

**ELIGIBILITY FOR EXTENDED SCHOOL YEAR UNDER THE IDEA:  
A CURRENT COMPREHENSIVE SNAPSHOT\***

by

Perry A. Zirkel, Ph.D., J.D., LL.M., & Allan G. Osborne, Jr., Ed.D.\*\*

One of the special requirements under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup> that the courts initially established<sup>2</sup> and that the IDEA regulations ultimately and only skeletally codified is the provision for an extended school year (ESY).<sup>3</sup> For the threshold issue of whether the particular child is eligible for ESY, a succession of state laws and court decisions have gradually and variously developed additions to this foundational stage.

The literature provides syntheses of the early, foundational case law<sup>4</sup> and limited samplings of the subsequent court decisions specific to ESY eligibility.<sup>5</sup> Moreover, a recent analysis provided the current framework of pertinent state laws.<sup>6</sup>

**Purpose and Method**

As the next step in advancing the professional literature, the purpose of this brief article is to provide a current, concise, and comprehensive canvassing of the combination of (a) the foregoing framework of state laws and (b) the long line of court rulings on ESY eligibility. For the state law framework, the analysis required reexamining the previously identified state laws with a more in-depth focus on eligibility.<sup>7</sup> The resulting two primary categories were procedural requirements and the specifically applicable criteria. For the court decisions, the method was a Boolean search of both Westlaw and Special Ed Connection, using terms such as “extended school year” and “twelve-month year,” and identifying in the resulting wide pool of cases those with final rulings specific to ESY eligibility of one or more children under the IDEA. The

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principal exclusions were (1) rulings in the selected court decisions for other issues in the case; (2) court decisions specific to separable ESY issues, such as whether the ESY program met the IDEA requirements for appropriateness and least restrictiveness<sup>8</sup>; and (3) cases decided on threshold adjudicative grounds, such as exhaustion or mootness, or the subsequent determination of attorneys' fees rather than on the merits of the ESY eligibility issue. The final data collection was in late October 2021.

## Results

Table 1 provides the applicable state law provisions and pertinent judicial rulings for each jurisdiction. The columns consist of the two procedural subcategories (IEP process and documentation); the various eligibility criteria, including one for a variety of low frequency items. aforementioned primary categories; and a catchall miscellaneous category.<sup>9</sup> The Comments column clarifies the state law entries, which are designated as shaded cells. The entries within the shaded and unshaded cells represent the rulings of the relevant courts' decisions, which are cited with needed parenthetical clarifications, in the endnotes. These judicial ruling entries represent the following three outcomes categories: P=in favor of the parents, Inc.=inconclusive (i.e., subject to further proceedings); and S=in favor of the school district.<sup>10</sup> For rulings that mentioned more than one criterion in the court's decisional discussion, the same entry appears in more than one column. Moreover, underlining of the entry indicates that the ruling relied, at least in part, on a cited state law provision.<sup>11</sup> For columns with more than one outcomes entry, the sequence is chronological, with the one based on the earlier endnoted court decision(s) listed first. Finally, for federal appeals court decisions, the ruling entries are repeated for each of the states within the circuit.

The rows in Table 1 represent the fifty-one jurisdictions, which are alternatively referred to herein generically as “states” to include the District of Columbia. The final row tabulates the entries across the jurisdictions, thus showing the number of states that have had completed litigation for each category. For this purpose, the jurisdiction is the ultimate unit of analysis, such that multiple entries in a column for the state count as one, regardless of the number of cited court decisions or their outcome categorization.

Table 1: *Outcomes Analysis of Eligibility Criteria for ESY Programs*

	A	B	C	D	E	F	G	H	I	J	K	Comments	
State	Procedure		Criteria									Misc.	
	IEP Team Process	Documentation	Regression/Recoupment	Significantly Jeopardizing	Impairment <sup>12</sup>	Alternate Resources <sup>13</sup>	Progress/Problems	Least Restrictive Environment	Vocational	Other <sup>14</sup>			
AL	S <sup>15</sup>		S <sup>16</sup>			S <sup>17</sup>						C-one of the criteria	
AK													
AZ		S <sup>18</sup>	S <sup>19</sup>	S <sup>20</sup>								C-incl. predictive data	
AR	S <sup>21</sup>											B-goals, services; C-detailed, incl. predictive+self-suff'y+ "guideline" periods; D-same as regression?; F-incl. home; J-curric.+open	
CA	S <sup>22</sup>		P <sup>23</sup> ; S <sup>24</sup>	S <sup>25</sup>								C-incl. self-suff'y; J-open (IEP team discretion)	
CO			Inc. <sup>26</sup>	Inc. <sup>27</sup> ; S <sup>28</sup>	Inc. <sup>29</sup>	Inc. <sup>30</sup>	Inc. <sup>31</sup>	Inc. <sup>32</sup>	Inc. <sup>33</sup>	Inc. <sup>34</sup>	Inc. <sup>35</sup>		
CT			S <sup>36</sup>									A-in time for parent to challenge	
DE												A-notice in time to resolve dispute by end of school year; C-incl. predictive; J-breakthrough opp'ties+open	
DC				S <sup>37</sup>								A-min. of 3 mos. progress data or equivalent; J-impact on critical skills	
FL												A-at least annually; B-particular device or service in IEP; C-detailed for regression but no mention of recoupment; G-health-	

												related absences; I-job coach for paid employment; J-open
<b>GA</b>												B-goals & services, start/end dates, service provider & location; J-individual needs
<b>HI</b>	S <sup>38</sup>		P <sup>39</sup> ; S <sup>40</sup>	S <sup>41</sup>	S <sup>42</sup>					S <sup>43</sup>		
<b>ID</b>			S <sup>44</sup>	S <sup>45</sup>								B-specific services; J-self-suff’y+ emerging skills; K-info sources
<b>IL</b>	S <sup>46</sup>		S <sup>47</sup>				S <sup>48</sup>					A-prior written notice; B-amount, frequency, duration, and location
<b>IN</b>	S <sup>49</sup>		S <sup>50</sup>				S <sup>51</sup>					B-child’s 3rd birthday during summer
<b>IA</b>	S <sup>52</sup>											
<b>KS</b>			Inc. <sup>53</sup>	Inc. <sup>54</sup> ; S <sup>55</sup>	Inc. <sup>56</sup>	Inc. <sup>57</sup>	Inc. <sup>58</sup>	Inc. <sup>59</sup>	Inc. <sup>60</sup>	Inc. <sup>61</sup>	Inc. <sup>62</sup>	
<b>KY</b>	S <sup>63</sup>		S <sup>64</sup>	S <sup>65</sup>							S <sup>66</sup>	
<b>LA</b>			P <sup>67</sup>	P <sup>68</sup>								A-determination after Jan. 1 unless sufficient data+parental notification; B-for performance/ progress+ESY form; C-detailed; D-“critical pt. of instruction”; G-incl. excessive absences; J-critical skills+individual needs+open
<b>ME</b>			S <sup>69</sup>									J-open (“not limited to”); K-info sources
<b>MD</b>	P <sup>70</sup> ; Inc. <sup>71</sup>	P <sup>72</sup>	S <sup>73</sup>	S <sup>74</sup>								A-at least annual notice+meetings in time for opportunity to file for due process hearing; B-services in IEP; D-overall; G-interfering behaviors+ progress toward IEP goals for critical life skills; J-emerging skills/ breakthrough opp’ties+open
<b>MA</b>			S <sup>75</sup>							S <sup>76</sup>		J-not for purely recreational reasons

