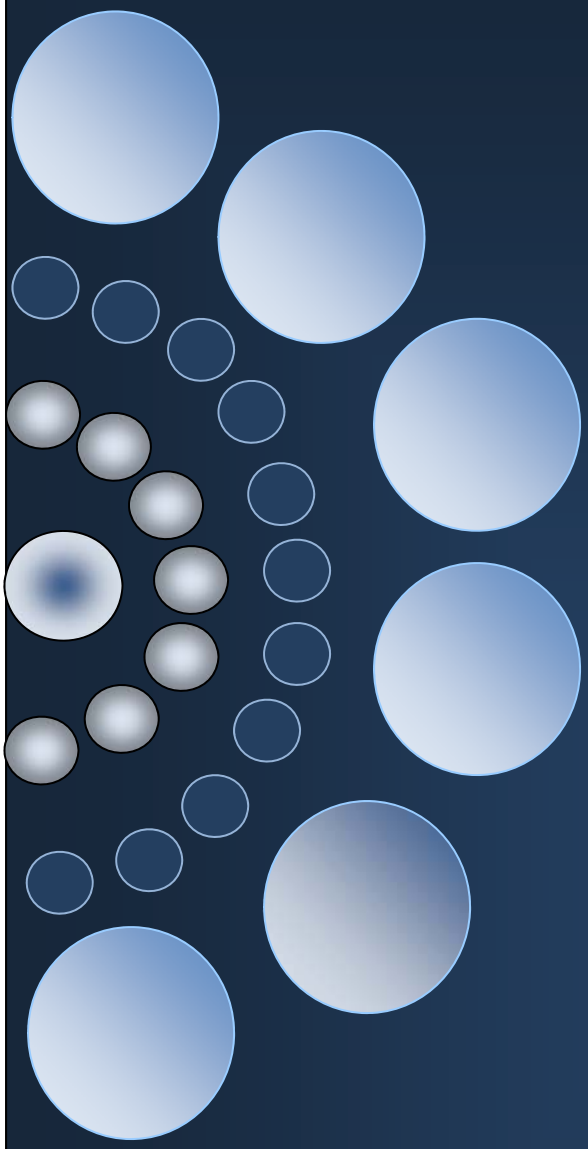


Extended School Year Services Guidance Manual

cde Improving Academic Achievement

This Page Intentionally Left Blank

State Board of Education

Bob Schaffer (R)
Chairman
4th Congressional District
Fort Collins

Marcia Neal (R)
Vice-Chairman
3rd Congressional District
Grand Junction

Elaine Gantz Berman (D)
1st Congressional District
Denver

Jane Goff (D)
7th Congressional District
Arvada

Angelika Schroeder (D)
2nd Congressional District
Boulder

Paul Lundeen (R)
5th Congressional District
Colorado Springs

Debora Scheffel (R)
6th Congressional District
Parker

Colorado Department of Education

Robert Hammond
Commissioner of Education

Dr. Ed Steinberg
Assistant Commissioner
State Director of Special Education

Extended School Year (ESY) Task Force Members

Jan Blair
Special Education Coordinator
Grand Junction

Dena Bethel
Exceptional Student Leadership Unit
Colorado Department of Education

Laura Freppel
Exceptional Student Leadership Unit
Colorado Department of Education

Lisa Humberd
Special Education Director
Pikes Peak Region

Alison Lowenthal
Secondary Transition Services
Colorado Department of Education

Deb Montgomery
Member of General Supervision Team
Colorado Department of Education

Wayla Murrow
PEAK Parent Center

Rebecca Odegard-Siegele
South Central Region for Special Education

Gina Quintana
Consultant on Significant Support Needs
Colorado Department of Education

Marietta Sears
Director of Special Education
Northern Colorado Region

Susan Smith
Pre-School Special Education Coordinator
Colorado Department of Education

Shirley Swope
PEAK Parent Center

Jackie Whittington
St Vrain Valley School District

Also special thanks to following individuals for sharing their expertise with the ESY Task Force:

Kama Linscome
Eligible Facilities
Colorado Department of Education

Lena Oliver
Colorado Special Education Advisory Council

Denise McHugh & Rebecca Kahn (Facilitators)
Center for Systems Integration

Table of Contents

Legal Framework

Extended School Year (ESY) services are governed by federal law, federal regulation and case law. The purpose of this section is to provide an overview of the legal requirements for ESY services in Colorado.

Although the federal Individuals with Disabilities Education Act (IDEA) makes no reference to ESY services, the federal regulations implementing the IDEA specifically address ESY Services. ESY services are defined as special education and related services that are provided beyond the normal school year in accordance with the child's IEP and at no cost to the parents.[1]

ESY services are a necessary component of a free appropriate public education (FAPE) for some, but not all, students with disabilities, i.e., ESY services "must be provided only if a child's IEP Team determines, on an individualized basis…that services are necessary for the provision of FAPE to the child."[2] Administrative units and state-operated programs may not limit ESY services to "particular categories of disability; or [unilaterally] limit the type, amount, or duration of those services."[3]

Consistent with the obligation to provide FAPE, ESY services must be determined annually and provided in the least restrictive environment (LRE) as determined by the child's IEP Team. However, the U.S. Department of Education has clarified that an administrative unit or a state-operated program is "not required to create new programs as a means of providing ESY services to students with disabilities in integrated programs if the public agency does not provide services at that time for its nondisabled children."[4]

Since at least 1983, questions about the proper standard for determining ESY services have been a source of litigation. The Tenth Circuit Court of Appeals, whose decisions are binding in Colorado, issued a decision in 1990 that continues to serve as the touchstone for determining ESY services in Colorado. *Johnson v. Independent School District No. 4 of Bixby, Tulsa County* involved a student with severe and multiple disabilities who attended an Oklahoma school

[1] 34 CFR § 300.106 (b)

[2] 34 CFR § 300.106 (a) (2)

[3] 34 CFR § 300.106 (a)(3)

[4] Assistance to States for the Education of Children with Disabilities, 64 Fed. Reg. 12577 (Mar. 12, 1999) (comments to proposed 34 C.F.R. 300.309).

district.[5] In the *Johnson* case, the court framed the critical issue to be resolved by IEP Teams when determining whether a child needs ESY services as follows:

> [The *Rowley*] educational benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought "to a virtual standstill." Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year round services...The issue is 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…[the] analysis should proceed by applying 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 situations at home and in his or her neighborhood community.[6]

The court identified a list of possible factors to be considered when determining ESY services:

- ✓ The degree of impairment;
- ✓ The degree of regression suffered by the child;
- ✓ The recovery time from this regression;
- ✓ The ability of the child's parents to provide the educational structure at home;
- ✓ The child's behavioral and physical problems;
- ✓ The availability of alternative resources;
- ✓ The ability of the child to interact with children without disabilities;
- ✓ The areas of the child's curriculum which need continuous attention;
- ✓ The child's vocational needs; and
- ✓ Whether the requested service is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition.[7]

It is important to note that the court did not intend that the possible list of predictive factors be exhaustive or that each factor "would impact planning for each child's IEP".[8]

---

[5] 921 F.2d 1022 (10th Cir. 1990)

[6] *Id.* at 1027-28 (*quoting Alamo Heights Indep. Sch. Dist. v. State Bd. Of Ed.*, 790 F.2d 1153 (5th Cir. 1986).

[7] *Johnson*, *supra* at 1027 and 1030, n. 9.

[8] *Id.* at 1030, n. 9.

The long-standing interpretation by the Colorado Department of Education (CDE) of the *Johnson* case has been that the purpose of ESY services is to maintain a student's previously learned skills.[9] The CDE's interpretation was challenged in *McQueen v. Colorado Springs School District No. 11*.[10] The federal district court upheld the CDE's interpretation but clarified that teaching a student new skills in order to maintain learned skills may be necessary depending on the unique needs of the student.[11] The CDE agrees with the clarification, which is reflected in this Guidance Manual.

Within this legal context, then, the Guidance Manual identifies a practical process for determining whether a special education student needs ESY services in order to receive a FAPE. The process also provides a practical method for documenting the annual ESY decision made by the IEP Team.

[9] *Determining ESY Services* (CDE 1998)

[10] 419 F. Supp. 2d 1303 (D. Colo. 2006), *rev'd on other grounds,* 488 F. 3d 868 (10th Cir. 2007).

[11] *Id.*, 419 F. Supp. 2d at 1309-10.

Extended School Year Services

FACT ESY Services ***are***:	FICTION ESY Services ***are not***:
ESY Services are for a subset of students, aged 3 to 21, who are eligible for Special Education.	ESY Services are not: • For every student on an IEP, • Automatically provided because the child received services the prior summer or at any other time in the past, or • Based on a disability category or medical diagnosis.
ESY Services are required to maintain existing skills in order to prevent severe regression, which may include the teaching of new skills in order to maintain existing skills, and are derived from targeted goals and objectives from the current IEP.	ESY Services are not designed to develop new skills unrelated to the maintenance of existing skills.
ESY Services are provided in the least restrictive environment (LRE).	ESY Services are not required to be provided in integrated settings if the public agency does not provide services at that time for its non-disabled children.
ESY Services are based on the individualized needs of the student.	ESY Services are not: • Provided as a substitute for daycare, or • A one-size-fits-all traditional summer school.
ESY Services, including the type, amount, and duration, are determined by the IEP Team and based on the unique needs of each student.	ESY Services are not compensatory education (i.e., making up for missed or inadequate services). ESY Services are not: • Designed to replace or duplicate alternative community resources; and/or • Intended to make up for absences when the parent opts to remove the child from school.
ESY Services are provided at no cost to families; however, when there are two or more appropriate programs, the cost of each option must be considered by the IEP Team. ECEA Rule 4.03(8)(c).	ESY Services are not paid for by the family. If the family opts for additional activities not related to ESY Services, the family is responsible for those costs.

Determination of Extended School Year Services

This Guidance Document is meant to assist IEP Teams in making appropriate decisions as to applicability of ESY services. ESY services must be considered annually for all students, aged 3-21, including:

- newly identified students;
- students transitioning from IDEA Part C services to IDEA Part B services; and
- students receiving secondary transition services

When determining ESY eligibility, there are several factors to consider. First, the IEP team must provide documentation that identifies the child's progress toward his/her goals and/or objectives. This data must be gathered before and after breaks and analyzed to determine whether the child has shown severe regression over breaks from school. Staff should document if there is severe regression and, if so, the length of time taken to recoup or regain a skill. Once the data have been reviewed, the IEP team must then review the Predictive Factors.

Each guiding question under the Predictive Factors should be considered in relationship to the specific child and his/her progress toward goals and/or objectives. After information has been gathered and each question has been individually considered, the IEP team will discuss the information to develop a comprehensive picture of the child. This information, along with the regression data, will be used to answer the question, **"Without continued supports and services, will the student experience a loss of skill(s) that will significantly jeopardize the educational benefits accrued to the student during the regular school year?**" The data collected will also be used to determine the type and amount of service that will be provided to assist the child in maintaining his/her learned skills over the break from school.

Remember that ESY services are not intended to meet newly developed goals and objectives, or to replicate full day services during the school year. ESY services can be provided in a variety of settings and may include the home, school, or community setting. Alternatively, if the child is scheduled to take part in family-planned community or home activities that may meet the child's need for ESY services, such activities may be sufficient rather than providing ESY services through the administrative unit.

