INDIVIDUALIZED EDUCATION PROGRAMS (IEPs): GENERAL AND SPECIAL EDUCATION WORKING TOGETHER—DEVELOPING AND IMPLEMENTING AN IEP

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1. When must an IEP Team meeting be convened?

An IEP Team meeting must be held to review "the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved." 34 C.F.R. § 300.324(b)(1)(i).

The IEP Team must also revise the IEP as appropriate to address:

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;
(B) The results of any reevaluation conducted under §300.303;
(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2) [review of existing evaluation data];
(D) The child's anticipated needs; and
(E) Other matters.

34 C.F.R. § 300.324(b)(1)(ii).

2. Can you make changes to an IEP without a meeting?

Yes, once the annual IEP Team meeting has been held, under IDEA 2004 the IEP can be

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amended without an IEP Team meeting, as stated below:

> In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. 34 C.F.R. § 300.324(a)(4)(i).

3. Can I prepare for the meeting, including by talking to my colleagues, without violating the parent's rights?

Yes, you may engage in "preparatory activities," including staffings, without inviting the parent. Parents always have the right to be present for a "meeting." However, not every gathering is a "meeting." The regulations tell us:

> A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b)(3).

4. Can I prepare a draft of the IEP ahead of time?

The U.S. Department of Education cautions regarding drafts, as follows:

> We do not encourage public agencies to prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child's needs. However, if a public agency develops a draft IEP prior to the IEP Team meeting, the agency should make it clear to the parents at the outset of the meeting that the services proposed by the agency are preliminary recommendations for review and discussion with the parents. The public agency also should provide the parents with a copy of its draft proposals, if the agency has developed them, prior to the IEP Team meeting so as to give the parents an opportunity to review the recommendations of the public agency prior to the IEP Team meeting, and be better able to engage in a full discussion of the proposals for the IEP. 71 Fed. Reg. 46678 (August 14, 2006).

But courts look to the facts and circumstances before determining that a draft was improper. In *Grant by Sunderlin v. Independent Sch. Dist. No. 11, Anoka-Hennepin*, 43 IDELR 219 (D. Minn. 2005), the court stated, "Neither the IDEA nor its regulations prohibit a district from coming to an IEP meeting with suggestions to facilitate the development of a proposed IEP." The court was persuaded by the evidence that the document was a genuine draft for parent input:

> Ryberg, the Student's case manager, testified that, consistent with the school's practice, she explained the document was a "draft" when she distributed it at the start of the meeting. During the meeting Ryberg consistently referred to the document as a draft….In [the parents' presence], Ryberg wrote "Draft" across the top corner of each page. [The parents'] copy also includes the words "rough draft" on the second page....Based on this evidence, the Court concludes…the…document was a "draft" IEP.

5. I know predetermination is not permissible. What is predetermination?

In *H.B. v. Las Virgenes USD*, 48 IDELR 31 (9th Cir. 2007), the Ninth Circuit has described predetermination as a particular "intent or state of mind [of the School District] prior to and during the IEP meeting." The court described the intent or state of mind as follows:

> [P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. …Thus, "[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." [Citations omitted.]
> …
>
> … Although an educational agency is not required to accede to parents' desired placement, it must maintain an open mind about placement decisions and be willing to consider a placement proposed by the parents, as well as its own proposed placement.

When the *Las Virgenes* case was remanded back to the district court to determine whether predetermination had occurred, the district court found there was predetermination and the Ninth Circuit agreed. *H.B. v. Las Virgenes USD*, 52 IDELR 163 (C.D. Cal. 2008); affirmed at 54 IDELR 73 (9th Cir. 2010). The district court's analysis largely hinged on statements from the assistant superintendent at the start of the meeting:

> Okay, so what we'll be doing today is going through the assessment results and then we will talk about those goals and objectives. And we'll talk about how we can meet those goals and objectives, program services—that discussion—then we'll talk about a transition plan.

The court noted:

> The option of keeping H.B. at the Elliott Institute was not discussed. … It was clear to the District that H.B.'s parents desired for him to stay at the Elliott Institute. At the IEP meeting of August 20, his parents expressed their concern that the District was unable to provide H.B. with a FAPE. However, there is no evidence that H.B.'s parents' concerns were ever addressed.

