What Are the Criteria for an Appropriate ESY Program?*

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The issue of extended school year (ESY) under the Individuals with Disabilities Education Act (IDEA)[1] has been the subject of a long line of court decisions that has largely stalled after addressing the criteria for eligibility, leaving largely neglected what the standards are for ESY itself. This brief article will comprehensively but concisely canvass the court decisions and resulting IDEA regulations, state laws, and, to a duly limited extent,[2] agency policy interpretations specific to ESY, with a culminating focus on the applicable standards for appropriate ESY services. "Appropriate" here is more generic than being limited strictly to its use in the IDEA's core obligation for school districts to provide students with disabilities a "free appropriate public education" (FAPE).

The long line of court decisions has proceeded in three approximate and not mutually exclusive stages. The resulting IDEA regulations, state law, and agency interpretations have largely interlineated the first two stages thus far. Similarly, the scant literature in special

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[1] 20 U.S.C. §§ 1400–1482 (2018).
[2] *E.g.,* Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 Ed. Law Rep. 671 (2017) (finding that courts cited OSEP policy interpretations to a limited extent and, per applicable criteria, not as necessarily persuasive).

education[3] and law[4] is almost entirely limited to the first two stages.[5] Thus, the third stage merits much more extensive and careful consideration.

Stage 1: Threshold Recognition of ESY

Starting in 1980, the initial cases established as a threshold matter that school districts' IDEA obligation to provide a free appropriate public education (FAPE) is not limited to the school year, thus recognizing the limited exception of ESY.[6] The IDEA legislation is yet to codify ESY.

Stage 2: Criteria for Students' ESY Eligibility

During the second overlapping stage starting in the mid-1980s, the courts ruled that regression-recoupment was at least a primary factor in determining eligibility for ESY,[7] with some cases identifying additional criteria.[8] The resulting state laws that codified the eligibility

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[3] *E.g.*, Lucy Barnard-Brak & Tara Stevens, *Criteria for Determining Eligibility for Extended School Year Services*, 55 J. SPECIAL EDUC. 3 (2021); Lucy Barnard-Brak & Gregory Benner, *Determining Eligibility for Extended School Year Services: A Survey of State and Local Special Education Directors*, 33 J. SPECIAL EDUC. LEADERSHIP 3 (Mar. 2020) (reporting surveys of special education leaders on ESY eligibility); Meghan M. Burke & Janet R. Decker, *Extended School Year: Legal and Practical Considerations for Educators*, 49 TEACHING EXCEPTIONAL CHILD. 339, 343–44 (2017); Mary Jane Rapport & Stephen B. Thomas, *Extended School Year: Legal Issues and Implications*, 18 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 16 (1993) (canvassing early case law on ESY eligibility).

[4] *E.g.,* Allan G. Osborne, *When Must a School Provide an Extended School Year Program to Students with Disabilitie*s, 99 Ed. Law Rep. 1 (1995) (tracing the early case law specific to ESY eligibility); Rosemary Queenan, *School's Out for Summer—But Should It Be?* 44 J.L. & EDUC. 165 (2015) (advocating multi-factor approach for determining ESY eligibility).

[5] The peripheral exceptions provide marginal coverage due to their date or focus. *E.g.*, Susan Etscheidt, *Extended School Year Services: A Review of Eligibility and Program Appropriateness*, 27 RES. & PRAC. PERSONS WITH SEVERE DISABILITIES 188, 199–200 (2002) (summarizing early case law that included only one court decision, which was of limited relevance); Allan G. Osborne, *Does the IDEA's Least Restrictive Environment Provision Apply to Extended School Year Program to Students with Disabilitie*s, 327 Ed. Law Rep. 561 (2016) (discussing the limited aspect of the overlapping issue of least restrictive environment).