When determining ESY eligibility, there are several factors to consider through a decision-making process. This process includes collecting a body of evidence that includes the following:

Step 1: Collect and review progress monitoring data throughout the regular school year based on current goals and/or objectives, paying particular attention to data points

collected before and after extended breaks (e.g., winter, spring, summer, and fall, and breaks occurring during year-round school).

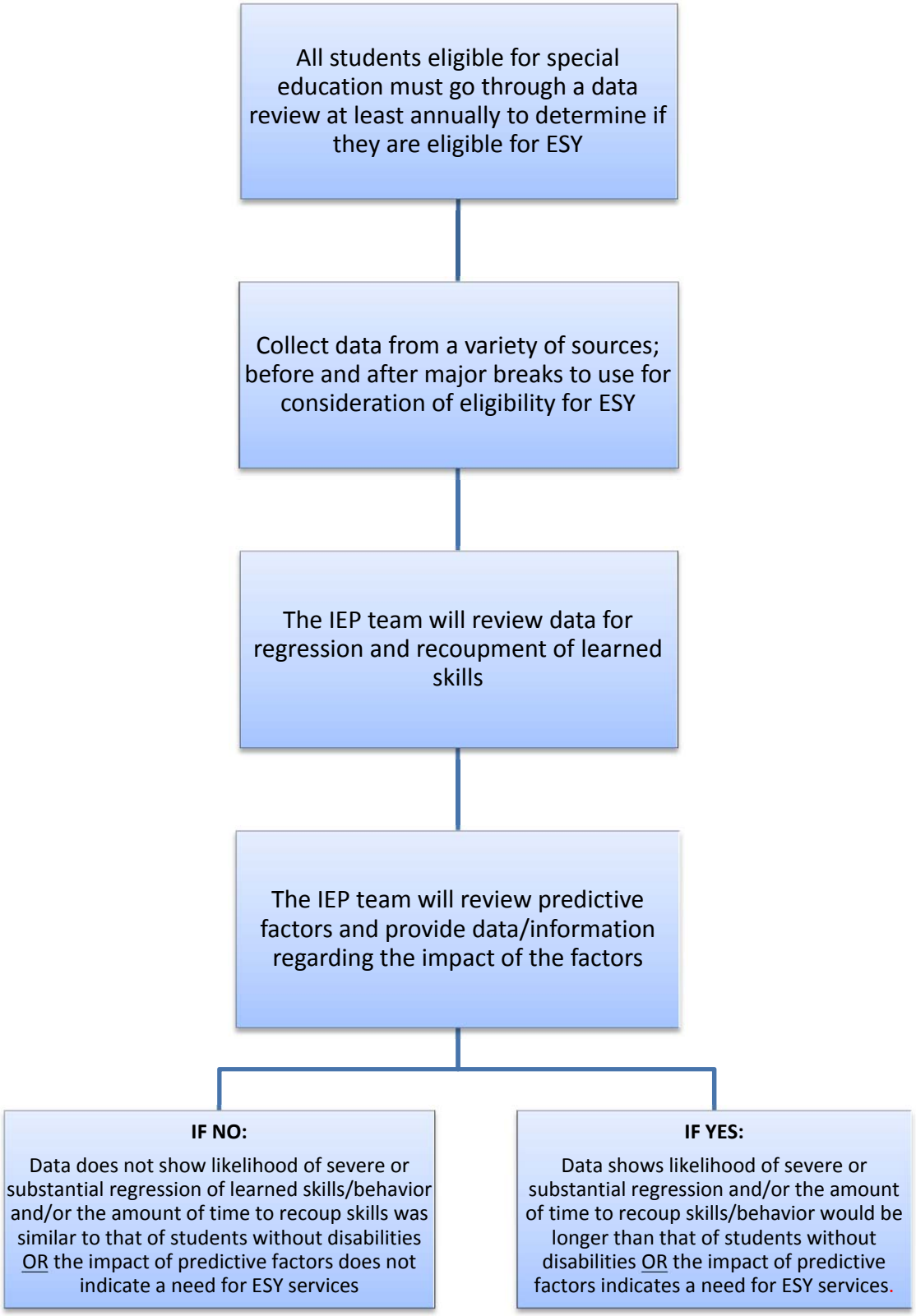
Step 2: Use the progress monitoring data to determine whether there was severe regression and recoupment during the extended breaks.

Step 3: Review and document the Predictive Factor data, using every applicable Guiding Question.

Step 4: After the regression/recoupment and predictive factors data have been reviewed, the IEP team must answer the following question: **Without continued supports and services, will the student experience a loss of skill(s) that will significantly jeopardize the educational benefits accrued to the student during the regular school year?**

Step 5: If the answer is "yes," the IEP Team must determine the type and amount of service that will be provided to assist the child in maintaining his/her learned skill(s) during the ESY period. If the answer is "no," then the child does not qualify for ESY services.

Flow Chart for Determining ESY Services



Regression and Recoupment

Regression is the loss of skills and/or knowledge experienced by the student during a break from school. Severe regression is loss of skill that significantly jeopardizes the educational benefits accrued to the student during the regular school year.

Thus, it is critical to collect pre- and post-break data in addition to the year-round progress monitoring of goals and/or objectives and the collection of multiple data points.

It is imperative to note that all students exhibit regression of skills during extended breaks.

Recoupment is the amount of time it takes for a student to recover skills and knowledge lost during a break. Pre- and post-break progress monitoring must include enough data points to obtain the rate of recoupment. The data is analyzed to determine whether this regression and recoupment significantly jeopardizes the educational benefits accrued to the student during the regular school year.

Depending on the child's unique needs, the number of data points needed to determine regression and recoupment may vary.

Guiding Questions:

1. What does pre- and post-break data show regarding regression of learned skills?

2. After extended breaks how much time does it take the student to recoup lost skills?

Data/Information regarding Regression and Recoupment:

Predictive Factors

The following questions will guide the process to be used by the IEP Team in determining whether the educational benefits accrued to the child during the regular school year will be significantly jeopardized if the child is not provided ESY services during extended breaks. The IEP Team should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the professional judgment of the IEP Team, as well as circumstantial considerations of the child's individual situation at home and in the child's neighborhood and community.

Child's Rate of Progress

Guiding Question:

Is the child's rate of progress such that the regression is severe and/or the recoupment is so slow that the child is prevented from progressing on his/her goals and/or objectives? Describe the rate of progress and whether the interruption of services would be detrimental to continued progress.

Data/Information regarding the predictive factor of rate of progress:

Type and Severity

Guiding Question:

How does the degree of impairment of this student's disability impact the maintenance of learned skills? Consider the following:

- Explain the student's progress on goals and/or objectives.
- What are the contributing factors that have impacted progress (e.g., Health factors, multiple illnesses)?
- Describe the type and amount of services and supports needed for the child to maintain skills or knowledge (e.g., Does the student require a highly organized, structured, environment to maintain skills)?

Data/Information regarding the predictive factor of type and severity:

Behavioral / Physical

Behavioral Guiding Question:

How does the child's behavior impact/interfere with the student's ability to maintain learned skills?

- Consider the information in the student's Behavior Intervention Plan (BIP), if the child has one.

Data/Information regarding the predictive factor of behavioral:

Physical Guiding Question:

How do the child's physical needs impact/interfere with the student's ability to maintain learned skills?

Data/Information regarding the predictive factor of physical:

Alternative Resources

Guiding Question:

What alternative resources are already planned by the family or could be available in order for the student to maintain learned skills? Please consider:

- What is the family planning for the extended break that might support the maintenance of the learned skill or knowledge of concern?
- What resources and activities have been or could be provided to the family to work on goals and/or objectives during extended breaks?

Data/Information regarding the predictive factor of alternative resources:

Ability to Interact with Peers without Disabilities

Guiding Question:

How will the student have opportunities to interact with peers without disabilities during the extended break?

- If there is a lack of opportunity for the student to interact with peers without disabilities, consider how that may significantly interfere with the maintenance of learned skills.

Data/Information regarding interaction with peers without disabilities:

Curriculum That Needs Continuous Attention

Guiding Question:

Describe the goals, objectives, curricular elements, or other IEP components that require continuous attention in order to maintain learned skills.

Data/Information regarding the predictive factor of curriculum that needs continuous attention:

Vocational Needs

Guiding Question:

What data indicate that the student requires ongoing vocational instruction in order to maintain learned skills?

Data/Information regarding the predictive factor of vocational needs:

Other Relevant Factors

Guiding Question:

What additional factors have impacted the child's ability to maintain learned skills and knowledge?

Data/Information regarding the predictive factor of other relevant factors:

Summary of Determination

Based on the body of evidence, without continued supports and services, will the student experience a severe loss of skill(s) or knowledge that will significantly jeopardize the educational benefits accrued to the student during the regular school year?

- ☐ Yes (If yes, the student is eligible for ESY services.)
- ☐ No (If no, the student is not eligible for ESY services.)

Regardless of whether the response is "yes" or "no," provide the rationale and bases for the decision.

If the student is eligible for ESY services describe the supports/services that are essential, as well as reasonable to meet this student's individual needs in order to maintain learned skills. Add the information here to the ESY section of the IEP.

Glossary of Terms

Term	Definition
34 CFR Part B Regulations	The U.S. Department of Education's regulations that implement the IDEA. Usually referred to by section number (i.e., 34 CFR § 300.1)
Acquisition Time	The amount of time to learn a skill or acquire knowledge.
Alternative Resources / Alternative Community Resources	Resources that are available in the community and are accessible to all students.
Annual / Annually	At least once every calendar year.
Community / Home Resources	Supplies, materials, people, services, or activities (e.g., summer camps, parks and recreation programs) that are provided within the home and/or community.
Data analysis	The process of evaluating data using analytical and logical reasoning to examine each component of the data.
Data Collection	Any systematic method of gathering and documenting skill levels, regression, recoupment and progress.
ECEA	The Exceptional Children's Educational Act, which is Colorado's special education law. Colo. Rev. Stat. § 22-20-101 et seq.
ECEA Rules	The State Board of Education rules implementing Colorado's Exceptional Children's Educational Act. 1 CCR 301-8, 2220-R-100.00 et seq.
Emerging Skills	Beginning levels of skill acquisition.
Essential	Necessary foundation or fundamental components.
Extended School Year(ESY) Services	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. 34 C.F.R. § 300.106.
Evidence	Data that is useful in forming a conclusion or judgment.
Extended Breaks	Any scheduled break in educational programming.
Extraordinary Services	Services that are beyond or out of the common order or method.
Goals	A required component of an IEP. Goals and objectives are written for the individual student and must be reviewed or revised annually. Goals are written to indicate skills or abilities students are currently working to achieve.
Objectives	Short-term objectives are a logical breakdown of the major component of the annual goal, and can serve as milestones for measuring progress toward meeting the annual goal. *Notice of Interpretation*, Appendix A to 34 CFR Part 300 (*1999 regulations*).
IDEA	The Individuals with Disabilities Education Act is the federal special education law. 20 U.S.C. § 1401 et seq.
Individualized Education Program (IEP) Team	The group of people responsible for developing, reviewing, and revising the IEP (Individualized Education Program) for a student with a disability. The IEP team includes: (i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment; (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) the Director of special education or designee who is knowledgeable about and has the authority to commit the resources of the administrative unit; (v) an individual who can interpret the instructional implications of evaluation results ; (vi) at the discretion of the parent of the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

	(vii) whenever appropriate, the child with a disability. 34 C.F.R. § 300.321; ECEA Rule 4.03(5).
Individual Family Service Plan (IFSP)	Document which outlines the services to be delivered to families of infants and toddlers receiving special education.
Integral	Essential or necessary for completion.
Interruption of services or educational programming	Any break in educational programming.
Learned Skills	Levels of achievement that have been acquired and that can be demonstrated through assessment.
Least Restrictive Environment	To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, should only be educated in special classes, separate schools, or removed from the regular educational environment when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114.
Maintain	To cause to remain at the current level of functioning.
Predictive Factors	Indicators or criteria which are considered when determining ESY eligibility.
Pre-Break Skill Level	Level measured immediately before the interruption of education programming.
Post-Break Skill Level	Level measured immediately after the interruption in education programming.
Progress Monitoring	Progress monitoring is the scientifically based practice of assessing students' academic performance on a regular basis for three purposes: 1. To determine whether children are benefiting appropriately from the instructional program, including the curriculum; 2. To build more effective programs for the children who do not benefit; and 3. To estimate rates of student improvement.

