

IEP BUILDING BLOCKS

NEW YORK STATE EDUCATION DEPARTMENT
IDEA VETERAN MEDIATOR TRAINING

VIRTUAL PROGRAM

MONDAY, SEPTEMBER 14, 2020
FRIDAY, SEPTEMBER 25, 2020 (REPEAT)

DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

I. INTRODUCTION

- A. The Individualized Education Program (IEP) is a written document created in a collaborative meeting between the parents of a student with a disability and the applicable school district. It outlines the student’s educational program and must include essential components.¹
- B. The Individuals with Disabilities Education Act (IDEA)² does not prescribe the length and format of the IEP document. However, most state educational agencies (SEA) have adopted a model IEP form.

¹ See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a).

² In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. See Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”). Implementing regulations followed in August 2006. See 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. See 34 C.F.R. Part 300 (December 1, 2008). In June 2017, the regulations were further amended to conform to changes made to the IDEA by the Every Student Succeeds Act (ESSA).

- C. As to its contents, the IEP must provide a program that is reasonably calculated to enable the student to make appropriate progress in light of the student’s circumstances.³

II. APPROPRIATE EDUCATION

- A. A free appropriate public education (FAPE) must be made available to each student with a disability who needs special education and related services.⁴ FAPE is defined as special education and related services that: (1) are provided at public expense; (2) meet the standards of the State; (3) include preschool, elementary school, or secondary school (but not post-secondary school); and (4) are provided in conformity with an IEP.⁵
- B. The United States Supreme Court made an attempt to define the term “appropriate” in *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982). Finding that Congress intended the IDEA to provide “equal educational opportunity,” the Court rejected arguments that appropriate under the IDEA meant some maximization of potential or commensurate opportunity.⁶ Rather, the IDEA requirements of a FAPE are satisfied when the State provides personalized instruction with sufficient support services to permit the student with a disability to benefit educationally from the instruction.⁷ Noting it was not attempting to establish any one test for determining the adequacy of educational benefits the IDEA required, it stated that an IEP: 1) had to be formulated in accordance with the procedural requirements of the IDEA; and 2) must be “reasonably calculated” to enable the child to obtain educational benefit.⁸

³ *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 69 IDELR 174 (2017). See also *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982).

⁴ 34 C.F.R. § 300.101(c)(1).

⁵ 34 C.F.R. 300.17.

⁶ *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982). States may establish higher programming standards, (see, e.g., *David D. v. Dartmouth Sch. Committee*, 775 F.2d 411, 557 IDELR 141 (1st Cir. 1985)), but few States actually do. Michigan has adopted a “develop the maximum potential” standard. However, the Sixth Circuit has said that these words may be more of an earnest request than a mandate. *Soraruf v. Pinckney Comm. Sch.*, 208 F.3d 215, 32 IDELR 4 (6th Cir. 2000).

⁷ *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982).

⁸ *Id.*

- C. In 2017, however, in a unanimous decision, the Court clarified *Rowley*'s FAPE standard. The Court rejected the Tenth Circuit's interpretation that an IEP is appropriate if it allows "merely ... more than *de minimis*" progress.⁹ The Court ruled that the student's program must be "appropriately ambitious" and provide "challenging objectives" in light of his/her unique circumstances.¹⁰ School districts must be able to offer a "cogent and responsive" explanation for their decisions that shows the IEP is reasonably calculated to enable the student to make progress appropriate in light of his/her circumstances.¹¹

III. IEP CONTENTS

- A. Present Levels of Academic Achievement and Functional Performance (PLAAFP). The PLAAFP is the starting point for determining annual goals.¹² Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,¹³ and to measure future progress.
1. The IDEA requires that each IEP includes a statement of the student's PLAAFP, including how the student's disability affects the student's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled students).¹⁴
 2. Because the PLAAFP statement is the foundation upon which the measurable and relevant annual goals are built upon, the needs must be written in a manner that allows the parent and those working with the student to understand exactly the level in which the student is functioning at the time the IEP is written.
 3. The PLAAFP statement must be all encompassing and reflect the entire range of strengths, deficits, interests, and learning

⁹ *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 69 IDELR 174 (2017).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Bend-Lapine Sch. Dist. v. K.H.*, 43 IDELR 191, 2005 WL 1587241 (D. Or. 2005), *aff'd*, *Bend-Lapine Sch. Dist. v. K.H.*, 234 F. App'x 508 (9th Cir. 2007) (unpublished). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46662 (August 14, 2006).

¹³ *Id.*

¹⁴ 34 C.F.R. § 300.320(a)(1). For preschool students, the IEP must include a statement explaining how the disability affects the student's participation in appropriate activities. *Id.* See also 8 NYCRR § 200.4(d)(2)(i).

style of the student, in both the academic (e.g., reading or language arts, math, science, and history) and non-academic domains (e.g., daily life activities, mobility).¹⁵

4. The information included in the PLAAFP statement should be reasonably specific and understandable (i.e., it can be interpreted by the participants in the IEP process and by those tasked to implement the agreed upon program). Though the use of test scores is permissible, test scores that are not self-explanatory or accompanied by an explanation can be meaningless and may compromise parental participation in the IEP development process.¹⁶
5. The absence of a PLAAFP statement can result in a denial of FAPE.¹⁷ So, too, does any statement that lacks specificity, fails to establish a baseline from which measurable and relevant annual goals can be written, or compromises the parent's ability to meaningfully participate in the IEP process.¹⁸

B. **Statement of Measurable Annual Goals.** Each IEP must include measurable annual goals, both academic and functional goals, to meet the student's needs resulting from the student's disability to enable the student to be involved, and make progress, in the general education curriculum and to meet the student's other educational needs.¹⁹

1. Annual goals are statements that describe what a student with a disability can reasonably be expected to accomplish within a 12-month period in the student's special education program.²⁰

¹⁵ See 34 C.F.R. § 300.324(a); 8 NYCRR § 200.4(d)(2). See also *Letter to New*, 211 IDELR 464 (OSEP 1987) (noting that the PLAAFP should be individualized to each student's unique needs and abilities).

