

Extended-School-Year (ESY) Services

How VADOE's technical assistance document compares with the law.

Where & Why VADOE is **stretching** the law!

Preparing for your child's ESY IEP meeting.

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Source of VADOE guidelines:

Extended School Year Services Technical Assistance Resource Document

August 2000

VADOE guidelines: In general, extended school year (ESY) refers to special education and/or related services provided beyond the normal school year of a public agency for the purpose of providing FAPE [a free appropriate public education] to a student with a disability. These services are distinct from enrichment programs, summer school programs, and compensatory services and are not simply an extension of time. ESY services are not so much a regression and recoupment issue as they are an issue of FAPE. Unrecouped regression, over time, may be evidence that FAPE is not being provided. In other words, it is not the case that a student is entitled to extended school year services, but that the student will not receive FAPE if ESY services are not provided. These services, at no cost to 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 consideration of extended school year services is a part of the individualized education program (IEP) process.

Free Appropriate Public Education

The Act defines a “free appropriate public education to mean”

“special education and related services which (A) have been provided at public expense ... (B) ... (C) ..., *and (D) are provided in conformity with [an] individualized education program.* 20 U.S.C. § 1401(18).

...

The *modus operandi* of the Act is the already mentioned “individualized education program.” The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. § 1401(19).

[*emphasis added, emphasis in original*] *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 105 S.Ct. 1996 at 2001-02, 471 U.S. 359 at 367-68 (U.S.Mass. 1985).

In its most well-known landmark decision, the Supreme Court provided emphasis on the individual:

The statutory definition of “free appropriate public education,” in addition to requiring that States provide each child with specially designed instruction, expressly requires the provision of “such ... supportive services... as may be required to assist a handicapped child *to benefit* from special education.” § 1401(17) (*emphasis added*). We therefore conclude that the “basic floor of opportunity” provided by the act consists of access to specialized instruction and related services which are *individually designed* to provide educational benefit to the handicapped child.

[*emphasis added*] *Board of Education v. Rowley*, 102 S.Ct. 3034 at 3048, 458 U.S. 176 at 201 (U.S.N.Y. 1982)

Who should receive ESY??

As stated by a 5th circuit judge, “The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.” *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (C.A. 5 (Tex.) 1986). This sentiment was reiterated verbatim in *Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma*, 921 F.2d 1022 at 1027 (C. A. 10 (Okla.) 1990).

VADOE guidelines: The Individuals with Disabilities Education Act Amendments of 1997 (P.L. 105-17) provide that all students with disabilities are entitled to a “free appropriate public education” (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. With this in mind, FAPE, for some students with disabilities, may require a program of special education and related services in excess of the normal school year.

Some Factors in Determining the Need for ESY Services

The proper standards used in determining whether extended-school-year services are appropriate for any one particular child can be summarized by scrutinizing the following applicable law and by reviewing the Virginia Department of Education’s standards.

- **Emerging skills and/or breakthrough opportunities**

A court within the 4th circuit provided the sentiment that emerging skills and/or breakthrough opportunities was a factor in determining the need for ESY services (*Reusch v. Fountain*, 872 F.Supp. 1421 (D.C. Md., 1994)).

“... a variety of nonregression-based factors – for example, “emerging skills” and “breakthrough opportunities” (as when a child is on the brink of learning to read) – can and should be incorporated into the eligibility analysis.” (*Reusch v. Fountain*, 872 F.Supp. 1421 at 1435).

VADOE guidelines: The IEP team reviews all **IEP goals targeting critical life skills** to determine whether any of these skills are at a breakthrough point. When the critical life skills are at this point, the IEP team needs to determine whether the interruption of services and instruction on those 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.

- **Degree of impairment:**

Courts within at least 4 circuits have included degree of impairment as a factor in determining the need for extended school year services. Cases include *Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma*, 921 F.2d 1022 at 1027 (C. A. 10 (Okla.) 1990); *Battle v. Pennsylvania*, 629 F.2d 269 at 280 (3d Cir.), on remand, 513 F.Supp. 425 (E.D.Pa. 1980); *Yaris v. Special School District of St. Louis County*, 558 F. Supp. 545 at 551; (D.C. Mo. 1983); *Lee v. Thompson*, EHLR DEC. 554:429 at 430 (D. C.