Rate of Progress	Progression over time of skill acquisition.
Recoupment Period	A span of time needed to regain the level of the previously learned skill.
Related Services	Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.34(a).
Severe or Substantial Regression	A loss of skill level that significantly jeopardizes the benefits accrued during the regular school year.
Severity	Degree of impact.
Skill Level	Documented level of achievement.

Appendix A

921 F.2d 1022 (1990)

Natalie JOHNSON, a minor who sues By and Through Fred and Jennifer JOHNSON, her father and mother, as next friends, Plaintiff-Appellant, v. INDEPENDENT SCHOOL DISTRICT NO. 4 OF BIXBY, TULSA COUNTY, OKLAHOMA; Oklahoma State Department of Education; Children's Developmental Center, Defendants-Appellees.

No. 89-5111.

United States Court of Appeals, Tenth Circuit.

December 11, 1990.

1023*1023 Lowell Thomas Price, Jr., of Protection & Advocacy Agency, Tulsa, Okl., for plaintiff-appellant.

Andrea K. Allbritton, of Rosenstein, Fist & Ringold, Tulsa, Okl. (John G. Moyer, Jr. with her on the briefs), for defendant-appellee Independent School District No. 4 of Bixby, Tulsa County, Okl. and defendant-appellee Children's Developmental Center.

Kay Mildren, Oklahoma State Dept. of Educ., Oklahoma City, Okl., for defendant-appellee Oklahoma State Dept. of Educ.

Before HOLLOWAY, MOORE and BRORBY, Circuit Judges.

PER CURIAM.

This case involves an action brought under the Education of All Handicapped Children's Act, 20 U.S.C. §§ 1400-1485 (1989), as implemented by 34 C.F.R. §§ 300.1-300.754 (1989) (collectively referred to as "the Act"). Natalie Johnson is a severely and multiply handicapped child who was eight years old at the time her local school district rejected her parents' request for a structured summer educational program. Natalie's parents invoked the due process provisions of the Act, and the schools' decision was administratively and judicially affirmed. There are two issues on appeal: (1) What information should be considered as a basis for entitlement under the Act to a free extended year school program in addition to the traditional September through May nine-month school program? 1024*1024 (2) In Oklahoma, is the cooperative special education service provider a necessary party to the due process procedure mandated by the Act? As to the first issue, we reverse the district court's grant of summary judgment in favor of the schools because insufficient information was utilized in both the administrative proceedings and the district court to satisfy the Act's procedural requirement for individualized review of Natalie's program plan. As to the second issue, we conclude that the special education cooperative unit is a not necessary party to this action.

I.

It is undisputed that Natalie has profound autistic defenses with at least moderate mental retardation and seizures. She has received educational services since the age of eighteen months from the Children's Development Center (CDC), a cooperative special education program serving severely and multiply handicapped children from several local county school districts, administered by the Superintendent of the Tulsa County Public Schools.[1] Natalie and her family are legal residents within the Independent

School District No. 4 of Bixby, Tulsa County, Oklahoma (the Bixby school district), which is, in turn, a member of the CDC cooperative program. CDC operates for nine months of the year, September through May. The Bixby school district does not provide a structured summer program for its severely and multiply handicapped children.

During the nine months of the regular school year, Natalie attended the CDC. For four years, 1982-1986, she attended a recreational day camp for handicapped children run by the Tulsa Association for the Retarded (TAR) during six weeks in the summer. The parties dispute whether this day camp experience had a positive educational effect on Natalie or whether it was tantamount to no structured educational program.

In January 1987, at the regular annual meeting held to plan Natalie's educational program, the Johnsons requested that Natalie be provided with a structured summer educational program. This request was denied after a separate meeting was held in April 1987 to discuss the issue. The Johnsons then invoked the due process procedures defined by the Act, beginning with a hearing before an administrative hearing officer appointed by the Oklahoma State Department of Education.

At the hearing, the Johnsons presented evidence in the form of testimony from Natalie's mother and from the social worker for Natalie's family, R. Vol. II, tr. at 9-33, 58-85, as well as written opinions from her pediatrician, her neurologist, and a psychologist who evaluated Natalie. R. Vol. II. All agreed that she needed to continue her experience in a structured educational setting during the summer months to prevent regression.

The school district presented testimony from Natalie's classroom teacher and her speech therapist for the 1985-86 and 1986-87 school years. Both teachers testified that, in fact, Natalie had not regressed during the summer of 1986 even though she had not participated in an extended school year program during that period. R. Vol. II, tr. at 89-90, 99-101.

1025*1025 The hearing officer found that Natalie's educational record did not provide objective documentation of improvement or lack of regression, despite her teachers' optimistic testimony. R. Vol. II, Hearing decision, findings of fact, ¶¶ 7, 8. The hearing officer concluded that an extended school year program was not warranted for Natalie. The hearing officer's decision was based, first, on the legal premise that predictions of future regression are insufficient to compel the schools to provide an extended school year to a handicapped child, and, second, on the factual finding that Natalie's parents failed to demonstrate that Natalie had in fact regressed during the summer of 1986.

Natalie's parents appealed the decision, and the appeals officer affirmed the hearing officer's decision, stating that "[a]ll parents are encouraged to supplement their children's required education in an effort to maximize the individual child's potential; but, this additional effort is not the School's responsibility." R. Vol. II, Appeal Review Decision at 3.

Natalie's parents then filed this action against the Bixby school district, the CDC and the Oklahoma State Department of Education (collectively referred to as "the schools") in the district court for the Northern District of Oklahoma, seeking judicial review of the decision. No additional evidence was offered by either party and the matter was referred to a magistrate following cross motions for summary judgment. The magistrate issued a report and recommendation stating that the preponderance of the evidence indicated that Natalie could be predicted to regress during the summer months without a structured summer program, and concluding that, pursuant to the Act, the schools must provide Natalie with a structured summer educational program as a continuation of her program during the regular school year. R. Vol. I, tab 27.

However, the district court, basing its decision on the same regression evaluation standard used by the administrative hearing officer, found the evidence that Natalie had not regressed during the previous summer, presented by two teachers who had worked with Natalie on a daily basis for many months, to be

more compelling than the predictions of outside experts, who had less continuous contact with the child, that such a summer program would prevent regression in the future. The district court therefore granted the schools' motion for summary judgment, holding that, as a matter of law under the Act and the Oklahoma statute, the Bixby school district was not required to provide an extended school year program to Natalie. Johnson v. Independent School District No. 4, No. 88-C-340-C (N.D.Okla. June 5, 1989). Natalie's parents appealed.

II.

This court has jurisdiction on appeal pursuant to § 1415(e) of the Act, and 28 U.S.C. § 1291 (1989). *See also* *Hendrick Hudson District Board of Education v. Rowley,* 458 U.S. 176, 186 n. 9, 102 S.Ct. 3034, 3041 n. 9, 73 L.Ed.2d 690 (1982) (the court has jurisdiction over an issue which evades review yet is capable of repetition).

The final district court order in this case was grant of the schools' motion for summary judgment.

We review the summary judgment orders *de novo,* applying the same legal standard used by the district court under Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment should be granted only if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When applying this standard, we are to examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. However, the nonmoving party may not rest on his pleadings; the party must set forth specific facts showing that there is a genuine issue for trial.

Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir.1990) (citations omitted).

In *Hendrick Hudson District Board of Education v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme 1026*1026 Court established a twofold inquiry for district courts to use in determining whether the Act's requirements have been met: (1) Has the State complied with the procedures set forth in the Act? (2) Is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Id.* 458 U.S. at 206-07, 102 S.Ct. at 3051.

The legal standard to be used by the district court in considering each of these issues is set forth in the Act: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2); *see* *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171, 173 (3d Cir.1988), *cert. denied,* 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989).[2] This case was submitted to the district court on the administrative record, including a transcript of the administrative hearing. Thus, our review includes *de novo* factual analysis based on that administrative record, as well as *de novo* legal analysis of the issues presented.

The parties should note that the burden of proof in these matters rests with the party attacking the child's individual education plan. In *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153 (5th Cir.1986), the Fifth Circuit reiterated that the Act

"placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, ... the Act creates a "presumption in favor of the education placement established by [a child's individualized education plan]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [individualized education plan] is not appropriate."

Id. at 1158 (quoting *Tatro v. Texas,* 703 F.2d 823, 830 (5th Cir.1983), *aff'd,* 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984)) (footnotes omitted).

III.

States which elect to receive federal funds under the Act must provide all handicapped children with the right to a "free appropriate public education." 20 U.S.C. § 1412(1). Under the Act, each child's substantive educational program must be defined by an annual individual educational plan (IEP) developed by the local school district in consultation with the child's parents. 34 C.F.R. §§ 300.340-.345. The IEP must include the specific goals, teaching methods, and evaluation procedures appropriate to that child's educational needs. *Id.* § 300.346. Each child's IEP must be revised at an annual meeting of the teachers and therapists who work with the child, his or her parents, and local school district special education administrators (IEP meeting). *Id.* §§ 300.341-.345. If the child's special education placement or program as defined by the IEP is disputed by the child's parents, the Act sets forth a procedure by which the IEP is to be reviewed by 1027*1027 an impartial hearing officer through the administration of the state education agency. 20 U.S.C. §§ 1415(a), (b), (d); 34 C.F.R. §§ 300.500-.508. The decision of the hearing officer may be appealed to an appeals hearing officer, also appointed by the state educational agency. 20 U.S.C. § 1415(c); 34 C.F.R. §§ 300.509-.510. That decision may be reviewed in an action brought in state court or in the local federal district court. 34 U.S.C. § 1415(e); 34 C.F.R. § 300.511.