[6] *E.g., Yaris v. Special Sch. Dist. of St. Louis Cnty*., 728 F.2d 1055, 1056, 16 Ed.Law Rep. 757 (8th Cir. 1984); *Crawford v. Pittman*, 708 F.2d 1028, 1034, 11 Ed.Law Rep. 815 (5th Cir. 1983); *Battle v. Pennsylvania*, 629 F.2d 269, 281 (3d Cir. 1980); *Anderson v. Thompson*, 495 F. Supp. 1256, 1266–67 (E.D. Wis. 1980), *aff'd on other grounds,* 658 F.2d 1205 (7th Cir. 1981).

[7] *E.g., Cordrey v. Euckert*, 917 F.2d 1460, 1473, 63 Ed.Law Rep. 798 (6th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ*., 790 F.2d 1153, 1157–58, 32 Ed.Law Rep. 445 (5th Cir. 1986).

[8] *E.g.*, *Johnson v. Indep. Sch. Dist. No.* 4, 921 F.2d 1022, 1027, 64 Ed.Law Rep. 1027 (10th Cir. 1990). Depending on interpretation, the dividing line between these two categories of eligibility is far from bright. *E.g., MM v. Sch. Dist. of Greenville Cnty*., 303 F.3d 523, 537–38, 169 Ed.Law Rep. 59 (4th Cir. 2002); *Reusch v. Fountain*, 872 F. Supp. 1421, 1435, 97 Ed.Law Rep. 299 (D. Md. 1994).

criteria fit in the two overlapping categories of regression-recoupment and multiple factors, including regression-recoupment.[9] The IDEA regulation specific to ESY dates back to 1997 for its original definitional provision[10] and to 1999 for the full incorporation of the clarifications that the IEP team must determine eligibility on an individual basis that the services are necessary for FAPE and that the entitlement may not be limited to particular disability classifications or unilaterally determined services.[11] Finally, the Office of Special Education Programs (OSEP) issued various policy interpretations that focused on eligibility criteria and procedures.[12]

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[9] *E.g.*, Burke & Decker, *supra* note 3, at 343–44; Queenan, *supra* note 4, at 182–87 (successively canvassing state law provisions for ESY eligibility).

[10] 62 Fed. Reg. 55,026, 55,087 (Oct. 22, 1997):

> (a) *General.* (1) Subject to paragraph (a)(2) of this section, each public agency shall ensure that [ESY] services are available to each child with a disability to the extent necessary to ensure that FAPE is available for the child.
> (2) The determination of whether a child needs [ESY] services must be made on an individual basis by the child's IEP team …
> (b) *Definition*. As used in this section, the term [*ESY*] means special education and related services that—
> (1) Are provided to a child with a disability—
> (i) Beyond the normal school year of the agency;
> (ii) In accordance with the child's IEP; and
> (iii) At no cost to the parents; and
> (2) Meet the standards of the SEA.

Immediately following these regulatory provisions were two notes clarifying that (1) public agencies may not limit ESY services to particular IDEA classifications or unilaterally limit their duration and (2) states may establish the standards for eligibility so long as they are not inconsistent with the IDEA. *Id*.

[11] 64 Fed. Reg. 12,406, 12,576–12,577 (Mar. 12, 1999):

> (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.

The present regulations consist of the cumulative provisions of the 1997 and 1999 version with renumbering and a slightly more compact version of the first subsection:

> (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 [the regulatory requirements for IEPs], that the services are necessary for the provision of FAPE to the child.

34 C.F.R. § 300.106 (2019).

[12] *E.g.,* 71 Fed. Reg. 46,540, 46,582 (Aug. 14, 2006) ("States may use recoupment and retention as their sole criteria but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services"); Letter to Given, 39 IDELR ¶ 129 (OSEP 2003) (concluding that use of lack of progress as the sole eligibility criterion would be contrary to this jurisdiction's case law); Letter to Harkins, 213 IDELR 263 (OSEP 1989) (examining the procedural requirements for ESY eligibility determinations under Iowa's law); Letter to Baugh, 211 IDELR 481 (OSEP 1987) (clarifying that whether a student with disabilities received ESY the previous year does not mean that the student is or is not eligible for ESY the following year).