6. So when is preparation not predetermination?

It always helps the school's case when the IEP Team makes changes to the draft or proposals at the meeting in response to the parents' input. This is perhaps the strongest evidence a school can offer to show that it has not "predetermined" the outcome. In a predetermination case the parents have the burden of proving that the school approached the IEP Team meeting with a closed mind, not even considering other ideas and possibilities. When the IEP Team adopts some parental recommendations, the parent's argument of predetermination loses steam.

This is illustrated in the case, *T.P. v. Mamaroneck Union Free School District*, 51 IDELR 176 (2nd Cir. 2009). The Second Circuit ruled for the school district, reversing the district court in a case alleging "predetermination." Prior to the IEP Team meeting, the school's expert on autism

reviewed the independent evaluation obtained by the parents and prepared a chart comparing the IEE recommendations with her own. There was at least some discussion about the matter between the expert and the chair of the IEP Team. The parents alleged, and the district court found, that this was "predetermination." The circuit court disagreed, explaining as follows:

> S.P.'s parents have failed to show that Mamaroneck did not have an open mind as to the content of S.P.'s IEP. Both Young and the Committee chairperson testified that there was no premeeting agreement to adopt Young's recommendations. There is also evidence that the parents meaningfully participated in the July meeting, for example the Committee's adoption in the IEP of the parents' recommendations that Mamaroneck staff observe S.P. over the summer and meet with his home providers, and that Mamaroneck staff receive training on how to educate S.P. We find that the parents meaningfully participated in the development of S.P.'s IEP, and Mamaroneck's premeeting consideration of programs for S.P. did not violate the procedural requirements of the IDEA.

7. Who are the required IEP Team members?

According to 34 C.F.R. § 300.321(a), the required members are as follows:

(1) The parents of the child;
(2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
(3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
(4) A representative of the public 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 public agency.
(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

…

(7) Whenever appropriate, the child with a disability.

8. Must the IEP Team include an individual who is qualified to conduct individual diagnostic assessments?

No. What is required is an individual who can interpret the instructional implications of evaluation results. This individual may or may not be qualified to conduct individual diagnostic assessments. The skill sets are not necessarily the same. As the U.S. Department of Education points out:

> An individual who is qualified to conduct a particular assessment does not necessarily have the skills or knowledge to assist the IEP Team in determining the special education, related services, and other supports that are necessary in order for the child to receive FAPE. Therefore, we do not believe that it is necessary to require that the IEP Team also include an individual who can conduct diagnostic assessments. 71 Fed. Reg. 46670 (August 14, 2006).

9. Are there discretionary IEP Team members?

Yes, 34 C.F.R. § 300.321(a)(6) includes among the IEP Team members:

> 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.

10. Can a required member be excused from attending all or a portion of the IEP Team meeting?

Yes, there are excusal provisions which apply to the required school district members of the IEP Team (those listed in 34 C.F.R. § 300.321 (a)(2) through (a)(5)). There are two types of excusals in the regulations. The applicable excusal criteria must be satisfied before a required member can be excused from even a portion of the meeting.

Type 1: when the required member's area of the curriculum or related service will not be discussed in the meeting.	*Type 2: when the required member's area of the curriculum or related service will be discussed in the meeting.*
34 C.F.R. § 300.321(e)(1). A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.	**34 C.F.R. § 300.321(e)(2).** A member of the IEP Team described in paragraph (e)(1) of this section may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if— (i) The parent, in writing, and the public agency consent to the excusal; and (ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

11. Can the parent require that the IEP Team include specific individuals employed by the school district?

No. According to the U.S. Department of Education:

> [I]t is important to emphasize that it is the public agency that determines the specific personnel to fill the roles for the public agency's required participants at the IEP Team meeting. A parent does not have a legal right to require other members of the IEP Team to attend an IEP Team meeting. Therefore, if a parent invites other public agency personnel who are not designated by the LEA to be on the IEP Team, they are not required to attend. 71 Fed. Reg. 46674 (August 14, 2006).

12. What if the child has more than one regular education teacher?

According to the U.S. Department of Education:

> With regard to situations in which there is more than one regular education teacher, the IEP Team need not include more than one regular education teacher. The regular education teacher who serves as a member of a child's IEP Team should be a teacher who is, or may be, responsible for implementing a portion of the IEP so that the teacher can participate in discussions about how best to instruct the child. If the child has more than one regular education teacher responsible for carrying out a portion of the IEP, the LEA may designate which teacher or teachers will serve as the IEP member(s), taking into account the best interest of the child. An LEA could also agree that each teacher attend only the part of the meeting that involves modification to, or discussion of, the teacher's area of the curriculum. 71 Fed. Reg. 46675 (August 14, 2006).

