Elementary School. In addition, the student would be provided with speech and occupational therapies on a one-to-one and "push-in" setting by both a one-to-one special education teacher and occupational therapist. The parents believed that the ESY program was not the least restrictive environment for their son given that the classroom to which he would be assigned would have no typical students present. Rather, they sought to have the district send him to a six-week art camp program offering a variety of art, acting and dance activities with typical peers, at which the director had assured them that their student could receive the three hours of daily ABA and occupational therapies to be provided by trained personnel from the District. The school district did not provide extended school year services to non-disabled students and therefore argued that the district could not mainstream this student but could provide him with an ESY program (albeit without non-exceptional peers) that would help maintain his current skills level in accordance with his IEP goals. While the district provided evidence as to the types of classes and instructional therapies the student would receive in both a small group/class-setting and one-on-one with a special education teacher, there was no testimony from the director or other camp representative as to what the camp proposed to offer or how camp activities were expected to assist in the implementation of the goals set forth in the student's IEP. Therefore, the Court held that the IEP was appropriate. Travis G. v. New Hope-Solebury School District 544 F.Supp.2d 435, 49 IDELR 248 (United States District Court, Eastern District, Pennsylvania (2008))
- D. A student with physical disabilities including blindness and deafness had an IEP calling for an extended school year program combining both school instruction and summer camp. The parents objected after learning that the

district selected the Easter Seals camp for his non-academic extended school year setting. The Easter Seals camp is specifically designed for students with disabilities. The school had agreed to arrange for the student to be accompanied to the camp by a regular education peer in his "circle of friends." The parents felt that the other summer camps, such as the one run by the YMCA, with both students with and without disabilities would be the least restrictive environment.

The Court found that the Easter Seals camp was appropriate. The Court observed that there was also a concern that the YMCA camp could not "differentiat[e] and diversify the types of activities that they offer so that students with special needs can participate effectively." By contrast, the Easter Seals camp provided for a greater opportunity to have social interactions with peers in his age group, or slightly older, and it had staff who are familiar with accommodating children with special needs.

The Court stated that there was no evidence to conclude that the regular day camps such as the YMCA were appropriate educational placements. Nor was there any record that there is some other appropriate less restrictive placement available for the student's summer program. Therefore, the Court held that the Easter Seals Camp satisfied both the FAPE and LRE requirements. D.F. v. Red Lion Area School District 58 IDELR 65 (United States District Court, Middle District, Pennsylvania (2012))

V. Procedures in Determining ESY Services

- A. The parents alleged that the district violated the IDEA's procedural requirements by failing to draft an ESY program during the November IEP Team meeting when the rest of her IEP was designed. They asserted that the district's practice of creating students' ESY programs in the spring places an illegal limitation on the IEP process, results in an incomplete IEP and eliminates the students' ability to challenge the program in a timely due process hearing.

The Court concluded that neither federal nor state law required a student's IEP to determine a student's ESY services by a particular date. The United States Office of Specific Education Programs spoke to this specific issue when it explained:

There is no need to specify a timeline for determining whether a child should receive ESY services. Public agencies are expected to ensure that these determinations are made in a timely manner so that children with disabilities who require ESY services in

order to receive FAPE can receive the necessary services.

Comments to the IDEA Regulations (Federal Register, Volume 64, Pages 12575, 12577 (1999)).

This Court found that the District fully complied in a timely manner with its procedural requirements regarding ESY services. The IEP team agreed at the November meeting that the student required ESY services but decided it would be advantageous to wait until the spring to define specific services to be included in her program. The IEP team's decision to defer until spring the specifics of the ESY services necessary to help the student to maintain the skills she had learned during the school year was reasonable under the circumstances since her medical conditions can change. Pachl v. Board of Independent School District No.11 42 IDELR 264 (United States District Court, Minnesota (2005)). Appealed on other grounds. Pachl v. Seagren 46 IDELR 1 (United States Court of Appeals, 8th Circuit (2006)).

