

Information UPDATE

Wisconsin Department of Public Instruction/Tony Evers, State Superintendent/P.O. Box 7841/ Madison, WI 53707-7841

BULLETIN NO. 10.02

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TO: District Administrators, CESA Administrators, CCDEB Administrators,
Directors of Special Education and Pupil Services, and Other Interested Parties

FROM: Carolyn Stanford Taylor, Assistant State Superintendent
Division for Learning Support: Equity and Advocacy

SUBJECT: Extended School Year (ESY) Services for Children with Disabilities

Over the years, there have been a number of issues and questions raised concerning school districts' responsibilities to provide special education during the summer and at other times not within the school term. The U.S. Department of Education has stated districts cannot exclude children from consideration for ESY services based solely on category of disability. Information included in this bulletin is based upon U.S. Department of Education policy letters, court decisions, and state and federal statutes and regulations. This bulletin is intended to assist school districts, parents, and other interested parties in understanding ESY services. It replaces bulletin #96.01, *Extended School Year Services for Children with Exceptional Educational Needs*.

The bulletin distinguishes between required ESY services and permissive summer school. The bulletin also defines the requirements for permissive summer school programs. School districts have flexibility in providing permissive summer school programs for children with disabilities. For example, a school district is not required to develop and implement an individualized education program (IEP) for permissive summer school. The district is not required to provide related services, such as transportation, for permissive summer school. In general, district policies governing summer school also govern permissive summer school offerings for children with disabilities.

ESY services are required special education and related services provided beyond the limits of the school term, in accordance with the child's IEP, and at no cost to the parents. These services are necessary in order to provide a free appropriate public education (FAPE). There are no state regulations addressing when a child needs ESY services, but there are federal regulations that specifically address ESY services. The federal regulations state ESY services must be provided when a child's IEP team determines that the services are necessary for the provision of FAPE. The regulations state a school district cannot limit ESY services to particular categories of disability or unilaterally limit the type, amount, or duration of the services.

Additionally, there have been several court cases which have provided guidance in this area. In these cases, the key issues are generally skill regression during a break in services and limited skill recovery after services resume. Therefore, it is reasonable for ESY services to concentrate on skill regression and recovery problems. As a result, ESY services may differ from the services during the regular school term.

Questions and answers provided in this bulletin are as follows:

1. What are ESY services?
2. What is the school term?
3. When is a school district required to provide ESY services to a child with a disability?
4. Who decides whether a child requires ESY services in order to receive FAPE?
5. What substantive standard should the IEP meeting participants apply to determine whether a child requires ESY services in order to receive FAPE?
6. When there is no documentation of past regression-recoupment problems, may a child be eligible for ESY services?
7. Does the fact ESY services were provided to a child in a prior year mean ESY services are needed in the current year?
8. May ESY services be limited to children with certain disabilities or limited to children who require a minimum number of hours of ESY services?
9. When a school district receives a transfer pupil, what is the obligation of the receiving school district to provide the ESY services described in the child's IEP?
10. What ESY services should be included in a child's IEP?
11. Must the IEP meeting participants consider the provision of related services as ESY services?
12. Is it necessary to make a separate showing of regression and poor recoupment of skills for ESY related services?
13. May a district provide related services as the sole component of an ESY program?
14. If a parent disagrees with the school district's decisions regarding the provision of ESY services, what recourse does the parent have?
15. What is summer school?
16. Does participation by a child with a disability in a permissive summer school class require an IEP?
17. May the child's ESY services be provided in the district's summer school program?
18. Are the costs incurred in providing ESY and summer school eligible for state categorical aid?

1. **What are ESY services?**

School districts must provide each resident child with a disability a free appropriate public education (FAPE). In order to provide a FAPE, districts must ensure all children with disabilities receive special education and related services consistent with the provisions of their IEPs. **Special education and related services provided pursuant to an IEP beyond the limits of the school term are ESY services.**

2. **What is the school term?**

Wis. Stats., Section 115.001(12), defines "school term" as the time commencing with the first school day and ending with the last school day that the schools of the district are in operation for attendance of pupils in a school year, other than for the operation of summer classes.

3. **When is a school district required to provide ESY services to a child with a disability?**

A school district is required to provide ESY services to a child **when the child requires such services to receive FAPE**. If the child requires ESY services to receive FAPE, the school district must develop an IEP for the child that includes ESY services. These requirements apply to all children with disabilities between the ages of three and 21 who have not graduated from high school.

