California State Board of Education
September 2022 Agenda
Item 05 Attachment 3: Public Comments

Patricia Alverson

From: Collins, Doug <DCollins@mcsd.k12.ca.us>
Sent: Tuesday, April 26, 2022 4:51 PM
To: REGCOMMENTS
Cc: Smith, Kevin; Seaton, Shela
Subject: [EXTERNAL] Proposed change to Section 56100

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DATE: 4/26/2022

TO: Lorie Adame, Regulation Coordinator
Administrative Support and Regulations Adoption Unit
California Department of Education

FROM: Doug Collins, Interim Superintendent
Merced City School District

RE: Proposed change to Section 56100, Education Code
References: Section 56345, Education Code; and 34 Code of Federal Regulations Section 300.106

It is respectfully submitted, as a matter of written comment, that it is the position of the Merced City School District to oppose any changes to the above-mentioned, Section 56100. The current regulations are not confusing and clearly state the requirements of Extended School Year (ESY) as it relates to regular education mainstreaming or inclusion. The District believes that the proposed change will contribute to confusion and lead Districts to falsely believe that regular education classes will need to be created for the sole purpose that some student's Individualized Education Plans require mainstream or inclusion placements during ESY. This change has great potential of creating unnecessary costs under the assumption that these services are required if not continued to be spelled out as they currently are in Education Code.

Douglas J. Collins | Interim Superintendent
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From:	Patricia Mange
To:	REGCOMMENTS
Cc:	Ramaah Sadasivam; Andria Seo
Subject:	[EXTERNAL] PUBLIC COMMENT/STATE BOARD OF EDUCATION MUST RESCIND SECTION 3043(G) OF TITLE 5 OF CA CODE OF REGULATIONS AND PROMOTE INCLUSION
Date:	Friday, May 27, 2022 3:59:33 PM
Attachments:	image001.png 2022.05.27 DRC Public Comment Letter.pdf

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Dear Lorie Adame, Regulations Coordinator:

Attached is the Public Comment Letter regarding the proposal by the State Board of Education to rescind section 3043(g) of title 5 of CA Code of Regulations regarding Extended School Year Services.

If you have any questions, please contact Ramaah Sadasivam or Andria Seo of Disability Rights California. Thank you.

Patricia A. Mangé
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May 27, 2022

Via Email Only

Lorie Adame, Regulations Coordinator
Administrative Support and Regulations Adoption Unit
California Department of Education
1430 N Street, Room 5319
Sacramento, CA 95814
regcomments@cde.ca.gov

Re: State Board of Education Must Rescind Section 3043(g) of Title 5 of the California Code of Regulations and Promote Inclusion

Dear Regulations Coordinator:

The organizations sending this public comment advance and protect the rights of California students with disabilities. We strongly support the proposal by the State Board of Education (SBE) to rescind Title 5 of the California Code of Regulations Section 3043(g) regarding Extended School Year Services (ESY). We also support the plan to provide additional guidance to the field but request that this be through a legal advisory rather than through a "Frequently Asked Questions" document as is currently proposed in the Initial Statement of Reasons.

Quite simply, Section 3043(g) violates federal law. The Individuals with Disabilities Education Act (IDEA) requires school districts educate students in their least restrictive environments (LRE), including during the Extended

School Year (ESY) period. Additionally, Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 require school districts to offer educational services to students in the most integrated setting, and to provide accommodations to enable disabled students to have equal access to educational programs. Section 3043(g) violates the above laws by allowing school districts to educate students in an overly restrictive setting during ESY.

Unfortunately, there are many students with disabilities throughout California who are integrated into general education classrooms during the regular school year but are segregated into separate programs during ESY. It is the regular policy and practice of many—if not most—school districts throughout the state to offer *only* segregated settings for ESY. For students who can be fully included with their non-disabled peers, segregated placements cannot provide the full extent of the meaningful education benefit to which they are entitled. These settings may not even address the potential of regression that qualified these students for ESY in the first place.

However, simply rescinding this facially discriminatory regulation is not enough. Section 3043(g) has allowed school districts to unlawfully segregate students with disabilities for decades. The California Department of Education (CDE) must now take steps to undo the damage from this unlawful segregation. If the Department truly supports inclusion of students with disabilities in all aspects of our education system, then Section 3043(g) must be rescinded and CDE and SBE must take affirmative action to promote inclusion in California schools, in compliance with federal laws.

