

**VIRGINIA DEPARTMENT OF EDUCATION
TECHNICAL ASSISTANCE RESOURCE DOCUMENT**

**EXTENDED SCHOOL YEAR
SERVICES**

**Implementing the Requirements of the
Individuals with Disabilities Education Improvement Act, 2004
and Federal Regulations, 2006**



© 2007 Commonwealth of Virginia Department of Education

The Virginia Department of Education does not discriminate on the basis of race, color, national origin, sex, age, or disability in employment or provisions of service.



COMMONWEALTH OF VIRGINIA
Department of Education
Division of Special Education and Student Services
Office of Dispute Resolution & Administrative Services
Office of Special Education Instructional Services

EXTENDED SCHOOL YEAR SERVICES

Technical Assistance Resource Document
Revised December 2007

This document was developed for the purpose of providing technical assistance to parents, school personnel, and other consumers on Extended School Year Services (ESY). Part I of this document summarizes various case law decisions and reviews applicable federal law and regulations. Part II recommends instructional practices to guide Individualized Education Program (IEP) teams in determining the individual student's need for ESY services. We suggest that you read Part I first, as it provides the necessary context for understanding the purpose and intent of the recommendations regarding instructional practice. This technical assistance document is a summary that is not regulatory in nature, but rather, is intended to provide guidance for addressing the regulatory requirements and instructional elements for ESY if those services are needed for a student's free appropriate public education (FAPE). This information may be provided to parents and used as a basis for ongoing personnel development in school divisions and state operated programs.

Contact Information

For matters related to the regulations, please contact the Office of Dispute Resolution and Administrative Services, 804-225-2013.

For matters related to instruction, please contact the Office of Special Education Instructional Services, 804-225-2932.

Toll free voice: 800-422-2083

Toll free TDD: 800-422-1098

Web site information: www.doe.virginia.gov/VDOE/sess/ see Resources.

ACKNOWLEDGEMENTS

The Virginia Department of Education wishes to acknowledge the following persons who responded as reviewers of this document. We appreciate their efforts in assisting us produce a document that will serve as a resource for parents and service providers.

- Virginia Department of Education staff members in the Division of Special Education and Student Services
- The Virginia State Special Education Advisory Committee
- JustChildren, Legal Aid Justice Center, Charlottesville, Virginia
- Krysia Carmel Nelson, Esquire, Consultant, Virginia
- Art Cernosia, Esquire, Consultant, Vermont

TABLE OF CONTENTS

PART I: INTRODUCTION	3
What Are Extended School Year Services?	3
What Are Not Extended School Year Services?	5
PART II: LEGAL OVERVIEW	6
Historical Perspective on Extended School Year Services	6
What Guidance Is Provided by Recent Case Law?	8
What Have We Learned from These Cases?	10
What Do the IDEA and Federal and State Regulations Say about Extended School Year Services?	11
What Do These Regulatory Requirements Mean?	12
PART III: INSTRUCTIONAL PRACTICE GUIDANCE	14
What Procedures Should the IEP Team Follow?	14
What Factors Should the IEP Team Consider?	15
What Discussion Questions Should the IEP Team Consider in Reviewing the Factor of Regression and Recoupment?	16
What Can Extended School Year Services Look Like?	18
What Other Factors Should the IEP Team Consider?	19
Terminology Associated with Extended School Year	20
Conclusion	22

PART I: INTRODUCTION

WHAT ARE EXTENDED SCHOOL YEAR SERVICES?

- A free appropriate public education (FAPE), for some students with disabilities, may require a program of special education and related services in excess of the normal school year.**

The Individuals with Disabilities Education Improvement Act of 2004 (P.L. 108-446) (IDEA 2004) provides that all students with disabilities are entitled to FAPE. To have meaningful access to public education, students with disabilities may require services or types of educational programs that are different from those needed by other students since each student with a disability has unique learning needs. Congress has not provided us with an exact definition of FAPE. Courts, however, have enunciated general principles for determining whether a particular educational program provides FAPE to a student in his or her specific circumstances. In general, courts have determined that, in order to receive FAPE, a student must receive an individualized education program (IEP) that provides the student with some educational benefit. This document will examine the concept of FAPE as it specifically relates to extended school year services (ESY).

