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## Individualized Education Programs (IEPS) and Special Education Programming for Students with Disabilities in Urban Schools

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# INDIVIDUALIZED EDUCATION PROGRAMS AND SPECIAL EDUCATION PROGRAMMING FOR STUDENTS WITH DISABILITIES IN URBAN SCHOOLS

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## ABSTRACT

This Article examines the individualized education program (IEP) requirement of the Individuals with Disabilities Education Act (IDEA) and presents a method for improving the education of students with disabilities in urban settings by appropriately developing IEPs. Part I considers the unique problems facing special education in urban school districts. Part II presents an overview of the IDEA and its requirement that school districts provide students with a free appropriate public education (FAPE). Part III examines the components of an IEP and the process for developing students' IEPs—the key vehicle for providing a FAPE. Part IV outlines a process for developing educationally meaningful and legally sound IEPs for students with disabilities. Finally, Part V discusses the important issues in professional development for ensuring that urban school district personnel understand their responsibilities in crafting IEPs.

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## TABLE OF CONTENTS

Introduction .....	671
I. Special Education in Urban Settings .....	672
II. The IDEA and FAPE.....	675
III. Individualized Education Programs (IEPs).....	680
A. IEP Requirements .....	681
1. Parental Involvement.....	681
2. Participants in IEP Development.....	684
3. IEP Content .....	686
a. Present Levels of Academic Achievement and Functional Performance.....	686
b. Measurable Annual Goals .....	687
c. Special Education Services, Related Services, and Supplementary Aids and Services .....	689
d. Extent to Which a Student Will Not Participate in General Education .....	691
e. State- and District-Wide Assessments .....	691
f. Behavior Interventions .....	692
g. Transition Plans .....	692
B. Implementing and Revising IEPs.....	694
IV. Placement and Students with Disabilities .....	695
V. Developing Educational, Meaningful, and Legally Sound IEPs .....	701
A. Question One: What Are the Student's Unique Educational Needs that Must Be Considered in Developing the Student's Instructional Program? .....	701
B. Question Two: What Measurable Goals Will Enable the Student to Achieve Meaningful Educational Benefit? .....	702
C. Question Three: What Services Will Be Provided to the Student to Address Each of His or Her Needs? .....	705
D. Question Four: How Will the Team Monitor the Student's Progress to Determine if the Instructional Program is Effective? .....	707
E. Professional Development Activities .....	710
1. Provide Professional Development Activities Based on Evidence-Based Procedures.....	710
2. Ensure that Principals and Assistant Principals Understand Their Roles and Responsibilities Under the IDEA .....	712
3. Ensure that Administrators, Teachers, and Parents Understand the Importance of Parental	

Involvement in the Special Education Process and Use Methods to Ensure that Meaningful School-Home Collaboration Occurs in the IEP Process .....713

4. Ensure that General Education and Special Education Teachers Understand Their Responsibilities Under the IDEA.....713

Conclusion.....714

**INTRODUCTION**

Individualized education programs (IEPs) are at the heart of the Individuals with Disabilities Education Act (IDEA), the purpose of which is to make a free appropriate public education (FAPE) available to every student in special education.<sup>1</sup> An IEP is: (a) the written document that records the essential components of an eligible student’s special education program, and (b) a collaborative process between a child’s parents and school personnel to design this program.<sup>2</sup> During the IEP planning process, the student’s needs, annual goals, special education and related services, evaluation and measurement criteria, and his or her educational placement are determined and implemented.<sup>3</sup>

The purpose of this Article is to examine the IEP requirement of the IDEA and to present a method for improving the education of students with disabilities in urban settings by developing IEPs that are educationally appropriate and legally sound. Part I considers some of the unique problems faced by special educators in urban settings. Part II presents an overview of the legal requirements of the IDEA and the mandate that schools provide a FAPE for eligible students with disabilities. Part III examines the different components of an IEP and the process for developing students’ IEPs—the key vehicle for providing a FAPE. Part IV outlines a process for developing educationally meaningful and legally sound IEPs for students with disabilities. Part V discusses the important issues in professional

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1. See Barbara D. Bateman, *Individualized Education Programs for Children with Disabilities*, in HANDBOOK OF SPECIAL EDUCATION 91 (James M. Kauffman & Daniel P. Hallahan eds., 2011).

2. Mitchell L. Yell et al., *Developing Educationally Meaningful and Legally Sound Individualized Education Programs*, in EVIDENCE-BASED PRACTICES FOR EDUCATING STUDENTS WITH EMOTIONAL AND BEHAVIORAL DISORDERS 187, 188 (Mitchell L. Yell et al. eds., 2d ed. 2013).

3. See *id.*

development for ensuring that urban school district personnel understand their responsibilities in crafting IEPs.

### I. SPECIAL EDUCATION IN URBAN SETTINGS

It has been asserted that the dismal outcomes among students who attend urban schools are among the most serious social problems facing education leaders today.<sup>4</sup> These poor student outcomes include high rates of poverty, absenteeism, and dropouts.<sup>5</sup> In addition, teachers in urban schools often: (a) feel overwhelmed by the substantial problems their students face, (b) have fewer resources available to them, and (c) face a greater number of students with discipline problems in their classrooms.<sup>6</sup> Moreover, teacher turnover rates are disproportionately high in urban schools, and the teachers are often uncertified and inexperienced.<sup>7</sup> These statistics indicate that teachers and students in urban schools face problems and challenges greater than those faced by their counterparts in suburban schools, or face them on a much more serious level.<sup>8</sup>

Students with disabilities in urban schools and their teachers face similar challenges as well as additional problems that may be aggravated in the special education context. Four such problems are: (a) inadequate preparation of special education teachers, (b) lack of early identification and intervention for students with disabilities, (c) fewer methods to monitor and measure student progress, and (d) insufficient parent involvement.<sup>9</sup>

For example, too often general education teachers in urban schools are not qualified in the subjects they teach,<sup>10</sup> and teachers of students with disabilities are often not certified in the area of disability in which they teach, or are teaching on a provisional or emergency

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4. See Amy L. MacArdy, Note, *Jamie S. v. Milwaukee Public Schools: Urban Challenges Cause Systemic Violations of the IDEA*, 92 MARQ. L. REV. 857, 864 (2009).

5. See Janice H. Patterson et al., *A Study of Teacher Resilience in Urban Schools*, 31 J. INSTRUCTIONAL PSYCHOL. 3, 4 (2004).

6. MacArdy, *supra* note 4, at 874.

7. See MYRNA MANDLAWITZ, CTR. ON EDUC. POLICY, *A TALE OF 3 CITIES: URBAN PERSPECTIVES ON SPECIAL EDUCATION* 28 (2003), available at <http://www.cep-dc.org/displayDocument.cfm?DocumentID=115> (follow "Full Report" hyperlink).

8. See MacArdy, *supra* note 4, at 863.

9. See MANDLAWITZ, *supra* note 7, at 5–12.

10. See *id.* at 12.

certification.<sup>11</sup> A provisional or emergency certification usually means that teachers do not currently possess the educational credentials that a state requires of general or special education teachers before the state will grant them a license or certification to teach in their area.<sup>12</sup> The practice of waiving certification requirements for both general and special education teachers because of teacher shortages has long been a concern in education.<sup>13</sup> This problem may be due to the acute shortages of special education teachers in urban school districts and the difficulties urban schools have in attracting and keeping highly qualified special education teachers.<sup>14</sup> Whatever the reason, these special education teachers urgently need professional development training in effective educational practices and procedures for students with disabilities. When special education teachers do not have adequate preparation to teach students with learning challenges, they are unlikely to use educational practices and procedures that research has shown to be effective in teaching students with disabilities.<sup>15</sup>

A second problem in urban school districts is that many children with potential disabilities and learning problems are not identified and provided with appropriate interventions early enough in their school careers for such intervention to make a meaningful difference in their lives.<sup>16</sup> Early intervention services are especially important for students who (a) have identified behavioral and developmental difficulties, (b) live in poverty and are high risk of school failure, and (c) are English Language Learners (ELL), the students who tend to be overrepresented in urban schools.<sup>17</sup> Scholars have asserted that the earlier identification and intervention occurs in the life of a

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11. See PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., U.S. DEP'T OF EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 52 (2002), available at <http://education.ucf.edu/mirc/Research/President's%20Commission%20on%20Excellence%20in%20Special%20Education.pdf>.

12. See generally *Teacher Certification and Licensure Information: Everything You Ever Wanted to Know About Getting Teacher Certification—and More*, ALL EDUC. SCH., [www.alleducationschools.com/education-careers/article/teacher-certification](http://www.alleducationschools.com/education-careers/article/teacher-certification) (last visited Dec. 18, 2013).

13. See *More on Highly Qualified Special Educators... in General*, NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, <http://www.nichcy.org/schools-administrators/hqt/idea/ingeneral> (last visited Sept. 26, 2013).

14. See MANDLAWITZ, *supra* note 7, at 39–40.

15. See PRESIDENTS COMM'N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 11, at 55–56.

16. Kathleen J. Marshall et al., *Early Intervention and Prevention of Disability: Preschoolers*, in HANDBOOK OF SPECIAL EDUCATION, *supra* note 1, at 703–04.

17. *Id.*

student with disabilities, the greater the likelihood of diverting the student from a trajectory leading to a host of long-term negative outcomes.<sup>18</sup>

Third, the development of methods and procedures to monitor students' educational progress within and across their years in schools has increased teachers' abilities to measure the effectiveness of their instruction and to make changes when instruction is not effective.<sup>19</sup> Monitoring student performance and making instructional changes when necessary has been shown to lead to greater academic growth.<sup>20</sup> Unfortunately, the use of progress monitoring of this sort has not been widespread in special education settings in urban, suburban, or rural schools.<sup>21</sup>

Finally, too often the parents of children with disabilities in urban schools are not meaningfully involved in their children's special education programs; thus, a student's parents have little or no voice in the development of the child's IEP.<sup>22</sup> There are clearly barriers to parent participation that may be more prevalent in urban environments (e.g., transportation, single-parent homes, parents working multiple jobs, loss of pay when time is taken off from work, language issues); nonetheless, parental participation in the special education process is a critical requirement in the IDEA.<sup>23</sup> The IDEA relies on parental participation and collaboration to ensure the success of the students within the educational programming.<sup>24</sup> Moreover, a student's IEP is the central vehicle for this collaboration.<sup>25</sup>

Many of the answers to these difficult problems lie in precise and faithful implementation of the principles of the IDEA, and in the collaborative development of a student's IEP. Next, this Article

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18. HILL M. WALKER ET AL., *ANTISOCIAL BEHAVIOR IN SCHOOL: EVIDENCE-BASED PRACTICES* 10 (2d ed. 2004).

19. Stanley L. Deno, *Whether Thou Goest . . . Perspectives on Progress Monitoring*, in *ISSUES IN EDUCATING STUDENTS WITH DISABILITIES* 77–78 (John Willis Lloyd et al. eds., 1997).

20. Amy L. Reschly et al., *Curriculum-Based Measurement Oral Reading as an Indicator of Reading Achievement: A Meta-Analysis of the Correlational Evidence*, 47 *J. SCH. PSYCHOL.* 427, 428 (2009).

21. See Deno, *supra* note 19, at 77.

22. See MANDLAWITZ, *supra* note 7, at 20.

23. See *Doug C. v. State of Haw. Dep't of Educ.*, 720 F.3d 1038, 1045–46 (9th Cir. 2013).

24. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205–06 (1982).