Most of the continuing line of ESY court decisions maintain the focus on whether the child is eligible rather than whether the program is appropriate.[13]

Third Stage: Criteria for Appropriate ESY

The third stage amounts to rather limited legal development thus far. The following list identifies the various potential criteria for the appropriateness of ESY services, with only the last one being not clearly applicable.[14] For each of these items, the accompanying summary reveals that the applicable legal authority is limited and to a large extent not clearly settled. More established answers to the overall question of this article will depend on parents raising these specific standards for ESY program appropriateness and the cases reaching the precedential level in the federal courts.

- must be free

The "F" in FAPE extends to ESY as the explicit no-cost regulatory criterion.[15] OSEP has concluded that this criterion does not prohibit certain incidental charges.[16]

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[13] *E.g., Elizabeth B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App'x 40, 44, 370 Ed.Law Rep. 592 (10th Cir. 2020); *Pangerl v. Peoria Unified Sch. Dist.,*780 F. App'x 505, 507, 370 Ed.Law Rep. 592 (9th Cir. 2019); *O.S. v. Fairfax Cnty. Sch. Bd.,* 804 F.3d 354, 361, 323 Ed.Law Rep. 70 (4th Cir. 2015); *S.H. v. Plano Indep. Sch. Dist.,* 487 F. App'x 850, 866–67, 287 Ed.Law Rep. 721 (5th Cir. 2012); *Todd v. Duneland Sch. Corp*., 299 F.3d 899, 907, 168 Ed.Law Rep. 67 (7th Cir. 2002); *Maggie J. v. Donegal Sch. Dist.,* 79 IDELR ¶ 42 (E.D. Pa. 2021); *C.K. v. Bd. of Educ. of Sylvania City Sch. Dist*. 78 IDELR ¶ 65 (N.D. Ohio 2021); *T.T. v. Jefferson Cnty. Bd. of Educ*., 77 IDELR ¶ 243 (N.D. Ala. 2020); *Grants Pass Sch. Dist. v. Student*, 65 IDELR ¶ 207 (D. Or. 2015); *Annette K. v. Haw. Dep't of Educ*., 60 IDELR ¶ 278 (D Haw. 2013); *Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386, 287 Ed.Law Rep. 73 (D.D.C. 2012); *D. D-S. v. Southold Union Free Sch. Dist*., 57 IDELR ¶ 164 (E.D.N.Y. 2011), *aff'd on other grounds*, 506 F. App'x 80 (2d Cir. 2012); *cf. Barney v. Akron Bd. of Educ*., 763 F. App'x 528, 532, 365 Ed.Law Rep. 811 (6th Cir. 2019); *Rosaria M. v. Madison City Bd. of Educ.,* 325 F.R.D. 429, 444–45, 355 Ed.Law Rep. 1081 (N.D. Ala. 2018); *William D. v. Manheim Twp. Sch. Dist*., 48 IDELR ¶ 247 (E.D. Pa. 2007); *Lawyer v. Chesterfield Cnty. Sch. Bd*., 19 IDELR 904 (E.D. Va. 1993); *Glazier v. Indep. Sch. Dist. No. 876*, 558 N.W.2d 763, 115 Ed.Law Rep. 1046 (Minn. Ct. App. 1997); *A.D. v. Sumner Sch. Dist.,* 166 P.3d 837, 845–46 223 Ed.Law Rep. 91 (Wash. Ct. App. 2007) (focusing on procedural side of ESY eligibility determination). For additional examples, *see infra* note 27.

[14] *Infra* notes 39–43 and accompanying text (LRE criterion).

[15] 34 C.F.R. § 300.106(b)(3) (2019) ("at no cost to the parents of the child").

[16] *E.g*., Letter to Sims, 38 IDELR ¶ 69 (OSEP 2002) ("Although. . . the Part B 'at no cost' requirement does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular [ESY] if summer school services, for which incidental fees are charged, are not a part of the [ESY] services provided to the student.").

