



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

FEB 12 2010

James Irby, Esq.
The Law Firm of James Irby, P.C.
120 East Tennessee Street
Florence, Alabama 35630

Dear Mr. Irby:

This letter is in response to your September 17, 2009 letter to Patricia Guard, former Acting Director of the Office of Special Education Programs. You requested guidance regarding the requirements of under Part B of the Individuals with Disabilities Education Act (IDEA) as they relate to additional reading instruction provided in lieu of mandatory physical education.

Specifically, you ask whether an Individualized Education Program (IEP) team for a student with a disability may agree to provide additional reading instruction in place of, and during, otherwise scheduled mandatory physical education instruction. You enclosed a November 16, 2004 memorandum from the State of Alabama Department of Education addressing sufficient instruction time for struggling readers that references the requirement for "30 minutes daily of physical education established in accordance with the *Code of Alabama (1975)*, 16-4-1." We interpret the State requirement as applying to students with and without disabilities and your question to be whether the IDEA provides the IEP Team with authority to waive this State requirement for students with disabilities who require additional reading instruction.

In general, it would be inappropriate for the IEP Team to deny children with disabilities the opportunity to participate in State mandated physical education instruction for the sole purpose of providing them with additional reading instruction. The IEP Team should consider additional strategies and scheduling, such as an extended school day or extended school year, if the child requires such instruction in order to receive a free appropriate public education.

Consistent with 34 CFR §300.320(a), each child's IEP Team determines the special education and related services, and supplementary aides, services, and other supports that are needed to meet each child's unique needs in order for the child to: (1) advance appropriately toward attaining the annual goals; (2) be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and (3) be educated and participate in such activities with other children with disabilities and nondisabled children. Because physical education instruction is a requirement for all students, the IEP Team must determine the child's needs in order to meet this requirement. We note that the definition of special education, at 34 CFR §300.39, includes instruction in physical education. Therefore, for some students with disabilities instruction in physical education may be a part of the special education services prescribed in IEP. Students with disabilities who can participate in the

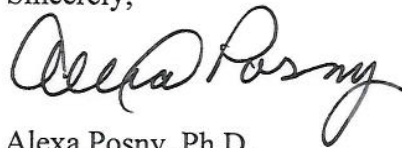
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regular physical education with or without supplementary aides, services and other supports must be provided an equal opportunity to meet this State requirement.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have questions, please do not hesitate to contact Laura Duos at 202-245-6474 or by email at Laura.Duos@ed.gov, or Deborah Morrow at 202-245-7456 or by email at Deborah.Morrow@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Alexa Posny". The signature is fluid and cursive, with the first name "Alexa" written in a larger, more prominent script than the last name "Posny".

Alexa Posny, Ph.D.
Acting Director
Office of Special Education Programs