We are bound by the Act, which rests on the cornerstone of granting handicapped children entitlement to a "free appropriate public education," 20 U.S.C. § 1412(1), based on an individually designed education plan revised at least annually. *Id.* at § 1414(a)(5); *Rowley,* 458 U.S. at 203, 102 S.Ct. at 3049. The individualization requirement is of paramount importance in the Act. 20 U.S.C. §§ 1401(a)(19), 1412(2)(B); *Rowley,* 458 U.S. at 188-89, 198, 202, 102 S.Ct. at 3041-42, 3046, 3048, *Polk,* 853 F.2d at 172; *Battle v. Pennsylvania,* 629 F.2d 269, 280 (3d Cir.), *on remand,* 513 F.Supp. 425 (E.D.Pa.1980), *cert. denied sub nom. Scanlon v. Battle,* 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981). While it would be easier for those involved in administrative review under the Act to have one and only one criterion for evaluating the appropriateness of a handicapped child's IEP, the handicapping impediments which force individualization of the child's education program in the first place also mandate an individualized approach to review of the child's IEP.

The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child's need for continuation of his or her structured educational program in the summer months. In *Alamo Heights,* the Fifth Circuit explained this "regression-recoupment" analysis, which plays an integral part in the case before us today:

As we stated in *Crawford v. Pittman* [708 F.2d 1028 (5th Cir.1983)], "The basic substantive standard under the Act, then, is that each IEP must be formulated to provide some educational benefit to the child," in accordance with "the unique needs" of that child. The some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought "to a virtual standstill." Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is 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.

790 F.2d at 1158 (citations omitted).

However, the regression-recoupment analysis is not the only measure used to determine the necessity of structured summer program. In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an "appropriate" educational program under the Act. These include the degree of impairment and the ability of the child's

parents to provide the educational structure at home, *Battle,* 629 F.2d at 280; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs, *Yaris v. Special School Dist.,* 558 F.Supp. 545, 551 (E.D.Mo.1983), *aff'd,* 728 F.2d 1055 (8th Cir.1984); and whether the requested service is "extraordinary" to the child's condition, as opposed to an integral part of a program for those with the child's condition. *Polk,* 853 F.2d at 182. In fact, the Third Circuit recently explicitly rejected using solely a regression analysis to determine the necessity of a summer program under the Act:

[A] serious problem ... lies in defendants' implicit suggestion that a child 1028*1028 must first show regression before his parents may challenge the appropriateness of his education.... [W]e do not believe that Congress intended that courts present parents with the Hobson's choice of allowing regression (hence proving their claim) or providing on their own what their child needs to make meaningful progress.

Polk, 853 F.2d at 184.

In *Rowley,* the Supreme Court explicitly held that administrative and court review may not limit analysis of the appropriateness of the IEP to any single criterion. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202, 102 S.Ct. at 3049; *see also Yaris,* 558 F.Supp. at 558. This restraint is as applicable to a specific educational program element, such as whether a child should be provided a structured summer educational experience, as it is to a generalized issue such as the "adequacy of educational benefits conferred upon all children covered by the Act." *Rowley,* 458 U.S. at 202, 102 S.Ct. at 3049; *see also Crawford,* 708 F.2d at 1034 n. 28 (declining to state whether the "regression-recoupment syndrome" should be used as a test to narrow the class of children to whom a summer program must be offered).

We prefer to adopt the Fifth Circuit's broad premise, as articulated in *Alamo Heights:*

The issue is 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. This is, of course, a general standard, but it must be applied to the individual by [those drafting and approving the IEP] in the same way that juries apply other general legal standards such as negligence and reasonableness.

790 F.2d at 1158.[3] The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying 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.[4]

In so holding, we are mindful of the Supreme Court's caution in *Rowley* that 1029*1029 the "appropriate" education required by the Act is not one which is guaranteed to maximize the child's potential. 458 U.S. at 197 n. 21, 102 S.Ct. at 3046 n. 21; *accord Polk,* 853 F.2d at 178-79; *Muth v. Central Bucks School Dist.,* 839 F.2d 113, 119 (3d Cir.), *cert. denied,* 488 U.S. 838, 109 S.Ct. 103, 102 L.Ed.2d 78 (1988) (as to local school district defendant and grounds pertinent hereto), and *rev'd,* 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) (only as to state as defendant on 11th Amendment immunity grounds).[5] The Act insures, first, that some services are provided to children who previously had received no services at all. 20 U.S.C. § 1412(3); *see, e.g., Rowley,* 458 U.S. at 201, 102 S.Ct. at 3048 (each child must be provided with a "basic floor of opportunity"); *Polk,* 853 F.2d at 179. Second, it insures that those services which are provided are individualized. 20 U.S.C. § 1412(2)(B). And third, it gives parents the right and obligation to act as the enforcement arm of the entitlement through the procedural safeguards outlined and mandated by the Act. 20 U.S.C. § 1412(5); *Rowley,* 458 U.S. at 205-06, 102 S.Ct. at 3050; *Hall v. Vance County Bd. of Educ.,* 774 F.2d 629, 634 (4th Cir.1985). Congress was mindful of the financial burdens which such expanded services imposed,[6] and was not utopian in its goals.

The State of Oklahoma is a recipient of federal assistance though the Act, and its legislature has enacted a correlative enabling statute, Okla. Stat. tit. 70, § 13-101 (1989 & Supp.1990) (the Oklahoma statute). The Oklahoma statute includes the provision that, if the child's IEP recommends continuing educational services during the summer, the local school district will be funded to provide a maximum of forty days educational programming during the summer to prevent loss of the educational gains achieved during the nine-month school year.[7]

If state legislation implementing the Act grants a broader entitlement than that found in the federal statute, the state statute defines the parameters of the program which must be extended to children living in that state. *See* *Board of Educ. v. Diamond,* 808 F.2d 987, 992 (3rd Cir.1986); *David D. v. Dartmouth School Comm.,* 775 F.2d 411, 417, 420 (1st Cir.1985) (the Act incorporates state substantive law implementing the Act), *cert. denied sub nom.* *Massachusetts Dept. of Educ. v. David D.,* 475 U.S. 1140, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986).

1030*1030 However, the Oklahoma statute is not broader than its federal counterpart in its provision for funding for forty days of summer programming under an IEP. The Third, Fifth, Eighth and Eleventh Circuits have all held that under the Act itself, states must provide a continuous educational experience through the summer under the child's IEP if that is the "appropriate" educational experience for the handicapped child's situation. *Georgia Ass'n of Retarded Citizens v. McDaniel,* 716 F.2d 1565, 1576 (11th Cir.1983), *modified on other grounds,* 740 F.2d 902 (1984), *cert. denied,* 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985); *Crawford,* 708 F.2d at 1034; *Yaris,* 558 F.Supp. at 559; *Battle,* 629 F.2d at 281. Thus, the federal statute's mandate of a "free appropriate public education," as judicially interpreted, includes the provision for a summer program if appropriate under a child's IEP. It follows that the Oklahoma statute, while assuring local school districts that state funding will cover a forty-day structured educational program during the summer for a child's individualized program, does not expand the federal statute.

To the extent that the Oklahoma statute has been interpreted to require the party attacking the child's proposed IEP to prove that the child has already experienced significant regression with ineffective recoupment of educational or basic life skills, or could be predicted to experience such regression during summer months, in isolation from any other elements which may be important to an individualized assessment of the child's situation, the Oklahoma statute is actually more restrictive than the federal entitlement, rather than more expansive. We cannot reconcile that interpretation with the individualized review demanded by the Act. As an example which is not uncommon, what of the child who has not shown regression in the past, but for whom other factors, such as acceleration of his or her deficiencies with increased physical maturity, outweigh the lack of past egregious regression? Under the Act, both documentation concerning past regression and predictions of future regression should be considered, an analysis which requires investigation into many aspects of the child's educational, home, and community life.

Turning to the case before us, a thorough review of the entire administrative record reveals it to be focused exclusively on a limited regression-recoupment analysis, which itself is vigorously disputed with opposing competent testimony and evidence.[8] Because of the conflict in evidence concerning Natalie's past regression, other factors, including some or all of those discussed above,[9] should have been considered as part of the evaluation of whether Natalie's IEP is "appropriate" for her individual circumstances. However, there was scant factual development in the record from the administrative proceedings concerning many aspects of Natalie's life.[10] 1031*1031 Because the record focuses so completely on only one component of Natalie's education, we do not have sufficient facts to make an informed disposition on the merits of this case, and we therefore express no opinion as to whether the Natalie's IEP is "appropriate" under the Act's mandate. We do hold, however, that those who conducted the administrative review, the administrative appeal, and the federal district court review of that administrative process erred by converting what should have been a multifaceted inquiry into application of a single, inflexible criterion.

As to the first issue, therefore, we reverse summary judgment in favor of the schools and remand the case for further proceedings, which should include presentation and consideration of evidence concerning other factors in addition to the regression-recoupment evaluation previously conducted, relevant to a decision as to whether a structured educational summer program should be included as part of Natalie's IEP.

IV.

As to the second issue, whether the CDC is a necessary party to the suit, the hearing officer did not render any finding or conclusion. The appeals officer found that the CDC was not a necessary party because Natalie's program is the legal responsibility of the local education agency, the Bixby school district, "under state and federal law and regulation." Appeal review decision at 2, 3 (citing the Oklahoma statute and 34 C.F.R. § 506). The magistrate held: "The Children's Developmental Center is not a proper party to this action, being a cooperative effort pursuant to 70 O.S. § 13-101(2)." Report and Recommendation at 19 n. 15. The district court found that it did not need to address the issue after it granted the schools' motion for summary judgment.[11]

Section 1415(b)(2) of the Act provides that:

Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency.

The Oklahoma State Department of Education has designated the "local education agency" as the proper party to respond to a parental request for due process review of a child's placement or program. *See Policies and Procedures Manual for Special Education in Oklahoma* at 53 (1988). By letter to counsel for the Johnsons dated June 5, 1987, the Oklahoma State Department of Education clarified that their request for review of Natalie's program must be forwarded to the superintendent of the Bixby Public Schools.

In theory, the CDC could be considered a "local educational agency" under the definitions given in the Act and in the regulations implementing the Act, *see* 20 U.S.C. §§ 1401(a)(8), 1401(a)(22); 34 C.F.R. § 300.8. However, the Act states clearly that the request for due process review is to be made to only one party, which may be designated by the state board of education. 20 U.S.C. § 1415(b)(2) (The "due process hearing ... shall be conducted by the State educational agency *or* by the local educational agency *or* the intermediate educational unit, *as determined by ... the State educational agency.*") (emphasis added). The Oklahoma State Board of Education has designated the local school district as the responsible party, consistent with the Act.[12] Thus, the CDC is not a necessary party to this action.

1032*1032 The order of the district court is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.

[1] The cooperative provision of services is statutorily approved by Okla. Stat. tit. 70, § 13-101 (1989 & Supp.1990), which provides in pertinent part:

Two or more school districts may establish cooperative programs of special education for exceptional children when such arrangement is approved by the State Board of Education. The county superintendent of schools of any county may establish and maintain a special education program, with the approval of the State Board of Education, and county funds may be expended for such purpose. Any school district or districts located wholly or in part in a county may participate in any such program so established by the county superintendent of schools and shall have authority to contribute school district funds, either directly or by reimbursement to the county participating in such program....

It shall be the duty of each school district to provide special education for all exceptional children as herein defined who reside in that school district. This duty may be satisfied by: ....

