



"Parents Are Vital in Education"

Parent Training and Information (PTI) Program

IS YOUR CHILD ENTITLED TO AN EXTENDED SCHOOL YEAR PROGRAM?

We have Parent Training and Information (PTI) Offices throughout the State.
Contact our main office toll-free at 1-800-572-7368 (v/tty), wapave9@washingtonpave.com or visit our website www.washingtonpave.org for the office closest to you.

A Program of Washington PAVE



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Additional resources used: "The Extended School Year Resource Guide, Part 1 and 2 and "Letter for Clarification from SPI"

IS YOUR CHILD ENTITLED TO AN EXTENDED SCHOOL YEAR PROGRAM, (ESY)?

1. Background

At the time the Education of All Handicapped Children Act was passed, public schools traditionally ran for 180 days per school year. Children who did not fit into a fairly regular curriculum were generally excluded from school.

With the passage of Public Law 94-142, schools had to become responsive to students with disabilities that did not fit the nine months per year, twelve-year curriculum. Congress recognized that some students learned slower and expanded the age range for services from 3 through 21. Some children require 24 hour per day placements at public expense. The same logic applied to the traditional summer break in programming. If a child needed programming throughout the year in order to receive the educational benefit to which he was entitled, then the public school had to provide it.

It certainly makes no sense for Congress to expand services over a 21 year range in order to give the students with disabilities a full chance while allowing the local schools to arbitrarily throw away one-fourth of every programming year in a summer break. Virtually every court to examine the issue of summer programming has struck down public school policies that deny summer services.

The key is that the Individuals with Disabilities Education Act, (IDEA) requires all decisions to be made on the basis of individual needs of a student. Any policy breaks the law if it attempts to be categorical e.g.

- No student gets summer programming;
- There are no related services during the summer;
- If you get summer school then you get the same thing they offer everyone else;
- Only the severely handicapped get summer services.

Local education agency responsibilities for providing special education and related services beyond the traditional 180-day school year are stated in the Washington Administrative Code Chapter 392-172-163. The current emphasis on Extended School Year (ESY) services in Washington State resulted from a complaint filed by a Seattle parent in January of 1981, alleging discrimination against certain students with disabilities because not all students in special education were screened to determine if they required extended school year services. The resolution of the complaint resulted in a Memorandum of Agreement between the Office for Civil Rights, The Superintendent of Public Instruction and the Seattle School District that became effective on June 13, 1984, and requires school districts to assess all students with disabilities to determine needs for extended school year programming. This requirement is intended to assure that all students with disabilities are provided access to a free and appropriate public education (FAPE) as guaranteed by the (IDEA) (P.L. 105-17), and in the amendments to Section 504 of the 1973 Vocational Rehabilitation Act.

ESY service eligibility is based on individual need as reflected in the goals and objectives of the student's individualized educational program (IEP). Though goals and objectives should not be construed as a promise or guarantee that students with disabilities will in fact achieve the growth projected in his/her IEP, such goals and objectives should be written in a manner "reasonably

calculated to enable the student to receive educational benefit" (Board of Education of the Hendrick Hudson Central School District v. Rowley, 454 U.S. 961, 102, 3.

Ct. 500, 70 L. Ed. and 376 (1982), EHLR 553:656 (1982). Eligibility considerations are provided at the conclusion of this section.

The student should be considered for ESY services when the multi-disciplinary team determines that benefit has not been conferred. The determination is made through:

- Professional Judgment
- Regression / Recoupment
- Health related factors
- Educational benefit analysis

2. Judicial Decisions

Although litigation to date has dealt primarily with severely handicapped students and the potential harm resulting from an extended summer break in schooling, the Supreme Court, in Rowley, stated that all students with disabilities have the right to receive educational benefit. Whenever there is a question regarding whether a particular student has received educational benefit, that student should be a priority for consideration as a candidate for ESY services.

Implications from the court cases, as well as others at the district court level, have been summarized by Reed Martin (1984):

1. No school district can state categorically that it will not consider yearlong services for a student with disabilities (Battle v. Kline).
2. No school district can refuse to consider ESY services for fiscal reasons (Crawford v. Pittman).
3. Any decision regarding the provision of ESY services must be a part of the IEP process (Lee v. Thompson).
4. The decision must be on an individual basis with the nature, duration, and frequency of services personalized to meet the unique needs of the child in question (Lee v. Thompson).
5. All types of children with disabilities must be eligible for consideration (Georgia Association for Retarded Citizen v. McDaniel).
6. Services offered must be sufficient so that the school can say that a benefit was conferred (Board of Education v. Rowly).

