
**What is New in the World of
Special Education?**

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I. WHAT'S NEW AT THE FEDERAL LEVEL?

- A. Segways®, Dogs, and Miniature Horses. Oh My! Title II and III of the ADA Regulations Amended - signed July 23, 2010, will be effective 6 months after publication in the Federal Register.

The Title II and Title III regulations add a number of definitions that may affect programming for special education students. New relevant definitional terms include: “direct threat”, “other power-driven mobility device”, “service animal”, “qualified reader”, “video remote interpreting services”, “auxiliary aids and services”, and “qualified interpreter”.

“Service Animal” means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and *the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.* See, 28 CFR § 35.104. (Emphasis added).

At 28 CFR § 35.136, the regulations address (among other things) the care and exclusion of Service Animals.

- (a) General. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.
- (b) Exceptions. A public entity may ask an individual with a disability to remove a service animal from the premises if--
- (1) The animal is out of control and the animal’s handler does not take effective action to control it; or
 - (2) The animal is not housebroken.
- (c) If an animal is properly excluded. If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

(d) Animal under handler's control. A service animal shall be under the control of its handler. ***

(e) Care or supervision. A public entity is not responsible for the care or supervision of a service animal.

(f) Inquiries. A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. ***

(g) Access to areas of a public entity. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.

(h) Surcharges. A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

(i) Miniature horses.

(A) A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(B) Assessment factors. In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider--

- (1) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
- (2) Whether the handler has sufficient control of the miniature horse;
- (3) Whether the miniature horse is housebroken; and
- (4) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(C) Other requirements. Paragraphs 35.136 (c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

NOTE: The same language appears in the Title III regulations at 28 CFR §104.36 and 28 CFR § 36.208, respectively.

**B. U.S. Department of Education's IEPs, Evaluations, and Reevaluations
Revised Q&A (revised June 2010)**

The Office of Special Education and Rehabilitative Services (OSERS) has issued a *revised* Q&A document with information regarding the IDEA requirements relating to individualized education programs (IEPs), evaluations, and reevaluations. Some of the more interesting highlights include:

- Q. What options are available when an out-of-state transfer student cannot provide a copy of his/her IEP, and the parent identifies the "comparable" services that the student should receive?
- A. After taking reasonable steps to obtain the child's records from the public school district in which the child was previously enrolled, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, if the new school district is not able to obtain the IEP from the previous school district or from the parent, the new school district is not required to provide special education and related services to the child. However, nothing in the IDEA would prevent the new school district from providing comparable special education and related services.

- Q. What is the timeline for a new school district to adopt an IEP from a previous public school district or to develop and implement a new IEP?
- A. The regulations do not establish timelines for the new school district to adopt the child's IEP from the previous public agency or to develop and implement a new IEP. However, the new public school district must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services.

- Q. Must a public school district obtain parental consent, or the consent of a child with a disability who has reached the age of majority, to invite a representative of a participating agency that is likely to be responsible for providing or paying for transition services to an IEP Team meeting ?
- A. The consent requirement was included to protect the confidentiality of discussions that occur at IEP Team meetings, which other agency representatives would be able to hear as a result of their attendance at such meetings, only because they may be providing or paying for transition services. Because the discussions at each IEP Team meeting are not the

same, and confidential information about the child is always shared, the consent of the parent, or of a child with a disability who has reached the age of majority, must be obtained prior to each IEP Team meeting if a public school district proposes to invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

- Q. The regulations in 34 CFR §300.320(b)(1) require that appropriate post secondary transition goals be measurable. Must public school districts measure achievement of the goals once a student has graduated or has aged out?
- A. There is no requirement for public agencies to determine whether the postsecondary goals have been met once a child is no longer eligible for FAPE.

