



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
OFFICE OF SPECIAL EDUCATION PROGRAMS

DIRECTOR

May 12, 2021

OSEP Policy 21-01

Garth Tymeson, PhD
Center on Disability Health and Adapted Physical Activity
University of Wisconsin-La Crosse
Department of Exercise and Sport Science
1725 State Street
108 Mitchell Hall
La Crosse, Wisconsin 54601

Dear Dr. Tymeson:

This letter responds to your April 9, 2020, correspondence addressed to Laurie VanderPloeg, former Director of the Office of Special Education Programs (OSEP), U.S. Department of Education (Department). In that letter, you asked that OSEP clarify requirements related to the provision of physical education, including adapted physical education (APE), to children with disabilities under the Individuals with Disabilities Education Act (IDEA). Specifically, you asked that OSEP clarify “issues including the substitution or replacement of required physical education services by related services such as physical or occupational therapy for children with disabilities in special education, ages 3-21, and the qualifications/licensure required to teach specially designed physical education included in the [individualized education program (IEP)] IEP.” You shared a scenario of a child who had received APE at her elementary school but, when she was to transition to middle school, the local educational agency members of the IEP Team proposed to replace the child’s APE with physical therapy services due to the unavailability of a qualified APE teacher at the middle school. On January 26, 2021, Daniel Schreier, Policy Advisor to the Acting OSEP Director, and Lisa Pagano, OSEP Policy Specialist, spoke with you by telephone to gather additional information related to your request. We regret the delay in responding.

We note that section 607(d) of the IDEA prohibits the Secretary of the Department from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. It represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented and does not establish a policy or rule that would apply in all circumstances. Other than statutory and regulatory requirements included in the document, the contents of this

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-2800

www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

IDEA defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.” IDEA section 602(29). The IDEA regulations define physical education to mean “[t]he development of – (A) [p]hysical and motor fitness; (B) [f]undamental motor skills and patterns; and (C) [s]kills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).” 34 C.F.R. § 300.39(b)(2)(i). Physical education “[i]ncludes special physical education, adapted physical education, movement education, and motor development.” 34 C.F.R. § 300.39(b)(2)(ii).

Under 34 C.F.R. § 300.108(a), the State is required to ensure that public agencies in the State make physical education services, specially designed if necessary, available to every child with a disability receiving a free appropriate public education (FAPE), unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades. Further, each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless - (1) the child is enrolled full time in a separate facility; or (2) the child needs specially designed physical education, as prescribed in the child’s IEP. 34 C.F.R. § 300.108(b). If specially designed physical education is prescribed in a child’s IEP, the public agency responsible for the education of that child must provide the services directly or make arrangements for those services to be provided through other public or private programs. 34 C.F.R. § 300.108(c).

Since instruction in physical education is included in the definition of special education, the IEP Team must determine the extent to which the child can access the regular physical education program available to nondisabled peers, in addition to the extent to which physical education is required as specially designed instruction to meet the child’s unique needs. Therefore, even if a school does not provide physical education to children without disabilities in the same grades as children with disabilities, the school is not relieved of the duty to provide physical education to those students who have unique needs requiring physical education and have IEPs setting out physical education as part of that student’s special education and related services. Thus, under IDEA Part B, “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.” Analysis of Comments and Changes to the final IDEA Part B regulations, 71 Fed. Reg. 46540, 46583 (Aug. 14, 2006); see also 34 C.F.R. § 300.108(c).

When the IEP Team determines a child requires physical education as specially designed instruction to meet the unique needs of a child with a disability, the service is considered special education and not a related service. As with other services in the IEP, the IEP Team determines the frequency, location, and duration of the service based on the needs of the child. See 34 C.F.R. § 300.320(a)(7). It would be inconsistent with IDEA for the IEP Team to base its

determination of services necessary to provide FAPE, including specially designed instruction in physical education, on the availability of qualified staff.

During the January 26, 2021, telephone discussion with OSEP staff, you asked that this response specifically address whether it would be appropriate for a physical therapist to develop and implement goals in a child's IEP that require specially designed instruction in physical education. You shared concerns that, in the absence of an APE teacher, IEP Teams may be inclined to substitute physical therapy for the specially designed physical education that had been determined necessary for FAPE. While Part B of the IDEA does not mandate any particular personnel standards, each State's policies and procedures must provide for the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of Part B are appropriately and adequately prepared and trained. 34 C.F.R. § 300.156(a). This includes ensuring that personnel have the content knowledge and skills to serve children with disabilities. *Id.* The Part B regulations at 34 C.F.R. § 300.156 address separately, the requirements for related services personnel and paraprofessionals (34 C.F.R. § 300.156(b)) and the qualifications for special education teachers (34 C.F.R. § 300.156(c)). The determination of who is qualified to provide physical education as specially designed instruction, including APE, is dependent upon the State's policies and procedures.

Finally, you asked whether an IEP Team meeting is required if a public agency proposes to remove APE included in a child's IEP and replace it with one-to-one physical therapy services. You inquired whether such a change would constitute a change in educational placement. Unless the parent and public agency agree to use the IEP amendment procedures in 34 C.F.R. § 300.324(a)(4) and (6), the public agency would need to convene the IEP Team to discuss making the revisions to the child's IEP that you describe. A public agency must provide the parent with prior written notice, as required by 34 C.F.R. § 300.503, a reasonable time before proposing to initiate or change, or refusing to initiate or change, the identification, evaluation, educational placement or provision of FAPE to the child.

Generally, OSEP does not opine on whether the scenarios set forth in policy inquiries constitute a change in a child's educational placement. Determinations about whether a revision to a child's program results in a change in placement are made based on the facts and circumstances of the specific child, examining a number of factors. To help guide that decision-making process, OSEP set out several factors to consider in its Letter to Fisher, 21 IDELR 992 (July 6, 1994):

In determining whether a "change in educational placement" has occurred, the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child's educational program. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.

We thank you for your continued commitment to ensuring children with disabilities have access to appropriate instruction to meet their unique physical education needs and trust that the information in this letter is responsive to your inquiry. If you have further questions, please contact Lisa Pagano at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

David Cantrell, PhD
Acting Director
Office of Special Education Programs