2. The district joining in a cooperative program with another district or districts to provide special education for such children....

[2] The court in *Campbell v. Talladega County Board of Education,* 518 F.Supp. 47 (N.D.Ala.1981), explained that:

The preponderance of the evidence standard codified at 20 U.S.C. § 1415(e)(2) reflects a decision to accord a greater role in the enforcement scheme to the federal courts. The original House version which provided that the determination of the state agency would be "conclusive in any court of the United States if supported by substantial evidence" was rejected by the conference committee and the present language was substituted.

Id. at 53 n. 9 (citation omitted); *see also David D. v. Dartmouth School Comm.,* 775 F.2d 411, 420 (1st Cir.1985) (federal courts do not have to assume deference to the administrative hearing officers' decisions under the Act, for to do so would be tantamount to elevating the decisions of the administrative hearing officer to that of the highest state court, clearly an inappropriate outcome), *cert. denied sub nom. Massachusetts Dept. of Educ. v. David D.,* 475 U.S. 1140, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986).

[3] The *Alamo Heights* case, in which the court found that the child in question should receive a structured summer educational program, resembles the case before the court today in that the testimony concerning the child's regression-recoupment tendencies was directly conflicting: "[T]he School District's employees and consultants were unanimous that they observed no significant regression, while the doctors, therapists, and former teachers who testified on behalf of [the child] all agreed that [the child] required a continuous structured program in order to prevent significant regression." *Id.* at 1159.

[4] We are aware that at least one district court has limited the provision of summer educational programs to those children who can prove irreparable regression. In *Bales v. Clarke,* 523 F.Supp. 1366 (E.D.Va.1981), the court held that "[p]laintiff is ... not entitled to year-round schooling without showing an irreparable loss of progress during summer months." *Id.* at 1371. The *Bales* court relied on *Anderson v. Thompson,* 495 F.Supp. 1256, 1266 (E.D.Wis.1980), *aff'd,* 658 F.2d 1205 (7th Cir.1981) (affirming district court denial of compensatory damages and attorney's fees).

We disagree with the *Bales* court, not only in its holding under the Act, but also with its implication that *Anderson* supports its conclusion. In *Anderson,* a case involving a child whose diagnosis and proposed educational program were disputed, the district court, without citing any legal authority, declined to order the local school district to provide a summer program because the student's academic regression was not predicted to be more severe than that of a nonhandicapped student. *Id.* at 1266. *Cf. Rettig v. Kent City School Dist.,* 539 F.Supp. 768, 778-79 (N.D.Ohio 1981) (regression standard is appropriately applied; the child whose program was the subject of this case had displayed periods of regression year-round; "[I]f on the basis of a *multi-factored evaluation,* a new IEP for [the child] called for summer school," the school must so provide with state funding) (emphasis added), *aff'd in pertinent part and partially vacated on other grounds,* 720 F.2d 463 (6th Cir.1983), *cert. denied,* 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984).

[5] It is important to be careful when using the term "maximization" in the educational setting. For example, the district court in *Bales v. Clarke* wrote as if the phrase "`maximizing' the plaintiff's educational opportunities" were synonymous with the idealistic goal of "`maximum educational progress' through the `best' education available, without regard to costs." 523 F.Supp. at 1371. However, these concepts are not synonymous. The former describes making the best use of the educational program which has been determined to be appropriate for the child, including balancing the needs of the local school district with the resources available to meet those needs. The latter describes the utopian ideal of providing unlimited services to every child, a goal which has been uniformly recognized as unreachable and inappropriate, given the press of needs in our communities. The former is mandated by the Act; the latter is not. Indeed, most professional educators would agree that it is a theoretical as well as a physical and financial impossibility to establish an educational program which "maximizes" each child's educational potential.

[6] These financial burdens have offsetting financial benefits. *See Polk,* in which the Third Circuit stated:

A chief selling point of the Act was that although it is penny dear, it is pound wise — the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.

853 F.2d at 181-82; *accord Rowley,* 458 U.S. at 201 n. 23, 102 S.Ct. at 3048 n. 23.

[7] Okla. Stat. tit. 70, § 13-101 provides in pertinent part:

Funds may be expended for school services for an additional period not to exceed forty (40) days during the summer months for approved programs for qualified children, who are severely or profoundly multiple-handicapped, provided their individualized education program (I.E.P.) states the need for a continuing educational experience to prevent loss of educational achievement or basic life skills.

[8] This dispute alone, concerning material factual matters, renders inappropriate the district court's grant of summary judgment.

[9] The list of possible factors includes the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child's parents to provide the educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested service is extraordinary for

the child's condition, as opposed to an integral part of a program for those with the child's condition. This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP.

[10] *E.g.,* the record reveals that for at least two summers, 1985 and 1986, Natalie's parents had applied for her participation in the "Laura Dester program," a program run by the Oklahoma Department of Human Services for handicapped children living at home. The program is apparently one of nonprofessionals working with parents in the home during the summer, using the child's IEP for guidance. The record is completely undeveloped as to whether there is any cost to the parents for this program, or why Natalie did not attend it. The record also contains an unexplained school memo to file indicating that a speech pathologist from the Laura Dester program who was assigned to work with Natalie during the summer of 1986 visited her classroom to observe the techniques Natalie's teacher was employing, although in fact Natalie did not attend the program in 1986.

[11] On appeal, the schools argue that this issue is not properly before us because Natalie's counsel did not address it in the complaint before the district court. The district court stated that, "The plaintiff has not specifically objected to this conclusion." Order at 4. However, the record reveals that the complaint specifically and repeatedly requested federal court review of this issue. *See, e.g.,* R. Vol. I, tab 1 at 4-7. This comment of the district court was plain error, but the error is harmless under our holding today.

[12] At the hearing, the hearing officer sustained the schools' objections to questions about whether any of the seven other children in Natalie's class at the CDC were attending summer programs. The schools' objections were based in part on the fact that the programs for other children were not relevant to Natalie's program, and in part that other students "are not even students this school district has any responsibility for." R. Vol. II, tr. at 103.

Under our holding today, it is clear that the question of what services are regionally available to a child with a particular handicap can be relevant to the evaluation of the schools' responsibility to provide a structured summer educational program. We trust that our intent to encourage broad information gathering during the evaluation process is clear, and that on remand, all relevant information will be included, in an attempt to achieve the balance of individual need and public resources which Congress envisioned.

Appendix B

419 F.Supp.2d 1303 (2006)

Joshua McQUEEN, a minor, by and through his parents, Keith and Shauna McQueen, Plaintiffs,
v.
COLORADO SPRINGS SCHOOL DISTRICT NO. 11, and various of its elected and appointed representatives in their official capacities, Defendants.

No. 04 CV 1116 LTB OES.

United States District Court, D. Colorado.

March 8, 2006.

1304*1304 Michael C. Cook, Michael C. Cook, P.C., Colorado Springs, CO, for Plaintiffs.

Brent E. Rychener, Deborah S. Menkins, Holme, Roberts & Owen, LLP, Colorado Springs, CO, Antony Ben Dyl, Colorado Attorney General's Office, Kathleen Marie Shannon, Colorado Association of School Boards, Denver, CO, for Defendants.

MEMORANDUM OPINION AND ORDER

BABCOCK, Chief Judge.

Joshua McQueen, ("Joshua"), by and through his parents Keith and Shauna McQueen ("the McQueens"), appeal the decision of an Administrative Law Judge ("ALF) denying their challenge to the policies of the Colorado Springs School District No. 11 ("District") and the Colorado Department of Education ("CDE") limiting the scope of Extended School Year ("ESY") services as facially violating the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* On the basis of briefs submitted by the parties, amicus briefs by the CDE and the Colorado Association of School Boards, ("CASB"), and an oral hearing February 28, 2006, for the reasons discussed below, the decision of the ALJ is AFFIRMED.

1305*1305 I. BACKGROUND

The facts in this case are not in dispute. Joshua was born September 10, 1996 and was eight years old at the time of the filing of this case. Joshua was diagnosed as severely autistic July 11, 2000. At the time of the events relevant to this case, Joshua was a student at Midland Elementary School in the District and was receiving special education services under both the IDEA and the Colorado Exceptional Children's Act, C.R.S. §§ 22-20-101 *et seq.* (2001), (the "CECA"). These services were developed jointly by District officials and the McQueens as part of Joshua's Individualized Education Program ("IEP"), pursuant to the IDEA, 300 C.F.R. §§ 300.340—300.350. Joshua's IEP included ESY services. 300 C.F.R. § 300.309. There is no dispute that Joshua is entitled to ESY services.

At a meeting of Joshua's IEP team to establish goals for the 2003-2004 school year, the team proposed an ESY for the summer of 2003 designed only to maintain the seven goals and objectives from Joshua's 2002-2003 IEP that he had already achieved. The McQueens requested that the ESY focus on skills identified in the 2002-2003 IEP that Joshua had not yet achieved, as well as skills identified for the 2003-2004 IEP. The IEP team refused, asserting that District policy, based on CDE guidelines, requires that ESYs address only maintenance and retention of skills already mastered, not acquisition of new skills.

The McQueens objected to the ESY proposed by the District as not meeting Joshua's individual needs, and invoked their right to a due process hearing, pursuant to 20 U.S.C. § 1415(f). On September 22, 2003 the McQueens and the District entered into a stipulated motion before the Impartial Hearing Officer ("IHO") bifurcating the proceeding to first address the limited issue of "whether the CDE guidelines for determining ESY services and the Respondents' (CSSD) ESY policy violate the IDEA by limiting required ESY services to maintaining learned skills rather than developing new skills." Only after this issue was addressed would the parties return to the IHO to undertake a full evidentiary hearing.

The IHO held a hearing September 23, 2003, and ruled November 20, 2003 that the District and CDE ESY policies do not conflict with the relevant provisions of the IDEA. The IHO, in his decision, noted that the McQueens offered "relevant and credible testimony" at the Hearing from Joann Gerenser, an expert on learning disabilities among autistic children, that the policy limiting ESY services to the goal of maintaining learned skills and not developing new skills "is quite possibly not appropriate for children with autism who may benefit most from a very intensive program on a year-round basis." However, the IHO found that the issue at the bifurcated hearing "was not whether the IEP as implemented during the school year or the extended school year" met the requirements of the IDEA, and was therefore "not the subject of or included in this order." The McQueens appealed the IHO decision to an ALJ, pursuant to 20 U.S.C. § 1415(g). The ALJ affirmed the IHO, concluding that based on the statute, regulations and case law, the ESY policy complied with the IDEA.

II. STANDARD OF REVIEW

The IDEA states that a district court shall review the decisions of an IHO or an ALJ based on a "preponderance of the evidence." 20 U.S.C. § 1415(i)(2)(C)(iii). While this grant of authority means that reviewing courts need not consider the findings of state administrative bodies conclusive, it also is not "an invitation to the courts to substitute their 1306*1306 own notions of sound educational policy for those of the school authorities which they review." *Board of Education of the Hendrick Hudson Central School District, Westchester County, v. Rowley,* 458 U.S. 176, 205-206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). District Courts may not "set state decisions at nought" and must give state administrative proceedings "due weight." *Id.* at 206, 102 S.Ct. 3034. *See also Murray v. Montrose County School Dist.,* 51 F.3d 921, 927 (10th Cir.1995).

