WHEN DOES THE SCHOOL DAY END?: After School Activities, Transportation, and Extended Year Programming

A Seminar Presented to the New Hampshire Association of Special Education Administrators

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an understanding of certain aspects of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq*., as amended by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the New Hampshire law and regulations pertaining to the education of children with disabilities. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

Under New Hampshire law, IEPs must include "[t]he length of the school year and the school day required to implement the IEP." Ed 1109.01(a)(2). The purpose of this material is to provide school officials with a deeper understanding of the laws, regulations, and cases pertaining to the length of the school day and year, with a focus on after-school activities, transportation, and extended school year programming. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

II. After School Activities

A. The Legal Framework: Section 504 and the IDEA

1. Section 504

Section 504 extends two legal principles to non-academic programming. The first principle is that a student with disabilities shall participate with non-disabled students in non-academic settings and extracurricular activities "to the maximum extent appropriate" to the needs of the student with disabilities. 34 C.F.R. § 104.34(b). The second legal principle is that schools must provide non-academic and extracurricular services and activities in a way that allows students with disabilities an equal opportunity for participation in such services and activities. 34 C.F.R. § 104.37(a)(1) (emphasis added). The regulations do not define the term "to the maximum extent appropriate" nor do they define "an equal opportunity." Instead, the definition of these two terms has been left to the courts.

Under Section 504, nonacademic and extracurricular services and activities include:

- Counseling services;
- Physical recreational athletics;
- Transportation;
- Health services;
- Recreational activities;
- Special interest groups or clubs sponsored by the recipients;
- Referrals to agencies which provide assistance to persons with disabilities; and,
- Employment of students, including employment by the school and assistance in making available outside employment.

34 C.F.R. § 104.37(a)(2) (emphasis added).

Schools that offer physical education courses, or operate or sponsor interscholastic clubs or intramural athletics, must provide qualified students with disabilities with an equal opportunity for participation. 34 C.F.R. § 104.37(b)-(c)(1).

Similarly, in accord with the New Hampshire Regulations, high schools are required to provide "reasonable accommodations for cocurricular activities as appropriate in order to allow for full access and participation by students with disabilities [sic]." Ed 306.27(v).

The case of Hermitage (MO) R-IV School District, 108 LRP 53412 (OCR, Feb. 11, 2008) is illustrative of the reasonable accommodations requirement. In that case, a parent of a child with a hearing impairment filed a complaint alleging that the District violated Section 504 when it failed to provide her daughter with an interpreter during an extracurricular school activity open to the public. OCR reviewed the legal standard for the provision of an accommodation, noting that districts "must give primary consideration to the requests of the individual with a disability in determining what type of auxiliary aid and service is necessary." In addition, the district "must honor the request unless it can demonstrate that another effective means of communication exists," or unless it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity and cause the [district] an undue burden."

OCR also noted that when a district provides an alternative accommodation, "a determination must be made as to whether the alternative provided an equal opportunity to the disabled individual to participate in the entity's service," or whether the accommodation that was offered was as effective as the requested accommodation. There are three parts to the "as effective as" determination:

1. Effectiveness and timeliness of delivery;
2. Accuracy of the translation; and,
3. The provision of the accommodation in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability.

Before asserting that providing an accommodation would constitute an undue burden, a district must first consider "all resources available for use in the funding and operation of the program, service or activity." Once the undue burden determination has been made, the district must provide a written statement explaining why the accommodation is an undue burden, and must take other appropriate steps, where possible, to ensure that the needs of students with disabilities are met.

OCR found that the student's primary means of communication was sign language with voice, and that she received instruction using sign language in the District's Deaf Communication Program. The complainant informed the principal that she and her daughter planned on attending a school play, and requested an American

Sign Language interpreter to assist her. The principal initially informed the parent that the district would provide the interpreter; however, two days prior to the play, the principal informed the parent that the district would not be providing an interpreter because the cost (approximately $375 to $550) would exceed the door proceeds of the Drama Club. The principal indicated that the complainant and her daughter could have front row seats and that the district would provide a copy of the playbill prior to the performance. The complainant and her daughter did not attend the play.

OCR determined that the student was a qualified individual with a disability, and that the district had an obligation to provide her with reasonable accommodations that would enable her to participate in, or receive the benefits of, the district's programs, including the play. OCR also determined that the accommodations offered by the district (front row seats and a copy of the playbill) was not "as effective as" the requested accommodation. This was because the acoustics were poor in the auditorium, and background noises could affect the effectiveness of the student's hearing aids; the playbill that was provided was above the student's reading level, and the playbill was provided on the day of the performance.

Finally, OCR also determined that the cost of the interpreter would not impose an undue burden on the District. OCR noted that the cost to provide the interpreter would exceed the anticipated revenue from the play; however, when comparing the cost of the interpreter to the District's overall budget, providing the interpreter did not create an undue burden. Following the investigation, the District agreed to implement a resolution agreement, whereby it offered training to its staff, and provided the student with admission to two performances at a local theater.

