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**Extended School Year (ESY) Services:
What Special Education Advocates
Need to Know**

**Presented by
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- ◆ Author of a number of articles and books that help parents, educators and other professionals understand legal requirements and meet student needs.

What are they?

- Extended School Year (ESY) Services are services provided beyond the normal school year that are necessary in order for a student to make educational progress (meaning receive FAPE) during the school year.
- Connected to the services the student receives during the school year and the IEP process

Text of the Law

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.

A Step Back...
Special Education & Related Services

- Services provided to students who are eligible under the IDEA
- Defined in the law, 34 CFR § 300.34, § 300.39, § 300.320
- Must be specially designed instruction to meet the child's unique needs, and provide meaningful progress or educational benefit (FAPE)

Special Education & Related Services in general

- Services detailed in child's IEP
- High expectations tied to general curriculum
- Based on peer-reviewed research when practicable
- Meet child's needs that result from their disability
- More than just academic – functional, behavioral, social/emotional, etc.

ESY Services

- Must meet same general legal requirements for special education and related services
- But they don't have to be the same or all of the services in IEP
- Student's IEP Team determines the services that will be provided
- Services must be part of providing FAPE
- More specifics later...

When are they provided?

- The law says: "Beyond the normal school year."
- Typically means that ESY services are provided during the summer months, but they don't have to be and cannot be limited to summer months if student requires more
- Can also be provided before and after regular school hours or during school vacations
 - See *Comments to federal regulations released in 2006*

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When are they provided?

- Key is the IEP Team determination of what the child requires 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.

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Advocacy Tip

- Raise ESY issues early in the process
- Develop ways to determine if a child requires ESY services and if the services need to be something more than services provided over the summer
- If so, don't wait until the end of year review meeting to request services
- If it is the end of year review, build the other times (beyond summer) into the following year's IEP

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Distinction

- ESY services are not “compensatory” services
- ESY can be required even if the school has met its obligations to provide FAPE in the past
- Don’t need a showing of FAPE not being provided
- Don’t need a hearing officer decision ordering services

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Distinction

- ESY services are not summer school services
- May be provided during summer school
- Student may also receive same summer school programming that other students receive
- ESY services must be special education and related services that provide FAPE

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Who is Eligible?

- Must be a child with a disability under the IDEA
 - Could also be under Section 504 but generally if student requires special education services they will be covered under the IDEA
- Must need ESY services to receive FAPE
- IEP Team makes the determination in the first instance
 - Parents may disagree and resolve the dispute through dispute resolution mechanisms (discussed later...)

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The Law...

34 CFR §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.

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Comments to 300.106

- The right of an individual child with a disability to receive ESY services is based on that child's entitlement to FAPE
- 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

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How?

- How do you determine if a specific student needs ESY services to receive FAPE?
- 2 levels:
 - State Standards for ESY eligibility
 - IEP Team decision for a specific student

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State Standards for ESY

- The federal law gives states some discretion in establishing standards for ESY eligibility
- Different states have different approaches
- State approach must be consistent with the individually-oriented requirements of the Act
- May not limit eligibility for ESY services to children with a particular disability category
- May not be applied in a manner that denies children with disabilities access to necessary ESY services.

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State ESY Standards May Not

- Limit extended school year (ESY) services to particular categories of disability; or
- Unilaterally limit the type, amount, or duration of those services.

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Advocacy Tip

- Need to check your state statutes and special education regulations to determine the specific ESY standards in your state, if any.
- Some states just adopt the federal language and then schools adopt methods in practice of determining ESY eligibility (which developed at least in part from case law).
- Some states have very specific requirements.
- Also, ask for your school's ESY policies.

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Regression & Recoupment

- One common standard in state standards and used in practice
- One of the first standards developed by courts
- Sometimes called “recoupment and retention”
- Basically looks to the level of regression a student will incur without services and how difficult it will be for the student to recoup the information.

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Evolution

- Most states now use more than one factor to determine ESY
- In the comments to the federal regulations released in 2006, the United States Department of Education said that states may use regression and recoupment as the sole criterion for ESY services, but they **do not have to do so**.
- May use other criteria in addition to, or instead of, regression and recoupment information

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What does regression & recoupment mean?

- Most students will regress to some extent over breaks
- It takes most students some amount of time to recoup what they learned after breaks
- So, it has to be something more than “regular” or “average” or “normal” regression and recoupment times.

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What does it mean?

- Standard has been described in different ways but generally means that without the ESY programming the student will suffer:
 - Severe, substantial, or significant regression
 - That can not be recouped within a reasonable period of time after school starts again
 - greater than usual time to get back to the level the child had achieved before a break in service
 - slower recoupment than for regular education students.

