

# Compliance Corner

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## Questions and Answers: You've Given Me the Task to Answer the Questions You Ask!

### **1) How are we to address absences with students? What happens when the absences occur because the parent doesn't get the student to school?**

Chronic absenteeism has been defined as missing at least 10 percent of the school year. Nationwide, according to the latest available data, 29.7 percent of students, nearly 14.7 million, were chronically absent in the 2021-22 school year. Children with disabilities were about three times more likely to have experienced excessive absenteeism compared to children without disabilities. Studies have shown excessive absences result in poor academic performance and an increase in school dropout rates.

School personnel are responsible for providing a Free Appropriate Public Education (FAPE) for students who are eligible. If the absences are due to medical or social/emotional reasons, school staff and families should convene an Individualized Education Program (IEP) meeting to determine appropriate and effective supports and services needed (i.e. FBA/BIP or a school health plan) to address the absenteeism. The Individuals with Disabilities Education Act (IDEA) requires school districts to address behavior that impedes the learning of the student by providing positive behavioral supports. Chronic absenteeism is a behavior that could impede a child's learning as the child is not receiving specially-designed instruction nor has access to the general education curriculum. IDEA (34 CFR §300.324 (a)(2)(i)) *Consideration of special factors states:*

*The IEP Team must—*

*In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;*

In addition to the IDEA, the New Mexico Administrative Code (NMAC) requires school districts to address these concerns as well. NMAC (6.31.2.11(F)(1)) states:

*Pursuant to 34 CFR Sec. 324(a)(2)(i), the IEP team for a child with a disability whose behavior impedes his or her learning or that of others shall consider, if appropriate, strategies to address that behavior, including the development of behavioral goals and objectives and the use of positive behavioral interventions, strategies, and supports to be used in pursuit of those goals and objectives. Public agencies are strongly encouraged to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal rules.*

It is also important to remember that IDEA requires school districts to convene an IEP when the student is exhibiting lack of progress. It is highly likely that students who are missing an excessive amount of school are not progressing toward meeting their goals. IDEA (34 CFR §300.324 (b)(1)(ii) (A)) states:

*Review and revision of IEPs —*

*(1) General. Each public agency must ensure that...the IEP Team—*

*(ii) Revises the IEP, as appropriate, to address—*

*(A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;*

School personnel need to be proactive and work closely with families to determine the reason(s) for the child's absences. Forming a relationship with the family is so important. Having conversations about the need for the child to be in school is essential. However, there are times in which the absences are due to the parent failing to ensure the child gets to school. In these situations, administration may need to get involved in addressing the issue(s). Conversations with families and documentation of these conversations would be paramount.

## **2) Does a special education teacher need to attend an IEP for an initial or annual speech only?**

IDEA (34 CFR §300.321(a)(3)) states:

*(a) General. The public agency must ensure that the IEP Team for each child with a disability includes—*

*(3) Not less than one special education teacher of the child, or where **appropriate**, not less than one **special education provider** of the child;*

In New Mexico, speech-only services are considered special education. NMAC 6.31.2.7 (20) defines special education in New Mexico as:

*“Special education” means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.*

*(a) As authorized by 34 CFR Secs. 300.8(a)(2)(ii) and 300.39(a)(2)(i), “special education” in New Mexico may include speech-language pathology services.*

*(b) Speech-language pathology services shall meet the following standards to be considered special education:*

*(i) the service is provided to a child who has received appropriate tier I universal screening under Subsection D of 6.29.1.9 NMAC as it may be amended from time to time, before being properly evaluated under 34 CFR Secs. 300.301 through 300.306 and Subsection E of 6.31.2.10 NMAC;*

*(ii) the IEP team that makes the eligibility determination finds that the child has a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance;*

*(iii) the speech language pathology service consists of specially designed instruction that is provided to enable the child to have access to the general curriculum and meet the educational standards of the public agency that apply to all children; and*

*(iv) the service is provided at no cost to the parents under a properly developed IEP that meets the requirements of Subsection B of 6.31.2.11 NMAC.*

*(c) If all of the standards are met, the service shall be considered as special education rather than a related service.*

In this regard, the speech and language pathologist would serve as the special education provider of the child and would fulfill this requirement, thus not needing a special education teacher.

**3) Can schools ask parents to come to the school when the student is out of control?**

I can understand how people would think it is appropriate to ask a parent to come to the school to deal with behavioral issues. However, the Local Education Agency (LEA) is responsible for providing a FAPE to the student. Just as we would not ask the parent to come to the school to teach their child how to read, we would not ask the parent to come to the school to address their child's behavioral concerns. The responsibility lies with school personnel. Schools need to employ whatever interventions and supports deemed necessary to address the behavioral concerns of the student. If needed, an IEP may need to be convened to discuss what services and supports may be required.

#### **4) Under what conditions would an IEE be granted?**

Under the IDEA (34 CFR §300.502 (b)) Parent right to evaluation at public expense.

*(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.*

*(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—*

*(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or*

*(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.*

*(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.*

*(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.*

*(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.*

Paying for an Independent Educational Evaluation (IEE) is typically the appropriate course of action and is usually in the best interest of the district, the child and the family. Districts have a choice to either defend their evaluation or agree to pay for an IEE when the parent disagrees with the LEA's evaluation. While filing for a due process hearing is permissible, it can be costly, both financially and in terms of irreparable harm regarding relationships with the family. The cost of the IEE would be minimal compared to the costs incurred by filing against the parent. However, school districts need to make this decision on an individual basis.

**5) What if a parent refuses to have their child evaluated when the school sees a need? What if after the evaluation the parent refuses services? How do we protect ourselves?**

The Procedural Safeguards (SPECIAL EDUCATION PROCEDURAL SAFEGUARDS FOR STUDENTS WITH DISABILITIES AND THEIR FAMILIES REQUIRED UNDER IDEA PART B p.7) states:

*The school district must make reasonable efforts to obtain your consent for an initial evaluation to decide whether your child is a child with a disability. Your consent for initial evaluation does not mean that you have also given your consent for the district to start providing special education and related services to your child.*

There are override procedures available to districts when parents refuse to consent to an evaluation. However, that can be quite costly, both financially and in terms of the relationship between the family and the school. To that end, this is something that might be pursued in rare and extreme circumstances.

While a district can utilize the override procedures pertaining to the evaluation, it cannot force a parent to consent to services. This will often feel that it's not in the best interest of the student, but ultimately, parents have that right. In this situation, the student is not afforded the protections under the IDEA and will be treated as a regular education student.

*The information included herein is not intended to provide legal advice. Should you need legal advice or guidance on any issue involving special education, please contact the appropriate person for your district.*