<b>MI</b>	S <sup>77</sup>		S <sup>78</sup>	S <sup>79</sup>							S <sup>80</sup>	A-at least annually+notice in time for plans for delivery; B-considered+services; J-critical stage or area per goal+individual needs
<b>MN</b>	S <sup>81</sup> ; P <sup>82</sup>		Inc. <sup>83</sup>		Inc. <sup>84</sup>					Inc. <sup>85</sup>	Inc. <sup>86</sup>	A-at least annually; E-unique needs; J-self-suff'y in critical skill+curric.; K-info sources
<b>MS</b>			P <sup>87</sup>	P <sup>88</sup>								A-at least annually; B-time specifics and services in IEP; C-detailed incl. predictive+loss of critical skills as alternative to recoupment; J-“nots” oddly attributed to <i>Crawford v. Pittman</i> (5th Cir. 1983); K-info sources
<b>MO</b>	S <sup>89</sup>											B-eligibility determination in IEP
<b>MT</b>			S <sup>90</sup>	S <sup>91</sup>								C-incl. predictive
<b>NE</b>	S <sup>92</sup>		P <sup>93</sup>									
<b>NV</b>			S <sup>94</sup>	S <sup>95</sup>								
<b>NH</b>			S <sup>96</sup>									
<b>NJ</b>												J-open via “all relevant factors”
<b>NM</b>			Inc. <sup>97</sup>	Inc. <sup>98</sup> ; S <sup>99</sup>	Inc. <sup>100</sup>	Inc. <sup>101</sup>	Inc. <sup>102</sup>	Inc. <sup>103</sup>	Inc. <sup>104</sup>	Inc. <sup>105</sup>	Inc. <sup>106</sup>	J-required consideration for students with autism in specified areas
<b>NY</b>			P <sup>107</sup> ; S <sup>108</sup>									C-regression w/o mention of recoupment; E-specified disability placements
<b>NC</b>	Inc. <sup>109</sup>		S <sup>110</sup>	S <sup>111</sup>								C-including predictive; J-“emerging critical skill acquisition (‘window of opportunity’)”
<b>ND</b>	S <sup>112</sup>											
<b>OH</b>	S <sup>113</sup>		P <sup>114</sup> ; S <sup>115</sup>	S <sup>116</sup>							S <sup>117</sup>	
<b>OK</b>			Inc. <sup>118</sup>	Inc. <sup>119</sup> ; S <sup>120</sup>	Inc. <sup>121</sup>	Inc. <sup>122</sup>	Inc. <sup>123</sup>	Inc. <sup>124</sup>	Inc. <sup>125</sup>	Inc. <sup>126</sup>	Inc. <sup>127</sup>	

<b>OR</b>			S <sup>128</sup>	S <sup>129</sup>								C-incl. predictive; J-open via “must include [regression/recoupment]”
<b>PA</b>			<u>P</u> <sup>130</sup> ; Inc. <sup>131</sup> ; <u>S</u> <sup>132</sup>		<u>S</u> <sup>133</sup>					<u>S</u> <sup>134</sup>	<u>S</u> <sup>135</sup>	A-at each IEP mtg.+for students with severe disabilities, no later than Feb. 28, with notice by Mar. 31+expedited due process hearing regardless of severity; J-critical skills+self-suff’y+withdrawal; K-info sources
<b>RI</b>			S <sup>136</sup>									C-incl. predictive; D-for meaningful progress on IEP goals; G-progress+interfering behaviors; J-physical needs+open; K-info sources
<b>SC</b>	Inc. <sup>137</sup>		S <sup>138</sup>	S <sup>139</sup>								
<b>SD</b>	S <sup>140</sup>											B-duration+length of school day; J-not regression/recoupment if need for prolonged assistance
<b>TN</b>	S <sup>141</sup>		S <sup>142</sup>	S <sup>143</sup>							S <sup>144</sup>	
<b>TX</b>			<u>P</u> <sup>145</sup>	P <sup>146</sup>								A-goals/obj. on IEP; C-incl. max. of 8 wks. for recoupment; G,H,I-for critical skills; J-self-suff’y+required consideration for students with autism based on specified areas
<b>UT</b>			Inc. <sup>147</sup>	Inc. <sup>148</sup> ; S <sup>149</sup>	Inc. <sup>150</sup>	Inc. <sup>151</sup>	Inc. <sup>152</sup>	Inc. <sup>153</sup> ; <u>S</u> <sup>154</sup>	Inc. <sup>155</sup>	Inc. <sup>156</sup> ; <u>S</u> <sup>157</sup>	Inc. <sup>158</sup>	J-open via “not ... exclusively”
<b>VT</b>			S <sup>159</sup>									B-services in IEP; I-transition goals; J-essential to reach reasonable goals
<b>VA</b>			P <sup>160</sup> ; S <sup>161</sup>	S <sup>162</sup>		P <sup>163</sup>	P <sup>164</sup>		P <sup>165</sup>	P <sup>166</sup>		
<b>WA</b>	P <sup>167</sup>		S <sup>168</sup>	S <sup>169</sup>								F-for maintenance; G-rate of progress; J-open via “including”

<b>WV</b>	Inc. <sup>170</sup>		S <sup>171</sup>	S <sup>172</sup>								A-annual notice; B-duration, hrs./wk., and location; G-degree of progress+interfering behaviors; J-emerging skills/breakthrough opp'ties+predictive data+open
<b>WI</b>		S <sup>173</sup>	S <sup>174</sup>				S <sup>175</sup>					
<b>WY</b>			Inc. <sup>176</sup>	Inc. <sup>177</sup> ; S <sup>178</sup>	Inc. <sup>179</sup>	Inc. <sup>180</sup>	Inc. <sup>181</sup>	Inc. <sup>182</sup>	Inc. <sup>183</sup>	Inc. <sup>184</sup>	Inc. <sup>185</sup>	J-"multi-factor approach" (w/o specified factors)
<b>Total</b>	21	3	40	27	9	8	10	6	7	11	12	



Table 1 yields various major findings. First, as the bottom row for the columns shows, the overlapping regression/recoupment (n=40 states) and significantly jeopardizing (n=27 states) criteria account for court decisions in more jurisdictions than any of the other eligibility issues, with the procedural issue of IEP Team Process being in third place (n=21 states). Second, as review of the rows reveal, the states with the most frequent ruling entries are Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming—all attributable to the broad-based, multi-factor nature of the Tenth Circuit’s 1990 decision in *Johnson v. Independent School District No. 4*.<sup>186</sup> Yet, as the endnotes for the ruling entries show, the jurisdictions with the most court decisions are Ohio (n=9), Pennsylvania (n=7), and Hawaii (n=6). Conversely, as the rows without any entries reveal, only three states—Alaska, Delaware, and Florida—have not had any relevant court rulings to date. Third, as the cells for the states in which the Tenth Circuit’s decision in *Johnson* illustrate,<sup>187</sup> the correlation between court decisions and state laws is far from complete. Fourth, as the combination of grey shading and underlined entries also indicate, the judicial rulings cited state laws as a decisional factor in relatively few cases, predominantly with regard to the regression/recoupment criterion.<sup>188</sup> Finally, as the grey cells without any entries show, the state law provisions in many jurisdictions have not been subject to court rulings.