13. What is the role of the regular education teacher in an IEP Team meeting?

The federal regulation, 34 C.F.R. § 300.324(a)(3) states as follows:

> Requirement with respect to regular education teacher. A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of—
>
> (i) Appropriate positive behavioral interventions and supports and other strategies for the child; and
>
> (ii) Supplementary aids and services, program modifications, and support for school personnel consistent with §300.320(a)(4).

14. Can we require the parent to tell us in advance who they are bringing to the IEP Team meeting?

You can ask, but you cannot require the parent to tell you. From *Letter to Marshall*, 211 IDELR 266 (OSEP 1981):

> [T]here is no provision in the [IDEA] regulations which requires parents to give prior notification to the agency regarding those people they intend to bring to an IEP meeting. The agency may request this information as a courtesy, but they may not [require notification] in advance of that person's intention to come.

15. What is the role of the "discretionary members" that the parent brings to an IEP Team meeting?

OSEP has stated: "individuals who are involved in an IEP meeting at the discretion of a child's parent(s) are participants in the IEP meeting and are permitted to actively take part in the proceedings." *Letter to Tokarz*, 221 IDELR 316 (OSEP 1983).

16. Can the parent bring an advocate to an IEP Team meeting?

Yes. In fact, OSEP has interpreted IDEA to permit a parent to have an advocate at an IEP Team meeting even if the parent is not present:

> We find nothing in [the IDEA regulations] that would require that a parent be present at the IEP meeting in order to have a person that the parent determines has special knowledge or expertise regarding the child at the meeting as a member of the IEP team. *Letter to Serwecki*, 44 IDELR 8 (OSEP 2005).

17. Can you give me the law on parental participation?

34 C.F.R. § 300.322(a):

> Public agency responsibility — general. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including —
> (i) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
> (ii) Scheduling the meeting at a mutually agreed on time and place.

34 C.F.R. § 300.322(d):

> Conducting an IEP Team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as —
> (i) Detailed records of telephone calls made or attempted and the results of those calls;
> (ii) Copies of correspondence sent to the parents and any responses received; and
> (iii) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

18. Can you give me an example of when it <u>was not okay</u> to hold an IEP Team meeting without the parent?

In *J.N. v. District of Columbia*, 53 IDELR 326 (D.C. 2010), the court held that the district denied the parent the opportunity to have meaningful participation at the IEP Team meeting by conducting the meeting without the parent and at a time to which the parent had objected. The district sent three notices proposing alternate dates, and received no response to the first two; therefore, the third notice stated when the meeting would be held. The parent responded to the third notice with phone calls asking that the meeting be rescheduled, but the district did not do so. The federal district court pointed out that: (1) the September 21 date was never agreed to; (2) there was no evidence that the parent could not be convinced to attend the meeting; and (3) the parent made "timely, diligent and reasonable efforts to reschedule" the meeting. The court thus concluded that the school had effectively eliminated the parent's ability to participate. The court noted that this was a procedural error that "undermine[s] the very essence of the IDEA."

19. Is it enough to invite the parent to participate by telephone?

34 C.F.R. § 300.322(c) states:

> Other methods to ensure parent participation. If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with §300.328 (related to alternative means of meeting participation).

According to the Ninth Circuit, the other methods should be offered only after the school makes adequate effort to schedule the meeting at a mutually agreeable time and place so that the parent can participate in person. In *Drobnicki v. Poway USD*, 53 IDELR 210 (9th Cir. 2009), the district scheduled the IEP meeting without asking the parents about their availability. The parents informed the district that they were unavailable on the scheduled date and wanted to reschedule. The district did not contact the parents to arrange an alternative date; however, the district offered to let the parents participate by speakerphone. Whether the parents actually had a conflict does not matter, according to the Court. The Court found that the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time, stating:

> The use of [a phone conference] to ensure parent participation is available only "if neither parent can attend an IEP meeting." The District's procedural violation deprived the parents of the opportunity to participate in the IEP process and denied the student FAPE.