25. See *Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

discusses the IDEA's mandate that school districts deliver a FAPE to all eligible students with disabilities.

## II. THE IDEA AND FAPE

The Education of All Handicapped Children Act was enacted in 1975 to address the educational needs of students with disabilities by providing federal financial assistance to states in order to ensure a FAPE to qualified students with disabilities.<sup>26</sup> Congressional findings indicated that prior to the Act's enactment, the educational needs of students with disabilities were largely unmet.<sup>27</sup> Consequently, the Act's overarching purpose was to ensure "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."<sup>28</sup>

The law has been amended several times over the years to allow children with disabilities to more fully participate in general education, improve educational outcomes, expand parental involvement, and ensure inclusion in state reform efforts.<sup>29</sup> For example, amendments in 1986 allowed courts to award legal fees to parents,<sup>30</sup> mandated services for children ages three to five,<sup>31</sup> and

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26. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401-1461 (2012)); *see also* MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 182 (3d ed. 2012).

27. Congress found,

[T]he educational needs of millions of children with disabilities were not being fully met because—

- (A) the children did not receive appropriate educational services;
- (B) the children were excluded entirely from the public school system and from being educated with their peers;
- (C) undiagnosed disabilities prevented the children from having a successful educational experience; or
- (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

20 U.S.C. § 1400(c)(2) (2012).

28. *See id.* § 1401(d)(1)(A).

29. Mitchell L. Yell et al., *The Individuals with Disabilities Education Act: The Evolution of Special Education Law*, in *HANDBOOK OF SPECIAL EDUCATION*, *supra* note 1, at 61, 63-66.

30. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. § 1415(e)(4)(B)-1415(f) (2012)).

31. 20 U.S.C. § 1435(a)(5) (2012); Infants and Toddlers with Disabilities Education Act of 1986, 20 U.S.C. §§ 1471-1485 (2012).

provided incentives to states for infant programs.<sup>32</sup> In 1990, the law was renamed the Individuals with Disabilities Education Act. Additionally, Congress expanded the IEP provision to include transition services at the age of sixteen.<sup>33</sup> In 1997, the IDEA Amendments aimed to include students with disabilities in state reform efforts through expanded access and progress in the general education curriculum and participation in district and statewide assessments.<sup>34</sup> Congress also set forth disciplinary procedures and alternative dispute conflict resolution systems (i.e., mediation).<sup>35</sup> In 2004, the Individuals with Disabilities Education Improvement Act aligned IDEA with the Elementary and Secondary Education Act's<sup>36</sup> provisions regarding highly qualified personnel, performance indicators, and evidence based practices.<sup>37</sup>

Some scholars have divided the IDEA into major principles for discussion purposes: zero reject, nondiscriminatory assessment, free appropriate public education, least restrictive environment, procedural safeguards, and parental participation.<sup>38</sup> Neither the IDEA's statutory language nor the U.S. Department of Education's Office of Special Education Programs recognizes the division of the law into these principles.<sup>39</sup> Nonetheless, this division is a useful tool for facilitating a thorough understanding of the law. The key principle of the IDEA that may present a challenge to urban school districts is the FAPE.

The keystone of the IDEA is a special education student's entitlement to a FAPE.<sup>40</sup> A challenging aspect of providing

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32. 20 U.S.C. § 1435(a)(5) (2012); Infants and Toddlers with Disabilities Education Act of 1986, 20 U.S.C. §§ 1471-1485 (2012).

33. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1401-1487 (2012)). The IDEA requires that IEPs for older students include plans designed to assist students with disabilities in moving or transitioning from school to post-school settings. *See* § 1401(34).

34. *See generally* Individuals with Disabilities Education Improvement Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified in scattered sections of 20 U.S.C.).

35. *See generally id.*

36. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

37. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 111 Stat. 2647 (codified in scattered sections of 20 U.S.C.).

38. *See, e.g.*, ANN TURNBULL ET AL., EXCEPTIONAL LIVES: SPECIAL EDUCATION IN TODAY'S SCHOOLS, 11-19 (6th ed. 2010); Yell et al., *supra* note 29, at 67-69.

39. Yell et al., *supra* note 29, at 67.

40. Perry A. Zirkel, *Is it Time for Elevating the Standard for FAPE Under IDEA?*, 79 EXCEPTIONAL CHILD, 497, 498 (2013).

educational services to students with disabilities has been to develop an education that is individualized and appropriate to meet a student's unique educational needs.<sup>41</sup> The IDEA requires that all eligible students with disabilities receive a FAPE.<sup>42</sup> According to the IDEA, a FAPE refers to special education services that

(a) [A]re provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program.<sup>43</sup>

The question of what constitutes a FAPE for a given student has been a vexatious and highly litigated issue.<sup>44</sup> In fact, the first special education case heard by the U.S. Supreme Court, *Board of Education of the Hendrick Hudson School District, Westchester County v. Rowley*, involved FAPE issues.<sup>45</sup> In *Rowley*, the Supreme Court established a two-part test to guide lower courts in determining whether a school district was affording a student with a disability a FAPE.<sup>46</sup> Specifically, the *Rowley* test requires the lower courts to ask two questions when determining if a school district has provided a FAPE: "First, has the [school district] complied with the procedures of the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"<sup>47</sup>

When applying the first part of the *Rowley* test, which has been referred to as the procedural prong,<sup>48</sup> a court must determine if a school district has adhered to the applicable procedural requirements of the IDEA.<sup>49</sup> These procedural requirements compel school district personnel to follow the law when developing, implementing, and

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41. See Mitchell L. Yell et. al., *Reflections on the 25th Anniversary of the U.S. Supreme Court's Decision in Board of Education v. Rowley*, 39 FOCUS ON EXCEPTIONAL CHILD. 1, 11 (2007).

42. See 20 U.S.C. § 1401(9) (2012).

43. *Id.*

44. See generally *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Spielberg v. Henrico Cnty. Pub. Sch.*, 853 F.2d 256 (4th Cir. 1988); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988); *Hall v. Vance Cnty. Bd. of Ed.*, 774 F.2d 629 (4th Cir. 1985).

45. 458 U.S. 176, 206-07 (1982)

46. *Id.* at 188-89.

47. *Id.* at 183.

48. Zirkel, *supra* note 40, at 500.

49. *Id.*

evaluating a student's special education program.<sup>50</sup> If a court decides that a school district has failed to adhere to the IDEA's procedural guidelines, the court must examine the error to determine if it resulted in the denial of a FAPE.<sup>51</sup> A school district's procedural violations, therefore, do not automatically require a finding of a denial of a FAPE.<sup>52</sup> If the error has no deleterious effect on a student's education a court will likely hold the error harmless, precluding a finding that the school district has denied the student a FAPE. Professor Zirkel has referred to this type of harmless procedural error as "no harm, no foul."<sup>53</sup> On the other hand, some procedural errors are so serious that a court may rule on that basis alone that a FAPE has been denied and the IDEA has been violated.<sup>54</sup> These errors include procedural errors that result in (a) impeding a student's right to a FAPE, (b) impeding the student's parents the opportunity to participate in the decision-making process, and (c) depriving a student of educational benefits.<sup>55</sup> An example of such a procedural error would be failing to involve a student's parents in developing their child's special education program.<sup>56</sup>

If a school district passes the procedural prong of the test, a lower court will turn to the second or substantive prong.<sup>57</sup> Justice Rehnquist, writing for the majority in *Rowley*, wrote that "Congress' intent . . . was more to open the door of public education to [children with disabilities] on appropriate terms than to guarantee any particular level of education once inside."<sup>58</sup> Justice Rehnquist further wrote that the special education services provided to a student had to be sufficient to confer some educational benefit upon the child with a disability. Rehnquist also wrote that "in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."<sup>59</sup>

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50. Mitchell L. Yell et al., *Avoiding Procedural Errors in Individualized Education Program Development*, 46 TEACHING EXCEPTIONAL CHILD. 56, 57 (2013).

51. Mitchell L. Yell & Jean B. Crockett, *Free Appropriate Public Education*, in HANDBOOK OF SPECIAL EDUCATION, *supra* note 1, at 77, 85.

52. *Id.*

53. Zirkel, *supra* note 40, at 500.

54. *See* Yell et al., *supra* note 50, at 57.

55. 20 U.S.C. § 1415(f)(3)(E)(ii) (2012).

56. *See* Yell et al., *supra* note 50, at 58.

57. Yell & Crockett, *supra* note 50, at 85.

58. Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982).

59. *Id.* at 200.

Thus, in the substantive prong of the test, a court must determine if the IEP was developed to confer educational benefit.<sup>60</sup> This prong of the *Rowley* test requires that IEP teams develop and implement an IEP consisting of individualized services that permit a student to benefit from that instruction.<sup>61</sup> The Supreme Court in *Rowley* noted that a FAPE does not require a school district to maximize the potential of each student with disability “commensurate with the opportunity provided” students without disabilities, nor does it require the best possible education.<sup>62</sup> School districts are required, however, to develop a program designed to meet the unique needs of students with disabilities, supported by such services as needed to permit the student to receive some educational benefit from instruction.<sup>63</sup>

Because of its substantive nature (i.e., is the IEP calculated to confer educational benefit?), part two of the *Rowley* test is clearly a more difficult question for hearing officers and judges.<sup>64</sup> To answer this question, a court has to determine what constitutes an educational benefit. The early post-*Rowley* courts tended to agree that a school district had provided a FAPE as long as the student obtained some educational benefit.<sup>65</sup> In these early rulings, the courts seemingly regarded IEPs as appropriate even if the student received minimal benefit.<sup>66</sup> In ruling on the second prong of the *Rowley* test, however, some courts have required that school districts must do more than the bare minimum and demonstrate that educational services have resulted in meaningful educational benefits.<sup>67</sup> For example, in 1988 the U.S. Court of Appeals for the Third Circuit concluded that “Congress intended to afford children with special needs an education that would confer meaningful benefit,” not just some trivial benefit.<sup>68</sup> Similarly, the U.S. Court of Appeals for the Fifth Circuit in 1997 ruled that benefits must be “likely to produce

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60. Yell et al., *supra* note 49, at 57.

61. Yell & Crockett, *supra* note 51, at 85.

62. *Rowley*, 458 U.S. at 198–200 (internal quotation marks omitted).

63. *Id.* at 192.

64. Yell & Crockett, *supra* note 51, at 85.

65. Mitchell L. Yell et al., *Special Education Law for Leaders and Administrators of Special Education*, in HANDBOOK OF LEADERSHIP AND ADMINISTRATION FOR SPECIAL EDUCATION 69, 94 (Jean B. Crockett et al. eds., 2012).

66. ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION 97 (1996).

67. Scott F. Johnson, *Rowley Forever More? A Call for Clarity and Change*, 41 J.L. & EDUC. 25, 30–32 (2012).

68. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988).

progress, not regression or trivial educational advancement.”<sup>69</sup> In 2004, the U.S. Court of Appeals for the Sixth Circuit also adopted the meaningful benefit standard.<sup>70</sup> After Congress passed the Individuals with Disabilities Education Improvement Act in 2004,<sup>71</sup> Professor Huefner aptly noted “the purpose of IDEA is no longer merely to provide a ‘basic floor of opportunity.’”<sup>72</sup> The expectation of academic and functional progress calls for more than a floor.<sup>73</sup> Although IDEA does not guarantee any certain standard of achievement, “it expects meaningful or substantive progress both toward general curriculum goals and the student’s unique educational goals . . . resulting from the disability.”<sup>74</sup> The vehicle by which a FAPE for students in special education is developed is the IEP.<sup>75</sup>

### III. INDIVIDUALIZED EDUCATION PROGRAMS (IEPS)

To ensure that students eligible for special education services under the IDEA receive a FAPE, the IDEA requires that school-based personnel along with a student’s parents develop an IEP for that student.<sup>76</sup> The IDEA’s centerpiece, and the basis of a student’s entitlement to a FAPE, therefore, is the IEP.<sup>77</sup> In fact, a student’s IEP will usually be accepted in legal proceedings as accurately depicting a student’s special education program and as the primary basis for determining if a school district delivered a FAPE to that student.<sup>78</sup> Thus, a student’s IEP is also the “primary evidence of the appropriateness of his or her educational program—its development, implementation and efficacy.”<sup>79</sup>

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69. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997) (citing *Bd. of Educ. of E. Windsor Reg’l Sch. Dist. v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986)).

70. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004).

71. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

72. Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 378 (2008).

73. *Id.*

74. *Id.*

75. Bateman, *supra* note 1, at 92.

76. JULIE UNDERWOOD & L. DEAN WEBB, *SCHOOL LAW FOR TEACHERS: CONCEPTS AND APPLICATIONS* 147 (2006).

77. Bateman, *supra* note 1, at 92.

78. *Id.* at 94.

79. *Id.* at 91.

### A. IEP Requirements

Not only does the IDEA govern the process of developing an IEP, it also details specific requirements that must be met for an IEP to comply with the law. These requirements are examined in the sections below.

#### 1. Parental Involvement

The most basic IEP requirement is that a student's parents be full, equal, and meaningful participants in the development of their child's IEP, along with school district personnel.<sup>80</sup> Congress emphasized the central role of parents in IEP development and the provision of an appropriate education from the outset in the findings and purposes provision of the IDEA:

Almost thirty years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—strengthening the role and responsibility of parents and ensuring that families . . . have meaningful opportunities to participate in the education of their children at school and at home.<sup>81</sup>

In 2007, the U.S. Supreme Court in *Winkelman ex rel. Winkelman v. Parma City School District* further clarified a school district's responsibilities when it ruled that the "IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child."<sup>82</sup> In fact, "[f]ew, if any, of IDEA's procedural rights are more vigorously protected by courts."<sup>83</sup> Furthermore, the U.S. Court of Appeals for the Ninth Circuit has held that interference with parental participation in IEP development undermines the very essence of the IDEA.<sup>84</sup> The Ninth Circuit explained that an "IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed."<sup>85</sup>

Federal regulations implementing the IDEA encourage full and equal parental participation by requiring school districts to: (a)

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80. *Id.* at 93.

81. 20 U.S.C. § 1400(c)(5)(B) (2012).

82. 550 U.S. 516, 533 (2007).

83. Bateman, *supra* note 1, at 93.

84. *See Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

85. *Id.*

provide a student's parents with adequate notice of IEP meetings; (b) schedule IEP meetings at a mutually agreed upon time and place; (c) inform the parents of the purpose, time, and place of IEP meetings; (d) notify the parents who will attend by district request; (e) notify the parents that they have the right to obtain an independent educational evaluation at public expense if they disagree with the school district's evaluation, and (f) inform the parents of their right to bring others of their choice to the meetings.<sup>86</sup> The U.S. Court of Appeals for the Ninth Circuit recently underscored the importance of securing parents' attendance at their child's IEP in its recent decision, *Doug C. v. State of Hawaii Department of Education*.<sup>87</sup> In *Doug C.*, the Ninth Circuit found that the school district had deprived a student of a FAPE and violated the IDEA when the district held the annual IEP meeting and changed the student's placement without the parent in attendance, despite the parent's request that he be present at the meeting.<sup>88</sup> In a previous decision, the court noted, "Procedural violations that interfere with parental involvement in the IEP formulation process undermine the very essence of the IDEA."<sup>89</sup>

A critical school district IEP mistake that essentially excludes parents from the special education decision-making process is referred to as predetermination.<sup>90</sup> Predetermination is a serious error that can lead to a denial of a FAPE, violating the IDEA. Predetermination occurs when school district personnel essentially decide on a student's program or placement prior to the actual IEP meeting.<sup>91</sup> When placement or program is predetermined, parental participation becomes a charade.<sup>92</sup> In fact, if a student's parents can demonstrate that they were excluded from the programming and placement process, they may be able to obtain relief for a denial of a FAPE.<sup>93</sup> School district personnel must be open and willing to discuss parental concerns and thoughts. IEP team members can come to a meeting with opinions and even a draft IEP, but they cannot bring a completed IEP with them to present to a student's parents.<sup>94</sup> As the court explained in *Doyle v. Arlington County School Board*,

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86. 34 C.F.R. § 300.322 (2013).

87. *Doug C. v. State of Haw. Dep't of Educ.*, 720 F.3d 1038 (9th Cir. 2013).

88. *Id.* at 1044-45.

89. *Amanda J.*, 267 F.3d at 892.

90. Bateman, *supra* note 1, at 95.

91. Yell et al., *supra* note 50, at 59.

92. Bateman, *supra* note 1, at 95.

93. Yell et al., *supra* note 50, at 64.

94. JOHN W. NORLIN, WHAT DO I DO WHEN—: THE ANSWER BOOK ON INDIVIDUALIZED EDUCATION PROGRAMS 4:4 (3d ed. 2009).

“[S]chool officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind.”<sup>95</sup>

Perhaps the most commonly cited example of predetermination occurred in *Deal v. Hamilton County Board of Education*.<sup>96</sup> In this case, the parents of Zachary Deal, a young boy with autism who had made exceptional progress in a program based on the principles of applied behavior analysis (ABA),<sup>97</sup> asked the Hamilton County School District to fund their ABA program. The parents offered what school district personnel called “impressive results” of the ABA program, but nonetheless school district personnel refused to fund the program and instead offered to place the child in their special program for children with autism.<sup>98</sup> The U.S. Court of Appeals for the Sixth Circuit, in ruling for the Deals, found that the Hamilton County School Board had committed a number of violations of the IDEA, including predetermining Zachary’s program and placement.<sup>99</sup> The court concluded that:

The facts of this case strongly suggest that the School System has an unofficial policy of refusing to provide one-on-one ABA programs . . . the clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services.<sup>100</sup>

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95. *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992).

96. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004).

97. ABA is the branch of psychology that is devoted to understanding and improving important social behavior. Mitchell L. Yell et al., *Applied Behavior Analysis*, in EVIDENCE-BASED PRACTICES FOR EDUCATING STUDENTS WITH EMOTIONAL AND BEHAVIORAL DISORDERS, *supra* note 2, at 74–75. It is based on the work of B.F. Skinner, and has three fundamental assumptions. First, a behavioral sequence has three fundamental components: antecedents, behaviors, and consequences. *Id.* The antecedent is an environmental event that occurs immediately before the behavior occurs. *Id.* Then the behavior occurs. *Id.* Finally, a consequence is an environmental event that occurs immediately after the behavior, and makes the behavior more or less likely to reoccur. *Id.* A reinforcing consequence makes a behavior more likely to reoccur and a punishing consequence make behavior less likely to occur. *Id.* Second, the way a person behaves is the result of antecedents and the person’s history of consequences associated with those antecedents. *Id.* Third, teachers must manage and control antecedents to facilitate the learning of socially desirable behaviors. *Id.*

98. *Deal*, 392 F.3d at 858.

99. *Id.*

100. *Id.*

The Court's "conclusion [was] bolstered by evidence that the school system steadfastly refused even to discuss the possibility of providing an ABA program, even in the face of impressive results."<sup>101</sup>

It is crucial that school district personnel make good faith efforts to both coordinate with parents or guardians when scheduling the IEP meetings and to encourage their involvement in the development of their child's IEP. If neither of a student's parents is able to participate in an IEP meeting, school district personnel may use other methods, such as videoconferencing or conference calls, to allow them to participate.<sup>102</sup> Moreover, school district personnel need to allow sufficient time for meetings.<sup>103</sup>

## 2. *Participants in IEP Development*

The law requires that an IEP team include: (a) the child's parents,<sup>104</sup> (b) the child's general education teacher,<sup>105</sup> (c) the child's special education teacher;<sup>106</sup> (d) a representative of the school district who is qualified to provide or supervise the provision of special education, is knowledgeable about the general curriculum, and is authorized to make decisions on behalf of the school district;<sup>107</sup> and (e) an individual who can interpret the instructional implications of the evaluation results, although this individual can be one of the previous team members.<sup>108</sup> Additionally, an IEP team may include other individuals who have knowledge or expertise about the student or the student's disability.<sup>109</sup> This may include related services personnel and others at the discretion of the parents or school district personnel.<sup>110</sup> Whenever an IEP team discusses transition programming for the student, the school district must invite a representative from any agency that is providing or paying for transition services.<sup>111</sup>

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101. *Id.*

102. 34 C.F.R. § 300.501(c)(3) (2013).

103. Yell et al., *supra* note 50, at 60.

104. § 300.321(a)(1).

105. § 300.321(a)(2).

106. § 300.321(a)(3).

107. § 300.321(a)(4).

108. § 300.321(a)(5).

109. § 300.321(a)(6).

110. *Id.*

111. § 300.321(b)(3).

It is imperative that the appropriate team members be present at IEP meetings.<sup>112</sup> In fact, failing to ensure that the composition of the IEP team is in line with the requirements of the IDEA is a procedural error that may thwart a school district's ability to provide a FAPE. Due process hearing officers and courts have invalidated IEPs when the required participants were not involved in the process and their absence affected the document's development.<sup>113</sup> It is likely that hearing officers and courts will conclude that an IEP developed by an improperly constituted IEP team will likewise be defective and fail to provide a FAPE.<sup>114</sup> For example, in *Deal*, the Hamilton school district failed to include a general education teacher at an IEP meeting for a four-year-old child with autism.<sup>115</sup> The school district personnel believed it was unnecessary to have a general education teacher at the IEP meeting; they did not believe that a general education teacher could have made a meaningful contribution to the meeting,<sup>116</sup> despite the fact that one of the reasons for the meeting was to discuss whether or not the student would be included in the general education setting.<sup>117</sup> In reversing the lower court's decision, the Sixth Circuit in *Deal* noted that a general education teacher's input is vitally important in considering the extent to which a student with a disability may be integrated into a general education classroom and how the student's individual needs might be met within that classroom.<sup>118</sup>

To ensure that IEP teams are comprised of appropriate members, school district personnel should: 1) inform local educational agency (LEA) representatives about the importance of including all required members on IEP teams; 2) appoint at least one of the student's general education teachers to participate on a student's IEP team and ensure that he or she is meaningfully involved in team meetings; and 3) ensure that the LEA representative is qualified to provide, or supervise the provision of special education, and that he or she is

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112. IDEA mandates that a core of specific members is present in developing a child IEP. § 300.321(a). A student's parents are integral members of the IEP team. § 300.321(a)(1). The absence of core members can result in violations of the IDEA. NORLIN, *supra* note 94, at 5:2.

113. STEVEN E. LAKE, THE TOP 10 IEP ERRORS: HOW TO AVOID THEM, HOW TO FIX THEM 1-2 (2002).

114. *Id.*

115. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 859-61 (6th Cir. 2004).

116. *Id.*

117. *Id.* at 859.

118. *Id.* at 860-61; *see also* Bateman, *supra* note 1, at 95.

knowledgeable about the general education curriculum and resources available to the school district.

