



# Technical Assistance Bulletin

Division of Early Intervention and Special Education Services | Bulletin #23-02

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Date: April 2023

## Extended School Year Services

### Purpose

The purpose of this technical assistance bulletin is to support Individualized Education Program (IEP) teams in understanding the purpose of, and determining eligibility for, extended school year services in Maryland. Extended school year (ESY) services are a component of a Free Appropriate Public Education (FAPE). Some students will need individualized services provided beyond the regular school calendar to enable them to maintain skills on specific goals and objectives and assist them in progressing on those goals within the IEP cycle. ESY services are necessary when the benefits a child with a disability gains during the regular school calendar will be significantly jeopardized if the child is not provided with an educational program during regular school breaks. All students who have IEPs must be considered for eligibility for ESY services in order to receive a FAPE. [34 CFR §300.106; COMAR 13A.05.01.09A(2)]

### Legal Framework

In Maryland, Local Education Agencies (LEAs) are bound by court decisions from the United States Fourth Circuit Court of Appeals (4<sup>th</sup> Circuit). The 4<sup>th</sup> Circuit has decided several cases regarding ESY that provide guidance when discussing eligibility, standards for ESY, and factors to consider when making the determination. In the case of MM v. School District of Greenville County, 303 F.3d 523, 538 (4<sup>th</sup> Cir. 2002), the Court articulated that “the mere fact of likely regression is not a sufficient basis [to receive ESY services] because all students, disabled or not, may regress to some extent during lengthy breaks from school.” In the case of DiBuo v. Board of Education of Worcester County, 309 F.3d 184, 190 (4<sup>th</sup> Cir. 2002), the 4<sup>th</sup> Circuit linked ESY services and FAPE, finding “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.” The 4<sup>th</sup> Circuit emphasized that ESY services are not provided to enable a student to make “additional progress on unmastered skills,” but to maintain those skills already learned during the regular school year so that when there is regression, the student’s progress is not jeopardized if it takes an extended timeframe to regain those same skills.

### Factors to Consider in Determining Eligibility for ESY

In the state of Maryland, IEP teams must consider many factors in determining whether a student requires ESY services in order to receive a FAPE. ESY is not determined based on disability category, program placement, or parent request. Decisions surrounding ESY are data-based decisions made annually. IEP teams must have

progress monitoring data on individual goals to make the decision. Teams also must have data reflecting student performance on goals and objectives before and after breaks from school. A student who has been eligible for ESY services one year may not be eligible the next year, or the opposite may be true. Eligibility changes annually based on data, student performance, and student need. [34 CFR §§300.106 and COMAR 13A.05.01.08]

The steps to determine eligibility include the following:

- Determine whether the student has annual goals related to critical life skills. A critical life skill is any skill determined by the IEP team to be critical to allowing the student to function independently. This can be related to communication, academics, self-care, social/emotional, motor, mobility, behavioral, or other areas addressed by IEP goals and objectives. [COMAR 13A.05.01.03B(15)]
- Based on data taken over breaks from the regular school calendar, determine whether there is a likely chance of substantial regression of critical life skills caused by that break and a failure to recover those skills in a reasonable timeframe. After reviewing data, if the consensus of the IEP team is that the student's progress on the annual goals related to the identified critical life skills will be, or has been, significantly impacted by breaks in the regular school calendar, the degree of regression and how long it has taken the student to regain the same skills, the team would consider checking yes for this question and would include the data as their basis for their decision. If the data review did not reflect regression, or if there was regression but the student was able to regain the skills within a reasonable timeframe, and the team does not feel ESY is required to provide a FAPE, they would check no for this question and provide the data that they used as a basis for their decision.
- Based on progress monitoring and reporting, teams must determine whether the student is demonstrating progress toward mastery of IEP goals related to critical life skills. Because the purpose of ESY is to maintain a level of progress on specific goals and objectives related to identified critical life skills, if a student is not making progress there is no progress to maintain. Accordingly, progress monitoring must reflect a degree of progress on the goals identified to be implemented during ESY services. *Note: If progress monitoring reflects that the student is not making adequate progress, the team must meet to determine if changes to the IEP are required.*
- Based on data, IEP teams determine whether there is a presence of emerging skills or breakthrough opportunities. Breakthrough opportunities can be in any area, any skill, that the IEP team has determined warrant the provision of ESY services that are required for a FAPE.
- The IEP team must consider whether there are significant interfering behaviors requiring ESY services. Some courts have held that significant self-injurious, stereotypic, ritualistic, and aggressive behaviors have interfered with a student's learning to the extent that their progress has been impeded and ESY services are required to enable the student to receive a FAPE and maintain their skills.
- The IEP team must discuss whether the nature and severity of the disability warrants the provision of ESY services. The IEP team determines whether, without ESY services, the nature and/or severity of the student's disability is likely to prevent the student from receiving some benefit from his/her educational program during the regular school year.
- The team must also consider whether there are other special circumstances that would necessitate the implementation of ESY services to provide the student with a FAPE. Some examples of special circumstances may include, but are not limited to, student who had unusual family circumstances, excessive absences due to prolonged illness or transience, student who had a late entry into school due to special circumstances.

