

Division of Special Education/Early Intervention Services Extended School Year Services

Three recent court decisions from the United States Fourth Circuit Court of Appeals (hereafter referred to as the 4th Circuit) on extended school year services, requires the Maryland State Department of Education to revise this technical assistance bulletin to reflect those court decisions. Decisions of the 4th Circuit are applicable to Maryland. For the first time the 4th Circuit has decided three cases that address the standard by which Individualized Education Program (IEP) teams are to determine whether a student requires extended school year (ESY) services to receive a free appropriate public education (FAPE). These cases [*JH v. Henrico County School Board (Va)* 326 F.3d 560, 103 LRP 16750 (4th Circuit 2003); *DiBuo v. Board of Education of Worcester Co. (Md)*, 309 F.3d 184, 37 IDELR 271 (4th Cir. 2002), and *MM v. School District of Greenville Co. (S.C.)* 303 F3d 523, 37 IDELR 183 (4th Cir. 2002)] articulate a formal standard for determining when ESY services are appropriate under the Individuals with Disabilities Education Act (IDEA).

In *MM v. School District of Greenville Co*, the 4th Circuit emphasized that under this standard, "the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school." In *DiBuo v. Board of Education of Worcester Co*, the 4th Circuit referred back to *MM v. School District of Greenville Co*, stating that the 4th Circuit articulated for the first time a formal standard for determining when ESY services are appropriate under the IDEA as being, "ESY services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months."

Most recently, on April 21, 2003, the 4th Circuit issued a decision in *JH v. Henrico County School Board (Va)* 326 F.3d 560, 103 LRP 16750 (4th Circuit 2003) which reiterates the standard articulated by *MM v. School District of Greenville Co*. In reviewing the decision of the administrative law judge and the District Court of Virginia, the 4th Circuit stated, "the goal of a disabled child making reasonable progress during the summer months on unmastered skills is obviously a higher goal than simply preventing the skills and benefits the same child has already gained from the regular school year from being significantly jeopardized."

Specifically, 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 he is not provided with an educational program during the summer months. While the Court did not limit the factors to be reviewed, it requires each of the factors to be independently reviewed to determine the impact on the student's ability to receive educational benefit from the program. In the consideration of the need for extended school year services, this standard must be individually applied for each student. The Individualized Education Program (IEP) team is to document the consideration of factors and the outcome of those considerations in determining whether or not the benefits and gains made during the regular school year will be significantly jeopardized if the student is not provided extended school year services.

[*JH v. Henrico County School Board (Va)* 326 F.3d 560, 103 LRP 16750 (4th Circuit 2003); *DiBuo v. Board of Education of Worcester Co. (Md)*, 309 F.3d 184, 37 IDELR 271 (4th Cir. 2002), and *MM v. School District of Greenville Co. (S.C.)* 303 F3d 523, 37 IDELR 183 (4th Cir. 2002)]

1. What are extended school year (ESY) services?

Extended school year (ESY) means an individualized extension of specific services beyond the regular school year that is designed to meet specific goals included in a student's individualized education program (IEP). ESY services will vary in intensity, location, inclusion of related services, and length of time, depending upon the student's needs. ESY services are provided at no cost to the parents as part of a free appropriate public education (FAPE) in accordance with the IEP, for students exhibiting the need for special education, related services, or both, beyond the regular school year.

[34 CFR §300.309; COMAR 13A.05.01.03B(23)].

2. How would I know whether a student needs ESY services?

To receive a FAPE, some students may require services beyond the regular school year. A FAPE must be reasonably calculated to confer some educational benefit to a student with a disability. The individualized determinations about each student's need for ESY services are made through the IEP process in accordance with 34 CFR §§ 300.340-300.350 and COMAR 13A.05.01.07-.09.

[34 CFR §300.309; *MM v. School District of Greenville County*, 37 IDELR 183 (4th Cir. 2002); Education Article §8-405; COMAR 13A.05.01.03B(23); 13A.05.01.08B(2); 13A.05.01.09A]

3. Who decides whether or not a student receives ESY services?

The IEP team, including the parent(s), determines whether ESY services are necessary for the provision of a FAPE.

[34 CFR §300.309; Education Article §8-405; COMAR 13A.05.01.03B(23); 13A.05.01.08B(2); 13A.05.01.09A]

4. When does the IEP team determine whether or not a student needs ESY services?

At least annually, the IEP team shall determine whether the student requires ESY services. This determination should be made early enough in the school year to allow the parent sufficient time to exercise their procedural safeguard rights if they disagree with the proposal made by the local school system. However, it should not be made so early as to not have sufficient information in order to make an informed decision.