20. Can you give me an example of when it <u>was okay</u> to hold an IEP Team meeting without the parent?

In *A.M. v. Monrovia Unified School District*, 55 IDELR 215 (9th Cir. 2010), the District scheduled a 30 day placement IEP team meeting required for transfer students under state law on a date agreeable to the parents. However, the parents cancelled three days before the meeting. The District held the meeting without the parents. The Court found that the District did not commit a procedural error because it took steps to obtain the parents' presence at the IEP team meeting. The Court reasoned:

> Defendant scheduled an IEP meeting for a date agreeable to Plaintiffs, and Plaintiffs cancelled three days before the meeting. Defendant offered to reschedule, but Plaintiffs would only agree to a meeting in mid-March or April, which was too far beyond the thirty-day limit. Defendant offered to allow Plaintiffs to participate by telephone, but Plaintiffs refused. Thus, Defendant took steps to obtain Plaintiffs' presence at the IEP meeting.

21. Do we have to hold a meeting outside of regular school/business hours to accommodate the parent's request?

The IDEA requires school districts to schedule the meeting at a "mutually agreed on time and place." 34 C.F.R. § 300.322(a)(2).

In *B.H. v. Joliet School District No. 86*, 54 IDELR 121 (N.D.Ill. 2010), the court held that the school district's refusal to hold an IEP Team meeting after school hours did not violate IDEA or Section 504, stating as follows:

> Regarding issue (d) [scheduling of IEP Team meeting], federal regulations clearly provide that IEP meetings are to be scheduled at a "***mutually*** agreed on time and place." 34 CFR 300.322(a)(2) (emphasis added). The IHO correctly found that the concept of mutual agreement does not encompass one party's unilateral insistence that an IEP meeting be held at a particular time, especially when that time is after school hours.

> The parties agree that District 86 refused to schedule an IEP meeting after school hours; however, this refusal simply does not fall within the bounds of acts prohibited by Section 504, even if it may have been unfair or inconvenient to Plaintiffs in some sense.

Similarly, in *Letter to Thomas*, 51 IDELR 224 (OSEP 2008), OSEP explains:

> Although Part B does not prohibit public agencies from scheduling IEP Team meetings in the evening, it does not require that they do so. Therefore, it is not unreasonable for public agencies to schedule meetings of the IEP Team only during regular school hours or regular business hours because it is likely that these times are most suitable for public agency personnel to attend these meetings.

22. Is it acceptable to include in our collective bargaining agreement that staff is not required to attend an IEP Team meeting after work hours?

In *Letter to Thomas*, 51 IDELR 224 (OSEP 2008), OSEP addressed this issue as well:

> We do not believe that the parent participation provisions for IEP Team meetings restrict public agencies from entering into such contractual arrangements or [collective bargaining] agreements, specifying that public agency employees will attend meetings of the IEP Team only during regular working hours. Although the terms of such agreements will necessarily vary across agencies and States, public agencies still must ensure that they take other steps to ensure parent participation if the parents are unable to attend during school hours or business hours.

23. Our IEP document has gotten really long. Is there anything we can do about it?

The IDEA and its regulations tell us you only need to say something once, and only when it is specifically required. 34 C.F.R. § 300.320(d) provides:

> Construction. Nothing in this section shall be construed to require —
> (i) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or
> (ii) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

24. So what are the basic content requirements?

At a minimum, an IEP must include: (a) a statement of present levels of academic achievement and functional performance; (b) a statement of measurable annual goals; (c) a description of how the child's progress toward meeting the annual goals will be measured and when periodic progress reports will be provided; (d) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, and program modifications or supports for school personnel; (e) transition services (beginning not later than the first IEP to be in effect when the child turns 16); (f) a statement of how the child will participate in state or districtwide assessments; (g) an explanation of the extent, if any, to which the child will not participate with nondisabled children; (h) the projected date for the beginning of the services and modifications; (i) and the anticipated frequency, location, and duration of services. See 34 C.F.R. § 300.320.

25. How important is it that everything appears on the face of the IEP document?

In *N.S. v. District of Columbia*, 54 IDELR 188 (D.C.D.C. 2010), the court held that the IEP failed to meet IDEA standards, thus reversing the decision of the hearing officer. The district acknowledged several deficiencies in the IEP, such as the absence of a statement of present levels or a description of the supplementary aids and services, but argued that these were technical defects that did not deprive the student of a FAPE. The court disagreed. The court noted that the hearing officer's decision was largely based on the testimony from the teacher about what could be provided to the student—rather than what services the IEP actually called for. The court explained the importance of the document:

> Defendants contend that as long as [the school] was "willing and able" to provide N.S. with appropriate services to meet his educational needs, any errors or deficiencies in the IEP are harmless. However, the IDEA requires that a school district do more than simply provide services adequate to meet the needs of disabled students; it requires school districts to involve parents in the creation of individualized education programs tailored to address the specific needs of each disabled student.

