



June 4, 2013

Dear Principals:

I am writing to address an issue regarding the District's obligations in situations where students with disabilities are consistently absent during all or part of the regular school day, particularly when those absences result from participation in private, third-party services or therapies not included in the student's individualized education program (IEP). School staff may learn throughout the school year that particular students are missing significant amounts of instructional time so that the students may participate in private services such as speech therapy, occupational therapy, physical therapy, and applied behavioral therapy. Schools sometimes have requests to reduce the child's instructional day to permit these absences and services.

It is the South Carolina Department of Education's position in these situations, that school districts may not allow students with disabilities to be habitually absent from school to accommodate the families' preferences for private, third-party services, therapies, or educational services not included in the student's IEP, during the student's regularly scheduled school day. Upon learning of excessive absences, including late arrivals and early dismissals, we must take steps to address that student's absences.

When this issue has been addressed in the past, the SCDE has frequently cited S.C. Code§ 16-17-510 as further statutory support for its position that outside service providers should refrain from encouraging or requiring their clients to miss the regularly scheduled school day to receive services from that provider. That statute makes it "unlawful for a person to encourage, entice, or conspire to encourage or entice a child enrolled" in a K-12 school from attendance at school or a school program.

Therefore, based on information previously provided to us by the SCDE, we believe the District must, at minimum, address such absences through the same avenues that a school district otherwise would use with non-disabled peers and document the attempts to do so, such as through parent letters. In addition, upon learning of student absences for participation in private services, the school must reconvene the student's IEP team to determine if those additional services are needed in the school setting and whether other IEP changes are warranted.

If you have any questions or need any further information, please do not hesitate to contact me. If you have questions regarding South Carolina Compulsory Attendance Law, please contact Michael Harris.

Sincerely,

Marlene Metts
Director of Special Services

cc: Helen Anderson, Chief Instructional Services Officer
Michael Harris, Director of Student Services
Christina Melton, Director of Elementary Education
Reggie Dean, Director of Secondary Education



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School District #5
Of Lexington/Richland
Counties

June 6, 2013

Dear Parent(s),

As you prepare for next school year, please be informed that tardies and absences during the school day due to private, third-party services, therapies or educational services will no longer be excused per District Policy as outlined by the State Department of Education.

Excessive absences, tardies, and early dismissals will be subject to the District's Attendance Policies and Procedures.

Attached you will find a letter addressed to Mrs. Paschal from Marlene Metts, Director of Special Services, regarding this issue as well as a copy of the District's attendance policy.

If you have any concerns or questions, please contact me at 476-4112 or clatiff@lexrich5.org.

I hope you have a wonderful summer!

Sincerely,

Catherine Latiff

DUFF, WHITE & TURNER, L.L.C.

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* ALSO ADMITTED IN TENNESSEE

March 25, 2013

VIA ELECTRONIC & U.S. MAIL

Ms. Marlene Metts
Director of Special Services
School District Five of Lexington and Richland Counties
1020 Dutch Fork Road
Irmo, SC 29063

Re: Truancy and Absences of Students with Disabilities under the Individuals
with Disabilities Education Act (IDEA)

Dear Ms. Metts:

You have asked for our opinion regarding the District's obligations in situations where IDEA-eligible students are consistently absent during all or part of the regular school day, particularly when said absences result from participation in private, third-party services or therapies not included in the student's individualized education program (IEP). As I understand it, school or special services staff may learn throughout the school year that particular students are missing significant amounts of instructional time so that the students may participate in private therapies or services. These services include speech therapy, occupational therapy, physical therapy, and applied behavioral therapy, among others. Further, your school district, along with many others, has experienced an increase in direct requests to schools and IEP teams to reduce the child's instructional day to permit these absences and services, with increased opposition from outside service providers and parents when the requests are denied, and the District attempts to address the absences.

As we understand the SCDE's position in these situations, school districts may not allow students with disabilities to be habitually absent from school to accommodate the families' preferences for private, third-party services, therapies, or educational services not included in the student's IEP, during the student's regularly scheduled school day. Upon learning of excessive absences, including late arrivals and early dismissals, school districts must take affirmative steps to address that student's absences from the regularly scheduled instructional day. That obligation stems from various state and federal laws, at the center of which are those regulating the length of the school day, as well as those relating to development and implementation of a student's IEP. State law establishes the minimum length of the instructional day for K-12 students as six (6)

