



The Intersection of Mental Health Issues, Section 504 and Special Education: What Determines Where the Student Should Receive Services?

Presented by

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Students with Mental Health Issues

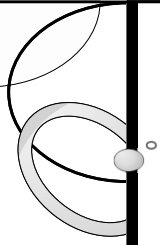
A problem exacerbated by the COVID pandemic, but already was an escalating problem (anxiety, depression...)

No duty to provide treatment or improve condition, but services addressing mental health issues that particularly affect FAPE may be required.

This is the “growth area” in special education, and schools must respond accordingly (awareness, ideas, resources, implementation).

Mental health disabilities raise legal issues in a variety of areas, including child-find, eligibility, attendance, services...

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Child-Find

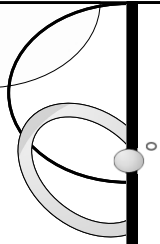
Zamora v. Hays Cons. Ind. Sch. Dist., 79 IDELR 12 (W.D.Tex. 2021)

Middle-schooler diagnosed with ADHD, depression and an anxiety disorder misses some school and goes to nurse a lot.

When parents asked about §504, a meeting was held, and a §504 Plan put into place with accommodations (extra time, breaks, reminders, notetaking assistance).

In high school parents ask for sp ed evaluation, but then refused to sign consent. (??)

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Child-Find

Zamora v. Hays Cons. Ind. Sch. Dist., 79 IDELR 12 (W.D.Tex. 2021)

Parents submitted a psychiatrist's letter indicating student had generalized anxiety disorder (GAD) and requesting §504 Plan (school knew, and student was already on a §504 Plan).

Before giving consent to evaluate, parents filed for due process.

Parents placed student in a charter school (where he had attendance problems).

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Zamora v. Hays Cons. Ind. Sch. Dist., 79 IDELR 12 (W.D.Tex. 2021)

HO had to order parents—twice—to submit the student for evaluation by the District.

Evaluation concluded student was not IDEA-eligible and HO ruled for the District.

On appeal, Court noted that parents had asked for §504 Plan, not sp ed, and that a district “does not commit a Child Find violation merely because it pursues §504 accommodations before pursuing a special education evaluation.... There may be cases where intermediate measures are reasonably implemented before resorting to evaluation.”

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Zamora v. Hays Cons. Ind. Sch. Dist., 79 IDELR 12 (W.D.Tex. 2021)

With his §504 Plan, student received all As and Bs, including in AP classes, and scored at “Masters” level on State tests.

Court thus found §504 Plan was addressing student’s needs.

Moreover, Court also found that District did not delay in evaluating the student under IDEA after he was formally diagnosed with GAD, but the parents failed to consent.

Private Dr’s letter, moreover, only recommended §504, not special education services.

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***Zamora v. Hays Cons. Ind. Sch. Dist.*, 79 IDELR 12 (W.D.Tex. 2021)**


Notes—A well-developed and executed §504 plan can save an IDEA child-find challenge in the right situations.

Note the recurring issue of students with anxiety taking the highest-stress advanced classes...

(Tactically, it cannot help a parents' child-find claim to refuse consent for evaluation when offered it...).

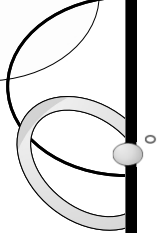
See similar cases—***G.D. v. West Chester Area Sch. Dist.*, 70 IDELR 180 (E.D.Pa. 2017)**(§504 plan sufficient for gifted student with anxiety; no child-find violation); ***Doe v. Brighton Sch. Dist. 27J*, 81 IDELR 218 (D.Colo. 2022)**(§504 plan sufficient for teen with PTSD; no child-find violation).

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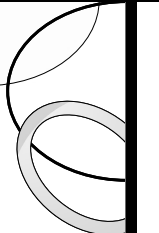
Contrast Case—At times, however, the mental health problems and need are simply too much for just a §504 Plan. In ***District of Columbia Pub. Schs.*, 123 LRP 1265 (SEA DC 2022)**, for example, a §504 plan was insufficient for a student with a long history of severe depression, anxiety, suicidal ideations and attempts, hospitalizations, and emergency room visits. The HO found that the school's delay in evaluating under IDEA for more than a year, despite knowledge of the severity of the issues, constituted a child-find violation (and reimbursement for private school).

