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# Extended School Year Services (ESYS): General Guidance

If a child who is eligible under the Individuals with Disabilities Education Act (“IDEA”) needs extended school year services (“ESYS”) as part of the child’s individualized education program (“IEP”) to receive a free appropriate public education (“FAPE”), the child’s school district, area education agency, or both, must provide those services. See, e.g., *Yaris v. Special Sch. Dist.*, 728 F.2d 1055 (8th Cir. 1984). This document sets out the legal basis for the ESYS requirement, as well as guidance for IEP Teams to consider in implementing that requirement.

## I. Legal Framework and Important Considerations

The IDEA regulations provide the following requirements concerning ESYS.

### § 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.

34 C.F.R. § 300.106. Iowa’s special education regulations contain a parallel requirement. Iowa Admin. Code r. 281–41.106. This regulation contains important requirements that school districts and AEAs must meet.

First, ESYS is required if it is necessary to provide a FAPE. In other words, if ESYS is needed in order for the child’s IEP to be “reasonably calculated to enable a child to make progress appropriate

in light of the child's circumstances,” *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017), then ESYS is required. If a FAPE is provided to a child without ESYS, the child does not require ESYS. LEAs and AEAs are not required to provide a benefit greater than the *Andrew F.* standard.

Second, ESYS decisions are to be individualized. Schools and AEAs shall not make them based on disability category. For example, both of the following statements are impermissible: “All children with autism do not require ESYS” and “Only children with autism require ESYS.” Similarly, schools and AEAs shall not limit ESYS consideration to children with disabilities of certain severity.

For example, the following statements are contrary to the law:

- “Only children with ‘Level III weighting’ receive ESYS.”
- “All children with ‘Level III weighting’ receive ESYS.”
- “Only children in the ‘Life Skills room’ receive ESYS.”
- “All children in the ‘Life Skills room’ receive ESYS.”
- “Only children ‘on the alternate assessment’ receive ESYS.”
- “All children ‘on the alternate assessment’ receive ESYS.”

Furthermore, schools and AEAs shall not unilaterally limit ESYS to certain services (“We only do ESYS for literacy skills.”); to certain amounts (“We only do ESYS for one hour each day.”); to certain durations (“We only do ESYS in June.”); or to certain types of services (“ESYS for children with literacy needs will be a computer-based tutorial.”). Additionally, required ESYS must be provided without regard to its cost. If ESYS is required to provide a FAPE, as in any other IEP-required service, a school or AEA shall not refuse it because it is “too costly.”

Third, because ESYS are a component of a FAPE, they must be provided by appropriately licensed personnel, based on the nature of the ESYS provided. *Letter to Copenhaver*, 50 IDELR 16 (OSEP 2007). For example, if a child’s ESYS calls for occupational therapy services from the AEA, those services must be provided or appropriately supervised by an appropriately licensed occupational therapist.

Fourth, because ESYS is “in accordance with the child’s IEP” and determined by the child’s IEP Team, see 34 C.F.R. § 300.106, the IDEA’s requirements for the development, implementation, and revision of IEPs apply to ESYS. ESYS is a part of the IEP process and the provision of FAPE, not an add-on or something to be considered after the IEP is written. If, during the year, the school or AEA determines that the ESYS decision should be reconsidered, The IEP team must be convened. If the IEP team determines ESYS must be provided, the IEP amendment process must be followed. All IEP Teams are required to consider whether ESYS is necessary; however, not all children with disabilities are eligible for ESYS. *Letter to Given*, 39 IDELR 129 (OSEP 2003). If an IEP Team makes a decision about ESYS (either to propose ESYS or to refuse ESYS), the IEP Team provides a prior written notice to the parents explaining the IEP Team’s decision. 34 C.F.R. § 300.503 (describing requirements for prior written notices). The parent then has procedural safeguards if the parent disagrees with the ESYS decision. *Id.* § 300.504.