- In general, ESY refers to special education and/or related services provided beyond the normal school year of a school division for the purpose of providing FAPE to a student with a disability.**

These services, provided by a local education agency,¹ are distinct from enrichment programs, summer school programs, and compensatory services and are not simply an extension of time. The consideration of ESY services is a part of the IEP process. Historically, some have focused on ESY services primarily as a means to address regression and recoupment issues. Recent case law developments in Virginia, however, have shown that ESY should be viewed more generally as a means to address the issue of FAPE. In other words, the focus of an IEP team should be on whether the student will receive FAPE if ESY services are not provided, and not merely on whether the student is entitled to ESY. The concept of regression may enter into the equation because unrecouped regression, over time, may be evidence that FAPE is not being provided. However, the standard articulated in controlling legal precedent in Virginia is broader. The IEP team must determine whether the benefits the child gained during the regular school year will be **significantly jeopardized** if the student does not receive ESY. Based on this analysis, if ESY is determined to be required, these services, at no cost to

¹ “Local educational agency” means a local school division governed by a local school board, a state-operated program that is funded and administered by the Commonwealth of Virginia, or the Virginia School for the Deaf and the Blind at Staunton and the Virginia School for the Deaf, Blind and Multi-Disabled at Hampton.

the parent, will vary in type, intensity, location, inclusion of related services, and length of time, depending on the individual needs of the student.

- ☐ **The IEP must address the provision of ESY services, if required, in order for the student to receive FAPE.**

The IEP, in accordance with the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* (Virginia Regulations), must have a statement of the projected dates for initiation of services and the anticipated duration of the services. Thus, any IEP that complies with this requirement already has a built-in mechanism to address the duration of services, whether for the length of the school year or some longer or shorter time.

- ☐ **ESY is not a separate planning process since it is part of the IEP process.**

Thus, an IEP meeting must be held to consider if a student needs ESY services and must be conducted like any other IEP meeting with appropriate prior notice. Treating ESY as a separate planning process may lead to the segmentation of services for the student and may also lead to situations where ESY services are considered or open to discussion for some students, but not for all. Therefore, a separate IEP should not be developed for ESY services; the current or an amended IEP should be used. However, we note that the time of the year when the annual IEP meeting is held may affect whether the team has enough information to make a determination as to whether ESY services are necessary. If the meeting is held early in the school year, it may be necessary for the team in its consideration of ESY services to decide to reconvene at a later date when more information is available. We note, however, that this decision should not be made so late in the school year as to jeopardize a parent's right to effectively pursue due process and/or mediation as a means to resolve disputes regarding ESY services.

- ☐ **Factors to be considered when determining the need for ESY services:**

- ✓ regression/recoupment
- ✓ degrees of progress
- ✓ emerging skills/breakthrough opportunities
- ✓ interfering behaviors
- ✓ the nature and/or severity of the disability
- ✓ special circumstances or other factors

An examination of these factors, which are described later in this document, should lead the IEP team to answer the basic question articulated by the courts: will the benefits a disabled child gains during the regular school year be **significantly jeopardized** if the

child is not provided with the ESY program? If the answer is “yes,” then the child must receive ESY services in order to receive FAPE.

WHAT ARE NOT EXTENDED SCHOOL YEAR SERVICES?

Because ESY services are uniquely designed to provide FAPE to students with disabilities, it is necessary to emphasize that **these services are:**

- **Not** based on the category of the student’s disability - services must be based on the student’s unique educational needs;
- **Not** mandated twelve-month services for all students with disabilities;
- **Not** a child care service;
- **Not** necessarily a continuation of the total IEP provided to a student with a disability during the regular school year;
- **Not** required to be provided all day, every day, or each day;
- **Not** an automatic program provision from year to year;
- **Not** summer school, compensatory services, or enrichment programs;
- **Not** required to be provided in a traditional classroom setting; and
- **Not** a service to be provided to maximize each student’s potential.



**Parent and School IEP Team Planning & Collaboration –
Essential to Ensure ESY Review**

PART II: LEGAL OVERVIEW

HISTORICAL PERSPECTIVE ON EXTENDED YEAR SERVICES²

Congress ensured ESY as a FAPE component.

Congress enacted the Education of All Handicapped Children's Act in 1975 to ensure that all children with disabilities receive FAPE. In 1991, with the passage of the Individuals with Disabilities Education Act (IDEA), Congress reiterated that central standard. Inherent in the provision of FAPE is the principle that education must be individualized to meet the unique needs of each child. Because each child's education is determined by an IEP team, specific criteria for the determination of the need for ESY were not prescribed by IDEA.

The early courts looked to regression and recoupment data to determine a student's need for ESY services.

Without meaningful legislative guidance, hearing officers and courts were forced to establish criteria, on a case by case basis, to be used to determine the need for ESY services in order to receive FAPE.

