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14.1 UNDERSTANDING EXTENDED SCHOOL YEAR (ESY): THE LEGAL AND PRACTICAL ASPECTS

Federal Regulations
The Individuals with Disabilities Education Act (34 CFR Part 300 §300.106) states:

(a) General.
(1) Each public agency shall ensure that extended school year services are available as necessary to provide a free appropriate public education (FAPE).
(2) Extended school year services must be provided only if a child’s IEP team determines, on an individual basis, in accordance with §300.320-300.324, 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
   (iv)  
(2) Meet the standards of the State Education Agency.

California Code of Regulations
The California Code of Regulations (CCR §3043) states:

Extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. The lack of clear evidence of such factors may not be used to deny an individual an extended school year program if the individualized education program team determines the need for such a program and includes extended school year in the individualized education program pursuant to subsection (f).
(a) Extended year special education and related services shall be provided by a school
district, special education local plan area, or county office offering programs during the
regular academic year.

(b) Individuals with exceptional needs who may require an extended school year are those
who:

(1) Are placed in special classes or centers; or
(2) Are individuals with exceptional needs whose individualized education programs
specify an extended year program as determined by the Individualized Education
Program Team.

(c) The term “extended year” as used in this section means the period of time between the
close of one academic year and the beginning of the succeeding academic year. The term
“academic year” as used in this section means that portion of the school year during
which the regular day school is maintained, which period must include less than the
number of days required to entitle the district, special education services region, or
county office to apportionments of state funds.

(d) An extended year program shall be provided for a minimum of 20 instructional days,
including holidays. For reimbursement purposes:

(1) A maximum of 55 instructional days excluding holidays shall be allowed for
individuals in special classes or centers for the severely handicapped; and
(2) A maximum of 30 instructional days excluding holidays shall be allowed for all
other eligible pupils needing extended year.

(e) A local governing board may increase the number of instructional days during the
extended year period, but shall not claim revenue for average daily attendance generated
beyond the maximum instructional days allowed in subsection (d)(1) and (2).

(f) An extended year program, when needed, as determined by the Individualized Education
Program team, shall be included in the pupil’s individualized education program.

(g) In order to qualify for average daily attendance revenue for extended year pupils, all of
the following conditions must be met:

(1) Extended year special education shall be the same length of time as the school day
for pupils of the same age level attending summer school in the district in which
the extended year program is provided, but not less than the minimum school day
for that age unless otherwise specified in the individualized education program to
meet a pupil’s unique needs.
The special education and related services offered during the extended year period are comparable in standards, scope and quality to the special education program offered during the regular academic year.

If during the regular academic year an individual’s Individualized Education Program specifies integration in the regular classroom, a public education agency is not required to meet that component of the individualized program if no regular summer school programs are being offered by that agency.

This section shall not apply to schools which are operating a continuous school program pursuant to Chapter 5 (commencing with Section 37600) of Part 22, Division 3, Title 2, of the Education Code.

[Authority cited: Section 56100(a) and (j), Education Code. Reference: Sections 37600, 41976.5 and 56345, Education Code; 34 C.F.R. 300.346]

Case Law
No single criterion can be used as a sole qualifying factor (Johnson v. Independent School District No. 4, 1990).

LEAs are required to consider more than just the regression/recoupment analysis and consider other factors relevant in determining ESY. One factor to be considered is the critical stage of developing a skill which has great potential for increasing self-sufficiency. For such skill, if not completely acquired and mastered, it is likely that the current level of acquisition will be lost due to the interruption of summer vacation (Reusch v. Fountain, 1994).

LEAs are not required to create programs in order to provide ESY services. An example would be a student who requires an integrated setting. If the LEA does not provide summer services for non-disabled students, the LEA is not required to create a new program (Tuscaloosa County Board of Education, 35 IDELER 172 [SEA AL 2001]).

There have been some court cases which help clarify issues of regression/recoupment.

In Cordrey v. Euckert (17EHLR 104 [6th Cir 1990], the court noted that “the school district has no purely custodial duty to provide for handicapped children while similar provision is not made for others. Therefore, begin with the proposition that providing an extended school year is the exception and not the rule…” Therefore, districts will consider all appropriate factors in determining whether the benefits a student has been credited with during the regular school year would be at significant risk for regression if not provided with ESY.
In MM v. School District of Greenville County, (37 IDELR 183, 303 F.3d 523 [4th Cir. 2002]), the court ruled the “ESY services are only necessary to FAPE when the benefits accrued a disabled child during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.”