Hi. 1983); and most importantly, the Eastern District of Virginia in *Daniel Stephen Lawyer v. Chesterfield County*¹, 19 IDELR 904 at 907, 1 ECLPR 297 (E. D. Va, 1993).

VADOE guidelines (reference “Nature and/or Severity of the Disability”): 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 benefit from his/her educational program during the regular school year.

- **Degree of regression suffered by the child [both retrospective and prospective]:**

Johnson v. Independent School District No. 4, *supra* at 1027; *Yaris v. Special School District of St. Louis County*, *supra* at 551; and most importantly, the Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907, as well as a myriad of other cases rely on regression as a significant standard in determining the need for ESY services.

VADOE guidelines (reference “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 (e.g., six to eight weeks after summer break).

VADOE guidelines (definition of “Regression”): Regression, for purposes 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.

- **Recovery time from the regression [both retrospective and prospective]:**

Johnson v. Independent School District No. 4, *supra* at 1027; and the Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907, as well as a myriad of other cases rely on recoupment, both in the past and with predictions of future recoupment as a significant standard in determining the need for ESY services.

VADOE guidelines (reference “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 (e.g., six to eight weeks after summer break).

VADOE guidelines (definition of “Recoupment (Recovery)”): Recoupment is the ability to recover a loss of skills in a reasonable time following a normal school break. Most students without disabilities recoup skills within six to eight weeks. 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.

¹ Implied reference as the decision hinges on the fact that the degree of impairment was such that the child would not benefit without ESY to prevent serious regression.

- **Ability of the child’s parents to provide the educational structure at home:**

Johnson v. Independent School District No. 4, *supra* at 1027; and *Battle v. Pennsylvania*, 629 F.2d 269 at 280 (3d Cir.), on remand, 513 F.Supp. 425 (E.D.Pa. 1980) detail that the parents' ability to provide the educational structure at home is a factor in determining the need for ESY.

VADOE guidelines: The technical assistance document includes this criterion, but does not explain it.

- **Availability of alternative resources that are available to the public, free of charge:**

The Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907, notes that the availability of alternative resources that are available to the public free of charge is a standard in determining the need for ESY services.

VADOE guidelines: The technical assistance document includes this criterion to the extent that it references it in its “Historical Perspective of Extended School Year Services.” The technical assistance document also fails to use the language “available to the public, free of charge.”

- **Child’s rate of progress:**

Johnson v. Independent School District No. 4, *supra* at 1027; *Yaris v. Special School District of St. Louis County*, *supra* at 551; and most importantly, the Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907, as well as a myriad of other cases reference the child’s rate of progress as a standard in determining the need for ESY services.

VADOE guidelines (reference “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, objectives or benchmarks will prevent the student from receiving benefit for his/her educational **placement** during the regular school year.

- **Child’s behavioral problems (or interfering behaviors):**

Johnson v. Independent School District No. 4, *supra* at 1027; *Yaris v. Special School District of St. Louis County*, *supra* at 551; and most importantly, the Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907, as well as a myriad of other cases rely on behaviors interfering with the child’s education as a significant standard in determining the need for ESY services.

VADOE guidelines: The IEP 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 some 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 program during the next school year.

ESY & LRE

EHA Ruling/Policy Letter, 213 IDEALR 255 (July 19, 1989), Office of Special Education Programs, (this policy letter is referenced in ***Reusch v. Fountain***, 872 F.Supp 1421 at 1427 (D.C. Md., 1994).

