M E M O R A N D U M

TO: District Superintendents
Directors of Special Education
Other Interested Parties

FROM: Christopher A. Koch, Ed.D.
Deputy Superintendent for Special Education

DATE: November 20, 2001

SUBJECT: Communication on Extended School Year Services for Students With Disabilities

This communication is intended to provide clarification and consistency regarding extended school year services for students with disabilities in accordance with the Individuals with Disabilities Education Act (IDEA) and the Illinois Administrative Code (23 IAC 225.75). The attached document may also be accessed via our website at www.isbe.net.

The Illinois State Board of Education wishes to thank Sheryl Piercy, Director of Special Education for Tri-County Special Education Association; David Peterson, Director of Special Education, Northern Suburban Special Education District; Kenneth Randle, Director of Special Education, Niles Township Department of Special Education; John Wilson, Director of Special Education, Wabash and Ohio Valley Special Education District; and Michael Blacharczyk, Director of Special Education for Belleville Area Special Services Cooperative, for their suggestions. In addition, I would like to recognize ISBE staff members Bobbie Reguly, Jan Tanner, Jennifer Chan and Georgiana Theoharis for their work in developing this communication.

We urge you to share this document with principals, interested staff and parents. If you have any questions, please contact Bobbie Reguly at 217/782-5589 (voice) or 217/782-1900 (TTY) or at this agency's Springfield address.

Illinois State Board of Education
Communication on Extended School Year Services
For Students With Disabilities
November 20, 2001

This *Communication on Extended School Year Services* has been prepared by the Illinois State Board of Education and is intended to provide guidance regarding extended school year services for students with disabilities. This guidance does not carry the weight of regulations, but rather is this agency's interpretation of applicable ESY requirements and is provided to assist IEP teams in complying with the IDEA Amendments of 1997 and the implementing regulations. This guidance supercedes Administrative Bulletin No. 91-3AB (Revised) issued on July 1, 1991.

Legal Requirements

1. What is the definition of Extended School Year (ESY) under federal and state requirements?

The sections of the IDEA regulations (34 CFR 300.309 Extended School Year Services) that cover ESY services are as follows:

(a) General.
(1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
(2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§300.340-300.350, 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.

(Authority: 20 U.S.C. 1412(a)(1))

Illinois regulations address the requirements of ESY in a manner consistent with 34 CFR 300.309. 23 IAC 226.75 defines extended school year services as "special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP and at no cost to the parents of the child and meet the requirements of Section 226.750(c) of this part."

23 Illinois Administrative Code at 226.750 states that "a school district shall not limit its provision of services during an extended school year to particular categories of disability, nor shall a district unilaterally limit the type, amount, or duration of such services." The regulations further require the ESY be provided when an IEP team determines it to be necessary for the individual student to receive a free appropriate public education (FAPE) (23 IAC 226.230(a)(9)).

The "normal school year" will differ from district-to-district and school-to-school depending on the adopted school calendar. For example, districts or individual schools operating a year-round calendar or a balanced calendar must consider the need for extended school year services during those interruptions unique to their school calendar. Extended school year services are not synonymous with summer school services. While the ESY requirement is new to Illinois regulations, courts have for some time recognized that for certain children, special education and related services may need to be extended longer than the traditional nine-month, 180-day school year.

2. What does case law tell us about the right to an ESY program?

Case law has established that a student with disabilities is entitled to an ESY program when the combination of regression and recoupment time needed to regain lost skills is excessive. (Armstrong v. Kline, 476 F.Supp.583 (E.D.Pa.1979), rem'd sub nom, Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980), on rem'd, 513 F.Supp. 425 (E.D.Pa.1981.)) Subsequent cases further refined and clarified this standard by requiring ESY programming when the benefits accrued during the school year would be significantly jeopardized in the absence of a summer program or when the need for ESY programming was established by expert opinion based on a professional individual evaluation. These cases also recast the standard by including factors such as: nature of the disability, areas of learning crucial to the goals of self-sufficiency and independence, extent of regression caused by an interruption in education, and the rate of recoupment; degree of impairment, rate of progress, availability of other resources, the student's skill level, and

whether the requested services are an integral part of the program for other students with the same condition. (Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir.1986); Cordrey v. Euckert, 917 F.2d 1460 (6th Cir.1990); Jonathan Lee v. Donnis Thompson, Civil No. 80-0418 (D.Haw.1983); Johnson v. Independent School District No. 4, 921 F.2d 1022 (10th Cir. 1990)).