In SS, JD, SS v. Henrico County School Board (38 IDELR 261, 326 F.3d 560 [4th Cir. 2003]), the Hearing Officer found that ESY services “were not for the purpose of achieving goals not met during the school year.”


Extended School Year (ESY) Is:

- Based only on the individual student’s specific critical skills that are critical to his /her overall education progress as determined by the IEP team
- 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
- Focused on specific critical skills where regression, due to extended time off, may occur
- Based on multi-criteria and not on a single factor
- Considered as a strategy for minimizing the regression of skill, in order to shorten the time required to gain the same level of skill proficiency that the child exited with at the end of the school year

Extended School Year (ESY) Is Not:

- It is not a mandated 12-month service for all students with disabilities
- It is not required to function as a respite care service
- It is not funded by General Fund
- It is not required or intended to maximize educational opportunities for any student with disabilities
- It is not necessary to continue instruction on all the previous year’s IEP goals during the ESY period
- It is not compulsory. Participation in the program is discretionary with the parents, who may choose to refuse the ESY service. There may be personal and family concerns that take precedence over ESY
- It is not required solely when a child fails to achieve IEP goals and objectives during the school year
- It should not be considered in order to help students with disabilities advance in relation to their peers
- It is not for those students who exhibit random regression solely related to transitional life situation or medical problems which result in degeneration
It is not subject to the same LRE environment considerations as during the regular school year as the same LRE options are not available. Additionally, LRE for some students may be home with family members.

It is not a summer recreation program for students with disabilities.

It is not to provide a child with education beyond that which is prescribed in his/her IEP goals and objectives.

It is not for making up for poor attendance during regular school year.

It is not the primary means for credit recovery for classes failed during the regular school year.

Guidance for IEP Teams

Who Recommends ESY Services?
Both federal and state regulations make it clear that it is the responsibility of the individual education program (IEP) team to determine a child’s need for ESY services. The IEP team membership must include a person knowledgeable about the range of services available, a general education teacher, a special education teacher, and the parent. The IEP team membership may also include related services providers, assessment personnel, and/or the student.

What is the Difference Between ESY and Summer School?
ESY services are special education and related services that are required by an individual with exceptional needs beyond the 180-day school year. Such individuals shall have handicaps which are likely to continue indefinitely or for prolonged periods, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. It is the issues of regression and recoupment that provide a framework upon which to base discussion on the needs of the student.

If the student does not require ESY, the student could be considered for regular summer school or regular summer intervention program services offered within the school district. Summer school classes are not special education, and therefore are not required. Summer school classes are not based upon a child’s individual needs and do not require an IEP. Summer school classes are not required in order for a child to receive FAPE which is in contrast with those services provided in ESY. In addition, a school district can choose not to provide summer school. While summer school usually focuses on opportunities for secondary students to recover credits, summer intervention programs generally focus on the development of skills that students at risk of retention need to progress. Given that, summer intervention classes may very well be appropriate for students with disabilities who are working toward grade level standards.

Several court cases have referred to the “availability of alternative resources” when considering ESY services. The LEA could consider community programs that are available to students. The
LEA must be cautious when identifying services provided by community agencies such as a Parks and Recreation program. These outside agencies have no requirement to maintain the student in their program.

**When Should ESY Be Recommended?**

Since the need for ESY is primarily based on an unacceptable regression or recoupment as demonstrated by the student, it is important to understand what might be acceptable for most students. Tilley, Cox, and Staybrook (1986) found that most students experience some regression during summer break. Using standardized tests, they found the rate of regression for regular education students was 4%. Students with mild handicaps, hearing impairments, and serious behavior disorders regressed at approximately the same rate as their regular education peers. For students with moderate to severe handicaps, there was an increased rate of regression and a slower rate of recoupment. According to the study, the areas that were most impacted for those students were language, gross motor, fine motor, and self-help skills. Therefore, it is reasonable for students with moderate to severe challenges to be considered for an ESY program that would concentrate on minimizing regression and recovery time.

When considering ESY for any student, the IEP must consider data collected during the previous year(s) to determine the student’s need based on regression and recoupment. This decision should be based on a multi-faceted measurement, although there may be rare instances where the IEP team might consider ESY services based on a single criterion. In either case, the IEP team must decide a child’s eligibility for ESY services based on data collected that reflects his/her regression/recoupment capacity. To help understand this process, the following chart adapted from [www.kyrene.org/resource/esy](http://www.kyrene.org/resource/esy) is included:

<table>
<thead>
<tr>
<th>First 8 weeks of school</th>
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<tbody>
<tr>
<td>• Collect data and re-teach</td>
</tr>
<tr>
<td>• Compare to Spring data to determine if the student recouped his/her skills from previous year (This data should be the basis of the ESY eligibility discussion at the annual IEP)</td>
</tr>
<tr>
<td>• Instruction and ongoing data collection</td>
</tr>
<tr>
<td>• As soon as a student is found eligible for ESY, document the reasons why ESY is recommended on the IEP summary page or on an addendum IEP</td>
</tr>
<tr>
<td>• Include data supporting the recommendation for ESY</td>
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<tr>
<td>• Continue instruction and document progress on progress reports</td>
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<table>
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<tr>
<th>Following the first and second grading period</th>
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<tr>
<td><em>For new students or any student for whom you were unable to gather regression/recoupment data during the first 8 weeks of school, review data before and after any break from school (e.g. Thanksgiving, Winter or Spring break) to determine if student may have a significant regression/recoupment problem</em></td>
</tr>
<tr>
<td>• Use data collected as the basis for ESY eligibility discussion at the annual review IEP or addendum meeting</td>
</tr>
<tr>
<td>• Re-teaching time should equal the length of the break (1 week break = 1 week re-teaching; retest)</td>
</tr>
<tr>
<td>• As soon as students are found eligible for ESY, the reasons for eligibility are documented on the IEP summary sheet or addendum</td>
</tr>
<tr>
<td>• Continue instruction and document progress on progress report</td>
</tr>
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Two to three months prior to the end of the school year

- Notify district administrator for students eligible for ESY
  - Be sure to include documentation to support decision
- Continue to teach and gather data for last quarter/trimester of the school year
- If the data indicates the student has a need for ESY and this has not yet been addressed, convene an IEP team meeting
  - If the team determines services are warranted, notify the district administrator as explained above

When should ESY Data Collection occur?

Recommended times for data collection:
- At the end of regular school year
- At the end of summer program
- At the beginning of subsequent school year
- Before and after school vacations; if student has been out of school for other reasons
- Ongoing collection of information throughout the school year

Several districts have year round calendars which may require a timeline for provision of ESY slightly different than traditional school year calendars. However, consideration of need for ESY services would follow a similar pattern as that outlined above. In both cases the number of days recommended for ESY is based on student data collected to support student need. Typically ESY services are aligned with the summer school and/or summer intervention programs provided for general education students in the district or school of attendance.

Why Should ESY Be Documented in a Child’s IEP?
The ESY services provided must be consistent with the student’s IEP so that the student receives a free appropriate public education (FAPE). ESY services should concentrate on the areas most impacted by regression and inadequate recoupment.

These services may look markedly different in ESY than services provided during the regular school year as determined by the IEP team. The decision is not driven by the setting in which the student is educated during the comprehensive school year. This may also be true for the frequency and/or the duration of services as based on the individual child’s needs. Related services must also be considered as they relate to the child’s benefiting from special education. Therefore, it is very important that the offer of FAPE be clearly documented within the IEP. ESY services are to be considered for students between the ages of three to twenty one or students who have not graduated from high school with a diploma.

How Should ESY Eligibility Be Determined?
The child’s individual education program (IEP) plan should be the foundation for determining the need for ESY. This can be achieved through ongoing assessment and/or review of progress toward goals/objectives. The IEP team meets to review the student’s progress, considering a variety of measurements to provide a baseline that documents the regression and recoupment rate.
The IEP team for an initial IEP will not be able to make this determination until after the student has been receiving the special education services and data has been collected. It is recommended that the IEP team reconvene after 3-6 months to review progress data and compare work from before and after break. Similarly, preschool students are another group that the IEP teams need to individually determine the need for ESY based on data collected after the student has participated in the special education program.

Since many districts have already implemented multiple measures to assess progress toward standards, the district’s assessments may be applicable to the IEP team determination of need for ESY. The assessment must be based on the IEP goals and/or objectives so that progress can be matched directly to each benchmark outlined and the data can be compared to support evaluation of service effectiveness. The team also needs to determine and document if the student will take the local measures with or without accommodations, with or without modifications, or take alternative measures.

The severity of the handicap is a primary consideration in determining eligibility for ESY. Based on the Reusch v. Fountain case, the IEP team should consider the following: student’s age, severity of the disability, presence of medically diagnosed health impairments, attainment of self-sufficiency, and development of an emerging, critical skill that will be lost due to interruption. Other factors to consider are regression rate and recoupment time in relation to normal rates, behavioral and physical problems, curricular areas which would be adversely impacted, and vocational needs.