- B. The parent alleged that the district's unreasonable delay in developing an ESY program denied him a free appropriate public education. Noting that Minnesota's two-tier administrative hearing process takes 105 days to complete, assuming no delays, the parent argued that the IDEA should be construed as requiring the district to propose an ESY program at least 105 days before the end of the school year. The parent interpreted the IDEA regulation to mean the ESY proposal must be completed contemporaneously with the other portions of the Student's IEP. The Court rejected this argument and found that the district fully complied with procedural requirements regarding ESY services. The purpose of ESY services is to prevent regression and recoupment problems, rather than advance the educational goals outlined in the student's IEP. As a result, the services in the ESY may differ from those provided during the school year. The IEP team's decision to defer until spring the specifics of the ESY services necessary to help the Student maintain the skills he learned during the school year was reasonable under the circumstances. Reinholdson v. School Board of Independent School District 187 F.Appx. 672, 46 IDELR 63 (United States Court of Appeals, 8th Circuit (2006)).
- C. In a class action lawsuit, the Court held that the school district violated the rights of parents and students with disabilities since the provision of ESY services were both procedurally and substantively invalid. The Court observed that the district had a "hostile attitude" toward providing ESY services. The principal of a special education school admitted that "our students somewhat systematically have not been

recommended for [ESY]," but rather had been encouraged to enroll in summer enrichment programs which were neither IEP-based nor free. In addition, a memo from the Associate Superintendent to the principals downplayed ESY in two dramatic ways. First, the sample IEP meeting agenda omitted any reference to ESY as a topic of discussion. Second, the procedures promote the avoidance of any ESY discussion at the school-based IEP meeting under the following directive:

Should parents have questions about [ESY] programming during the meeting, continue with decisions about the program and refer summer program discussion to the field office supervisor/assistant supervisor of special education and pupil services.

Regarding the timing of the IEP Team decisions, the Court recognized that generally, matters of timing are left to the school's discretion. That discretion is abused, however, when decisions are delayed for illegitimate purposes---such as to deny parents the ability to exercise their due process rights guaranteed under other sections of the regulations. Timely decision-making is critical to the integrity of the rights granted under the IDEA. In particular, unduly late decisions infringe upon parents' rights to administrative review of IEP decisions within established timeliness. The Court concluded that the school district violated the IDEA by delaying many ESY decisions so long as to infringe on the procedural rights of disabled students. The delays have, in effect, fostered the overall scheme of the school district to minimize the availability of ESY to disabled children. Reusch v. Fountain 872 F.Supp. 1421, 21 IDELR 1107 (United States District Court, Maryland (1994))

VI. Provision of ESY Services for Transfer Students

- A. The United States Department of Education issued a recent guidance letter regarding a student with a disability who transfers school districts and needs ESY services. Generally, when a student on an IEP transfers into a new school district, whether in the same State or a different State, and enrolls in a new school in the same school year, the new school district (in consultation with the parents) must initially provide FAPE to the student, including the provision of services comparable to those described in the student's IEP from the previous school district. 34 CFR Section 300.323(e)-(f).

In the case of an in-State transfer student, the new school district must provide comparable services until the new school district either adopts the student's IEP from the previous school district or develops and implements a new IEP for the student that meets applicable requirements in State and Federal law. In the case of an out-of-State transfer student, the new school district must provide comparable services until the new school district conducts its own evaluation (if determined to be necessary by the new school district), and develops and implements a new IEP for the student, if appropriate, that meets applicable requirements in State and Federal law.

The Department interprets "comparable services" to mean services that are similar or equivalent to those services that were described in the student's IEP from the previous school district, whether in the same State or in another State, as determined by the student's newly-designated IEP Team in the new school district. The new school district generally must provide ESY services as comparable services to a transfer student whose IEP from the previous school district contains those services, and may not refuse to provide ESY services to that student merely because the services would be provided during the summer. While the determination of comparable services is made on an individual basis, the new school district's IEP Team may not arbitrarily decrease the level of services to be provided to the student as comparable services.

A transfer student's need for ESY services as comparable services could arise if the student received ESY services from the previous school district during the prior summer and the student's current IEP from that school district reflects the student's need for those services, or if the student's current IEP from the previous school district includes ESY services that have not yet been provided because the student's family has moved.

In the case of an in-State transfer student, ESY services deemed comparable services must be provided either for the duration of time determined appropriate by the newly-designated IEP Team or until the new school district adopts the student's IEP from the previous school district or develops and implements a new IEP for the student that is consistent with State and Federal law. 34 CFR Section 300.323(e).