3. Can a local school district have a policy or practice that precludes the provision of ESY in any and all instances?

No. Federal case law has well established that ESY must be an available option in the continuum of services. (Georgia Association of Retarded Citizens v. McDaniel, 511 F.Supp.1263 (N.D.Ga.1981), aff'd, 716 F.2d 1565 (11th Cir. 1983), vac'd and rem'd, 468 U.S.1213, 104 S.Ct. 3581, 82 L.Ed.2d 880,mod'd 740 F.2d 902 (11th Cir.1984); Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983); Yaris v. Special Sch. Dist., St. Louis County, 558 F.Supp. 545 (E.D. Mo. 1983), aff'd, 728 F.2d 1055 (8th Cir. 1984)). Federal regulations also require that each local school district insure that extended school year services are available as necessary to provide FAPE (34 CFR 300.309). The local school district 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 CFR 300.309). The general standard to apply in determining the individual need for ESY was identified by the Fifth Circuit as "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" (Alamos Heights vs. State Board of Education, 790 F.2d 1153 (5th Cir. 1986)).

ESY Eligibility

4. What factors should be considered in determining the need for ESY services?

No single factor is determinative of the need for extended school year services. Extended school year services must be provided only if the child's IEP team, on an individual basis and in accordance with the district's IEP procedures, determines that ESY services are necessary to insure FAPE (34 CFR 300.309). As with all IEP decisions, the final determination of what services will be provided must be individually determined based on the needs of the student.

A variety of factors must be examined when considering if a student should receive ESY services. These factors include, but are not limited to: the degree of impairment, ability of child's parents to maintain child's level

of skills, whether the service is extraordinary to the child's condition, and the child's rate of progress, retrospective data such as past regression and rates of recoupment of skills *(*Johnson v. Independent School District No. 4 of Bixby, 921, F.2d 1022 (10th Cir. 1990)). Cordrey v. Euckert, 917 F.2d 1460, (6th Cir. 1990) also recommends consideration of "emerging skills" in the ESY eligibility analysis.

Reliable sources of information for determining the presence of these factors may include: (1) progress on goals in consecutive IEPs; (2) progress reports maintained by teachers and others having direct contact with the student before and after interruptions in the educational program; (3) observations and opinions from teachers, parents and others; and (4) results of criterion referenced tests, assessments and other equivalent measures.

5. What do the courts say about "regression-recoupment " learning criterion? Where is this derived from?

First articulated by the 3rd Circuit Court in Armstrong, supra, regression-recoupment analysis is one measure for determining whether a child may need extended school year services. It cannot be the sole means for determining ESY eligibility. In addition to the degree of regression and the time necessary for recoupment of previously learned skills and acquired knowledge, IEP teams must considered many other factors important in its discussions of what constitutes an “appropriate” educational program and the need for extended school year services. (See question #4)

For the purposes of determining the need for ESY services, regression is defined as the amount of loss during a scheduled break in instruction of a learned skill or acquired knowledge which has been specified in the measurable annual goals and short-term objectives or benchmarks in the child’s IEP.

The amount of services provided must be individually determined and sufficient to minimize regression. (Hoelf v. Tucson Unified School District, 967 F.2d 1298 (9th Cir. 1992)). ESY should provide for the maintenance of acquired skills and knowledge not the acquisition or continued development of new skills. For that reason, the amount of services provided for ESY purposes are usually less than that provided during the regular school term where the child is expected to make “progress.”

Recoupment is the amount of time required to recoup those lost skills when school/instruction resumes. It is typical for students, those with and without disabilities, to spend time at the beginning of each school year for review and re-teaching of previously learned skills. A district may

establish its own standard for what it believes to be a reasonable amount of time for a student with a disability to relearn lost skills or knowledge. Long standing guidance from the Illinois State Board of Education suggests that "review and re-teaching should not extend beyond the *first thirty school days of the school year*."

6. Are children who turn three over the summer entitled to ESY services?

Section 226.260(c) of the 23 Illinois Administrative Code states that: "[I]f a child's third birthday occurs during the summer, the IEP Team for that child shall determine when the district's services to the child will begin." Therefore, if the IEP Team determines that a child who turns three over the summer is entitled to ESY services, those services must be provided by the school district to the child.

7. If a child graduates from an elementary district at the close of a regular school term, is the elementary or the high school district responsible for the provision of ESY services during the summer?

