**CALIFORNIA DEPARTMENT OF**

**EDUCATION**

TONY THURMOND

State Superintendent of Public Instruction

916-319-0800

**CALIFORNIA STATE BOARD OF**

**EDUCATION**

LINDA DARLING-HAMMOND

President

916-319-0827

#  NOTICE OF PROPOSED RULEMAKING

## AMENDMENT TO CALIFORNIA CODE OF REGULATIONS, TITLE 5, REGARDING

EXTENDED SCHOOL YEAR

Notice published April 15, 2022

**NOTICE IS HEREBY GIVEN** that the State Board of Education (SBE) proposes to adopt the regulations described below after considering all comments, objections, or recommendations regarding the proposed action.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

### PUBLIC HEARING

California Department of Education (CDE) staff, on behalf of the SBE, will hold a virtual public hearing at 9:00 a.m. on May 31, 2022.

Any interested person may participate in the public hearing via Zoom videoconference by logging in per the following instructions:

* Click the following link or paste the link to the browser to join the webinar and enter the password:

[https://us02web.zoom.us/j/81355706179](https://us02web.zoom.us/j/81355706179%22%20%5Co%20%22Launch%20Zoom%20Meeting)

Meeting ID: 813 5570 6179

Passcode: 093779

* To connect with audio only and no video, call one of the following telephone numbers and enter the above meeting ID and password:

 +1 669 900 9128 US (San Jose)

 +1 213 338 8477 US (Los Angeles)

Alternatively, callers may find their local number by using this link: <https://us02web.zoom.us/u/kbQCMShIeA>

For persons intending to attend the Zoom meeting, those persons may check their computers by:

* Clicking on the test link: <https://zoom.us/test>.
* For any issues regarding connecting with Zoom, go to <https://support.zoom.us/hc/en-us> for assistance.

At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the Informative Digest. The SBE requests, but does not require, that persons who make oral comments at the public hearing also submit a written summary of their statements. No oral statements will be accepted subsequent to this public hearing.

### REASONABLE ACCOMMODATION FOR ANY INDIVIDUAL WITH A DISABILITY

Pursuant to the *Rehabilitation Act of 1973,* the *Americans with Disabilities Act of 1990,* and the *Unruh Civil Rights Act,* any individual with a disability who requires reasonable accommodation to attend or participate in a public hearing on proposed regulations, may request assistance by contacting Monica Pecarovich, California Department of Education, Special Education Division, 1430 N Street, Suite 2401, Sacramento, CA, 95814; 916-445-0081. It is recommended that assistance be requested at least two weeks prior to the hearing.

Pursuant to Government Code section 11346.6(a)(3) and (b), because some of this regulation pertains to special education, the following provisions also apply:

Upon request from a person with a visual disability or other disability for which effective communication is required under state or federal law, the CDE shall provide that person a narrative description of the additions to, and deletions from, the regulations. The description shall identify each addition to or deletion from the regulations by reference to the subdivision, paragraph, subparagraph, clause, or subclause within the proposed regulation containing the addition or deletion. The description shall provide the express language proposed to be added to or deleted from the regulations and any portion of the surrounding language necessary to understand the change in a manner that allows for accurate translation by reading software used by the visually impaired.

The CDE shall provide the information described above within 10 business days, unless the CDE determines that compliance with this requirement would be impractical and notifies the requester of the date on which the information will be provided.

Notwithstanding any other law, if information is provided to a requester as described above, the CDE shall provide that requester at least 45 days from the date upon which the information was provided to the requester to submit a public comment regarding the proposed regulation. The CDE shall not take final action to adopt the regulation until the requester has submitted a public comment or the extended 45-day comment period expires, whichever occurs first.

### WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to:

Lorie Adame, Regulations Coordinator

Administrative Support and Regulations Adoption Unit

California Department of Education

1430 N Street, Room 5319

Sacramento, CA 95814

Comments may also be submitted by facsimile (FAX) at 916-322-2549 or by email to regcomments@cde.ca.gov.

Comments must be received by the Regulations Coordinator prior to or on May 31, 2022. All written comments received by CDE staff during the public comment period are subject to disclosure under the Public Records Act.

### AUTHORITY AND REFERENCE

Authority: Section 56100, Education Code.

References: Section 56345, Education Code; and 34 Code of Federal Regulations Section 300.106.

### INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Individuals with Disabilities Education Act (IDEA) as amended, mandates the provision of Free and Appropriate Public Education (FAPE), at no cost to parents, to eligible children with exceptional needs, with the intention to meet the unique needs of the child. Title 34 of the Code of Federal Regulations (34 C.F.R.) section 300.106 extends this mandate to extended school year (ESY) services if a child's individualized education program (IEP) team determines, on an individual basis, in accordance with 34 C.F.R. sections 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child. Title 5 of the California Code of Regulations (5 CCR), section 3043 was adopted by the SBE in 1988, pursuant to its general rulemaking authority. This section describes the obligation of local educational agencies (LEAs), Special Education Local Plan Areas (SELPAs), or county offices of education providing special education and related services and receiving federal funding for the same to provide ESY services for each individual with exceptional needs who requires special education and related services in excess of the regular academic year. Subsection (g) of section 3043 states that “if 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.” Recently concerns have been raised that this regulation could be interpreted, incorrectly, to operate so as to preclude consideration of least restrictive environment in ESY determinations. It is recommended that subsection (g) be deleted for clarity. It is also recommended that subsection (i) of be deleted because it has no meaning except in relation to subsection (g).

#### *Policy Statement Overview*

All students eligible under the IDEA, title 20 of the United States Code section 1400 et seq., are entitled to a FAPE. The IDEA regulations address the possibility that some students with IEPs will require services beyond the regular academic year, i.e., ESY services. The regulations state:

Each public agency must ensure that extended school year services are available as necessary to provide FAPE . . .

34 C.F.R. 300.106(a)(1).

While all students eligible under the IDEA are entitled to services during the regular academic year, not all students with IEPs will require ESY services in order to receive a FAPE. Federal and state law provide that the IEP team for each individual student determines whether ESY services are necessary (34 C.F.R. 300.106(a)(2); Ed. Code, § 56345(b)(3)). The federal ESY regulation does not specify how the IEP team should make the determination of “necessity.” California has adopted a regulation setting forth criteria for how the IEP team should make that determination for each individual student (5 CCR §, 3043). The state regulation states that the IEP team should consider whether interruption of a student’s programming during the summer may cause regression, when coupled with a student’s limited recoupment capacity.

The IDEA has a provision known as “least restrictive environment,” or LRE, which states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. 1412(a)(5)(A).

Toward that end, a SELPA in California must make a “continuum” of placements available, including regular classes, special classes, and other options (34 C.F.R. 300.115(b)(1); Ed Code, §§ 56360-56361).

While ESY services too must be provided in the LRE, it is important to recognize that ESY services are provided during summer months when, as a practical matter, the full continuum of placements may not be available. While school attendance is mandatory during the regular academic year for students ages 6 to 18 (Ed. Code, § 48200), school attendance is not mandatory during the summer. Nothing in federal or state law mandates that an LEA offers an optional “regular education” summer school program to all of its students. Nevertheless, currently LEAs may offer various regular education summer school programs for various student populations through various funding sources (examples may include Title I, enrichment, credit recovery for graduation, COVID-related learning loss, or others).

California's ESY regulation states:

If 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.

5 CCR Section 3043(g).

Existing federal and state law require that LEAs consider the LRE concept in relation to ESY, although an LEA's overall offerings look different in the summer. However, recently concerns have been raised that this regulation could be interpreted, incorrectly, to operate so as to preclude consideration of LRE in ESY determinations. Part of the confusion may be that an LEA does not necessarily implement any student's traditional school year IEP during ESY, but rather creates within the IEP an ESY program for the student that may be different from the traditional school year IEP. For this reason, the phrase in 5 CCR section 3043(g) stating that if the LEA does not offer any regular education summer school programs, the LEA "is not required to meet that [regular education] component of the [traditional school year] IEP,” may be confusing. The California Department of Education is planning to prepare and issue Frequently Asked Questions to address concerns about ESY, including consideration of the LRE concept in relation to ESY.

It is recommended that 5 CCR section 3043 (g) be deleted for clarity. The existing federal and state law are sufficient to address ESY without subsection (g), and, rather than clarify and implement existing law, subsection (g) may be confusing the field.

Also, it is recommended that subsection (i) of 5 CCR, section 3043 be deleted. Subsection (i) states, “This section [subsection (g)] shall not apply to schools which are operating a continuous school program pursuant to Chapter 5 (commencing with Section 37600) of Part 22, Division 3, Title 2, of the Education Code.” Subsection (i) has meaning only in relation to subsection (g), and not in relation to the rest of section 3043. Because subsection (g) is being deleted, subsection (i) should be deleted as well.

Furthermore, it is recommended that Education Code section 37600 be deleted from the “Reference” section in the NOTE because it is reference only for subsection (i), which is being deleted. Finally, it is recommended that Education Code section 41976.5 be deleted from the “Reference” section in the NOTE because it was repealed by Statutes 2021, chapter 666, section 32 (Assem. Bill No. 486), effective January 1, 2022.