> *Key Point: This case illustrates the temporal extension of the school day. The obligation to provide reasonable accommodations extends to all district activities, regardless of whether they occur during typical school hours.*

2. The IDEA

The IDEA buttresses the concept that a school is obligated to ensure that students with disabilities have an equal opportunity to participate in non-academic and extracurricular activities along with their non-disabled peers. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) requires that an IEP include:

> a statement of the special education and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or, on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child . . . (bb) . . . to participate in extracurricular and other non-academic activities; and (cc) to be educated and participate with other

children with disabilities and nondisabled children in the activities described in this paragraph.

See also 34 C.F.R. § 300.107(a) (public agencies must "take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities").

Under the IDEA, nonacademic and extracurricular services and activities include:

- Counseling services;
- Athletics;
- Transportation;
- Health services;
- Recreational activities;
- Special interest groups or clubs sponsored by the public agency;
- Referrals to agencies that provide assistance to individuals with disabilities; and
- Employment of students, including both employment by the public agency and assistance in making outside employment available.

34 CFR § 300.107; Ed 1102.02(o).

In the case of Socorro Independent School District 36 IDELR 180 (TX State Educational Agency (SEA) 2002), a hearing officer ordered the school district to permit a 16 year old student with multiple disabilities to participate in softball games in his position as team manager, over the objections of the varsity coach. The student's IEP provided for his involvement in extracurricular activities in order to afford social interaction.

Practice Pointer: The implication of this decision is that if an IEP calls for participation in non-academic services and extracurricular activities, that participation may become a part of FAPE and can only be terminated in accord with the procedures governing IEP amendment.

A contrary result was found in a case where the district scheduled an algebra tutorial in conflict with a high school student's spring football practice. The hearing officer ruled that because the high school student's IEP did not include participation in football, the district had not violated the IDEA. See Lauderdale County Board of Education, 36 IDELR 178 (AL SEA 2002). Perhaps the result would have been similar to the Socorro decision if the student's IEP team had determined that participation in football was a necessary component of FAPE for the student and included that participation in the student's IEP. See also Amherst, Mont Vernon, and Souhegan (NH) Cooperative School Districts, 35 IDELR 167 (OCR 2001) (suspension from football

did not constitute a significant change in placement; the student's IEP mentioned football as an activity that might be beneficial for him, but OCR concluded that his participation in the sport could not be characterized as an IEP related service).

B. Participation in After School Programs

In Hayward (CA) Unified School District, 50 IDELR 289 (OCR 2008), parents complained that the district failed to provide their child with reasonable modifications that were necessary to afford him an equal opportunity to participate in a before and after-school program. The complainant's student attended kindergarten in the district; the student had been identified as having a disability for a speech/language disorder and had an IEP. The district operated two before and after school programs, the Latchkey program (Latchkey) and the Youth Enrichment Program (YEP). The programs were staffed by district employees and overseen by the district. Latchkey was funded by parents of children who attended the program and YEP was funded through a grant. The Latchkey program was not part of the student's IEP.

The Latchkey program was described in a brochure as a program operated by the district, providing a safe, after-school child care program "under the administration" of the district. The program handbook stated that suspension was a "rare" discipline method, but that "[g]roup care is not appropriate for all children. In the event the child cannot benefit from our program, we reserve the right to recommend the child leave the program." In addition, the enrollment form indicated that the program "reserve[d] the right to recommend that a child leave the program if it is determined that the Extended Day Program can not meet the needs of the child."

Shortly after the student began attending the Latchkey program, he "began to display aggressive and non-responsive behavior." In addition, "the [s]tudent would wander off, ignore instruction, and jump on other children." As a result, he required "a substantial amount of additional supervision" from staff. The teacher attempted to respond to the behavior through various accommodations, and she spoke with the student's kindergarten teacher and the parent. The parent informed the teacher that she was attempting to get a one-to-one aide for the student; the teacher believed that the student could remain in the program with a one-to-one aide.

On July 24, 2007, approximately one week after the student joined the program, he was dismissed for behavior related issues. Parents were told that the student was being dismissed from the Latchkey program because it did not meet the student's needs. On August 8, 2007, the parents received a letter, stating that the student's behavior was unsafe and that a meeting would be convened to discuss the student's reinstatement when the parent obtained a one-to-one aide for the student.

The district informed OCR that the student was dismissed for safety reasons, and that it did not provide one-to-one aides for before and after-school programs, unless they are required by a student's IEP. If it is not required by the IEP, parents must locate

and pay for an aide. OCR found that the district did not have policies or procedures pertaining to serving students with disabilities in its before and after-school programs, and that the parents were not given information about requesting accommodations or modifications.