In the case of an out-of-State transfer student, ESY services deemed comparable services must be provided. The duration of time for such services is determined by the newly-designated IEP Team or until the new school district conducts its own evaluation and eligibility determination. 34 CFR Section 300.323(f). Letter to State Directors of Special Education 61 IDELR 202 (United States Department of Education, Office of Special Education Programs (2013))

VII. Section 504 and Extended School Year Services

- A. Although ESY are not mentioned in the Section 504 regulations, the Office for Civil Rights (OCR) has found school districts to be in violation for not following the proper process in determining whether a student with a disability is in need of such services. For example, in one case OCR concluded that the evidence established that the school district reduced the student's ESY services based on a uniform, district-wide decision regarding the amount of ESY services it would provide during summer, not based on an individualized determination regarding the student's educational needs. The evidence showed the director of the school's ESY program stated in the student's Team meeting that the student would only receive two days per week of ESY services due to a policy change or change in the way the school district ran the ESY program. Several staff members confirmed that the director of the program made this or a similar statement, and the fact was that no student in the school district received more than two days of ESY services during summer. OCR concluded that the school district violated Section 504 and Title II of the Americans With Disabilities Act by failing to make an individualized determination regarding the amount of ESY services the student needed during the summer to receive a free appropriate public education. Tuttle, Oklahoma Public Schools 110 LRP 30379 (United States Department of Education, Office for Civil Rights (2009)).
- B. A FAPE for certain students with disabilities may necessitate a program of special education in excess of the traditional 180 days per school year. District personnel are responsible for determining whether the child requires a continuous program in excess of 180 days per year and, if so, the type and length of the program required must be based on the individual child's unique needs. Evidence indicated that the district violated Section 504 requirements in Sections 104.33, FAPE, and 104.35, Evaluation and Placement, by precluding consideration of ESY service, during the evaluation and placement process. OCR found that the District did not have any written policy, criteria, or procedures for identifying and assessing when special education and/or disabled students required ESY services pursuant to its FAPE obligations. OCR found that the District had no in-service or staff development training,

and had no identified guidance literature or written materials to special education personnel on the subject of ESY services. OCR found that the absence of written policy and criteria, staff development, and guidance materials caused confusion on the part of many special education teachers. This absence left the teachers with tremendous discretion as to the standard for determining which students were entitled to ESY services. Although many students entitled to ESY services were served, this discretion was not exercised in a manner consistent with the requirements of Section 504 as to all students with disabilities. Letter to Clark County School District 16 IDELR 311 (United States Department of Education, Office for Civil Rights (1989))

VIII. Extended School Day Services

- A. The Department of Education in the IDEA regulatory comments addressed the need for extended school day when it stated:

Typically, ESY services are provided during the summer months. However, there is nothing in Section 300.106 that would limit a public agency from providing ESY services to a child with a disability during times other than the summer, such as **before and after regular school hours or during school vacations**, if the IEP Team determines that the child requires ESY services during those time periods in order to receive FAPE. The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child. (emphasis added)

Comments To the IDEA Regulations (Federal Register, Volume 71, No.156, Page 46582 (2006))

- B. A school district asked for guidance from the United States Department of Education whether the IEP Team could agree to provide additional reading instruction in place of, and during, otherwise scheduled mandatory physical education instruction (the state code required 30 minutes per day of physical education). Specifically, the question was whether the IDEA provides the IEP Team with authority to waive this State requirement for students with disabilities who require additional reading instruction. The Department opined that in general, it would be inappropriate for the IEP Team to deny children with disabilities the opportunity to participate in state mandated physical education instruction for the sole purpose of providing them with additional reading instruction. The IEP Team should

consider additional strategies and scheduling, such as an **extended school day** or extended school year, if the child requires such instruction in order to receive a free appropriate public education. Letter to Irby 55 IDELR 231 (United States Department of Education, Office of Special Education Programs (2010)).

