

## **EXTENDED SCHOOL YEAR SERVICES**

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The Individuals with Disabilities Education Act (IDEA) requires a school district to provide “extended school year” services (ESY) if the services are necessary for a student to receive a “free appropriate public education” (FAPE). The problem is identifying when ESY services are necessary.

The Ninth Circuit Court of Appeals ruled on September 4, 2008 in *N.B. et. al. v. Hellgate Elementary School District* that Montana’s use of a regression-recoupment test to determine ESY eligibility is appropriate under the IDEA. Decisions by the Ninth Circuit, a federal appeals court, interpreting federal law are controlling in Montana.

The “regression-recoupment” test is this: If a child is expected to regress in skills during the summer and then be unable to recoup those skills within a reasonable time in the fall, the child is entitled to receive ESY services

Significantly, the Ninth Circuit applied Montana’s policy guidance for the regression recoupment test. Montana’s policy guidance requires consideration of numerous factors to determine if regression may occur. [see sidebar].

What the court decision does not address is the new administrative rule adopted by the Montana Office of Public Instruction in 2007. This rule states that school districts shall use the regression-recoupment test to determine ESY entitlement, but does not incorporate the factors listed in OPI’s policy guidance.

Unless and until OPI changes its technical assistance manual on ESY, IEP teams must still consider all the factors listed in the guidance.

It is important to remember that the team can decide to provide ESY even if there is no data showing regression in the past. The team can offer ESY services if, in their judgment, regression and difficulty with recoupment *may* occur. Under Montana’s policy guidance, regression may occur if the child has emerging skills, for example, that may be stymied or lost due to a lack of ESY services.

Even when data is available, it is important to scrutinize it carefully. Lack of regression during short breaks, such as spring break or the winter holiday break, may not be sufficient to show that regression will not occur during a 12 week break.

In the *N.B. v. Hellgate* case, the Ninth Circuit found that ESY services were not required for a young preschool student with autism basically because the parents had not proven he had emerging skills that would be jeopardized by a lack of ESY. The parents’ testifying expert had not observed the child, whereas the teachers worked with the child every day. The testimony about emerging skills was conflicting, with teachers testifying there were no emerging skills. This holding emphasizes the need for parent consultants to observe the child in the school setting

and to be as familiar with the child as possible.

What's significant here is that the Ninth Circuit upheld the denial of ESY services *not* based on a strict regression-recoupment test, but based on the fact that the hearing officer and the district court had considered the factors in Montana's policy guidance, weighed the evidence on those factors, and found that none of the factors applied.

To read the decision in *N.B. et. al. v. Hellgate Elementary School District*, please click [here](#).

**Factors for deciding ESY include:**

- **degree of impairment**
- **degree of regression**
- **recovery time from regression**
- **ability of parents to provide the educational structure at home**
- **child's rate of progress**
- **child's behavioral and physical problems**
- **availability of alternative resources**
- **child's ability to interact with children who do not have disabilities**
- **areas of the child's curriculum which need continuous attention**
- **child's vocational needs**
- **whether the child missed school during the regular school year**
- **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**
- **whether the child has emerging skills, such as being on the brink of learning to read**
- **whether there is a "window of opportunity" for the child to learn certain skills**