In contrast, in *M.F. v. Irvington Union Free School District*, 54 IDELR 288 (S.D.N.Y. 2010), the court ruled for the school district and declined to adopt a strict "four corners" rule for assessing IEPs. The parents argued that the IEP's validity and adequacy should be judged strictly from what is written within the "four corners" of the document. The court noted persuasive authority to this effect from other circuits, but none from the 2nd Circuit. And the court refused to adopt such a rule in this case. The specific issue was the fact that the IEP did not identify a particular developmental reading class as one the student would be taking. However, that class was in the portion of the IEP document that listed the student's schedule. The class in question was a regular mainstream class available to all students and thus not normally identified on the IEP. Moreover, the district actually did provide the services to the student in that class.

26. Does the statement of present levels have to address both academic achievement and functional performance?

Yes, the IEP must include: "A statement of the child's present levels of academic achievement *and* functional performance..." 34 C.F.R. § 300.320(a)(1) (emphasis added). The U.S. Department of Education has pointed out that the term "functional performance" is in the statute and, therefore, cannot be omitted. Thus, the IEP must always include a statement of "the child's present levels of academic achievement and functional performance." 71 Fed. Reg. 46662 (August 14, 2006).

27. What does "academic achievement" mean?

The U.S. Department of Education declined to define the term in the regulations, but explained the term as follows:

> "Academic achievement" generally refers to a child's performance in academic areas (e.g., reading or language arts, math, science, and history). We believe the definition could vary depending on a child's circumstance or situation, and therefore, we do not believe a definition of "academic achievement" should be included in these regulations. 71 Fed. Reg. 46662 (August 14, 2006).

28. What does "functional" mean?

The U.S. Department of Education also declined to define "functional" in the regulations but explained the term as follows:

> It is not necessary to include a definition of "functional" in these regulations because we believe it is a term that is generally understood to refer to skills or activities that are not considered academic or related to a child's academic achievement. Instead, "functional" is often used in the context of routine activities of everyday living. 71 Fed. Reg. 46661 (August 14, 2006).

29. Is the present levels statement a baseline for the annual goals?

As the U.S. Department of Education has pointed out, the requirement of a present levels statement "directly corresponds" to the requirement of a statement of annual goals. As a result, the U.S. Department of Education has stated that it does not "believe further clarification is needed regarding the alignment of a child's present levels of performance with the child's annual goals."

34 C.F.R. § 300.320(a)(1).	**34 C.F.R. § 300.320(a)(2).**
The IEP must include— (1) A statement of the child's present levels of <u>academic achievement and functional performance</u>, including – (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities.	The IEP must include— (2)(i) A statement of <u>measurable annual goals, including academic and functional goals</u> designed to— (A) 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 (B) Meet each of the child's other educational needs that result from the child's disability; (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short- term objectives.

30. What do the cases say about the relationship between the present levels statement and the annual goals?

In *Kirby v. Cabell County Board of Education*, 46 IDELR 156 (S.D. W.Va. 2006), the school district's failure to include present levels data in the student's IEP led the court to conclude that the student's IEP was not reasonably calculated to provide FAPE. The court stated:

> This deficiency goes to the heart of the IEP; the child's level of academic achievement and functional performance is the foundation on which the IEP must be built. Without a clear identification of Robert's present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed."