### 3. *IEP Content*

The contents of IEPs are also detailed in the IDEA.<sup>119</sup> Essentially, a student's unique educational needs and the services required to meet those needs are written in his or her IEP.<sup>120</sup> Four questions lie at the heart of the IEP. (1) What are the student's unique educational needs that must be considered in developing the instructional program? (2) What measurable goals will enable the student to achieve meaningful educational benefit? (3) What services will be provided to the student to address each of his or her needs? (4) How will the team monitor the student's progress to determine if the instructional program is effective?<sup>121</sup> These questions are addressed in the three major components of the IEP: (1) present levels of academic achievement and functional performance; (2) measurable annual goals and a description of how the goals will be measured; and (3) statements of special education services.<sup>122</sup> A collaborative good faith effort by IEP team members to answer these questions will help to ensure that a student's IEP is both educationally appropriate and legally sound. Each major component of a student's IEP is explored in the following sections.

#### a. *Present Levels of Academic Achievement and Functional Performance*

The IEP is based on a student's needs as written in the statement of present levels of academic and functional performance (PLAAFP).<sup>123</sup> The purpose of this statement is to describe the problems that interfere with the student's education so that the special education services and annual goals can be developed and student progress can be measured.<sup>124</sup> In effect, this statement of PLAAFP is the starting point from which teams develop the IEP and measure its success.<sup>125</sup> Thus, the PLAAFP statement of creates a baseline for designing a student's educational program and measuring future progress.<sup>126</sup> The

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119. 34 C.F.R. § 300.320 (2013).

120. NORLIN, *supra* note 94, at 2:2.

121. *See* Yell et al., *supra* note 2, at 208.

122. Bateman, *supra* note 1, at 97.

123. § 300.320(a)(1).

124. Bateman, *supra* note 1, at 97.

125. *Id.*

126. NORLIN, *supra* note 94, at 2:9.

statement should also include information about how a student's disability affects his or her involvement and progress in the general education curriculum<sup>127</sup> so that the IEP team can determine what accommodations a student will need to participate in the general education settings to the maximum extent appropriate.<sup>128</sup>

Missing, incomplete, or deficient PLAAFP statements can result in the denial of a FAPE and a violation of the IDEA.<sup>129</sup> The connection between the PLAAFP statement and other components of the IEP has been aptly described by the U.S. Department of Education as being a "direct relationship between the present levels of performance and the other components of the IEP."<sup>130</sup> Thus, if the PLAAFP statement "describes a problem with the child's reading level and points to a deficiency in reading skills, the problem should be addressed under both goals and specific special education and related services provided to the child."<sup>131</sup> The PLAAFP, therefore, becomes the starting point for developing the measurable annual goals and the services to be delineated in a student's IEP. The second component in IEP development is measurable annual goals.

*b. Measurable Annual Goals*

All IEPs must contain measurable annual goals that focus on remediation of academic or functional problems, allow a student to be involved in and make progress in the general education curriculum, and are based on the student's PLAAFP statements.<sup>132</sup> Annual goals are projections the team makes regarding the student's progress in one school year. According to the U.S. Department of Education, "Measurable annual goals . . . are critical to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team . . . can develop strategies that will be most effective in realizing those goals."<sup>133</sup>

The purpose of measurable annual goals is to help the IEP team determine whether a student is making educational progress and if

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127. § 300.320(a)(1)(i).

128. NORLIN, *supra* note 94, at 2:9.

129. *Id.*

130. 34 C.F.R. § 300 app. C (1997).

131. *Id.*

132. § 300.320(a)(2)(i).

133. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 64 Fed. Reg. 12,406, 12,471 (Mar. 12, 1999).

the special education program is providing a meaningful educational benefit.<sup>134</sup> Goals and objectives, correctly written, enable teachers and parents to monitor a student's progress in a special education program and make timely educational adjustments.<sup>135</sup>

When an IEP is written for a student who requires an alternate assessment<sup>136</sup> (usually a student with severe disabilities), the IEP must also contain short-term objectives.<sup>137</sup> A short-term objective breaks down annual goals so that teachers and IEP teams can measure, at intermediate times during a school year, how well a student is progressing toward his or her annual goal.<sup>138</sup>

When developing the measurable annual goals, IEP teams should consider the student's past achievement, current level of performance, practicality of goals, priority needs, and amount of instructional time devoted to reaching the goal.<sup>139</sup> Additionally, the IEP must include information about how the student's progress toward each goal will be measured.<sup>140</sup> This description should be an objective, as opposed to a subjective, method by which a student's progress can be measured.<sup>141</sup> The IEP must also contain a schedule of when and how a student's progress will be reported to his or her

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134. Mitchell L. Yell & Todd W. Busch, *Using Curriculum-Based Measurement to Develop Educationally Meaningful and Legally Sound Individualized Education Programs (IEPs)*, in *A MEASURE OF SUCCESS: THE INFLUENCE OF CURRICULUM-BASED MEASUREMENT ON EDUCATION* 37–38 (Christine Espin et al. eds., 2012).

135. *Id.*

136. Students with disabilities are required to take statewide or district-wide tests that students in general education are required to take. Alternate assessments are used for students with disabilities who are unable to participate in regular assessments even with modifications or accommodations. YELL, *supra* note 26, at 156–58. Alternate assessments are based on either the state's academic content standards or the state's alternate achievement standards. *Id.* Up to one percent of school districts' students with significant intellectual disabilities are eligible to take an alternate assessment based on the state's alternate achievement standards. *Id.* These assessments traditionally have been used to evaluate functional skills in real-life or natural environments and include portfolio, IEP-linked body of evidence, performance assessment, checklist, and traditional test (paper or computer-based). *Id.*

137. *Id.* at 202. The IDEA gives states the choice between following the federal law and eliminating short-term objectives or retaining short-term objectives in the IEPs of students in their states. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,663–64 (Aug. 14, 2006).

138. NORLIN, *supra* note 94, at 2:18.

139. Yell et al., *supra* note 2, at 202.

140. 34 C.F.R. § 300.320(a)(3)(i) (2013).

141. NORLIN, *supra* note 94, at 2:21–22.

parents.<sup>142</sup> Neither the IDEA nor the IDEA's regulations specify how this reporting is to be accomplished, although regulations do suggest that this could be done through quarterly or other periodic reports, concurrent with the issuance of report cards.<sup>143</sup>

*c. Special Education Services, Related Services, and Supplementary Aids and Services*

The third major component of the IEP is the development of services that will be provided to a student to assist that student in meeting his or her goals. These services may include special education services, related services, and supplementary aids and services.<sup>144</sup>

An IEP must include a statement of special education services to be provided by the school district.<sup>145</sup> This includes special education, related services, and supplementary aids and services required to assist students in attaining their IEP goals, to be involved in and make progress in the general education curriculum, to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students with disabilities and nondisabled students.<sup>146</sup>

Special education services are defined as "specially designed instruction" to meet the unique needs of a child with a disability.<sup>147</sup> Specially designed instruction means adapting the content, methodology or delivery of instruction to meet a student's needs.<sup>148</sup> Related services include transportation and the developmental, corrective and other supportive services required to help a child benefit from special education.<sup>149</sup> Supplementary aids and services are any aids or services that are provided in regular education settings and nonacademic settings to allow a student with disabilities to be educated with their nondisabled peers to the maximum extent appropriate.<sup>150</sup>

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142. § 300.320(a)(3)(ii).

143. Yell et al., *supra* note 2, at 202.

144. *Id.*

145. *Id.* at 200.

146. § 300.320(a)(4) (2013).

147. 34 C.F.R. § 300.39(a) (2013).

148. § 300.39(b)(3).

149. 34 C.F.R. § 300.34(a) (2013).

150. 34 C.F.R. § 300.42 (2013).

This requirement commits the school district to providing these services at no charge to parents.<sup>151</sup> The team must determine the special education and related services needs of a student based on the student's needs, not on the availability of services.<sup>152</sup> In addition to enumerating the types of services, the IEP should also include the amount, frequency, and duration of services.<sup>153</sup> The needs must be set forth in the IEP so that everyone working with the child knows the level at which the child is functioning and can develop an IEP.<sup>154</sup>

The provision of special education services, related services, and supplementary aids and services must be based on "peer-reviewed research to the extent practicable."<sup>155</sup> Peer-reviewed research generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets standards of the field before the research is published.<sup>156</sup> Peer-reviewed research applies to academic and nonacademic areas, such as behavior intervention.<sup>157</sup> Determining whether a particular intervention service is based on peer-reviewed research may require a review of literature or other information that reports on the use of evidence-based practices by peer providers.<sup>158</sup> The intent of this requirement is to ensure that the IEP team's selection of educational approaches reflects sound practices that have been validated empirically whenever possible.<sup>159</sup>

The U.S. Department of Education has clarified that the IEP team has the final say about peer-reviewed research: "This does not mean that the service with the greatest body of research is necessarily required for a child to receive FAPE . . . the final decision about the

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151. Yell et al., *supra* note 2, at 202–03.

152. YELL, *supra* note 26, at 255.

153. 34 C.F.R. § 300.320(a)(7).

154. NORLIN, *supra* note 94, at 2:8.

155. § 300.320(a)(4).

156. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,664 (Aug. 14, 2006).

157. *Id.* at 46,683.

158. See Letter to Kane, 55 IDELR 203 (Office of Special Educ. Programs Feb. 12, 2010).

159. Susan Etscheidt & Christina M. Curran, *Peer-Reviewed Research and Individualized Education Programs (IEPs): An Examination of Intent and Impact*, 18 EXCEPTIONALITY 138, 139 (2010).

special education and related services, and supplementary aids and services . . . must be made by the child's IEP Team.”<sup>160</sup>

The IEP content must include the PLAAFP statement, the measurable annual goals, the methods by which teachers will measure a student's progress toward his or her goals, and the special education services that will be provided to a student.<sup>161</sup> The IDEA also requires that the content discussed in the following sections be included in a student's IEP.

*d. Extent to Which a Student Will Not Participate in General Education*

The IEP must include an explanation of the extent to which a student with disabilities will not participate with nondisabled students in general education classes.<sup>162</sup> The purpose of including this requirement in all IEPs is to ensure that IEP teams carefully consider the extent to which a student will be educated with his or her nondisabled peers.<sup>163</sup> If team members decide that the student cannot participate full time with nondisabled students, the IEP must include a statement that explains the extent to which the student will not participate with nondisabled students in the general education classroom.<sup>164</sup>

*e. State- and District-Wide Assessments*

Because students with disabilities must be included in state- and district-wide assessments, an IEP team must determine if a student will participate in the same assessment as his or her nondisabled peers or if he or she will participate in the same assessment but with accommodations.<sup>165</sup> Accommodations refer to changes in testing materials or procedures to ensure that the assessment actually measures a student's knowledge and skills rather than a student's disability. If the team decides that a student needs accommodations

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160. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006).

161. Mitchell L. Yell et al., *Contemporary Legal Issues in Special Education, in CRITICAL ISSUES IN SPECIAL EDUCATION: ACCESS, DIVERSITY, AND ACCOUNTABILITY* 16, 21 (Audrey McCray Sorrells et al. eds., 2004).

162. 34 C.F.R. § 300.320(a)(5) (2013).

163. YELL, *supra* note 26, at 256.

164. § 300.320(a)(5).

165. § 300.320(a)(6)(i).

to validly measure his or her academic and functional performance, the IEP must include a statement of these accommodations.<sup>166</sup>

Because the IDEA requires that a student's IEP address all of his or her unique educational needs, some students' IEPs will contain additional required components. Two such areas are problem behavior and transition needs.