4. **Who decides whether a child requires ESY services in order to receive FAPE?**

The participants in a meeting to develop the child's IEP must consider, as appropriate, whether a child needs ESY services in order to receive FAPE. The district is not required to consider ESY services for each child at an IEP meeting. If ESY services are an issue, raised by a parent or another IEP meeting participant, the IEP meeting participants must determine whether the child requires ESY services in order to receive FAPE.

5. **What substantive standard should the IEP meeting participants apply to determine whether a child requires ESY services in order to receive FAPE?**

Federal special education regulations and court cases establish a standard for determining whether a child is eligible for ESY services. Federal special education regulations require schools to provide ESY services, as necessary, to provide a child with FAPE. 34 C.F.R. §300.106(a). ESY services must be provided only if a child's IEP team determines, on an individual basis, the services are necessary for providing FAPE to the child. Furthermore, the regulations specifically prohibit limiting ESY services to particular categories of disability, or unilaterally limiting the type, amount, or duration of those services. 34 C.F.R. §300.106(a)(3).

In most cases, courts consider regression during an interruption in services and recoupment of skills after services resume in determining eligibility for ESY services. The Seventh Circuit Court of Appeals, which includes Wisconsin, has held that states should engage in a multi-factored determination of eligibility for ESY services, including “the likelihood of regression, slow recoupment, and predictive data based upon the opinion of professionals.” *Todd v. Duneland Sch. Corp.*, 229 F.3d 899, 907 (7th Cir. 2002). Several other Courts of Appeals have articulated a similar standard for determining whether a child requires ESY services. Specifically, in *Alamo Heights Independent School District v. Texas Board of Education*, the Fifth Circuit Court of Appeals explained:

[I]f a child will experience severe or substantial regression during the summer months in the absence of summer programming, the handicapped child may be entitled to year-round services. The issue 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. 790 F.2d 1153, 1158 (5th Cir. 1986).¹

Consistent with the Seventh Circuit, the Tenth Circuit explained in *Johnson v. Independent School District Number 4*, 921 F.2d 1022 (10th Cir. 1990), that multiple factors are relevant in considering a child's need for ESY services. The court listed possible factors to consider, including but not limited to:

. . . 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

¹ A similar standard has been adopted by other courts considering the issue, including the Fourth Circuit in *M.M. v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002), the Sixth Circuit in *Board of Education of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007) (quoting *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990)), the Ninth Circuit in *N.B. v. Hellgate Elementary School District, ex rel. Board of Directors*, 541 F.3d 1202, and the Tenth Circuit in *McQueen ex rel. McQueen v. Colorado Springs School District No. 11*, 488 F.3d 868 (10th Cir. 2007).

children, the areas of the child's curriculum which needs continuous attention, the child's vocational needs, and whether the requested service 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.

Accordingly, the department recommends that districts consider **all appropriate factors** in determining whether the benefits accrued to a child during the regular school year will be significantly jeopardized if the child is not provided ESY services.

6. When there is no documentation of past regression-recoupment problems, may a child be eligible for ESY services?

Yes. A child may still be eligible for ESY services even though there is no documentation of past regression-recoupment problems. In analyzing a child's potential regression-recoupment problems, the district needs to consider predictive information as well as any information obtained from prior experience with recoupment and regression, along with other appropriate factors. See question #5.

7. Does the fact ESY services were provided to a child in a prior year mean ESY services are needed in the current year?

No. The provision of ESY services in a prior year does not mean ESY services are needed in the current year. Similarly, the fact no ESY services were provided in a prior year does not mean ESY services are not needed in the current year.

8. May ESY services be limited to children with certain disabilities or limited to children who require a minimum number of hours of ESY services?

No. Any child who requires ESY services in order to receive FAPE must be provided with needed ESY services. A district may not have a policy that prohibits or inhibits full consideration of the educational needs of each child. Consideration for ESY services may not be limited to children with certain disabilities or to children labeled as "severely" or "profoundly" disabled. Eligibility for ESY services may not be limited to children who require a certain minimum number of hours or type of ESY services.

9. When a school district receives a transfer pupil, what is the obligation of the receiving school district to provide the ESY services described in the child's IEP?

When a school district receives a transfer student with a disability, the receiving district must provide services comparable to those described in the child's IEP until the new district either adopts the child's IEP from the previous agency or conducts an evaluation, if determined to be necessary, and develops and implements a new IEP. This requirement includes implementing IEP provisions relating to ESY services.