Table 2 provides an analysis of the outcomes trend across the successive decades of the cited court decisions. For this purpose, to avoid “double counting,” the court decision, rather than its component ESY eligibility rulings, is the unit of analysis. The last row represents only 1.8 years based on the late October 2021 data collection.<sup>189</sup> The earlier decades were not included in this table because the court decisions at that initial stage focused on establishing the subsequently codified entitlement to ESY.<sup>190</sup> Finally, the percentages are rounded to avoid decimals, thus potentially amounting to slightly more or less than 100% per time period.

Table 2. *Longitudinal Outcomes Distribution of ESY Eligibility Court Decisions*

<b>Decade</b>	<b>Rulings for P</b>	<b>Inconclusive</b>	<b>Rulings for S</b>
<b>1990–1999</b> (n=8)	50% (n= 4)	25% (n= 2)	25% (n= 2)
<b>2000–2009</b> (n=16)	13% (n= 2)	13% (n= 2)	75% (n= 12)
<b>2010–2019</b> (n=22)	18% (n= 4)	0% (n= 0)	82% (n= 18)
<b>2020–2021*</b> (n=5)	0% (n= 0)	0% (n= 0)	100% (n= 5)
<b>Total Period</b> (n=51)	20% (n= 10)	8% (n= 4)	73% (n= 37)

\*The coverage for the current decade is limited to 1.8 years.

The results in Table 2 reveal the longitudinal trends for not only the outcomes, but also the frequency. For frequency, the successive n's in the Decade column show a steady growth of ESY eligibility cases that have reached completion as reported decisions. Although the trajectory is subject to change, the straight-line projection for 2020–2029 would be 28 decisions,<sup>191</sup> thus fitting the overall ascending trend. For outcomes, which is the primary focus of this table, the trend shifted from a pro-parent direction in the relatively few court decisions of the initial decade of this post-foundational stage to an increasingly pronounced pro-district skew. Although the 100% success rate for the handful of cases during the most recent segment will almost certainly

moderate in the remaining 8.2 years of the decade, the overall ratio is approximately 3:1 in favor of districts, especially in light of the dwindling number of inconclusive rulings.<sup>192</sup>

### **Discussion**

The IDEA regulations make it clear that school districts must offer ESY services when they are necessary to provide a FAPE to the individual student with disabilities but do not provide specific substantive criteria for IEP team determinations of eligibility.<sup>193</sup> The combination since the 1980s of laws in thirty-six states<sup>194</sup> and court decisions in an overlapping forty-eight jurisdictions increasingly fill that gap.

For the interpretation and implications of the gap-filling to date, this comprehensive canvassing of this combination of state laws and court decisions has limitations that include its absence of: (1) coverage of dispute resolution activity either below the surface of reported court decisions, such as hearing/review officer decisions and settlements, or via parallel decisional avenues, such as the IDEA's state complaint process and Section 504/ADA's Office for Civil Rights complaint resolution process; (2) coverage of both federal and state guidance specific to ESY eligibility; (3) differentiation according to the time factor in terms of changes in state law and superseding court decisions; and, on an overlapping basis, (4) the differentiation of the precedential weight of the cited court decisions. A second major limitation is the fuzzy boundaries in the categorization of the criteria in terms of the varying formulations in state law and the varying interpretations in the judicial rulings. For example, state laws are not uniform in their descriptors and details for the regression/recoupment criterion,<sup>195</sup> including whether they appear to treat "significantly jeopardizing" as a separate criterion.<sup>196</sup> Similarly, court decisions have varied in their interpretation as to the scope of this predominant criterion in relation to other potential criteria.<sup>197</sup>

Within these limitations, each of the major findings of the foregoing analysis suggests tentative attributions and conclusions. First, the regression/recoupment criterion, alone and in relation to other criteria, merits special attention in light of its predominant frequency in Table 1. A key consideration that both state laws and court decisions make clear is the need for expert opinion, including but not limited to school personnel, in addition to empirical data. Otherwise, neither the state law nor the court decisions in most jurisdictions make clear to parents and to the other members of the IEP team the specific scope and measurement of regression and recoupment. The resulting choice in these jurisdictions is to either (a) revise their laws to follow Louisiana's lead for detailed specificity with due consideration of the case law or (b) leave such consideration—with or without state guidance—to the discretion of IEP teams.

Second, the IEP team process, based on its decisional role in the case law entries in twenty-one jurisdictions and its potential roles in the shaded cells in seven more jurisdictions in column A of Table 1, warrants similar scrutiny. As a threshold matter, IEP teams need to be aware of and in compliance with specific timing, notice, and content requirements of their state law. Although the case law entries in this column reflect the general pro-district outcome skew, more pronounced emphasis on the parent-participation alternative in the two-step test for procedural denial of FAPE<sup>198</sup> and the alternative decisional forum of state complaint procedures<sup>199</sup> put districts at risk of more pronounced adverse outcomes. Moreover, best practice in terms of professional norms and parental relationships warrant not only fulfilling but going proactively above these legal minimums.

Third, the case law in a few leading jurisdictions in Table 2, including Pennsylvania and Ohio, merit discussion to illustrate the role of state law and court decisions in the development of the specifications for IEP teams. In addition to the aforementioned variance in the case law in

Ohio,<sup>200</sup> the Pennsylvania cases illustrated the varying interpretations of previous court decisions and state law provisions in the development of the eligibility framework within a jurisdiction. More specifically, the first Pennsylvania case, which was decided in 1987, applied the regression/recoupment-in-relation-to-self-sufficiency standard of the Third Circuit's foundational decision but extended in scope beyond the academic to the emotional dimension from the lower court's earlier, modified decision.<sup>201</sup> Next, in 1991, a federal district court in Pennsylvania upheld the need to include expert opinion in applying the regression-recoupment standard, but did so without citing supporting legal authority,<sup>202</sup> such as the Sixth Circuit's 1990 decision in *Cordrey*.<sup>203</sup> These decisions were prior to state law provisions specific to ESY eligibility, as such courts recognized.<sup>204</sup> After the adoption of a specific ESY regulation in Pennsylvania, the next court decision relied on the seven criteria and reliable sources provisions of the state regulation to uphold the district's determination of non-eligibility.<sup>205</sup> Yet, the next decision upheld non-eligibility based on the lack of "serious" regression, relying on a Fourth Circuit decision and not mentioning the state's multi-factor ESY regulation.<sup>206</sup> Finally, the most recent two decisions in Pennsylvania relied on the multiple criteria in the state's ESY regulation for their eligibility rulings.<sup>207</sup>

Fourth, the rather steadily upward trajectory in the frequency of the court decisions on a decade-by-decade basis, as Table 2 shows, may be attributable in part to the overall increase in IDEA litigation in general since the 1980s.<sup>208</sup> The emergence and expansion of state laws during this overall period may be another contributing factor, particularly in light of the addition of factors beyond regression-recoupment in some jurisdictions and the varying interpretations of the generally imprecise state-codified eligibility standards.<sup>209</sup> Conversely, the increasingly adverse

outcomes trend in the judicial precedents has not at all reversed or markedly dampened this ascending frequency of the case law.<sup>210</sup>

Fifth, the increasing pro-district skew in the outcomes of the court decisions that Table 2 shows may be attributable to several factors, all of which require further research. If confirmed as having improved, professional practice, including a better awareness of and compliance with legal requirements, may have resulted in more IEP teams “getting in right” and consequently being successful in litigation. Another potential contributing factor may be the outcome trends at the hearing and review officer levels if parents are obtaining favorable ESY eligibility rulings.<sup>211</sup> Similarly, it may be that the judicial trend is countered by a more favorable trend via the settlement process<sup>212</sup> or in the alternate investigative avenues, such as the state complaints process.<sup>213</sup> Each of these factors merits empirical attention both qualitatively and quantitatively.

