

III. DEVELOPING THE IEP

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Disclaimer

This portion of the Legal Compliance Guide is meant to be practical and broad in scope. It does not emphasize the nuances of the law, and should not be interpreted as providing legal advice.

Additional Resources

Please visit www.edlawny.com/resources for additional resources related to special education legal issues.

A. Background – Purpose and Importance of the IEP

Pursuant to the Individuals with Disabilities Education Act (“IDEA”), a federal law applicable to all states, all students deemed eligible for special education services are entitled to an Individualized Education Program (“IEP”). The IEP is a legal document that summarizes the strengths, needs, and present levels of performance of a child with a disability. It details how that disability interferes with the child’s learning, and lays out the accommodations, modifications, and special education and related services that will be implemented to address the gaps in their academic, functional, and socio-emotional development. The United States Supreme Court has asserted that the IEP is “the Centerpiece of the [IDEA]’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988). As such, it is essential that school districts take great care in how they develop each student’s IEP.

In order to develop an effective IEP that complies with the substantive and procedural guidelines established under the IDEA, it is important to understand the goals of the IEP, and how the IEP itself functions in the provision of a Free Appropriate Public

Education (“FAPE”) of students with disabilities. Last year the United States Supreme Court explained that “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

When a child is evaluated and determined to be eligible for special education services, the child’s school district is required to develop a plan for addressing the developmental gaps that the general education setting alone cannot meet for that child. The IEP functions as a sort of written contract, wherein the school district essentially promises to provide the necessary special education and related services such that the student will receive a FAPE. Mitchell L. Yell et. al., *Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools*, 41 *Fordham Urb. L.J.* 669, 694 (2013). If the child’s public school district is unable to provide the appropriate educational program and services the child needs, federal and state law require that the district fund an appropriate non-public school program.

B. Who is involved in the IEP process?

The development of the IEP requires the input of a team of individuals (the “IEP Team”). At any stage of the IEP development process, the participation of each member of the IEP team is meant to provide a diversity of perspectives that together inform the creation of an educational program that is tailored to the individual strengths and needs of the child. The IDEA describes the IEP Team as a group of individuals consisting of:

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local educational agency who—

- (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- (II) is knowledgeable about the general education curriculum; and
- (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B). Although every school district in the country must adhere to the above list,¹ each state is capable of creating more specific rules and regulations. The Regulations of the Commissioner for New York State, for instance, necessitates the presence of “an additional parent member of a [student] with a disability residing in the school district or a neighboring school district...if specifically requested...at least 72 hours prior to the meeting.” 8 NYCRR § 200.3(a)(1)(viii); 8 NYCRR § 200.3(a)(2)(v).

C. Providing Parents with an Opportunity to Meaningfully Participate in the Creation of the IEP

Although schools are charged with carrying out many of the responsibilities involved in developing the IEP, the IDEA affords special legal rights to the parent or legal guardian of the child in the form of procedural safeguards. These procedural safeguards function to ensure that parents are given the opportunity to meaningfully

¹ Note, however, that there are circumstances in which a “member of the IEP Team shall not be required to attend an IEP meeting,” or in which a “member of the IEP Team may be excused from attending an IEP meeting.” 20 U.S.C. § 1414(d)(1)(C).

engage in the development of their child's IEP at every stage of its development. Parents and legal guardians are entitled to "examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1).

Notice, consent, and consistent communication are the primary mechanisms by which schools can ensure that they are adequately providing parents with the opportunities to meaningfully participate in the development of their child's IEP. Federal and state law require school districts to:

- (a) provide a student's parents with adequate notice of IEP meetings;
- (b) schedule IEP meetings at a mutually agreed upon time and place;
- (c) inform the parents of the purpose, time, and place of IEP meetings;
- (d) notify the parents who will attend by district request;
- (e) notify the parents that they have the right to obtain an independent educational evaluation at public expense if they disagree with the school district's evaluation, and
- (f) inform the parents of their right to bring others of their choice to the meetings.

Mitchell L. Yell et. al., *supra*, at 682; *see also* 34 C.F.R. § 300.322. Additionally, all communications must be conducted in the parent's native language, unless it is "clearly not feasible to do so." 20 U.S.C. § 1415(b)(4).