If a child is to graduate from an elementary school district at the end of the regular term, representatives of the receiving high school district must be invited to participate in the review and revision of the IEP. If the IEP Team determines that the child needs extended school year services over the summer, those services become the responsibility of the high school district regardless of the student's age.

If a student with a disability does not graduate from the elementary school, he/she becomes the responsibility of the high school district at the age of 15 in accordance with Section 14-6.01 of the School Code. The high school district may assume responsibility at age 14 ½. Regardless, when a child with a disability reaches the age of 14 ½, it is the responsibility of the elementary district to notify the high school district regarding the child's eligibility, program needs and evaluation results. The high school district may participate in the IEP meeting convened by the elementary school, or it may convene its own IEP meeting and formulate its own IEP.

No matter which district convenes the meeting, the high school district is responsible for providing the extended school year services for those students who graduate from the elementary district and is financially responsible for those students who reach the age of 15.

If the ESY services are being provided as compensatory services pursuant to the State's complaint resolution process or an impartial due

process hearing as a result of the elementary district's failure to provide the service(s) on the IEP during the regular school term, the elementary district may be required to provide the service(s) or to reimburse the high school district for the cost of the service(s).

IEP Development

8. What questions might the IEP Team ask to determine on an individual basis the need for extended school year services?

IEP teams may want to consider the following non-exhaustive list of questions as discussion points when addressing the need for extended school year services:

- Does regression/recoupment data suggest that this student's skill losses over breaks are excessive and that it takes an unacceptably long period of time for lost skills to be regained upon return? Would the time needed to re-teach lost skills limit the student's ability to learn NEW skills? To what extent does this student lose skills if those skills are not practiced during the school year? What is the relative impact of short breaks on student performance?
- At what rate did the student make progress on existing IEP goals? To what extent were IEP goals met? Is there any pattern to the timing of the progress (or lack of progress) that would indicate the need for ESY services? Does the student make progress at expected levels given the nature/severity of his/her disability?
- What else is significant about the nature and severity of the child's disability? For example, could ESY services markedly slow the rate of degeneration anticipated due to a student's medical condition?
- Are there any other individual circumstances that make the provision of ESY services critical so that this child can learn or participate in school activities upon return to school?

9. How should ESY services be documented on the IEP?

The IEP must include a statement as to whether the child requires the provision of services ("extended school year services") beyond the district's normal school year in order to receive FAPE. (23 IAC 226.230(a)(9)) (34 CFR 300.309) "Extended school year services must be provided only if the child's IEP Team determines, on an individual basis, in accordance with 34 CFR 300.340-300.350, that the services are necessary for the provision of FAPE to the child." (34 CFR 300.309(a)(2))

Once the IEP Team has determined the need for ESY services, the IEP must reflect: (1) the specific ESY service(s) to be provided with a link to a measurable goal, short-term objective or benchmark; (2) who will be providing the service; (3) the amount of time the service(s) will be offered, (4) how the service(s) will be delivered (direct or consultation); (5) where the service(s) will be provided (LRE); and (6) how the service(s) will be evaluated.

10. Can the IEP for ESY include only related services such as occupational therapy?

Yes. If the IEP Team determines that a child needs a particular related service that service may be provided without providing special education and/or regular education instruction with accommodations. It would not be inconsistent with IDEA to deliver the related service(s) in a different location or utilize a different instructional approach, i.e., pullout vs. inclusive, group vs. individual. As with any IEP decision, the determination of what is to be delivered, how, the amount, and the duration, must be individually determined based on the needs of the child. As with any IEP placement decision, LRE considerations and options must be documented. (See question 11)

11. Must LRE requirements be considered by the IEP Team when determining needed ESY services?

Yes. LRE must be considered by the IEP Team. Although IDEA does not address the obligation of school districts to provide a full spectrum of alternative placements to students with disabilities when districts provide ESY programs, the Office of Special Education Programs, U.S. Department of Education, has stated that the LRE requirements (34 CFR 300.530-300.556) "do apply when an IEP is developed for ESY services." Districts must provide integrated extended year programs when a particular disabled student's IEP requires interaction with nondisabled children. However, districts do not need to establish public programs for nondisabled students for the sole purpose of being able to implement the LRE requirement for students with disabilities who require ESY. As appropriate, a district must meet the LRE provision by alternative means when it is determined that a child with a disabling condition must have interaction with nondisabled children (OSEP Memoranda 213:255 (July 19, 1989) and 16 EHLR 290 (December 18, 1989)). Recently, a federal court in Reusch v. Fountain, 872 F.Supp.1421, 8 A.D.D. 514 (D.Md. 1994)) found that IDEA was violated by the school district because ESY placements were not taking into account the LRE requirement. Like OSEP, the court held that LRE requirements must be considered for students who qualify for ESY. However, the court did not interpret IDEA

"to mandate indifference to legitimate practical considerations or interference with other school programming to create artificial LRE settings during the summer months" (Id. at 1438).