The role of the present levels statement as the "baseline" for the annual goals was observed in *Bend-Lapine School District v. K.H.*, 48 IDELR 33 (D. Or. 2005), *aff'd*, 2007 WL 1675180 (9th Cir. 2007). K.H. was an emotionally disturbed adolescent who had been suspended at least twice for violence against other students prior to being identified by the district as eligible for IDEA services. After removing K.H. from the district's program and placing her in a private school, the parents filed a request for a due process hearing seeking reimbursement for the private school placement. Both the hearing officer and the district court found in the parents' favor, in part because the district had failed to adequately identify K.H.'s present levels of academic achievement and functional performance. The case was subsequently affirmed by the Ninth Circuit. The district court explained:

> Without that baseline of current performance and/or behavior, it is difficult to draft measurable and relevant annual goals. The District provided the following information regarding K.H.'s "behaviors," presumably based on K.H.'s disability: her behaviors "resulted in short term suspensions," K.H. had been physically and verbally aggressive, and K.H. "had been involved in some sexual harassment incidents." It was further noted that K.H. had difficulty maintaining friendships, verified by the behavioral inventory, and that people "don't always enjoy [K.H.'s] company." Finally, K.H.'s "inappropriate behaviors interfere with her success in the classroom both socially and academically."
>
> The ALJ correctly found that the statement quoted above was insufficient to determine an accurate baseline of K.H.'s behaviors affected by her disability. The information explaining K.H.'s current level of performance failed to provide any measurable level of problematic behaviors, including how many times K.H. had been suspended as a result of the behaviors associated with her disability, or how many instances and in what settings had K.H. been verbally aggressive.

In *Nack v. Orange City School District*, 454 F.3d 604, 46 IDELR 32 (6th Cir. 2006), the Sixth Circuit held that the IEP was procedurally flawed because it did not include baseline data from which to measure progress. However, in this instance, the Court further held that the error did not cause substantive harm. The court reasoned:

> The primary shortcoming of the sixth-grade IEP was its failure to provide a baseline by which to measure David's future progress. However, as the IHO noted, David's test results, which he scored at or above proficiency standard in all categories, along with Maxine Rosenbaum's probes showing David's progress, demonstrated that he derived educational benefits from the 6th grade IEP as implemented….In the end, the minor procedural violations of the 6th grade IEP cannot be said to have caused David any substantive harm.

The Eighth Circuit in *Lathrop R-II School District v. Gray*, 54 IDELR 276 (8th Cir. 2010), rejected the notion that the IEP must specifically incorporate baseline data, stating:

> [The parent] has not cited any case in which any court has read such an implied requirement into the law.

31. Why do the annual goals have to be measurable?

A federal district court in *Escambia County Bd. of Educ. v. Benton*, 406 F.Supp.2d 1248, 44 IDELR 272 (S.D. Ala. 2005), said it best:

> [W]ithout meaningful, measurable objectives and goals, Benton's educators and parents were engaged in a futile endeavor to pin the tail on a moving donkey while blindfolded in a dark room.…The mushy, ambiguous, unquantifiable goals often listed in Benton's IEPs are at odds with [the] IDEA.…Vague and unmeasurable objectives are the handmaiden of stagnation, as a program cannot possibly confer an educational benefit to Benton if his teachers and parents do not know where they are trying to take Benton and how they will know when he has arrived.

32. Can you show us some specific goal language reviewed by a court?

In *Indep. Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92 (D. Minn. 2006), the two annual goals under review were written as follows: (1) "the Student will increase the ability to express anger and frustration in socially acceptable ways from arguing, confronting, and refusing to work to calmly discussing solutions to problems with others" and (2) "the Student will improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write and do basic math skills independently." The hearing officer determined the IEP goals "were vague and general as to fail to demonstrate that the IEP was reasonably calculated to result in educational benefit," and the court affirmed that decision:

> The wording of each goal and the three short-term objectives that follow each goal could define a broad range of conduct. For example, it is unclear what reading, writing, and math skills are required for independence. Further, although the short-term objectives provide that the academic goal will be met according to certain percentages, the short-term objectives do not provide objective criteria against which achievement can be measured. The Court finds that the goals and objectives are vague and immeasurable. Thus, the Court affirms the [hearing officer's] conclusion that the goals and objectives were inadequate.

In *Penn Trafford Sch. Dist. v. C.F. by M.F. and A.F.*, 45 IDELR 156 (W.D.Pa. 2006), the court found the annual goals to be inadequate, stating:

> …[T]he November 2002 IEP did not provide measurable annual goals. As the Appeals Panel concluded, measuring annual goals in terms of grade equivalencies is inadequate. Goals such as "[C.F.] will complete the fourth grade curriculum in the areas of science, social studies and reading" and "[C.F.] will improve his organization skills so that he fulfills expected levels of achievement attached to short-term objectives" do not provide an objectively measurable basis for tracking C.F.'s progress. "Completing" a curriculum is an extremely vague goal for a developmentally disabled child and does not provide sufficient guidance for providing a FAPE.