- C. A school stopped funding the after school home program for a student with autism. The student's parents continued to provide two hours of nightly in-home education at their own expense and initiated a due process hearing seeking reimbursement. The school argued that the appropriate legal standard is set forth in Thompson R2-J School District v. Luke P., 540 F.3d 1143, 1150 (10th Cir. 2008), which stands for the proposition that a student's failure to generalize certain skills learned in school to the home environment is an insufficient basis for concluding that a school district was not providing a child with a FAPE.

The Court held that in this case the home program was required to provide the student with a FAPE. The Court noted that the underlying determination that a home program was needed was not based on a legal standard requiring generalization of skills. Here, the record included substantial evidence that the student's behaviors were not only detrimental to his home life, but also interfered with his learning. Therefore, the Court concluded that home programming was needed to allow the student to benefit from his education. New Milford Board of Education v. C.R. 56 IDELR 283 (United States Court of Appeals, 3rd Circuit (2011)). Note: This is an unpublished opinion.

- D. The parents disputed the discontinuation of 15 hours of after school 1:1 ABA services for their student with autism. The IEP also provided for parent training and communication.

The Court concluded that the IEP without the after school services would provide the student a FAPE since the extensive parent training provided would help the parents meet the student's needs at the end of the school day. The Court noted that the IEP is likely to produce educational progress rather than regression. C.G. v. New York City Department of Education 752 F.Supp.2d 355, 55 IDELR 157 (United States District Court, Southern District, New York (2010)). See also E.Z.-L. v. New York City Department of Education 763 F.Supp.2d 584, 56 IDELR 10 (United States District Court, Southern District, New York (2011)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.

Appendix A

State Requirements and Guidance from Iowa, Kansas and Nebraska

IOWA

Iowa Administrative Rules

Extended school year services. 281—41.106(256B,34CFR300)

(1) *General.* Each public agency must ensure that extended school year services are available as necessary to provide FAPE.

a. Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with rules 281—41.320(256B,34CFR300) to 281—41.324(256B,34CFR300), that the services are necessary for the provision of FAPE to the child.

b. In implementing the requirements of this rule, a 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.

41.106(2) Definition. As used in this rule, the term “extended school year services” means special education and related services that meet the standards of the SEA and 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.

KANSAS

Kansas Administrative Regulations

K.A.R. 91-40-1(x). Extended school year services. Extended school year services means special education and related services that are provided to a child with a disability under the following conditions:

- (1) Beyond the school term provided to nondisabled children;
- (2) in accordance with the child's IEP; and
- (3) at no cost to the parents of the child.

K.A.R. 91-40-3(e). Ancillary FAPE Requirements

- (1) Each agency shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability.
- (2) An agency shall be required to provide extended school year services 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.
- (3) An agency shall neither limit extended school year services to particular categories of disability nor unilaterally limit the type, amount, or duration of those services

Kansas Special Education Services Process Handbook

EXTENDED SCHOOL YEAR/DAY SERVICES (Chapter 5, Section F)

When the IEP is developed initially or reviewed annually, the IEP team shall consider the need for extended school year (ESY) services for children with disabilities. Children identified as gifted are not eligible for extended school year services. ESY services are different than general education summer school. ESY may or may not be provided in conjunction with the general education summer school. ESY may be needed by a child even though summer school is not offered for general education children. In fact, for certain children, services over winter or spring breaks may be needed. The reason for these services is to ensure the provision of FAPE so that the child can make progress toward the goals specified on the child's IEP and to prevent regression, which would impede such progress.

However, if a child with a disability is attending a summer school program for general education purposes, (not extended school year) the school shall consider what reasonable accommodations/modifications may be necessary for the child to have an equal opportunity to participate in the general education environment and curriculum. The necessary supports can be provided through a 504 plan.

The need for ESY is to be decided individually. Therefore, a district shall not have a policy that no ESY services will be provided, that they are only available to a certain group or age of children, or that services are only provided for a set amount of time or a specified number of days.

The IEP Team may use the following methods to decide if a student with a disability (not students who are gifted) needs ESY services. Note that each is not mutually exclusive and consideration of all of these factors may be warranted. These reasons are not all-inclusive.

1. Is a significant regression anticipated if ESY services are not provided? The school is not required to provide ESY services merely because the student will benefit from them. Instead, the IEP Team should determine if the regression

experienced by the student would significantly affect his/her maintenance of skills and behaviors.