C. **OSEP and OSERS Opinion Letters**

- ***Letter to Cox***, 110 LRP 10357, Office of Special Education Programs, August 21, 2009. Explains what a school district must do when parents who both have legal authority to make educational decisions on behalf of a child clash on revoking consent. Once a parent authorized to do so revokes consent, the LEA must provide prior written notice, cease providing the services, and treat any subsequent evaluation request by either parent as a request for an initial evaluation.
- ***Letter to Heath***, 110 LRP 17415, Office of Special Education Programs, August 21, 2009. Districts may not exclude postsecondary employment goals from a student's transition plan based strictly on the nature of the student's disability. The explanation came in response to the official's request that OSEP "waive" the requirement for including a postsecondary goal in employment for students with disabilities who have severe medical conditions and developmental needs. "While including employment goals in the IEPs of some students with severe medical conditions and developmental needs may be upsetting to their parents, the IDEA does not provide an exception for this requirement based on the nature of the child's disability; and OSEP does not have the authority to waive this statutory requirement."
- ***Letter to Moffett***, 110 LRP 17264, Office of Special Education Programs, August 24, 2009. OSEP informed a concerned individual the IDEA does not require educational agencies to conduct reevaluations or additional testing of a student solely to secure testing accommodations for the student on the SAT or ACT.

- ***Questions and Answers on Serving Children with Disabilities Eligible for Transportation***, 109 LRP 72855, Office of Special Education and Rehabilitative Services, November 1, 2009. OSERS answered 11 questions submitted including: what are transportation services, who determines what transportation services are required, what is “travel training”, does an LEA have to redirect routes or provide aides in order to provide transportation services, when does an LEA have to provide transportation in a climate controlled vehicle, what confidential information must be provided to bus drivers, when is an LEA required to provide transportation for a preschool child between private daycare and the public preschool, and what are the procedural protections to be afforded to a student with disabilities who is subject to discipline for misconduct on a bus?
- ***Letter to Weinberg***, 110 LRP 32312, Office of Special Education Programs, December 8, 2010. Noted that while there is no set timeframe for making an eligibility determination, OSEP informed a special education attorney that it must occur within "a reasonable period of time" after the initial evaluation. The question arose from a situation in which an IEP team purportedly waited a year after an evaluation request to consider a student's eligibility.

II. WHAT'S NEW AT THE STATE LEVEL?

A. OSEP Monitoring Visit Review -- Occurred in October 2009

OSEP determined the ODE does not have a supervisory system that is reasonably designed to identify non-compliance in a timely manner, or to ensure correction of the identified non-compliance.

Additionally, OSEP had previously selected LRE as an area of concern for focused monitoring in Ohio. OSEP again concluded that ODE has not demonstrated that it has procedures and practices in place to appropriately monitor whether LRE requirements are appropriately implemented by school districts.

What does this mean for Ohio Public School Districts?

- Expect that ODE will be reluctant to extend the timelines for any state complaint. Extensions will only be granted in the case of extreme “exceptional circumstances” which will not include summer vacations, school staff unavailability, or the complexity of the complaint. Additionally, the definition adopted by the recent *Doe* Consent Order requires that “[e]xceptional circumstances ... be narrowly defined.”
- Expect IHOs handling Due Process Hearing Requests to be reluctant to extend the timelines for issuing their decision within the 45 day timeframe.

- IHOs will now contact the parties within days 15-30 of the resolution period (or after day 7 for expedited requests) to begin the process of scheduling hearing dates. (See. Kathy Shelby's *Memo to Superintendents, Special Education Directors, SSTs and OCECD* dated 7/7/10)
- Expect ODE to provide intensified scrutiny of LRE determinations while investigating state complaints or when performing on-site monitoring.

B. Ohio Medicaid School Plan (OMSP)

1. Historical Refresher

- Community Alternative Funding System (CAFS) used to pay for specific services for Medicaid eligible students - it was discontinued in June 2005.
- ODE partnered with ODJFS to facilitate the creation of a new program called "Ohio's Medicaid School Program" (OMSP).

