

Alerts & Articles

Changes to ESY Regulation for Summer 2023!

02.13.2023

As a follow up to our April 21, 2022, Alert, Title 5, California Code of Regulations, Section 3043, has been amended, **effective January 1, 2023**, to reflect the deletion of the following two subsections:

- subdivision (g), which previously stated:

If during the regular year an individual's individualized education program ("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.

- subdivision (i), which previously stated:

This section 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.

All other federal and California regulations/statutes pertaining to extended school year ("ESY") remain unchanged.

Why was this change made?

Existing federal and state laws require that local educational agencies ("LEAs") consider the least restrictive environment ("LRE") when determining an appropriate ESY for eligible students. Concerns were raised that subsection (g) could be interpreted as precluding the consideration of LRE in ESY determinations.

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The regulation was purportedly amended to eliminate confusion as to whether LEAs should consider LRE in making determinations related to ESY. However, it should be noted that many LEAs did not find the prior regulation confusing. Rather, many LEAs believed the prior regulation provision was helpful because it allowed IEP teams to offer specialized academic instruction in lieu of regular education instruction when regular education instruction within an LEA was not generally available during the summer.

What does this mean for the 2023 ESY?

LEAs in California have always been obligated to consider LRE in developing all aspects of a child's IEP. The amendment to Section 3043 has not changed this obligation.

That said, while ESY services must be provided in the LRE, ESY services are provided during summer months when the full continuum of placement options are typically not available. Nothing in federal or state law mandates that an LEA offer an optional "regular education" or "general education" summer school program to all of its students.

Prior to the removal of subdivisions (g) and (i), of section 3043, LEAs were expressly not required to make available to its special education students opportunities for integration into regular education classes during ESY if the districts were not offering regular summer school programs. This language appears to have been an effort to codify federal law and subsequent guidance from the United States Department of Education which affirmed that because ESY services are provided during a period of time when the full continuum of alternative placements is not normally available, the Department does not require States to ensure that a full continuum of placements is available solely for the purpose of providing ESY services.

Critics of the amendment are concerned that the deletion of subsection (g) could be interpreted by some, albeit incorrectly, to mean that LEAs are required to provide certain ESY services in regular education classrooms, even if general education summer school programming is not offered.

So what do we do now?

- Remind your staff to consider the LRE requirement when making determinations for ESY;



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- Document any and all discussions regarding the specific factors considered in developing a child's IEP, including ESY eligibility/ services. Remember, no one size fits all;
- Be prepared to articulate how a student's needs will be appropriately met through the offered ESY programming, and be sure that your ESY offers are specific and clear; and
- Keep an eye out for the California Department of Education's forthcoming FAQ concerning the application of LRE in relation to ESY and OAH decisions interpreting the updated ESY provision in the State's regulation.

If you have any questions regarding this Alert, you can contact the authors or your favorite attorney at Atkinson, Andelson, Loya, Ruud & Romo.

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