CDE and SBE can promote inclusion by issuing a legal advisory regarding Section 3043 that affirms:

- LRE applies to ESY;
- ESY programs must be provided in students' least restrictive environments—regardless of whether the school district has a general education summer school program;
- The requirement for a continuum of placements also applies to ESY;

- If a school district cannot provide a student who is otherwise fully included with an ESY program in a general education setting, it must conduct an individualized assessment of alternative programs from other school districts or private agencies that can; and
- Students in an inclusive ESY program must be offered the same accommodations provided in their regular general education classes.

Such a legal advisory would align with the United States Department of Education's longstanding position that LRE applies to ESY and that school districts must make available a continuum of placements for ESY.[1] Given the length of time that the current regulation has been on the books, issuing an FAQ does not carry sufficient force to correct past practices. The Department has issued legal advisories in the past and should do so again here.

We recognize that some school districts have limited resources and cannot host an inclusive ESY program for students with disabilities. However, school districts can utilize other programs, including programs from contracted outside agencies or neighboring school districts, to ensure that their students with disabilities are provided an ESY program that meets their needs, including social-emotional needs. For example, a summer camp program may be an appropriate ESY program for a student who is likely to regress without the opportunity to interact with non-disabled peers. Similarly, an ESY program for students with learning disabilities might be LRE for a student with intellectual disabilities, if the student is offered the same accommodations they received in the general education classroom during the regular school year.

Without such action from CDE and SBE, school districts may maintain the status quo of offering students with disabilities who are otherwise fully included with only segregated ESY programs. As the state educational agency, CDE must address the harms caused by the unlawful segregation promoted by Section 3043(g) and push school districts to treat ESY

[1] *See* Office of Special Education Programs ("OSEP"), *Letter to Myers*, 213 IDELR 255 (August 30, 1989); OSEP, *Letter to Myers*, 16 IDELR 290 (December 18, 1989); OSEP, *Letter to Skiba*, 18 IDELR 592 (December 16, 1991). *See also T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.,* 2014 WL 3850786 at 14-16 (2nd Cir. 2014) (amicus curiae brief filed by the U.S. Department of Education).

programs as more than an afterthought. Our students are entitled to fully inclusive ESY programs, and it is time for the state to publicly acknowledge that and to support school districts in making such programs a reality.

Sincerely,

Andria Seo
Senior Attorney
Disability Rights California

William S. Koski
Professor of Law
Stanford Law School
Director, Youth & Education Law Project
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National Center for Youth Law

Disability Rights Education & Defense Fund

Maureen Graves
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California Association for Parent-Child Advocacy

From: Jennifer RoweGonzalez
To: REGCOMMENTS
Cc: Trina Frazier
Subject: [EXTERNAL] Public Comment Re: Extended School Year (5 CCR 3043(g) and (i))
Date: Tuesday, May 31, 2022 4:35:21 PM

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Lorie Adame, Regulations Coordinator
Administrative Support and Regulations Adoption Unit
California Department of Education
1430 N Street, Room 5319
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Dear Ms. Adame,

The Fresno County Superintendent of Schools ("FCSS") operates 76 county-operated special day classes ("SDCs"). Fifty-four of these SDCs are located on integrated school campuses where general education students attend during the regular school year. The integrated school campus classrooms are leased to FCSS by school districts within the Fresno County SELPA ("SELPA") for the purpose of serving students within the SELPA with the most severe needs during the regular school year. The remaining SDCs are run on FCSS's three special education center sites—sites that do not have general education peers. These SDCS also serve students within the SELPA who have the most severe needs. The special education center sites run year-round and extended school year ("ESY") is provided for any of the 76 county-operated SDC classrooms' students whose individualized education programs ("IEPs") include ESY. Because many students choose not to participate in ESY, this allows FCSS to better meet the student's needs and to provide peers—even if those peers are also disabled. Additionally, most of the integrated sites do not have any students present during the summer months. In fact, many of the campuses on which FCSS's integrated site SDCs are located are closed during the summer except for janitorial staff—administrative and support staff are not present for four to six weeks. These weeks of closure overlap with FCSS's ESY calendar.