However, where as here, there are no facts in dispute and the sole issue is interpreting federal law, it is unnecessary for a federal court to afford the legal conclusions of the state administrative officials "due weight." *See Muller ex rel. Muller v. Committee on Special Educ. of East Islip Union Free School District,* 145 F.3d 95, 102 (2nd Cir.1998). I therefore consider the legal conclusions of the IH and the ALJ *de novo.*

Since the McQueens challenge the District policy on its face, my review is also governed by the formidable standard applicable to facial challenges. In a facial challenge "the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Although the Tenth Circuit has applied the *Salerno* standard numerous times, *see West v. Derby Unified School District No. 260,* 206 F.3d 1358, 1367 (10th Cir.2000) and *Public Lands Council v. Babbitt,* 167 F.3d 1287, 1293 (10th Cir.1999), the Supreme Court has, since *Salerno,* pondered whether it should be applied literally, *see Washington v. Glucksberg,* 521 U.S. 702, 739-740, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997) (Stevens, J., concurring), causing the Tenth Circuit to question whether *Salerno* remains good law. *U.S. v. Castillo,* 140 F.3d 874, 879 (10th Cir.1998).

However, even under more lenient facial challenge standards the challenger must establish that "the invalid applications of a statute `must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Glucksberg,* 521 U.S. at 740, 117 S.Ct. 2302. So, to invalidate the District ESY policy on its face, the McQueens must show either that the policy is in all respects non-compliant with the IDEA, or at the very least that the applications of the policy that do not comply with the IDEA are substantial in relation to the applications that do comply with the IDEA.

III. STATUTORY FRAMEWORK

The overall goal of the IDEA is, in part, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A). All states that receive federal funds under the IDEA must provide a "Free Appropriate Public Education" ("FAPE") to all disabled children between the ages of 3 and 21. 20 U.S.C. § 1412(a)(1)(A). The Supreme Court has held that the FAPE requirement does not mean that school districts are obliged to "maximize the potential" of each disabled child, but must provide services sufficient to "confer some educational benefit" on the disabled child. *Rowley,* 458 U.S. at 200, 102 S.Ct. 3034.

A FAPE must be provided in accord with an IEP. 20 U.S.C. § 1401(9)(D). The IEP is a written plan for a disabled child's special education, developed among school officials and the child's parents, detailing the special education and related services the child needs to participate in school programs. 20 U.S.C. § 1414(d). The IEP 1307*1307 includes "a statement of measurable annual goals, including academic and functional goals." 20 U.S.C. § 1412(d)(1)(A)(i)(II). The IEP must be developed individually for each child. 20 U.S.C. § 1414(d)(3).

ESY services are special education and related services provided to children with a disability beyond the normal school year. 34 C.F.R. 300.309(b)(1)(I). ESY services are necessary only if the IEP team finds, on an individual basis, that these services are necessary to provide a FAPE. 34 C.F.R. § 300.309(a)(2). ESY services must be in accord with a child's IEP. 34 C.F.R. § 300.309(b)(1)(ii).

IV. DISCUSSION

1. *Does the ESY Policy of the CDE and CSSD violate Children's Procedural Rights under IDEA for an Individualized Approach to their FAPE?*

A state or district policy can violate the IDEA either by failing to comply with its procedural requirements or by failing to comply with its substantive requirements. *Rowley,* 458 U.S. at 206-207, 102 S.Ct. 3034. The McQueens challenge the District ESY policy on procedural grounds, arguing that by limiting the content and goals of ESY programs only to retain already acquired skills, the policy violates the procedural right of disabled children to an individualized assessment of their ESY needs, and denies them FAPE under the IDEA. The McQueens contend, and the District does not dispute, that the IDEA requires states to provide an IEP based on each student's individual needs. The FAPE required under the IDEA must be "tailored to the unique needs" of each disabled child. *Rowley,* 458 U.S. at 181, 102 S.Ct. 3034. Indeed, "The individualization requirement is of paramount importance in the Act." *Johnson v. Independent School District No. 4,* 921 F.2d 1022, 1027 (10th Cir.1990).

The District does not deny that its ESY policy prohibits setting goals other than retention of already acquired skills. Nor does the District dispute that this policy applies to children regardless of their individual needs. Moreover, the District policy is based on CDE's ESY guidelines. As Amicus CDE points out, this challenge is therefore not only a challenge to the policies of the District, but also to the CDE ESY guidelines. The McQueens argue that the District ESY policy violates the IDEA because it restricts the goals of the ESY only to maintaining and retaining skills already acquired during the normal school year, without any individual assessment of the needs of each child.

Neither the McQueens nor the District identify any federal regulation or case law that specifically governs the content of an ESY. The McQueens argue that a series of cases have established that categorical rules of any kind are anathema to the individualization requirement of the IDEA. Courts have stricken as incompatible with the IDEA school district policies that categorically bar consideration of Applied Behavioral Analysis treatment for autistic children, *Deal v. Hamilton County Bd. of Educ.,* 392 F.3d 840, 859 (6th Cir.2004), that refuse to consider direct physical therapy programs, *Polk v. Central Susquehanna*

Intermediate Unit 16, 853 F.2d 171, 176-177 (3d Cir.1988), and that limit the duration of special education to 180 days a year. *Battle v. Com. of Pa.,* 629 F.2d 269, 280 (3d Cir.1980). Even though none of these cases directly address ESY services, the McQueens contend that these cases establish that all blanket restrictions violate the IDEA's individualization requirement and, thus, the District's ESY policy also violates the IDEA.

The McQueens also assert that the Tenth Circuit in *Johnson* held that a school district may not limit ESY services 1308*1308 only to students who are likely to regress over the summer and who face long recoupment time in the fall. *Johnson,* 921 F.2d at 1027. *Johnson* considered the criteria that govern a school district's decision to provide ESY services. The McQueens argue that *Johnson* concluded that a narrow focus on the student's likelihood of regression and prospects for recoupment (the "regression-recoupment" model) must be supplemented by other factors, including the degree of impairment, the ability of the child's parents to provide educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-disabled children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs. *Id.* While *Johnson* addressed *when* ESY services are needed (an issue not in dispute here since Joshua had an ESY) rather than the *content* of ESY services, the McQueens contend that since these other factors must be considered to determine if ESY services are necessary, it is logical that ESY services must also address these additional concerns and cannot be limited solely to regression-recoupment.

The District makes two basic arguments for why its policy comports with the IDEA. First, federal IDEA regulations state that ESY programs can not be limited based on the "type, amount or duration" of services. 34 C.F.R. § 300.309(a)(3)(ii). The District argues, and the IHO and ALJ agreed, that its restriction on teaching new skills is a limit on the *goal* of ESY services, not the type, amount or duration of services, and is thus not prohibited.

The District also argues that the case law of several circuits, including the Tenth Circuit in *Johnson,* supports its ESY policy. Numerous Circuit Courts of Appeal have upheld school district policies using variations of the significant jeopardy/regression recoupment standard ("significant jeopardy standard"), including the Fourth Circuit, *MM v. School District* of *Greenville County,* 303 F.3d 523, 537-538 (4th Cir.2002), the Sixth Circuit, *Cordrey v. Euckert,* 917 F.2d 1460, 1473 (6th Cir.1990) and the Fifth Circuit, *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153, 1158 (5th Cir.1986). There is little question that the significant jeopardy standard applies in jurisdictions throughout the country as a basis for determining *when* ESY services are needed, without violating the IDEA.

In the Tenth Circuit, the District contends, contrary to the McQueens, *Johnson* supports its ESY policy. *Johnson* analyzed an Oklahoma significant jeopardy standard and concluded that significant jeopardy may be assessed using both past evidence of regression and predictive data and information. *Johnson,* 921 F.2d at 1028. The District argues that the various factors cited by the McQueens are not independent criteria for ESY eligibility but factors to be used in a regression—recoupment analysis. *Id. Johnson,* under this analysis, supports the District's policy limiting the availability, or in this case the scope, of ESY services to address regression and recoupment.

The United States Department of Education, ("DOE"), in its 1999 Summary and Response to Comments accompanying its Final Rulemaking on the IDEA, specifically cited *Johnson* and other cases as supporting the proposition that states may use the significant jeopardy standard to determine when ESY services are necessary. *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, Attachment 1—Analysis of Comments and Changes,* 1309*1309 64 Fed.Reg. 12,406, 12,576 (March 12, 1999). The DOE endorses standards such as "likelihood of regression, slow-recoupment, and predictive data based on the opinion of professionals" as "derived from well-established judicial precedents and have formed the basis for many standards that State have used" in setting ESY eligibility criteria. *Id.* I consider this opinion by the federal agency responsible for IDEA compliance, published in the Federal Register, to be a definitive statement that the significant jeopardy standard for determining when to provide ESY services comports with the IDEA.

The District argues that policies valid for establishing the availability of ESY services apply also to establishing the content of ESY services. If ESY services are necessary only when a student faces the risk of regression, then it is logical that ESY programs may be limited to the services needed to prevent regression. Indeed, the one circuit that addressed the content of an ESY program reached this precise conclusion. In *JH ex Rel JD v. Henrico County School Bd.,* the Fourth Circuit, without much explanation, expanded its own circuit's significant jeopardy standard from a threshold for providing ESY services to the basis for determining the content of ESY services. 326 F.3d 560, 567 (4th Cir.2003). The District argues that this same analytic step is appropriate here.

I agree. This position is supported by the IDEA's strong deference to state discretion in formulating the most appropriate education policy. *Rowley,* 458 U.S. at 207-208, 102 S.Ct. 3034. Additionally, the DOE's Office of Special Education Programs (OSEP) has issued several memoranda and interpretive letters to states endorsing the significant jeopardy standard as the basis for the content as well as the trigger of ESY services. *See for example, Letter to Myers,* 16 IDELR 290 (OSEP 1989)("[T]he purpose of the ESY program is to prevent regression and recoupment problems.") While these kinds of agency interpretive memoranda do not have the force of law, they "are entitled to respect" to the extent that they are persuasive. *See Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

I conclude the District does not violate the IDEA when it limits ESY goals to those necessary to prevent skills or benefits already accrued from the prior year from facing significant jeopardy due to regression or lack of retention. This limit on the goals of an ESY, even applied categorically, does not violate the IDEA.

The McQueens also make a second challenge to the District ESY policy. They contend that this policy goes beyond limiting the goals of an ESY to retention of existing skills, but actually prohibits the teaching of new skills even when this may be a necessary step towards the purpose of retaining existing skills. This is an important distinction, since the IHO heard "relevant and credible testimony" from Gerenser that for some children, including severely autistic children, teaching new skills may be necessary for *retaining* existing skills. Gerenser described situations where a child must learn new skills in order to embed already acquired skills. According to the McQueens, the District policy bars teaching new skills even in this scenario, and thus potentially undercuts its own stated goal of avoiding significant jeopardy.