In the late 1970's and early 1980's, courts across the country attempted to clarify Congress' mandate. For example, some states initially had policies that limited services to 180 days per year. Several federal courts ruled that services must be individualized for each child, and therefore, could not be limited to 180 days.³ As a result of these rulings, it is now generally accepted that consideration must be given to the possible need for programs that extend beyond 180 school days per year or five and one half hours per day.

Closer to home, a federal court in Virginia held that to establish entitlement to year-round schooling, a student had to show an irreparable loss of progress during the summer. *Bales v. Clark*, 523 F. Supp. 1366 (E.D. VA. 1981). This ruling echoed that of a federal court in Ohio that entitlement to a summer school program did not turn on whether it was beneficial for the student, but whether it was necessary to prevent significant regression.

² The review of case law in Part II of this document highlights only the early court progression of judgment related to ESY services and its later refinement by the United States Court of Appeals for the Fourth Circuit. This review is meant to provide an overview rather than an exhaustive review of cases.

³ See *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979); *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), cert. denied, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1980); and *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983).

Rettig v. Kent City Public School District, 539 F. Supp. 768 (N.D. Ohio 1981), affirmed in part, vacated in part on other grounds, 720 F.2d 464 (6th Cir. 1983).⁴

□ **The 1990's saw a broadening of the criteria used to determine the need for ESY services.**

The practical limitations of the retrospective “regression and recoupment” standard necessarily led the courts to suggest additional criteria that school divisions and parents could consider prospectively. Courts around the country suggested consideration of such factors as: the nature of the student’s disability, the severity of the student’s disability and the areas of learning crucial to attaining the goal of self-sufficiency and independence from caretakers, the probability of future regression, the degree of the child’s impairment, the child’s physical and behavioral problems, the parents’ ability to provide education in the home, the availability of alternative resources, the child’s rate of progress, the child’s needs for interaction with nondisabled peers and vocational training, and whether the requested services are an integral part of a program for students with similar disabilities.⁵ Parents no longer had to wait until their child regressed to support their request for ESY services – they could seek a professional’s assessment that, based on the individualized needs of their child, ESY services were called for to prevent regression.

Some courts were called upon to distinguish ESY services from traditional summer program offerings, such as summer enrichment programs. In deference to these holdings, it is now generally accepted that summer enrichment programs do not qualify as extended school year services because these services are not individualized, are not IEP-based, and are not free of charge to parents. *See, Reusch v. Fountain*, 872 F.Supp. 1421 (D. Md. 1994).

A federal court in Richmond clarified that ESY services could include, or be limited to, “related” services such as speech therapy. In *Lawyer v. Chesterfield County*, 20 IDELR 173 (E.D. Va. 1993), the parents requested continuous speech and language services for their son with autism. The court found that, because communication was critical to the student’s behavior and to his future vocational needs, and because there was a small, but vital, window of opportunity in which the student could effectively learn, the student must have uninterrupted speech language therapy in order to receive FAPE.

⁴ For an additional federal court decision discussing a regression/recoupment standard, see *Alamo Heights Independent School District v. Texas Board of Education*, 709 F.2d 1153 (5th Cir.1986).

⁵ *See, e.g., Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990); *Lee v. Thompson*, 80-0418 (D. Hawaii 1983); *Johnson v. Independent Scholl District No. 4*, 921 F.2d 1022, 1027 (10th Cir. 1990).

WHAT GUIDANCE IS PROVIDED BY RECENT CASE LAW?

- **In Virginia, we are guided not only by the decisions of our state courts, but also by the decisions of federal district courts sitting in Virginia and decisions of the United States Court of Appeals for the Fourth Circuit (which sits in Richmond and in other locations within the Circuit).⁶**

In 2002 and 2003, the United States Court of Appeals for the Fourth Circuit issued three major decisions impacting ESY:

- *MM v. School District of Greenville County, South Carolina Board of Education*, 303 F.3d 523 (4th Cir. 2002) (*MM*)
- *DiBuo v. Board of Education of Worcester County (MD)*, 309 F.3d 184 (4th Cir. 2002) (*DiBuo*)
- *JH v. Henrico County School Board (VA)*, 326 F.3d 560 (4th Cir. 2003) (*JH*)

The *MM* case articulates the basic rules for jurisdictions in the Fourth Circuit as to when ESY services must be provided.