Title 34 of the Code of Federal Regulations section 300.106 defines ESY as "special education and related services that [a]re provided to a child with a disability [b]eyond the normal school year of the public agency; [i]n accordance with the child's IEP; and [a]t no cost to the parents of the child; and [m]eet the standards of the [state educational agency]." In California, the state educational agency is the California Department of Education ("CDE"). The California Department of Education, in accordance with California's rules, laws, and regulations, has promulgated Title 5 of the California Code of Regulations section 3043 as the ESY standards for the state educational agency. This section has existed in substantially the same form since 1988. Since that time, it has been reviewed by the United States' Department of Education ("USDOE") multiple times and has not been found to violate federal law and, specifically, Title 34 of the Code of Federal Regulations section 300.106.

California's description of ESY is not unique. Many states use the "regression/recoupment" standard

for determining whether a student requires ESY as part of an offer of a free appropriate public education ("FAPE") in a student's IEP. California also allows an IEP team to make the ultimate determination of whether a student requires ESY as part of the IEP process regardless of regression/recoupment. (*See* 5 CCR § 3043(e).) When the federal regulations were developed in 2006 after the last reauthorization of the Individuals with Disabilities Education Action ("IDEA") in 2004, USDOE's comments to section 300.106, support California's language in 3043, and acknowledge that "[t]he concepts of 'recoupment' and 'likelihood of regression or retention' have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents. (*See, for example, Johnson v. Bixby Independent School District 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)). States may use recoupment and retention as their sole criteria, but they are not limited to these standards and have **considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations**. However, whatever standard a State uses must be consistent with the individually-oriented requirements of the Act and may not limit eligibility for ESY services to children with a particular disability category or be applied in a manner that denies children with disabilities who require ESY services in order to receive FAPE access to necessary ESY services." (71 Fed. Reg. 46,582 (2006) (Emphasis added).)

The considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations is why California's section 3043 has never been found by the USDOE to violate the IDEA. Indeed, there is no requirement in section 300.106 for ESY to include access to typically developing peers. And, California's statement in section 3043, subsection (g), which states that, "[i]f during the regular academic year an individual's IEP specifies integration in the regular classroom, a public education agency is not required to meet that component of the IEP if no regular summer school programs are being offered by that agency" has never been found to be problematic by the USDOE—the agency tasked with the oversight and implementation of the IDEA. Thus, there is no reason for California to remove this subsection from its ESY standards.

The federal regulations and comments to the regulations show that ESY does not have to meet the same standard of FAPE, including, but not limited to least restrictive environment ("LRE") that are required for FAPE during the regular school year. The regression/recoupment/IEP team decision standard developed in California is consistent and complies with the IDEA.

If CDE alters the regulations and requires LRE and access to typically developing peers during ESY, FCSS and most, if not all, LEAs will be placed in the impossible situation because they do not have access to typically developing peers in the summer and do not necessarily have access to the same facilities on integrated campuses during the summer. Parents will then demand non-school access to typically developing peers, access that will have to be funded by LEAs. Removing subsection (g) will significantly increase the cost of ESY as well as litigation related to ESY. It will also increase the time and personnel necessary for monitoring and compliance of ESY from CDE—time and personnel that CDE does not have.

Additionally, CDE's basis for removing subsection (i) does not make sense. This subsection is not a subdivision of subsection (g). Rather, it is its own subsection, which is incorrectly numbered. It

should be subsection (h). This subsection addresses an entirely different topic from access to regular classrooms. This subsection addresses year-round schools and exempts them from offering ESY. Traditional, integrated site, year-round school programs do not have the length of breaks necessary to run a 20-day ESY between breaks in the regular school year. They also do not usually have the space to run ESY; this is why they are a year-round school. Other year-round programs such as those run in juvenile halls have even shorter breaks because they only take traditional holidays and otherwise are in session. Thus, removing subsection (i) would place a truly impossible requirement on year-round schools.

Based on the foregoing, both subsections (g) and (i) should remain in place as currently written and should not be removed from section 3043.

Respectfully submitted,

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