2. OAC Rule Numbers 5101:3-35-01 et seq. were amended, effective October 15, 2009

- The rules cover enrolling as an MSP provider, reimbursement claiming procedures, reimbursable services, and parental notification and informed consent.

3. ODE's Evaluation Timeline - Issued August 2009 - Updated November 4, 2009

- Offers a summary of evaluation requirements under the MSP -- See attached.

4. ODE's Published Answers to 104 Questions Posed During MSP Trainings - Posted December 29, 2009. Some of the more interesting highlights include:

- An IEP progress report may *not* meet the requirements of the MSP in terms of showing progress on *medical* goals. (Question 8)
- Only assessments that have medical components are reimbursable under the MSP. (Questions 9, 17, 19)
- Reasons for maintaining the same information (annual assessment consent forms, etc.) on *all* students, not just Medicaid eligible students:
 - the fluidity of Medicaid eligibility, and

- the perception of delivering services to students differently based on funding. (Questions 10, 58)
- That annual reassessments are not required for IEPs but are required for MSP eligibility. (Question 11)
- If the level/cost of a service exceeds that indicated in an IEP, is the excess reimbursable under the MSP?
 - Yes, with prior authorization from OFJFS. (Question 45)
- MSP provides reimbursement for equipment of those items that are only used in the educational setting. (Question 62, 63)
- If the DOR enters into a relationship with another district, and MSP reimbursement is available, which district pursues the MSP funds?
 - The DOR, so long as it is a MSP provider. (Question 65)
- A school district may create its own parental consent form. (Question 79)
- Delegated nursing tasks are not reimbursable services under the MSP. (Question 100)

5. **ODJFS's Release of MSP Fiscal Documentation - Released July 15, 2010**

- Provides information for the preparation of required Cost Reports based on Agreed Upon Procedures (AUPs). AUPs must be performed by a certified CPA and are required to include sampling and testing of each provider's documentation and programmatic compliance.
- Provides Record Retention Guidance for MSP Cost Reports. Such reports must be retained by the provider for a period of seven (7) years from the date of receipt for all sources, or six (6) years following the completion of a state or federal audit.

C. **Restraint** – Executive Order 2009–13S, signed by Governor Strickland on August 3, 2009

Executive Order 2009-13S requires state agencies, including the Ohio Department of Education, to adopt the “Policy on the Use of Prone Restraint, Transitional Hold, and Other Types of Physical Restraint.” This policy prohibits the use of prone restraint, defined as all items or measures used to limit or control the movement or normal functioning of any portion, or all, of an individual's body while the individual is in a face-down position for an extended period of time.

The use of transitional hold (defined as a brief physical positioning of an individual face-down for the purpose of quickly and effectively gaining physical control) is permitted only when certain conditions are met and as determined by departmental policy.

Other types of physical restraint are to be used only when there is risk of escape or harm to the individual or others, or by personnel within the specific guidelines

of a secured facility. Physical restraint may only be used by trained staff and under the approval, guidance, and restrictions as outlined within each department's policies.

ODE has indicated that when it receives a Complaint related to discipline, it will be investigating whether staff has been properly trained in physical restraint.

Note: Currently pending before Congress are two bills (one pending before the House of Representatives (H.R. 4247), and one before the Senate (S. 2860)) which are nearly identical to each other. The full House approved the bill on March 3, 2010 and referred it to the Senate, where it is currently pending. If the Act were approved by Congress as currently drafted, the following language would become law: "the use of physical restraint or seclusion as a planned intervention shall not be written into a student's education plan ...or individualized education program...." Stay tuned....