- **ESY services are only necessary to a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if the child is not provided with an educational program during the summer months.**

In *MM*, the parents contended that the school division had erred by failing to offer their daughter ESY services for the summer of 1997. In examining the issue, the court articulated the standard for determining the necessity for ESY for jurisdictions within the Fourth Circuit: ESY services are only necessary to a free appropriate public education if the child's progress during the regular school year will be "significantly jeopardized" without the provision of an ESY program. In this case, the record reflected that there was conflicting evidence on the child's regression, and the Fourth Circuit upheld the U.S. District Court's finding that the parents had failed to demonstrate that the child's progress would be significantly jeopardized if he was not provided with services during the summer months.⁷

⁶ It is important to note that the standards articulated by a Virginia court or by the Fourth Circuit may not be applicable outside Virginia (or in the case of the Fourth Circuit, outside jurisdictions within the Fourth Circuit). Likewise, while court decisions in other jurisdictions may provide insight on ESY issues, they may not prove to be controlling in Virginia.

⁷ In due process hearing decisions, the question of extended school day (ESD) services has been addressed. Although few in number, there have been several cases wherein ESD programming provided additional hours of instruction during school breaks, after-school, and Saturdays. The key in each case is the child's

JH shows further application of this standard set forth in *MM*. In *JH*, the parents brought a due process proceeding regarding the appropriateness of ESY services offered to their son by the school division. The Virginia hearing officer had ruled in favor of the parents granting ESY, holding that the purpose of ESY services is to enable the child to make “reasonable progress” on unmet goals, rather than simply “maintaining” the progress already made, as contended by the school division. As a result, the hearing officer ordered that additional ESY services be provided. The hearing officer, however, rejected the parents’ claim that the object of ESY was to allow the child to “master” goals.

The federal district court agreed with the standard articulated by the hearing officer, but found that the services proposed by the county were adequate. The Fourth Circuit noted that, after the appeal in the case had been filed, the Court had issued its decision in *MM*. It noted that the goal of ESY as articulated by the hearing officer and the federal district court, making reasonable progress on unmastered skills, was a higher goal than preventing the skills and benefits the child has already gained from the regular school year from being **significantly jeopardized**.⁸ As a result, the case was remanded for the hearing officer to consider the matter in light of the standard articulated in *MM*.⁹

□ **Showing of actual regression is not required.**

In its *MM* decision, the court acknowledged that parents should not be compelled to watch their child regress in order to qualify for ESY services. The court emphasized that the child’s need for ESY services may be established by expert testimony. However, the mere fact of “likely regression” is not a sufficient basis for ESY services because all students, disabled or not, may regress to some extent during the lengthy breaks from school. “ESY services are required under IDEA only when such regression will *substantially* thwart the goal of ‘meaningful progress.’”¹⁰ [Emphasis added.]

educational needs were determined to be considerably significant that any disruption in the services would be detrimental to the student’s educational progress. See *Arkansas County Independent School District*, 22 IDELR 170 (SEA TX 1994); *Portland School Department*, 21 IDELR 1209 (SEA ME 1995).

⁸ A Colorado court also has recently applied the “significant jeopardy” standard. In *McQueen v. Colorado Springs School District No. 11*, 419 F. Supp. 2d 1303 (D. Colo. March 2006), the court upheld Colorado Department of Education Guidelines that limit ESY goals to those necessary to prevent skills or benefits already gained from facing significant jeopardy due to regression or lack of retention. It further held that policy did not prohibit teaching new skills if such were necessary for the ESY skills maintenance goal.

⁹ On remand, the hearing officer again ruled in favor of the parent and the school division appealed. The case eventually was appealed again to the 4th Circuit. The court once again remanded the case to the hearing officer because the burden of proof had been improperly placed on the school division. The case eventually was settled.

¹⁰ The court captured the term “meaningful progress” from a 1988 Third Circuit decision. *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 177, 184 (3rd Cir. 1988).

□ **“Appropriate deference” must be given to the professional educators.**

The Fourth Circuit in *MM* strongly emphasized the weight that should be given to the professional educators who work with the student on a daily or frequent basis. This is especially important when there is conflicting expert evidence between the parents’ experts and the professional educators.¹¹

This does not mean that the school division can summarily dismiss the independent evaluators presented by the parents at an IEP meeting when ESY is considered. This occurred in the *DiBuo* case, where the IEP team refused to review reports from the parents’ independent evaluators. The failure of the IEP team to *consider* the parents’ independent evaluations created an IDEA procedural violation for the school division. The court noted that procedural violations may compromise the student’s FAPE entitlement to ESY services, and remanded the case for consideration of the issue.

WHAT HAVE WE LEARNED FROM THESE CASES?

What began in the 1970's as a disagreement over whether school divisions must consider a school year of more than 180 days for those students who need additional services in order to receive educational benefit, has become an acknowledgment that school divisions must consider ESY services for all students with disabilities and provide individualized ESY services to students who need them. Additionally, based upon applicable precedent in Virginia, regression/recoupment is no longer the only criterion to be used in determining the need for or denial of such services, although certainly the issue of regression/recoupment can be directly related to whether the gains a student has made will be significantly jeopardized. The individual facts and circumstances should be viewed in light of the question of whether the ESY services are necessary to prevent the benefits a child has received during the regular school year from being significantly jeopardized.