#### *Anticipated Benefits of the Proposed Regulation*

This action will clarify, consistent with existing federal and state law, that decisions as to what constitutes FAPE in the LRE for individual students during ESY should be made based on individual student needs. Further regulation to implement the applicable federal and state ESY provisions is unnecessary and deletion of such regulation, i.e., 5 CCR section 3043(g) and related section 3043(i), is expected to minimize confusion over its application in relation to existing law.

#### *Evaluation of Inconsistency/Incompatibility With Existing State Regulations*

An evaluation of the proposed amendment to regulations has determined they are not inconsistent/incompatible with existing regulations, pursuant to Government Code section 11346.5(a)(3)(D). After conducting a review for any regulations that would relate to or affect this area of law, the SBE has concluded that these are the only regulations that concern the ESY regulation.

### DISCLOSURES REGARDING THE PROPOSED ACTION/ FISCAL IMPACT

The SBE has made the following initial determinations:

*Other statutory requirements*: There are no other matters as are prescribed by statute applicable to the specific state agency or to any specific regulations or class of regulations.

*Mandate on local agencies and school districts*: None

*Costs to any local agencies or school districts for which reimbursement would be required pursuant to Part 7 (commencing with section 17500) of division 4 of the Government Code*: None

*Cost or savings to any state agency*: None

*Other non-discretionary costs or savings imposed on local agencies, including local educational agencies*: None

*Costs or savings in federal funding to the state*: None

*Effect on housing costs*: None

*Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states*: None

*Cost impacts on a representative private person or businesses*: The SBE is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

*Report required*: The proposed regulations do not require a report to be made.

*Effect on small businesses*: The proposed amendment to regulations would not have an effect on any small business because the removal of 5 CCR section 3043(g) and related section 3043(i) does not change or modify existing law requiring the provision of FAPE in the LRE or the provision of an ESY program as determined by the student’s IEP by a public agency receiving federal funding under the IDEA.

### results of the Economic Impact Analysis/ASSESSMENT

The SBE concludes that it is unlikely that these proposed regulations will: 1) create or eliminate jobs within California; 2) create new businesses or eliminate existing businesses within California; or 3) affect the expansion of businesses currently doing business within California.

Benefits of the Proposed Action: The proposed amendments to section 3043 by removing subsection (g) and related subsection (i) benefits of the health and welfare of California residents by removing a perceived barrier to the provision of FAPE to students as required under the IDEA. These proposed regulations will have no adverse effect nor benefit on worker safety or the State’s environment.

These proposed regulations will have no adverse effect nor benefit on worker safety or the State’s environment.

### CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the SBE must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the SBE, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

### CONTACT PERSONS

Inquiries concerning the content of these proposed regulations should be directed to:

Monica Pecarovich, Interim Education Administrator

California Department of Education

Special Education Division

1430 N Street, Room Suite 2401

Sacramento, CA 95814

Telephone: 916-445-0081

Email: mpecarovich@cde.ca.gov

Inquiries concerning the regulatory process may be directed to the Lorie Adame, Regulations Coordinator, or the backup contact person, Hillary Wirick, Regulations Analyst. The Regulations Coordinator and the Regulations Analyst may be reached by email at regulations@cde.ca.gov or by telephone at 916-319-0860.

### AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS AND INFORMATION

As of the date this notice is published in the Notice Register, the rulemaking file consists of this Notice, the proposed text of the regulations, the Initial Statement of Reasons (ISOR), the agenda and a recording of the SBE meeting where the SBE approved commencement of this rulemaking activity, and Fiscal and Economic Impact Statement (STD. 399). These documents upon which the proposed action is based may be obtained upon request from the Regulations Coordinator. In addition, this Notice, the text of the proposed regulations and the ISOR may also be viewed on CDE’s website at <http://www.cde.ca.gov/re/lr/rr/>.

### AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public hearing and considering all timely and relevant comments received, the SBE may adopt the proposed regulations substantially as described in this Notice

or may modify the proposed regulations if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified regulation will be available to the public for at least 15 days prior to its adoption from the Regulations Coordinator and will be mailed to those persons who submit written comments related to this regulation, or who provide oral testimony at the public hearing, or who have requested notification of any changes to the proposed regulations. The SBE will accept written comments on the modified regulations for 15 days after the date on which they are made available.

### AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

You may obtain a copy of the Final Statement of Reasons, once it has been finalized, by making a written request to the Regulations Coordinator.

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the Regulations Coordinator.

### AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations with modifications highlighted, as well as the Final Statement of Reasons, when completed, and modified text, if any, can be accessed via CDE’s website at <http://www.cde.ca.gov/re/lr/rr/>.

02-22-2022 [California Department of Education]