[34 CFR §300.309; Education Article §8-405; COMAR 13A.05.01.03B(23); COMAR 13A.05.01.08B(2)]

5. If a child turns three towards the end of the school year and the local Infants and Toddlers Program provides speech therapy in the summer, past the child's third birthday, must this be considered ESY?

Yes. Since an IEP must be in effect on the child's third birthday, the IEP team must consider whether or not the child is in need of ESY services at the time the initial IEP is developed. Any special education or related service provided after the child's third birthday must be in accordance with an IEP. If a service is to be provided after one school year ends and before the next one begins, eligibility for ESY must be documented.

[34 CFR §300.309; Education Article §8-405; COMAR 13A.05.01.03B(23); COMAR 13A.05.01.08B(2); 13A.05.01.09B]

6. How does an IEP team determine whether or not a student is eligible for ESY?

The determination as to whether a student needs ESY services to receive a FAPE must be made by the student's IEP team. In reviewing a student's IEP, the IEP team needs to consider the IEP content, the progress reports sent to the parents, existing IEP data,

information from parents, teachers, related service providers, and others, as appropriate. The IEP team needs to consider the following questions:

- Is there a likelihood of substantial regression of critical life skills caused by the normal school break and a failure to recover those skills within a reasonable time?
- What is the student's degree of progress toward mastery of the IEP goals related to critical life skills?
- Is there the presence of emerging skills or breakthrough opportunities?
- Are there any interfering behaviors?
- What is the nature and severity of the student's disability?
- Are there any special circumstances to be considered?

After consideration of the factors applicable for the student with a disability, the IEP team must decide whether or not the benefits a student receives from his or her educational program during the regular school year will be significantly jeopardized if the student is not provided ESY. None of these factors in isolation, or in some combination, necessarily entitles a student to ESY services. Rather the regulations mandate the IEP team to consider if any of the factors will prevent a student from receiving some benefit from the student's educational program during the regular school year, if the student does not receive extended school year services. The IEP team shall document its considerations and decisions within the summary of the IEP team review, based upon consideration of the student's unique needs and consistent with the procedures for IEP team meetings in 34 CFR §§300.340-300.350. Decisions made regarding ESY services requires the same content of notice required in accordance with 34 CFR §300.503 and COMAR 13A.05.01.12B

For children transitioning to preschool services at age three, the process for considering ESY for the child's initial IEP is the same. Although the year-round nature of early intervention services may preclude opportunities to determine whether or not regression might occur, transition outcomes on a child's Individualized Family Service Plan (IFSP) should address how the presence of other factors might be documented for the IEP team to consider when a child turns three.

[34 CFR §300.309; Education Article §8-405; *JH v. Henrico County Sch. Bd.*, 103 LRP 16750 (4th Cir. 2003); *DiBuo v. Board of Education of Worcester Co. (Md)*, 309 F.3d 184, 37 IDELR 271 (4th Cir. 2002) and *MM v. School District of Greenville Co. (S.C.)* 303 F3d 523, 37 IDELR 183 (4th Cir. 2002); COMAR 13A.05.01.03B(23); COMAR 13A.05.01.08B(2); 13A.05.01.09B]

7. May a school system limit the type of service, or amount of service offered as ESY?

No. It is essential that public agencies not limit eligibility for ESY services to children in particular disability categories, or unilaterally limit the type, amount or duration of those services. These issues are key to ensuring that each student with a disability who requires ESY services receives the necessary services to receive a FAPE.

Because ESY services are uniquely designed to meet the individual needs of a student with a disability, it is necessary to emphasize that extended school year services are:

- **Not** a mandated twelve (12) month services for all students with disabilities;
- **Not** a child care service;
- **Not** necessarily a continuation of the total IEP provided during the regular school year;
- **Not** intended to teach new skills, or to increase progress on instructional objectives;
- **Not** required to be provided all day, every day, or each day during the normal school break;
- **Not** an automatic program provision from year to year;
- **Not** a service limited to or available by only broad categories of disabilities; or
- **Not** a service to be provided to maximize each student's potential.