¹¹ This is highlighted in the second appeal to the Fourth Circuit of the *JH* case. In remanding the case to the hearing officer, the court provided the following guidance: “First, in crediting the testimony of any witness, the Hearing Officer must explain why it chose to do so over conflicting testimony by another witness. In this regard, the Hearing Officer should be especially concerned with explaining why he may choose to credit the testimony of one of the Plaintiffs’ expert witnesses over SLP Smith or OT Stone, whose professional opinions as local educators regarding the adequacy of the Summer 2001 IEP are entitled to deference, *MM*, 303 F.3d at 532-33. Additionally, if the Hearing Officer chooses to credit the testimony of any witness who did not actually observe JH in the school setting, the Hearing Officer needs to expressly acknowledge such fact and explain why he chose to credit that witness’s testimony anyway. The same goes for the crediting of any expert reports.” *JH v. Henrico County School Board*, 395 F.3d 185 (4th Cir. 2005). In other words, the Hearing Officer was not prohibited from crediting the parent’s experts, but needed to articulate why the parents’ experts should be credited over the school division personnel.

**WHAT DO THE IDEA AND FEDERAL AND STATE REGULATIONS
SAY ABOUT EXTENDED SCHOOL YEAR SERVICES?**

Since the issuance of the decisions in *MM*, *JH*, and *DiBuo*, the applicable federal statutes and regulations have been amended. These provisions, as well as the applicable Virginia regulations must be examined in order to understand whether the standards set forth in these cases remain unaltered.

☐ **Individuals with Disabilities Education Improvement Act of 2004
(IDEA 2004)**

The IDEA 2004 reauthorized the IDEA of 1997 and provided as follows with regard to ESY:

IDEA 2004, 20 U.S.C. §§ 1401(d)(1)(A) and 1412(a)(1)

§ 1401(d)(1)(A) “The purposes of this title are to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”

§ 1412(a)(1) “A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3¹² and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”

☐ **Federal Regulations Implementing IDEA 2004, effective October 13, 2006**

New federal regulations implementing IDEA 2004 became effective on October 13, 2006, and addressed ESY as follows:

34 C.F.R. § 300.106

(a) General

- (1) Each school division must ensure that extended school year services are available as necessary to provide FAPE.
- (2) Extended school year services 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.
- (3) In implementing the requirements of this section, a school division may not –

¹² According to the Virginia Regulations, FAPE begins at two years of age. 8 VAC 20-80-60 A.1.

- (i) Limit extended school year services to particular categories of disability; or
- (ii) Unilaterally limit the type, amount, or duration of those services.

(b) *Definition.* The term extended school year services means special education and related services that:

- (1) Are provided to a child with a disability –
 - (i) Beyond the normal school year of the school division;
 - (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 State Educational Agency.

The Virginia Regulations

Finally, the Virginia Regulations have addressed ESY as follows:

8 VAC 20-80-60 I, Extended school year services

- 1. Each school division shall ensure that extended school year services are available as necessary to provide a free appropriate public education.
- 2. Extended school year services must be provided only if a child’s IEP team determines on an individual basis that the services are necessary for the provision of a free appropriate education to the child.
- 3. A local school division may not:
 - (a) Limit extended school year services to particular categories of disability; or
 - (b) Unilaterally limit the type, amount, or duration of those services.

WHAT DO THESE REGULATORY REQUIREMENTS MEAN?

The language of the 2006 Federal Regulations pertaining to ESY, as set out above, did not change from the prior version of the regulations implementing IDEA 1997. In fact, the United States Department of Education (USDOE), in commentary accompanying its publication of regulations implementing IDEA 2004, effective on October 13, 2006,

declined to provide further guidance on the content of ESY services. In response to a comment suggesting that the proposed regulations include language providing that “recoupment and retention” should not be the sole criteria in determining eligibility for ESY, USDOE declined, explaining that:

“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 [IDEA 2004] 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 services.” 71 Fed. Reg. 46582 – 46583 (August 14, 2006).

Since there has not been any significant change in the statutory and regulatory provisions pertaining to ESY after the relevant cases were decided, it is safe to say that the case law that has developed on this subject is still relevant. The inquiry in Virginia remains whether or not the progress the student has made during the regular school year will be significantly jeopardized if extended school year services are not provided.¹³

With the Fourth Circuit Court’s direction and the above guidance from USDOE, the Virginia Department of Education offers the following section of recommended instructional practices to guide IEP teams in determining the individual student’s need for ESY services.