Accordingly, districts have a responsibility to consider LRE options outside of those placements offered by the public school. If the IEP calls for an inclusive placement for socialization or behavioral needs, the district has an obligation to look at nontraditional sites like park district programs, non-public/private programs, etc. A student previously served in an inclusive setting cannot be served in a more restrictive setting. For a district to simply say "we don't offer any summer programming for regular education students and therefore we do not have a responsibility to provide ESY in a location with nondisabled children" is legally indefensible.

Summer School vs. ESY Services

12. What is the difference between an ESY program and a summer school program

A distinction is drawn between a *regular summer school* program operated by the local school district and *extended school year services*. 23 IAC 226.75 defines extended school year services as *"special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP and at no cost to the parents of the child and meets the requirements of Section 226.750* (c) *of this Part."* (See question 2) While State reimbursement for ESY is limited to those programs operated over the summer months, ESY eligibility must be considered whenever there may be a need to extend services longer than the traditional nine-month, 180 school day year.

Regular education summer school programs are defined at 105 ILCS 5/10-22.33A as those courses offered during that period of the calendar year not encompassed by the regular school term. A district may charge a fee for attendance not to exceed the per capita cost. The local board of education may waive all or part of such charges. The subjects taught normally include those offered during the regular school term. Except as provided at 105 ILCS 5/10-22.33B, attendance is not required. A student with a disability may participate in a regular education summer school program provided he/she meets the qualifications. Students with disabilities may be assessed fees in the same manner as non-disabled students for participation in regular education summer school programs, provided that participation is not required by the student's IEP. If the

student's participation in regular summer school is provided in the IEP, the program must be at no cost to the family.

A district may require attendance of resident students identified by the school district as being academically at risk in such critical subject areas as language arts (reading and writing) and mathematics who will be entering any of the school district's grades for the next school term who have **not** been identified as disabled under Article 14 of the Illinois School Code, but who meet the criteria establish under this Section (105 ILCS 5/10-22.33B). This does not mean that school districts can exclude students from such programs specifically designed for "at risk" students solely on the basis of the child's disability. A student with a disability may qualify for participation either as a recommended service on his/her IEP, or through the application of the same process established for other district resident students. However, the statute does prohibit mandatory attendance on the part of the student with a disability.

13. Can special education ESY services be provided during a regular summer school program?

Yes. Depending on the special education student and his or her IEP, it may be appropriate for a special education student to receive ESY services in a regular education summer school program. School districts via the IEP process must determine what is appropriate to meet a special education student's needs.

14. Can a student with a disability be excluded from a regular education summer school program?

No. A student with a disability cannot be excluded from a regular education summer school program if they meet the eligibility qualifications set forth for all students. (See questions 12 and 13)

Funding of ESY during the Summer Term

15. Can a school district provide and receive reimbursement for the provision during the summer of only a related service?

Local and federal dollars may be used for the purpose of providing a necessary related service during the summer. State funds are only available for reimbursement when the related service is in conjunction with an instructional program provided during the summer. Speech/language services may be considered as an instructional program or a related

service; as such, these services are eligible for personnel reimbursement when provided during the summer.

16. What reimbursement is available for special education ESY services provided during the summer?

The following state special education categorical line items provide funding for extended school year services provided during the summer:

- Section 14-7.02 of the School Code provides reimbursement for private tuition costs when students are placed in approved nonpublic special education programs with rates established by the Illinois Purchased Care Review Board.

- Section 14-7.03 of the School Code provides full tuition reimbursement for eligible pupils with severe and profound disabilities.

- Section 14-13.01 of the School Code provides personnel reimbursement for professional and noncertified personnel providing services to students during the summer. This section also provides special transportation reimbursement when required on a student's IEP.

- Section 18-4.3 of the School Code provides summer school state aid reimbursement for those students eligible for reimbursement under Section 14-7.02, Private Tuition, or Section 14-7.02a, Extraordinary Services, during the regular school term.

Details of the processes for applying for and claiming these fund sources are sent to regional and district superintendents and directors in the spring of each year. The most recent memorandum on this topic is dated March 1, 2001.