Ms. Marlene Metts
March 25, 2013
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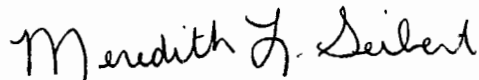
hours or the equivalent weekly. See S.C. Code § 59-1-440; S.C. Reg. 43-234(IV)(C)(2). Furthermore, children with disabilities must receive the same length of instructional time as non-disabled peers, unless the IEP team makes an individual determination that a different amount of time is necessary for FAPE. Once the team specifies the services needed to provide FAPE in an IEP, the District may run afoul of its IDEA obligation to implement that IEP if the student routinely does not attend for the entirety of the regularly scheduled school day. Lastly, when this issue has been addressed in the past, the SCDE has frequently cited S.C. Code § 16-17-510 as further statutory support for its position that outside service providers should refrain from encouraging or requiring their clients to miss the regularly scheduled school day to receive services from that provider. That statute makes it "unlawful for a person to encourage, entice, or conspire to encourage or entice a child enrolled" in a K-12 school from attendance at school or a school program.

Therefore, based on information previously provided to us by the SCDE, we believe the District must, at minimum, address such absences through the same avenues that a school district otherwise would use with non-disabled peers and document the attempts to do so, such as through parent letters. In addition, upon learning of student absences for participation in private services, the District should reconvene the student's IEP team to determine if those additional services are needed in the school setting and whether other IEP changes are warranted, including the need for a reduced school day or receipt of third-party services as a component of FAPE (at no cost to parents) – particularly where those services or needs have not been previously discussed by the IEP team. I also wish to caution you that the District cannot reduce a child's school day for the purpose of allowing a child to receive private, third-party services during the regular school day; nor can the District knowingly "look the other way." In those cases, an argument could be made that the District has implicitly agreed said services are necessary for FAPE, or that the District is ignoring unexcused absences.

There is very little case law or due process decisions on this point; however, we believe the SCDE has made its position clear in various conversations and its annual conferences. Therefore, I also have copied Barbara Drayton in the SCDE's Office of General Counsel on this correspondence so that she may advise the District if I have misstated the SCDE's position and expectations in the situations addressed in this letter.

I trust this correspondence is responsive to your inquiry. If you have any questions or need any further information, please do not hesitate to contact me.

Sincerely,



Meredith L. Seibert

c: Barbara Drayton, Esq., SCDE Office of General Counsel
Andrea E. White, Esq.



Re: District Attendance Policy

Mon, Dec 2, 2013 at 4:22 PM

To: mametts@lexrich5.org

Hi Marlene,

I have a question about Lexington-Richland District Five's attendance policy. I have met with several parents who have children with special needs who also attend schools within your district. Many of the parents have informed me that they have been told that their child's speech and/or occupational therapy appointments will no longer be recognized as an excused absence. More than one parent explained to me that they were told that the change came about due to a new, state-wide mandate that precludes third party therapy services that take place during the regular school day.

Would you please forward to me a copy of the district's attendance policy? Could you also forward to me or a copy of this new, state-wide mandate? I've researched it briefly, but was unsuccessful in locating new mandate regarding attendance policy.

I'm sure there's just some misunderstanding, but I would like to get clarification. These parents have told me that:

1. Their child has special needs and falls under the special needs umbrella, with an IEP in place.
2. They have doctor's orders for speech and/or occupational therapy.
3. Many of them are on waiting lists to get therapy appointment times for after school hours, but of course, that is the most difficult time to secure. Others may be taking off of work or having other family members pick up their child, take them to therapy and then return them to school. This routine may suit their schedules and family lives better.

At any rate, they are being told that the excuses that they bring back to school are no longer counted as "excused absences" under this new mandate and/or district policy. They are being told that with enough unexcused absences, they face being reported to social services for educational neglect due to truancy.

I'm sure you would agree with my assessment that social services would have an awfully difficult time prosecuting a parent for educational neglect due to truancy if the parent can prove they were taking their child to speech and/or occupational therapy appointments.

I have advised the parents to carefully document each absence and keep copies of all excuses. I'm also going to advise them to be sure to request that the third-party therapy appointments be listed under the accommodations section of their child's IEP, to prevent any future problems with attendance.

Many of these students also receive therapy services at school, in addition to receiving services elsewhere. I'm guessing that they don't realize that this "outside" therapy needs to be accounted for in their child's IEP as well, if it takes place during the school day.

I would greatly appreciate it if you could help clarify this misunderstanding for me. I want to be able to provide helpful information to these parents, many of whom are frightened that they will have to stop taking their children to therapy else be reported for educational neglect. Some parents are so scared, they've already dropped the outside therapy. These children so desperately need all the help they can get. We don't want them to miss out on any opportunity to get these much-needed services. I want to be able to assure these parents that they shouldn't be afraid of retaliation simply for trying to get therapy services for their children. With your help, I'd like

to be able to do that.