Fifth, because ESYS is part of the IEP process, IEP Teams must consider ESYS for children who have “support services only” IEPs, see Iowa Admin. Code r. 281–41.326(2). For example, an IEP team may decide that speech services must be continued through breaks in the school year to secure a FAPE. IEP teams must also consider the need for ESYS for children who are transitioning from Early ACCESS to early childhood special education, see 34 C.F.R. § 300.124. While some children and families may require more informal school orientation activities in the transitions, others may require that certain instructional or support services be continued during the transition period. IEP

teams must also consider ESYS for children with disabilities who transfer from different districts or different states, *see id.* § 300.323(e)-(f); *Letter to State Directors of Special Education*, 61 IDELR 202 (OSEP 2013). Rather than “inheriting” ESYS from a sending district, a receiving district must, while temporarily providing required services, have its own discussion of the need for ESYS.

Sixth, because children with disabilities who are enrolled in accredited nonpublic schools are entitled to public special education services “in the same manner and to the same extent” as children with disabilities who are enrolled in a public school under Iowa law, Iowa Code § 256.12(2), IEP Teams must consider ESYS for children with disabilities who are enrolled in accredited nonpublic schools.

Seventh, although there is nothing requiring that ESYS decisions be made at a certain time of the year, IEP Teams must make ESYS decisions sufficiently in advance of the end of the school year to allow the district or AEA to make ESYS arrangements and for parents to use their procedural safeguards if they disagree. *Reinholdson v. Independent Sch. Dist.*, 44 IDELR 42 (D. Minn. 2005), *aff'd* 187 Fed. App'x 672 (8th Cir. 2006). Because the IEP process is ongoing, public agencies cannot deny ESYS because a parent’s request is “too late.” Regardless of when a parent makes an ESYS request, the IEP Team must determine need and provide needed services as soon as practicable in light of the specific child’s circumstances.

Eighth, because the ESYS determination is part of the IEP process, and the IEP must be reviewed at least annually, IEP Teams must also make the ESYS determination annually under the provisions of these rules. 34 C.F.R. § 300.106. For example, just because a child’s IEP Team determined the child requires ESYS after first grade does not mean the child automatically and permanently requires ESYS after grades two and beyond.

Ninth, although the federal regulation refers to an extended school year, an IEP Team may decide that a particular child needs an extended school day, extended school week, *see, e.g.*, Iowa Admin. Code r. 281–41.11, or other alteration of the school calendar (*e.g.*, continuous services through school breaks) to receive a FAPE.

Tenth, because ESYS is part of a child’s FAPE, it is not provided for non-education needs (child care, respite care, still on a waiting list for adult services) or for non-FAPE related educational needs, such as services that would benefit all children or services that would provide benefit greater than that required by *Andrew F.* (summer school, enrichment). *Virginia Dep’t of Educ., Extended School Year Services*, at 5 (2007) (hereinafter *Virginia Guidance Document*).

## II. ESYS Decision-Making Standards

### A. Data to Be Considered.

The starting point for all decision-making is the IEP Team, which determines, based on need, that the child needs ESYS to receive a FAPE. *In re R.W.*, 13 D.o.E. App. Dec. 218, 24 IDELR 516 (1996). That need must be determined based on the information as a whole, and without reliance on a single data point. *See id.* The IEP Team may not restrict consideration to certain types of information. *See, e.g., Letter to Anonymous*, 22 IDELR 980 (OSEP 1995). The following is a useful summary of data to be considered:

[The ESYS] decision should be based upon an examination that [may include], but is not limited to, the following:

- review of the current IEP goals (or objectives or benchmarks, if required);
- observation and data from teachers, [related service providers], parents, and others having direct contact with the student before and during breaks in educational programming;

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- data and observations regarding the student's performance after long weekends, vacations, and past summer breaks;
- assessment or information maintained on the student, including pretest and post-test data; and
- curriculum-based assessment, including pretest and post-test data; and other relevant factors.

*Virginia Guidance Document*, at 16-17 (bracketed words added).

## **B. Need for ESYS: Recoupment-and-Regression.**

As a result of the traditional school calendar, nearly all children lose some skill during the summer break and require some reteaching when school resumes. This, standing alone, is not enough to demonstrate a need for ESYS. To have a need for ESYS based on recoupment-and regression, the following is the standard for IEP Teams to consider: "Has there been (or is there a potential for) *significant* regression during periods of interruption that would require *significant* recoupment?" *2001 Standards*, at 19 (emphasis added). As a general rule, this is beyond the amount of regression and recoupment that would be expected of similar age-or-grade peers when breaks in school programming occur.