- must meet state standards

This definitional requirement in the IDEA regulations[17] has been subject to limited to minimal interpretation or application thus far[18] other than the legal developments separately summarized herein for the dimensions of FAPE.[19]

- must be individualized

Does the pervading individualization requirement, which is the "I" in "IDEA" and an at least partly explicit appropriateness standard in its regulations,[20] merely mean the variations from one IEP to another IEP for ESY-eligible children or does it mean differences in the daily and overall length of the ESY program? The prevailing practice in most school districts seems to suggest the first answer,[21] but the IDEA regulations,[22] the agency policy interpretations,[23] and some state laws[24] support the second view. Indeed, the well-established stage 1 case law, which rejected a fixed school year for all students with disabilities would seem to run counter to the first view.[25] Similarly, the more general FAPE case law concludes that districts must write IEPs

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[17] 34 C.F.R. § 300.106(b)(4) (2019) ("[m]eet the standards of the SEA").
[18] Letter to Copenhaver, 50 IDELR ¶ 16 (OSEP 2007) ("Personnel providing ESY services should meet the same requirements that apply to personnel providing the same types of services as a part of a regular school [year] program.").
[19] *Infra* notes 27–38 and accompanying text.
[20] 34 C.F.R. § 300.106(b)(3) ("in accordance with the child's IEP"). The separate individualized requirement in the IDEA's ESY regulation appears to be intended for the eligibility stage. *Id*. § 300.106(a) ("must be provided only if a child's IEP Team determines, on an individual basis . . . , that the services are necessary for the provision of FAPE to the child").
[21] *E.g*., Emily Eyrolles Sobeck, *Nine Tips for Creating an Effective Extended School Year Program for Students with Disabilities*, 52 INTERVENTIONS SCH. & CLINIC 170, 173 (2017) ("[M]ost ESY programs are typically only 4 to 5 weeks in duration"). In light of the lack of recent reliable research, the status of current practice for the daily and overall duration is limited to such impressionistic dicta.
[22] 34 C.F.R. § 300.106(a)(3)(ii) (2019) ("[districts] may not . . . [u]nilaterally limit the type, amount, or duration of those services").
[23] *E.g.,* Letter to Libous,17 IDELR 419 (OSERS 1990) (adopting a uniform length of the day for ESY would be predetermination); Letter to Baugh, 211 IDELR 481 (OSEP 1987) ("[limiting the duration of ESY] would violate the basic requirement that programs be designed to meet the individual needs of each child").
[24] *E.g*., LA. ADMIN. CODE tit. 28, § 709(A) (2017) ("duration is based on the individual needs of the student"); N.H. CODE R. ANN. EDUC. 1110.01(b) (2020) ("[ESY] services shall not be limited to the summer months or to predetermined program design").
[25] *Supra* note 6 and accompanying text.

to fit the student's individual needs, not the institution's available services.[26] Yet, the applicable court rulings are few and far between.[27]

- must be substantively appropriate

The problem is the various interpretations as to the applicable standard. First, although sometimes requiring special scrutiny, court rulings on the appropriate standard warrant careful separation when specific to the issue of determining ESY eligibility.[28] Second, although perhaps inadvertently failing to make this differentiation, the scant remaining judicial authority applied the parallel eligibility standard.[29] Third, the potential competing substantive standards are either the same one that applies to the school year IEP[30] or a necessity standard tied to the school year

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[26] *E.g., Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 259, 48 Ed.Law Rep. 352 (4th Cir. 1988) (affirming that the school district violated the IDEA by deciding on a placement and then developing an IEP to fit that decision).

[27] *E.g.*, *Reusch v. Fountain*, 872 F. Supp. 1421, 1438, 97 Ed.Law Rep. 299 (D. Md. 1994):

> [P]utting the existence of fixed-length programs in their proper place in the IDEA hierarchy, [the district] first must determine the child's individualized summer needs and *then* determine whether an existing program can satisfy those needs. In any event, Defendants must make allowances and adjustments in those instances when a child's individualized needs cannot be met by an existing summer program.

[28] *E.g.*, *KB v. Katonah Lewisboro Union Free Sch. Dist*., 847 F. App'x 38, 41, 389 Ed.Law Rep. 747 (2d Cir. 2019); *N.B. v. Hellgate Elementary Sch. Dist*., 541 F.3d 1202, 1211–12, 236 Ed.Law Rep. 603 (9th Cir. 2008); *MM v. Sch. Dist. of Greenville Cnty*., 303 F.3d 523, 537, 169 Ed.Law Rep. 59 (4th Cir. 2002).