*f. Behavior Interventions*

The IDEA requires that when a student has behavior problems that impede his or her learning or the learning of others, the student's IEP team must consider the use of positive behavioral interventions that address the problem behavior.<sup>167</sup> When such plans are developed, they are often referred to as behavior intervention plans (BIPs).<sup>168</sup> As the language of the regulation indicates the emphasis is placed on positive rather than punitive interventions and procedures.<sup>169</sup> In fact, a behavior intervention plan with primarily punitive interventions and strategies will likely be suspect and viewed as such by hearing officers.<sup>170</sup>

*g. Transition Plans*

A major purpose of the IDEA is to prepare students with disabilities for post-school life.<sup>171</sup> Scanlon views successful transition as the ultimate outcome of special education, as well as the ultimate measure of effectiveness.<sup>172</sup>

Beginning with the first IEP in effect when the student turns sixteen years old, the IEP must include a transition plan that contains: (1) measurable postsecondary goals based on age-appropriate transition assessments; (2) services needed to enable the student to reach these goals; and (3) a statement that IDEA rights transfer from the parents to the student upon reaching the age of majority under

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166. § 300.320(a)(6)(i).

167. § 300.324(a)(2)(i).

168. Behavior intervention plans are comprehensive and non-coercive plans that teach students adaptive and socially desirable skills that replace destructive, stigmatizing, and undesirable behaviors. Erik Drasgow et al., *Functional Behavioral Assessments, Behavior Intervention Plans, and the Collection of Data on Student Progress*, EVIDENCE-BASED PRACTICES FOR EDUCATING STUDENTS WITH EMOTIONAL AND BEHAVIORAL DISORDERS, *supra* note 2, at 104–05.

169. NORLIN, *supra* note 94, at 7:2–5.

170. *Id.* at 7:6.

171. David Scanlon, *Transition to Adulthood and High Incidence Disabilities*, in HANDBOOK OF SPECIAL EDUCATION, *supra* note 1, at 569.

172. *Id.*

state law.<sup>173</sup> In some states, the age by which transition programming must be included in an IEP is less than age sixteen, which is in line with transition researchers and practitioners who agree that the earlier the inclusion of transition planning in the IEP process, the better.<sup>174</sup> For example, in South Carolina, transition services must begin at age thirteen.<sup>175</sup> The purpose for including transition planning and programming in students' IEPs is to require the IEP teams to consider where a student is heading after leaving school and to implement programming and services that will assist the student in reaching his or her post school goals.<sup>176</sup>

Transition programming is defined as: "A coordinated set of activities for a child with a disability that: (1) is designed to be a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities."<sup>177</sup> Such activities may include "post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation."<sup>178</sup> As with all other components of IEPs, transition plans are based on an individual student's needs, which takes into account the "child's strengths, preferences, and interests . . . and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation."<sup>179</sup> As with the entire special education process, the key to successful transition planning and programming is individualization and appropriateness.<sup>180</sup>

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173. 34 C.F.R. § 300.320(b)–(c) (2013).

174. James G. Shriner et al., *Development of Individualized Education Programs for Students with Emotional or Behavior Disorders: Coordination with Transition Plans*, in *TRANSITION OF SECONDARY STUDENTS WITH EMOTIONAL OR BEHAVIORAL DISORDERS: CURRENT APPROACHES FOR POSITIVE OUTCOMES* 171, 173 (Douglas Cheney ed., 2d ed. 2010).

175. S.C. CODE Ann. § 43-243(IV)(D)(1)(b) (2011).

176. NORLIN, *supra* note 94, at 10:1.

177. 34 C.F.R. § 300.43 (2013).

178. *Id.*

179. 20 U.S.C. § 1401(34) (2012).

180. NORLIN, *supra* note 94, at 10:2.

### B. Implementing and Revising IEPs

After developing a student's IEP, a school district is responsible for implementing the student's individualized program.<sup>181</sup> An IEP is similar to a contract in that the school district is promising, in writing, to provide specific educational services to a particular student to ensure that the student receives a FAPE.<sup>182</sup> The IEP is not a guarantee of performance; rather it is a guarantee of resources and services.<sup>183</sup>

A number of cases have examined situations in which school districts have not implemented the IEP as written.<sup>184</sup> The primary issue in such cases is how perfect the implementation must be to comply with IDEA.<sup>185</sup> In 2006, the U.S. Court of Appeals for the Second Circuit held that the IDEA requires compliance and distinguishes that term from substantial compliance.<sup>186</sup> Previously, the Fifth<sup>187</sup> and the Eighth Circuits<sup>188</sup> issued similar holdings; when determining if a violation of the IDEA exists, a court must examine the shortfall in IEP services offered and the progress of the student. A school district violates the IDEA when it fails to implement an essential provision of the IEP that was necessary for a student to receive an educational benefit.<sup>189</sup> In 2007, the Ninth Circuit held in *Van Duyn ex rel. Van Duyn v. Baker School District 5J* that to violate the IDEA, there must have been more than a minor discrepancy between what the school provided and what the IEP required.<sup>190</sup> A strong dissent to the decision called the ruling unworkably vague and inconsistent with the language of IDEA, which requires services to be provided in conformity with or in accordance with the IEP.<sup>191</sup> The dissent proposed a per se rule where any deviation in implementation of the IEP would violate the IDEA. According to the dissent, "Judges are not in a position to determine which parts of an agreed-

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181. Bateman, *supra* note 1, at 104.

182. LAKE, *supra* note 113, at viii.

183. *Id.*

184. Bateman, *supra* note 1, at 104.

185. *Id.*

186. D.D. *ex rel. V.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 512 (2d Cir. 2006).

187. *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

188. *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003).

189. Bateman, *supra* note 1, at 104.

190. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770, 778-80 (9th Cir. 2007), *opinion amended and superseded by Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007).

191. *Id.* at 785 (Ferguson, J., dissenting).

upon IEP are or are not material.”<sup>192</sup> However, the courts have typically given school districts some leeway and have required a significant or material failure to implement an IEP before finding a violation of the IDEA.<sup>193</sup>

According to the IDEA, a school district must ensure that the team reviews a student’s IEP annually to determine whether student achieved the annual goals.<sup>194</sup> A school district, does not meet its obligations by simply reviewing every student’s IEP on an annual basis; however, because students’ needs change, some students’ IEPs will need more frequent reviews.<sup>195</sup> A student’s IEP must be reviewed and revised to address: (a) any lack of expected progress toward the annual goals or in the general education curriculum, (b) the results of a reevaluation, (c) information about a student as provided to or by the parents, or (d) a student’s anticipated needs.<sup>196</sup> As noted by the U.S. Department of Education, “if either a parent or a public agency believes that a required component of the student’s IEP should be changed, the public agency must conduct an IEP meeting if it believes that a change in the IEP may be necessary to ensure the provision of FAPE.”<sup>197</sup>

When a student’s IEP is revised, these changes can be made at an IEP meeting by the entire team or by amending the IEP, rather than redrafting the entire IEP.<sup>198</sup> School district personnel and a student’s parents may agree not to convene a full team meeting for purposes of making changes, but they do need to develop a written document, which is appended to an IEP, to modify the current IEP<sup>199</sup> and to notify the team of the changes.<sup>200</sup>

#### IV. PLACEMENT AND STUDENTS WITH DISABILITIES

A placement team, which consists of knowledgeable school personnel and a student’s parents, determines the setting in which the student will receive his or her special education services.<sup>201</sup> The

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192. *Id.*

193. Bateman, *supra* note 1, at 104.

194. 34 C.F.R. § 300.324(b)(1)(i) (2013).

195. NORLIN, *supra* note 94, at 3:5.

196. § 300.324(b)(1)(ii).

197. 34 C.F.R. § 300 app. A (2006).

198. § 300.324(a)(6).

199. § 300.324(a)(4)(ii).

200. § 300.324(b)(1)(ii).

201. Bateman, *supra* note 1, at 93.

placement determination is not actually part of the IEP process.<sup>202</sup> Nevertheless, the IEP team usually determines a student's placement,<sup>203</sup> a practice that is entirely acceptable because parents are part of both the IEP team and the placement team, and as members of IEP teams are as knowledgeable about the student as are members of a placement team.<sup>204</sup>

The two primary requirements regarding placement decisions for students with disabilities are: (a) the placement decision can be made only after the IEP is developed, and (b) the student's placement must be in accordance with the IDEA's principle of least restrictive environment (LRE).<sup>205</sup>

First, a student's placement must be based on his or her IEP.<sup>206</sup> This requirement exists because the placement team must have a basis for determining the setting in which the student's unique educational needs can be met and the team does not have this information until after a student's IEP is developed.<sup>207</sup> The practice of determining a student's placement prior to developing his or her IEP is a practice that has been called "shoehorning,"<sup>208</sup> because when a school district determines a student's placement before developing his or her IEP, it essentially "shoehorns" a student's program into the placement.<sup>209</sup> School district personnel that place a student prior to programming are violating the IDEA.<sup>210</sup>

In *Spielberg ex rel. Spielberg v. Henrico County Public Schools*, the Henrico County School District had been paying the tuition of Jonathan Spielberg, a student with severe intellectual disabilities, to attend a private residential school in Pennsylvania where he received year-round schooling as well as after school care.<sup>211</sup> The school district reevaluated Jonathan and changed Jonathan's placement to a public facility instead of the private school, and Jonathan's parents

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202. *Id.*

203. *Id.*

204. *Id.*

205. Yell et al., *supra* note 49, at 59–60.

206. 34 C.F.R. § 300.116(b) (2013).

207. BARBARA D. BATEMAN & MARY ANNE LINDEN, *BETTER IEPs: HOW TO DEVELOP LEGALLY CORRECT AND EDUCATIONALLY USEFUL PROGRAMS* 74 (5th ed. 2012).

208. Yell et al., *supra* note 50, at 60.

209. *Id.*

210. BATEMAN & LINDEN, *supra* note 207, at 14, 74.

211. *Spielberg ex rel. Spielberg v. Henrico Cnty. Pub. Sch.*, 853 F.2d. 256, 256 (4th Cir. 1988).

appealed the school district's decision.<sup>212</sup> The federal district court ruled that the school district had followed the requirements of the law and Jonathan's parents filed another appeal.<sup>213</sup> The Court of Appeals for the Fourth Circuit held that school officials had violated the law's procedures, thereby denying Jonathan a FAPE, when they decided to change his placement and then developed an IEP to carry out their decision.<sup>214</sup> The Fourth Circuit noted that making a placement decision before developing an IEP on which to base a student's placement violates the IDEA regulations<sup>215</sup> and both the spirit and intent of the law.<sup>216</sup>

Second, the IDEA requires that, when appropriate, students with disabilities be educated in settings with children without disabilities in the least restrictive environment.<sup>217</sup> Specifically, the law provides, "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled . . . ."<sup>218</sup> The IDEA then requires:

special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>219</sup>

This provision is the least restrictive environment mandate of the IDEA.

There are two parts to the least restrictive environment requirement of the IDEA. The first addresses the presumptive right of all students with disabilities to be educated with students without disabilities.<sup>220</sup> School personnel, working together with a student's parents, must make good faith efforts to place and maintain the student in less restrictive settings.<sup>221</sup> The second part of the least restrictive environment requirement states that when placement in an environment with nondisabled students is not appropriate for a

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212. *Id.* at 257–58.

213. *Id.*

214. *Id.* at 259.

215. *Id.*

216. *Id.*

217. 20 U.S.C. § 1412 (2012).