OCR also determined that the Latchkey was a program of the district, rather than a program that received "significant assistance" from the district. This determination was based on the fact that the program occurred at the district, was staffed by district employees and overseen by district administrators, and the district held the program out as a program of the district. Thus, the district was responsible for ensuring that the program complied with Section 504. OCR determined that the district's policy of "not providing one-on-one aides in the before and after school programs, except when required by [a] student's IEP," violated Section 504. The decision was not based on an individualized determination as to whether the aide would fundamentally alter the nature of the program, or cause an undue burden for the district. Instead, it was based on the district's policy. The district entered into a voluntary resolution agreement, whereby it agreed to create policies and procedures to ensure that qualified students with disabilities who be provided with an equal opportunity to participate in the before and after school programs. The district also agreed to provide training to the program staff and volunteers.

Similarly, in Chattahoochee County (GA) School District, 6 ECLPR 26 (OCR 2008), OCR found that the district violated Section 504 by conditioning a student's participation in an after school program on the grandparent paying for a staff member. In that case, the student's grandmother alleged that the district had violated Section 504 by denying her grandson's request for admission to an after-school program. The grandmother alleged that the student was not admitted because the district lacked the staff necessary to accommodate the student's disability (cerebral palsy). OCR found that in September 2006 and March 2007, the grandmother tried to enroll the student in an after-school program that was located in a district building. The district informed her that the student could not attend because an additional staff person would be needed to assist the student, and the district could not afford to hire another person. The district told her that the student could attend the program if she paid for an extra staff person. Consequently, the student did not enroll in the program.

Until 2001, the program had been run by the county government; in 2001, the district assumed control, and the program moved to a district building. The program was financially self-supporting and it paid rent for use of the district space. The district's bookkeeping system was used to manage the program's funds, and the district and program shared two employees. The school board approved the hiring of the program staff and determined the fees that the program charged. In addition, the program was advertised as a program offered by the district. Thus, OCR determined that the program was a district program.

OCR found that the addition of a staff person would not have fundamentally altered the after-school program, and that the hourly salary (approximately $40-48 per day) did not create an undue financial burden. Thus, the district violated Section 504 by categorically excluding the student from the program because of his disability. As with the Hayward case, the district offered to enter into an agreement to resolve the complaint. The district agreed to allow the student to participate in the after school program, and to meet with the grandmother to determine what aides and related services the student needed to participate in the program. The district also agreed to develop a policy pertaining to the provision of related aids and services to qualified students at the after-school program, and to provide additional training to the program staff.

> *Practice Pointer: There is a difference between a program that is operated by a district, and a program that a district "substantially assists." Districts are responsible for Section 504 compliance for all of their "district operated programs."*

C. Non-District Programs/Substantial Assistance

Section 504 prohibits school districts from providing substantial assistance to entities that discriminate on the basis of disability. 34 C.F.R. § 104.4(b)(1)(v); see also Rose Tree Media (PA) School District, 40 IDELR 188 (OCR 2003) (District that provides substantial assistance to a private club must either ensure that the club complies with Section 504 and the ADA or sever its relationship with the club). OCR has recently issued several opinions involving non-district programs that receive "substantial assistance" from a school district.

In the first case, Puyallup (WA) School District No. 3, the parent filed a complaint with OCR, alleging that the district discriminated against a student by refusing to provide the student with accommodations during an after-school program. 49 IDELR 200 (OCR 2007). The parents enrolled the student in an after-school program operated by a religious organization and requested that the district provide the student, who was deaf, with an interpreter. The district refused to provide the interpreter because the after-school program was a non-district private program, run by several community groups. The parent then requested that the after-school program provide an interpreter; it attempted to locate a volunteer, but was unsuccessful. As a result, the student was not able to participate in the after-school program.

OCR found that the after-school program was not a district-operated program or activity. Nevertheless, the assistance that the district provided to the program was deemed to be "significant."

The district provided the groups with:

- Organization and coordination assistance;

- Publicity on its website;
- Free use of space in district facilities after regular school hours;
- Office space;
- Computer services;
- A small grant to assist with program implementation.

However, the district did not:

- Exercise control over the content of the program;
- Provide direct funding to the groups that operated the program;
- Control or provide the staff for the after-school program activities; or
- Determine what students attended the programs, or whether students participated in the programs.

Ultimately, OCR determined that the district was not aware that it was providing significant assistance to a program that discriminated on the basis of disability. OCR also found that the program had created a process whereby it would respond to requests for accommodations. Thus, Section 504 was not violated.

In Capistrano (CA) Unified School District, parents filed a complaint with OCR, alleging that the district violated Section 504 by providing significant assistance to an after-school program that discriminated against students with disabilities. 108 LRP 17704 (OCR 2007). The program was operated by the YMCA as an independent contractor under a five-year contract. However, the district allowed the YMCA to rent one of its facilities at less than the market rate and promoted the programs by distributing literature to parents one time per year and by providing a link to the YMCA website. The district did not provide the YMCA with any direct financial support, staff materials or oversight. However, OCR found that the district significantly assisted the YMCA's program by permitting it to use district facilities at a discounted rate and by promoting the YMCA program to parents. Therefore, the district was obligated to end its relationship with the YMCA or to ensure that the YMCA did not discriminate.