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What does it mean?

The Massachusetts Department of Elementary and Secondary Education interprets a child's difficulties with "recoupment" to be an aspect of "significant regression." Specifically, significant regression and recoupment consist of the following inter-related elements:

- (1) the loss of performance levels that were attained before a break in service,
- (2) the child's limited learning rate, which lengthens the amount of time the child requires to review and/or relearn previously attained objectives, and
- (3) the fact that the time for that child to accomplish such recoupment is greater than the period of time the school district allows all other children for review and/or relearning.

http://www.doe.mass.edu/pqarta/esyb_qa.html

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Other factors

Other factors considered by some include:

- the degree of impairment
- the ability of the child's parents to provide the educational structure at home
- the child's rate of progress
- his or 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
- 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.
- *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10th Cir. 1990)
- Followed in Mass, IL, Wisconsin, NY, and numerous others...

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Other factors

Nature and/or Severity of the Disability or Degree of Impairment

- Without ESY services, the nature and/or severity of the student's disability is likely to prevent the student from receiving benefit from his/her educational program during the regular school year.
- **Example:** Students with disabilities requiring consistent, highly structured programs may regress substantially when their services are interrupted and may also have limited recoupment capacity.

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Other Factors

Degree or Rate of Progress

- The IEP team reviews the student's progress toward the IEP's goals and determines whether, without ESY services, the student's degree or rate of progress toward those goals or objectives will prevent the student from receiving benefit for his/her educational placement during the regular school year.
- Some limit this to "critical life skills"
 - If so, need to determine definition of the term
- 4th Circuit and USED seem to have rejected using a degree of progress approach as the sole criterion for ESY

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Other Factors

Emerging Skills/ Breakthrough Opportunities

- The IEP team reviews all IEP goals targeting important skills to determine whether any of these skills are at a breakthrough point.
- Again, sometimes done in the language of "critical life skills"
- Depending on definition could be beginning to read, write, communicate, accomplish self-care or sufficiency skills, walk, etc.
- IEP team determines whether the interruption in services and instruction on those goals or objectives is likely to prevent the student from receiving benefit from their educational program during the regular school year.

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Other Factors

Critical Point of Instruction

- When the student is at a critical point of instruction such that extended school year services are necessary to
 - prevent a loss of general education class time,
 - to prevent an increase in special education service time that would result from a lack of skill development, or
 - to prevent a loss of progress made toward the acquisition and/or maintenance of a critical self help, community access or social/behavioral skill.
- May be a student who is losing momentum from progress once showed earlier in the school year or on the verge of regressing

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Other Factors

Interfering Behaviors

- Without ESY services, will interfering behaviors (i.e. ritualistic, aggressive, or self-injurious behavior) targeted by the IEP goals prevent the student from receiving benefit from their educational program during the school year?

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Other Factors

Special Circumstances or Other Factors

- Without ESY services, are there any special circumstances that will prevent the student from receiving benefit from his/her education program during the regular school year?
- Least restrictive environment concerns

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LRE

- Least restrictive environment is a consideration for where the ESY services are provided
- It should also be considered in the eligibility process
- Some students require ESY services in order to support or maintain a continued placement in the least restrictive environment
- Example is Arizona on the next slide

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Arizona LRE Example

- LRE should be considered when ESY is determined to be necessary in order for a child to **maintain placement in the least restrictive environment (LRE) during the regular school year.**
- This applies to a student who has been in a highly structured program to maintain essential skills that were established and are in danger of regression.

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Arizona Example

- Gina is a student with a disability at Your High School. During the review of her IEP, the team determined that, although her academic regression over summer vacation would not be significant, the loss of behavior control would be severe, if not permanent.
- The team also considered Gina's placement in the school program, and determined that, without ESY, it was likely that Gina would have to be placed in a more restrictive environment for most of the following school year.
- Therefore, ESY would be necessary in order for her to remain in the least restrictive environment.

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What does it mean? Court decisions

- A number of courts have interpreted ESY standards to be relatively difficult for students to qualify for, or meet.
- Goal to prevent “significant skill losses of such degree and duration so as seriously to impede his progress toward his educational goals.”
- *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), cert. denied, 499 U.S. 938 (1991).

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What does it mean? Court decisions

- “[I]t is incumbent upon those proposing an ESY for inclusion in the child's IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression.”
- “More specifically, it must be shown that an ESY is necessary to permit the child to benefit from his instruction.”
- *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269 (6th Cir. 2004)

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What does it mean? Court decisions

- 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.”
- Includes more than just regression and recoupment though evidence of those factors are part of it
- *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986)
- *M.M. v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002)

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Questions?

