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MEMORANDUM

TO: Kara Bobroff, Deputy Secretary of Identity, Equity and Transformation

FROM: Deborah Dominguez-Clark, Special Education Bureau Director

RE: Clarification of special education and related services in New Mexico related to the eligibility category of Developmental Delay (DD)

This memorandum has been issued to provide clarification on special education and related services in New Mexico related to the eligibility category of Developmental Delay (DD). Several issues are addressed in this memo, including:

- Eligibility for special education and related services under the category of DD (questions 1-4)
- Relationship between the eligibility category of DD and other eligibility categories, including speech or language impairment (SLI) (questions 5-6)
- Clarification regarding the determination of need for related services (questions 7-11)
- Clarifications related to DD in the area of physical development (“motor”, questions 12-15)

Relevant citations from the Individuals with Disabilities Education Act (IDEA) and New Mexico Administrative Code (NMAC) are included following the questions and answers. Eligibility Determination Teams (EDTs) and Individualized Educational Program (IEP) teams are reminded to reference IDEA, NMAC, current New Mexico Public Education (PED) guidance, and the current edition of the NM Technical Evaluation and Assessment Manual (NM TEAM) when making decisions regarding eligibility determinations, service provision, and placement.

Clarifications: Questions and Answers

Eligibility for Special Education and Related Services under the Category of DD

Q1. How is it determined if a child has a Developmental Delay (DD) consistent with the Individuals with Disabilities Education Act (IDEA) and Subsection B(4) of 6.31.2.7 of the New Mexico Administrative Code (NMAC)?

A1. The Eligibility Determination Team (EDT) must determine that the child is a child with a DD using procedures set forth in the current edition of the New Mexico Technical Evaluation and Assessment Manual (NM TEAM) as required under Department rules and standards. This involves demonstrating that (a) the child is a child with DD and (b) that the child requires specially designed instruction as a result of that disability. As a result of the disability, there must be an adverse effect on the child's educational performance to the degree that the child requires special education and related services.

Q2. If a child's test scores are not more than 2 standard deviations (SDs) below the mean, is it appropriate to calculate and consider chronological age instead of using standard scores?

A2. In most circumstances the answer is 'no,' per the guidance provided in NM TEAM. As discussed in NM TEAM, there are significant limitations with the use of age-equivalency scores. Although they are frequently used for eligibility determination and service delivery under Part C of IDEA, there are typically more robust assessments available for children aged 3 and older. If a more psychometrically sound score (like a standard score) is available, NM TEAM guidance indicates that the more robust score should be used and age-equivalency scores should not be used. If an EDT chooses to use age-equivalency scores, clear justification should be provided and, as with all scores, the data should be triangulated with other data sources to support the eligibility determination decision.

Q3. Is the EDT required to have standardized test scores to determine that a child is eligible for special education and related services under the DD category?

A3. No. Although standardized assessments are an integral part of most evaluations for eligibility determination decisions, they are only one piece of a comprehensive evaluation (NM TEAM, pg. 19). Consistent with NM TEAM guidelines, standardized assessment results are only one part of the multiple data sources used to make eligibility determination decisions. Although multiple data sources of evaluation data (including standardized and non-standardized sources of data) must be used for all decisions, it is important that EDTs recognize that means that they should consider all sources of data and use the most appropriate data for a given child and situation. In all cases, data from sources other than standardized assessments are essential, as standardized testing alone is not adequate to meet the requirement of "multiple sources of data." However, standardized assessments are not required for all eligibility determination decisions, including decisions made under the eligibility category of DD.

Q4. Is the EDT required to document that the child was unable to participate in standardized testing before deciding to use alternative methods of obtaining data?

A4. Sometimes standardized assessments are not the most appropriate method for assessing a child (e.g., due to factors such as the child's age, cognitive abilities, language skills, attention factors, etc.). It is imperative that EDTs use alternative methods of obtaining data to gather information about a child's levels of performance when an evaluation in any area is unable to be completed using standardized measures or when the EDT determines that another method is most appropriate (e.g., NM TEAM, pg. 102). The EDT is responsible for determining the most appropriate assessment methods and procedures for each individual child (e.g., NM TEAM, pg. 14). It is not required that a standardized assessment be attempted prior to determining that alternative methods would be more appropriate.