Younger students with medically diagnosed health impairments are more likely to be referred for ESY due to degenerative diseases and/or high absenteeism as a result of the health impairment. The ability to maintain self-sufficiency skills of the more mentally and physically challenged students will continue to be a key issue in ESY eligibility.

Once services are determined as necessary based on data collected and regression-recoupment rate, the IEP team must include a description of the services required by the child’s IEP in order to receive FAPE during the provision of ESY.

The Riverside County SELPA has developed the following “Determination of Need for ESY Services Worksheet” to assist IEP team members in this decision making process. The Case Carrier begins the worksheet by identifying the student’s name, date of birth, grade, school, district, and Regular School Year Special Education Services. Various people (e.g., special education teacher, general education teacher, related services personnel, parent, administrator) may provide information to complete the multiple criteria considerations in all areas of need. These should include:

- Teacher observations
- Running records
- Benchmark measures
With the above information in hand, the IEP team can more proceed to answering the series of questions on the ESY Checklist and make a determination of need for ESY. The worksheet is signed, dated, and attached to the student’s IEP. Please note: This determination of need for ESY services needs to be completed annually.

14.2 SHASTA COUNTY SPECIAL EDUCATION LOCAL PLAN AREA (SELPA) EXTENDED SCHOOL YEAR CONSIDERATION CHECKLIST

This checklist is designed to assist IEP teams in determining whether a student is eligible for extended school year (“ESY”) services. Please note that all if not most students lose some knowledge or skills during a school break, but most students, including students with disabilities, are able to recoup these skills within a reasonable time frame upon his/her return to school. The student is entitled to an ESY program if the IEP team determines:

1) The student has a disability that is likely to continue indefinitely or for a prolonged period;
2) Interruption of the student’s educational programming may cause serious regression when coupled with limited recoupment capacity; and
3) It is impossible or unlikely the student will attain the level of self-sufficiency and independence that would otherwise be expected in view of his/her disability.

When completing this checklist, please review and consider information from the following:

1) IEP team members (e.g. parents, teachers, service providers and assessors) and private providers and assessors (e.g. non-public and private providers);
2) Existing data such as how the student regressed and recouped skills from previous breaks, previous IEPs, progress towards goals and objectives, observations, assessment reports, test results, progress reports, report cards, work samples, behavior logs, expert opinions, medical and other agency or private reports and information; and
3) Predictive data in terms of whether the student is likely to regress and how long it may take him/her to recoup lost knowledge and/or skills.

It is also important to consider all educational skills (e.g. academic, vocational, social, emotional and/or behavioral), medical and other information such as the level and type of family or private support a student receives during a break.
Extended School Year Consideration Checklist

Student Name: ____________________________  D.O.B.: __________________
District: ____________________________  Date of Meeting: ____________

1. Describe student’s disability, including severity: ____________________________

2. Describe the degree of actual or likely regression following a school break: __________

3. Describe the amount of time it takes or may take the student to regain the prior level of knowledge skills, benefits or functioning following a school break: __________

4. Identify other issues including physical, medical, emotional, social, behavioral, mental health, family, academic and/or vocational, which may affect student’s ability to recoup skills after a break: ____________________________

Based on the IEP team discussion, the team believes that one of the following is true:

☐ The student has, in the past, experienced a serious loss of knowledge or skills over a school break that he/she was unable to recoup in a reasonable amount of time, and is therefore eligible for ESY.

☐ The student may experience a serious loss of knowledge or skills over a school break that he/she will be unable to recoup in a reasonable amount of time, and is therefore eligible for ESY.

☐ The student is not likely to experience a serious loss of knowledge or skills over a school break that he/she will not recoup in a reasonable amount of time upon return to school, and is therefore not eligible for ESY.

Describe ESY services on IEP. Attach this form.
§ 3043. Extended School Year.

Extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. The lack of clear evidence of such factors may not be used to deny an individual an extended school year program if the individualized education program team determines the need for such a program and includes extended school year in the individualized education program pursuant to subsection (f).

(a) Extended year special education and related services shall be provided by a school district, special education local plan area, or county office offering programs during the regular academic year.

(b) Individuals with exceptional needs who may require an extended school year are those who:

(1) Are placed in special classes or centers; or

(2) Are individuals with exceptional needs whose individualized education programs specify an extended year program as determined by the Individualized Education Program Team.

(c) The term “extended year” as used in this section means the period of time between the close of one academic year and the beginning of the succeeding academic year. The term “academic year” as used in this section means that portion of the school year during which the regular day school is maintained, which period must include not less than the number of days required to entitle the district, special education services region, or county office to apportionments of state funds.