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See also, ***R.B. v. North East Ind. Sch. Dist.*, 80 IDELR 162 (W.D.Tex. 2022)**, where a district violated child-find in not evaluating a gifted high school student despite knowledge of her increasing anxiety, depression, unusual behavior, declining grades, excessive absences, self-injurious behavior, suicidal ideations, and a residential treatment placement.

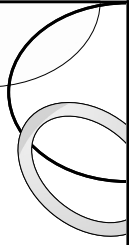
But contrast ***Heather H. v. Northwest ISD*, 81 IDELR 32 (5th Cir. 2022)** and ***Ashley G. v. Copperas Cove ISD*, 80 IDELR 179 (5th Cir. 2022)**(District did not violate child-find as there was no evidence of atypical difficulties at school despite private mental health diagnoses), showing that not all mental health conditions will manifest with problems at school.



- **Child-Find Takeaways**

Careful not to over-rely on academic performance in making the child-find decision (see 34 C.F.R. §300.111(c), which indicates child-find may apply to students “advancing from grade to grade”).

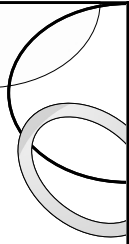
Developing a solid §504 plan, when appropriate, can help student and assist in disputes involving timing of child-find, but effectiveness must be monitored.



- **Child-Find Takeaways**

When worrisome factors start coming together (excessive absences, parent concerns, private diagnoses, private treatment, social issues, work refusal), it's time to offer a sp ed evaluation.

The presence of mental health diagnoses puts potential §504 or IDEA eligibility in play immediately, so careful with Rtl/gen ed interventions (are they really tailored for this type of problem? If you have disability plus some degree of difficulty justifying Rtl, are you not at the point of §504 eligibility anyway?).



- **Child-Find Takeaways**

A hospitalization involving mental health problems should trigger consideration of child-find based on any “spill-over” of mental health issues into school performance (including attendance).

If in doubt as to proper child-find pathway, offer parents a sp ed evaluation (with ED as the suspected area of disability) and document offer.



Eligibility

General Eligibility Legal “Equation”

Condition (meets fed and state criteria) +
Adverse impact on education (broad view) +
Need for sp ed services (broad view)

= **IDEA eligibility**

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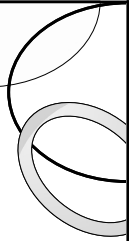
Eligibility

Independent Sch. Dist. No 283 v. E.M.D.H., 74 IDELR 19 (E.D.Va. 2020), aff’d 76 IDELR 203 (8th Cir. 2020)

High-schooler had depression and anxiety (and a number of other diagnoses over time), with an apparent capacity to comprehend and master class work, but with recurring attendance problems since elementary school.

In middle school, the student expressed she was afraid to go to school, stopped attending altogether, and was disenrolled.

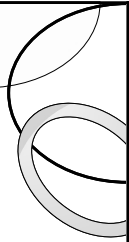
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- ***Independent Sch. Dist. No 283 v. E.M.D.H., 74 IDELR 19 (E.D.Va. 2020).***

She began 9th grade, but attendance quickly became irregular, and she was admitted (again) to a day treatment program, and later, to an in-patient program in Wisconsin.

At the beginning of 10th grade, the school placed her on a §504 plan (extra time, shortened work, check-ins with teachers, breaks from class, pass to counselor's office, fidget device), but she was again disenrolled due to mounting absences.

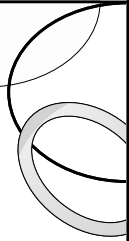


- ***Independent Sch. Dist. No 283 v. E.M.D.H., 74 IDELR 19 (E.D.Va. 2020)***

She re-enrolled 11th grade, school agreed to evaluate for sp ed.

While District evaluation was pending, student was offered a self-paced online learning environment. She attended only three days.

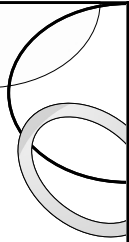
IEP team ultimately concluded student did not meet eligibility criteria under IDEA because her conditions did not adversely impact her educational performance, and because her impairments did not manifest in the classroom setting.



- ***Independent Sch. Dist. No 283 v. E.M.D.H., 74 IDELR 19 (E.D.Va. 2020)***

With quick analysis, Court found that the student was both SED and OHI, as “her several diagnoses...appear to have directly impacted her attendance at school.”