Thanks for your time. I appreciate your attention to this matter.

Danni Bloom
[REDACTED]

Marlene Metts <mametts@lexrich5.org>

Mon, Dec 2, 2013 at 6:50 PM

To: Danni Bloom [REDACTED]

Thank you for your email. As soon as I'm in the office for a few minutes, I'm going to send you a legal opinion. After your review, we can discuss further if needed. There is no "new" statewide mandate, to my knowledge.

[Quoted text hidden]

Danni Bloom [REDACTED]

Mon, Dec 2, 2013 at 7:01 PM

To: Marlene Metts <mametts@lexrich5.org>

Thank you so much. I appreciate that you're looking into this for me. I want to be sure that I advise these parents correctly.

[Quoted text hidden]

Marlene Metts <mametts@lexrich5.org>

Tue, Dec 3, 2013 at 5:19 PM

To: Danni Bloom [REDACTED]

Here's the legal opinion letter I referenced. You may also know that this issue has been addressed in multiple trainings by the State Dept. over the last few years.

[Quoted text hidden]



Opinion Ltr re SCDE position re absences third party services 3.25.13 (3).pdf

137K

Danni Bloom [REDACTED]

Tue, Dec 3, 2013 at 6:49 PM

To: Marlene Metts <mametts@lexrich5.org>

Ms. Metts.

I read this letter, and there are several things that stand out. First, this is the opinion of a random law firm, not a Court's Opinion, nor the Attorney General's opinion. Second, the lawyer makes pains to keep repeating "if not in the IEP". Another thing the lawyer points out is SC Code 16-17-510. Upon reading the statute, to claim that that law applies to Board Certified therapists treating a child in a professional setting within their scope of practice is beyond preposterous. Common sense must rule the day here. Finally, the lawyer agrees that there is almost no Case Law nor Due Process pertaining to this matter.

Worst case scenario, the Developmental Pediatrician prescribes intermittent Home-bound Education to allow for absences as needed.

Thanks for your time and response

[REDACTED]

[REDACTED]
[REDACTED]

Marlene Metts <mametts@lexrich5.org>

Tue, Dec 3, 2013 at 6:57 PM

To: [REDACTED]

I would be glad to discuss with you if we can set a specific time. I do want to point out that, as I mentioned earlier, this is based on SCDE guidance. Yes, if the service was in the IEP, that would be an entirely different situation.

If you will give me a couple of times that would work for you over the next week, perhaps we can set up a time to talk. Thank you!

[Quoted text hidden]

Danni Bloom [REDACTED]

Wed, Dec 4, 2013 at 9:28 AM

To: Marlene Metts <mametts@lexrich5.org>

Thanks, again, for continuing to assist in this matter. I look forward to sitting down with you to discuss this in more detail. First, I want to be sure to forward all of your information to The U.S. Department of Education's Office of Civil Rights Division. I'm very interested to see what their take is on this situation.

Public schools are required by law to accommodate the health needs of students. The plan to accommodate health needs may be called a health plan or a 504 plan. If the child has this in place and school is not following it, it's a **big** no-no. Children who have an IEP in place also have all the protections granted under a 504 plan. The State Department of Education is aware that there are exemptions for children who have documented health care needs. So, thankfully, there is a way for these parents to be able to get their child the services they need and not have to fear retaliation from the district.

<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>

<http://www.wrightslaw.com/info/sec504.index.htm>

Thanks again for your help.

[Quoted text hidden]

Marlene Metts <mametts@lexrich5.org>

Tue, Dec 10, 2013 at 7:16 PM

To: Danni Bloom [REDACTED]

I'm sorry I haven't been back to you with some dates to meet. This week before the holidays was packed! I'm am working next week through Thursday and perhaps that would work for you.

[Quoted text hidden]

Danni Bloom [REDACTED]

Wed, Dec 11, 2013 at 8:38 AM

To: Marlene Metts <mametts@lexrich5.org>

Hi Marlene,

I have several entities looking into this for me and I'd like to wait a bit before we sit down to discuss it in depth.

Enjoy your holidays.