After considering the data, including regression/recoupment and all the other factors, the IEP team must respond to the essential question: Will the benefits that the student receives from their educational program during the regular school year be significantly jeopardized if the student is not provided ESY? To respond to this

question, the IEP team must again review progress monitoring data for each goal, data taken before and after breaks from school, and discuss the data as an IEP team to determine whether ESY services will be a part of a FAPE for the student. If the response to this question is no, the student will not be eligible for ESY services. If the response is yes, the student will be eligible for ESY services, and the IEP team will identify the goals and services the student will need.

[COMAR 13A.05.01.08B(2)(c)]

## **Scenarios**

### **Scenario 1:**

*A student's annual review was held in March and the student was making sufficient progress on their goals in June when the school year ended. Over the summer the student had a significant amount of regression. It takes the student until December to regain skills at the same level they were able to achieve in June when school ended. The progress on those goals would be stalled because of the level of regression over the lengthy break and the limited timeframe before the next annual review. The student may be eligible for ESY if there were critical life skills, or other factors such as interfering behaviors, emerging or breakthrough skills, or other factors considered in the ESY decision making included on his IEP.*

*According to the 4<sup>th</sup> Circuit, the student would not, however, be using ESY to address new goals. ESY would be used to maintain existing skills so the student would continue to progress on the existing goals when school started again in September. [JH v. Henrico County School Board, 326 F.3d 560 (4<sup>th</sup> Cir. 2003).]*

### **Scenario 2:**

*A sixth grade student has never been eligible for ESY, despite having critical life skills on his IEP. His progress data has shown steady progress, reflecting no regression over long breaks from school. The student has met his annual goals each year. During the student's annual review in February, the team determined that the student was not eligible for ESY. However, in the beginning of April, the student began to independently use multimodal communication, using both his AT device and American Sign Language functionally. The IEP team reconvened and determined that this breakthrough skill was important to maintain over the long summer break from school. The student was recommended for ESY services for communication only.*

## **Using Data to Make Informed Decisions**

Decisions regarding ESY should be individualized and made based on all available data at the time. Decisions regarding eligibility for ESY may not be based on a specific disability category or placement. When determining a student's eligibility for ESY, it is important that the team look at student performance before and after breaks (winter or spring break, long weekends), as well as over time, to determine if a student is demonstrating regression or prolonged recoupment of skills. This can be done by looking at progress monitoring data over time to determine if there is data to support loss of skills during extended periods of time when the student does not attend school. When reviewing this data, it is important to consider the amount of lost skills as well as the time it takes the student to recover such skills, as it is normal for all students to lose some skills over long breaks.

It is important to note, however, that ESY services are provided to maintain, not advance skills. They are determined based on the current year's progress data. Student grades are not determinative of ESY as the focus is on maintaining skills included in the student's individualized goals and objectives, not on improved mastery of grade level curriculum or credit recovery.

## Best Practices for ESY Determinations

It is important that all members of the IEP team attend and participate in IEP meetings to determine ESY eligibility whenever possible, as students may require services for related services (occupational therapy, physical therapy, speech and language therapy) or other instructional services (hearing or vision services) during ESY. Additionally, it is important that parents are made aware of the purpose of ESY and understand the rationale for recommending or not recommending ESY for their child.

ESY determinations are required to be made annually, typically at the annual review IEP team meeting. However, at times it may not be possible to make a decision regarding ESY eligibility at the annual review meeting. In those cases, the IEP team can convene at a later date at a periodic review IEP team meeting to discuss eligibility for ESY.

When considering goals for ESY, the IEP team must consider current goals and identify those that the data supports meet the regression/recoupment standard, or other special considerations. Teams must identify specific objectives within the identified ESY goals that will be addressed during the timeframe the team has determined appropriate to meet the student's needs.

When considering accommodations for ESY, it is important that the team ensure that students will have access to all accommodations that they will require to access ESY services, regardless of location, for example, students who require the use of a communication device must be provided with that device during ESY if it is required to access their program or a student who requires a mobility device to support positioning must have access to it during ESY. All ESY service providers should receive training and instruction on how to use any assistive technology or specific accommodations so that they are able to effectively support the student during ESY.

Like all IEP team decisions, the amount, frequency, duration, and location of ESY services are individualized to meet the needs of each student. Services are based on the number and types of goals and objectives identified for ESY and the needs of the student. Additionally, least restrictive environment (LRE) factors must be considered as well as the student's transportation needs for all students receiving ESY services, even students receiving only single services during ESY, such as speech or occupational therapy.

## Questions and Answers

### 1. **When are decisions about ESY made?**

ESY decisions are made annually. Generally, IEP teams make ESY decisions during annual review meetings if the data are available. If the data are not available at the time of the annual review meeting, or if the team would like additional time to consider and collect additional data, the team may defer the decision. All ESY decisions must be made with sufficient time to allow a parent to exercise their procedural safeguards prior to the start of ESY services if they disagree with any decisions.