The LRE requirements at **34 CFR Sections 300.530-300.556** do apply when an IEP is developed for extended school year services, but the EHA does not address the obligation of school districts to provide a full range of alternative placements to handicapped children when the districts provide extended school year programs. OSEP does not interpret EHA-B to mean that districts must establish extended year programs for nonhandicapped students solely for the purpose of providing integration for all handicapped students in extended year programs when a particular student's IEP requires interaction with nonhandicapped children. 213 IDEALR at 255

The LRE requirements at **34 CFR '' 300.530-300.556** do apply when an IEP is developed for extended school year services, but the EHA-B does not address the obligation of school districts to make a full continuum of alternative placements available to children with handicaps when the school district provides extended school year services. The Department does not interpret the LRE provision to mean that school districts must establish public programs for nonhandicapped children for the sole purpose of being able to implement the LRE provision for children with handicaps who require an extended year program. However, a school district must meet the LRE requirements by alternative means, such as private placements, when it is determined that a child with a handicapping condition **must** have interaction with nonhandicapped children. Each child's placement must be based on an IEP. If one placement option, such as a center-based program, is available within a school district, modifications must be made or alternative means of serving a child must be made available when such adjustments are needed to implement a child's IEP. 213 IDEALR at 255, 256 (1989)

- **Ability of the child to interact with nonhandicapped children:**

Johnson v. Independent School District No. 4, *supra* at 1027; ***Yaris v. Special School District of St. Louis County***, *supra* at 551; rely on the ability to interact with nonhandicapped children as a standard in determining the need for ESY services.

VADOE guidelines: (reference “ability of the child to interact with children without disabilities”): The technical assistance document includes this criterion, but does not explain it.

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

Johnson v. Independent School District No. 4, *supra* at 1027; ***Yaris v. Special School District of St. Louis County***, *supra* at 551; and most importantly, the Eastern District of Virginia in ***Lawyer v. Chesterfield County***, *supra* at 907 detail that areas of the child's curriculum which need continuous attention is a significant factor in determining the need for ESY services.

VADOE guidelines (reference “areas of the child’s curriculum which need continuous attention”): The technical assistance document includes this criterion, but does not explain it.

- **Whether the requested service is extraordinary for the child’s condition (as opposed to an integral part of a program for those with the child’s condition):**

Johnson v. Independent School District No. 4, *supra* at 1027; and *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 at 182 (3d Cir. 1988) each consider whether the requested service is extraordinary for the child’s condition (as opposed to an integral part of a program for those with the child’s condition) as a factor in determining whether ESY services should be provided.

VADOE guidelines: The technical assistance document does not mention this criterion.

- **Child’s Vocational Needs:**

Johnson v. Independent School District No. 4, *supra* at 1027; *Yaris v. Special School District of St. Louis County*, *supra* at 551; *Lee v. Thompson*, *supra* at 430; and most importantly, the Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907 detail that the child’s vocational needs is a factor in determining the need for ESY services.

VADOE guidelines: The technical assistance document includes this criterion to the extent that it references it in its “Historical Perspective of Extended School Year Services.”

- **Small, But Vital Window of Opportunity:**

The Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907 detailed that a “small, but vital, window of opportunity in which they² can effectively learn” is a significant factor in determining the need for ESY services.

VADOE guidelines: The technical assistance document includes this criterion to the extent that it references it in its “Historical Perspective of Extended School Year Services.”

- **Special Circumstances**

VADOE guidelines: The IEP team determines whether, without ESY services, there are any special circumstances that **will prevent** the student from receiving some benefit from his/her education program during the regular school year.

No example is provided.

It is believed that “special circumstances” could include situations such as: An aide, speech therapist or occupational therapist missing for part of the year; or the child was ill or had appointments for a substantial number of days during the year.

² Used in reference to a child with “moderate to severe childhood autism.”

- **Child’s physical problems:**

Johnson v. Independent School District No. 4, *supra* at 1027; *Yaris v. Special School District of St. Louis County*, *supra* at 551; and most importantly, the Eastern District of Virginia in *Lawyer v. Chesterfield County*, *supra* at 907 detail that the child's physical problems is a factor in determining the need for ESY services.

VADOE guidelines: The technical assistance document includes this criterion to the extent that it references it in its “Historical Perspective of Extended School Year Services.”

- **Irreparable loss of progress:**

Bales v. Clarke, 523 F. Supp. 1366 at 1371 (E. D. Va. 1981) (King George County) details that the standard for ESY is whether there will be an irreparable loss of progress during the summer months. *Johnson* (*supra*, see footnote 4 at 1031) explicitly took issue with this portion of the *Bales* holding.

VADOE guidelines: VADOE mentions the *Bales* holding in its "Historical Perspective of Extended School Year Services," but does not discount its significance.

Conclusions and Preparation:

An analysis of extended-school-year law shows that the regression/recoupment analysis is but one of many factors to be considered. The notion that extended school year services were necessary to prevent regression came about from the early court decisions that largely relied on the regression-recoupment analysis. The Virginia Department of Education acknowledges that:

ESY services are not so much a regression and recoupment issue as they are an issue of FAPE. Unrecouped regression, over time, may be evidence that FAPE is not being provided. In other words, it is not the case that a student is entitled to extended school year services, but that the student will not receive FAPE if ESY services are not provided.

(VADOE technical assistance document) Previously VADOE’s analysis of ESY included a statement that ESY is “not intended to teach new skills, or to increase progress on instructional goals and objectives.³” The “no new skills” myth remains pervasive throughout Virginia and allows schools to design non-individualized prefabricated ESY programs.

As extended-school-year standards have been expanded by the courts, the “prevent regression” purpose of extended school year services has remained, largely in part to the fact that school boards and departments of education dictate the analysis until a court renders a decision. However, a review of some of the ESY standards and some common sense indicates that the “prevent regression” purpose for ESY services is incomplete. In looking at a child with a very slow rate of progress, to the point where a free appropriate public education (FAPE) was not provided during the regular school year, it is manifest that additional education *progress* should be made over the summer to ensure FAPE. Similarly, with an emerging critical life skill or with a breakthrough opportunity (reference *Reusch v. Fountain*), the notion that ESY services are only to “prevent regression” is absurd.

As with all proper determinations in special education under IDEA, the need for, and the purpose of ESY is an individual determination. It is not subject to any hard and fast rules. The questions below under each of

³ Reference Virginia Department of Education’s *Cornerstone* draft document.

the ESY standards are designed to help the parent see a number of ways to present their child in this sometimes-critical ESY IEP meeting.

ESY Factor Ranking⁴

(i.e., likelihood that a factor could play a key role in getting your child ESY)

1) Child's rate of progress (Lawyer** at 907)**

Did your child meet all his IEP goals?

If not, this could be a sign that progress is not up to par.

Are the IEP goals indicative of a slow rate of progress?

Even if your child met his/her goals, oftentimes the goals do not equate to "normal" progress.

Does the IEP team *only* look at the IEP goals and objectives in considering the child's rate of progress?

While the IEP forms the basis for the school's analysis of your child, other factors, such as progress in a home program and progress in extracurricular educational activities should be considered. As a parent, it is up to you to bring this information to light during the ESY IEP meeting.

Is your child in regular education? a self-contained placement?

With the mandate of LRE, non-regular-education placements should typically be found when the child is either a behavior problem or the child will benefit more from special education than regular education. A self-contained (or other non-regular-education) placement is an indication that the child's rate of progress may be sub-par.

If your child is in regular ed., did he/she keep up?

Remedial summer programs are a part of many school systems. If your child is in regular education with an IEP and failed to keep up, any "remedial" help should be IEP based as well.

2) Degree of regression suffered by the child [both retrospective and prospective] ... (Lawyer** at 907) & recovery time from the regression [both retrospective and prospective] ... (**Lawyer** at 907)**

What data do you have? What data has the school system taken?

In preparing for the ESY meeting, you should know what data the school has taken, if any. That data should be reviewed before the meeting along with any data that you have taken. The data can be in e.g., the form of charts or anecdotal notes.

What experiences do you have from last year? last Christmas break? spring vacation? Get them written down!

Again, preparation for the meeting is the key. It is very tough to remember all the points that you want to make regarding regression or recoupment.

Does the team *only* look at the IEP goals and objectives in considering the possibility for regression?

⁴ As ranked by the presenter with respect to children with low-medium functioning autism residing in the Eastern District of Virginia.

The IEP is almost always the starting place, but it is not the only place to look. What did the child learn during the year that was not covered in the IEP? Were you discouraged from putting educational goals in the IEP because you were told that this is covered by the general curriculum? Were you discouraged from putting behavioral goals in the IEP because they alleged it would not be a problem? These are factors to weigh as to whether the IEP is the only place to look.

Does the IEP team only look at regression with respect to critical life skills?

The courts do not so narrowly limit the idea of regression / recoupment to critical life skills. One court referenced “skills or knowledge.” Another referenced “educational regression.” Ultimately, it might come down to the definition of “critical life skills.” One could argue that school is only addressing critical life skills.

3) Small, but vital, window of opportunity⁵ (**Lawyer** at 907)

Is your child characterized as having “moderate to severe childhood autism”? Is your child with autism less than 10 years old?

Do you believe the experts’ testimony?

The experts testified in **Lawyer v. Chesterfield** that this “small, but vital, window of opportunity” applied to children with moderate to severe childhood autism generally between the ages of 5 & 8. The autism expert in *Brown v. Stafford County* testified that the window of opportunity begins as soon as you are aware there are problems, oftentimes before a diagnosis (i.e., 2 years old or so). Both the **Lawyer** judge and the **Brown** State Hearing Officer significantly relied on this small window of opportunity in the decisions.

Does this small, but vital, window of opportunity apply **only** to moderate to severely affected children with autism?

This depends largely in part on how you can sell the point. There is much research showing the importance of educating mentally impaired children early in life. One point to note is that the author has yet to see any county/city/state that acknowledges that this “small, but vital, window of opportunity” is a factor in determining ESY need.

4) Emerging (critical life) skills and/or breakthrough opportunities

Is your child on the verge of a breakthrough or does your child have emerging skills in the area of reading, writing, basic arithmetic, speech or other communication means, controlled behavior?

A parent’s input is needed here.

What other areas would be considered “critical life skills”? (e.g., social skills?)

This in part depends on the definition. VADOE defines “critical life skills” to include “any skill determined by the IEP team to be critical to the student’s overall educational progress.” While social skills fall within the scope of the layman’s definition of “critical life skills,” it may not satisfy the definition used by the IEP team.

⁵ Used in reference to a child with “moderate to severe childhood autism.”

Does the emerging skill or breakthrough opportunity have to be targeted by an IEP goal or objective during the school year?

Again, the IEP is almost always the starting place, but it is not the only place to look. What did the child learn during the year that was not covered in the IEP? Oftentimes, it is unexpected progress (i.e., progress that was not targeted by the IEP team) that has brought the child to the breakthrough point. Furthermore, children often learn skills not included in the IEP. Their ability to surprise you should never be underestimated. If any of these skills are critical life skills and emerging or at a breakthrough point, they too should be considered.

5) Child's behavioral problems (or interfering behaviors) ... (**Lawyer** at 907)

Does your child have behavior problems related to his/her disability? Is he/she always cooperative? Do those behavior problems interfere with his/her progress in the classroom?

Children with behavior problems, especially those with severe behavior problem oftentimes lose educational time because much effort is put into managing the behavior. Further, time spent in *time out* or at the principal's office is time away from education. Many children are just barely receiving a meaningful education with full classroom time. Time spent on other activities clearly takes away from that education.

Is your child *not* in the LRE because of his behavior(s)?

Again, with the mandate of LRE, non-regular-education placements should typically be found when the child is either a behavior problem or when the child will benefit more from special education than regular education. If a child is such a behavior problem that it warrants removal from the regular classroom, rest assured that much educational time is being missed due to attempts to deal with the behavior.

Is "self-stimming" a behavior problem or interfering behavior?