Relationship between DD and Other Eligibility Categories

Q5. Can a child be eligible for special education and related services under both the DD category and another category?

A5. No. The eligibility category of DD must only be used for children who are not eligible for special education and related services under any other category. In other words, if an eligibility category such as autism, intellectual disability, or speech or language impairment best describes the child's need for special education and related services, it would not be appropriate to determine that child as eligible under the category of DD.

Q6. If a child's communication evaluation indicates that the child's performance is more than 2 SD below the mean for his age, should that child be found eligible as a child with a speech or language impairment (SLI) instead of DD?

A6. Not necessarily. It is imperative that EDTs conduct a comprehensive evaluation consistent with NM TEAM. Eligibility determination decisions are based on both the presence of a disability and the need for specially designed instruction because of that disability. If a child does not have significant concerns other than communication, the child may be most appropriately identified as a child with SLI. However, if the child has other areas of need (e.g., cognitive development, physical development, social or emotional development, or adaptive development), the child may be more appropriately identified as a child with DD.

Determination of Need for Related Services

Q7. Does a child need to demonstrate test scores that are more than 2 SD below the mean or more than 30 percent below chronological age to receive related services such as occupational therapy, physical therapy, and speech-language services?

A7. No. These criteria as outlined in Subsection 6.31.2.7(B)(4) NMAC are specific to the eligibility category of DD and refer to the data used alongside other evaluation information per NM TEAM in order to document the presence of a child's disability. Again, consistent with 71 Federal Register 46586 (August 14, 2006), "the student's IEP team determines the services that are needed to provide FAPE to a child with a disability based on the needs of the child." This includes the child's special education needs and a determination of any related services the child requires in order to benefit from their special education program. These decisions are not based on test scores or eligibility criteria, but rather on the unique needs of the child based on the child's IEP goals as determined by the IEP team.

Q8. Doesn't a child need to be found eligible as a child with SLI in order to receive services from a speech-language pathologist?

A8. No. 71 Federal Register 46586 (August 14, 2006) states that "with all special education and related services, the student's IEP Team determines the services that are needed to provide FAPE to a child with a disability based on the needs of the child." IEP teams identify the most appropriate services and placement for the child based on the child's IEP goals, not on the child's eligibility category. Services from an SLP may be considered either special education or a related service, depending on the nature of the services provided to the child.

Q9. Under what circumstances are related services (e.g., occupational therapy, physical therapy, and speech-language pathology services) added to a child's IEP?

A9. If the child is a child with a disability according to IDEA and NMAC, provision of related services is an IEP team decision. According to Section 300.24(a) of IDEA, related services are

provided when “required to assist a child with a disability to benefit from special education” and the IEP team makes that determination based on the needs of the child, not based on test scores or other prescriptive criteria.

The NM PED cannot provide specific guidance on circumstances under which related services would need to be added, as each child’s IEP is specific to their educational program. It is important to note that related services cannot be added to a child’s IEP without parental consent (including prior written notice), an evaluation, and determination by the IEP team that the student needs this related service in order to benefit from special education.

It is important for teams to recognize that “an evaluation” does not mean formal, standardized testing. Per IDEA and NMAC, evaluations must use a **variety of evaluation strategies** that allow the teams to identify all of the child’s special education and related service needs. This includes information from formal assessments, informal assessments, interviews, observations, etc. As need for related services is determined on an individual basis for each child, it is not appropriate to require formal, standardized testing prior to adding related services to a child’s IEP.

The expertise of appropriate related service providers should be used when determining the need for related services on a child’s IEP. It would rarely (if ever) be appropriate to add related services to a child’s IEP without meaningful input from a related service provider of the same profession.

Q10. When are related services (e.g., occupational therapy, physical therapy, and speech-language pathology services) discontinued from a child’s IEP?