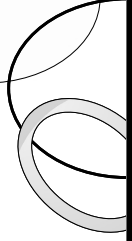
”No one disputes that the Student excelled on standardized tests; neither can anyone dispute that her absenteeism inhibited her progress in the regular curriculum.”



- ***Independent Sch. Dist. No 283 v. E.M.D.H., 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)***

On appeal, the 8th Circuit agreed that the student wasn't missing school as a result of bad choices, “but rather as a consequence of her compromised mental health, a situation to which the IDEA applies.”

It also noted that “[t]his Student may not present the paradigmatic case of a special education student,” but the District failed to offer her a FAPE.

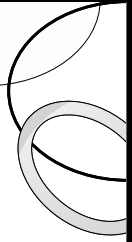
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- ***Independent Sch. Dist. No 283 v. E.M.D.H., 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)***

Notes—OHI eligibility: does the student exhibit “limited strength, vitality, or alertness” (34 C.F.R. §300.8(c)(9))? An awkward fit.

SED eligibility: “pervasive mood of unhappiness or depression,” “fears associated with school problems,” “inability to learn”? A better fit.

Note the school’s misconception at work here—if the student is bright and able to perform when in the classroom, then the mental health conditions are not adversely impacting education, even if she is failing and cannot finish school years...

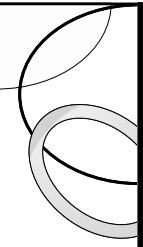
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- ***Independent Sch. Dist. No 283 v. E.M.D.H., 74 IDELR 19 (E.D.Va. 2020), aff'd 76 IDELR 203 (8th Cir. 2020)***

It’s hard to argue a §504 plan is addressing the disability-related problems when the student is not attending school, is in and out of programs, and clearly in distress—at least in part—from mental health conditions.

Contrast with *D.H.H. v. Kirbyville ISD, 79 IDELR 242 (5th Cir. 2021)*, where 8th grader with emotional problems was properly found not IDEA-eligible, as she performed well academically, had good attendance, and did not exhibit behavior problems.

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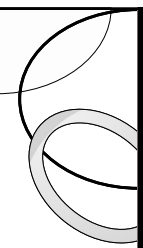
- **Eligibility Takeaways**

It should be well-established that adverse impact on education is comprehensive of non-academic effects (e.g., behavior, absences, socialization difficulties, withdrawal).

Likewise, for students with mental health issues, special ed may be needed for non-academic reasons.

Careful with facile findings—without solid support—that students are engaging in willful refusal to attend or perform work.

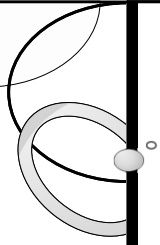
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- **Eligibility Takeaways**

Students with anxiety may present a "mixed bag," where part of the difficulties are due to disability and part are due to non-disability factors (e.g., family issues, willful behavior, attitudinal issues, etc), and where it is virtually impossible to parcel out the respective causes.

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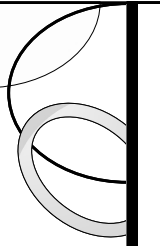
Attendance

Perhaps the most vexing potential symptom of students' mental health problems is difficulty attending school regularly.

At times, academic demands can generate anxiety, leading to problems completing schoolwork, creating a vicious cycle.

Obviously, failure to attend has immediate impact on both academic and non-academic progress.

Difficult Sub-Question—When is the behavior willful non-attendance and when is it a result of the student's mental health diagnoses?

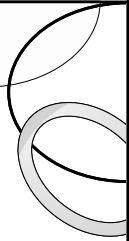


- ***K.K. v. Northside Ind. Sch. Dist., 76 IDELR 61 (5th Cir. 2020)***

Student with various mental health diagnoses (Bipolar Disorder, Mood Disorder, ADHD, and psychotic symptoms) was hospitalized 8 times between the ages 3 to 7.

In 4th grade, student was hospitalized 81 days and only attended school about 46 days.

Student had suicidal and homicidal ideations, and a independent evaluator was unable to complete an IEE.

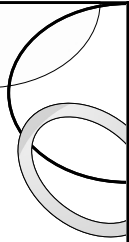


- ***K.K. v. Northside Ind. Sch. Dist., 76 IDELR 61 (5th Cir. 2020)***

After a serious incident at home, the student was hospitalized, and there assaulted his mother and a nurse.

Parent requested the ARDC place the student in a residential facility, after which she initiated a Refusal to Accept Parental Responsibility Case in order to get the student intense mental health services.