Similarly, the effect the COVID-19 pandemic on ESY court decisions is at this juncture speculative, especially in light of the cumbersome and prolonged adjudication process under the IDEA. In addition to careful monitoring and analysis of the frequency and outcomes of these pandemic-related ESY cases, the federal and state guidance concerning “compensatory services” as a proactive IEP team response to learning loss warrants special attention because the criteria and implementation of these services notably overlaps with ESY.<sup>214</sup>

Inevitably, ESY litigation will continue based on the individualized nature of ESY eligibility determinations and the varying state law codifications and judicial interpretations of the applicable criteria. It is relatively clear that at the court level, ESY eligibility is the exception rather than the rule.<sup>215</sup> The challenge at the local level is to determine the boundary between the exception and the rule on an individual basis with accuracy and consistency. The starting point is the applicable state law and case law in the jurisdiction, but the ending point is defensible

determinations that avoid the high transaction costs of litigation and yet do not allow the exceptions to swallow the rule. Finally, do not neglect the overlapping and increasing issue of appropriateness of ESY programs.<sup>216</sup>

*Appendix: Citations for State Law Additions to the IDEA for ESY*

AL	ALA. ADMIN. CODE r. 290-8-9-.05(9) (2013)
AZ	ARIZ. REV. STAT. ANN. § 15-881 (2020)
AR	005 ARK. CODE R. §§ 18.19-19.03 – 18.19-19.08 (2021)
CA	CAL. EDUC. CODE § 3043 (West 2017)
CT	CONN. AGENCIES REGS. § 10-76d-3 (2018)
DE	14 DEL. ADMIN. CODE § 923(6) (2017)
DC	D.C. MUN. REGS. tit. 5-E, § 3017 (2018)
FL	FL. ADMIN. CODE ANN. r. 6A-6.03028(12) (2021)
GA	GA. COMP. R. & REGS. 160-4-7-.06(18)(c) (2018)
ID	IDAHO SPECIAL EDUCATION MANUAL, <a href="https://www.sde.idaho.gov/sped/sped-manual/">https://www.sde.idaho.gov/sped/sped-manual/</a> (2018)
IL	105 ILL. COMP. STAT. 5 § 14-8.02f (b) (2018); ILL. ADMIN. CODE tit. 23, § 226.230(a)(4) (2018)
IN	511 IND. ADMIN. CODE 7-43-2(e) (2020)
LA	LA. ADMIN. CODE tit. 28, §§ 701 – 709 (2017)
ME	05-71-101 ME. CODE R. § X(2)(A)(7) (LexisNexis 2018)
MD	MD. CODE REGS. 13A.05.01.07(B)(2), 13A.05.01.08(B)(2), 13A.05.01.11(B) (2020)
MA	603 MASS. CODE REGS. 28.05(4)(d) (2019)
MI	MICH. ADMIN. CODE r. 340.1721e(1)-(2) (2020)
MN	MINN. R. 3525.0755 (2018)
MS	7-3 MISS. ADMIN. CODE R. § 74.12 (LexisNexis 2018)
MT	MONT. ADMIN. R. 10.16.3324 (2017)
NH	N.H. CODE ADMIN. R. ANN. EDUC. 1110.01 (2020)
NJ	N.J. ADMIN. CODE § 1:6A:14-4.3(c) (2018)
NM	N.M. CODE R. § 6.31.2.11(B)(5)(a) (LexisNexis 2020)
NY	N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.1(eee), 200.6(k)(1), 200.16(i)(3)(v) (2017)
NC	N.C. 1501-2.4 (2021), <a href="http://www.ncpublicschools.org/ec/policy">http://www.ncpublicschools.org/ec/policy</a>
OH	OHIO ADMIN. CODE 3301-51-02(G) (2019)
OR	OR. ADMIN. R. 581-015-2065 (2019)
PA	22 PA. CODE § 14.132 (2021)
RI	200 R.I. CODE R. § 20-30-6.5.1(F) (LexisNexis 2019)
SD	S.D. ADMIN. R. 24:05:25:26 (2019)
TX	19 TEX. ADMIN. CODE §§ 89.1055(c), (e)(1), 89.1065 (2020)
UT	UTAH ADMIN. CODE R277-751-4 (2019)
VA	8 VA. ADMIN. CODE 20-81-100(k) (2017)
VT	7-1 VT. CODE R. § 5:2363.7(h) (2017)
WA	WASH. ADMIN. CODE § 392-172A-02020 (2018)
WV	W.V. CODE R. § 126-16-5-1(H) (2019)
WY	206.002-7 WYO. CODE R. § 5(c) (2017)



## Endnotes

\*\* Perry A. Zirkel is university professor emeritus of education law at Lehigh University, and Allan G. Osborne is retired principal of Snug Harbor Community School in Quincy, MA.

<sup>1</sup> 20 U.S.C. §§ 1400–1482 (2018).

<sup>2</sup> *E.g.*, *Yaris v. Special Sch. Dist. of St. Louis Cnty.*, 728 F.2d 1055, 1056, 16 Ed.Law Rep. 757 (8th Cir. 1984); *Crawford v. Pittman*, 708 F.2d 1028, 1034, 11 Ed.Law Rep. 815 (5th Cir. 1983); *Battle v. Pennsylvania*, 629 F.2d 269, 281 (3d Cir. 1980).

<sup>3</sup> 34 C.F.R. § 300.106 (2019):

- (a) General. (1) Each public agency must ensure that [ESY] services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
- (2) [ESY] must be provided only if a child’s IEP Team determines, on an individual basis, in accordance with [the regulations for IEPs], that the services are necessary for the provision of FAPE to the child.
- (3) In implementing the requirements of this section, 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.
- (b) Definition. As used in this section, 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 public agency;
    - (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 SEA.

<sup>4</sup> *E.g.*, Allan G. Osborne, *When Must a School Provide an Extended School Year Program to Students with Disabilities*, 99 Ed. Law Rep. 1 (1995); Mary Jane Rapport & Stephen B. Thomas, *Extended School Year: Legal Issues and Implications*, 18 J. ASS’N FOR PERSONS WITH SEVERE HANDICAPS 16 (1993).

<sup>5</sup> *E.g.*, Frances Amendola et al., *Extended School Programs for Children with Disabilities*, 78A C.J.S. § 1060 (June 2021); Susan Etscheidt, *Extended School Year Services: A Review of Eligibility and Program Appropriateness*, 27 RES. & PRAC. PERSONS WITH SEVERE DISABILITIES 188, 199–200 (2002)

<sup>6</sup> Perry A. Zirkel, *State Laws for Extended School Year under the IDEA*, 391 Ed. Law Rep. 10 (2021).

<sup>7</sup> Based on the previous article (*id.*), the Appendix *infra* lists the citations of the state laws.

<sup>8</sup> For analyses specific to those issues, see, for example, Perry A. Zirkel, *What Are the Criteria for an Appropriate Extended School Year Program?* 391 Ed. Law Rep. 1 (2021); Allan G. Osborne, *Does the IDEA’s Least Restrictive Environment Provision Apply to Extended School Year Program to Students with Disabilities*, 327 Ed. Law Rep. 561 (2016).