[29] *JH v. Henrico Cnty. Sch. Bd*., 326 F.3d 560, 567–69, 175 Ed.Law Rep. 414 (4th Cir. 2003), *after remand*, 395 F.3d 185, 198 (4th Cir. 2005) (applying, without discussing any arguable differentiation, the same court's intervening eligibility standard in terms of whether the level of ESY services is adequate to prevent the gains that the child had made during the prior school year from being significantly jeopardized); *cf. A.S. v. Madison Metro. Sch. Dist*., 477 F. Supp. 2d 969, 979–80, 218 Ed.Law Rep. 445 (E.D. Wis. 2007) (applying cursory combination of general substantive FAPE and ESY-specific regression standards); Letter to Myers, 213 IDELR 255 (OSEP 1989) ("It is … reasonable for an [ESY] IEP to concentrate on: (1) the areas in which the child may experience regression; or (2) skills or programs that are not academic but are needed so that regression does not occur in academics.")

[30] *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) ("reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"). Some of the stage 2 appellate cases seemed to encompass their analysis within the FAPE standard of the *Rowley* decision, which *Endrew F.* reaffirmed and refined. *E.g.*, *Johnson v. Indep. Sch. Dist. No.* 4, 921 F.2d 1022, 1028, 64 Ed.Law Rep. 1027 (10th Cir. 1990); *Cordrey v. Euckert*, 917 F.2d 1460, 1473, 63 Ed.Law Rep. 798 (6th Cir. 1990).

FAPE.[31] Finally, a few state laws add related substantive considerations.[32]

- must meet the other principal dimensions of FAPE

The other two principal aspects of FAPE are the procedural and implementation dimensions.[33] The procedural dimension of FAPE is generally limited in terms of remedial success in adjudication due to the harmless-error approach.[34] In light of the scant applicable IDEA procedural considerations for ESY, which are limited to agency policy interpretations,[35] and the lack of judicial authority that apply the limited gap-filling state law procedural requirements,[36] the court decisions are thus far rare.[37] Similarly, the less uniform adjudicative standards for denial of FAPE based on incomplete implementation have generally been less than

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[31] 34 C.F.R. § 300.106(a)(1) (2019) ("available as necessary to provide FAPE"). This long-standing language (*supra* note 11) is not clear as to whether it is intended to apply to the appropriateness stage or is merely introductory to the accompanying repetition of the necessity standard as more specifically required for the eligibility stage. *Supra* note 20. If this necessity standard is applicable at the appropriateness stage, it may be analogous to the case law specific to needed-to-benefit limitation for related services (20 U.S.C. § 1402(26)(A) ("as may be required to assist a child with a disability to benefit from special education"). *E.g.*, *E.I.H. v. Fair Lawn Bd. of Educ*., 747 F. App'x 68, 73, 361 Ed.Law Rep. 609 (3d Cir. 2018) (ruling in favor of related services claim for nurse on the bus based on child's safety need); *Se.H. v. Bd. of Educ. of Anne Arundel Cnty.,* 647 F. App'x 242, 249, 333 Ed.Law Rep. 602 (4th Cir. 2016) (ruling against related services claim for specially trained aide as not necessary for the child). Alternatively, it may amount to a symmetry-based importation of the eligibility criteria, such as regression-recoupment. The courts have not yet addressed this interpretation, but it would seem to yield the maintenance approach that the Washington State regulations illustrate. *Infra* note 32.

[32] *E.g.*, 14 DEL. ADMIN. CODE § 923(6.6) (2021) "[ESY] services are to be based on needs and goals or objectives found within the child's IEP of the school year, though activities may be different"), *id*. § 923(6.7) (presumptively include reading if not beginning reader by age 7); OR. ADMIN. CODE R. 581-015-2065(4) (2019); WASH. ADMIN. CODE § 392-172A- 02020(5) (2017) ("The purpose of [ESY] services is the maintenance of the student's learning skills or behavior, not the teaching of new skills or behaviors"); UTAH ADMIN. CODE r. 277-751-4(1) ("The primary goal . . . is to maintain the current level of the student's academic and functional skills and behavior in areas identified by the student's IEP in order to provide FAPE.").