D. Special Education Funding – *Doe v. State of Ohio*, No. 2:91-CV-464, 2004 U.S. Dist. LEXIS 29954 (U.S. Dist. Ct., S.D. of Ohio)

This class-action case resulted in a partial settlement agreement. The settlement agreement addressed: (1) the way ODE monitors compliance with the IDEA; (2) requests for waivers of state standards for the delivery of special education services; (3) investigation of state-level complaints filed by parents; and (4) corrective action to be taken when a school district does not meet state or federal standards (including a withholding of funds under IDEA, Part B, and Foundation dollars, as well as the fact that the District cannot be rated as "meets requirements" if a corrective action is not completed within 1 year).

Upshot: On-site monitoring of select school districts began in January 2010. Additionally, ODE has begun posting on www.edresourcesohio.org letters of non-compliance for school districts in state complaints.

E. Whose IDEA is This? Procedural Safeguards Notice. Updated version of *Whose IDEA Is This?* dated June 14, 2010 is now available. Updated to reflect the change in federal regulations related to parental revocation of consent for special education and related services. The updated version must be used by all school districts starting July 1, 2010.

F. ODE's Memo Defining Other Health Impairment – Major and Minor (Issued February 10, 2010). The Office for Exceptional Children released a memo defining and listing conditions that would be reported in EMIS as other health impaired – major or minor. The memo is available at <http://edresourcesohio.org/files/OHI%20Memo%202-10-2010.pdf>.

G. ODE's New Online Tool – Going Places with a Standards-Based IEP (GPS-IEP) (March 2010). The Office for Exceptional Children announced a new online resource designed to assist school personnel in developing standards-based IEPs. The tool, based on *A Seven-Step Process to Creating a Standards-based*

IEP, guides users through each of the seven steps and uses a sample IEP to illustrate how each step applies to completing an IEP.

As an example, the first GPS-IEP scenario (released in March 2010) contained guidance on the critical elements for a well-written IEP goal.

“A well-written goal has six critical elements. The elements may appear in any order but all six elements must be included.

- *Who?* This relates to the child for whom the goal is written.
- *Will do what?* This is observable behavior describing what the child will do to complete the goal.
- *To what level or degree?* This relates to criteria and mastery of the goal. Criteria states how many times the behavior must be observed for the goal to be considered completed. Mastery states the level of achievement required.
- *Under what conditions?* These are conditions that describe the situation, setting, or given material that will need to be in place for the goal to be completed.
- *In what length of time?* This is the timeframe in which the goal is completed.
- *How will progress be measured?* This is performance data.”

Example Goal Provided: Given sixth-grade reading material and using a one-minute probe, T.J. will orally read a passage and increase his reading fluency to 100 words per minute by the end of the school year.

A second GPS-IEP scenario (released in April 2010) contained additional guidance on writing IEP goals, as well as guidance on defining student need. The GPS-IEP tool is available at <http://www.edresourcesohio.org/index.php?slug=gps-iep>.

III. WHAT’S THE OHIO GENERAL ASSEMBLY UP TO?

Written Policy Protecting Students with Peanut and Other Food Allergies

Under HB 1, effective October 16, 2009, boards of education were required to establish a written policy protecting students with peanut or other food allergies. The statute required that the policy be developed in consultation with parents, school nurses, and other school employees, volunteers, students, and community members.

IV. WHAT’S HAPPENING IN THE COURTS?

- A. **Update: Reimbursement denied for private school placement unrelated to disability – *Forest Grove School District v. T.A.*, No. 04-331, 2009 U.S. Dist. LEXIS 115356 (U.S. Dist. Ct. Oregon, Dec. 8, 2009)**

After unilaterally enrolling their child in a private school, the parents sought tuition reimbursement from the school district. Following a determination by the U.S. Supreme Court that reimbursement for private school placement is authorized even if a student has never received special education services through the public school; the district court issued a decision on the merits of the parents' reimbursement claim.

The district court denied reimbursement based on evidence that the parents enrolled their child "not because of any disability recognized by the IDEA but because of his drug abuse and behavioral problems." The Court noted the parents did not list ADHD and trouble with schoolwork on the private school application. The school district's responsibility is to address the learning-related symptoms of a disability, not the underlying medical disability.