33. Our teachers do a terrible job drafting measurable annual goals, but do a great job drafting measurable short-term objectives.

Some courts have held that measurable objectives cured an IEP that lacked measurable annual goals. In *Leticia H. v. Ysleta Indep. Sch. Dist.*, 47 IDELR 13 (W.D. Tex. 2006), the court concluded that the student's annual goals in the areas of speech, gross motor and fine motor were not measurable. The goals were written as follows: (1) to "demonstrate measurable progress toward the acquisition of developmentally appropriate communication using alternative and/or augmentative communications techniques;" (2) to "employ developmentally appropriate communications skills needed for personal, social, and/or education control; (3) "to improve gross motor skills;" and (4) to "increase his fine motor skills to allow increased participation in classroom activities." Despite the lack of measurable annual goals, the court held that student's short-term objectives were written with specificity and provided the district a means by which to establish progress, and thus there was no denial of a FAPE: "[T]he Court agrees with Officer Hollis's finding that the specificity and progression of R.H.'s short-term objectives prevented any loss of educational opportunity."

34. Is it okay to continue drafting short-term objectives even when they are not required?

Yes. The U.S. Department has stated: "IEPs may include more than the minimum content, if the IEP Team determines the additional content is appropriate." 71 Fed. Reg. 46662 (August 14, 2006).

35. Do we have to write separate goals for related services?

No. The U.S. Department has stated: "The Act does not require goals to be written for each specific discipline…" 71 Fed. Reg. 46662 (August 14, 2006).

In *Letter to Hayden*, 22 IDELR 501 (OSEP 1994), OSEP was asked whether IEP goals must be specific to a particular discipline such as physical therapy or occupational therapy, and the answer was "No." OSEP explained:

> [W]hile there is no Part B requirement that an IEP include <u>separate</u> annual goals…for related services, the goals…in the IEP must address all of the student's identified needs that the IEP Team has determined warrant the provision of special education, related services, or supplementary aids and services, and must enable the Team to determine the effectiveness of each of those services.
>
> For example, if the IEP Team has determined that a student needs speech and language therapy services as a component of FAPE, the IEP must include goals…that address the student's need to develop and/or improve communication-related skills. It would not be necessary, however, to label the goals…as "speech therapy" goals….Therefore, if the IEP includes goals…which appropriately address the student's need to develop communication-related skills, no additional or separate "therapy" goals…would be required.

36. How often do we have to inform the parent of the child's progress on the IEP goals?

The IEP must include a description of:

> (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 C.F.R. § 300.320(a)(3).

The U.S. Department of Education explains:

> The Act does not require report cards or quarterly report cards. Report cards and quarterly report cards are used as examples in § 300.320(a)(3)(ii) of when periodic reports on the child's progress toward meeting the annual goals might be provided. The specific times that progress reports are provided to parents and the specific manner and format in which a child's progress toward meeting the annual goals is reported is best left to State and local officials to determine. In addition, under section 614(d)(1)(A)(ii)(I) of the Act we cannot interpret section 614 of the Act to require additional information in a child's IEP that is not specifically required by the Act. 71 Fed. Reg. 46664 (August 14, 2006).

37. Can we use more than one tool to measure progress?

Yes. The U.S. Department of Education in its discussion of the regulations clarified: "The Act does not require goals…to have outcomes and measures on a specific assessment tool." 71 Fed. Reg. 46662 (August 14, 2006).

38. What does the IEP have to specify in the way of services?

The IEP must include:

> A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, 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 to enable the child —
> (i) To advance appropriately toward attaining the annual goals;
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.
> 34 C.F.R. § 300.320(a)(4).

39. What does "based on peer reviewed research to the extent practicable" mean?

The U.S. Department of Education explains:

> States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. 71 Fed. Reg. 46665 (August 14, 2006).

40. Must we specify methodology in the IEP?

No. The U.S. Department of Education states:

> There is nothing in the Act that requires an IEP to include specific instructional methodologies….The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP. 71 Fed. Reg. 46665 (August 14, 2006).