[34 CFR §300.309; Education Article §8-405; COMAR 13A.05.01.03B(23); COMAR 13A.05.01.08B(2); 13A.05.01.09B]

8. What is the relationship between general education summer school and ESY?

ESY is an individualized extension of specific services beyond the regular school year. These services are designed to meet specific goals included in a student's IEP if the benefits a student receives from his or her educational program during the regular school year will be significantly jeopardized if the student is not provided ESY. In contrast to ESY, summer school programs are optional and voluntary programs which provide enrichment or reinforcement activities. The provision of summer school is not ESY. Summer school is not required for a FAPE. Extended school year services can be provided in combination with existing summer school programs, if such programs are available.

With increased emphasis on student achievement as a result of the No Child Left Behind Act of 2001 (NCLB) an increasing number of students with disabilities may need to attend general education summer school. These services are not ESY. A student's need for ESY does not "disqualify" the student from summer school, and conversely, the provision of

summer school does not negate a student's possible need for ESY. A student may receive both services. If a student with a disability attends summer school, there may need to be the provision of accommodations and supplementary services to access the general curricular instruction of the summer program. General educators may be expected to deliver these services.

9. How and when are parents informed about the availability of ESY services?

Each public agency is required to ensure that parents of students with disabilities are notified of the availability of ESY services. Whatever method an agency chooses to provide notice to parents of the availability of ESY services, that notice must include information regarding the ESY decision making process. All procedural safeguards, including due process rights, are applicable to the provision of ESY services.

[34 CFR §300.309; Education Article §8-405; COMAR 13A.05.01.03B(23); COMAR 13A.05.01.08B(2); 13A.05.01.09B; 13A.05.01.11B]

10. What recourse is available to parents who disagree with the proposal made by an IEP team regarding their child's need for ESY services?

If a parent disagrees with the determinations and recommendations of the IEP team, the parent has the right to file for mediation or a due process hearing. Decisions need to be made early enough so that parents may exercise their right to a hearing and have a timely decision.

If a parent believes that there has been a violation of federal or State law, the parent may file a written complaint stating the alleged violation(s) to Dr. Carol Ann Baglin, Assistant State Superintendent, Division of Special Education/Early Intervention Services, 200 West Baltimore Street, Baltimore, Maryland 21201. A complaint should include a statement that the public agency has violated a provision of federal or State law and the facts upon which the statement is based. This would include any documentation supporting the allegation(s). Under the IDEA, if a written complaint is received that is also the subject of a due process hearing the State must set aside any part of the complaint that is being addressed in the due process hearing.

[34 CFR §§300.13; 300.309; 300.500-300.516; 300.660-662; COMAR 13A.05.01.11-.15]

11. May a parent waive ESY services for their child?

Yes. If parents refuse to make their child available for the ESY services determined by the IEP team to be necessary to ensure their child receives a FAPE, the public agency is not required to pursue formal mediation or due process to establish its right to provide ESY services.

Public agencies must have procedures in place to demonstrate that they made ESY available, the parents declined to take advantage of the services, and the public agency will continue to make a FAPE available. It is suggested that public agencies practices include the following provisions:

- Convene an IEP team meeting prior to the end of the school year in a timely manner to determine a student's need for ESY;
- Determine the need for ESY on an individual basis;
- Ensure ESY services are not limited to a particular category of disability, or unilaterally limited in the type, amount, duration of those services;
- Ensure ESY decisions are made in accordance with 34 CFR §§300.340 – 300.350;
- Notify the local school superintendent, pursuant to Education Article §7-302, when a student is not participating in ESY services because the parents declined to take advantage of the services;
- Provide the parent with written notice in accordance with 34 CFR §300.503 of the IEP team proposal that documents the need for ESY to ensure the student receives a FAPE;
- Continue to work with the parent to identify a range of strategies and scheduling options for the delivery of the services; and
- Convene the IEP team soon after the start of the school year to review the student's IEP and determine whether or not the IEP needs to be revised because the student was not available for ESY services.

[34 CFR §300.309; Education Article §8-405; COMAR 13A.05.01.03B(23); COMAR 13A.05.01.08B(2); 13A.05.01.09B; Advice of Counsel November 29, 2000].

12. What ESY services data is reported to MSDE?

Beginning with the 2003-2004 school year*, the child count will be collected annually on the last Friday in October. As part of the annual child count data, local school systems shall report whether or not students with disabilities received ESY services during the previous summer break. The local school systems shall document each student's status regarding ESY services as either:

1 = Yes, service was provided during Extended School Year.

2 = No, service was not provided during Extended School Year.

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* Prior to the 2003-2004 school year, the required child count has been collected annually on December 1.