Without getting into this debate, it is sufficient to say that if your child is "self-stimming" in the classroom, he is probably not getting the individual attention he/she needs to learn. This is simply a sign that a meaningful education may not have been provided during the regular school year.

Do the behavior problems *have* to be "targeted by IEP objectives"?

The IEP is almost always the starting place, especially since IDEA '97 encourages positive behavioral supports, but it is not the only place to look. Were you discouraged from putting behavioral goals in the IEP because they alleged behaviors would not be a problem? Were you discouraged from putting behavioral goals in the IEP because they alleged he would be managed without the need for goals or that controlling behaviors is what teachers do? These are factors to weigh as to whether the IEP is the only place to look.

6) Child's physical problems ... (**Lawyer** at 907)

Does your child have physical problems? Do those physical problems interfere with his/her progress in the classroom?

If your child has physical problems that require him to miss educational time or otherwise interfere with his/her education, such should definitely factor into the ESY equation.

Is your child in regular education? a self-contained placement?

Physical problems alone are not a legitimate reason to remove a child from the regular classroom. Couple that with the accepted belief that a self contained placement is not teaching the full spectrum of skills that the regular education placement would.

7) Degree of impairment ... (**Lawyer** at 907⁶)

Is your child severely impaired in any of the areas of reading, writing, basic arithmetic, speech or other communication means, controlled behavior and/or other areas? Does your child's label mean anything here? ("autism"? "HFA"? "ADHD"? "MMR"? etc.).

The federal & district court cases are not very clear as to how "degree of impairment" is to be interpreted. It makes more sense that the degree of impairment relates to specific areas to be targeted such as speech, reading, etc. In this light, the label accorded your child is merely an indication of how significant the degree of impairment may be. For example, a child labeled "classically autistic" would be expected to have significant degrees of impairment in e.g., speech and communication and behavior control.

8) Areas of the child's curriculum which need continuous attention ... (**Lawyer** at 907)

Does your child need continuous attention in any of the areas of reading, writing, basic arithmetic, speech or other communication means, controlled behavior?

As with many of these standards, this standard is closely related to the regression standard. Children who need continuous attention in an area of their curriculum, and without the continuous attention, will suffer educationally, may be entitled to extended school year services.

Do the "areas of the child's curriculum" have to be based on the IEP?

As has been a recurring theme in this Q & A, the IEP is almost always the starting place, but it is not the only place to look. Were you discouraged from putting educational goals in the IEP because you were told that this is covered by the general curriculum? Were you discouraged from putting behavioral goals in the IEP because they alleged behaviors would not be a problem? Were you discouraged from putting behavioral goals in the IEP because they alleged he would be managed without the

⁶ Not explicitly stated, implied with reference to a "severe language deficit."

need for goals or that “controlling” behaviors is what teachers do? These are factors to weigh as to whether the IEP is the only place to look.

9) Child’s vocational needs ... (**Lawyer** at 907)

What are your child’s future vocational needs?

As the **Lawyer** decision makes clear, your child’s future vocational needs factor into the ESY determination.

Will they be affected by deficiencies in any of the areas of reading, writing, basic arithmetic, speech or other communication means, controlled behavior?

Again, we see another ESY standard that is tied to other standards. This standard is not far removed from the “degree of impairment” standard, for if your child is significantly impaired in any of these areas, his future vocational needs are jeopardized by that (those) impairment(s). The **Lawyer** decision and the State Hearing Officer’s decision in *Brown v. Stafford County* made significant reference to the child’s vocational needs.

10) Availability of alternative resources that are available to the public, free of charge ... (**Lawyer** at 907)

What’s free these days?

The **Lawyer** court extended the “availability of alternative resources” standard set forth in e.g., **Johnson** by holding that these alternative resources should be “free of charge.” This is completely consistent with the notion of *free* appropriate public education, the thrust of the IDEA.

Is the alternative resource directed to an area in which your child is deficient?

If not, then it should essentially be of no consequence in the ESY determination. An example would be if your child has a pragmatic speech problem or a behavioral problem that is subject to regression or requires continuous attention. A summer outdoor camp that happens to be free for children with disabilities will not be of much benefit in these areas.

