



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

FEB - 4 2003

Susan Given
West Virginia Advocates
Litton Building 4th Floor
1207 Quarrier Street
Charleston, West Virginia 25301-1842

Dear Ms. Given:

This is in response to your letter to the Office of Special Education Programs requesting clarification on determining a student's eligibility for extended school year services (ESY) under Part B of the Individuals with Disabilities Education Act (IDEA). You asked whether West Virginia schools may consider factors other than the retention and recoupment of critical skills in determining whether children are eligible for ESY under Part B. You specifically cited two court decisions that have enumerated the retention factor as well as other factors and asked specifically whether lack of progress alone may be considered in determining whether a child needs ESY.

As you know the Part B regulations require that "extended school year services must be provided only if a child's IEP [individualized education program] team determines, on an individual basis, in accordance with §§300.340-300.350, that the services are necessary for the provision of FAPE [a free appropriate public education] to the child." 34 C.F.R. §300.309(a)(2). "[A] public agency may not (i) limit extended school year services to particular categories of disability; or (ii) unilaterally limit the type, amount, or duration of those services." 34 C.F.R. §§300.309(a)(3)(i) and (ii). Furthermore, ESY are services that are provided "(i) beyond the normal school year of the public agency; (ii) in accordance with the child's IEP; and (iii) at no cost to the parents; and (2) meet the standards of the SEA." 34 C.F.R. §§300.309(b)(1) and (2).

Further discussion on ESY is provided in Attachment 1 (Analysis of Comments and Changes) to the Part B regulations promulgated on March 12, 1999. 64 Fed. Reg. 12405, 12537 (March 12, 1999). The Discussion in the Attachment on §300.309 states that "individualized determinations about each disabled child's need for ESY services are made through the IEP process." The Discussion makes clear that §300.309 does not "require the provision of ESY services to every disabled child, regardless of individual need." However, it states further that "[I]n most cases, a multi-factored determination would be appropriate, but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor. In all instances, the child's IEP team must decide the appropriate manner for determining whether a child is eligible for ESY services in accordance with applicable State standards and Part B requirements."

The Discussion on ESY in Attachment 1 states that States may establish State standards for use in making these determinations as long as the State's standards ensure that FAPE is provided consistently with the individually-oriented focus of the Act and the other requirements of Part B and the State standards do not limit eligibility for ESY services to children in particular disability

categories. The Discussion also acknowledges “the requirement to provide ESY services to children with disabilities under this part who require such services in order to receive FAPE is not a new requirement, but merely reflects the longstanding interpretation of the IDEA by the courts and the Department....”

As noted in the Discussion in Attachment 1, some of the factors that States use in making these determinations (the following factors were listed in the note following the prior regulation but identified as not exhaustive -- likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals) are derived from well-established longstanding judicial precedents. *See, e.g., Johnson v. Bixby ISD* 4, 921 F.2d 1022 (10th Cir. 1990); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983); *GARC v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983).

The U.S. Court of Appeals for the Fourth Circuit (which includes West Virginia) acknowledged in a recent decision that it has “not developed a standard for determining when ESY services are appropriate under the IDEA.” *M.M. v. School Dist. Of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002). However, the *M.M.* Fourth Circuit decision agreed with the lower district court’s standard in the *M.M.* case which required parents to demonstrate that “ESY would prevent significant regression of skills or knowledge retained by the child so as to seriously affect his progress toward self-sufficiency, or that benefits accrued to the child during the regular school year would be significantly jeopardized if he were not provided an educational program during the summer.” 303 F.3d at 537. Thus, regarding your question as to whether lack of progress alone can be the basis for an ESY determination, the *M.M.* case requirement that parents demonstrate either “significant regression” or a jeopardization of benefits accrued during the school year, would be inconsistent with relying on lack of progress as the sole criterion for determining that ESY services are necessary. The Fourth Circuit Court also noted that an ESY determination is necessarily fact and case specific and that a showing of actual regression is not required in order to find a child eligible for ESY. 303 F.3d at 537-538. A copy of the *M.M.* decision is enclosed for your reference.

I hope this information is helpful. If you have any questions, please contact Dr. JoLeta Reynolds of my office at 202-205-5507.

Sincerely,



Stephanie S. Lee
Director
Office of Special Education Programs

cc: Dr. Dee Braley
State Director of Special Education

Enclosure