

SCHOOL LAW ADVISORY

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Courts emphasize broad view of extended school year services

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The obligation of schools to provide extended school year services ("ESY") to students with disabilities got a slow start in court rulings, but has been reviewed much more carefully in recent years. These recent rulings have strongly emphasized that schools must comply with all the same procedural requirements that govern other decisions about the IEP, and that schools must avoid overly restrictive standards in determining whether a student qualifies for ESY services. Maine hearing officer rulings have reflected the difficulty in applying these standards.

Maryland Federal Court continues trend

The most recent federal court ruling on this issue has continued that trend. In *Reusch v. Fountain*, 872 F. Supp. 1421 (D. Md. 1994), the District Court issued a blistering decision finding that the local school unit had engaged in practices that routinely short circuited the rights of parents to a full consideration of ESY services by the IEP Team, and that the school had applied too narrow a standard in determining whether students qualify for ESY services.

- Procedural issues

The *Reusch* Court ruled against the school unit on a number of procedural grounds. Most importantly, the Court ruled that the local school unit delayed decisions on ESY services until too late in the school year - thereby making it particularly difficult for parents to access a due process hearing in time to obtain the services to which the student might be entitled. The Court did not set forth a firm time line for ESY determinations, but was concerned that most decisions were made after May 1, and that some were made as late as June 23. The Court refused to adopt the April 15 deadline proposed by the parents in the case, but went on to rule that

decisions must be made ... sufficiently early to preserve the ability of the child to pursue procedural rights of review. Disabled children can no longer have

their right to obtain appropriate ESY during the summer recess blocked by [school] delays in making decisions.

Given that due process hearings are to be completed within 45 days of the hearing request, it would appear that schools should do their best to reach ESY decisions by the first of June, when possible. A hearing officer decision by mid-July should leave sufficient time for an adequate program to be implemented.

The *Reusch* Court also found that the school unit had failed to give parents adequate notice of their right to have ESY services considered at IEP Team meetings. In particular, the parental notice for the annual IEP review meeting made no mention that one of the issues to be considered by the Team would be whether ESY services would be appropriate for the student. The Court also noted that the school failed to inform parents of the standard to be applied in determining whether ESY services were appropriate.¹

It is unclear how broadly this court ruling applies, since the Maryland law itself required that schools provide notice of ESY rights before each annual meeting - a requirement that is not now specifically included in the federal regulations. Nevertheless, schools that are cautious on such matters should consider including consideration of ESY services in the statement of purpose in the notice for the annual IEP meeting (or for a spring IEP Team meeting).

- The substantive standard for ESY services

The *Reusch* Court followed a series of Court of Appeals decisions recommending a broad standard for determining if a student should be provided with ESY services.² Courts that have addressed this issue have agreed that the standard for ESY services will generally be met

when it is shown that the student will suffer some significant regression of skills or knowledge without a summer program, followed by an insufficient recoupment of the same during the next school year.³

Yet it is now also becoming clear in these same decisions that ESY services could also be considered as a related, or supportive, service under IDEA.⁴ With this in mind, ESY services may at times be necessary because the student is unable to obtain "some educational benefit" from his or her annual IEP if such services are not provided.

Of course, under this standard the IEP Team must recall that schools are not required to maximize a student's educational potential, and also that IEPs are not guarantees of success. The mere fact that a particular IEP failed to succeed in a given year should not require provision of ESY services. Yet there may be students, given the unique needs caused by their disability, who are simply unable to obtain "some educational benefit" during the year without the provision of ESY services.

When the school-year IEP is reasonably calculated to provide the student with some educational benefit, however, this standard would not seem to be available to the parent requesting ESY services. In that case, the only standard to support ESY services would appear to be the regression and recoupment standard that has most frequently been followed. The determination about regression and recoupment must draw upon a variety of factors, and cannot require that the student first demonstrate regression without adequate recoupment before such services are ordered - as with other determinations, the Team must make reasonable calculations about what is likely to occur.

Maine regulation 5.11 follows most of these principles. It includes five factors that should be reviewed in deciding whether the student is "at risk of losing skills previously mastered and unable to recoup those skills within a reasonable time." Those factors include the nature and severity of the student's disability, whether the student is addressing self sufficiency goals, the regression and recoupment considerations, and also whether the student would be unlikely to achieve his IEP goals as a result of the denial of ESY services.

In sum, the *Reusch* decision follows earlier rulings on the substantive standard for ESY services. It continues to recognize the regression/recoupment principle (broadly assessed) as central to an order for ESY services, but also reminds us that such services may at times be required as a related service when the student is otherwise unable to obtain some educational benefit from his or her IEP without the services.

Maine decisions reflect trends

Two decisions by Maine hearing officers reflect the difficulty for PETs in making determinations regarding the precise level of summer services needed by the students in question. Each case involved a child with autism in early elementary school.

In *Portland Public Schools*, 20 IDELR 596 (Lenna 10/15/93) the hearing officer upheld the appropriateness of an extended year program that was to last for six weeks, four days a week, 4 1/2 hours a day. She rejected the parent's request for a nine-week program for five days each week. In *Brunswick School Dep't*, No. 95.044 (Neale 6/30/95), the hearing officer rejected the school's proposal for a five-week program for three hours per day, three days per week. She instead ordered an eight-week program, for five days a week, three hours a day.

There is little guidance on how to draw the fine distinctions between five week, six week, and eight week programs under the ESY standard. What is clear, however, is that PETs must make individualized determinations about the student and avoid the appearance of placing the student in a predetermined program. ■

Endnotes

1 *Reusch*, 872 F. Supp. at 1433.

2 See *Johnson v. Independent School Dist.*, 921 F.2d 1022 (10th Cir. 1990); *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990); *Alamo Heights Independ. School Dist. v. Board of Educ.*, 790 F.2d 1153 (5th Cir. 1986).

3 *Reusch*, 872 F. Supp. at 1434.

4 *Reusch*, 872 F. Supp. at 1434; *Cordrey*, 917 F.2d at 1473.