<sup>9</sup> The column headings are inevitably inexact, largely due to the overlap among various subcategories, with “regression-recoupment” and “significantly jeopardizing” being a major example.

<sup>10</sup> This three-category scale has proven useful in other outcome analyses, especially although not exclusively where the ruling rather than the case is the unit of analysis. *See, e.g.*, Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities; An Empirical Analysis of Court Claim Rulings*, 361 Ed. Law Rep. 498 (2019); Linda K. Mayger & Perry A. Zirkel, *Principals’ Challenges to Adverse Employment Actions: An Empirical Analysis of the Case Law*, 98 NASSP BULL. 219 (2014); Mark A. Paige & Perry A. Zirkel, *Teacher Termination Based on Performance Evaluations: Age and Disability Discrimination?*, 300 Ed. Law Rep. 1 (2014); Perry A. Zirkel, *Twice-Exceptional Students under the Individuals with Disabilities Education Act*, 389 Ed. Law Rep. 1 (2021); Perry A.

Zirkel, *The Legal Meaning of Specific Learning Disability: The Next Case Law Update*, 49 COMMUNIQUÉ 18 (Mar.-Apr. 2021); Perry A. Zirkel, *The Orton-Gillingham Approach for Students with Disabilities: Case Law Update under the IDEA*, 377 Ed. Law Rep. 472 (2020); Perry A. Zirkel, *The Use of Restraints with Students with Disabilities: An Updated Empirical Analysis of the Case Law*, 327 Ed. Law Rep. 1 (2016); Perry A. Zirkel & Richard Fossey, *Liability for Student Suicide: An Update of the Case Law*, 354 Ed. Law Rep. 628 (2018).

<sup>11</sup> The underlining is only partial if the entry is based on more than one court decision and at least one of the court decisions does not rely on a state law provision.

<sup>12</sup> Alternatively referred to as “disability,” including nature and/or severity.

<sup>13</sup> “Alternative resources,” including those provided at home.

<sup>14</sup> Including “open” for inferable additional but unspecified criteria.

<sup>15</sup> *Rosaria M. v. Madison City Bd. of Educ.*, 325 F.R.D. 429, 443–44, 355 Ed.Law Rep. 1081 (N.D. Ala. 2018) (focusing on consideration requirement).

<sup>16</sup> *T.T. v. Jefferson Cnty. Bd. of Educ.*, 77 IDELR ¶ 243 (N.D. Ala. 2020); *Rosaria M. v. Madison City Bd. of Educ.*, 325 F.R.D. at 444–45.

<sup>17</sup> *Rosaria M. v. Madison City Bd. of Educ.*, 325 F.R.D. at 445 (including availability of structure at home).

<sup>18</sup> *L.M.H. v. Ariz. Dep’t of Educ.*, 68 IDELR ¶ 41 (D. Ariz. 2016) (focusing on lack of specifics for ESY program that district provided).

<sup>19</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App’x 505, 507, 370 Ed.Law Rep. 592 (9th Cir. 2019) (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1211, 236 Ed.Law Rep. 603 (9th Cir. 2008) (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors).

<sup>20</sup> *Id.*

<sup>21</sup> *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App’x 672, 673, 213 Ed.Law Rep. 416 (8th Cir. 2006) (ruling that the IDEA does not prescribe a specific deadline during the school year for the ESY proposal).

<sup>22</sup> *S.H. v. Tustin Unified Sch. Dist.*, 2015 WL 133339447 (N.D. Cal. Apr. 7, 2015), *aff’d on other grounds*, 682 F. App’x 559, 345 Ed.Law Rep. 82 (9th Cir. 2012) (concluding that postponement in determination for regression data was reasonable).

<sup>23</sup> *Orange Unified Sch. Dist. v. C.K.*, 59 IDELR ¶ 74 (C.D. Cal. 2012) (citing California regulation for particular additional service in ESY program).

<sup>24</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App’x 505 at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors).

<sup>25</sup> *Id.*

<sup>26</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1027–31, 64 Ed.Law Rep. 1027 (10th Cir. 1990) (reversing and remanding for relying solely on the regression/recoupment, or significantly jeopardizing, standard and identifying various other criteria, or factors).

<sup>27</sup> *Id.*

<sup>28</sup> *Elizabeth B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App'x 40, 44, 388 Ed.Law Rep. 172 (10th Cir. 2020).

<sup>29</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (including curriculum).

<sup>35</sup> *Id.* at 1028 (clarifying that this broad-based ESY eligibility determination should be based on “not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community”).

<sup>36</sup> *KB v. Katonah Lewisboro Union Free Sch. Dist.*, 847 F. App'x 38, 41, 389 Ed.Law Rep. 747 (2d Cir. 2021) (citing the New York regulation).

<sup>37</sup> *Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386, 287 Ed.Law Rep. 73 (D.D.C. 2012).

<sup>38</sup> *Dep't of Educ. of Haw. v. Leo*, 226 F. Supp. 3d 1081, 1112, 344 Ed.Law Rep. 246 (D. Haw. 2016); *K.K. v. Haw. Dep't of Educ.*, 66 IDELR ¶ 12 (D. Haw. 2015) (fulfilling consideration requirement); *Dep't of Educ., Haw. v. Z.Y.*, 62 IDELR ¶ 137 (D. Haw. 2013) (focusing on LRE aspect of consideration requirement).

<sup>39</sup> *Annette K. v. Haw. Dep't of Educ.*, 60 IDELR ¶ 278 (D. Haw. 2013) (mentioning but not seeming to rely on other factor).

<sup>40</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App'x at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors); *Dep't of Educ. of Haw v. Leo*, 226 F. Supp. 3d at 1113–14 (including other factors, such as impairment and self-sufficiency).

<sup>41</sup> *Id.*; *K.K. v. Haw. Dep't of Educ.*, 66 IDELR ¶ 12 (D. Haw. 2015).

<sup>42</sup> *Dep't of Educ. of Haw v. Leo*, 226 F. Supp. 3d at 1113–14 (including other factors, such as impairment and self-sufficiency).

<sup>43</sup> *Id.*

<sup>44</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App'x at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors).

<sup>45</sup> *Id.*

<sup>46</sup> *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 907, 168 Ed.Law Rep. 67 (7th Cir. 2002) (ruling that the IEP team duly considered ESY).

<sup>47</sup> *Id.* (including progress).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 907 (ruling that the IEP team duly considered ESY).

<sup>50</sup> *Id.* (including progress).

<sup>51</sup> *Id.*

<sup>52</sup> *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App'x at 673 (ruling that the IDEA does not prescribe a specific deadline during the school year for the ESY proposal).

<sup>53</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31 (reversing and remanding for relying solely on the regression/recoupment, or significantly jeopardizing, standard and identifying various other criteria, or factors).

<sup>54</sup> *Id.*

<sup>55</sup> *Elizabeth B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App'x at 44.

<sup>56</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (including curriculum).

<sup>62</sup> *Id.* at 1028 (clarifying that this broad-based ESY eligibility determination should be based on “not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community”).

<sup>63</sup> *Barney v. Akron Bd. of Educ.*, 763 F. App'x 528, 532, 365 Ed.Law Rep. 811 (6th Cir. 2019) (fulfilling consideration requirement).