¹⁶ See *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 28 IDELR 177 (10th Cir. 1998); *Chase v. Mesa County Valley Sch. Dist. No. 51*, 53 IDELR 72 (D. Colo. 2009).

¹⁷ *Ravenswood City Sch. Dist. v. J.S.*, 870 F. Supp. 2d 780, 59 IDELR 77 (N.D. Cal. 2012).

¹⁸ *Friedman v. Montgomery County Bd. of Educ.*, 24 IDELR 654 (D. Md. 1996).

¹⁹ 34 C.F.R. § 300.320(a)(2); 8 NYCRR § 200.4(d)(2)(iii).

²⁰ *Letter to Butler*, 213 IDELR 118 (OSERS 1988).

2. Once the measurable annual goals are written, the IEP team²¹ can develop strategies that will be most effective in realizing the annual goals and include either measurable, intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable parents, students, and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the student's instructional needs.²²
3. A school district must include objectives and benchmarks only for those students with disabilities who take alternate assessments aligned to alternate achievement standards,²³ but also has the option to develop objectives and benchmark for other students. Though short-term objectives are required for any student who takes alternate assessments, the school district is only required to include the objectives in the IEP during the years that the student is actually taking the alternate assessments.²⁴
4. The annual goals must also be objectively measurable,²⁵ but the IDEA does not require goals to have outcomes and measures on a specific assessment tool.²⁶
5. Annual goals must be reasonably specific to allow the parent and the school district to monitor progress during the school year, and, as necessary, to revise the IEP consistent with the student's instructional needs.²⁷ Vague and immeasurable

²¹ In New York, the Committee on Special Education (CSE) or the Committee on Preschool Special Education (CPSE) carries out the functions of the IEP team. 8 NYCRR § 200.3(a)(1). For purposes of this outline, the prevalent nomenclature “IEP team” is used.

²² *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12471 (Mar. 12, 1999).

²³ 34 C.F.R. § 300.320(a)(2)(ii); 8 NYCRR § 200.4(d)(vi).

²⁴ *Letter to Kelly*, 49 IDELR 165 (OSEP 2007).

²⁵ 34 C.F.R. § 300.320(a)(2)(i).

²⁶ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46662 (Aug. 14, 2006); see also *A.M. v. New York City Dept. of Educ.*, 964 F. Supp. 2d 270, 61 IDELR 214 (S.D.N.Y. 2013) (rejecting the argument that the failure of the annual, math goals to include a specific measurement standard denied FAPE).

²⁷ *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12471 (Mar. 12, 1999).

goals often deny FAPE.²⁸

6. When the goals are vague, inexact or otherwise immeasurable, the IEP cannot be said to include a statement of relevant or meaningful measurable annual goals, and results in the loss of educational opportunity for the student and seriously infringes on the parent's opportunity to participate in the IEP formulation process.²⁹
7. In some instances, appropriately drafted short-term objectives may compensate for inadequate annual goals,³⁰ but equally inadequate benchmarks and short-terms objectives are not an appropriate substitute.³¹
8. Because an IEP must address the individual needs of the student, the IDEA does not specify how many annual goals must be included in the IEP – there should be a corresponding annual goal for each identified need listed in the PLAAFP.

²⁸ See, e.g., *Omidian v. New Hartford Cent. Sch. Dist.*, 52 IDELR 132 (N.D.N.Y. 2009); *New Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92 (D. Minn. 2006).

²⁹ *Bend-Lapine Sch. Dist. v. K.H.*, 43 IDELR 191, 2005 WL 1587241 (D. Or. 2005) (affirming the ALJ's findings that statements included in the IEP were insufficient to determine an accurate baseline of the behaviors affected by the student's disability, failed to adequately state measurable goals, and lacked sufficient specificity to determine what supplementary aids might be required to implement the IEP), *aff'd*, *Bend-Lapine Sch. Dist. v. K.H.*, 234 F. App'x 508 (9th Cir. 2007) (unpublished); *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005) (affirming the hearing officer's findings that annual goals defined by an inadequate statement of present levels of performance are meaningless, and that the IEP was flawed because it did not identify measurable goals). See also *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008), *aff'd*, 54 IDELR 29 (D. Alaska 2009) (holding that the omission of a baseline and the inclusion of vague and immeasurable annual goals in an IEP denies FAPE); *Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92 (D. Minn. 2006) (finding that the two annual goals and three short-term objectives that follow each goal could define a broad range of conduct and, therefore, inadequate).