Practice Pointers:

- *Based on these opinions, it appears that OCR will find that a district has provided a private program with significant assistance when the district allows the organization to use its facilities without charge, or at a reduced rate, and when the district provides the program with publicity.*

- *It is important to remember that if your district provides substantial assistance to an organization, the district must ensure that the organization complies with Section 504 and the ADA; if the program refuses to comply with those statutes, then your district may be forced to sever ties with that organization.*

Another case was recently resolved without a full-blown OCR investigation after the district agreed to take voluntary action. School Union 49 (ME), 51 IDELR 113 (OCR 2008). In that case, the parents alleged that the district discriminated against their daughter on the basis of disability by denying or giving her limited access to the Lincoln Academy school building, because of icy sidewalk/pathway conditions leading from the parking lot to the school. At the outset, OCR noted that the Academy was not subject to its jurisdiction under Section 504 or the ADA because it did not receive federal funds and was not a public entity. However, the district was subject to the provisions of Section 504 and the ADA, and the district had placed the student at the private school and was paying for her tuition. Thus, the district had an obligation to ensure that it was not perpetuating discrimination against the student by providing a significant aid, benefit, or service to an entity that discriminates on the basis of disability.

With regard to snow removal, the parents alleged that the Academy removed the snow before school, but did not address snowfall that occurred during the day. As a result, student occasionally missed classes in two school buildings because she was unable to navigate her wheelchair through the snow. The district entered into an agreement with the Academy whereby the Academy agreed to construct a wheelchair ramp, and agreed to have members of its maintenance department clear the walkway so that the student could transition from class to class.

Practice Pointer: A private placement by a District may constitute "substantial assistance."

The case of Morris Board of Education, 48 IDELR 295 (NJ State Educational Agency Aug. 10, 2007) illustrates the application of principles of inclusion to after-school and extracurricular programs. In that case, a 9-year old autistic student, was enrolled in the Sunset Program, a three-hour after-school program. The Sunset Program was not part of the student's IEP, nor was it tailored to students with disabilities; thus, students with disabilities were required to have an aide. At the parents' request, the District provided the student with an aide, but only for one hour. Parents funded the remaining two hours, and requested due process, arguing that the District denied FAPE and violated Section 504 by failing to provide the aide for the full three hour period; parents requested reimbursement for the monies spent on the aide for two hours per day.

The Hearing Officer found that the student's IEP provided her with appropriate inclusionary programs that allowed the student to interact with her non-disabled peers. Thus, the District was not required to provide the student with opportunities for inclusion in after-school hours, and there was no denial of FAPE. However, the District did violate Section 504 because it failed to provide "meaningful and equal access" to the after-school program. Thus, the District should have provided the student with a full-time aide, which she required in order to access the after-school program. The District was ordered to reimburse the parents for the costs associated with providing the aide during the after-school program.

III. Transportation

A. How Do I Get There? An Overview of the Laws and Regulations Pertaining to Transportation

1. Statutory Requirements

Districts are required to provide transportation to all pupils in grades 1 through 8 who live more than 2 miles from the school to which they are assigned. RSA 189:6. Districts may provide transportation to kindergarten pupils, pupils in grades 8 through 12, or to pupils residing less than 2 miles from the school to which they are assigned, when providing transportation "is appropriate," or when the district has been "directed" to furnish transportation by the Commissioner of Education. RSA 189:6. Pupils attending approved private schools are entitled to the same transportation privileges within the town or district as are provided for pupils in public schools. RSA 189:9. In addition, Districts may provide transportation to pupils "between schools and legally-operated before-and after-school programs." RSA 189:6-b.

Transportation is a related service under the IDEA. 20 U.S.C. 1401(26)(A); 34 C.F.R. 300.34(a); RSA 186-C:2(V)(a)(1); Ed 1102.04(q). Therefore, in addition to the State transportation laws, districts must provide transportation to students with disabilities when their IEP teams determine that transportation is necessary to enable them to receive a free, appropriate public education [FAPE]. See 34 C.F.R. 300.34(a); IEP Teams are responsible for determine whether transportation is a necessary related services, and whether supports and/or modifications are needed in order for a child to be transported. Fed. Reg. Vol. 71, No. 156 (Aug. 14, 2006).

When a Team determines that a student requires transportation as a related service, the duty to transport includes: travel to and from school and between schools, travel in and around school buildings and specialized equipment (adapted buses, lifts, and ramps). 34 C.F.R. § 300.34(16).