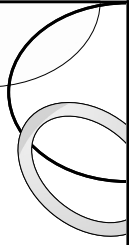
Court agreed with lower court that school conducted all necessary evaluations and developed IEPs based upon them.



- ***K.K. v. Northside Ind. Sch. Dist., 76 IDELR 61 (5th Cir. 2020)***

Progress reports indicated the student made some progress despite his frequent hospitalizations. “Student’s academic progress was not inhibited and...he made meaningful and measurable progress despite his severe handicap,” including making friends and socially interacting.

IEP goals were revised to acknowledge his progress in reading and math, and he made progress in fine-motor skills.

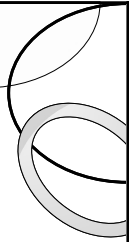


- ***K.K. v. Northside Ind. Sch. Dist.*, 76 IDELR 61 (5th Cir. 2020)**

“*Andrew F.* does not guarantee that an IEP sufficient under the IDEA would be perfect nor does it insulate a child from experiencing hardships while being subject to the IEP.”

Note—The provision of a data-based BIP in a self-contained sped classroom, together with counseling services (although a bit delayed), looked like an appropriate placement to the HO, lower court, and 5th Circuit Panel.

The case shows it is not the school’s responsibility to treat or improve the underlying disability, which admittedly is severe.

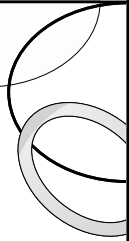


- ***N.S. v. Randolph Bd. of Educ.*, 75 IDELR 103 (D.N.J. 2019)**

Student excelled academically and had no attendance problems from 6th to 10th grade.

He had a §504 plan based on a diagnosis of GAD, but was unwilling to attend school or work in home instruction.

His teachers saw no signs of anxiety at school, and he only stopped attending when he reached the end of compulsory attendance age.

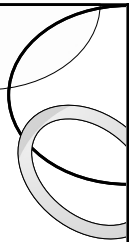


- ***N.S. v. Randolph Bd. of Educ.*, 119 LRP 387700 (D.N.J. 2019)**

Court found that his anxiety was not the cause of his failure to attend school.

Thus, his anxiety did not require special ed, and there was no IDEA child-find violation.

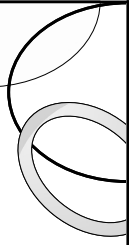
Parents' request for residential placement was denied ("there is evidence that plaintiffs decided to place him at Waypoint prior to the District's eligibility meeting to reduce stress and chaos in the home").



- ***N.S. v. Randolph Bd. of Educ.*, 119 LRP 387700 (D.N.J. 2019)**

Notes—Here, the fact that the student's mental health issues did not have an impact on his attendance until he reached the end of compulsory attendance age indicates that this was a willful decision, not a symptom of mental health issues.

Contrast with the *E.M.D.H.* case from earlier, where the student had exhibited attendance difficulties for as long as she had the mental health diagnoses. And, she always tried to attend early in the school years, only to experience problems finishing the years...

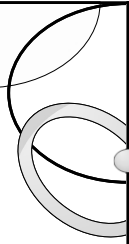


• Attendance and Outpatient Mental Health Programs

Private mental health outpatient treatment can be effective from a psychiatric standpoint, but they generally require the student to be absent from school for potentially extended periods of time.

The schools where these students reside are still responsible for FAPE, but the students are not homebound-eligible and their day programs may not allow for a hospital class placement option.

If a doctor documents that these absences are for treatment of a “serious or life-threatening illness,” they must be excused (and do not count toward 90% attendance rule). See Tex. Educ. Code §§25.087(b)(3), 25.092(a-3).



• Homebound Placement

Frequently sought by parents who are having trouble getting their children to school due to anxiety.

But, it is a double-edged sword that can entrench school avoidance, perpetuate problems with peer interaction, and lead to academic regression (which can itself cause more mental health problems).

Parents also may not understand that in a homebound setting, the student is expected to do their schoolwork independently, as the homebound hours will focus on instruction.

As a short-term measure with solid planning for transition back to school, it can be appropriate. The longer it goes, however, the more difficult the return to school.



Homebound Placement

For an example of an appropriate short-term homebound placement with a planned school re-entry, see **Gwinnett County Sch. Dist., 115 LRP 17688 (SEA GA 2015)**(homebound services for last 3 weeks of school year for student who stopped attending due to anxiety were appropriate and enabled him to pass his classes, did not violate LRE).

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IEP Services

Public schools do quite well with students with academic learning disabilities, and even for those with severe intellectual disabilities and autism, but mental health disabilities is an area where schools must *invest*.

We need to innovate and expand the services available to students with mental health issues who cannot receive FAPE if those problems are not addressed in their IEP services.

Unfortunately, we think of sp ed services too much as an academic construct, or a life-skills construct, and not a mental health perspective.

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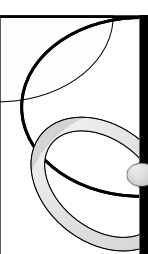


Services

◦ Again, this does not mean schools are responsible for treatment or improvement of underlying mental health disorders, but for providing the mental health services most necessary to facilitating education.

Note the following excerpt from the July 2022 OSEP Discipline Q & A, at fn. 12:

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◦ “Additional services and supports, supplementary aids and services, and program modifications and supports for school personnel could include: **counseling** services for mental health needs (e.g., anxiety, depression, etc.); **social skill instruction**; explicit reinforcement of positive behavior (such as through a classroom token economy); **explicit instruction in stress, anxiety, and depression management**; consultation with a professional with expertise in behavioral interventions to create a positive behavioral support plan; increased access to counselors; access to **targeted strategies** based on peer-reviewed research to support social, emotional, behavioral, or mental health needs (**e.g., anxiety scaling, mindfulness exercises**); changing the student’s class schedule; training staff on additional positive behavioral supports and universal design for learning; and, access to consultation with related service providers and others with specialized expertise.”

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Services Issues

Again, for students with mental health issues, there may be a need for mental health-oriented IEP services to enable the student to receive FAPE.

Ideally, the school-based based efforts are coordinated with outside mental health resources, if available, and if parents consent to the exchange of information.

Input and participation of school psychologists will be important in developing the IEP, and does not end when evaluation is completed.

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Services Issues

Note that under *Endrew*, the student's mental health issues are part of the "child's circumstances" that may moderate expectations for progress.

See, e.g., *C.C. v. Warren Ind. Sch. Dist.*, **69 IDELR 282 (E.D.Tex. 2017)** (limited progress was "appropriate for a student of [the student's] circumstances where his own behavior so significantly impedes his access to general education.").

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IEP and Services Ideas

Behavioral Interventions and Plans

Depending on the FBA data, the IEP team may focus on interventions such as:

- Positive reinforcement for attendance
- High-interest task at the start of the school day
- Close communication with parents
- Mentor or counselor meets student at start of day
- Counselor phone calls to home in early morning
- Counselor debriefs student at end of day
- Schedule high-interest class at start of day
- Safe “cool-down” location protocol

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IEP and Services Ideas

Behavioral Interventions and Plans

Caution—“Cool-down” protocols must require close monitoring and logging of frequency of use, time in cool-down, effectiveness, as time in cool-down is lost instructional time.

Can become a task avoidance mechanism in some cases, so the IEP team may want to set limits on frequency and time of use.

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IEP and Services Ideas

Counseling

Developing a good rapport with a school counselor can make all the difference in a student's attendance.

Counselors can collaborate with parents and private counselors to coordinate approaches and share information.

Note—Parent consent is needed for school counselors to exchange information with private counselors. If the parents prefer, communication can be limited to school-based issues, such as attendance, and avoid discussion of family or non-school issues. Document offer and parents' response.

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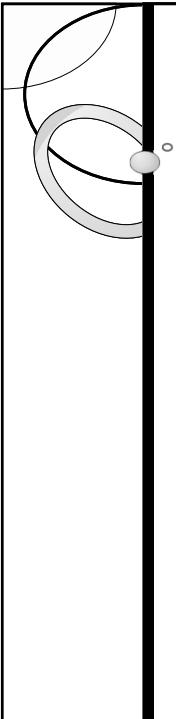
IEP and Services Ideas

Counseling

IEP teams should not decline to include counseling in IEP simply because a student has an outside counselor. Those counselors likely primarily address non-school issues, but can coordinate with school-based counselors.

What if the student refuses to participate? If the IEP team believes the student needs counseling as a related service, it should be placed on the IEP, and then, if the student declines to participate, the counselor can encourage the student to participate and document their refusal.