<sup>64</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 315, 216 Ed. Law Rep. 354 (6th Cir. 2007) (including significantly jeopardizing); *Kenton Cnty. Sch. Dist. v. Hunt*, 384 F.3d 269, 279–80, 192 Ed.Law Rep. 55 (6th Cir. 2004); *Cordrey v. Euckert*, 917 F.2d 1460, 1472–75, 63 Ed.Law Rep. 798 (6th Cir. 1990) (including expert opinion).

<sup>65</sup> *Id.*

<sup>66</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315; *Cordrey v. Euckert*, 917 F.2d at 1474–75 (allowing reliance on testimony of professionals).

<sup>67</sup> *S.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x 850, 866–67, 287 Ed.Law Rep. 722 (5th Cir. 2012); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1159, 32 Ed.Law Rep. 445 (5th Cir. 1986) (including significantly jeopardizing).

<sup>68</sup> *Id.*

<sup>69</sup> *Ms. S. v. Reg'l Sch. Unit 72*, 64 IDELR ¶ 202 (D. Me. 2014), *adopted*, 54 IDELR ¶ 140 (D. Me. 2015), *vacated based on statute of limitations*, 916 F.3d 41, 363 Ed.Law Rep. 1 (1st Cir. 2019).

<sup>70</sup> *Reusch v. Fountain*, 872 F. Supp. 1421, 1430, 1433, 97 Ed.Law Rep. 299 (D. Md. 1994).

<sup>71</sup> *DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 191–92, 170 Ed.Law Rep. 503 (4th Cir. 2002) (focusing on whether consideration requirement resulted in requisite denial of FAPE).

<sup>72</sup> *Reusch v. Fountain*, 872 F. Supp. at 1434.

<sup>73</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 361, 323 Ed.Law Rep. 70 (4th Cir. 2015); *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537–38, 169 Ed.Law Rep. 59 (4th Cir. 2002) (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>74</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537–38, 169 Ed.Law Rep. 59 (4th Cir. 2002) (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>75</sup> *Wanham v. Everett Pub. Schs.*, 550 F. Supp. 2d 152, 159, 233 Ed.Law Rep. 573 (D. Mass. 2008) (ruling that regression alone was not sufficient to require ESY).

<sup>76</sup> *Id.* (although not specifying what other criteria apply beyond regression alone).

<sup>77</sup> *Barney v. Akron Bd. of Educ.*, 763 F. App'x at 532 (fulfilling consideration requirement).

<sup>78</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315 (including significantly jeopardizing); *Kenton Cnty. Sch. Dist. v. Hunt*, 384 F.3d at 279–80; *Cordrey v. Euckert*, 917 F.2d at 1472–75 (including expert opinion).

<sup>79</sup> *Id.*

<sup>80</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315; *Cordrey v. Euckert*, 917 F.2d at 1474–75 (allowing reliance on testimony of professionals).

<sup>81</sup> *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App'x at 673 (ruling that the IDEA does not prescribe a specific deadline during the school year for the ESY proposal); *Glazier v. Indep. Sch. Dist. No. 876*, 558 N.W.2d 763, 768, 115 Ed.Law Rep. 1046 (Minn. Ct. App. 1997) (focusing on consideration requirement in review of state complaints decision).

<sup>82</sup> *Indep. Sch. Dist. No. 97 v. Bonney*, 705 N.W.2d 209, 216–17, 202 Ed.Law Rep. 828 (Minn. Ct. App. 2005) (focusing on consideration and notice requirements in review of state complaints decision).

<sup>83</sup> *In re Students in Functional Skills Program at Halverson Elementary Sch., Indep. Sch. Dist. 241*, 70 IDELR ¶ 262 (Minn. Ct. App. 2007) (relying on Minnesota's regulation rather than regression alone in affirming state complaints decision that required change in policy and applying it to affected students).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (finding flawed interview process but not prejudicial in this case).

<sup>87</sup> *S.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x at 866–67; *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d at 1159 (including significantly jeopardizing).

<sup>88</sup> *Id.*

<sup>89</sup> *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App'x at 673 (ruling that the IDEA does not prescribe a specific deadline during the school year for the ESY proposal).

<sup>90</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App'x at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors).

<sup>91</sup> *Id.*

<sup>92</sup> *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App'x at 673 (ruling that the IDEA does not prescribe a specific deadline during the school year for the ESY proposal).

<sup>93</sup> *Williams v. Gering Pub. Schs.*, 463 N.W.2d 799, 806, 64 Ed.Law Rep. 901 (Neb. 1990).

<sup>94</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App'x at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors).

<sup>95</sup> *Id.*

<sup>96</sup> *J.W. v. Contoocook Valley Sch. Dist.*, 154 F. Supp. 2d 217, 233–34, 156 Ed.Law Rep. 224 (D.N.H. 2001) (citing the regression criterion in the then applicable regulation).

<sup>97</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31 (reversing and remanding for reliance solely on the regression/recoupment, or significantly jeopardizing, standard and identifying various other criteria, or factors).

<sup>98</sup> *Id.*

<sup>99</sup> *Elizabeth B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App'x at 44.

<sup>100</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (including curriculum).

<sup>106</sup> *Id.* at 1028 (clarifying that this broad-based ESY eligibility determination should be based on “not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community”).

<sup>107</sup> *Holmes v. Sobel*, 690 F. Supp. 154,160, 48 Ed.Law Rep. 524 (W.D.N.Y. 1988) (preliminary injunction).

<sup>108</sup> *KB v. Katonah Lewisboro Union Free Sch. Dist.*, 847 F. App'x at 41; *F.L. v. Bd. of Educ. of Great Neck Unified Sch. Dist.*, 274 F. Supp. 3d 94, 124–25, 350 Ed.Law Rep. 956 (S.D.N.Y. 2017), *aff'd on other grounds*, 735 F. App'x 38 (2d Cir. 2018); *C.H. v. Goshen Cent. Sch. Dist.*, 61 IDELR ¶ 19 (S.D.N.Y. 2013); *D.D-S. v. Southold Union Free Sch. Dist.*, 57 IDELR ¶ 164 (E.D.N.Y. 2011), *aff'd on other grounds*, 506 F. App'x 80, 292 Ed.Law Rep. 592 (2d Cir. 2012) (citing the New York regulation); *see also P.K. v. Bedford Sch. Dist.*, 569 F. Supp. 2d 371, 382 n.5, 237 Ed.Law Rep. 127 (S.D.N.Y. 2008).

<sup>109</sup> *DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d at 191–92 (focusing on whether consideration requirement resulted in requisite denial of FAPE).

<sup>110</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>111</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>112</sup> *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App'x at 673 (ruling that the IDEA does not prescribe a specific deadline during the school year for the ESY proposal).

<sup>113</sup> *Barney v. Akron Bd. of Educ.*, 763 F. App'x at 532 (fulfilling consideration requirement).

<sup>114</sup> *Cremeans v. Fairland Local Sch. Dist. Bd. of Educ.*, 633 N.E.2d 570, 580, 91 Ed.Law Rep. 280 (Ohio Ct. App. 1993).