Written notice must be given to parents and legal guardians whenever there is a proposal (or refusal) to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(3)(b). In order for such notice to be considered adequate, it must provide:

- (A)** a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

20 U.S.C. § 1415(c)(1).

D. Developing the IEP

When developing the IEP, members of the IEP Team should consider the results of evaluations (including independent educational evaluations), the child's overall academic, functional, and socio-emotional strengths and needs, and any concerns raised by the members of the IEP Team (including—and perhaps most importantly—the parents). The IDEA details eight main aspects that must be included in the IEP. An abridged version of these aspects are listed below:

(I) a statement of the child's present levels of academic achievement and functional performance...;

(II) a statement of measurable annual goals, including academic and functional goals...;

- (III)** a description of how the child’s progress toward meeting the annual goals...will be measured and when periodic reports on the progress the child is making toward meeting the annual goals...will be provided;
- (IV)** a statement of the special education and related services and supplementary aids and services...to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child...;
- (V)** an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and...activities...;
- (VI)** **(aa)** a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments...; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement why—

 - (AA)** the child cannot participate in the regular assessment; and
 - (BB)** the particular alternate assessment selected is appropriate for the child;
- (VII)** the projected date for the beginning of the services and modifications...and the anticipated frequency, location, and duration of those services and modifications; and
- (VIII)** beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

 - (aa)** appropriate measurable postsecondary goals...;

(bb) ...transition services....

20 U.S.C. § 1414(d)(1)(A)(i).

E. Creating Measurable IEP Goals – Are They Relevant, Measurable and Objective?

The Measurable Annual Goals section is one that often distinguishes very effective IEPs from inadequate or ineffective ones. When designed appropriately, the Measurable Annual Goals, or “IEP Goals,” should enable the child’s educators and service providers to create an individualized educational roadmap that addresses the gaps in the child’s development. Appropriately designed goals share at least the following three characteristics: they are *relevant*, they are *measurable*, and they are *objective*.

To ensure that the IEP goals are *relevant*, the IEP team must identify high-priority skills across content areas that the child needs targeted support in. Once these skills are determined, the IEP Team should ascertain an ambitious yet realistic projection of where the child should be in their development of those skills in one year. The United States Supreme Court recently explained that a child’s “educational program must be appropriately ambitious in light of [the child’s] circumstances...The goals may differ, but every child should have the chance to meet challenging objectives.” *Andrew F.*, 137 S. Ct. at 1000. To illustrate, if a child in 4th grade is functioning three years below grade level in math, creating a goal that centers around the 5th grade math standards would likely be overly ambitious, while a goal that aims to meet 1st grade math standards would not be ambitious enough. Designing a goal that strikes the right balance requires a nuanced understanding of the child, how their disability impacts their learning, and the projected effectiveness of certain special education and related services.

Designing goals that are both *measurable* and *objective* requires that the IEP Team identify appropriate assessment tools and methods by which the child’s progress towards their goals will be measured. These methods will vary greatly depending on the skill and subject area. Nevertheless, it is crucial to avoid evaluation methods that yield

results that are more rooted in the assessor's subjective opinions than in the child's actual abilities.

The IEP Team should revisit the previous year's IEP goals at the annual IEP meeting. Taking into account the child's progress towards the goals from the previous year should help ensure that the IEP goals for the following year are reflective of the child's overall development. Perhaps more importantly, revisiting the IEP goals at subsequent IEP meetings can provide a more accurate picture of the child's developmental trajectory, and can further illustrate whether the special education and related services being provided are adequately supporting the child so that the child can make meaningful progress.

F. Predetermination and Other Pitfalls

The IEP must be developed through the collective input of all the members of the IEP Team *before* the child's educational placement can be determined. If the educational placement of the child is determined prior to the development of their IEP, or if a change is made to the IEP without the appropriate consent and meaningful engagement of the parent or legal guardian, the IEP is "predetermined," and in violation of the IDEA procedural safeguards. The issue of predetermination arises, for instance, in the context of an IEP meeting in which a representative of the school district attends the meeting having already determined a placement or program change without considering alternate options that the parent or other members of the IEP Team may propose.

It is hoped that members of the IEP Team will give substantial thought to the program they believe will allow the child to make meaningful progress within the least restrictive environment. Nonetheless, to avoid predetermination in the IEP's development process, it is important that all members cooperate and keep an open mind to the input and opinions of other members of the IEP Team. Importantly, members of the IEP Team ought to be aware that a lack or insufficiency of resources available at the child's school, or in other possible school placements, should never be factored into the decisions made regarding a child's IEP. Mitchell L. Yell et. al., *supra*, at 683.

G. Documenting IEP Meetings and Including Minutes

The IDEA does not require that formal minutes be taken at the meetings; however, parents are encouraged to take notes, especially if there is disagreement over any aspect of the IEP. Documenting what takes place at an IEP meeting is an effective way for ensuring that what is discussed at the meeting is reflected in the final version of the IEP. In some circumstances, IEP meeting notes (in addition to the text of the IEP itself—including, for instance, parental concerns) can serve as important evidence with respect to potential claims of predetermination or other procedural or substantive violations of the IDEA.

H. IEP Reconvenes

It is not always possible for an appropriate IEP to be developed in one sitting. Oftentimes, conflicting schedules do not allow for all members of the IEP Team to participate. In other instances, additional information or documentation may need to be gathered before the team can create an appropriate IEP. Given the importance of the IEP, under such circumstances the IEP Team should “reconvene” in order to allow meaningful participation for the parents and other IEP Team members.