Of what value is the alternative resource if it is not IEP based?

The **Reusch** decision made specific reference that the school system was not meeting its ESY requirement by providing a summer program that was “neither individualized nor free.” The alternative resource must be evaluated with respect to the reasons your child needs ESY services.

Does a **free** summer enrichment program qualify as an alternative resource?

Absolutely, but the alternative resource (the summer enrichment program) must be evaluated with respect to the reasons your child needs ESY services. If your child needs speech help and no speech therapist is part of the program, then the significance of this alternative resource should be diminished in the ESY determination.

11) Ability of the child to interact with nonhandicapped children

Does your child have social deficits?

More than one court has referenced that the ability of the child to interact with non-handicapped children as a factor.

Are there any goals on the IEP related to socialization or peer interaction?

Has peer interaction been a constant topic at IEP meetings?

The IEP is the starting point. With goals directed to peer interaction, clearly there may be a deficiency in the child's ability to interact. As noted above in many instances, the parent may have been discouraged from inserting peer-interaction goals in the IEP.

Is your child included? in a completely self-contained placement?

There are two ways to view these placements. A child that is completely self-contained may have significant problems with peer interaction, but assuming that this child is in the LRE, it might be too much to ask to consider some interaction during the summer months. Oddly, if a child is integrated to some extent with his peers during the regular school year, but has social deficits, it could be fair game to suggest the same type of program for the summer where social skills can be worked on.

Alternatively, one could view this standard quite simply. If the child is self-contained (or integrated) and *has* social deficiencies, then this standard weighs in the favor that ESY services be provided. The parent can use this standard as the stepping stone to services by arguing that the child is socially deficient and ESY services on speech, communication and education would be appropriate to help him bridge some of the gap. Viewed in this light, this standard takes on similar attributes as the "degree of impairment" and "vocational needs" standards.

12) Whether the requested service is extraordinary for the child's condition (as opposed to an integral part of a program for those with the child's condition)

What is the requested service? Speech and language therapy? A summer program? Peer interaction?

This is the one standard that appears to categorize the child's needs with his/her disability. It is for that reason that this standard is ranked low. It is not appropriate to argue that my child needs speech services because other children with e.g., autism need those services. One should imply argue that my child needs speech services because he is deficient in speech. Notwithstanding this legal analysis, one can certainly walk into the IEP meeting noting the court(s) citing this as a factor and then tying their child's deficiency in with the class of children with the disability.

"It [is] hard to imagine any autistic child who would not qualify for extended school year services."⁷

⁷ Quotation allegedly attributed to Melinda Maloney Baird, Esq., an attorney working exclusively for school systems and a national speaker for LRP Publications in its series of workshops, "***Building a Blueprint for Defensible Autism Programs.***"

13) Ability of the child's parents to provide the educational structure at home

Do you provide a great educational program at home? Is your home program better than the school's program? Do you pay for educational services during the summer?

If the parents have a history of providing their child with an enriched educational environment, it may weigh against the decision to provide ESY services. However, if the parents are paying for educational services at home, it would be improper for the school system to rely on the parents continued program as a reason for denying ESY services. IDEA emphasizes an appropriate education at no cost to the parents (a.k.a. FAPE).

Does a summer day care arrangement factor into this equation?

Returning to the notion of FAPE, the questions to be asked are: Is there any individualized services with the day care placement; and is the day care at no cost to the parent. IDEA = individualized & free services.

14) Whether there will be an irreparable loss of progress during the summer months

What exactly is an "irreparable loss of progress"?

While a later court dismissed this standard for ESY services, one must ask the hypothetical question: Can one make up for lost time? One would think that if extra services were to be provided in the future, the loss of progress would not be irreparable, but who exactly is going to provide these extra services? If the school system starts mentioning this as a standard for ESY, you are probably in for a denial. Your counterattack, in addition to all the other standards, is to mention the *Johnson* decision that dismissed this as a viable ESY standard.