³⁰ See *B.P. v. New York City Dept. of Educ.*, 64 IDELR 199 (S.D.N.Y. 2014), *aff'd*, 66 IDELR 272 (2d Cir. 2015) (unpublished); *D.A.B. v. New York City Dep't of Educ.*, 973 F. Supp. 2d 344, 62 IDELR 21 (S.D.N.Y. 2013), *aff'd*, 630 F. App'x 73, 66 IDELR 211 (2d Cir. 2015).

³¹ See, e.g., *Edinburg Consol. Indep. Sch. Dist.*, 109 LRP 72776 (SEA TX 2009).

- C. Method of Measuring Progress. Each IEP must include a description of how the student's progress towards meeting the annual goals will be measured and when periodic reports on the progress will be provided to the parent.³²
1. Though the IDEA requires a description of how the student's progress towards meeting the annual goals will be measured, the IDEA does not require the use of standardized tests to meet the requirement and the use of standardized test scores is not dispositive in determining whether the student made progress.³³ And, because annual goals are individually tailored to the needs of the student, the use of standardized tests to measure progress is not always appropriate because what the tests are intended to measure may not necessarily be aligned to the objectives of the annual goals.
 2. The IEP does not specify by when the periodic reports must be given to the parent, what is to be included in the reports, or how often the parent is to be informed about the student's progress. Though the periodic reports may be in the form of quarterly or other interval reports, concurrent with the issuance of reports cards to non-disabled peers, the IDEA 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).³⁴ The specific times that progress reports are provided to the parent and the specific manner and format in which a student's progress toward meeting the annual goals is reported to the parent is left to the SEAs to decide.³⁵
- D. Special Education, Related Services, and Supplementary Aids and Services. The IEP must also 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 student or on his/her behalf. The IEP must further provide a statement of the program modifications or supports for school personnel that will be provided to enable the student to advance appropriately toward attaining the annual goals and be involved in and make progress in the general education curriculum,

³² 34 C.F.R. § 300.320(a)(3); **8 NYCRR § 200.4(d)(2)(iii)(b).**

³³ *Jaccari v. Bd. of Educ. of the City of Chicago*, Dist. No. 299, 690 F. Supp. 2d 687, 54 IDELR 53 (N.D. Ill. 2010); *Pierce v. Mason City Sch. Dist.*, 48 IDELR 7 (S.D. Ohio 2007).

³⁴ **See also 8 NYCRR § 200.4(d)(2)(iii)(c).**

³⁵ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46662 (Aug. 14, 2006).

and to participate in extracurricular and other nonacademic activities.³⁶ The IEP may need to include the related service of “parent counseling and training” to, among other things, “help the parent acquire the necessary skills that will allow them to support the implementation” of the student’s IEP.³⁷

1. The specific needs of the student define the amount and type of services to be provided to the student or on his/her behalf. As such, the IEP must clearly specify the nature and type of services that the school district intends to provide.
2. Said services must be based on peer-reviewed research.³⁸ This is “research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published.”³⁹ However, an IEP team may recommend an eclectic program even though the eclectic program itself is not peer reviewed, provided the program is tailored to the student’s needs and designed to confer educational benefit.⁴⁰
3. An IEP’s failure to include a particular special education service preferred by the parent does not make the IEP defective unless the service is necessary to provide the student with FAPE.⁴¹ However, an IEP that arbitrarily limits the duration of a service to less than what the student requires for the year may be found to be defective even though the IEP team agrees to revisit the matter midyear or prior to cessation of the service.⁴²
4. There is nothing in the IDEA that requires an IEP to include specific instructional methodologies.⁴³ There may be

³⁶ 34 C.F.R. § 300.320(a)(4); 8 NYCRR § 200.4(d)(2)(v).

³⁷ 34 C.F.R. §§ 300.6(e) and 300(c)(8)(iii).

³⁸ 34 C.F.R. § 300.320(a)(4); 8 NYCRR § 200.4(d)(2)(v)(b).

³⁹ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46664 (Aug. 14, 2006).

⁴⁰ See, e.g., *Joshua A. v. Rocklin Unified Sch. Dist.*, 319 F. App’x 692, 52 IDELR 64 (9th Cir. 2009).

⁴¹ *Winkelman v. Parma City Sch. Dist.*, 294 F. App’x 997, 51 IDELR 92 (6th Cir. 2008) (unpublished), cert. denied, 557 U.S. 946, 109 LRP 38984 (2009).

⁴² See, e.g., *Reyes v. New York City Dep’t of Educ.*, 760 F.3d 211, 63 IDELR 244 (2d Cir. 2014).

⁴³ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46665 (August 14, 2006). A parent can request a specific

circumstances in which the particular teaching methodology that will be used with the student is an integral part of what is individualized about a student education. In those circumstances, the teaching methodology will need to be discussed at the IEP meeting and incorporated into the student's IEP.⁴⁴ In general, however, specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist the student achieve his or her annual goals would not normally require action by the student's IEP team.⁴⁵

- E. Time, Place, and Duration of Services. In addition to the educational services the school district is required to provide the student, the IEP must also include the projected start date of the services and the anticipated frequency, location, and duration of the services.⁴⁶
1. The IEP team determines the start date for each service based on the individual needs of the student.⁴⁷

instructional methodology and have it considered by the IEP team. Whether to incorporate it into the student's IEP is within the discretion of the IEP team as a whole. *See Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005).

⁴⁴ *J.L. v. Mercer Island Sch. Dist.*, 575 F.3rd 1025, 52 IDELR 241 (9th Cir. 2009); *see also Letter to Anonymous*, 49 IDELR 258 (OSEP 2007); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46665 (August 14, 2006); *Letter to Wilson*, 37 IDELR 96 (OSEP 2002). An LEA, however, is not required to provide the parents' preferred teaching methodology when it is established that the recommended program meets the applicable statutory standard. *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 20 IDELR 1449 (9th Cir. 1994). Courts typically defer questions of educational policy and methodology to the States. *See, e.g., M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 45 IDELR 1 (11th Cir. 2006) (reminding the parents that the IDEA does not permit parents to challenge an IEP "on the grounds that it is not the best or most desirable program for their child"); *Joshua A. v. Rocklin Unified Sch. Dist.*, 319 F. App'x 692, 52 IDELR 64 (9th Cir. 2009) (unpublished) (upholding an LEA's use of an eclectic approach that was not itself peer-reviewed); *Bend-Lapine Sch. Dist. v. D.W.*, 152 F.3d 923, 28 IDELR 734 (9th Cir. 1998) (stating that an LEA is not required to "cooperate" with the parents when deciding what methodology was to be used).

⁴⁵ *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Pages 12552, 12595 (March 12, 1999).

⁴⁶ 34 C.F.R. § 300.320(a)(7); 8 NYCRR § 200.4(d)(2)(v)(b)(7).

⁴⁷ 34 C.F.R. § 300.320(a)(7); 8 NYCRR § 200.4(d)(2)(v)(b)(9). *See also Letter to Ackerhalt*, 60 IDELR 21 (OSEP 2012).

2. The description of the amount of services must be sufficiently comprehensively to make clear the school district's level of commitment to the student.⁴⁸

F. Participation in General Education Class and Activities. The student's unique needs determine whether s/he is removed from the general education environment for all or part of a school day. If the IEP team determines that the student should be removed from the general education environment, even if for a portion of the school day, the IEP must include a statement explaining why the student will not participate with nondisabled students in the regular class and in extracurricular and other nonacademic activities.⁴⁹

1. The IEP should identify what portion of the school day the student is to participate in the general education environment.⁵⁰

G. Accommodations for Assessments. The IEP must identify the necessary accommodations, if any, a student requires to measure the academic achievement and functional performance of the student on State and district-wide assessments.⁵¹

1. The IEP team determines whether the student will participate in regular assessments and, if so, with or without accommodations, or whether the student will participate in alternate assessments.⁵²
2. If the IEP team determines that the student is to participate in alternate assessments, the IEP must include an explanation of why the student cannot participate in regular assessments and identify the particular alternate assessments that would be appropriate for the student.⁵³
3. Any selected accommodation must be based on the student's unique needs.

⁴⁸ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46667 (August 14, 2006).

⁴⁹ 34 C.F.R. § 300.320(a)(5); 8 NYCRR § 200.4(d)(2)(viii)(a).

⁵⁰ *See, e.g., P. v. Newington Bd. of Educ.*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008).

⁵¹ 34 C.F.R. § 300.320(a)(6)(i); 8 NYCRR § 200.4(d)(2)(vi).

⁵² 34 C.F.R. § 300.320(a)(6)(ii); *see also Letter to Anonymous*, 54 IDELR 172 (OSERS 2009). *Cf.* 8 NYCRR § 200.4(d)(2)(vii).

⁵³ 34 C.F.R. § 300.320(a)(6)(ii); 8 NYCRR § 200.4(d)(2)(vii).

- H. Transition Services. Under the IDEA, when the student is no older than 16 (15 or younger in New York), the IEP team must conduct appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills.⁵⁴ Thereafter, the IEP must include appropriate, measurable postsecondary goals (based on the results of the assessments) and transition services (including courses of study) needed to assist the child in reaching those goals.⁵⁵
1. The lack of appropriate assessments and the failure to adequately take into account the student's preferences and interests can result in loss of educational opportunities to the student denying the student a FAPE.⁵⁶
 2. The school district must invite the student to the IEP team meeting in which the student's post-secondary goals and transition services are being discussed and considered.⁵⁷ If the student does not attend the meeting or is not able to attend, the school district must take other steps to become acquainted with the student's preferences and interests and to ensure that the student's preferences and interests are considered.⁵⁸
 3. The IEP team must also invite a representative of any participating agency that is likely to be responsible for providing or paying for the transition services, with the parent or student's, as appropriate, consent.⁵⁹
 4. The participating agency's failure to subsequently provide services to the student requires the school district to reconvene the IEP to identify alternative strategies to meet

⁵⁴ 34 C.F.R. § 300.320(b)(1); 8 NYCRR § 200.4(d)(2)(ix)(b).

⁵⁵ 34 C.F.R. § 300.320(b)(2); 8 NYCRR §§ 200.4(d)(2)(ix)(b) and (c).

⁵⁶ See, e.g., *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 655 F. App'x 423, 68 IDELR 33 (6th Cir. 2016) (unpublished) (affirming award of 425 hours of transition related services).

⁵⁷ 34 C.F.R. § 300.321(b)(1); 8 NYCRR § 200.4(d)(4)(i)(c).

⁵⁸ 34 C.F.R. § 300.321(b)(3); 8 NYCRR § 200.4(d)(4)(i)(c). The failure to invite the student is a procedural violation that may result in a denial of FAPE. See, e.g., *Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, 61 IDELR 97 (S.D. Ohio 2013), cert. denied, 655 F. App'x 423, 116 LRP 30318 (6th Cir. 2016) (unpublished) (finding no denial because the IEP team considered the student's preferences and interests despite her absence); *W.W. v. New York City Dep't of Educ.*, 171 F. Supp. 3d 126, 67 IDELR 186 (S.D.N.Y. 2016) (same).

⁵⁹ 34 C.F.R. § 300.321(b)(3); 8 NYCRR § 200.4(d)(4)(i)(c).

the transition objectives for the student set out in the IEP.⁶⁰ Similarly, if the agency fails to pay for the services, the school district must fund the services in a timely manner but can seek to recover the costs from the agency.⁶¹

IV. SPECIAL FACTORS

- A. **Positive Behavior Interventions and Supports.** If the student's behavior impedes his or her learning or that of others, the IDEA requires the IEP team to consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior, and to include same in the IEP.⁶²
1. It is within the discretion of the IEP team whether to include positive behavioral interventions and supports in the IEP, with one notable exception.⁶³ The failure to include positive behavioral interventions and supports in the IEP when a student demonstrates the need for same can result in a denial of FAPE.⁶⁴
 2. The IDEA does not require the IEP team to develop a formal plan termed a behavior support/intervention/management plan (BIP). What is required is that the IEP adequately addresses the student's behavioral needs.⁶⁵

⁶⁰ 34 C.F.R. § 300.324(c)(1); 8 NYCRR § 200.4(e)(6).

⁶¹ 34 C.F.R. § 300.154(b)(2).

⁶² 34 C.F.R. § 300.324(a)(2)(i); 8 NYCRR § 200.4(d)(1). See also *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

⁶³ In the disciplinary context, if it is determined that the conduct is not a manifestation of the student's disability, the school district may apply the relevant disciplinary procedures to the student in the same manner and for the same duration as the procedures would be applied to students without disabilities. 34 C.F.R. § 300.530(c); 8 NYCRR § 201.9(c)(2). The school district, however, must continue to provide the student with educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress towards meeting the goals set out in his or her IEP. *Id.* In addition, the student must receive, as appropriate, a functional behavioral assessment (FBA), and behavioral intervention services and modifications, to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1); 8 NYCRR § 201.10(c).

⁶⁴ See, e.g., *R.K. v. New York City Dep't of Educ.*, 56 IDELR 212 (E.D.N.Y. 2011), *aff'd*, 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012).

⁶⁵ *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 361 F. App.x 156, 53 IDELR 141 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2064, 110 LRP 18650 (U.S. 2010).

3. There are no specific substantive requirements for the behavioral interventions and supports contemplated by the IDEA,⁶⁶ though courts require sufficient specificity in the IEP/BIP to address the behavior.⁶⁷
 4. A functional behavioral assessment (FBA) is not a prerequisite to the IEP team including behavioral interventions and supports in the IEP or developing a BIP, though some States do require an FBA. **New York State does require an FBA.**⁶⁸
- B. Limited English Proficiency.⁶⁹ An IEP team must consider the language needs of a student with a disability who is also an English learner as those needs relate to the student's IEP.⁷⁰
- C. Blind or Visually Impaired. A school district must provide instruction in Braille and the use of Braille to students who are blind or visually impaired unless the IEP team determines after assessing the student that instruction in Braille or the use of Braille

⁶⁶ *Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221*, 375 F.3d 603, 41 IDELR 146 (7th Cir. 2004), *cert. denied*, 543 U.S. 1009, 110 LRP 39024 (2004).

⁶⁷ *See, e.g., M.M. v. District 0001 Lancaster County Sch.*, 702 F.3d 479, 60 IDELR 92 (8th Cir. 2012) (finding that the school district considered the evaluator's recommendation for the use of a calming room); *Kingsport City Sch. Sys. v. J.R.*, 51 IDELR 77 (E.D. Tenn. 2008) (upholding the administrative law judge's finding that the school district denied the student FAPE when the BIP relied heavily on adult intervention to help the student develop appropriate social skills).

⁶⁸ 8 NYCRR § 200.4(b)(1)(v); *see also M.W. v. New York City Dep't of Educ.*, 725 F.3d 131, 61 IDELR 151 (2d Cir. 2013). A BIP may be found to be inappropriate when it is not based on an FBA. *See C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 62 IDELR 281 (2d Cir. 2014) (concluding that, despite State law requiring an FBA "as necessary to ascertain ... behavioral and emotional factors which contribute to [a] suspected disability[y], in the absence of an FBA, the court should nonetheless look to the IEP to determine whether it adequately addresses the student's problem behaviors); *J.C. v. New York City Dep't of Educ.*, 643 F. App'x 31, 67 IDELR 109 (2d Cir. 2016) (unpublished) (finding no denial of FAPE despite the fact the district did not conduct an FBA to address interfering behaviors because the student's teachers relied on the positive interventions outlined in the student's IEP).

⁶⁹ The Every Student Succeeds Act of 2015 and its 2016 regulations replaced the term "limited English proficient" with the term "English learner." *See* 34 C.F.R. § 300.27.

⁷⁰ 34 C.F.R. § 300.324(a)(2)(ii); 8 NYCRR § 200.4(d)(3)(ii).

is not appropriate for the student.⁷¹

- D. Communication Needs. An IEP team must also consider the communication needs of a student with a disability. For a student who is deaf or hard of hearing, the IEP team must consider the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode.⁷²
- E. Assistive Technology Devices and Services. An IEP team must consider whether a student with a disability needs assistive technology devices (ATD) and services (ATS).⁷³
1. ATD means basically any item, piece of equipment, or product system used to increase, maintain, or improve the functional capabilities of children with disabilities.⁷⁴ ATS means any service that directly assists a child with a disability in the selection, acquisition, or use of an ATD.⁷⁵ An IEP team determines what ATD/Ss are necessary to provide the student with a FAPE.⁷⁶
 2. As a practical matter, school districts have typically not been asked to provide and bear the expense of eye glasses, hearing aids, or medical equipment, such as respirators or even wheelchairs (unless needed to assist the child benefit from special education).⁷⁷ Note, however, that the IDEA expressly excludes a "medical device that is surgically implanted or the replacement of such device" from the definition of ATD.⁷⁸

⁷¹ 34 C.F.R. § 300.324(a)(2)(iii); 8 NYCRR § 200.4(d)(3)(iii).

⁷² 34 C.F.R. § 300.324(a)(2)(iv); 8 NYCRR § 200.4(d)(3)(iv).

⁷³ 34 C.F.R. § 300.324(a)(2)(v); 8 NYCRR § 200.4(d)(3)(v).

⁷⁴ 34 C.F.R. § 300.5; 8 NYCRR § 200.1(e).

⁷⁵ 34 C.F.R. § 300.6; 8 NYCRR § 200.1(f).

⁷⁶ 34 C.F.R. § 300.24(a)(2)(v); *see* 8 NYCRR § 200.4(d)(3)(v). The failure to specify the ATD that a student requires may infringe on the right of the parent to participate in the IEP process. *See, e.g., M.C. v. Antelope Valley Union High Sch. Dist.*, 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017), *amended*, 117 LRP 21748 (9th Cir. 2017).

⁷⁷ *See Letter to Stohrer*, 213 IDELR 209 (OSEP 1989); *Letter to Seiler*, 20 IDELR 1216 (1993); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46681 (August 14, 2006).

⁷⁸ 34 C.F.R. § 300.5; 8 NYCRR § 200.1(e).

3. The IEP must specifically identify the ATD/S that the student requires.⁷⁹ A school district cannot unilaterally change the provision of an ATD/S included in the student's IEP. This decision is solely reserved for the IEP team.⁸⁰
4. A school district, however, is not required to purchase a costlier or better ATD/S than what is minimally required in the student's IEP if the lower cost/no frill ATD/S is consistent with the student's needs outlined in the IEP.⁸¹
5. The cost of obtaining and maintaining the ATD/S belongs to the school district.⁸² The school district does not meet its obligation to the student by allowing the student to use his/her own device.⁸³
6. Parents, too, may need to be trained on the use of an ATD if the student is required to take the device home to complete assignments.⁸⁴

V. NOT REQUIRED

- A. A school district is not required to include any additional information beyond the required contents, though a State may require additional information beyond what is minimally required by the IDEA.⁸⁵ The inclusion of additional information beyond what is required may obligate the school district to provide additional services throughout the period covered by the IEP.⁸⁶
- B. There is no requirement that the IEP team include information found in one segment of the IEP in another segment of the same

⁷⁹ *Letter to Anonymous*, 18 IDELR 627 (OSEP 1991).

⁸⁰ *Letter to Anonymous*, 24 IDELR 854 (OSEP 1996).

⁸¹ *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982).

⁸² *Letter to Cohen*, 19 IDELR 278 (OSERS 1992).

⁸³ *See, e.g., Washoe County Sch. Dist.*, 69 IDELR 201 (SEA 2016) (finding that the student's use of his mobile phone to record assignments in class violated IDEA's no cost requirement).

⁸⁴ *See, e.g., Bethel Local Sch. Dist.*, 116 LRP 26503 (SEA OH 2016) (finding that the IEP was not properly implemented because neither the school staff nor the parent had been trained on how to use the assigned iPad and the installed programs resulting in the student not being able to complete his assignments as detailed in his IEP).

⁸⁵ *See* 34 C.F.R. § 330.320(d)(1).

⁸⁶ *See Letter to Anonymous*, 17 IDELR 180 (OSEP 1990).

IEP.⁸⁷

- C. An IEP team need not include in the IEP, except in rare circumstances: the names of specific teachers/providers; the required qualifications for assigned teachers/providers; methodology; identification of the materials to be used with the student; and/or the assigned classroom or specific school.⁸⁸
- D. The IEP is not required to include services provided to the student that are unrelated to special education.⁸⁹ The IEP is also not required to include extracurricular activities, including sports, not considered part of the student's appropriate educational program.⁹⁰
- E. The IEP is not required to include summaries of discussions held during the IEP team meeting and recommendations that were not adopted.⁹¹

VI. MEANINGFUL PARTICIPATION

- A. Parents play a key role in the IEP development process.⁹² The IDEA's procedural safeguards (e.g., notice requirements, prior written notice) help to ensure the parent's full and effective participation in the IEP process.⁹³
- B. The parent's ability to participate must go beyond simply speaking.⁹⁴ An IEP team must consider the parent's input and suggestions and, as appropriate, incorporate same into the IEP.⁹⁵

⁸⁷ 34 C.F.R. § 300.320(d)(2).

⁸⁸ See *Bobby v. Sch. Bd. of the City of Norfolk*, 63 IDELR 225 (E.D. Va. 2014); *S.M. v. State of Hawaii*, 808 F. Supp. 2d 1269 (D. Haw. 2011); *T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 53 IDELR 69 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3277, 110 LRP 28696 (U.S. 2010); *Letter to Hall*, 21 IDELR 58 (OSEP 1994). *But see A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 47 IDELR 245 (4th Cir. 2007), *cert. denied*, 552 U.S. 1170, 110 LRP 19412 (2008) (finding that the school district denied the student FAPE when the IEP failed to identify a specific private day school and the IEP left questions as to whether any school in the area would be able to meet the student's needs).

⁸⁹ *Letter to Montano*, 18 IDELR 1232 (OSEP 1992).

⁹⁰ *Letter to Anonymous*, 17 IDELR 180 (OSEP 1990).

⁹¹ *Letter to Anonymous*, 20 IDELR 1460 (OSEP 1994).

⁹² See 34 C.F.R. § 300.321(a)(1).

⁹³ See 34 C.F.R. § 300.322.

⁹⁴ See *R.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173, 63 IDELR 182 (11th Cir. 2014).

⁹⁵ See, e.g., *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004), *cert. denied*, 546 U.S. 936, 110 LRP 46999 (2005)

However, the IDEA “does not require school districts simply to accede to parents’ demands without considering any suitable alternatives.”⁹⁶

- C. A school district must also provide the parent with accommodations, as necessary, to allow for full and effective participation (e.g., language interpreter, tape recording).⁹⁷
- D. Decisions made during the IEP team meeting are by consensus and not subject to vote.⁹⁸ In the absence of consensus, the school district must determine the appropriate services and provide the parent with prior written notice and inform the parent of his/her right to initiate due process.⁹⁹

VII. RELATIONSHIP BETWEEN IEP AND PLACEMENT

- A. Generally. Once an IEP, or its contents, is determined, a multidisciplinary team (“MDT”) is tasked with identifying an appropriate educational placement where the IEP can be implemented.¹⁰⁰
- B. Placement Decision Need Not Be Made by IEP Team. Note that 34 C.F.R. § 300.116(a)(1) does not require the IEP team to make the

(finding a denial of FAPE because the school district pre-decided the student’s program and services without considering the student’s needs).

⁹⁶ *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 31 IDELR 132 (8th Cir. 1999).

⁹⁷ 34 C.F.R. § 300.322(e); **8 NYCRR § 200.4(a)(9)(i)**. See also *Manteca Unified Sch. Dist.*, 12 ECLPR 79 (SEA Cal. 2014), *aff’d*, *J.L. v. Manteca Unified Sch. Dist.*, 68 IDELR 17 (E.D. Cal. 2016) (use of Spanish interpreter); *Belvidere Community Unit Sch. Dist. No. 100*, 112 LRP 12955 (SEA Ill. 2012) (use of advocate to take extensive notes, explain IEP team discussions, and answer questions); *Child with a Handicapping Condition*, Decision No. 12,710 (SEA N.Y. 1992) (use of a stenographer during IEP team meeting); *E.H. v. Tirozzi*, 735 F. Supp. 53, 16 IDELR 787 (D. Conn. 1990) (use of a tape recorder during an IEP team meeting for a limited English proficient parent). Cf. *Letter to Anonymous*, 40 IDELR 70 (OSEP 2003) (stating that school districts have the option to require, prohibit, limit, or otherwise regulate the use of recording devices during IEP team meetings, provided exceptions can be made to ensure the parent understands the IEP or the IEP process).

⁹⁸ *Buser v. Corpus Christi Independent Sch. Dist.*, 20 IDELR 981 (S.D. Tex. 1994), *aff’d*, 51 F.3d 490, 22 IDELR 626 (5th Cir. 1995), *cert. denied*, 516 U.S. 916, 110 LRP 66347 (1995). See also *Letter to Richards*, 55 IDELR 107 (OSEP 2010).

⁹⁹ *Letter to Richards*, 55 IDELR 107 (OSEP 2010).

¹⁰⁰ 34 C.F.R. § 300.116; **8 NYCRR § 200.4(d)(2)(xii)**.

placement decision, but a State, **as New York has**, may elect to have the IEP team also make the placement determination.¹⁰¹

- C. Extent of Participation. A parent does have the right to participate in decisions about the student's placement. However, the IDEA does not give the parent the right to control or veto placement decisions.¹⁰²
1. The parent is an essential part of the placement team.¹⁰³ However, the parent is not necessarily denied a meaningful opportunity to participate in the placement decision when the school district engages in preparatory activities in advance of the IEP / placement meeting. The IEP team/MDT may meet in advance of the placement meeting to discuss potential placements for the student.¹⁰⁴ Nonetheless, the school district must keep an open mind and must give meaningful consideration to the parent's input regarding the student's placement.¹⁰⁵ Failure to give meaningful consideration to the parent's input may be a denial of a FAPE.¹⁰⁶
 2. A placement decision may be made without the involvement of the parent, provided the school district is unable to obtain the parent's participation in the decision.¹⁰⁷ As with the IEP process, however, the school district must document its

¹⁰¹ **8 NYCRR § 200.4(d)(2)(xii).**

¹⁰² See *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003) (noting that, while the IDEA requires the school district to provide services to allow the student the requisite basic floor of opportunity, it does not require the school district to make special accommodations at the parent's request, particularly where the request is not related to helping the student achieve academic potential).

¹⁰³ 20 U.S.C. § 1414(e); 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.116(c); See *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46585 (August 14, 2006).

¹⁰⁴ See, e.g., *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 51 IDELR 176 (2d Cir. 2009) (noting that the school staff can discuss potential services and placements in advance of the IEP / placement meeting, so long as the school staff arrives at the meeting with an open mind).

¹⁰⁵ *H.B. by Penny B. v. Las Virgenes Unified Sch. Dist.*, No. 04-cv-08572-FMC, 52 IDELR 163 (C.D. Cal. 2008), *aff'd*, 370 F. App'x 843, 54 IDELR 73 (9th Cir. 2010) (holding that the superintendent's pronouncement at the start of the meeting that the IEP Team would discuss the student's transition to public school showed that the school district predetermined the student's placement).

¹⁰⁶ See, e.g., *id.*

¹⁰⁷ 34 C.F.R. § 300.501(c)(4).

attempts to ensure parental involvement before the placement team makes the placement decision without the parent's participation.¹⁰⁸ Failure by the school district to make meaningful attempts to ensure parental involvement in the placement decision may be a denial of FAPE.¹⁰⁹

3. Meaningful opportunity to participate in the placement decision is achieved when, for example, the parent helps to develop the IEP itself and is afforded the chance to share with the other members of the IEP team/MDT his/her educational preferences.¹¹⁰
4. IDEA, however, does not permit a placement decision to be based solely on parental preference. 34 C.F.R. § 300.116(b)(2) requires that the educational placement for each student be based on the student's IEP.¹¹¹ However, although parental preference cannot be the sole or predominant factor in a placement decision, parental choice is not inconsistent with the IDEA, provided the chosen placement is consistent with 34 C.F.R. § 300.116 and meets the LRE requirements found at 34 C.F.R. § 300.114 through § 300.118.¹¹²

E. Designation of Specific Site, Classroom or Teacher. IDEA does not require a placement decision to identify the particular site,

¹⁰⁸ *Id.*

¹⁰⁹ *See, e.g., Drobnicki v. Poway Unified Sch. Dist.*, 358 F. App'x 788, 53 IDELR 210 (9th Cir. 2009) (unpublished) (holding that a California school district should have attempted to schedule an IEP meeting at a mutually agreeable time and place rather than offering to allow the parent to participate by teleconference).

¹¹⁰ *Paolella v. District of Columbia*, 210 F. App'x 1, 46 IDELR 271 (D.C. Cir. 2006)(unpublished). *See also Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 49 IDELR 71 (D.D.C. 2007); *T.T. v. District of Columbia*, No. 06-0207-JDB, 48 IDELR 127 (D.D.C. 2007).

¹¹¹ *See also Letter to Burton*, 17 IDELR 1182 (OSERS 1991) (OSEP found Indiana's "parent option" provision to be inconsistent with IDEA because the State law permitted the school district to base a placement decision solely on "parent option" or "parent preference"). *But see Board of Educ. Of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. Of Educ.*, 938 F.2d 712, 18 IDELR 43 (7th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992) ("[A] child whose parents oppose an IEP so vehemently and vocally as to 'doom' its prospects should not be enrolled in the placement merely to enable educational agencies and federal courts to 'discipline' parents.").

¹¹² *Letter to Bina*, 18 IDELR 582 (OSERS 1991).

classroom or teacher in which a child's IEP must be implemented.¹¹³ The IEP team/MDT, however, may make such decisions.¹¹⁴

The assignment of a child to a specific site, classroom or teacher can be an administrative determination that need not be made by the IEP team/MDT, provided that the particular site, classroom or teacher is consistent with the placement decision, including the LRE aspect.¹¹⁵

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¹¹³ *Letter to Wessels*, 16 IDELR 735 (OSEP 1990). *But see A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 47 IDELR 245 (4th Cir. 2007), *cert. denied*, 552 U.S. 1170, 110 LRP 19412 (2008) (holding that the IEP must identify a particular school to offer a FAPE when the parents expressed doubt concerning the existence of said school).

¹¹⁴ *Letter to Wessels*, 16 IDELR 735 (OSEP 1990).

¹¹⁵ *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003) ("Schools have significant authority to determine the school site for providing IDEA services."). *See also Letter to Veazey*, 37 IDELR 10 (OSEP 2001) (advising that if an LEA has two or more equally appropriate locations that meet the student's special education and related services needs, the assignment of a particular school may be an administrative determination, provided that the determination is consistent with the placement team's decision); *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (advising that it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual's needs of the student); *Letter to Wessels*, 16 IDELR 735 (OSEP 1990) (advising that OSEP does not interpret the educational placement regulations as requiring a placement decision to identify the particular classroom or teacher in which a student's IEP must be implemented, if more than one of these is available and would be consistent with the placement decision).