A10. Although the NM PED cannot provide specific guidance on circumstances under which related services would need to be discontinued because each child’s IEP is specific to their educational program, it is important for IEP teams to recognize that nothing in IDEA or NMAC requires formal, standardized testing when making the decision to discontinue the provision of related services to a child.

IDEA requires the Local Education Agency (LEA) to evaluate a child before determining that a child is no longer a child with a disability (Section 300.305(e)(1)) and NM TEAM strongly encourages the use of the REED process prior to discontinuing special education services, but there is no requirement in IDEA or NMAC that a child must be evaluated prior to discontinuing related services.

Discontinuation of specific supports and services should be considered when the child no longer demonstrates a need for that related service. This can be determined by factors such as: (1) the child has met IEP goals supported by that related service and no other support from that related service provider is necessary; (2) the school team has the ability to effectively implement strategies without the expertise of the related service provider; (3) the child’s identified areas of need (e.g., motor skills) are not interfering with the child’s functioning in the educational environment; and/or (4) the related service provider’s expertise (in consultation with the rest of the IEP team) indicates that continuation of the service is not warranted based on available data (formal and/or informal data). These are determinations that are most appropriately made by the child’s IEP team after the development of appropriate IEP goals.

The expertise of appropriate related service providers should be considered and heavily weighed when determining discontinuation of a related service from a child’s IEP. It would rarely (if ever) be appropriate to continue or to discontinue related services from a child’s IEP without meaningful input from a related service provider of the same profession.

Q11. If a child is eligible for special education and related services under the category of DD and a speech-language pathologist is the child’s case manager, can the child also receive related services such as occupational therapy or physical therapy?

A11. Children who are eligible for special education and related services under the category of DD have received a full educational evaluation and an IEP is developed to address the area(s) of need.

For some children, services from an SLP are considered special education and the SLP serves as the child’s case manager according to 6.29.1.7 (W) NMAC. In most cases, this child would not require occupational therapy and/or physical therapy as those are related services that are only provided if the child requires them to benefit from special education. If the child has needs beyond communication, it may be more appropriate for a special education teacher to provide services to that child and serve as the child’s case manager.

DD in the Area of Physical Development

Q12. Can a child be determined to be eligible under the eligibility category of DD for “motor only?”

A12. It is important to recognize that the phrase “motor only” can be misleading, as it may refer to motor as an area of need or as an area of service. It is recommended that teams do not use the phrase “motor only” and instead talk specifically about the physical development and/or service needs of the child.

According to Subsection 6.31.2.7 (B)(4), a child with DD has a delay in one or more of the following areas: communication development, cognitive development, physical development, social or emotional development or adaptive development. Therefore, if a child has documented delays in physical development which meet the requirements of Subsection 6.31.2.7 (B)(4) and requires special education and related services because of that physical development delay, the child may be identified as a child with DD.

If the child’s physical development delays require specially designed instruction (special education) in order 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, then the child may be found eligible as a child with DD. Related services, such as occupational therapy and physical therapy, may also be required to assist that child in benefiting from his special education program. However, that if the child only needs services from a physical therapist or occupational therapist, the child would not be eligible for services as a child with DD.

For example, if a child is unable to move around the school environment safely because of poor coordination and poor motor planning, that child may require specially designed instruction to improve physical development and learn alternative strategies to move through the environment safely. This child may also need the expertise of a physical therapist or occupational therapist to work with the general education and special education teachers to identify strategies and supports. This child may be appropriately identified as a child with DD in the area of physical development.

On the other hand, if the child was able to move through the environment safely despite the poor coordination and poor motor planning, he would not require specially designed instruction to participate in developmentally appropriate activities. Although this child may benefit from the support of an occupational therapist or physical therapist to develop his physical skills, he does not require specially designed instruction in order to access and make progress in the general

education curriculum and therefore would not be appropriately identified as a child with DD in the area of physical development.

Q13. If physical development is the only area of need, can the child be eligible for special education and related services?

A13. If a child has a physical impairment (e.g., orthopedic impairment) or delay in physical development (e.g., DD) and the IEP team determines that the child requires specially designed instruction (i.e., special education) because of that disability in order to have access to the general curriculum and meet the educational standards of the public agency that apply to all children, the answer is YES.