The flaw in this argument is that the District policy does not appear to raise this specter. In response to my questions, the lawyer for the District stated explicitly during oral argument that the District policy in no way prevents a student from receiving additional skills training if the IEP committee determines that this is 1310*1310 necessary in order to meet an ESY skills-maintenance goal. The McQueens point to the hearing record and language in the District policy that suggest otherwise. However, after careful review of the record, and in light of counsel's binding admission, I cannot conclude that the District policy is or does what the McQueens suggest. That is to say, the District policy does not facially prohibit a student from receiving additional skills training if and when the IEP committee determines that this is necessary to meet ESY skills-maintenance goals. While the McQueens contend that the District was "back-peddling" during the oral argument, I believe that the record below is ambiguous on this point, and I accept that counsel's statements on the record before me represent the policy and practice of the School District.

Therefore, it is so ordered that,

1) The decision of the ALJ upholding the District's and the State's ESY policy limiting the goals of an ESY program to retaining skills already acquired in the prior school year is AFFIRMED.

Appendix C

Introduction

[Federal Register: March 12, 1999 (Volume 64, Number 48)]
Rules and Regulations
From the Federal Register Online via GPO Access

Extended School Year Services (§ 300.309)

Part II
Department of Education

34 CFR Parts 300 and 303

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities; Final Regulations

Page 12406

RIN 1820 –AB40

AGENCY: Office of Special Education and Rehabilitative Services,
Department of Education

ACTION: Final Regulations

Extended School Year Services (Sec. 300.309)

Comment: A number of commenters expressed support for this regulation. Because Notes 1 and 2 following § 300.309 provide important clarification regarding criteria for providing extended school year (ESY) services, some commenters recommended that these notes be added to the regulations.

Other commenters requested that § 300.309 be deleted because it has no statutory base, and could be interpreted to require ESY services for all disabled children regardless of what the child's IEP indicates is appropriate for the child. One comment noted that responsibility for providing ESY services will be extremely costly and likely will require large expenditures of local dollars.

Several commenters requested that both notes be deleted because Note 1 is ambiguous and unnecessary since the regulation is sufficiently clear, and Note 2 is not appropriate because all children regress in the summer.

Numerous comments were received regarding the standards referenced in Note 2 that States can establish for use in determining a child's eligibility for ESY services. One comment urged the adoption of a Federal standard and formula for determining unacceptable rates of recoupment. One recommendation was that while Note 2 should be added to the regulation, it should be changed to clarify that the list of factors is not exhaustive.

Another comment stated that ''regression/recoupment'' is a minimum standard that should be used in determining a child's eligibility for ESY services. Other commenters indicated that regression/recoupment is too narrow a standard, and recommended adding to the regulations additional criteria that courts have used to determine eligibility (e.g., whether the child has emerging skills, the nature or severity of the disability, and special circumstances, such as prolonged absence or

other serious blocks to learning progress, which in the view of the IEP team could be addressed by ESY services).

Another comment recommended that the list of factors be revised to specify ''evidence or likely indication of significant regression and recoupment.'' One comment recommended that the reference to ''predictive data'' be expanded to ''predictive data and other information based on the opinion of parents and professionals.'' Another comment stated that, although the regulation should incorporate Note 2 and permit States to establish standards for determining ESY eligibility, public agencies also should be required to make these standards available to parents either at IEP meetings or on request.

One comment recommended deleting Note 2 because it is too narrow and inconsistent with case law. According to the comment, the ESY standard should be flexible and permit consideration of a variety of factors (e.g., whether the child's current level of performance indicates that the child will not make ''meaningful progress'' during the regular school year in the general curriculum or in other areas pertinent to child's disability-related needs).

Several comments recommended other specific changes to § 300.309, such as the following: (1) Section 300.309(a)(2) should be revised to state that the determination of whether a child needs ESY services, including the type and amount of services, must be made by the IEP team and should be specified in the child's IEP; (2) the regulation should specify a timeline for determining eligibility for ESY services to enable the parents to take appropriate steps to challenge the denial of services; (3) the regulation should clarify whether ESY services are limited only to summer programming or to other breaks in the school calendar; and (4) no one factor can be the sole criterion for determining whether a child receives ESY services.

Another comment requested that clarification be added to specify that ESY services must be provided in the least restrictive environment, and that to ensure that this occurs, students with disabilities may have to receive ESY services in noneducational settings.

One comment requested that a note be added to clarify that the process for determining the length of a preschool child's school year must be individualized and described in the child's IEP/IFSP, and added that the decision is not necessarily based on school-aged ESY practices or formulas, which may be inappropriate for younger children, and that if a child turns three during the summer, the child should receive ESY services if specified in the IEP or IFSP.

Other comments requested that the regulations: add a new paragraph (c) to address the needs of disabled children enrolled in private facilities and include additional guidance relating to an LEA's obligation to conduct necessary evaluations during the summer when a child arrives in an LEA in the summer with an IEP from another LEA that requires ESY services.

Discussion: The regulation and notes related to ESY services were not intended to create new legal standards, but to codify well-established case law in this area (and, thus, ensure that the requirements are all in one place). Since the requirement to provide ESY services to children with disabilities under this part who require such services in order to receive FAPE is not a new requirement, but merely reflects

the longstanding interpretation of the IDEA by the courts and the Department, including it in these regulations will not impose any additional financial burden on school districts. On reflection and in view of the comments, it has been determined that this regulation should be retained, and that Note 1 following § 300.309, with some modifications, should be incorporated into the text of the regulation. Section 300.309 and accompanying notes clarify the obligations of public agencies to ensure that students with disabilities who require ESY services in order to receive FAPE have necessary services available to them, and that individualized determinations about each disabled child's need for ESY services are made through the IEP process. The right of an individual disabled child to ESY services is based on that child's entitlement to FAPE. Some disabled children may not receive FAPE unless they receive necessary services during time periods when other children, both disabled and nondisabled, normally would not be served. Both parents and educators have raised issues for many years about how determinations about ESY services can be made consistent with the requirements of Part B.

The clarification provided in Note 1 in the NPRM is essential to ensuring that public agencies do not limit eligibility for ESY services to children in particular disability categories, or the duration of these necessary services. Since these issues are key to ensuring that each disabled child who requires ESY services receives necessary services in order to receive FAPE, this concept from Note 1 should be incorporated into this regulation.

In the past, the Department has declined to establish standards for States to use in determining whether disabled children should receive ESY services. Instead, the Department has said that States may establish State standards for use in making these determinations so long as the State's standards ensure that FAPE is provided consistent with the individually-oriented focus of the Act and the other requirements of Part B and do not limit eligibility for ESY services to children in particular disability categories. These regulations continue this approach.

Within the broad constraints of ensuring FAPE, States should have flexibility in determining eligibility for ESY services, and a Federal standard for determining eligibility for ESY services is not needed. As is true for other decisions regarding types and amounts of services to be provided to disabled children under Part B, individual determinations must be made in accordance with the IEP and placement requirements in Part B.

Regarding State standards for determining eligibility for ESY services, Note 2 was not intended to provide an exhaustive list of such standards. Rather, the examples of standards that were included in Note 2 (e.g., likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals) are derived from well established judicial precedents and have formed the basis for many standards that States have used in making these determinations. See, e.g., Johnson v. Bixby ISD 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). It also should be pointed out that nothing in this part is intended to limit the ability of States to use variations of any or all of the standards listed in Note 2. Whatever standard a State uses must be consistent with the individually-oriented focus of the Act and may not constitute a limitation on eligibility for ESY services to children in particular disability categories.

To ensure that children with disabilities who require ESY services receive the services that they need, a high priority is being placed on monitoring States' implementation of this regulation in the next several years to ensure that State standards are not being applied in a manner that denies children with disabilities who require ESY services in order to receive FAPE access to necessary services. However, to give States needed flexibility in this area, the regulations should clarify that States may establish their own standards for determining eligibility for ESY services consistent with the requirements of this part.

To respond to a concern expressed in the comments that this regulation could require the provision of ESY services to every disabled child, regardless of individual need, paragraph (a)(2) has been revised to make clear that ESY 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.

Although it is important that States inform parents about standards for determining eligibility for ESY services, a regulatory change is not necessary. Since this matter is relevant to the provision of FAPE, it already would be included in the information contained in the written prior notice to parents provided under this part for children for whom ESY services are an issue.

There is no need to incorporate the IEP team's responsibility to specify the types and amount of ESY services. Section 300.309(a)(2) already specifies that the determination of whether a child with a disability needs ESY services must be made on an individual basis by the IEP team in accordance with §§ 300.340–300.350. These IEP requirements include specifying the types and amounts of services consistent with the individual disabled child's right to FAPE.

The determination of whether an individual disabled child needs ESY services must be made by the participants on the child's IEP team. In most cases, a multi-factored determination would be appropriate, but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor. In all instances, the child's IEP team must decide the appropriate manner for determining whether a child is eligible for ESY services in accordance with applicable State standards and Part B requirements. Therefore, no requirements have been added to the regulation regarding this issue.

There is no need to specify a timeline for determining whether a child should receive ESY services. Public agencies are expected to ensure that these determinations are made in a timely manner so that children with disabilities who require ESY services in order to receive FAPE can receive the necessary services.

No further clarification has been provided regarding the times when ESY services can be offered. Section 300.309(b)(1)(i) specifies that ESY services are provided to a child with a disability ''[b]eyond the normal school year of the public agency.'' For most public agencies, the normal school year is 180 school days. Typically, ESY services would be provided during the summer months. However, there is nothing in the definition of ESY services in § 300.309(b) that would limit the ability of a public agency to provide ESY services to a student with a disability during times other than the summer, when school is not in session, if the IEP team determines that the child requires ESY services during these time periods in order to receive FAPE.

There is no need to provide clarification regarding the comment that public agencies may wish to use different standards in determining eligibility of preschool-aged children with disabilities for ESY services from those used for school-aged children. Since Part B does not prescribe standards for determining eligibility for ESY services, regardless of the child's age, the issue of whether a State should establish a different standard for school-aged and preschool-aged children is a matter for State and local educational authorities to decide.

The IEP or IFSP will specify whether services must be initiated on the child's third birthday for children with disabilities who transition from the Part C to the Part B program, if the child turns three during the summer. This means that ESY services would be provided in the summer if the IEP or IFSP of a child with a disability specifies that the child must receive ESY services during the summer. In any case, the IEP or IFSP must be developed and implemented in accordance with the terms of those documents by the child's third birthday. These responsibilities are clarified elsewhere in these regulations.

No additional clarification is being provided in this portion of the regulations as to whether parentally-placed disabled students can receive ESY services. As is true for determinations regarding services for children with disabilities placed in private schools by their parents, determinations regarding the services to be provided, including the types and amounts of such services and which children will be served, are made through a process of consultation between representatives of public agencies and representatives of students enrolled by their parents in private schools. Through consultation, if a determination is made that ESY services are one of the services that a public agency will offer one or more of its parentally-placed disabled children, Part B funds could be used for this purpose.

No regulatory change has been made regarding the application of LRE requirements to ESY services. While ESY services must be provided in the LRE, public agencies are not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings if the public agency does not provide services at that time for its nondisabled children. However, consistent with its obligation to ensure that each disabled child receives necessary ESY services in order to receive FAPE, nothing in this part would prohibit a public agency from providing ESY services to an individual disabled student in a noneducational setting if the student's IEP team determines that the student could receive necessary ESY services in that setting. No further clarification is needed regarding the comment about requirements for evaluating students who move into LEAs during the summer to determine eligibility for ESY services. Requirements for child find are addressed elsewhere in these regulations.