Danni Bloom

Danni Bloom



December 17, 2013

Dr. Mitchell Zais, State Superintendent of Education
South Carolina State Department of Education
1429 Senate Street
Columbia, South Carolina 29201

Dear Dr. Zais,

I am writing to file a complaint on behalf of many South Carolina families who have children with special needs. The nature of my complaint is as follows:

- Families with children who have special needs are being told by their school district that their doctor-ordered therapy appointments will no longer count as excused absences if the child is absent for any part of the school day for the purpose of receiving treatment from a health care provider. They are further threatening to report families to the department of social services for educational neglect (due to truancy) if the child misses any portion of the school day to attend therapy.

These children have varying disabilities that range from speech delays to autism, but all have doctor-ordered prescriptions to receive speech therapy, occupational therapy and/or music therapy from qualified healthcare practitioners. Additionally, many families are on waiting lists to procure appointment times after school. However, because those time-slots fill quickly and rarely become available, parents are taking time off from work to transport their children from school to therapy and back to school again. Many families feel that their children are being singled out because of their disabilities.

I believe it is the obligation of public schools to make reasonable modifications to policies, practices and procedures to permit students with special needs to have their temporary absences excused when the student has a documented appointment with a health care professional during regular school hours and if the student begins classes or returns to school on the same day of the appointment. Furthermore, excused absences should not be counted when determining the number of absences that trigger a referral or complaint for failure to comply with the compulsory attendance requirements.

Because federal law preempts state law, if there is a state law, statute, amendment, regulation, code or a legal opinion that is allowing schools to prevent children with special needs from having their health care absences excused, then it is directly conflicting with federal law and the state law must be interpreted in a way that complies with federal law.

For the above reasons, I believe the school districts are in violation of certain requirements in the Individuals with Disabilities Education Act. Specifically:

The Individuals with Disabilities Education Act (IDEA) is the law that provides your child with the right to a free, appropriate public education. The **purpose** of the IDEA is "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 further education, employment, and independent living...***"

Enclosed are copies of relevant documents and correspondence I have sent to and received from the school district concerning this matter. Please provide me with copies of any information you obtain in the process of investigating my complaint. If you need further information or clarification on my complaint, I can be reached at (██████████). Thank you.

Sincerely,



Danni Bloom

Enclosures:

CC: Ms. Cathy Boshamer, M.Ed. Director, Exceptional Children
State Department of Education
Rutledge Building
Suite 808G
Columbia, SC 29201

South Carolina Education Oversight Committee
Post Office Box 11867
Columbia, SC 29211

Washington DC (Metro)
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-1475

President *Pro Tempore* John W. Courson
Chairman, Senate Education Committee
412 Gressette Building
Columbia, SC 29201

This information can be found on the U.S. Department of Education, Office for Civil Rights' webpage here



<http://www2.ed.gov/about/offices/list/ocr/qa-disability.html>

I'm pretty sure this should clear up any confusion about the matter.

It's important that we are disseminating correct information to parents who have children with special needs, especially when faced with threats of truancy charges.



No. They cover all programs of a school or college, including academics, extracurricular, and athletics. Also, the laws apply to the activities of a school or college that occur off campus..

Do all buildings have to be made physically accessible?

No, not necessarily. While buildings constructed after the Section 504 regulation was issued (that is, those built since 1977) must be fully accessible, older buildings do not have to be made fully accessible. For older buildings, the law requires that the program or activity be made accessible. A common way this is done is to relocate the program to another building that is accessible.

What types of adjustments are required for students with disabilities in colleges and universities?

Colleges and universities are required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in the school's program. Examples of auxiliary aids that may be required are taped texts, notetakers, interpreters, readers, and specialized computer equipment.

Colleges and universities are not required to supply students with attendants, individually prescribed devices such as hearing aids and wheelchairs, readers for personal use or study, or other devices or services of a personal nature

What types of services are required for students with disabilities in elementary and secondary schools?

School districts are required to provide a free appropriate education to students with disabilities based on their individualized educational needs. The services may include special education and related aids and services such as physical therapy, as well as modifications to the regular education program including adjustments in test taking procedures and adjustments to rules regarding absences when a student's absences are due to a disability.

Does OCR enforce laws that prohibit harassment of students or others because of a disability?

Yes. Both Section 504 and Title II of the Americans with Disabilities Act make it unlawful to harass people in covered entities because of their disabilities. OCR and the Office of Special Education and Rehabilitation Services have jointly issued guidance to school districts regarding harassment based on disability.

- Other Civil Rights Agencies
- Recursos de la Oficina Para Derechos Civiles en Español
- Resources Available in Other Languages

I feel confident that we can all interpret this to mean that a child with autism or other disability would be attending speech, occupational, music or other therapy sessions due to their disability, no?