<sup>115</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315 (including significantly jeopardizing); *Kenton Cnty. Sch. Dist. v. Hunt*, 384 F.3d at 279–80; *Cordrey v. Euckert*, 917 F.2d at 1472–75; *Horen v. Bd. of Educ. of Toledo City Sch. Dist.*, 55 IDELR ¶ 102 (N.D. Ohio 2010) (including expert opinion); *see also C.K. v. Bd. of Educ. of Sylvania City Sch. Dist.*, 78 IDELR ¶ 65 (N.D. Ohio 2021); *Bd. of Educ. of Green Local Sch. Dist. v. Redovian*, 18 IDELR 1092 (N.D. Ohio 1992) (relying on significantly jeopardizing and necessary-for-FAPE standards); *cf. Rettig v. Kent City Sch. Dist.*, 539 F. Supp. 768, 778–79, 4 Ed.Law Rep. 1083 (N.D. Ohio 1980), *aff'd*, 720 F.2d 463, 466, 14 Ed.Law Rep. 445 (6th Cir. 1983) (limiting affirmance to brief overall conclusion based on generally necessity-to-benefit standard).

<sup>116</sup> *Id.*

<sup>117</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315; *Cordrey v. Euckert*, 917 F.2d at 1474–75 (allowing reliance on testimony of professionals).

<sup>118</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31 (reversing and remanding for relying solely on the regression/recoupment, or significantly jeopardizing, standard and identifying various other criteria, or factors).

<sup>119</sup> *Id.*

<sup>120</sup> *Elizabeth B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App'x at 44.

<sup>121</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (including curriculum).

<sup>127</sup> *Id.* at 1028 (clarifying that this broad-based ESY eligibility determination should be based on “not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community”).

<sup>128</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App'x at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors); *Grants Pass Sch. Dist. v. Student*, 65 IDELR ¶ 207 (D. Or. 2015) (relying solely on regression-recoupment criterion per the Oregon regulation).

<sup>129</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App'x at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors).

<sup>130</sup> *Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR ¶ 271 (E.D. Pa. 2018); *see also Bucks Cnty. Pub. Schs. Intermediate Unit 22 v. Dep't of Educ.*, 529 A.2d 1201, 1203, 41 Ed.Law Rep. 251 (Pa. Commw. Ct. 1987).

<sup>131</sup> *Johnson v. Lancaster-Lebanon Intermediate Unit 13*, 757 F. Supp. 606, 622, 66 Ed.Law Rep. 227 (E.D. Pa. 1991).

<sup>132</sup> *Maggie J. v. Donegal Sch. Dist.*, 79 IDELR ¶ 42 (E.D. Pa. 2021); *William D. v. Manheim Twp. Sch. Dist.*, 48 IDELR ¶ 247 (E.D. Pa. 2007) (citing seven factors in the Pennsylvania regulation); *Morgan M. v. Penn Manor Sch. Dist.*, 64 IDELR ¶ 309 (E.D. Pa. 2015); *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 574–75, 305 Ed.Law Rep. 141 (E.D. Pa. 2013), *aff'd on other grounds*, 581 F. App'x 141, 310 Ed.Law Rep. 673 (3d Cir. 2014) (relying on regression without mentioning the state regulation or other factors).

<sup>133</sup> *Maggie J. v. Donegal Sch. Dist.*, 79 IDELR ¶ 42 (E.D. Pa. 2021); *William D. v. Manheim Twp. Sch. Dist.*, 48 IDELR ¶ 247 (E.D. Pa. 2007) (citing seven factors in the Pennsylvania regulation).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Beitle v. E. Greenwich Sch. Comm.*, 2006 WL 3095658 (D.R.I. Oct. 27, 2006).

<sup>137</sup> *DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d at 191–92 (focusing on whether consideration requirement resulted in requisite denial of FAPE).

<sup>138</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>139</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>140</sup> *Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App'x at 673 (ruling that the IDEA does not prescribe a specific deadline during the school year for the ESY proposal).

<sup>141</sup> *Barney v. Akron Bd. of Educ.*, 763 F. App'x at 532 (fulfilling consideration requirement).

<sup>142</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315 (including significantly jeopardizing); *Kenton Cnty. Sch. Dist. v. Hunt*, 384 F.3d at 279–80; *Cordrey v. Euckert*, 917 F.2d at 1472–75 (including expert opinion).

<sup>143</sup> *Id.*

<sup>144</sup> *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315; *Cordrey v. Euckert*, 917 F.2d at 1474–75 (allowing reliance on testimony of professionals).



<sup>145</sup> *S.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x at 866–67 (including Texas regulation); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d at 1159 (including significantly jeopardizing); *J.F. v. Hous. Indep. Sch. Dist.*, 55 IDELR ¶ 10 (S.D. Tex. 2010).

<sup>146</sup> *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d at 1159.

<sup>147</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31 (reversing and remanding for relying solely on the regression/recoupment, or significantly jeopardizing, standard and identifying various other criteria, or factors).

<sup>148</sup> *Id.*

<sup>149</sup> *Elizabeth B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App'x at 44.

<sup>150</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1315, 161 Ed.Law Rep. 478 (D. Utah 2002) (relying on LRE and self-sufficiency in the then applicable Utah regulation).

<sup>155</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31.

<sup>156</sup> *Id.* (including alternative resources/home structure and curricular factors).

<sup>157</sup> *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d at 1315 (relying on LRE and self-sufficiency in the then applicable Utah regulation).

<sup>158</sup> *Id.* at 1028 (clarifying that this broad-based ESY eligibility determination should be based on “not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community”).

<sup>159</sup> *KB v. Katonah Lewisboro Union Free Sch. Dist.*, 847 F. App'x at 41 (citing the New York regulation).

<sup>160</sup> *Lawyer v. Chesterfield Cnty. Sch. Bd.*, 19 IDELR 904 (E.D. Va. 1993); *Bales v. Clarke*, 523 F. Supp. 2d 1366, 1370, 1 Ed.Law Rep. 218 (E.D. Va. 1981).

<sup>161</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>162</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>163</sup> *Lawyer v. Chesterfield Cnty. Sch. Bd.*, 19 IDELR 904 (E.D. Va. 1993).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (including curriculum and “window of opportunity”).

<sup>167</sup> *A.D. v. Sumner Sch. Dist.*, 166 P.3d 837, 845–46, 223 Ed.Law Rep. 991 (Wash. Ct. App. 2007) (finding inadequate evaluative consideration that resulted in requisite harm to parents’ participation).

<sup>168</sup> *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App’x at 507 (relying on broader FAPE-necessity standard but citing *N.B. v. Hellgate*); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211 (including other factors, such as impairment and home structure under Montana guidance, and citing case law that relied on broad significant regression and significantly jeopardizing factors).

<sup>169</sup> *Id.*

<sup>170</sup> *DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 191–92 (focusing on whether consideration requirement resulted in requisite denial of FAPE).

<sup>171</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>172</sup> *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d at 361; *see also MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38 (conflating significant regression and significantly jeopardizing into a single criterion).

<sup>173</sup> *Todd v. Duneland Sch. Corp.*, 299 F.3d at 907 (ruling that the IEP team duly considered ESY).

<sup>174</sup> *Id.* (including progress); *see also Anderson v. Thompson*, 495 F. Supp. 1256, 1266 (E.D. Wis. 1980), *aff’d on other grounds*, 658 F.2d 1205 (7th Cir. 1981).

<sup>175</sup> *Todd v. Duneland Sch. Corp.*, 299 F.3d at 907.

<sup>176</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31 (reversing and remanding for relying solely on the regression/recoupment, or significantly jeopardizing, standard and identifying various other criteria, or factors).

<sup>177</sup> *Id.*

<sup>178</sup> *Elizabeth B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App’x 40.

<sup>179</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d at 1027–31.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (including curriculum).

<sup>185</sup> *Id.* at 1028 (clarifying that this broad-based ESY eligibility determination should be based on “not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child’s parents as well as circumstantial considerations of the child’s individual situation at home and in his or her neighborhood and community”).