218. *Id.*

219. *Id.*

220. YELL, *supra* note 26, at 271.

221. *Id.*

student with disabilities, the student can be moved to a more restrictive setting.<sup>222</sup> The presumptive right to placement in a setting with nondisabled students, therefore, is rebuttable. That is, the principle sets forth a general rule of conduct (i.e., integration) but it may be rebutted when integration is not appropriate for a student.<sup>223</sup> Thus, the IDEA favors integration, but recognizes that for some students, more restrictive or segregated settings may be appropriate. The IDEA anticipates that placements in more restrictive settings may sometimes be necessary to provide an appropriate education.<sup>224</sup> According to the U.S. Supreme Court, “Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children.” The (IDEA) “thus provides for the education of some handicapped children in separate classes.”<sup>225</sup> According to the U.S. Department of Education’s Office of Special Education and Rehabilitation Services, the purpose of maintaining additional settings is because some students with disabilities “may require placement in settings other than the regular education classroom in order to be provided with an education designed to address their unique needs.”<sup>226</sup>

Nevertheless, the least restrictive environment mandate requires that before students with disabilities are placed in more restrictive settings, efforts must first be made to maintain them in less restrictive settings with the use of supplementary aids and services.<sup>227</sup> It is only when a school cannot provide an appropriate education, even with supplementary aids and services, that students with disabilities may be placed in more restrictive settings.<sup>228</sup>

To ensure that students with disabilities are educated in the least restrictive environment that is most appropriate for their unique individual needs, the IDEA requires school districts to provide a range or continuum of alternative placement options to meet students’ needs.<sup>229</sup> The U.S. Department of Education’s Office of Special Education and Rehabilitative Services has stated that the purpose of requiring a continuum of placement options is so that

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222. *Id.*

223. H. RUTHERFORD TURNBULL III, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* 257 (7th ed. 2007).

224. YELL, *supra* note 26, at 286.

225. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 n.4 (1982).

226. Letter to Goodling, 18 IDELR 213, 214 (Office of Special Educ. & Rehabilitative Servs. July 11, 1991).

227. YELL, *supra* note 26, at 271.

228. *Id.* at 271-72.

229. *Id.* at 272.

school districts are prepared to address the individual needs of all students.<sup>230</sup> The continuum represents, therefore, an entire spectrum of placements where a student's special education program can be implemented.<sup>231</sup> Regulations require that "[e]ach [school district] shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."<sup>232</sup> Moreover, this continuum must "[i]nclude the alternative placements . . . (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions)"<sup>233</sup> and include "supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement."<sup>234</sup>

The less restrictive settings on the continuum are typically the settings closest to the general education classroom or mainstream.<sup>235</sup> It is very important that school districts consider the continuum of placements when students are educated in more restrictive settings.<sup>236</sup> This means that IEP teams should not move students to a more restrictive placement (e.g., a special class) without first attempting to educate the student in a less restrictive setting (e.g., the general classroom with supplementary aids and services).

On the other hand, school districts should not substitute a policy of full inclusion for the continuum of placements. Placement has been at the center of an "[i]deological storm" in the past decade.<sup>237</sup> Proponents of full inclusion argue that the proper learning environment for all children, with and without disabilities, is the general education classroom.<sup>238</sup> Many educators, adults with disabilities, and advocacy organizations, however, argue that full inclusion deprives many students of the special education services they need to meet their unique educational needs.<sup>239</sup> As Bateman and Linden have noted, "[w]hile, the storm rages, the law quietly remains unchanged. There is not now, and has never been, a requirement that all children with disabilities be "included" or "mainstreamed" in the

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230. See Letter to Frost, 19 IDELR 594 (Office of Special Educ. & Rehabilitative Servs. Dec. 24, 1991).

231. *See id.*

232. 34 C.F.R. § 300.551 (2013).

233. *Id.*

234. *Id.*

235. YELL, *supra* note 26, at 272–74.

236. *Id.*

237. BATEMAN & LINDEN, *supra* note 207, at 16.

238. *Id.*

239. *Id.*

regular classroom.”<sup>240</sup> Placing students with disabilities in either full inclusion or segregated settings without considering their individual needs violates the IDEA.<sup>241</sup>

When placing students with disabilities in the appropriate educational settings, there are three overarching principles that IEP teams must follow.<sup>242</sup> First, a central principle of the IDEA is that a student’s individual needs are the most important consideration when determining educational services and placement. The team that develops a student’s IEP must first determine what educational services are required and then where these services can be most appropriately delivered.<sup>243</sup> Placement decisions should never be based on the category or severity of a student’s disability. Rather, placement, like educational services, should be determined based on the student’s individual needs.<sup>244</sup> Nothing in the statutory or case law indicates that LRE considerations are intended to replace considerations of appropriateness.<sup>245</sup> In determining a student’s special education program and placement, therefore, questions of what educational services are required must precede questions of where they should be provided.<sup>246</sup>

Second, the IDEA’s least restrictive environment mandate sets forth a clear preference for educating students with disabilities in integrated placements.<sup>247</sup> That is, students with disabilities have a right to be educated with students who are not disabled to the maximum extent appropriate.<sup>248</sup> IEP teams, therefore, must make good-faith efforts to educate students with disabilities in integrated settings.<sup>249</sup> The third principle is that when determining placement, if the team decides that a general education placement is not appropriate, the team must have the optional placements available in the continuum of placements from which to choose a placement that is appropriate and based on a student’s individual needs.<sup>250</sup>

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240. *Id.*

241. *Id.*

242. YELL, *supra* note 26, at 283–87.

243. Yell et al., *supra* note 50, at 60–61.

244. *Id.*

245. *Id.*

246. Yell et al., *supra* note 2, at 208.

247. YELL, *supra* note 26, at 286.

248. *Id.*

249. *Id.*

250. *Id.* at 288.

## V. DEVELOPING EDUCATIONAL, MEANINGFUL, AND LEGALLY SOUND IEPs

A hearing officer in Vermont aptly described the IEP process as follows: “The IEP can be viewed as an intricate puzzle . . . whose sole purpose is to create an educational program from which a disabled child can benefit. How the puzzle is constructed is crucial. Missing pieces jeopardize the whole picture.”<sup>251</sup>

Earlier in this Article we asserted that there are four questions at the heart of the IEP process. By considering these four questions while planning, implementing, and evaluating a student’s IEP, educators and parents can ensure that they collaboratively develop IEPs that are educationally appropriate and legally sound; that all the pieces of the puzzle fit together. Each question is addressed in turn.

### A. Question One: What Are the Student’s Unique Educational Needs that Must Be Considered in Developing the Student’s Instructional Program?

A school must conduct a full and individualized assessment of a student prior to providing special education services.<sup>252</sup> A meaningful and relevant assessment, which must cover all areas related to a student’s disability, forms the basis of the entire IEP.<sup>253</sup> The identified needs are entered into the IEP as the PLAAFP.<sup>254</sup> These statements describe a student’s academic and nonacademic problems that interfere with the student’s education so that (a) annual goals can be developed, (b) special education services can be determined, and (c) a student’s progress can be measured.<sup>255</sup> In effect, the PLAAFP statements become baselines by which IEP teams develop a student’s special education program and measure the success of that program.<sup>256</sup> All components of a student’s IEP, therefore, must follow logically from these statements.

Professor Bateman describes the importance of the assessment and the PLAAFP statements as if the IEP were a house: “the assessment of the student would be the foundation, the IEP itself the framing, and the placement decision the roof. The IEP must stand solidly and

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251. Rutland South Supervisory Union, 33 IDELR 140 (Vt. State Educ. Agency Aug. 23, 2000).

252. BATEMAN & LINDEN, *supra* note 207, at 13.

253. Bateman, *supra* note 1, at 93.

254. *Id.* at 97.

255. Yell & Crockett, *supra* note 51, at 79.

256. Bateman, *supra* note 1, at 97.

squarely on a foundation of current, accurate evaluations of the student's level of performance in academic and functional areas."<sup>257</sup>

A district court judge from the Southern District of West Virginia used a similar metaphor when commenting on the importance of a full and individualized assessment. He wrote that if the assessment and subsequent levels of academic and functional performance statement is not done properly:

[t]his deficiency goes to the heart of the IEP . . . level of academic achievement and functional performance is the foundation on which the IEP must be built. Without a clear identification of [the child's] present levels, the IEP cannot set measurable goals, evaluate the child's progress and determine which educational and related services are needed.<sup>258</sup>

To ensure that assessments are relevant and meaningful, and that the present levels provide the basis for educationally appropriate and legally sound IEPs, school districts should first ensure that IEP teams include members with expertise in a student's suspected areas of need. For example, if referrals and interviews indicate possible behavior problems, a person with behavioral expertise should be included on the IEP team. Similarly, if a student has needs assistive technology devices or services, the IEP team should include a person with expertise in conducting assessments of assistive technology needs. Second, a student's parents should be informed and have an opportunity to be involved in the assessment process. Parents can provide valuable information to the team regarding a student's strengths and needs. Third, the IEP team must ensure that all of a student's academic and nonacademic needs that are included in the present levels statements have a corresponding measurable annual goal and a special education program to address that need.

#### **B. Question Two: What Measurable Goals Will Enable the Student to Achieve Meaningful Educational Benefit?**

Measurable annual goals are fundamental to the IDEA and to the provision of a FAPE.<sup>259</sup> Annual goals focus on remediating a student's academic or nonacademic problems that are detailed in his or her present statements. They are projections the team makes regarding the student's progress in one school year. By measuring the

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257. *Id.* at 93.

258. Kirby *ex rel.* v. Cabell Cnty. Bd. of Educ., 2006 WL 2691435, at \*8 (S.D.W. Va. Sept. 19, 2006).

259. Bateman, *supra* note 1, at 98.

annual goals, members of the IEP team can determine if the anticipated outcomes for the student are being met, and whether the special education services and placement are effective. In a proposed rule, the U.S. Department of Education described a student's measurable goals as being "instrumental to the strategic planning process used to develop and implement the IEP."<sup>260</sup> Moreover, after the IEP team has developed the measurable annual goals for a student,

the team can (1) develop strategies that will be most effective in realizing these goals, and (2) develop measurable, intermediate steps [progress markers] . . . that will enable families, students, and educators to monitor progress during the year and, if appropriate, to revise the IEP consistent with the child's instructional needs.<sup>261</sup>

Unfortunately, too few IEP team members or special education teachers know how to write measurable goals and too few goal writers actually intend that anyone actually measure the progress a student makes toward achieving the goals.<sup>262</sup> In fact, too often "IEPs and their goals are viewed by many as mere paperwork to be filed and forgotten, and are not seen as the daily guide to the child's education."<sup>263</sup> Not knowing how to write a measurable goal plus not intending to try to measure student progress may leave IEP goals meaningless and useless.<sup>264</sup>

Fortunately, there are a number of excellent "how to" books on writing measurable annual goals.<sup>265</sup> These resources can be excellent sources of information for special educators. All of these resources essentially teach variations on a method originally developed by Dr. Robert Mager in 1963.<sup>266</sup> According to Dr. Mager, the following three components are absolutely necessary for a goal to be measurable: first, a measurable goal needs to include an observable behavior that

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260. Assistance to States for the Education of Children with Disabilities, Preschool Grants for Children with Disabilities, and Early Intervention Program for Infants and Toddlers with Disabilities, 62 Fed. Reg. 55,026, 55,124 (proposed Oct. 22, 1997).