[33] *E.g.*, Perry A. Zirkel, *An Adjudicative Checklist of the Four Criteria for FAPE under the IDEA*, 346 Ed. Law Rep. 18 (2017) (identifying the different dimensions of IDEA FAPE, principally consisting of procedural, substantive, and implementation).

[34] *See, e.g.,* Perry A. Zirkel*, Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2020) (recognizing the limited relief from courts thus far procedural denial of FAPE).

[35] *E.g.*, Letter to Baugh, 211 IDELR 481 (OSEP 1987) ("LEAs are obligated to discuss and respond to summer program issues at IEP meetings where such issues are raised.").

[36] A few state laws provide one or more procedural requirements specific to ESY formulation or implementation. *E.g.,* LA. ADMIN. CODE tit. 28, § 701(C) (2017); PA. CODE § 14.132(a)(1), (d) (2017).

[37] *E.g.*, *D.F. v. Red Lion Sch. Dist*., 2011 WL 7070537 (M.D. Pa. Sept. 26, 2011), *adopted*, 2012 WL 175020 (M.D. Pa. Jan. 20, 2012) (finding no prejudicial procedural violation for parental participation in formulating the student's ESY services).

rigorous,[38] and the relevant judicial case law in the ESY context is thus far rather scant.[39]

- must meet the LRE requirements?

Although agency policy interpretations support applying LRE to ESY at least in terms of availability,[40] the limited judicial authority is far from conclusive. In the leading case, the Second Circuit adopted the position that LRE applies to ESY to the extent of consideration of available public and private placements.[41] However, in an unofficially published subsequent decision, the Eleventh Circuit declined to decide whether LRE applied to ESY, instead ruling on an assuming arguendo basis that even if the Second Circuit approach applied, the district provided the child with only available ESY placement.[42] Moreover, the tuition reimbursement context of the Second Circuit's decision serves as another possible limitation in its application.[43] Finally, a few states provide ESY specifications relating to LRE.[44]

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[38] *See, e.g*., Perry A. ZIRKEL, *Failure to Implement the IEP: The Third Dimension of FAPE under the IDEA*, 28 J. DISABILITY POL'Y STUD. 174 (2017) (tracing the relatively relaxed prevailing approach for denial of FAPE based on incomplete implementation).

[39] *E.g*., *S.S. v. Howard Road Acad.,* 585 F. Supp. 2d 56, 67–68, 239 Ed.Law Rep. 550 (D.D.C. 2008) (ruling that that district's lack of ESY implementation met the materiality standard for denial of FAPE); *Cent. Bucks Sch. Dist. v. Sarah K*., 34 IDELR ¶ 235, at *4 (Pa. Commw. Ct. 2000) (upholding compensatory remedy based on inferable per se approach for incomplete implementation of ESY, concluding that "[o]nce an appropriate [ESY] services program has been established, it is the School District's responsibility to fulfill its obligations under this program, and when it does not, it is required to make up that time with compensatory services.").

[40] *E.g*., Letter to Myers, 213 IDELR 255 (OSEP 1989) (opining that LRE applies to ESY but via alternative means, such as private placements rather than necessarily providing programs for nondisabled students for this sole purpose)

[41] *T.M. v. Cornwall Cent. Sch. Dist*., 752 F.3d 145, 163–67, 305 Ed.Law Rep. 29 (2d Cir. 2014). The previous case law specific to the LRE issue were too limited in their level and analysis to merit relative consideration. *E.g*., *D.F. v. Red Lion Sch. Dist*., 2011 WL 7070537 (M.D. Pa. Sept. 26, 2011), *adopted*, 2012 WL 175020 (M.D. Pa. Jan. 20, 2012).

[42] *A.L. v. Jackson Cnty. Sch. Bd*., 635 F. App'x 774, 783, 330 Ed.Law Rep. 60 (11th Cir. 2015).