10. What ESY services should be included in a child's IEP?

ESY services are intended to minimize the effects of regression and recoupment problems. Therefore, it is reasonable for the ESY services to concentrate on areas of regression and limited recoupment. Because the emphasis in ESY programming is on preventing regression and recoupment problems, the ESY services may differ markedly from the services provided to a child during the school term. The ESY services may or may not be school-based. The specific ESY services provided, including the amount and the duration of the services, must be determined by the IEP meeting participants and be based upon the

child's individual needs. Any changes to the amount or duration of the ESY services must be made either through an IEP team meeting or if, after the annual IEP team meeting, the parent and district agree not to convene an IEP team meeting and instead develop a written document to amend or modify the child's current IEP.

11. Must the IEP meeting participants consider the provision of related services as ESY services?

Yes. The IEP meeting participants must consider whether the child requires related services, including transportation, in order to benefit from special education.

12. Is it necessary to make a separate showing of regression and poor recoupment of skills for ESY related services?

No separate showing of a regression-recoupment problem is required. What is required is a showing that related services are needed to assist the child to benefit from special education.

13. May a district provide related services as the sole component of an ESY program?

Yes. While a child may not need ESY special education, a child may need ESY related services **in order to benefit from special education when school resumes during the school term**. In this instance, the related services may be the sole component of the ESY program. The decision whether the child should be provided related services as the sole component of an ESY program is the responsibility of the IEP meeting participants. Those participants should consider whether, without such ESY related services, there would be regression-recoupment problems in the child's special education program when school resumes.

14. If a parent disagrees with the school district's decisions regarding the provision of ESY services, what recourse does the parent have?

The department recommends the parties attempt to resolve any disagreements locally through informal means. If a parent disagrees with the school district's decisions regarding the provision of ESY services, the parent may request an IEP meeting to reconsider the decisions or the parent may request the district enter into mediation to resolve the dispute. In addition to informal resolution processes, a parent has the right to request a due process hearing under Wis. Stats., s. 115.80, to challenge the district's decisions regarding ESY services.

15. What is summer school?

Wis. Stats., Section 118.04, provides that a school board may elect to operate summer classes or to permit pupils to attend summer classes operated by another district on a tuition basis if the school district of operation will accept them. Also, the statute provides that the compulsory attendance requirement does not apply to summer classes. A school district is not required to provide a summer school program. Summer school is a permissive program typically operated on a set schedule for a number of weeks during the summer.

16. Does participation by a child with a disability in a permissive summer school class require an IEP?

No. A child's IEP includes only those services required for the child to receive FAPE. If a child needs ESY in order to receive FAPE, such services must be articulated in the child's IEP. **If a child does not require ESY services in order to receive FAPE, the IEP should not include the child's participation in permissive summer school classes.** Making summer school classes available to children with disabilities does not relieve a school district of its obligation to consider, as appropriate, and, if necessary, to provide ESY services. Also see question #18.

17. May the child's ESY services be provided in the district's summer school program?

ESY special education and related services may be provided in the district's summer school by staff who teach summer school classes. The staff must be appropriately licensed, and the services must be provided consistent with the child's IEP. State categorical aid is available only for the time eligible staff devote to implementing the child's IEP. **The ESY services must be tailored to the unique needs of the child and cannot be based solely on the availability of services during the summer.** The amount and the duration of ESY services cannot be limited arbitrarily to the district's summer school schedule.

18. Are the costs incurred in providing ESY and summer school eligible for state categorical aid?

State categorical aid is granted to assist school districts to partially offset the cost of providing special education and related services. Special education and related services are designed to meet the unique needs of a child with a disability and are provided pursuant to an IEP. If a school district determines a child with a disability requires particular special education and related services, the district is **required** to provide those services pursuant to an IEP. A district may determine a child with a disability requires ESY special education and related services in order to receive FAPE. Consequently, the ESY special education and related services qualify for the payment of state categorical aid.

Summer school classes are not special education, because they are **not required**; they are not based upon the child's individual needs; and they do not require an IEP. In contrast to ESY services, summer school classes are not required in order for a child to receive FAPE. A school district may choose not to provide summer school. For these reasons, summer school classes do not qualify for state categorical aid.

Questions regarding this bulletin can be addressed to the Special Education Team, Division for Learning Support: Equity and Advocacy, 125 South Webster Street, P.O. Box 7841, Madison, WI 53707-7841, (608) 266-1781 or TDD (608) 267-2427.

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