Whether a child with a disability would have significant regression and require significant recoupment is based on all data available and in light of the child's unique circumstances. The *2001 Standards* offers this explanation.

Some children's needs may be so great that they cannot suffer even the modest regression and recoupment times that would otherwise be acceptable. The matter must be judged on a case-by-case basis. For example, the severity of a child's intellectual or physical impairments may minimize the child's incremental developmental gains to such a degree that services must be virtually continuous for the child to progress and benefit from the educational experience or to achieve the independence from caregivers he or she might otherwise be unable to achieve.

*Id.* at 20. This may include a determination that the time required to re-learn a skill would interfere or divert from needed instructional time in other areas required to receive a FAPE. Here are two additional examples:

- A child who has just begun to demonstrate mathematics progress after sustained and repeated specially designed instruction in mathematics might be a candidate for ESYS if the data show that the child would require substantial relearning or skill reacquisition in the fall before new skills are introduced.
- A child whose aggressive behaviors have recently begun to subside in lieu of prosocial replacement behaviors might be a candidate for ESYS if repeated practice in using the prosocial replacement behaviors is necessary for the child to receive a FAPE.

Here are some important questions for determining whether this recoupment-and-regression standard is met.

- Does the student need extensive review to demonstrate previously learned skills?
- What inconsistencies does the student demonstrate in mastered or partially acquired skills?
- Has the student reached a critical point of instruction or behavior management where a break in programming would have serious, detrimental effects?
- Does the student demonstrate behaviors or deficits that would cause [significant] regression if breaks in programming occur?
- Is there a [...] medical condition that might cause regression?

- Will a break in programming jeopardize the student's placement in the least restrictive environment (LRE)?

*Virginia Guidance Document*, at 16 (bracketed word added). Actual regression in the past is not necessary to establish ESYS eligibility based on a recoupment-and-regression standard. *Id.*; see also *2001 Iowa Standards*, at 20. “If no empirical data are available on regression, then the need may be shown by expert opinion or prospective criteria established by the IEP team.” *Virginia Guidance Document*, at 16. In other words, IEP Teams must consider “predictive data based on the opinion of professionals in consultation with the child’s parents as well as circumstantial considerations of the child’s individual situation at home and in his or her neighborhood and community.” *2001 Iowa Standards*, at 20.

If the child’s loss of skills or recoupment time is similar to peers with and without disabilities, the child is less likely to need ESYS based on the recoupment-and-regression standard.

### **C. Need for ESYS: Rare-and-Unusual Circumstances.**

Even if the child’s data would not suggest that recoupment-and-regression is an issue, the child may still require ESYS if the child’s data suggests a rare and unusual circumstance requires ESYS to receive a FAPE. “Rare and unusual,” in this context, refers to the following two circumstances.

First, the case is rare and unusual and [ESYS] may be awarded when the child is in a *critical stage* of development – when there is a *window of opportunity* that will be lost if services are not provided. For example, there are circumstances in which a child with [] autism may have a given window of opportunity for learning specific behaviors. The case for [ESYS] may be strong in this circumstance. Other examples include a student who requires immediate mastery of a skill (e.g., safety, swallowing) or requires continuous programming due to abrupt changes in physical, sensory, [or] mental capacity (e.g., visual training or using a wheelchair).

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Second, the case may be rare and unusual and [ESYS] may be awarded when continuous or year-round treatment is an integral part of the methodology deemed appropriate for the child. As an example, where the methodology chosen for the child was “designed to be administered year-round,” a federal court ruled that [ESYS] were mandated. Where the benefit derived from a program is related to its “intensity” or continuity over time, the selection of the appropriate program itself may determine whether uninterrupted services are necessary for the child to progress.

*2001 Iowa Standards*, at 22 (emphasis in original, omissions added and citations omitted).

In determining whether a child’s circumstances are “rare and unusual,” the IEP Team must review all relevant data and determine whether ESYS is necessary to provide a FAPE.

### **D. Need for ESYS: Other Considerations.**

Even if a child’s data do not suggest either a recoupment-and-regression issue or the presence of a rare and unusual circumstance, the child may still require ESYS if it is necessary to provide a FAPE. In making the individualized, fact-specific decision required in this circumstance, IEP Teams may need to consider the following non-exhaustive list of factors:

- The degree of impairment of the child;
- The degree of regression [sustained] by the child;
- The child’s recovery time from regression;

- The ability of the child’s parents to provide educational structure at home;
- The child’s behavioral and physical challenges;
- The availability of alternative resources;
- The ability of the child to interact with [children without disabilities];
- The areas of the child’s [involvement in the] curriculum that need continuous attention; and
- The child’s vocational needs.

*2001 Iowa Standards*, at 23 (paraphrasing and summarizing *Johnson v. Independent Sch. Dist.*, 921 F.2d 1022 (10th Cir. 1990)) (alterations added). This “other considerations” way of showing ESYS need is, in effect, a “safety valve” for those students who need ESYS to receive a FAPE but who do not meet either of the more common standards.

## E. Determining Goal Area of Concern.

An additional step in the analysis is to identify a goal area of concern. *2001 Standards*, at 18. This is a narrower question focused on the need for ESYS. If it were not, every child with a disability would need ESYS because every child with a disability has at least one IEP goal. *Cf. Great River Area Educ. Agency*, 20 IDELR 1014 (SEA Iowa 1993). The child’s data, when considered as a whole, must demonstrate that the child will not receive a FAPE if the school or AEA did not provide ESYS related to that goal. *See, e.g., id.* Failure to meet an IEP goal during the school year is not enough to establish ESYS eligibility. *Letter to Kleczka*, 30 IDELR 270 (OSEP 1998); *Virginia Guidance Document*, at 17. Failure to make progress toward an IEP goal, standing alone, is not enough to establish ESYS eligibility. *Letter to Given*, 39 IDELR 129. The fact that the student would benefit from additional services is, standing alone, an insufficient basis to establish ESYS eligibility. *Reinholdson*, 44 IDELR 42. Maximization of the child’s achievement in the goal area is not the purpose or criterion for ESYS. *See, e.g., R.W.*, 13 D.o.E. App. Dec. 218; *Great River Area Educ. Agency*, 20 IDELR 1014.

If the child does not have a goal in a potential area of concern in the current IEP, the IEP Team may consider the need for ESYS for new areas of concern not currently captured on the existing IEP. “The very nature of the IEP document requires it to be dynamic and rewritten to reflect new needs that in turn will require a consideration of” ESYS. *Iowa Dep’t of Educ., Iowa Standards for Students with Disabilities: Extended School Year (ESY) Services*, at 18 (2001) (hereinafter *2001 Standards*).<sup>1</sup>

The goal area of concern may, in appropriate circumstances and based on age-appropriate transition assessments, be measurable postsecondary goals (referred to as “Postsecondary Expectations” in Iowa). 34 C.F.R. § 300.320(b). ESYS may, if required to provide a FAPE, be transition services “needed to assist the child in reaching those goals.” *Id.* § 300.320(b)(2); *see also id.* § 300.43 (defining “transition services”).

When considered as a whole, a goal meets this standard if there is “significant concerns regarding skill acquisition or maintenance of skills during a break in services. These goal areas should represent *skills essential to the progress* of the student.” *2001 Iowa Standards*, at 18. The two most common ways to demonstrate this standard is by using a “recoupment and regression” analysis or by consideration of rare and unusual circumstances.

<sup>1</sup> This document replaces the *2001 Standards*; however, the *2001 Standards* contain useful language, which is quoted.

## F. Determining Services Required to Meet the ESYS Need.

Once a child has been determined to need ESYS, the district or AEA is required to provide such services as are necessary to meet that need. Those services are not necessarily the same services or in the same location provided during the school year. *Virginia Guidance Document*, at 5. The services provided will depend on the unique ESYS needs of the individual. *Id.* at 18 (“In determining the ESY services, the IEP team can consider flexibility in the delivery of services if the flexibility fulfills the needs of the student.”). For some students, it may be a continuation of the school year’s IEP services or a full-time program. For other students, it may be a relatively simple, but still meaningful, plan based on the child’s needs. The Department provided the following examples in a 1996 guidance memo:

Perhaps a computer program or student training in skills maintenance techniques will meet the need; perhaps accessing an existing community resource such as a summer recreation program will meet the need. If so, the provision of those services will satisfy [ESYS requirements].

*2001 Iowa Standards*, at 12. The following is a useful and non-exhaustive list of possible ESYS and ESYS delivery options:

- the teacher and parent working together (materials could be sent home with progress periodically monitored by the teacher);
- learning packages with staff monitoring;
- home-based [settings];
- grouping students with similar goals;
- school-based [settings];
- cooperative programs with other agencies;
- multi-system shared [settings];
- contractual arrangements with service providers or agencies;
- community-based [settings]; and
- vocational settings.

*Virginia Guidance Document*, at 5 (bracketed words added).

The federal regulations define ESYS as “special education and related services....” 34 C.F.R. § 300.106(b). ESYS may be specially designed instruction or support services, but it may also be a related service. While a related service must somehow “assist the child to benefit from” specially designed instruction or a support service, *id.* § 300.34(a), there is no requirement that the related service be provided simultaneously to the specially designed instruction or support service if the IEP Team determines that the related service is required to “assist the child to benefit from” special education or support services in the prior year or in the coming year. Consider the following two examples.

- An IEP Team may determine that a child, to benefit from the past year’s specially designed instruction in behavior, may require the related service of “parent counseling and training,” see *id.* § 300.34(c)(8), as ESYS.
- An IEP Team may determine that a child requires the related services of “rehabilitation counseling services,” see *id.* § 300.34(c)(12), if necessary to benefit from planned specially designed instruction on employability skills to be provided in the coming school year. An IEP Team is not required to provide rehabilitation counseling services as a related service if it was merely helpful, as opposed to necessary for the child to benefit from specially designed instruction or a support service.

Furthermore, because ESYS is a component of a child's IEP, public agencies must monitor progress during ESYS. IEP Teams have considerable flexibility in determining how to monitor and report progress in ESYS to parents and students. In some cases, ESYS is, in essence, an extension of progress monitoring during the school year. For a child who recently demonstrated increased competence in a skill or behavior during the school year, ESYS may be a necessary way to monitor the effectiveness of that instruction.

Finally, because ESYS is part of a child's IEP, ESYS must be provided in the least restrictive environment ("LRE"). 34 C.F.R. § 300.114. ESYS services must be provided "to the maximum extent appropriate" with children without disabilities. *Id.* This would include required provision of supplementary aids and services. *Id.* § 300.42. When an IEP Team is making a decision about how to provide ESYS, it must give careful attention to the IDEA's LRE requirement, with due understanding that ESYS need not look like the standard school year. In considering the LRE for a child receiving ESYS, a district or AEA is not "required to create new programs" but is required to provide ESYS in settings with children without disabilities to the "maximum extent appropriate." *2001 Iowa Standards*, at 25 (citation omitted). This may require providing ESYS in differing settings, such as community-based settings (summer reading programs at the local library, summer recreational programs).

### III. For Further Information

In addition to the references cited in this document, feel free to consult the following:

1. Iowa IDEA Information, Extended School Year Services, *available at* <https://iowaideainformation.org/special-education/individualized-education-programs/components-of-an-iep/>
2. Susan Etscheidt, *Extended School Year Services: A Review of Eligibility Criteria and Program Appropriateness*, 27 J. Ass'n Persons with Severe Handicaps 188 (2002).
3. Allan G. Osborne, *Does the IDEA'S Least Restrictive Environment Provision Apply to Extended School Year Programs?*, 327 Educ. L. Rep. 561 (West 2016).
4. Allan G. Osborne, *When Must a School District Provide an Extended School Year Program to Students with Disabilities?*, 99 Educ. L. Rep. 1 (West 1995).