From legal theory to implementation...



¹³ It also should be noted that USDOE’s Office of Special Education Programs (OSEP) has addressed the matter of costs associated with ESY. FAPE means that parents do not bear the cost of the special education and related services. Because ESY is considered a FAPE component, it would follow that there are no costs requirements for ESY. However, OSEP noted in 2002 that the “no cost” requirement does not “preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.” *Letter to Sims*, 38 IDELR 69, OSEP 2002.

PART III INSTRUCTIONAL PRACTICE GUIDANCE

Determining the need for ESY services must be presented in the context of the IEP process and completed at an IEP meeting. The IEP team should consider the need for these services initially and at least annually, but the consideration for ESY services should be an integral part of any IEP meeting. In addition, the parent, the student, the student's teacher(s), related service providers, or administrators may request an IEP team meeting for this purpose.

WHAT PROCEDURES SHOULD THE IEP TEAM FOLLOW

As we have seen in the previous Parts I and II, the regulations, OSEP guidance, and case law support the fact that any procedures used by a local school division to assist the IEP team in collaboratively determining¹⁴ the need for ESY services:

- must prohibit the postponement of the decision by the IEP team regarding ESY services until after the summer in order to gather data or to determine what would happen if the services were not provided;
- should allow the decision by the IEP team regarding ESY services to be made early enough to ensure that the parents can meaningfully exercise their due process rights if they wish to challenge an ESY decision¹⁵;
- must ensure that the individual needs of the student are addressed and that the nature of the services provided will vary based upon those needs;
- must not unilaterally limit the ESY services to a set number of days, hours of service, nor restrict the provision of ESY services for administrative convenience;
- must not allow the availability of ESY services to be limited by the financial resources of the school division;

¹⁴ Although neither the IDEA 2004 nor the regulations specify how collaborative decision-making must be conducted, the process in coming to a consensus regarding ESY issues should include a sharing of views with discussion of questions, areas of disagreement and alternatives.

¹⁵ Note that federal courts in Minnesota have rejected the contention that the ESY determination should be made by a particular date. See *Reinholdson v. Independent School District No. 11*, 106 LRP 4496 (8th Cir. 2006) unpublished decision; *Pachl v. School Board of Independent School District No. 11*, 105 LRP 8100 (D. Minn., 2005). Although the Pachl case stated that there was no specific timeline for deciding ESY services, the federal district court in *Reusch v. Fountain*, cited earlier, said that it was not permissible to hold ESY meetings so late in the school year that the child with a disability would not be able to exercise due process rights.

- must not allow the denial of ESY services to those students who need the services in order to receive FAPE; and
- must not limit ESY services to predetermined disability categories nor categorically exclude certain students with disabilities.

WHAT FACTORS SHOULD THE IEP TEAM CONSIDER?

When determining the need for ESY services by the IEP team, decisions should always occur retrospectively or prospectively based upon the unique needs of the student. Decisions are made to ensure that the student is provided FAPE. Thus, the decision is based upon data and discussions by the IEP team and not determined solely by any formula, including a regression/recoupment formula. Factors that the IEP team should consider in making its decision are listed below. Any of these factors, alone or in combination, can trigger the need for ESY if they indicate that the benefits the student has received during the regular school year will be significantly jeopardized.

- **Regression/Recoupment** - The IEP team determines whether without these services, 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. It is noted that some regression in skills typically occurs with all students during school breaks, but such losses would not be considered substantial.
- **Degree 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 (or objectives or benchmarks, if required) will significantly jeopardize the student's receipt of benefit for his/her educational placement during the regular school year.
- **Emerging Skills/ Breakthrough Opportunities** - The IEP 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 those goals (or objectives or benchmarks, if required) by the school break is likely to significantly jeopardize the student's receipt of benefit from his/her educational program during the regular school year without these services.
- **Interfering Behaviors** - The IEP 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 significantly jeopardize the student's receipt of benefit from his/her educational programming during the next school year without ESY services.

- **Nature and Severity of the Disability** - The IEP team determines whether, without ESY services, the nature and severity of the student's disability are likely to significantly jeopardize the student's receipt of benefit from his/her educational program during the regular school year.
- **Special Circumstances or Other Factors** - The IEP team determines whether, without ESY services, there are any special circumstances that will significantly jeopardize the student's receipt of benefit from his/her education program during the regular school year. Other factors cited in cases include:
 - ability of the child's parents to provide the educational structure at home;
 - ability of the child to interact with children without disabilities; and
 - areas of the child's curriculum, which need continuous attention.

WHAT DISCUSSION QUESTIONS SHOULD THE IEP TEAM CONSIDER IN REVIEWING THE FACTOR OF REGRESSION AND RECOUPMENT?

- Does the student need extensive review to demonstrate previously learned skills?
- What inconsistencies does the student demonstrate in mastered or partially acquired skills?
- Has the student reached a critical point of instruction or behavior management where a break in programming would have serious, detrimental effects?
- Does the student demonstrate behaviors or deficits that would cause regression if breaks in programming occur?
- Is there a degenerative medical condition that might cause regression?
- Will a break in programming jeopardize the student's placement in the least restrictive environment (LRE)?

It is important to note that the IEP team is not required to demonstrate previous student regression before ESY services are provided. If no empirical data are available on regression, then the need may be shown by expert opinion or prospective criteria established by the IEP team. This decision should be based upon an examination that includes, but is not limited to, the following:

- review of the current IEP goals (or objectives or benchmarks, if required);
- observation and data from teachers, therapists, parents, and others having direct contact with the student before and during breaks in educational programming;
- data and observations regarding the student's performance after long weekends, vacations, and past summer breaks;
- assessment or information maintained on the student, including pretest and post-test data; and
- curriculum-based assessment, including pretest and post-test data; and other relevant factors.

ESY services should not be granted solely on the basis of the student's failure to achieve one or more of the IEP's goals (or objectives or benchmarks, if required).

The determination of what services are necessary must be based on those services needed in order for the student to receive FAPE. Thus, the IEP team must also review and consider the need for any related services including transportation. If related services are necessary for the student to benefit from the special education services provided during the ESY, then they must be provided.

When the IEP team is determining whether a student needs ESY services, they may use the following types of information:

- historical data;
- review of current and previous IEPs;
- documented regression and recoupment time;
- documented clinical evidence;
- classroom observation;
- progress notes;
- standardized tests;
- samples of the student's work;
- behavior logs;
- parent interviews;
- attendance information;
- other objective evidence; and
- expert opinions.

WHAT CAN ESY SERVICES LOOK LIKE?

The requirement regarding placement in the least restrictive environment (LRE) during the normal school year applies to ESY services. The placement should be based on the IEP. If a proposed ESY placement might further isolate the student, the IEP team should consider whether an alternative is more appropriate for the student. However, the IEP team may determine, in some cases, that a more restrictive setting is necessary to provide FAPE. In determining the ESY services, the IEP team can consider flexibility in the delivery of services if the flexibility fulfills the needs of the student. While the school division must consider LRE, it is not required to create artificial LRE settings during the ESY to meet the LRE requirement.

Qualified personnel¹⁶ must provide ESY services. Additionally, it is recommended that the staff persons who provide ESY services submit a report regarding the student's progress to the student's teacher(s) for the coming school year. As best practice, progress could also be indicated on the student's IEP.

Examples include:

- the teacher and parent working together (materials could be sent home with progress periodically monitored by the teacher);
- learning packages with staff monitoring;
- home-based programs;
- grouping students with similar goals;
- school-based programs;
- cooperative programs with other agencies;
- multi-system shared programs;
- contractual arrangements with service providers or agencies;
- community-based programs; and
- vocational settings.

¹⁶ "Qualified personnel" means personnel who have met Virginia Department of Education approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individual is providing special education or related services. In addition, the professional must meet other state agency requirements for such professional service and Virginia licensure requirements as designated by Virginia law or regulations. 8 VAC 20-80-10.

The IEP team reviewing potential ESY services should document all LRE options considered.

Transportation must be offered in order for the student to benefit from special education and related services. **If the student's IEP includes ESY services, then the school division is responsible for ensuring that the student is transported to and from the services.** The IEP team determines if the student requires specialized transportation.

WHAT OTHER FACTORS SHOULD THE IEP TEAM CONSIDER?

At an IEP meeting, at least annually, there should be a determination if a student with a disability needs ESY services in order to receive FAPE. The IEP team should consider all factors in its discussion. All decisions and the basis for the decisions should be documented and communicated to the parent (and student, if appropriate).

Remember the critical question: Will the benefits a disabled child gains during the regular school year be significantly jeopardized if the child does not receive ESY?