261. *Id.*

262. Bateman, *supra* note 1, at 98.

263. *Id.*

264. *Id.*

265. See generally BARBARA D. BATEMAN, FROM GOBBLEDYGOOK TO CLEARLY WRITTEN ANNUAL IEP GOALS (2007); BARBARA D. BATEMAN & CYNTHIA M. HERR, WRITING MEASURABLE IEP GOALS AND OBJECTIVES (2006); CAROL KOSNITSKY, IEP GOALS THAT MAKE A DIFFERENCE: AN ADMINISTRATOR'S GUIDE TO IMPROVING THE PROCESS (2008); ROBERT F. MAGER, PREPARING INSTRUCTIONAL OBJECTIVES: A CRITICAL TOOL IN THE DEVELOPMENT OF EFFECTIVE INSTRUCTION (3d ed. 1997).

266. See generally ROBERT F. MAGER, PREPARING INSTRUCTIONAL OBJECTIVES: A CRITICAL TOOL IN THE DEVELOPMENT OF EFFECTIVE INSTRUCTION (1962).

a student must perform.<sup>267</sup> For example, “will read aloud” is observable; however, “will enjoy reading” is not. Second, a measurable goal needs a condition under which the performance is to occur.<sup>268</sup> If a teacher needs to measure the target behavior of “read aloud,” a condition would be the method by which the teacher would measure the number of words read aloud. For example, “when given a reading passage from the 4th grade reading textbook, and one minute to read,” is a condition statement that tells how the goal will be measured. Dr. Mager’s third component is the criterion for acceptable performance.<sup>269</sup> This component of the goal lists the criteria a student must meet in order to have achieved the goal. For example, the criteria could be “100 words per minute with less than 2 errors.” Thus, the following is an example of a measurable goal that would meet Dr. Mager’s three criteria: “When given a passage from the Fourth grade reading textbook and one minute to read the student will read aloud 100 words per minute with less than 2 errors.”

It is important that IEP team members know how to develop measurable annual goals. Writing measurable annual goals is often a difficult and frustrating task for IEP team members because usually they have not been taught a simple method of writing such goals.<sup>270</sup> When school-based personnel are taught the methods to writing measurable annual goals, such as the methods based on Mager’s three-components, the mystery is removed, the steps revealed, and writing measurable annual goals becomes an easy exercise.<sup>271</sup>

To ensure that IEP team members can develop measurable annual goals, teachers need to be taught how to write a measurable goal directly.<sup>272</sup> First, school district officials and state departments of education should provide professional development activities on goal writing. Second, teachers need practice and feedback in goal writing to help hone their skills. Third, school district personnel should evaluate goals written in IEPs for measurability.

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267. *Id.* at 51.

268. *Id.* at 83.

269. *Id.* at 110.

270. Bateman, *supra* note 1, at 91.

271. *Id.*

272. *Id.*

**C. Question Three: What Services Will Be Provided to the Student to Address Each of His or Her Needs?**

All students' IEPs must include a statement of the specific special education services, related services, and supplementary aids and services that will be provided by a school district to address the student's academic and nonacademic needs.<sup>273</sup> The purpose of the statements is to clarify the services that the school will provide to help the student (a) progress toward his or her annual goals, and (b) be involved in and progress in the general education curriculum.<sup>274</sup> These services must be individualized and reflect a student's unique needs, not the availability of services in a school district.<sup>275</sup>

The descriptions of services in the IEP should be understandable to every person on the IEP team, including a student's parents.<sup>276</sup> This means that the IEP should not include abbreviations, acronyms, or any terms whose meaning is not readily apparent.<sup>277</sup>

When an IEP team proposes that a program or service is included in a student's IEP, there should be reliable evidence that the program or service is effective.<sup>278</sup> This evidence should be based on research in peer-reviewed literature or approved by a panel of independent experts through a rigorous, objective, and scientific review.<sup>279</sup> The peer-reviewed research requirements, described earlier in this article, apply to the selection and provision of special education methodology (e.g., reading programming, speech & language services, behavioral interventions), related services (e.g., counseling services, physical therapy, psychological services), supplementary aids, services, supports, and program modifications provided in general education settings.<sup>280</sup>

A clear implication of the peer-reviewed research requirement is that IEP team members, especially special education teachers on a team, need to understand and remain current on research in their areas and strive to base IEP services in procedures, strategies, and

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273. 34 C.F.R. § 300.320(a)(4) (2012).

274. *Id.*

275. BATEMAN & LINDEN, *supra* note 207, at 54.

276. Bateman, *supra* note 1, at 101.

277. *Id.*

278. Mitchell L. Yell & Michael Rozalski, *The Peer-Reviewed Research Requirement of the IDEA*, in EVIDENCE-BASED PRACTICES: AN EXAMINATION OF LAW AND POLICY 149, 158-59 (Bryan G. Cook et. al. eds., 2013).

279. 20 U.S.C. § 7801(37) (2012).

280. Yell & Rozalski, *supra* note 278, at 159.

interventions that have support in the research literature.<sup>281</sup> Moreover, IEP team members should be prepared to discuss peer-reviewed research in IEP meetings and be able to explain the research behind the special education and related services they propose to include in a student's IEP. IEP team members must also acknowledge and discuss research that parents propose at IEP meetings.

It is important that a school district implement the services and interventions that are included in a student's IEP as closely as possible to the terms included in the IEP.<sup>282</sup> Furthermore, such services and interventions should be implemented with fidelity, which means as close as possible as intended.<sup>283</sup> This means that teachers should implement interventions in the manner that the interventions were designed or intended to be implemented.<sup>284</sup> If interventions are not implemented as intended, "it is impossible to determine whether poor student outcomes result from an ineffective intervention or an effective intervention that is poorly implemented."<sup>285</sup>

Special education researchers are constantly developing, testing, and publishing research findings that can and do improve educational outcomes for students with disabilities. It is difficult for IEP team members to keep current on the latest research findings.<sup>286</sup> Therefore, it is up to school and state officials to structure professional development activities for their teachers that keep them abreast of new and improved ways to educate students with disabilities.<sup>287</sup> The Institute of Education Sciences in the U.S. Department of Education has developed the What Works Clearinghouse<sup>288</sup> to help educators and policy makers make evidence-based decisions about educating their students. Additionally, the Office of Special Education Programs in the U.S. Department of Education funds National Technical Assistance Centers to provide assistance to state educational agencies and school districts in evidence based practices in numerous areas. The Technical Assistance and Dissemination

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281. *Id.* at 167.

282. *See* Bateman, *supra* note 1, at 104.

283. *See* Lisa M. Hagermoser Sanetti & Thomas R. Kratochwill, *Treatment Integrity Assessment in the Schools: An Evaluation of the Treatment Integrity Planning Protocol*, 24 SCH. PSYCHOL. Q. 24, 24 (2009).

284. *Id.*

285. *Id.*

286. *See* Yell & Rozalski, *supra* note 278, at 168.

287. *Id.*

288. *See generally* *What Works Clearinghouse*, INST. OF EDUC. SCI., <http://ies.ed.gov/ncee/wwc> (last visited Dec. 18, 2013).

Network maintains a website on which educators can access the websites of each National Center.<sup>289</sup> Two examples of National Technical Assistance Centers are the Center on Positive Behavior Supports and Interventions<sup>290</sup> and the Center on Intensive Interventions.<sup>291</sup>

#### **D. Question Four: How Will the Team Monitor the Student's Progress to Determine if the Instructional Program is Effective?**

All students' IEPs must describe how and when student progress will be measured and reported.<sup>292</sup> This requirement is a response to the movement toward greater accountability in education, and its purpose is to: (a) increase student achievement through the systematic and frequent progress monitoring, and (b) inform parents and educators of a student's progress toward his or her annual goals.<sup>293</sup> Then, of course, a student's special education teacher must actually measure a student's progress as required in his or her IEP.

"Progress monitoring is a scientifically based practice that is used to assess students' academic and functional performance and evaluate the effectiveness of instruction."<sup>294</sup> The primary assumption behind progress monitoring is that it creates a database for each student that allows his or her teacher to evaluate the effectiveness of the student's educational program by creating a formative evaluation framework in which the teacher collects data on student performance and determines if the student is becoming more proficient in his knowledge or skills.<sup>295</sup> Professor Deno likens teachers using progress monitoring assessments to measure student growth to the practice of physicians collecting the vital signs of health to monitor a person's physical health (e.g., measuring blood pressure, temperature). Both provide important information regarding the student or patient's well-being.<sup>296</sup>

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289. See generally *Find A Center*, TA&D NETWORK, <http://www.tadnet.org/pages/526-find-a-center> (last visited Dec. 18, 2013).

290. OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAV. INTERVENTIONS & SUPPORTS, [www.pbis.org](http://www.pbis.org) (last visited Dec. 18, 2013).

291. NAT'L CENTER ON INTENSIVE INTERVENTION, <http://www.intensiveintervention.org> (last visited Dec. 18, 2013).

292. 34 C.F.R. § 300.320(a)(3)(i)-(ii) (2013).

293. YELL, *supra* note 26, at 258.

294. NAT'L CENTER ON STUDENT PROGRESS MONITORING, <http://www.studentprogress.org> (last visited Dec. 18, 2013).

295. Stanley Deno, *The Nature and Development of Curriculum-Based Measurement*, 36 PREVENTING SCH. FAILURE 5, 5 (1992).

296. *Id.* at 5-6.

When monitoring student progress, a teacher begins with the student's current level of performance and his or her annual goal.<sup>297</sup> Then the teacher monitors the student's academic performance on a regular basis over time using an appropriate measure.<sup>298</sup> Progress toward meeting the student's goals is then assessed by comparing the actual and expected rates of learning.<sup>299</sup> Based on these measures, the teaching strategies or instructional procedures are adjusted as needed.<sup>300</sup>

A hearing officer in Alabama described the importance of progress monitoring as follows: "Periodic review of progress on the goals and objectives provides the disabled student's teacher with supportive data needed to make a determination of the success of the intervention."<sup>301</sup> Similarly, a hearing officer in New Mexico wrote that progress monitoring "information allows the IEP team to determine whether a child is making adequate progress, and, if not, to revise the IEP accordingly."<sup>302</sup>

Unfortunately, most goals are not measured, nor is student progress monitored using objective and accurate measurement procedures; instead, teachers rely on their subjective impressions to monitor student progress.<sup>303</sup> The sole reliance on subjective impressions was addressed by the State Educational Agency in New York when it found that the Rhinebeck Central School District had denied a FAPE for two consecutive years because the IEPs for both years lacked objective means by which to measure a student's progress.<sup>304</sup> In its ruling, the Educational Agency wrote: "Although subjective teacher observation provides valuable information, teacher observation, by itself, is not an adequate method of monitoring a student's progress in his areas of academic need, particularly when a baseline has not been established."<sup>305</sup> Similarly, an Alabama hearing

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297. See Yell & Busch, *supra* note 132, at 44–46.

298. *Id.* at 46.

299. Douglas Marston, *School- and District-Wide Implementation of Curriculum-Based Measurement in the Minneapolis Public Schools*, in A MEASURE OF SUCCESS: THE INFLUENCE OF CURRICULUM-BASED MEASUREMENT ON EDUCATION 59 (Christine Espin et al. eds., 2012).

300. *Id.* at 64–65.