2. What is the nature and severity of the disability(ies)? Each student's needs must be considered individually.
3. Are instructional areas or related services needed that are crucial in moving toward self-sufficiency and independence? Particular consideration for ESY services should be given to students who need instruction in such self-help skills as dressing or eating, or who need continued structure to develop behavioral control.
4. The IEP Team could use the following information and data in determining the need for ESY services:
 - a. Teacher assessment of the student's success with various instructional interventions;
 - b. Criterion-referenced and standardized test data;
 - c. Health and health-related factors, including physical and social/emotional functioning;
 - d. Past educational history, as appropriate, including any ESY services;
 - e. Direct observation of the student's classroom performance;
 - f. IEP goals and objectives;
 - g. Student performance (pretest and posttest data);
 - h. Behavior checklists; and
 - i. Parent interviews and student interviews where appropriate.

It is important for the IEP Team to address the educational needs of each student and how they might be addressed, such as:

- Scope of the special education instructional services including the duration and content of the program;
- Which current goals and objectives will be addressed to maintain present skills and behaviors;
- Implementer(s) of the ESY services;
- What related services will be made available; and
- If contracting with other schools or private agencies is needed.

Additional Guidance on ESY Services (Chapters 4 and 5)

Question: If the IEP team does not have adequate information at the time of the IEP team meeting to determine what Extended School Year (ESY) services will be necessary for the child during the summer, what should be written on the IEP?

One of the responsibilities of the IEP team is to consider whether or not ESY services are necessary for each child with a disability. If the IEP team decides that ESY is necessary for the child, they must then determine what those services will be and include them in the IEP.

If the IEP meeting is held in the fall of the school year or if the child is new to the school, the IEP team may not have enough data to determine if the child needs ESY services or what those services should be. In this case, the team should include in the IEP a statement that ESY services were considered and that there was inadequate information at the time of the meeting to make an appropriate decision. The team should also include in this statement a date later in the school year when more information will be available to reconvene and determine if ESY services are needed and amend the IEP as necessary (34 C.F.R. 300.309).

Question: If a child turns 21 during the school year, must ESY services be provided the summer after the student's final year of school?

Children continue to be eligible for all necessary special education and related services including ESY until they appropriately exit special education. A student with a disability may be eligible for special education and related services through the school year (ending June 30) in which they turn 21. Thus, it is an IEP team decision whether ESY is necessary for the student until June 30 after their 21st birthday. Some factors in the IEP team's decision may include whether or not the June 30 deadline will give the child time to complete ESY services and whether or not the child will benefit from ESY services.

Question: What if the IEP team determines that a student is eligible for ESY services and the parent indicates the student will not be participating due to other summer commitments?

If ESY is in the child's IEP and the parent refuses the services, then the parent may be in violation of the State's special education compulsory attendance statute. (K.S.A. 72-977) A parent who wishes to revoke consent for the particular ESY services may only do so in accordance with the procedures outlined in K.A.R.91-40-27, which requires the IEP team to certify in writing that the revocation of the particular service would not prevent the student from receiving FAPE.

NEBRASKA

Nebraska Administrative Code, Title 92, Chapter 51

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 school district or approved cooperative, in accordance with the child's IEP, at no cost to the parents of the child, and meet the requirements of 92 NAC 51. (Nebraska Code Section

3.26)

Extended School Year Services (ESYS)

007.07C5a Each school district or approved cooperative shall ensure that extended school year services are available as necessary to provide a free appropriate public education consistent with 92 NAC 51-007.07C5b.

007.07C5b Extended School Year (ESY) services must be provided only if a child's IEP team determines, on an individual basis, in accordance with Section 007, that the services are necessary for the provision of a free appropriate public education.

007.07C5c In implementing the requirements of this section, a school district or approved cooperative may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of those services.

(Nebraska Code Section 7.07C5)

Nebraska Technical Assistance Document

Extended School Year Services: Technical Assistance Document

can be accessed at: <http://www.education.ne.gov/sped/technicalassist.html>

The critical question that each IEP team must ask is “Will the learning that occurred during the regular school year be significantly jeopardized if ESY services are not provided?”

Reasons why ESY services may be needed vary from child to child.