(d) An extended year program shall be provided for a minimum of 20 instructional days, including holidays. For reimbursement purposes:

(1) A maximum of 55 instructional days excluding holidays shall be allowed for individuals in special classes or centers for the severely handicapped; and

(2) A maximum of 30 instructional days excluding holidays shall be allowed for all other eligible pupils needing extended year.
(e) A local governing board may increase the number of instructional days during the extended year period, but shall not claim revenue for average daily attendance generated beyond the maximum instructional days allowed in subsection (d) (1) and (2).

(f) An extended year program, when needed, as determined by the Individualized Education Program team, shall be included in the pupil’s individualized education program.

(g) In order to qualify for average daily attendance revenue for extended year pupils, all of the following conditions must be met:

1. Extended year special education shall be the same length of time as the school days for pupils of the same age level attending summer school in the district in which the extended year program is provided, but not less than the minimum school day for that age unless otherwise specified in the individualized education program to meet a pupil’s unique needs.

2. The special education and related services offered during the extended year period are comparable in standards, scope and quality to the special education program offered during the regular academic year.

(h) If during the regular academic year an individual’s individualized education program specifies integration in the regular classroom, a public education agency is not required to meet that component of the individualized education program if no regular summer school programs are being offered by that agency.

(i) This section shall not apply to schools which are operating a continuous school program pursuant to Chapter 5 (commencing with Section 37600) of Par 22, Division 3, Title 2, of the Education Code.

Note: Authority cited: Section 56100(a) and (j), Education Code. Reference: Sections 37600, 41976.5 and 56345, Education Code; and 34 C.F.R. 300.346.
14.4 EXTENDED SCHOOL YEAR PROGRAMMING GUIDELINES

Pursuant to Section 300.309 of Title 34 of the Code of Federal Regulations, extended school year services (ESY) shall be included in the IEP and provided to the pupil if the IEP team determines, on an individual basis, the services are necessary for the provision of a free appropriate public education (FAPE).

The need for Extended School Year (“ESY”) programming must be considered and documented annually on the IEP for every student receiving special education services. The need for ESY programming may be addressed at any IEP meeting. The IEP meeting addressing ESY should take place a reasonable time prior to the commencement of the extended break.

**Determination of ESY Eligibility and Programming** - ESY programming must be provided to eligible students at no additional cost to parents. The IEP team shall determine the need for ESY eligibility and programming considering the following factors:

**Nature and severity of the disability** The more severe the disability, the higher the probability that the student will need ESY services.

**Current IEP goals and objectives** If progress on meeting these goals has been very slow; the student may need ESY services to continue to make progress in support of FAPE.

**Emerging skills and breakthrough opportunities** If a student is just beginning to communicate or accomplish self-care skills a temporary break may cause a setback.

**Interfering behaviors** Behavior may have an impact of student’s ability to make educational progress.

**To prevent serious regression during an extended break** The Worksheet for Determining Extended School Year Programming may be used along with the regression/recoupment data collection sheet. If the student has continued to progress educationally from year to year despite the lack of ESY programming, ESY may not be necessary to ensure FAPE. Additionally however, there does not need to be a pattern of regression previously but team needs to consider whether there is a likelihood of regression based on knowledge of student.

**Rare and unusual circumstances** ESY services are more likely to be necessary for students who have been absent for extended periods of time or for students moving from restrictive placements to inclusive programs. If ESY programming is recommended, then the IEP team shall:

a) identify the specific goals that are to be addressed, and
b) include the specific nature of the program and services on the IEP, including the, frequency, duration and location.

**Definition: Regression/Recoupment** - All students experience some regression and loss over an extended break. In most instances these skills are re-mastered (recouped) within a reasonably short period of time. However, some special needs students have disabilities which are likely to continue indefinitely or for a prolonged period, and interruption of the student’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering
it impossible or unlikely that the pupil will attain the level of self sufficiency and independence that would otherwise be expected in view of his or her disabling condition. However, the lack of clear evidence of such factors may not be used to deny a student an ESY program if the team determines the need for ESY programming. Thus, when a student experiences more than minimal regression and he/she is not able to recoup skills within a short period of time the provision of a free appropriate public education means that instruction and/or related services must also be provided during an extended break.

**Definition: Extended Break** - Extended break means a period of time when school is not in session such as summer break, school holidays and when school is off-track or on intersession.

**Definition: Extended School Year Programming** - ESY services are special education and related services that are tailored to each student to help him or her meet specific goals in his/her IEP to support the delivery of FAPE for the individual student as appropriate.