301. Escambia Cnty. Pub. Sch. Sys., 42 IDELR 248 (Ala. State Educ. Agency Nov. 8, 2004).

302. Rio Rancho Pub. Sch., 40 IDELR 140 (N.M. State Educ. Agency Aug. 19, 2003).

303. See YELL, *supra* note 26, at 258–59.

304. Bd. of Educ. of the Rhinebeck Cent. Sch. Dist., 39 IDELR 148 (N.Y. State Educ. Agency May 5, 2003).

305. *Id.*

officer when ruling on a FAPE dispute wrote that language in the IEP goals which specified P. “would ‘improve’ was not designed to provide any indication of measurable achievement.”<sup>306</sup>

An important issue the IEP team must confront in determining how to monitor and measure student progress is what method of measurement to use. That is, the IEP team must choose a meaningful measurement system that reliably and validly assesses the behavior of interest (e.g., reading, writing, behavior, interactions).<sup>307</sup> Fortunately, the Office of Special Education Programs in the U.S. Department of Education funded the National Center on Student Progress Monitoring.<sup>308</sup> Although the grant that supported the site has expired, the National Center still maintains resources on the Center’s website.<sup>309</sup> The information is also on a new National Center website sponsored by the U.S. Department of Education: The National Center on Response to Intervention.<sup>310</sup> The RTI Center also maintains a page of progress monitoring tools.<sup>311</sup>

If a measurement procedure is appropriate and meaningful, the student’s teacher needs to systematically and frequently track and report on the student’s progress. If a student is not on track to meet his or her annual goal, then something in the student’s program must be changed, and the teacher needs to continually monitor the behavior of interest.<sup>312</sup>

Appropriate monitoring of a student’s progress toward meeting IEP goals and objectives is essential because without measuring a student’s progress, it will be impossible to determine if the student’s program is working.<sup>313</sup> If IEP’s goals and objectives cannot be measured or evaluated, the IEP will not appropriately address the student’s needs, which may result in the denial of FAPE.<sup>314</sup> The research literature in progress monitoring of students in special education shows conclusively that the students of teachers who

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306. Mobile Cnty. Bd. of Educ., 40 IDELR 226 (Ala. State Educ. Agency Feb. 6, 2004).

307. Bateman, *supra* note 1, at 98–99.

308. See NAT’L CENTER ON STUDENT PROGRESS MONITORING, <http://www.studentprogress.org> (last visited Dec. 18, 2013).

309. *Id.*

310. NAT’L CENTER ON RESPONSE TO INTERVENTION, [www.rti4success.org](http://www.rti4success.org) (last visited Dec. 18, 2013).

311. *Tools Charts*, NAT’L CTR. ON RESPONSE TO INTERVENTION, [www.rti4success.org/toolschartsLanding](http://www.rti4success.org/toolschartsLanding) (last visited Dec. 18, 2013).

312. See Yell & Busch, *supra* note 134, at 45–46.

313. See Yell, *supra* note 26, at 200.

314. Yell et al., *supra* note 65, at 94.

monitor their progress show greater achievement than the students of teachers who do not monitor their progress.<sup>315</sup>

Again, the most effective means to prepare special education teachers is to provide effective professional development activities that include initial training and follow up coaching and practice activities. The aforementioned websites are useful tools to accompany training activities.

### E. Professional Development Activities

Earlier in this Article we noted that teacher turnover rates are disproportionately high in urban schools and that many teachers are often uncertified and inexperienced.<sup>316</sup> Similarly, special education teachers nationally are often not certified in the area of disability in which they teach or they are teaching on a provisional or emergency certification.<sup>317</sup> Moreover, urban school districts have difficulties attracting and keeping highly qualified special education staff.<sup>318</sup> A review of urban perspectives on special education by the Center on Education Policy concluded that urban school districts' general education and special education teachers need continuous professional development to ensure that all teachers are using the most current and effective practices to teach students with disabilities.<sup>319</sup> This Article adds that there is a pressing need for training administrators. The Article next offers suggestions to assist educators in urban school district in developing and providing appropriate and meaningful professional development experiences for administrators and educators.

#### 1. *Provide Professional Development Activities Based on Evidence-Based Procedures*

Professional development refers to school districts' strategies and procedures to ensure that educators continue to strengthen and improve their practice throughout their careers by staying updated on developments occurring in education.<sup>320</sup> The U.S. Department of Education's Office of Special Education Programs noted that school

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315. Reschly et al., *supra* note 20, at 427–28.

316. MANDLAWITZ, *supra* note 7, at 12.

317. PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 11, at 52.

318. MANDLAWITZ, *supra* note 7, at 6.

319. Yell et al., *supra* note 65, at 69.

320. HAYES MIZELL, WHY PROFESSIONAL DEVELOPMENT MATTERS 3 (2010), available at [http://www.learningforward.org/docs/pdf/why\\_pd\\_matters\\_web.pdf](http://www.learningforward.org/docs/pdf/why_pd_matters_web.pdf).

district officials should use peer-reviewed research when they create and implement professional development programs for educators.<sup>321</sup>

In a study reviewing the research-based evidence on how teacher professional development affects student achievement, the U.S. Department of Education's Institute on Education Sciences reported that the teachers who had substantial professional development would have increased their students' achievement by twenty-one percentile points.<sup>322</sup> Additionally, good professional development helps to retain teachers and sets them on a path to be more effective.<sup>323</sup>

Effective professional development requires thoughtful planning, careful implementation, and evaluative feedback.<sup>324</sup> Research on professional development has shown that there are three common elements to effective professional development. First, successful professional development activities include both a conceptual or philosophical component and a procedural or technical component. That is, in successful professional development educators learn why they are doing something as well as how to do it.<sup>325</sup> Second, a description of a skill or strategy is presented, along with modeling or demonstration of the skill and practice in simulated and actual settings.<sup>326</sup> The third component of successful professional development is coaching, along with guided practice, feedback, and support.<sup>327</sup> Researchers who examined the use of professional development activities to improve teachers' use of an evidence-based practice found that a training package consisting of modeling, role-

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321. *See generally* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540 (Aug. 14, 2006).

322. KWANG SUK YOON ET AL., REVIEWING THE EVIDENCE ON HOW TEACHER PROFESSIONAL DEVELOPMENT AFFECTS STUDENT ACHIEVEMENT, at iii (2007), available at [http://ies.ed.gov/ncee/edlabs/regions/southwest/pdf/rel\\_2007033.pdf](http://ies.ed.gov/ncee/edlabs/regions/southwest/pdf/rel_2007033.pdf).

323. MIZELL, *supra* note 320, at 6.

324. *Id.* at 10.

325. Russell Gersten & Susan Unok Brengelman, *The Quest to Translate Research into Classroom Practice: The Emerging Knowledge Base*, 17 REMEDIAL & SPECIAL EDUC. 67, 70 (1996).

326. JOCELYN A. BUTLER, A REVIEW OF ADULT LEARNING THEORY AND STAFF DEVELOPMENT RESEARCH 9 (1989), available at <http://files.eric.ed.gov/fulltext/ED308334.pdf>.

327. Russell Gersten et al., *Close to the Classroom is Close to the Bone: Coaching as a Means to Translate Research into Classroom Practice*, 62 EXCEPTIONAL CHILD. 52, 52 (1995).

playing, direct practice, and peer coaching improved the accuracy of teachers' use of the evidence-based procedure.<sup>328</sup>

2. *Ensure that Principals and Assistant Principals Understand Their Roles and Responsibilities Under the IDEA*

The effective development, implementation, and supervision of special education programs requires that special education administrators possess (a) a thorough understanding of special education laws, and (b) the ability to implement programs in a manner that is consistent with these laws.<sup>329</sup> Usually, a principal or assistant principal will be the representative for the local educational agency on the IEP team. LEA representatives typically set the agenda for the meeting and lead the discussion at the IEP table. Moreover, the LEA representative must be knowledgeable about the general education curriculum and be able to commit school district resources. It is also important that ongoing training be provided to keep administrators current on developments. The IDEA is reauthorized and usually amended approximately every four to six years, which can lead to significant changes in the law.<sup>330</sup>

Professional development activities for principals and assistant principals should also include training in research-based practices, writing measurable annual goals, and collecting data to monitor student progress. Clearly, administrators will not be responsible for teaching students or collecting data on student progress, but an understanding of these important areas will help the to ensure that students' IEPs meet the requirements of the IDEA. Because two important factors that affect special education teachers are lack of (a) administrative support, and (b) time for collaboration with general education personnel, administrators should also receive training in these areas.<sup>331</sup>

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328. Larry Maheady et al., *Utilizing Evidence-Based Practice in Teacher Preparation*, in EVIDENCE-BASED PRACTICES FOR EDUCATING STUDENTS WITH EMOTIONAL AND BEHAVIORAL DISORDERS, *supra* note 2, at 121, 132.

329. Yell et al., *supra* note 65, at 69.

330. *Id.* at 92.

331. MANDLAWITZ, *supra* note 7, at 7.

3. *Ensure that Administrators, Teachers, and Parents Understand the Importance of Parental Involvement in the Special Education Process and Use Methods to Ensure that Meaningful School-Home Collaboration Occurs in the IEP Process*

Parents bring a wealth of knowledge regarding their child to the IEP table. For example, they often have specific knowledge about how their child's disability impacts their child in a variety of environments and activities. This knowledge can help the IEP team to identify the skills that students need to acquire to have a more successful educational experience. School-based participants in IEP meetings, therefore, should actively work to elicit contributions from a student's parents during an IEP meeting. Moreover, these contributions must be discussed and be given careful and deliberate consideration. Parental participation should be documented at IEP meetings. Assigning a person on the school team to take notes at IEP meetings is an effective way to document parental contributions.<sup>332</sup> At the end of the IEP meetings, IEP team members should review these notes to ensure accuracy.<sup>333</sup>

4. *Ensure that General Education and Special Education Teachers Understand Their Responsibilities Under the IDEA*

Errors made during the special education process may not only result in students with disabilities not receiving a FAPE,<sup>334</sup> but also may result in school district liability.<sup>335</sup> It is very important, therefore, that general and special education teachers understand their responsibilities and duties under the IDEA.<sup>336</sup> Special education teachers need expertise in (a) conducting assessments that provide relevant information for educational planning, (b) writing ambitious, but realistic, measurable annual goals, (c) planning special education programs that are based on peer-reviewed research, and (d) monitoring and analyzing students' progress using appropriate data collection procedures.<sup>337</sup> General education teachers should also have knowledge in disability areas, their responsibilities in planning,

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332. Yell et al., *supra* note 65, at 82.

333. *Id.* at 83.

334. *Id.*

335. Bateman, *supra* note 1, at 102–03.

336. Yell et al., *supra* note 65, at 93.

337. Bateman, *supra* note 1, at 102–03.

developing, and implementing IEPs, and in methods that promote collaboration.<sup>338</sup>

### CONCLUSION

Students with disabilities in urban schools and their teachers face difficult problems. Four such problems are (a) inadequate preparation of special education teachers, (b) lack of early identification and intervention for students with disabilities, (c) fewer methods to monitor and measure student progress, and (d) insufficient parent involvement. This Article examined the importance of developing educationally meaningful and legally sound IEPs as a way of improving the outcomes for students with disabilities. Working together with parents to develop IEPs that are based on students' needs and then ensuring that teachers have the skill sets to use research-based strategies, monitor student progress, and make instructional changes when the data indicate a need, will lead to greater student outcomes. The challenges of the urban school setting, including inadequate preparation and fewer certified special education teachers, will require in-depth professional training in IEP development. IEPs are the heart and soul of the IDEA. When they are developed, implemented, and evaluated faithfully, appropriately, and with integrity, they will lead to the improvement of special education services delivered to *all* students with disabilities.

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338. *Id.*