Though three Circuit Court decisions have mandated extended school year consideration and provision when a particular student is determined to be eligible, the emphasis in Washington State resulted from the previously mentioned Memorandum of Agreement between the Office for Civil Rights, the Superintendent of Public Instruction and the Seattle School District. This Agreement was

an impetus for clarification and modification regarding State ESY policy in the Washington Administrative Code Chapter 392-172.

3. How much service must be provided?

How much summer service must be provided, if a school cannot limit a program to 180 days per year, or limit eligibility by category, or limit it by whether state funds are available for individualized decision-making? The answer is found in the Supreme Court's discussion of the substantive requirements of Public Law 94-142 in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Court stated that to determine if education is appropriate, one must ask:

"Is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive education benefit?"

One inference that can be clearly made is that for a "benefit to have been conferred", there must be a net gain. Thus, if summertime regression "brings their overall progress for the year to a virtual standstill" then it could not be said that any benefit had been "conferred".

The argument often is, that every child regresses during interruptions in programming, and then they recoup the loss after the program picks up again. Some suggest that the program will simply begin each fall trying to teach the child whatever has been lost through summertime regression, and that benefit will have been conferred if the child eventually recoups the loss.

That is not fair for two reasons. First, the child will be denied a full opportunity at instructional growth during any current year because attention must be focused on playing catch-up from the previous year. Recent court cases have found that if it takes more than a few weeks in the fall to get back to where the child was in the spring, the regression was too severe.

A second reason it is unfair is that some kinds of skills, once lost, are harder, if not impossible, to re-institute. In areas such as self-care or impulse control, when skills are lost they may be replaced by incompatible behaviors which will inhibit the re-teaching of the desired skills.

Although a child may regress only slightly in one area, s/he will presumably be in a program addressing many areas at the same time. Academic skills might not be a problem for a particular child, but behavioral skills may face severe regressions with an interruption in programming. Social interaction skills may not achieve reasonable growth without continuous programming through the year.

IT'S AN INDIVIDUAL DECISION.

All of the courts that considered the issue emphasize that the decision cannot be made for a group; it must be made on an individual basis. Each IEP must truly be individualized and must state, as the Supreme Court said in *Rowley*, a "written record of reasonable expectations" for that one child. That one child's goals are thus what would be used to determine whether benefit has been conferred.

The amount of benefit will differ from child to child. But how does a parent or school know whether the child will attain sufficient benefit in a given year? The cases all talk about regression --

an after-the-fact judgment. Does the child have to be allowed to regress during the summer before the IEP can allow for extended services? No -- not if the case can be made that reasonable expected benefit will not be conferred if the program is cut off after 180 days, or if the case can be made that the benefit which will be conferred during the 180 days will be lost during the summer break in programming.

In Texas the lower court indicated that previous experience with breaks in programming could be considered, as well as making a mid-year determination of how the program is going. The IEP must have short-term evaluation goals and those mid-program evaluations will determine if the student needs to have the program extended.

Thus on an individual basis, school and parent could agree at the IEP meeting that the child in question seems to be a candidate for extended services: either because his reasonably expected goals for the year are far from being attained mid-year; or because past history documents he will lose too much if there is a lengthy summer break in programming. In either case, consideration must then be given to extending the program into the summer.

NO SINGLE CRITERIA CAN MAKE THE DECISION.

Often it is assumed that when one considers students for summer services, those students must be profoundly disabled. The courts disagree. Any student, no matter what the disability, could be considered for extended services. Public Law 105-17 clearly demands that all decisions be made on an individual basis. Therefore, a school cannot have a policy that says only the students with sever disabilities will be considered for summer services.

In *Lee V. Thompson* (D. Hawaii 1983) the Federal District Court examined what criteria would be used. That court had previously found against the Department of Education of Hawaii for failure to provide education to children with disabilities in excess of the standard school year. The court ordered that the school district consider, in determining whether a particular child needs such extended services, the following factors:

- a. Nature of the disability
- b. Severity of the disability
- c. Areas of learning crucial to attaining the goal of self-sufficiency and independence from caretakers;
- d. Extent of regression caused by interruption in educational programming; and
- e. Rate of recovery following interruption in educational programming.

The court then found that the school district had erred because it had "selected the first two factors - the nature and severity of the handicapping condition -- and had made these criteria the exclusive measure of a child's entitlement to an extended school year."

The court ordered compliance with its earlier order and the school district developed new criteria. The district erred again, selecting "the last two factors listed by Judge Curtis -- regression and recoupment -- and has made these factors the exclusive measure of a child's entitlement to an extended school year."

The court then pointed out that each of the criteria must be considered. "Judge Curtis chose to treat the five factors ... as independent factors and to reject any single standard based simply on

regression and recoupment.

The meaning of Judge Curtis' order is unambiguous: at a minimum the Department of Education must consider all five factors in evaluating an individual child's entitlement to extended education."

Only when all factors are considered can one determine how much service must be offered. The rationale for the extended service -- that a specific need of a specific child has been identified as in peril -- answers the question how much service is required. One child might need a service (or services) that requires only a few hours a week. They might be offered in one central location. Another child might need a fuller curriculum that requires an offering more like a full school day.

Where children are served, how they are grouped, the staff that serve them, how many hours per day are required, how many days per week are required, and how many weeks per summer are required are all questions that can only be answered after those children who are entitled to an extended year are identified and the services specified.

4. Determining Your Child's Need for Extended School Year Programming

The court cases discussed in the previous section **do not** mean that your child with a disability is automatically due a summer program. They **do** mean that the decision to provide or not provide a summer program must be made on an individual basis and must be controlled by the IEP.

At the IEP meeting, look at each area of need (for example: behavioral, social, emotional, vocational, speech, academic, independent living skills, and physical needs) and examine each area's annual goals. Always keep in mind the question - what are your child's unique needs that require an extension of the program into the summer?

Put your observations about your child's needs, the program's progress (or lack of it) and your request for a continuation of services in writing. State that it is to be made part of your child's record folder.

Relate your request to either lack of growth toward a reasonably expected goal, or fear of regression from a satisfactorily achieved goal, or both. **Do not** say you are requesting the services to "enrich" the program or to allow your child to "maximize her potential." Courts have rejected that. **Do** say the summer extension of services is needed to enable your child to achieve and/or maintain reasonable growth toward reasonably expected annual goals related to the overall goal of independent functioning and self-sufficiency.

As a parent you are part of the IEP process. Congress and the Supreme Court have referred to you as an "equal participant" with the school district. Congress and the Supreme Court have also recognized that you are part of the evaluation process. Be as specific as you can. If you take a written statement about the regressions that occurred as a result of last summer's lack of summer programming to the IEP meeting, make sure the statement is placed in your child's record and used in developing the program. Congress expected parents to make these kinds of observations and wanted evaluations that were "independent" of the evaluations performed by schools.

For example, if you noted (with daily, dated notes) the recurrence of inappropriate behaviors during the summer that had been under control during the regular school year, the loss of skills during

the summer that were being developed during the year, and the length of time in the fall that it took to get those behaviors back under control and the skill back up to their previous level, those facts would be very important to any consideration of summer programming.

If your child does not receive services during the summer take daily, dated notes of any changes in your child, such as:

- The recurrence of behaviors that had been under control as a result of the IEP services.
- Loss of skills
- Length of time it took to regain the skills and/or manage the behavior

This documentation will be very helpful in any future consideration of ESY.

If you can tie your request specifically to a lack of growth toward a stated goal, do so. For example, although her annual goal was to be able to do x, she is far short of that and needs to continue if the program is to be reasonably calculated to confer the desired educational benefit. (Remember: Congress made it clear that the annual goals stated are for a twelve-month year; not a nine-month year. The program must be reasonably calculated to confer educational benefit -- that is, to reach that twelve-month goal. If the goal is not being reached then the program must be extended as the most reasonably calculated way to meet the goal.) One warning to parents -- don't let the school district try to water down the annual goals so that they can easily be met in nine months.

You might also tie your request for a continuation of services into summer to regression. Based on previous experience (last summer, Christmas break, spring break) you might say she would lose significant ground this summer and regress in the absence of programming. For example, although she attained her annual goal last year, she was severely set back last summer and it was December before she was able to begin working on the goals for this year's program.

A denial of your request for an extension of services into the summer must be put in writing. (Notice requirements - General, WAC 392-172-302,-307) Any time a school refuses to initiate or change a matter in regard to the provision of an appropriate education (and extension of services into the summer is certainly part of an appropriate education), and then they must give a written explanation of:

- What they are refusing to do;
- Why they are refusing it;
- What options they considered;
- Why they rejected the options; and
- What evaluation, test or other measure they relied on.

As to this last factor -- what the decision was based on - if the school has nothing in the record on your child's summer problems, and you have supplied a written statement, it would be hard for them to refuse summer programming and explain on what evaluation their decision was based.

Use the requirement that the school must put its decision in writing to press the school for services. **Do not leave the meeting with a denial of services and nothing in writing to explain it.** If there is a refusal to put the denial in writing, write a note to that effect and direct that it be made part of the IEP (you are an equal participant in the process) and be kept in your child's permanent records.

5. Problems You Can Anticipate

1. You might be told that your child does not need summer programming because the IEP goals have been met. The real problem may be that you have a poor IEP, with poorly stated goals, such as "increase motor functioning" and "increase reading." Further, such poorly stated measures of attainment (e.g. "teacher observation"), that accurate evaluation is impossible. If this is the case, challenge the poorly stated goals and say you don't feel your child has made enough progress. Ask them to show you precisely where your child was at the beginning of the year in each area of concern, and precisely where your child is now, so it can be determined whether there was reasonable progress. If they cannot show you where your child was and where he is now because the IEP goal and measurement statements are so vague, then it can't be said that so much progress has been made that summer services are not needed.
2. If where your child is now is in any doubt, request (in writing) an evaluation now, to give you a baseline for future goal setting. With that baseline established, you can also better evaluate whether there is regression over the summer if you do not get summer services. If written request for an evaluation is refused, then ask that the refusal, be given to you in writing.
3. If summer programs are offered only for children facing severe regression, this is not the standard in Federal Courts. Ask for a copy of the district policy for determining eligibility for ESY.
4. If the term "severe" (severely handicapped, severe regression) is used, ask in writing to see the written criteria by which "severe" is assessed and defined.
5. In addition to academics, remember to address behavioral, social, emotional, vocational, speech, independent living skills, and physical needs as well as academics. Each might be the source of need for summer services.
6. Ask in writing to see the written evaluation of your child in all areas that are used to make the decision. There is probably no such evaluation. Decisions cannot be based on a single measure, do not accept "teacher observation" as the sole criteria. Ask in writing for an evaluation of your child in each area of concern using the school's written criteria if they have them, by an independent evaluator paid for at public expense. If your request is refused, make sure they request the refusal in writing with the required explanations.
7. If summer services are denied because the school says your child will not regress, ask exactly what they mean.
 - What program areas won't regress?
 - How will the school show no regression?Watch your child over the summer, checking for any regression in the same way that the school will check. If regression has occurred, immediately request an IEP meeting to obtain services in the areas of need to stop the regression. If the school district refuses services, ask for compensatory education in the fall to make up for the loss of skills.

8. The decision about summer services cannot be made solely on the basis of severe regression. The "severe regression only" criteria was struck down in **Lee v. Thompson** (D. Hawaii 1983) and insist that it be considered whether summer services are needed to enable your child to achieve reasonable growth toward the overall goal of independent living. If they refuse, get their refusal in writing.
9. It might be said that the summer program is for "multi handicapped" only. It is a violation of the law to categorically make decisions that summer school will only be for one group. Ask for a statement, in writing, that summer school is only offered to a single predetermined category of handicapping conditions and since your child does not fit that category they will not consider your child for summer services.
10. It might be said that your child will not get summer services because s/he is too low functioning and could not benefit. This is a violation like (9) above. In addition, it is contradictory because if summer services ought to be for anyone they ought to be for lower functioning children. Make sure that statement of denial of services is given to you in writing.
11. If a school **does** offer summer services it will probably have a predetermined block of time (for example, two hours per day for four weeks) with no particular curriculum. Insist that summer services for your child be based on his/her individual needs. If your child needs a continuation of a full day of programming, then insist on that. The Fifth Circuit case of **Crawford v. Pittman**, says the school cannot categorically decide in advance how much summer services to give to all children. If a block of services is offered on a take-it-or-leave-it basis, be sure to get that in writing.
12. Similarly, many schools will not offer any related services during the summer: If your child needed physical therapy and occupational therapy or transportation to benefit during the regular year, they need it during the summer as well. Get any denial in writing.
13. Always keep a copy of your written requests and a copy of written response.
14. Tape-record all meetings. If you do not get the services your child deserves this summer, you can at least document the case you need for better services in the fall and summers services next year.

6. Conclusion

The fact that your child has a disability does **not** give you an automatic right to summer programming. What it does give you is a right to have the decision regarding summer programming be an individual decision made on the basis of IEP goals.

If you have followed the procedures described here, and still feel that your child has been inappropriately denied needed summer services, you should request mediation or file a formal complaint with the State Education Agency. Contact Washington PAVE if your need more information.