2nd Step IEP Team

- IEP Team charged with deciding whether a student needs ESY based on the standards
- Parents part of the team
- Could be done as part of IEP annual review, and before for students who require it
- Can be a separate meeting
- Must be an individualized decision based on student's unique needs and FAPE

IEP Team

- Some state regulations specifically require ESY consideration at certain times, or at certain IEP meetings.
- Some have deadlines that require decisions to be made early enough to ensure that services can be provided and to ensure that if ESY services are denied, parents have adequate time to resolve the disagreement.
- Prior USED comments to federal regulations have stated that States should follow this kind of approach.

IEP Team General guidelines

- Exact discussion determined by standard that state follows for ESY
- Look to each IEP goal to determine if ESY criteria met
- May be met for some goals and not others
- Presumes that the IEP goals are calculated to provide FAPE
- Remember - it is more than academic!
 - functional, social/emotional, behavioral, communication, self-sufficiency skills, etc.

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Advocacy Tip

- Having accurate, appropriate, measurable IEP goals becomes really important
- So do progress reports and other info regarding the goals and objectives
 - At that breakthrough opportunity stage?
- So do evaluations regarding the need for various services related to those goals
- More about gathering info in a minute...

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General Guidelines

- Don't have to wait and see
- Don't have to show past or actual regression
- Don't have to go without services to show student has interfering behaviors or nature and severity of disability requires ESY, etc.
- Need may be proven by "predictive data" based upon a professional, individual assessment

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Gathering info

Variety of informal and formal sources that can be used to make decisions about ESY services include:

- Progress towards goals on IEPs
- Observations and anecdotal information maintained by educators and others having direct contact with the student before and after interruptions in the educational program
- Parent assessments - negative changes in behaviors or loss of skills over break periods
- Medical and other agency reports
- Results of evaluations
- Norm or criterion referenced tests

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Gathering info

● **Performance on state assessments**
(required by No Child Left Behind)

- USED says: *“Accelerated growth toward, and mastery of State-approved grade-level standards are goals of special education.” (71 Federal Register, Pg. 46,653)*

● **Assignment to alternate assessments**, particularly alternate assessment on modified achievement standards –

- USED says: *“The student’s progress to date in response to appropriate instruction, including special education and related services...is such that, even if significant growth occurs, the IEP team is reasonably certain that the student will not achieve grade-level proficiency within the year covered by the student’s IEP.” (Guidelines for IEP teams) (72 Federal Register, Pg. 17778)*

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Gathering info

More sources...

- Records or logs of daily performance
- Behavior checklists
- Student work
- Student self-assessments

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Gathering information

Before and after interruption:

- Have information about student's level of functioning on skills at issue before break
- Then on return assess skill levels
- If regression, determine recoupment time
- Break could be spring or winter break
 - doesn't have to be summer...
- **Remember that you don't have to wait and see!**

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Reasonable Recoupment

- Some schools have set amounts of time that they go by for "reasonable recoupment" rates
 - 20 to 30 days for summer break
 - 5 to 7 days for three week break
 - 3 to 5 days for two week break
 - 2 to 3 days for one week break
- Not written in the law
- May have other opinions on that from evaluators
- May vary depending on other facts, skills at issue and standard or factors used for ESY

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Standard recoupment rates

- Remember that special education is about the unique needs of the child and FAPE for that particular child.
- Schools cannot have policies that inhibit or prevent the full consideration of the individual needs of a student with a disability.
- "Standard rates" may help though in showing need for ESY services.

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Advocacy Tip

- If evaluations are used in the ESY determination...
 - Remember that parents have a role in which evaluations are used when they consent
 - Remember that parents can request an independent evaluation if they disagree with the results
 - Can also request additional evaluations

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What services are provided?

- Services are provided in areas needed to provide FAPE – remember, not just academic
- May be different than services provided during school year but must be provided in accordance with the IEP
- Depends on what is required to provide FAPE and to meet State standards for ESY
 - Focus is generally maintaining skills or levels in areas at risk for significant regression

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ESY services

- ESY services should be documented as part of an IEP or an addendum
- Need measurable goals and objectives that will be addressed by ESY services
- Should include the type of services, the amount and duration of each service, service provider, etc.
- Remember that law requires consideration of **related services** too
 - This could include transportation and anything else that fits in the definition of related services

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New Goals?

- Generally, most say that ESY services won't require a "new goal" as the purpose is to maintain learned skills as opposed to teaching new skills.
- But remember that the requirement is to provide FAPE. That may require a new goal (or at least a different goal) to maintain skills over the break.
- Also when ESY is considered as part of the end of year review, new goals are being developed for next year's IEP and ESY services would be part of that process and help maintain the student over the break so that the goals are still appropriate at the beginning of the next school year.