Districts also have a transportation duty under Section 504. 34 CFR 104.33(c)(2). When a district places a qualified student with a disability out-of-district, or refers such student for aid, benefits, or services not operated or provided by the district, then the district must ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his/her parents or guardian if the person were placed in the aid, benefits, or services operated by the district. However, when a parent declines FAPE, and instead opts to place a student privately, districts are generally not obligated to provide transportation under Section 504. See Hinds County (MS) School District, 20 IDELR 1175 (OCR 1993).

2. The Regulatory Requirements

The recent amendments to the New Hampshire Rules for the Education of Children with Disabilities alter the requirements pertaining to transporting students with disabilities. See Ed 1109.02. The requirements of Ed 1109.02 will apply whenever a child is transported to or from school or a school activity by someone, other than his or her parent, who is under contract or a reimbursement agreement with the District. Ed 1109.02(d) (emphasis added). Parents who are transporting their own children are not required to meet the standards of Ed 1109.02(a) – (b). Ed 1109.02(c).

Pursuant to Ed 1109.02, "[a]ll vehicles[1] used to transport children with disabilities provided by or on behalf of a school district shall be maintained in safe working order and be inspected and licensed according to the New Hampshire Department of Safety Rules as provided in Saf-C 1307[2] and RSA 266:7.[3]" Ed 1109.02(a). In addition, "[a]ll drivers of such vehicles shall be licensed according to department of safety rules." Ed 1109.02(b).

These requirements apply to "[a]ny contracted providers of transportation for children with disabilities." Ed 1109.02(d) (emphasis added). However, "[e]ach person who transports children other than their own in a private passenger vehicle to or from school or a school related activity shall not be required to obtain a school bus driver's certificate pursuant to RSA 263:29[4] and these rules, as long as he/she is not under

[1] A vehicle is a "mechanical device in, upon or by which any person or property is or may be transported or drawn upon a way, excepting devises used exclusively upon stationary rails or tracks." RSA 259:122.

[2] Saf-C 1307 contains rules pertaining to school bus vehicle maintenance and inspection. A school bus is "a vehicle owned by a public or governmental agency, or a privately owned vehicle, including a station wagon, suburban, panel body vehicle and vehicle converted to a school bus, but excluding a passenger vehicle, employed solely in transporting school children to and from school or school activities by virtue of a contract with a municipality, municipal board or school board authorities." RSA 259:96; see also Saf-C 1302.14 (defining school bus by reference to RSA 259:96).

[3] Pursuant to RSA 266:7, "[t]he director [of the division of motor vehicles of the department of safety] shall have authority, through his duly authorized agents, to inspect any motor vehicle used for the purpose of transporting school children to any school to determine its fitness for such purpose, and if he finds that such vehicle is unfit, he may refuse to permit it to be designated as a school bus. Said inspection shall be made before any motor vehicle transporting school children to any school is used for said transportation. The director shall cause to be issued some identification if such vehicle is approved as a school bus." (Emphasis added).

[4] RSA 263:29 states:

> The owner of any school bus transporting children to and from any private or public school . . . shall submit to the authorities in the town or city or to the organization which pays for said transportation a list of names of the persons who are to drive the buses used in such transportation. . . . No person shall drive a school bus unless he has satisfactorily passed the special examination for said driving and received from the division a special school bus driver's certificate. . . .

contract or reimbursement agreement with a municipality." Ed 1109.02(e) (emphasis added); see also Saf-C 1304.05(b) (Individuals who transport children in a private passenger vehicle to or from school or a school related activity are not required to obtain a school bus driver's certificate, provided that they are not under contract or reimbursement agreement with a municipality).

Thus, pursuant to Ed 1109.02, the transportation rules apply to the following individuals:

- Contracted providers of transportation for children with disabilities;
- Individuals who transport children in a private passenger vehicle to or from school, who are under contract with a municipality; and,
- Individuals who transport children in a private passenger vehicle to or from school related activities, who are under a reimbursement agreement with a municipality.

When the transportation regulations apply, districts must ensure that all drivers obtain a school bus driver's certificate pursuant to RSA 263:29, and that the vehicles used to transport the children are inspected and licensed in accord with Saf-C 1307 and RSA 266:7.

Private schools and non-district programs must "provide all transportation required for the implementation of any IEP, or portion of any IEP, which the program has agreed to implement."[5] Ed 1114.06(c). When private schools and non-district programs provide transportation, they must comply with Ed 1109.02. Ed 1114.06(d).

B. Transportation Duties

1. Case Studies

a. After-School Activities

The laws and regulations pertaining to transportation in a school bus apply when transporting students to and from school or school activities. See e.g. RSA 259:96; Ed 1109.02(e); Saf-C 1304.05(b). A school activity is "an event or sports activity involving pupils, to include intramural events, sponsored or approved by a school, school district, school board or school administrative unit." Saf-C 1302.17. When off-site extracurricular, transition or community activities are part of an IEP, they would very

[5] It is worth noting that the definition of "services plan," includes "any transportation necessary consistent with 34 CFR 300.132." Ed 1102.05(e). Thus, in some cases, the duty to transport may turn on the contents of a services plan.

likely be considered "school activities," and the transportation laws and regulations would apply.