[43] *E.g., W.U. v. Haw. Dep't of Educ*., 74 IDELR ¶ 5 (D. Haw. 2019) (affirming denial of remedial relief in wake of procedural denial of FAPE for ESY program determination in light of *T.M*.'s reimbursement rationale as well as lack of sufficient information for compensatory education).

[44] *E.g.,* CAL. CODE REGS tit. 5, § 3043(g) (2018) ("If during the regular academic year an individual's IEP specifies integration in the regular classroom, a public education agency is not required to meet that component of the IEP if no regular summer school programs are being offered by that agency"); LA. ADMIN. CODE tit. 28, § 701(B) (2017) (" LEAs should provide [ESY] instruction in a location that is the [LRE] option for that student"), *id*. § 703(F) ("LEAs should continue to address LRE needs of the student in the implementation of ESY services."); UTAH ADMIN. CODE r. 277-751-4(5)(a) ("An LEA shall ensure that . . . an ESY student receives services in the [LRE]").

Conclusion

The third stage court rulings are rather thin in not only number but also analysis. For each of the potential criteria, the scant rulings tend to confuse student eligibility with program appropriateness and not to reach the nuances with careful analysis. Although no single factor is the explanation,[45] the reasons for the thin judicial authority to date likely include (1) the limited time of ESY;[46] (2) the judicial deference to school authorities in ESY cases;[47] and (3) the lack of a specialized focus by the plaintiff bar thus far.[48]

Finally, with a look to the future judicial analyses specific to the criteria for ESY services for the relatively few eligible students,[49] the coverage here extends to an illustrative sampling of recent IDEA hearing officer decisions. Although lacking precedential weight, these decisions exemplify current analysis at this broader adjudicative level and are potentially largely predictive of subsequent judicial rulings.[50]

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[45] The relatively low incidence of affected students does not explain the infrequency of litigation. While the stage 1 cases stall in their development, the stage 2 cases continue apace. *Supra* note 13. Similarly, although appropriateness of ESY is arguably lesser stakes than the eligibility for any ESY, relatively low stakes does not inhibit litigation for some other IDEA issues. *See, e.g.*, Perry A. Zirkel, *An Update of Judicial Rulings Specific to FBAs and BIPs under the IDEA and Corollary State Special Education Laws*, 51 J. SPECIAL EDUC. 50 (2017); Perry A. Zirkel*, Independent Educational Evaluations at Public Expenses: The Latest Update*, 341 Ed. Law Rep. 555 (2017).

[46] The relatively short duration of the program, which rarely extends to the full summer break, is a passing amount not amenable to timely relief or precedent. The first step alone, which is the due process hearing, is supposed to be completed within 75 days, including the optional resolution period, averages approximately 200 days. Diane M. Holben & Perry A. Zirkel*, Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed . . .* , ADMIN. L. REV. (forthcoming Jan. 2022). Moreover, with the exception of the relatively few states that have strict timelines, school district IEP teams do not make such decisions until rather late in the school year. *E.g., Reusch v. Fountain*, 872 F. Supp. 1421, 1434, 97 Ed.Law Rep. 299 (D. Md. 1994).

[47] *E.g., Cordrey v. Euckert*, 917 F.2d 1460, 1469, 63 Ed.Law Rep. 798 (6th Cir. 1990); Virginia S. v. Dep't of Educ., Haw., 47 IDELR ¶ 42, at *11 (D. Haw. 2007).

[48] Such a strategic focus would require selecting a case in which the stage 3 ESY determination was the sole or at least leading issue, the facts are rather flagrantly favorable, expert witnesses familiar with the child and the relevant data, are available, and the arguments are well developed based on this previously not available research.

[49] Limited survey research suggests that approximately 6%–8% of students with disabilities receive ESY services . *E.g.*, Barnard-Brak & Stevens, *supra* note 3, at 9.