Changes: Consistent with the above discussion, paragraph (a)(2) of § 300.309 has been revised, and a new paragraph (a)(3) has been added to this section to specify that (1) ESY services must be provided only if a child's IEP team determines the services are necessary for the provision of FAPE to the child; and (2) Public agencies may not limit eligibility for ESY services based on category of disability, and may not unilaterally limit types and amounts of ESY services. Notes 1 and 2 have been removed.

Appendix D

Federal Register

Monday,
August 14, 2006

Part II

Department of Education

34 CFR Parts 300 and 301

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; Final Rule

(1) Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children of those ages.

(2)(i) Children aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility—

(A) Were not actually identified as being a child with a disability under § 300.8; and

(B) Did not have an IEP under Part B of the Act.

(ii) The exception in paragraph (a)(2)(i) of this section does not apply to children with disabilities, aged 18 through 21, who—

(A) Had been identified as a child with a disability under § 300.8 and had received services in accordance with an IEP, but who left school prior to their incarceration; or

(B) Did not have an IEP in their last educational setting, but who had actually been identified as a child with a disability under § 300.8.

(3)(i) Children with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to children who have graduated from high school but have not been awarded a regular high school diploma.

(iii) Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with § 300.503.

(iv) As used in paragraphs (a)(3)(i) through (a)(3)(iii) of this section, the term *regular high school diploma* does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED).

(4) Children with disabilities who are eligible under subpart H of this part, but who receive early intervention services under Part C of the Act.

(b) *Documents relating to exceptions.* The State must assure that the information it has provided to the Secretary regarding the exceptions in paragraph (a) of this section, as required by § 300.700 (for purposes of making grants to States under this part), is current and accurate.

(Approved by the Office of Management and Budget under control number 1820–0030)

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

Other FAPE Requirements

§ 300.103 FAPE—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

(c) Consistent with § 300.323(c), the State must ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1401(8), 1412(a)(1)).

§ 300.104 Residential placement

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B))

§ 300.105 Assistive technology.

(a) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's—

(1) Special education under § 300.36;

(2) Related services under § 300.34; or

(3) Supplementary aids and services under §§ 300.38 and 300.114(a)(2)(ii).

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(12)(B)(i))

§ 300.106 Extended school year services.

(a) *General.* (1) Each public agency must 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 §§ 300.320 through 300.324, 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.

(Approved by the Office of Management and Budget under control number 1820–0030)

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

§ 300.107 Nonacademic services.

The State must ensure the following:

(a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Approved by the Office of Management and Budget under control number 1820–0030)

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

implanted medical device to make sure it is turned on and operating. However, mapping a cochlear implant (or paying the costs associated with mapping) is not routine checking as described above and should not be the responsibility of a public agency. We will add language to the regulations to clarify a public agency's responsibility regarding the routine checking of external components of surgically implanted medical devices.

Changes: A new § 300.113 has been added with the heading, "Routine checking of hearing aids and external components of surgically implanted medical devices." Section 300.105(b), regarding the proper functioning of hearing aids, has been removed and redesignated as new § 300.113(a). We have added a new paragraph (b) in new § 300.113 clarifying that, for a child with a surgically implanted medical device who is receiving special education and related services under this part, a public agency is responsible for routine checking of external components of surgically implanted medical devices, but is not responsible for the post-surgical maintenance, programming, or replacement of a medical device that has been surgically implanted (or of an external component of a surgically implanted medical device).

The provisions in § 300.105 have been changed to conform with the other changes to this section and the phrase "proper functioning of hearing aids" has been removed from the heading.

Extended School Year Services (§ 300.106)

Comment: Several commenters recommended removing § 300.106 because the requirement to provide extended school year (ESY) services to children with disabilities is not required in the Act.

Discussion: The requirement to provide ESY services to children with disabilities who require such services in order to receive FAPE reflects a longstanding interpretation of the Act by the courts and the Department. The right of an individual child with a disability to receive ESY services is based on that child's entitlement to FAPE under section 612(a)(1) of the Act. Some children with disabilities may not receive FAPE unless they receive necessary services during times when other children, both disabled and nondisabled, normally would not be served. We believe it is important to retain the provisions in § 300.106 because it is necessary that public agencies understand their obligation to ensure that children with disabilities who require ESY services in order to receive FAPE have the necessary services available to them, and that individualized determinations about each disabled child's need for ESY services are made through the IEP process.

Changes: None.

Comment: One commenter stated that the ESY requirements in § 300.106 should not be included as part of the State eligibility requirements and would be more appropriately included in the definition of FAPE in § 300.17.

Discussion: The definition of FAPE in § 300.17 is taken directly from section 602(9) of the Act. We believe the ESY requirements are appropriately included under the FAPE requirements as a part of a State's eligibility for assistance under Part B of the Act because the right of an individual child with a disability to ESY services is based on a child's entitlement to FAPE. As a part of the State's eligibility for assistance under Part B of the Act, the State must make FAPE available to all children with disabilities residing in the State in mandated age ranges.

Changes: None.

Comment: One commenter recommended removing the word "only" in § 300.106(a)(2) because it is unduly limiting.

Discussion: The inclusion of the word "only" is intended to be limiting. ESY services must be provided "only" if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child. We do not think this language is overly restrictive; instead, we think it is necessary for providing appropriate parameters to the responsibility of the IEP Team.

Changes: None.

Comment: A few commenters suggested revising § 300.106(a)(3)(i) to specifically state that, in addition to particular categories of disabilities, public agencies may not limit ESY services to particular age ranges. Other commenters proposed adding "preschooler with a disability" to the definition of ESY services in § 300.106(b)(1).

Discussion: The revisions recommended by the commenters are not necessary. Section 300.106(a) clarifies that each public agency must ensure that ESY services are available for children with disabilities if those services are necessary for the children to receive FAPE. Section 300.101(a) clearly states that FAPE must be available to all children aged 3 through 21, inclusive, residing in the State, except for children ages 3, 4, 5, 18, 19, 20, or 21 to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, regarding the provision of public education to children of those ages. We do not believe any further clarification is necessary.

Changes: None.

Comment: One commenter requested that language be added to § 300.106(b)(1)(i) to clarify that providing ESY services to a child with a disability beyond the normal school year includes, but is not limited to, before and after regular school hours, on weekends, and during regular school vacations.

Discussion: Typically, ESY services are provided during the summer months. However, there is nothing in § 300.106 that would limit a public agency from providing ESY services to a child with a disability during times other than the summer, such as before and after regular school hours or during school vacations, if the IEP Team determines that the child requires ESY services during those time periods in order to receive FAPE. The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child.

Changes: None.

Comment: One commenter suggested adding language to § 300.106 clarifying that "recoupment and retention" should not be used as the sole criteria for determining the child's eligibility for ESY services.

Discussion: We do not believe the commenter's suggested change should be made. The 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.

Changes: None.

Nonacademic Services (§ 300.107)

Comment: One commenter recommended adding more specific language in § 300.107 regarding services and accommodations available for nonacademic activities to ensure that children with disabilities are fully included in nonacademic activities.

Discussion: We agree with the commenter. Section 300.107(a), as proposed, requires public agencies to take steps to provide nonacademic and extracurricular services and activities in a manner necessary to afford children with disabilities an equal opportunity to participate in those services and activities. In addition, § 300.320(a)(4)(ii), consistent with section 614(d)(1)(i)(IV)(bb) of the Act, clarifies that an IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child to participate in extracurricular and other nonacademic activities. We will add language in § 300.107(a) to clarify that the steps taken by public agencies to provide access to nonacademic and extracurricular services and activities include the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team.

Changes: Additional language has been added in § 300.107(a) to clarify that the steps taken by public agencies to provide access to nonacademic and extracurricular services and activities include the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team.

Comment: One commenter expressed concern about including "nonacademic services" in § 300.107, because it is not in the Act. The commenter stated that services such as athletics, recreational activities and clubs, counseling, transportation and health services should not be included in the regulations because they may be costly and are usually available on a limited basis. One commenter stated that it is confusing to include related services in the examples of nonacademic services and recommended that they be removed.

Discussion: The list of nonacademic and extracurricular services and activities in § 300.107(b) is not exhaustive. The list provides public agencies with examples of services and activities that may afford children with disabilities an equal opportunity for participation in the services offered to other children of the public agency. We disagree that the list of activities causes confusion with related services, as we think that the public can easily recognize the difference between academic counseling services, for example, that are offered to all children, and the type of counseling services that might be included in a child's IEP as a related service. For these reasons, we believe it is appropriate to maintain the list of nonacademic and extracurricular services and activities in § 300.107, including those services that are also *related services* in § 300.34.

Changes: None.

Physical Education (§ 300.108)

Comment: A few commenters stated that, in some States, physical education is not required for every nondisabled child every year and this creates situations in which children with disabilities are in segregated physical education classes. The commenters recommended that the regulations clarify the requirements for public agencies to make physical education available to children with disabilities when physical education is not available to children without disabilities.

Discussion: Section 300.108 describes two considerations that a public agency must take into account to meet the physical education requirements in this section. First, physical education must be made available equally to children with disabilities and children without disabilities. If physical education is not available to all children (*i.e.*, children with and without disabilities), the public agency is not required to make physical education available for children with disabilities (*e.g.*, a district may provide physical education to all children through grade 10, but not to any children in their junior and senior years). Second, if physical education is specially designed to meet the unique needs of a child with a disability and is set out in that child's IEP, those services must be provided whether or not they are provided to other children in the agency.

This is the Department's longstanding interpretation of the requirements in § 300.108 and is based on legislative history that the intent of Congress was to ensure equal rights for children with disabilities. The regulation as promulgated in 1977 was based on an understanding that physical education was available to all children without disabilities and, therefore, must be made available to all children with disabilities. As stated in H. Rpt. No. 94–332, p. 9, (1975):

> Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

We agree that § 300.108(a) could be interpreted to mean that physical education must be made available to all children with disabilities, regardless of whether physical education is provided to children without disabilities. We will, therefore, revise paragraph (a) to clarify that the public agency has no obligation to provide physical education for children with disabilities if it does not provide physical education to nondisabled children attending their schools.

Changes: Section 300.108(a) has been revised as described in the preceding paragraph.

Full Education Opportunity Goal (FEOG) (§ 300.109)

Comment: One commenter requested that the regulations clarify how a State communicates and monitors the progress of the State's FEOG.

Discussion: We do not believe it is appropriate to regulate how a State communicates and monitors its progress toward the State's FEOG. We believe the State should have the flexibility needed to implement the provisions of this section and the State is in the best position to make this determination.

Changes: None.

Program Options (§ 300.110)

Comment: A few commenters recommended revising § 300.110 to require States to ensure that each public agency have in effect policies, procedures, and programs to provide children with disabilities the variety of educational programs and services available to nondisabled children. The commenters stated that § 300.110 does not provide any guidance to educators. A few commenters stated that "vocational education is an outdated term" and proposed replacing it with "career-technical and adult education" or "career and technical education."

Discussion: We do not believe it is necessary to change § 300.110. Under this provision, States must ensure that public agencies take steps to ensure that children with disabilities have access to the same program options that are available to nondisabled children in the area served by the agency, whatever those options are, and we are not aware of any implementation problems with