In the case of Bethpage (NY) Union Free School District, 16 IDELR 1086 (OCR 1990), a parent complained that a district discriminated against her son by failing to provide late bus transportation that would enable him to participate in after-school activities at his out-of-district placement. The student had been placed by the district in a private, out-of-district placement. Parent requested that the district provide late bus transportation to the student so that he could participate in the services offered at the out-of-district placement. The district denied that request, and the parent filed a complaint with the Office for Civil Rights ("OCR").

OCR found that the district had a policy that it would provide after-school late bus transportation to students who participated in extracurricular activities at public and/or private schools, if at least 5 students requested transportation. However, the policy did not apply because less than 5 students were requesting transportation. In addition, participation in after-school activities was not a component of the student's IEP. Nevertheless, OCR determined that the district's failure to provide the student with late bus transportation violated Section 504 by denying him an equal opportunity to participate in extracurricular services and activities.

Similarly, in the case of Board of Education of the Roslyn Union Free School District, 27 IDELR 1113 (NY SEA 1998), the State Educational Agency reversed a decision of a hearing officer, and held that a district was obligated to provide transportation from his out-of-district placement to an after-school program, and from the after-school program to his home. The SEA found that the district offers late bus services to students who attend its after-school programs. The SEA also found that the student had been placed by the district, and that the out-of-district placement could not be used to deny the student transportation services that he would have received had he been attending the district schools.

> *Key Point: These cases illustrate that districts cannot place a student out-of-district, and then deny the student the opportunity to participate in after-school activities by refusing to provide late-bus transportation, which was offered to other students attending district schools.*

Finally, in the recent case of Department of Education, State of Hawaii, 46 IDELR 266 (HI SEA 2006), the parents requested due process, alleging that their child's IEP did not offer a FAPE because it did not include appropriate transportation to and from after school programming. The Hearing Officer found that the district had provided transportation to the student, but that the student's team met on September 26, 2005, and rejected the yellow school bus as a method of transportation because it was not age appropriate for the 17-year old student. However, following that meeting, the student's transportation plan was not altered. Thus, the student was denied a FAPE.

The Hearing Officer ordered that the team convene to determine an appropriate mode of transportation, that was age appropriate and that individualized sites to address the issues in the student's behavior plan.

In the case of Orange Grove (TX) Independent School District, 25 IDELR 991 (OCR 1996), OCR concluded that the district was not obligated to provide evening transportation to a student with a disability. Parents filed a complaint with OCR, alleging that the district violated section 504 by failing to provide evening bus transportation to her son on two days a week, when he attended school sponsored tutoring services related to his disability. OCR found that the student received tutoring during the school day, and not after school. Thus, there was no educational basis for the parents' request for evening transportation, and the district did not violate Section 504.

b. Transportation During the Summer Months

Transportation obligations do not end at the end of the school year. In the case of Walnut Valley Unified School District, 22 IDELR 1169 (Ca SEA 1995), the district placed a student at a day treatment program for mental health services. The program was scheduled for six months, commencing on May 15, 1995. The district agreed to provide transportation to and from the program during the regular school year, but informed the parents that it would not transport during the summer months. The parents requested due process, and the hearing officer found that the district was required to provide transportation. This decision was based on the fact that the student required the program, and that she was not able to participate in the program unless she received transportation from the district. Thus, the district was obligated to provide transportation to and from the program.

c. Transportation to Locations Other than Home

In the case of Fick v. Sioux Falls Sch. Dist., 39 IDELR 151, 337 F.3d 968 (8th Cir. 2003), the court held that the district did not have a duty to transport a student to a day care center, because transportation to that location was not necessary for the student to benefit from her IEP. In that case, parent requested transportation to a day care center (rather than the child's home), and the district refused, indicating that the requested location did not comply with its transportation policies. The parent renewed the request at an IEP meeting; that request was again denied, and ultimately, the matter went to due process.

Pursuant to its policies, the district had created "geographical 'cluster sites'" which allowed children residing within the cluster sites to be with the same neighborhood peer group as they moved through school. The district used those cluster sites to establish transportation policies for all children who were eligible for transportation to/from school. Students were allowed on designated pick-up site before school and one drop-off site after school. The addresses did not have to be the same,

but they had to be within the child's cluster site. However, if required by the child's IEP, the district will transport a child outside of the cluster site.

In this case, the day care center was located outside of the child's cluster site, and the request to change the drop-off location was made for personal, rather than educational, reasons. Thus, the court held that the district did not deny the student a FAPE by refusing to transport the student to a location outside of her cluster site.

> *Key Point: Districts may apply facially neutral policies, including transportation policies to children with disabilities, without violating the law, if the reason for the request to deviate from a policy is not based on the child's educational needs. It is likely that the outcome of this case would have been different if the parents' request was based on the student's educational needs.*

IV. Extended Year Programming

A. The Legal Framework

1. The IDEA

The IDEA defines extended school year ("ESY") services as "special education and related services that –

(1) Are provided to a child with a disability –

(i) Beyond the normal school year of the public agency;
(ii) In accordance with the child's IEP; and
(iii) At no cost to the parents of the child; and,

(2) Meet the standards of the SEA. 34 CFR § 300.106(b).

For several years, the IDEA has required that Districts provide ESY services to students with disabilities "if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324 [IEPs], that the services are necessary for the provision of FAPE to the child." 34 CFR § 300.106(a)(2).

In addition, districts are prohibited from limiting ESY services to particular categories of disability and unilaterally limiting the type, amount, or duration of ESY services. 34 CFR § 300.106(a)(3).

2. State Law

Until recently, New Hampshire law had required that Districts provide students with ESY services when it could "be demonstrated by a preponderance of the evidence,

in accordance with rules adopted by the state board of education, that interruption of the program of an educationally disabled child would result in severe and substantial harm and regression and would have the effect of negating the benefits of such educationally disabled child's regular special education program." RSA 186-C:15 (amended by HB 766).

However, as of January 1, 2009, RSA 186-C:15 was amended, and it now states, in part:

> The length of the school year and school day for a child with a disability shall be the same as that provided by the local school district for a child without a disability of the same age or grade, except that the local school district shall provide an approved program for an extended period when the child's individualized education program team determines that such services are necessary to provide the child with a free appropriate public education.

See also Ed 1110.01(a) (requiring compliance with 34 CFR 300.106). The regulations also state that ESY services shall not be limited to summer months or "to predetermined program design." Ed 1110.01(b); see also Fed. Reg. Vol. 71, 46582 (Aug. 14, 2006) (noting that the regulations do not "limit a public agency from providing ESY services to a child with a disability during times other than the summer, such as before and after regular school hours or during school vacations, if the IEP Team determines that the child requires ESY services during those time periods in order to receive FAPE. The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child").

The regulations do not contain a date certain by which ESY determinations must be made, however, the NH DOE has opined that the "determination should be made early enough to ensure that the parents can meaningfully exercise their due process rights if they wish to challenge an ESY decision." Bureau of Special Education FY'08 Memo #44 (May 30, 2008).

a. Personnel and Supervision Requirements

ESY services that are **"**provided in non-special education or district programs," must "be supervised, on site, by appropriately certified LEA personnel no less than once per week." Ed 1110.01(c) (emphasis added).

The Office of Special Education Programs recently opined that the personnel providing ESY services meet the same requirements that apply to personnel providing the same types of services during the regular school program. Letter to Copenhaver, 50 IDELR 16 (OSEP Nov. 7, 2007). Thus, special education teachers employed during the summer months must satisfy the HQT requirements in the No Child Left Behind Act,

and related service providers and paraprofessionals must meet the state's qualifications.

B. The ESY Determination

Despite the amendment to the state law, the regression/recoupment standard will likely continue to play a role in determining whether a student requires ESY services in order to receive a FAPE. The United States Department of Education ("US DOE") has opined that:

> The concepts of 'recoupment' and 'likelihood of regression or retention' have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents. . . . 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 and establishing State standards for making ESY determinations. However, whatever standard a State uses must be consistent with the individually-oriented requirements of the Act and may not limit eligibility for ESY services to children with a particular disability category or be applied in a manner that denies children with disabilities who require ESY services in order to receive FAPE access to necessary ESY services.

Fed. Reg. Vol. 71, 46582-46583 (Aug. 14, 2006). In other words, the US DOE recognizes that the regression/recoupment standard has played a role in ESY determinations, and will likely continue to play a role in ESY determinations. This is acceptable, provided that the ultimate determination be based on whether a child will receive a FAPE.

Similarly, the NH DOE has opined that the following factors may be considered when determining whether a child requires ESY services:

- **Regression/recoupment**: whether there is a likelihood of substantial regression of critical life skills caused by a school break and a failure to recover those lost skills in a reasonable time following the school break (e.g., six to eight weeks after summer break). [The IEP team may decide that regression is a key factor, alone or in concert with other factors, in determining eligibility for ESY services. However, it is important to note that the IEP Team <u>is not required</u> to demonstrate previous regression, before ESY services are provided.]

- **Degrees of progress**: the IEP Team reviews the student's progress toward the IEP's goals on critical life skills and determines whether, without these services, the student's degree or rate of

progress toward those goals, objectives or benchmarks will prevent the student from receiving benefit for his/her educational placement during the regular school year.