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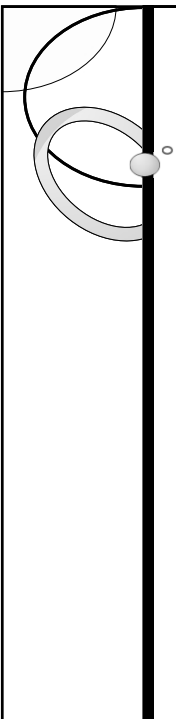
IEP and Services Ideas

Counseling

Session frequency and time? These IEP team decision should be based on student’s age, attention span, and the counselor’s recommendations.

Strategies? OSEP’s recent discipline guidance document mentions modern mindfulness techniques for anxiety that can help students live with their anxiety by emphasizing awareness of the present.

See, e.g., Sutton, *How to Use Mindfulness Therapy for Anxiety: 15 Exercises* (<https://positivepsychology.com/mindfulness-for-anxiety>); Hoffman, Sawyer, Witt & Oh, *The Effect of Mindfulness-Based Therapy on Anxiety and Depression: A Meta-Analytic Review* (American Psychological Assoc. 2022).



IEP and Services Ideas

Psychological Services

Services include “planning and managing a program of psychological services, including psychological counseling...” 34 C.F.R. §300.34(c)(10).

At times, students with mental health conditions may require actual direct counseling from a school psychologist, who may coordinate with school and private counselors or outside clinicians.

Schools should not think of LSSPs as solely responsible for evaluations and consultation on FBAs and BIPs. Some students may require direct services from school psychologists, or indirect services to school counselors, or both.



IEP and Services Ideas

Parent Training or Counseling

At times, parents exhibit difficulty in getting students up and ready for school in the morning, and have run out of homemade ideas to deal with their children's resistance to school.

Parent training or counseling can assist parents with strategies, including setting an evening and morning routine, helpful encouraging statements, reminders of reinforcements and rewards for attending, among others.

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IEP and Services Ideas

Common Accommodations Ideas

- Shortened assignments (to degree possible, in percentages)
- Alternatives to oral presentations
- Makeup work packets (if student falls behind)
- Extended deadlines (state extension for daily work and longer tasks)
- Tests in alternate location or small group
- Organizational aids (agenda, calendar, assignment lists)
- Avoid calling on in class unexpectedly
- Advanced notice of changes in schedule, substitutes
- Facilitate makeup work

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IEP and Services Ideas

Common Accommodations Ideas

- Working with parents on documentation for excused absences
- Working with attendance officers
- Assignment of a "safe" person or persons in case of distress at school

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IEP and Services Ideas

Support Services

- Escort from class to class (for students that get to school but skip classes)
- Staff person support to process problems in "cool down"
- Behavior Specialist support
- School Psychologist support
- Home visits
- Assigning of a mentor
- Social worker assistance

Additional Source—For valuable ideas on school-wide engagement approaches, see Pennsylvania Training and Technical Assistance Network (PaTTAN), *Enhancing School Engagement and Attendance for Students with Disabilities* (2021).

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IEP and Services Ideas

Social Skills Instruction

For students with mental health issues related to peer interaction.

A special education service supported with IEP goals.

Staffing options? Sp ed teachers, collaboration with counselor

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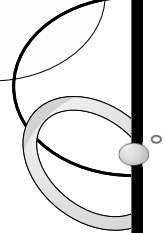
IEP and Services Ideas

IEP Goals

Potential areas relevant to attendance:

- Self-monitoring
- Anxiety
- Coping skills
- Emotional regulation
- Social/Emotional problem solving
- Motivation

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IEP and Services Ideas

Good Sources for IEP Goal Ideas

Whole Child Counseling, *SMART Social-Emotional IEP and Treatment Goals and Objectives* (<http://wholechildcounseling.com/post/smart-social-emotional-iep-and-treatment-goals-and-objectives>)

Sonoma County SELPA, *Social Emotional Goals* (<http://www.sonomaselpa.org>)—great bank of IEP goals

See The School Psych Toolbox IEP Goal Bank (<http://behaviorpsych.blogspot.com/goalbank.html>) for some nice goals

Centervention, *Social Emotional IEP Goals* (<https://centervention.com/social-emotional-iep-goals/>)

PositiveAction, *100+ Social-Emotional Skills IEP Goals* (<https://www.positiveaction.net/blog/social-emotional-iep-goals>)