B. Alleged misclassification of child with a disability does not deny FAPE – *Pohorecki v. Anthony Wayne Local School Dist.*, No. 3:08 CV 1709, 2009 U.S. Dist. LEXIS 64251 (U.S. Dist. Ct., N.D. of Ohio, July 23, 2009)

A school district's continued classification of a child as a child with "emotional disturbance" under the IDEA, even after the child was diagnosed with Asperger's syndrome, does not constitute a denial of FAPE. The IDEA does not require states to classify students into a specific category as long as the disability is recognized and appropriate services are provided. Moreover, the child's disability meets the IDEA's definition of "emotional disturbance." Additional services (one-on-one aide and speech and occupational therapy) were not required to provide a FAPE.

C. Tape-Recording IEP Meetings - *Horen v. Board of Educ. of City of Toledo*, (U.S. Dist. Ct., N.D. Ohio, September 8, 2009).

This case involved a severely disabled child. Toledo sought to convene an IEP meeting for the development of an IEP and the parents demanded that they be able to record those meetings. Parents also objected to the presence of Toledo's legal counsel, although such person was identified on the IEP invitation. When parents were told that under Board policy the meetings could not be recorded, they refused to participate, no IEP was developed for the child, and the parents enrolled the child in private school. A Due Process complaint followed. The Court noted that OSEP had previously indicated that a public agency could have a policy prohibiting the use of recording devices at IEP meetings as long as the policy provides for exceptions necessary to ensure a parent understands the IEP process and is in accord with state law governing the recording of an IEP meeting. Because Ohio law is silent on the issue of recording IEP meetings, the Court upheld the District's no recording rule. The Court also held that the parents had no legal basis to refuse to participate in the IEP process simply because Toledo's legal counsel was present. Under applicable federal regulations, counsel may be considered an individual with special knowledge or expertise regarding the child.

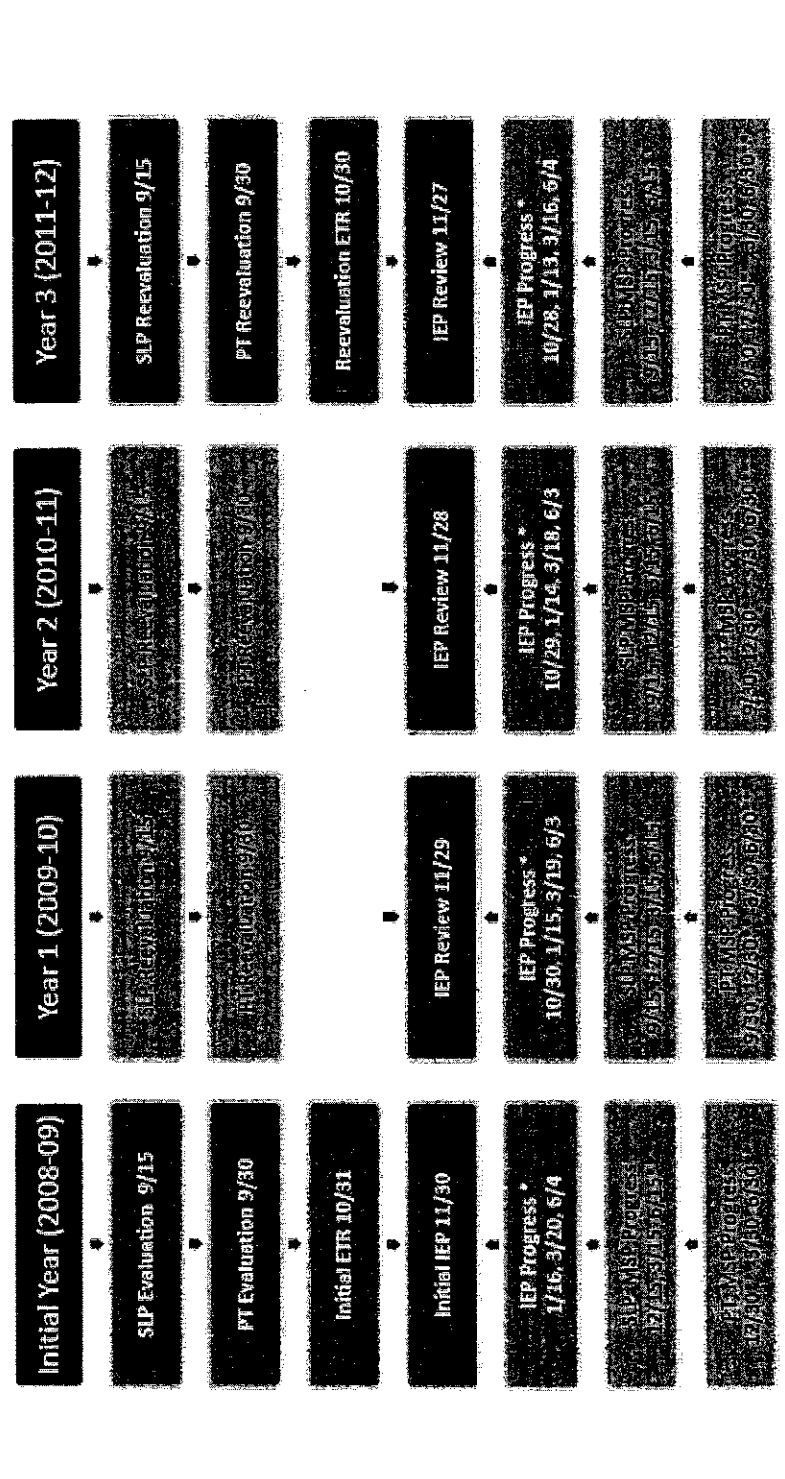
- D. **Parental Cooperation** -- *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 94860 (U.S. Dist. Ct., S.D. Ohio, September 28, 2009)