However, if the IEP team determines that a child's physical impairment/delay does not **adversely impact** educational performance to the degree that the child needs special education and related services, the answer is NO. For example, even if a child has poor motor skills, such as difficulty cutting complex shapes, poor handwriting, difficulty climbing or jumping, etc., if the child can access the general education curriculum and meet the educational standards, the child may not require specially designed instruction and might not be identified as a child with a disability.

In other words, it is inappropriate to have an IEP that only has services provided by an occupational therapist, a physical therapist, etc. There must also be a need for and provision of special education services.

Q14. Can an IEP only have goals related to fine and/or gross motor skills?

A14. Yes. All IEPs should be individualized and address the "academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability" (Section 300.320 (a)(2)). If the IEP team determines that appropriate goals for the child are related to development of fine and/or gross motor skills and that special education (specially designed instruction) is required to meet those goals, the IEP may only include academic and functional goals related to motor skills (for example, academic goals related to physical education and functional goals related to navigating the school environment). IEP teams are encouraged to consider the educational impact of the motor skills to ensure that the goals and services identified will enable the child to make progress in the general curriculum and meet the same educational standards that apply to all children. It is important to recognize that IEPs must document provision of special education services. In New Mexico, occupational therapy and physical therapy do not meet the definition of special education under Subsection B(18) of 6.31.2.7 NMAC. Therefore, a child's IEP cannot only have documentation of services provided by these related services.

Q15. Can an OT or PT be the child's case manager if "motor" is the only area of need identified on the child's IEP?

A15. No. OTs, PTs, and other related service providers cannot serve as case managers. According to Subsection W of 6.29.1.7 NMAC, only special education teachers and speech-language pathologists (when providing special education services) can be case managers. Although "motor skills" is listed as an area of functional need on the NM PED's sample IEP form, teams are encouraged to think about the educational impact of the motor skills in order to

ensure that the goals and services identified are designed to enable the child to make progress in the general curriculum and meet the same educational standards that apply to all children. For example, the educational impact of poor “motor skills” might be that the child cannot safely navigate the school, has difficulty completing work because of fine motor skills, inability to feed or dress themselves, etc. It is often more appropriate to write goals related to these higher-level skills (e.g., work completion) rather than the underlying deficits (e.g., fine motor).

Relevant Laws and Regulations

In accordance with the Individuals with Disabilities Education Act (IDEA) 34 CFR Section 300.8 (b) and Subsection 6.31.2.7 (B)(4) NMAC, a child eligible for special education and related services under the eligibility category of DD is a child “aged 3 to 9 or who will turn 3 at any time during the school year; with documented delays in development which are at least two standard deviations below the mean on a standardized test instrument or 30 percent below chronological age; and who in the professional judgment of the IEP team and one or more qualified evaluators needs special education and related services in at least one of the following five areas: communication development, cognitive development, physical development, social or emotional development or adaptive behavior.”

Additionally, regarding eligibility determination decisions under the eligibility category of DD, Subsection (F)(2) of 6.31.2.10, “the developmentally delayed classification may ... only be used for children who do not qualify for special education under any other disability category.”

In New Mexico, "**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 §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 must 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 §300.301-300.306 and Subsection D 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; and

(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 above standards are met, the service will be considered as special education rather than a related service. [6.31.2.7 (B)(18)(a-c) NMAC].”

34 CFR §300.39(b)(3) defines specially designed instruction as “adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction (i) to address the unique needs of the child that result from the child’s disability; and (ii) to ensure

access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.”

In accordance with 34 CFR §300.8(a)(2)(i), “...if it is determined through an appropriate evaluation under §300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.”

According to 34 CFR §300.34(a), “related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.”

34 CFR §300.304 provides guidance on evaluation procedures, including that “the public agency must (1) use a variety of assessment tools and strategies to gather relevant, functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining (i) whether the child is a child a disability under §300.8 and (ii) the content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities); (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational