

Mr. Robert A. Borucki  
Director  
Pupil Personnel Services  
Board of Education  
District So. 4  
222 North Kennedy Drive  
Addison, Illinois 60101

Dear Mr. Borucki,

April 11, 2023

This is in response to your recent letter to Mr. Joseph Clair of the staff of the Office of Special Education Programs (OSEP) concerning the obligations of school districts to continue to provide special educational services to a child with a handicap who is unwilling to cooperate with school authorities in attaining the goals and objectives in his individualized education program (IEP). The regulations implementing Part B of the Education of the Handicapped Act (EHA-B) at 34 CFR Part 300 are enclosed for your information. Your questions and OSEP's responses follow.

Q. In this situation, must the special education staff continue to provide services? Since it is apparent that the student does not want to cooperate, can special education services be discontinued on the premise that he does not 'want' to be successful? Can it be assumed that the student, with the parent's tacit approval, has chosen to fail and is 'free' to make that decision?

A. Under EHA-B, States and local school districts have a continuing responsibility to make a free appropriate public education (FAPE) available to all children determined to have one or more of eleven specified handicapping conditions. Entitlement to FAPE includes the right of all children with handicaps, regardless of the severity of their handicap, to receive special education and related services in conformity with an IEP, in the least restrictive environment (LRE) in which the child's IEP can be implemented. The situation described in your inquiry is partly addressed in the IEP regulation at 34 CFR §300.349 which states:

"Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives."

The Comment to this regulation explains further:

"This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized

education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made."

Thus, while EHA-B does not require that school officials be held accountable for a student's progress, the failure of a student to cooperate with school staff in attaining the goals and objectives in the child's IEP does not relieve school officials of the responsibility to provide a FAPE to that child.

Q. "Must the special education teacher continue this student in a special education program when the student refuses to cooperate?"

A. Yes. See the response to previous questions. The obligation of States and school districts to provide appropriate educational services to eligible students with handicaps is equally applicable to cooperative and uncooperative students. Further, it is OSEP's position that EHA-B requires States and local school districts to provide educational services to children with handicaps during periods of long-term suspension or expulsion, regardless of whether the student's misconduct was related to the student's handicapping condition.

Your letter indicates that in this situation, the placement team believes that the child's current placement is appropriate. However, the student's failure to cooperate with school staff may be an indication of the need for a reevaluation, a revision in the child's IEP, or a change in the child's educational placement. Under these circumstances, it may be appropriate for school officials to convene an IEP meeting to review or revise the child's IEP. If the participants at the IEP meeting decide to change the child's IEP, the child's educational placement may have to be modified to conform to the IEP.

In addition, under 34 CFR §300.534(b), State and local educational agencies must ensure that "an evaluation of the child, based on the requirements of §300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation." Such a reevaluation, which is intended to confirm the child's identified handicapping condition or to diagnose a new handicapping condition, must include an assessment of the child "in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." School districts must comply with the above procedures to ensure that each child receives an appropriate educational program.

Q. "Is it more prudent, in the long run, to serve students who are willing to benefit from the service than those who are not motivated to do so?"

A. EHA-B mandates that States and local school districts ensure that FAPE is provided to all eligible students with handicaps and affords school officials no discretion to elect to serve only certain eligible students.

Q. "Would the discontinuance of services, for lack of cooperation, violate any provisions of P.L. 94-142 and subsequent revisions?"

A. The refusal of a local educational agency (LEA) to establish and maintain programs to provide FAPE to eligible students with handicaps could jeopardize the LEA's Federal funding. If the State educational agency (SEA) determines that the LEA is unable or unwilling to provide FAPE to eligible children with handicaps, the SEA may not distribute funds to that LEA and "shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency." Under the Education Department General Administrative Regulations (EDGAR), an individual or organization may file a complaint with the SEA alleging that a State or a subgrantee is violating a Federal statute or regulations that apply to the EHA-B program. The SEA is also responsible for ensuring that all educational programs for children with handicaps administered within the State meet State education standards and EHA-B requirements.

If the SEA, through its general supervisory responsibility or through the complaint process, finds the LEA out of compliance for refusing to provide FAPE to an eligible student, and the LEA fails to take the necessary steps to achieve compliance, the SEA could notify the LEA of its intent to disapprove the LEA's application for EHA-B funds in whole or in part. In this situation, the LEA would have the right to challenge the SEA's action by requesting a hearing before the SEA pursuant to 34 CFR §76.401(d).

In addition, parents could also challenge an LEA's refusal to provide FAPE to an eligible student with a handicap by requesting an impartial due process hearing under 34 CFR §300.506. EHA-B affords both parents and public educational agencies the right to request such a hearing to resolve disputes over an agency's proposal or refusal regarding the identification, evaluation, or educational placement of a child, or the provision of FAPE to the child.

I hope the above information has been helpful.

Sincerely,

Judy A. Schrag, Ed.D.  
Director  
Office of Special Education Programs