Finding no evidence that an Ohio district offered inadequate ABA services to a 6-year-old boy with autism, the Court held that the child's proposed IEP was appropriate. The Court noted that the parents refused to sign the IEP or participate in further discussions unless the district specified the amount and location of the child's one-to-one ABA services. That evidence undermined the parents' claim that the district predetermined the child's ABA services. Moreover, the Court observed that the parents did not participate in the IEP process in good faith. Determining that the IEP was appropriate, the Court denied the parents' request for relief.

- E. **Failure to Exhaust Administrative Remedies** - *Doe v. Dublin City School District*, (U.S. Dist. Ct., S.D. Ohio, April 8, 2010).

A district's purported delay and indifference with respect to evaluating a child was no justification for bypassing the IDEA's administrative process. A federal District Court reasoned that the parents failed to establish that they were excused from the exhaustion requirement based on futility. The parents' lawsuit asserted that the district violated the IDEA by failing to evaluate their son and develop an IEP. Parents contended that pursuing a due process hearing would have been pointless because the district violated the IDEA, acted in bad faith, and failed to evaluate the child before the beginning of the school year. The Court noted that an allegation of bad faith -- here, in the form of slow, indifferent or contrary action -- is no basis for excusing exhaustion. The fact that the district may have delayed or appeared skeptical did not establish that the administrative process would be futile.

IDEA & MSP Example Timelines for a Student



Actions that must meet both IDEA and MSP requirements

Actions that must meet IDEA requirements

* IEP progress is reported (by method defined in IEP) to the parent at least as frequently as interim or report cards are sent to all students. In this example the district only sends quarterly report cards.

** Progress on goals for MSP services must be documented in service notes no later than quarterly (every 3 months) from MSP evaluation date. Written IEP progress reports may be used as the documentation when timing is approximately the same date. For quarters overlapping school breaks, progress should be documented on the last day of service prior to due date.