- **Emerging skills/breakthrough opportunities**: The team reviews all IEP goals targeting critical life skills to determine whether any of these skills are at a breakthrough point. When critical life skills are at this point, the IEP team needs to determine whether the interruption in services and instruction on these goals, objectives or benchmarks by the school break is likely to prevent the student from receiving benefit from his/her educational program during the regular school year without these services.

- **Interfering behaviors**: The Team determines whether, without ESY services, any interfering behavior(s) such as ritualistic, aggressive or self-injurious behavior(s) targeted by IEP goals have prevented the student from receiving benefit from his/her educational program during the school year. The team also determines whether the interruption of programming which addresses the interfering behavior(s) is likely to prevent the student from receiving benefit from his/her educational programming during the next school year.

- **The nature and/or severity of the disability**: The Team determines whether, without ESY services, the nature and/or severity of the student's disability is likely to prevent the student from receiving benefit from his/her educational program during the regular school year.

- **Other factors**: The IEP Team determines whether, without ESY services, there are any special circumstances that will prevent the student from receiving benefit from his/her education program during the regular school year. Other factors include:

    - The ability of the child to interact with children without disabilities; and

    - Areas of the child's curriculum which need continuous attention.

Bureau of Special Education FY'08 Memo #44 (May 30, 2008) (underlining in original, bold added).

C. Case Studies

There are numerous cases pertaining to the provision of ESY services. The following cases are a sampling of some of the more recent decisions.

In Savannah (MO) School District, 50 IDELR 262 (OCR 2007), the parents filed a complaint with OCR, alleging that the district discriminated against their child by failing to consider whether he required any accommodations in order to participate in a general education summer program ESY. OCR found that the student's IEP team determined that the student did not qualify for ESY services for the summer of 2007. Although the district was not required to implement the student's IEP during the summer months, it was obligated to consider whether he needed any program modifications in order to ensure that he had an equal opportunity to participate in summer school. OCR found that this failure violated Section 504. The District agreed to enter into a resolution agreement, whereby it developed policies and procedures pertaining to its summer programming, and specifically addressed attendance by students who did not qualify for ESY services. The District also agreed to provide training to its employees.

> *Key Point: There is no provision in Section 504 requiring that Districts provide ESY services. However, as this case illustrates, Section 504's equal opportunity requirement will apply, regardless of whether a student qualifies for ESY services under the IDEA.*

In the case of Barrington School District, 4 ECLPR 653, IDPH-FY-05-05-079 (NH SEA July 25, 2005) the parents requested due process, alleging that the district should have provided. The student, a six year old, was identified as eligible to receive special education services as a result of a developmental delay. The student's team determined believed that she would not regress over vacation, and that she would be able to retain what she had learned over the school year; thus, the student was not eligible for ESY. The hearing officer noted that the parents bore the burden of establishing that ESY services were necessary in order to provide the student with a FAPE. Hearing Officer Morrison concluded that ESY services were not necessary for the provision of FAPE to the child, noting that there was no evidence that the student experienced regression in learning, and that "without proof of regression or an expert opinion stating that regression will likely occur, a hearing officer is not at liberty to extrapolate that difficulty with transitions and the need for consistency and structure means that the student will experience severe regression over summer vacation." (citing Cordrey v. Euckert, 917 F.2d 1460, 1472 (6th Cir. 1990)). The Hearing Officer concluded that the student had benefited from special education and that there was no evidence that she would lose that benefit without ESY.

> *Key Point: At the time this decision was issued, RSA 186-C:15 contained the regression/recoupment standard for ESY. However, this decision does not reference RSA 186-C:15, but instead references the IDEA's FAPE-based ESY standard. Thus, it is likely that hearing officers will continue to utilize the*

regression/recoupment standard when deciding ESY cases. This is consistent with the law throughout the country.

In the case of Lower Merion School District, 41 IDELR 194 (Pa SEA 2004), the parents requested ESY, arguing that the district's ESY program was inappropriate. The parents wanted the student to attend the summer camp that he had attended during previous summers. However, the district proposed ESY in the district, providing for inclusion with nondisabled peers with pull-out services in reading, math, OT, PT, VT, and trials for assistive technology. In addition, the district offered a 1:1 aide.

The Hearing Officer found, and the SEA affirmed, that the district's proposed ESY offer was reasonably calculated to provide the student with meaningful benefit; in other words, that the ESY program would have provided a FAPE. The program was aligned with the student's IEP, including an inclusion component, which addressed the least restrictive environment requirement.

V. Conclusion

As a general rule, the end of a student's school day will be determined by his or her IEP. When an IEP incorporates participation in extra-curricular activities, then the "school day" for that child will end when the program concludes. To avoid confusion and disputes, districts should ensure that IEPs and Section 504 plans clearly indicate which services are required in order for a student to receive a FAPE, and when those services will be provided.

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