41. Does this create a higher standard?

In *Joshua A. v. Rocklin Unified School District*, 52 IDELR 64 (9th Cir. 2009), the parents challenged the district's "eclectic approach" to their child's education, arguing that it was not based on "peer reviewed research." The district court found for the school district:

> Student also argues that District's program violates the IDEA because it is not based on peer-reviewed research. However, both *Adams* and *Deal* (on remand) ultimately found that an eclectic approach similar to the one proposed by District met the IDEA's substantive requirements. See *Adams*, 195 F.3d at 1145. This eclectic approach, while not itself peer-reviewed, was based on "peer-reviewed research to the extent practicable."

The Ninth Circuit affirmed and addressed the parent's argument that the "peer reviewed research" language altered the U.S. Supreme Court's standard of FAPE:

> Plaintiff contends that this Court should consider the *Rowley* standard in light of more recent Congressional language inferring that "peer review research" services are required. The Court declines to do so. It does not appear that congress intended that the service with the greatest body of research be used in order to provide FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE.

With regard to methodology disputes in general, the Ninth Circuit stated:

> Indeed, the *Rowley* opinion sets forth the well-established principle that, as long as a district offers an appropriate educational program, the choice regarding the methodology used to implement the IEP is left to the district's discretion. *Rowley*, 458 U.S. at 208.

> In *Rowley*, the United States Supreme Court expressed reluctance to interject itself into the methods and means of instruction used by a school system, stating "courts must be careful to avoid imposing their view of preferable education methods upon the states."
>
> The District's program appears to have been tailored to Plaintiff's needs and based upon the District's belief that Plaintiff would make meaningful benefit from the program. The ALJ properly applied the legal standards and determined that while the District's IEP plan did not identify an ABA approach for Plaintiff's educational program for the 2006-2007 school year, it nonetheless satisfied the requirements of FAPE.

42. Can a doctor prescribe the services in the IEP?

The case of *Marshall Joint School Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010), involved a dispute over eligibility, specifically whether a child with Ehlers-Danlos Syndrome ("EDS") had a need for special education services. In holding in favor of the parents, the hearing officer relied on testimony from the child's physician that the child needed special education services. Although the district court affirmed, the Seventh Circuit reversed. Regarding reliance on the physician, the Seventh Circuit stated:

> Concerning the last point, Dr. Trapane was the main source of evidence cited for the proposition that the EDS adversely affects C.D.'s educational performance. And the sole basis of her information was C.D.'s mother. Dr. Trapane evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. In fact, "Dr. Trapane admitted that she has no experience or training in special education and never observed C.D. in the classroom." [ ] Her only familiarity with school curricula was with her own children. Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ's finding. [ ] (Citations omitted.)
>
> … It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by the applicable rules and regulations. We agree.

43. Can a needed service be discontinued due to a student's failure to cooperate?

The obligation to provide a FAPE is not altered by a student's lack of cooperation. In *Letter to Borucki*, 16 IDELR 884 (OSEP 1990), OSEP explains:

> … The obligation of States and school districts to provide appropriate educational services to eligible students with [disabilities] is equally applicable to cooperative and uncooperative students. …the student's failure to cooperate with school staff may be an indication of the need for a reevaluation, a revision in the child's IEP, or a change in the child's educational placement.

44. What must the IEP include regarding the level of services to be provided?

The IEP must specify:

> The projected date for the beginning of the services and modifications described in paragraph (a)(4) [special education, related services, supplementary aids and services] of this section, and the anticipated frequency, location, and duration of those services and modifications. 34 C.F.R. § 300.320(a)(7).

45. What level of specificity is required?

The U.S. Department of Education has stated:

> What is required is that the IEP include information about the amount of services that will be provided to the child, so that the level of the agency's commitment of resources will be clear to parents and other IEP Team members. The amount of time to be committed to each of the various services to be provided must be appropriate to the specific service, and clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP. 71 Fed. Reg. 46667 (August 14, 2006).

46. If we are not sure as to the amount, can we just say "as needed" or "as appropriate"?

No. In *O'Toole v. Olathe Dist. Schs.*, 144 F.3d 692 (10th Cir. 1998), the Tenth Circuit federal court of appeals stated:

> We agree with the reviewing officer that the term "as appropriate" fails adequately to specify the level of related services the District committed to provide, as required by the IDEA and Kansas law.

47. What happens if we cannot reach agreement regarding the IEP?

In *Letter to Richardson*, 55 IDELR 107 (OSEP 2010), OSEP explained the process as follows:

> The IEP Team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child. The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

The information in this handout was created by Walsh, Anderson, Brown, Gallegos & Green, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.