<sup>186</sup> *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1027–31, 64 Ed.Law Rep. 1027 (10th Cir. 1990).

<sup>187</sup> *Supra* text accompanying note 186.

<sup>188</sup> The nine states, including the seven with regard to the regression/recoupment criterion, were California, Maine, Maryland (two decisions), Minnesota, New Hampshire, New York, Pennsylvania (four decisions), Texas, and Utah. These instances accounted for only one quarter of the total number of relevant court decisions.

<sup>189</sup> This estimate takes into consideration, as a limited reduction, the imprecise but generally relatively brief time lag in the appearance of court decisions in the two source databases.

<sup>190</sup> See *supra* note 2 and accompanying text.

<sup>191</sup> See *supra* note 189 (yielding estimate of 1.8 years as the basis for the projection).

<sup>192</sup> On balance, the relatively few inconclusive rulings were more in favor of the plaintiff parents than the defendant districts because, although not determining that these children was eligible, these decisions required districts to determine their eligibility in cases that they previously were either not considered for eligibility or determined to be ineligible.

<sup>193</sup> See *supra* note 1 and accompanying text.

<sup>194</sup> Zirkel, *supra* note 6, at 12.

<sup>195</sup> Review of the shaded cells and clarifying comments in Table 1 reveal, for example, that the recoupment criterion is missing or replaceable in the state laws of Florida, Mississippi, and New York.

<sup>196</sup> See, e.g., 200-R.I. CODE R. 20-30-6.5 (requiring analysis of severity of regression coupled with the amount of time required to recoup prior skill level, likelihood of retention of skills, rate of progress during the school year, and whether meaningful progress on IEP goals is significantly jeopardized); FLA ADMIN. CODE R. 6A-6.03028(12)(b)(I), (II) (requiring IEP team to consider whether significant regression will occur in several areas and whether a lapse in services will substantially jeopardize a student's learning critical life or emerging skills; 8 VA. ADMIN. CODE 20-81-100(J)(2) (requiring ESY services when benefits a child gains will be significantly jeopardized).

<sup>197</sup> The Sixth Circuit's 1990 decision seemed to conclude that the appropriate interpretation of the regression/recoupment criterion subsumed the various other specific criteria for ESY eligibility. *Cordrey v. Euckert*, 917 F.2d at 1472. Yet, the same court's subsequent decisions in 2004 and 2007 applied *Cordrey* rather narrowly to focus on regression and recoupment without specific consideration of any other factors beyond the over-arching necessary-for-FAPE standard. *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315; *Kent Cnty. Sch. Dist. v. Hunt*, 384 F.3d at 278–81. Moreover, lower courts in the Sixth Circuit applied *Cordrey* narrowly for ESY eligibility by relying on its references to significantly jeopardizing and necessity for FAPE without consideration of more specific criteria. *C.K. v. Bd. of Educ. of Sylvania City Sch. Dist.*, 78 IDELR ¶ 65 (N.D. Ohio 2021); *Bd. of Educ. of Green Local Sch. Dist. v. Redovian*, 18 IDELR 1092 (N.D. Ohio 1992).

<sup>198</sup> 20 U.S.C. § 1415(f)(3)(E)(ii) (2018). For an explanation of this Congressionally specified alternative for denial of FAPE in the two-step adjudicative analysis of procedural claims, see Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?* 15 CONN. PUB. INT. L.J. 1 (2016).

<sup>199</sup> See, e.g., Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 183, 189 (2017) (finding markedly higher success rate for parents in the IDEA's investigative rather than adjudicative process, with tendency of applying a one-part test for claims of procedural violations of FAPE in this alternative forum).

<sup>200</sup> *Supra* note 197.

<sup>201</sup> *Bucks Cnty. Pub. Schs. Intermediate Unit 22 v. Dep't of Educ.*, 529 A.2d at 1203 (citing a remedial order at the district court level after the remand in *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980) for the standard even though the expanded dimension was specific to the previous district court decision that the Third Circuit did not affirm).

<sup>202</sup> *Johnson v. Lancaster-Lebanon Intermediate Unit 13*, 757 F. Supp. at 622.

<sup>203</sup> *Cordrey v. Euckert*, 917 F.2d at 1472–75.

<sup>204</sup> *Armstrong v. Kline*, 513 F. Supp. 425, 428 (E.D. Pa. 1980) (“The Commonwealth is, of course, free to promulgate new policies [that do not conflict with *Battle v. Pennsylvania*]”).

<sup>205</sup> *William D. v. Manheim Twp. Sch. Dist.*, 48 IDELR ¶ 247 (E.D. Pa. 2007).

<sup>206</sup> *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 574–75, 305 Ed.Law Rep. 141 (E.D. Pa. 2013), *aff’d on other grounds*, 581 F. App’x 141, 310 Ed.Law Rep. 673 (3d Cir. 2014) (citing the Fourth Circuit’s decision in *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d at 537–38).

<sup>207</sup> *Maggie J. v. Donegal Sch. Dist.*, 79 IDELR ¶ 42 (E.D. Pa. 2021); *Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR ¶ 271 (E.D. Pa. 2018).

<sup>208</sup> See, e.g., Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 Ed.Law Rep. 1 (2011) (finding continued growth of special education litigation largely attributable to the federal courts through the decade 2000–2009). Although corresponding empirical data are not available for the period 2010–2021, an informal examination of the “Students with Disabilities” chapter in the YEARBOOK OF EDUCATION LAW from 2010 to 2020 seems to suggest that this upward trend has continued.

<sup>209</sup> See Zirkel, *supra* note 6; see also *supra* notes 197, 201–07 and accompanying text.

<sup>210</sup> These counter trends may be attributable to lack of awareness among the attorneys representing the plaintiffs, but the corresponding trends with regard to local (a) ESY eligibility determinations and (b) the settlement process of resulting disputes may serve as intervening or superseding factors.

<sup>211</sup> If indeed parents are obtaining significantly more favorable ESY eligibility rulings in administrative adjudications, districts may be less likely to appeal these decisions than for high-stakes issues due to the relatively low cost, short duration, and relative unpredictability of ESY eligibility determinations.

<sup>212</sup> See, e.g., Gina Gullo & Perry Zirkel, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 Ed.Law Rep. 870, 878 (2020) (finding that, on average, only about one in every ten filings for a due process hearing end in a decision).

<sup>213</sup> See *supra* note 198 and accompanying text.

<sup>214</sup> See, e.g., Perry A. Zirkel, *COVID-19 Confusion: Compensatory Services and Compensatory Education*, 30 S. Cal. REV. L. & SOCIAL JUST. 391 (2021) (explaining the trend to use regression-recoupment and related ESY criteria and to use summers as one of the likely periods for delivering such recovery services).

<sup>215</sup> See, e.g., *Pangerl v. Peoria Unified Sch. Dist.*, 780 F. App’x at 507; *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d at 1211; *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 315; *Cordrey v. Euckert*, 917 F.2d at 1474; *Maggie J. v. Donegal Sch. Dist.*, 79 IDELR ¶ 42 (E.D. Pa. 2021); *C.K. v. Bd. of Educ. of Sylvania City Sch. Dist.*, 78 IDELR ¶ 65 (N.D. Ohio 2021); *Grants Pass Sch. Dist. v. Student*, 65 IDELR ¶ 207 (D. Or. 2015); *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d at 574.

<sup>216</sup> See *supra* note 8.