[50] *E.g.*, Perry A. Zirkel & Cathy A. Skidmore, *Judicial Appeal of Due Process Hearing Rulings: The Extent and Direction of Decisional Chang*e, 29 J. DISABILITY POL'Y STUD. 22 (2018) (finding that 70% of a broad sample of IDEA final court rulings were either the same or only slightly changed from the outcome at the hearing officer level).

In various hearing officer decisions specific to the appropriateness of ESY services, the legal analysis was cursory without identifying any applicable criteria.[51] As a specific example, in a Hawaii case, the hearing officer recited the evidence in the case and then upheld the district's reduction of ESY services without specifying the applicable criteria for appropriateness.[52] Instead, the hearing officer merely cited the traditional judicial deference to school authorities' methodology decisions and concluded: "Without any evidence or credible testimony to the contrary, the Hearings Officer will not second-guess [the district's reduction]."[53]

Even when focused on a particular criterion, these hearing officer decisions do not tend to provide a particularly nuanced analysis. For example, in a case specific to the LRE criterion, a California hearing officer relied on the aforementioned[54] state law and a cramped interpretation of other relevant authority in making short shrift of the parents' LRE claim regarding their child's ESY services.[55] Similarly, in a case that addressed both the ESY program and the school year IEP, the hearing officer applied the *Endrew F.* substantive standard for FAPE without any separable discussion of the specifically applicable regulatory and related authority.[56]

As a partial exception to such limited analyses, a Massachusetts hearing officer referred to a blended ESY appropriateness standard of "reasonably calculated to prevent substantial . . . regression" within the statement of the issues but without any separate legal analysis[57] and then arrived at compromise-type ruling based on the individualization criterion. Finding its

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[51] *E.g.*, Glynn Cnty. Sch. Dist., 114 LRP 46669 (Ga. SEA Oct. 10, 2014); Hockinson Sch. Dist., 120 LRP 32846 (Wash. SEA Sept. 18, 2020); *cf.* Methacton Sch. Dist., 117 LRP (Pa. SEA July 14, 2017) (addressing limited issue for district ESY program otherwise stipulated as appropriate).
[52] Dep't of Educ., Haw., 68 IDELR ¶ 118 (Haw. SEA 2016).
[53] *Id*. at *9.
[54] *Supra* note 43.
[55] L.A. Unified Sch. Dist., 120 LRP 22859 (Cal. SEA July 6, 2020).
[56] Pa. Virtual Charter Sch., 74 IDELR ¶ 90 (Pa. SEA 2018); *see also* Ridgefield Bd. of Educ., 73 IDELR ¶ 58 (Conn. SEA 2018); *cf.* Quakertown Cmty. Sch. Dist., 69 IDELR ¶ 23 (Pa. SEA 2016) (applying pre-*Endrew F.* substantive standard for FAPE without any analysis of the ESY-specific sources of legal authority).
[57] Mansfield Pub. Schs., 66 IDELR ¶ 59, at *2 (Mass. SEA 2015).

seemingly fixed five-week duration problematic in light of the child's regression during even short breaks, the hearing officer ordered the district to extend the ESY services for two weeks, along with limited other modifications, to make the district's program appropriate, thus not reaching the parents' proposal for a private ESY program.[58]

In sum, in light of the stunted development of the stage 3 case law to date, the future case law concerning the criteria for ESY programs is unlikely to have thoughtful rigor unless the parent bar make particularly concerted and cogent litigation efforts or advocacy groups lobby effectively for specific revisions to the IDEA or corollary state laws. Although school districts' practical issues for vacation periods, such as personnel availability and student attendance, merit consideration,[59] they cannot be excuses for one-size-fits-all ESY program that is based on administrative efficiency. The time is now for appropriate actions beyond the school year.

[58] *Id*. at *9–10.
[59] *E.g*., Lucy Barnard Brak, Tara Stevens, & Evelyn Valenzuela, *Barriers to Providing Extended School Year Services to Students with Disabilities: An Exploratory Study of Special Education Directors*, 37 RURAL SPECIAL EDUC. Q. 245 (2018) (finding difficulties, in descending order, of finding qualified personnel, determining eligibility, parent willingness for child's participation, and limited financial resources).