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LRE

LRE requirements apply to ESY services, but...

- Schools are not required to create new programs as a means of providing ESY services to children with disabilities in integrated settings, if the school does not provide services at that time for its non-disabled children.
- LRE requirements for ESY are not identical to LRE requirements that apply during the regular school year.
- The full continuum of educational options does not have to be created for the sole purpose of ESY services.

Federal Register, Vol. 64, No. 48, 1999, pg. 12577

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Dispute resolution

- If disagree on ESY eligibility or services can resolve through dispute resolution mechanisms
- Mediation, neutral case evaluation, due process, state complaint process
- Be sure to have information that supports the need for services before going through the resolution process

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Advocacy Tip

- Case law establishes that the information about the need for ESY must be very specific for that student.
- Generally, if there is a disagreement, parents will have the burden to prove ESY is required.
- Evidence can include prior regression and recoupment or information to show other ESY factors are met based on past experiences when ESY not provided.

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Advocacy Tip

- Evidence can also include **predictive data** of what will happen if ESY services are not provided.
- Generally done by expert testimony (which could simply be an evaluator testifying at the hearing).

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Advocacy Tip

- Evidence must address specifically why ESY is necessary for that student to receive FAPE
 - How regression is significant
 - How recoupment time is more than reasonable, normal, average, etc.
 - How it will impact student in the skills or areas at issue
 - And/or how other factors are met

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Testimony that was not good enough...

- **Kenton County School District v. Hunt, 384 F.3d 269 (6th Cir 2004)**
- Dispute over ESY services. Student had hemiplegic cerebral palsy and delayed cognitive and communication development.
- Parents had an expert who had evaluated their son testify at hearing.

Testimony not good enough...

- When asked to explain why in his opinion it was “important that services for Jason have no interruption throughout the year?” He answered based on his experience with patients with traumatic brain injury in general stating in part:

Almost invariably what happens if you don't provide that constant flow of services, that there's going to be regression and significant regression. The way these kinds of individuals process information, without that flow not only will there be regression, but there's going to be a considerable amount of time before they can catch up.

Testimony not good enough...

Dr. Ebbens was also asked what his opinion was “regarding regression for Jason Hunt.” He answered:

“[m]y opinion would be if you were to take him out of a full-time, intense comprehensive program, that it is inevitable that he would regress and quite significantly.”

Court said...

- We find this testimony inadequate to meet the high burden that the *Cordrey* court imposed on those who propose an ESY for inclusion in the child's IEP.
- In other words, there was no demonstration, "in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression."

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Court said...

- "Dr. Ebbens could only opine, based on his experience with individuals similar to Jason, that it would take two months or more for Jason to recoup what he would lose without ESY."
- "This opinion was not particularized nor did it explain whether two months is or is not an adequately recoupable regression."
- School had testified that 2 months was normal recoupment time.

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Remedies

- A failure to provide required ESY services would be a failure to provide FAPE
- Remedies can include orders to provide ESY services
- Remedies could also include compensatory services
 - Different jurisdictions have different tests for compensatory services
 - A day for a day

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Questions?

Sources & resources

- Fairfax County Virginia ESY explanations
http://www.fcps.edu/ss/SpecialEd/esy_info.htm
- Virginia Department of Education Extended School Year Services Resource Document
<http://www.doe.virginia.gov/VDOE/Instruction/Sped/ESYdoc.pdf>
- Arizona example used in the PowerPoint from
<http://www.kyrene.k12.az.us/formmatrix/help/downloads/AZTAS/Extended%20School%20Year.pdf>
- Extended School Year Services Manual by Maryland Disability Law Center Leslie Seid Margolis
<http://www.mdicbalto.org/pdfs/ESYmanual.pdf>
- More information about ESY from Attorney Margolis
<http://www.nfb.org/Images/nfb/Publications/fr/fr17/fr05ws18.htm>

Sources & Resources

- Guidelines for the provision of ESY Services from the Wyoming Department of Education
http://www.k12.wy.us/SE/Docs/extended_school.pdf
- *Services Beyond the School Year for Students with IEPs* by Candace Cortiella, The Advocacy Institute published on the GreatSchools website at www.greatschools.net/cgi-bin/showarticle/1210?cpn=20080409ld
- Indiana P&A website on ESY Services
<http://www.in.gov/ipas/2373.htm>
- Advocacy Center for Persons with Disabilities ESY links
<http://www.advocacycenter.org/FactSheets/ESYLinks.htm>