IF YES:

- Identify the specific goals (or objective or benchmark, if required) from the current IEP, since all goals may not be affected;
- Determine the type, amount and duration of the special education and/or related services required based upon the goals identified (the amount, type and duration may differ for each identified service if more than one service is required). Do not forget to address any needed related services including transportation. **Decisions regarding services must be based upon the student's need and not on existing programs;**
- Determine the LRE in which the specific goal will be addressed;¹⁷
- Determine participation with peers without disabilities; and
- Determine the person(s) responsible for providing services (i.e., special education teacher, speech/language pathologist, physical therapist, etc.).

¹⁷Schools are not required to establish summer programs for nondisabled students for the sole purpose of satisfying the LRE requirements for students receiving ESY. See *Letter to Boschwitz*, 213 IDELR 215 (EHLR 213:215) (OSERS 1988).

IF NO:

- Provide the parents with written notice as required in state and federal regulations.

Some parents may decide not to have their child participate in ESY services. School personnel should document any refusal of parents regarding ESY services for their child and should have a parent signature indicating the refusal to consent. In this case, a school division may consider requesting mediation or initiating a due process hearing to resolve the dispute in order to ensure that the student's entitlement to FAPE is not compromised. 8 VAC 20-80-76 B.2.

TERMINOLOGY ASSOCIATED WITH ESY

Critical Life Skills:

A critical life skill includes any skill determined by the IEP team to be critical to the student's overall educational progress, including social and behavior skills. In determining critical life skills for the specific needs of the student, the school division may consider those skills that lead to independent living, including toileting, feeding, communicating, dressing, and other self-help skills. In some cases, the school division may consider and address academic and behavioral issues. Depending on factors, such as a student's age, ability, and the number of years the student has left in school, the areas of reading, math, and written language could be considered critical life skills.

Degree of Progress:

The IEP team must review the expected degree of progress on any IEP goals and objectives targeting critical life skills, and determine whether, without ESY services, the student's degree of progress on those IEP goals and objectives significantly jeopardize the student's receipt of educational benefit from his/her educational program during the regular school year.

Emerging Skills/Breakthrough Opportunities:

The IEP team determines whether any IEP goals and objectives targeting critical life skills are at a breakthrough point. At this point, the IEP team determines whether the interruption of instruction on the critical life skills caused by the school break would significantly jeopardize the student's receipt of educational benefit from his/her educational program during the regular school year without ESY services.

Extended School Year Services:

ESY services mean an individualized extension of specific special education and/or related services beyond the regular school year provided in order for the student to receive FAPE in accordance with his/her IEP.

Interfering Behaviors:

The IEP team determines whether any interfering behaviors, such as stereotypic, ritualistic, aggressive, or self-injurious behavior(s), targeted by the IEP's goals and objectives would substantially jeopardize the student's receipt of benefit from his or her educational program during the regular school year. The IEP team also determines whether the interruption of programming for this (these) interfering behavior(s) would significantly jeopardize the student's receipt of benefit from his or her educational program without ESY services.

Regression/Recoupment:

The IEP team determines whether, without ESY services, there is a likelihood of substantial regression of critical life skills caused by the school break that would result in the failure to recover those lost skills in a reasonable time following the school break.

Regression:

Regression, for the purpose of this document, is a substantial loss of any critical life skill. Some degree of loss in skills typically occurs with all students during normal school breaks and would not be considered substantial.

Recoupment (Recovery):

Recoupment is the ability to recover a loss of skills in a reasonable time following a normal school break. Most students with disabilities recoup skills within a reasonable time following the school break. Reasonable recoupment rates vary among individuals based upon individual learning styles and rates. Accordingly, some students with disabilities may require more than six to eight weeks to recuperate.

Some benefit: A student who improves in meeting the IEP goals, as determined by the progress he or she makes toward the goal (or objective or benchmark, if required) in the IEP, has obtained some benefit. The determination of this progress can be shown by, for example, the number of successful trials.

Summer School: In contrast to ESY services, summer school programs are optional and voluntary programs that provide enrichment, remedial and reinforcement activities, or address new skills. Summer school is not required for the provision of FAPE. ESY services could be provided in combination with existing summer school programs if such programs are available and are appropriate for the individual student.

CONCLUSION

Any ESY services must be individualized to meet the student's unique needs at no cost to the parents or student. In developing an IEP for ESY services, the IEP team must consider providing services for students who have demonstrated or are likely to demonstrate significant jeopardy in skills and benefits already gained caused by extended school breaks. ESY services should assist the student progress toward the becoming an independent and successful adult.

Initial Distribution List:

VDOE Staff

VDOE Hearing Officers

VDOE Mediators

Local Special Education Administrators

State Operated Programs – Education Directors

SSEAC

Virginia Board for People with Disabilities, Early Intervention/Education Committee

T/TAC Directors

Parent Resource Centers

PEATC

Local Advisory Chairs