[See Reusch v. Fountain, 872 F.Supp. 1421 (D.MD. 1994).]

### 2. **Does a family have to accept ESY services if the IEP team determines the student is eligible?**

The IEP team is responsible for determining the services required for the provision of a FAPE. Accordingly, if the team determines the student requires ESY services to receive a FAPE, the team must complete the eligibility analysis and make the determination. The family may elect for their child not to participate. The team must document the family's decision in the Prior Written Notice from the meeting.

[34 CFR § 300.106(b)]

3. **May an LEA offer one type of ESY program for all students?**  
No. As with all decisions regarding the provision of a FAPE, the amount, duration, type, services, goals, and other aspects of ESY services are based on the individual needs of the student. ESY decisions may not be made based on “what the LEA offers,” availability of space, or administrative convenience.  
[34 CFR §§ 300.101, .320 and .324]
4. **Does the Least Restrictive Environment (LRE) provision apply to ESY services?**  
Yes, however, LEAs do not have to establish public programs for students without disabilities for the sole purpose of being able to implement LRE for ESY services. The IEP team must consider the full continuum of services and determine the most appropriate LRE for the student to receive ESY services and receive a FAPE. If the LEA does not have an appropriate LRE for the student, they must meet those needs through private programs or other methods if it is determined that the student must have services with nondisabled peers and the LEA does not have a program to meet that need. [ See Letter to Myers (1989)].
5. **Are transportation services provided during ESY?**  
Yes. If the student requires transportation as a related service to participate in the recommended ESY service, even if it is a single service on a single day, transportation services must be provided.
6. **If a student is only recommended to receive ESY services for 30 minutes each week during ESY, must the IEP team also recommend transportation services?**  
If the student is unable to access the service, even for 30 minutes each week, without the provision of transportation services, yes. The parent cannot be required to provide transportation services if the service has been determined as a necessary component of FAPE.
7. **Is ESY the same thing as summer school?**  
No. ESY services are specialized instruction and related services, as appropriate, that specifically target individualized goals that the IEP team has determined are necessary for the student to receive a FAPE. Summer school may provide curriculum content, credits, or extension activities for other purposes. ESY services can, however, be provided during summer school in a general education summer school classroom if that is what the IEP team has determined is appropriate for the student.
8. **Can an IEP team determine eligibility for ESY for a student if an initial IEP is being developed?**  
Yes. IEP teams must determine eligibility for ESY for every student with an IEP. Eligibility for ESY is a data driven decision and the determination is dependent on the data that is available for review. In addition, there are special factors that a student with an initial IEP may meet. It is always an individualized decision and part of the provision of a FAPE for that student.  
[COMAR 13A.05.01.08B(2)]
9. **What recourse is available to families who disagree with the ESY decisions made by an IEP team regarding their child’s need for ESY, the type or the amount of services recommended?**  
If a family disagrees with the determinations of the IPE team, or if they believe there has been a procedural violation of federal or State law, they have the right to access any of their procedural safeguards to resolve their dispute. Decisions must be made early enough for the family to exercise their right to a due process hearing and receive the decision prior to the start of ESY services.
10. **What are the differences between ESY services and compensatory services?**  
ESY services are intended to maintain the current skills a student has and prevent loss or regression of such skills, not to enhance the current skills or levels of a student. Compensatory services are provided when the district fails to provide a student with FAPE, such as when there are staffing shortages that make a district unable to provide services. Both types of services should be individualized based on individual student needs.

**11. Is ESY required to be provided during the summer?**

No, ESY can be provided at any time during the school year, to include being an extension of the student's school day. The ESY decision is an individualized decision and the determination about services is based on student need. While most LEAs provide ESY during the summer, the law does not require services to be provided during the summer.

**12. If a parent tells the IEP team that they do not need to discuss ESY because they do not want it, can the IEP team skip the discussion?**

No. The ESY determination is a part of the offer of FAPE and must be discussed and presented as a part of the student's IEP. If the parent elects not to have their child participate in ESY services, it is documented, but the IEP team must make the decision as to whether the student is eligible, identify the goals and objectives, and make services recommendations, as a part of FAPE.

**Legal References**

T.M. by A.M. v. Cornwall Central School District, 63 IDELR 31 (2d Cir. 2014).

JH v. Henrico County School Board, 326 F.3d 560 (4<sup>th</sup> Cir. 2003).

MM v. School District of Greenville County, 303 F3d 523 (4<sup>th</sup> Cir. 2002).

DiBuo v. Board of Education of Worcester County, 309 F.3d 523 (4<sup>th</sup> Cir. 2002).

Reusch v. Fountain, 872 F.Supp. 1421 (D.MD. 1994).

United States Department of Education: Office of Special Education Programs, Letter to Myers, 1989

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