

“Dotting Your I’s and Crossing Your T’s: How to Effectively Document the Implementation of the IEP

Cynthia S. Buechler
Buechler & Associates, P.C.
3660 Stoneridge Road, Suite D-101
Austin, TX 78746
attorneys@buechlerlaw.com

Why is it Important?

- Litigation
- TEA complaints
- PBMAS
- Staying out of litigation

FAPE

Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). The District has a duty to provide FAPE to all children with disabilities ages 3- 21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The District is responsible for providing Student with specially designed, personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport.

The Four-Factor Test

The Fifth Circuit has articulated a four-factor test to determine whether a Texas school district's program meets IDEA requirements. Those factors are:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Whether positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997)

First Factor: Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide a FAPE, a school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

First Factor: Individualized on the Basis of Assessment and Performance

While the IEP need not be the best possible one nor must it be designed to maximize a student's potential, the school district must nevertheless provide a student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry is whether the IEP implemented by the school district "is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 1001 (2017).

First Factor: Individualized on the Basis of Assessment and Performance

The District's obligation when developing a student's IEP is to consider the student's strengths, the parent's concerns for enhancing their child's education, results of the most recent evaluation data, and the student's academic, developmental, and functional needs. 34 C.F.R. 300.320(a)(1)(i). The District considered all of those elements in forming an educational plan for Student.

The Student's educational program should be based on observation, performance, and assessment.

Second Factor: Least Restrictive Environment

The IDEA requires that a student with a disability must be educated with peers without disabilities to the maximum extent appropriate and that special classes, separate schooling, and other removal from the regular education environment occurs only if 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. This provision is known as the "least restrictive environment (LRE) requirement." 34 C.F.R. § 300.114(a)(2)(i-ii).

Second Factor: Least Restrictive Environment

To determine whether a school district is educating a student with a disability in the LRE, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F. 2d 1036, 1048 (5th Cir. 1989).

Second Factor: Least Restrictive Environment

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs. This determination requires an examination of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting;
- a school district's efforts to modify the general education curriculum to meet the student's individual needs;
- the educational benefit a student is receiving while placed in the general education setting; and
- the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

Third Factor: Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), aff'd 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents.

Fourth Factor: Academic and Non-Academic Benefit

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012). While grades and performance on state assessments and benchmarks may provide evidence of academic benefit for many students, progress for students with greater challenges may be demonstrated by the advancement on the goals and objectives. Additionally, gains in behavior, communication, self-help and functional skills are as important as gains in academics.

IMPLEMENTATION

Implementation

To prevail on a claim of failure to implement the IEP, the party challenging implementation of the IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school district failed to implement substantial or significant provisions of the IEP. This approach affords school districts some flexibility in implementing IEPs while also holding them accountable for material failures and for providing each student with a disability a FAPE. *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). Failure to implement a material portion of an IEP violates the IDEA, but failure to perfectly execute an IEP does not amount to denial of a FAPE. See *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 642 F.3d 478, 484 (4th Cir. 2011).

Implementation

In the case of *Student v. Denison ISD*, 157-SE-0120 (2021), the hearing officer found the following:

“To prevail on a claim that the District failed to implement Student’s IEP, Petitioner would need to demonstrate the District failed to implement substantial provisions of the IEP as opposed to demonstrating, as Petitioner has in this case, one improper restraint.”

PLAAFPS

What is PLAAFPS?

A statement of the child's present levels of academic achievement and functional performance.

Are the PLAAFP derived from The FIE?

If the FIE was done in close proximity to the annual ARD, then the results of the FIE are one source to obtain the PLAAFP. However, if the evaluation was done significantly before the annual ARD, the PLAAFP need to be based upon current assessment from the student's teachers and related service providers.

How specific do the PLAAFP need to be?

Since the PLAAFP are the foundation for developing measurable goals and objectives, they need to provide a clear picture of the student's strengths and weaknesses.

GOALS AND OBJECTIVES

Drafting Measurable Goals

A layperson who is unfamiliar with the child or the school should be able to look at the IEP and see what the student is expected to do and how it will be determined whether the student has achieved the goals and objectives.

Goals and objectives have four (4) critical components:

1. BEHAVIOR: The student will do what . . .
2. CONDITIONS: Under what conditions . . .
3. CRITERION: To what level or degree . . .
4. TIMEFRAME: In what length of time . . .

The goals and objectives should be derived from the baseline data on the student's performance.

ACCOMMODATIONS

Purpose

Accommodations are adaptations that are made to the environment, curriculum, instruction, or assessment practices in order for students with disabilities to be successful learners and to participate actively with other students in the general education classroom and in school-wide activities.

Accommodations are changes in how a student accesses information and demonstrates learning. Accommodations do not substantially change the instructional level, content, or performance criteria. The changes are made in order to provide a student with equal access to learning and equal opportunity to show what he or she knows and can do.

Modifications are changes in what a student is expected to learn. The changes are made to provide a student opportunities to participate meaningfully and productively along with other students in the classroom and learning experiences.

1. Discretionary or Mandatory?

Accommodations are mandatory if written in the IEP

2. Accountability

The teacher, not the student, must ensure that the accommodations are provided.

3. Providing Accommodations

Only check accommodations that are necessary for the child to access the curriculum.

4. Documenting Implementation

Keep samples from each grading period. The samples must reflect that the accommodations were made.

5. "As Needed"

The accommodations that are chosen are mandatory. "As needed" leaves it to the teacher's discretion. Consequently, do not use the term "as needed" in association with an accommodation.

6. Giving the Student Discretion

It is appropriate, however, to give the student the choice to access an accommodation.

7. Student Refusal

If the student is refusing the accommodation, the first question to consider is whether the accommodation is necessary. If it is, then the next question to consider is why the student is refusing it. Is the student embarrassed to be treated differently from his/her peers? Is there an alternative to the accommodation that would be appropriate which the student will access?

8. Removing an Accommodation

In order to remove an accommodation, an ARD meeting must be held.

RELATED SERVICES

Logs

Providers should keep logs of their visits, detailing the time spent with the child. If appropriate, have the student sign the log.

For homebound students, have the parent sign the log.

Do related service providers need to provide IEP progress reports?

If the student has IEP goals and objectives for a related service, the related service provider needs to provide IEP progress updates in the same manner as a teacher. It should be noted that most of these goals and objectives can be co-implemented by the service provider and teacher.

BIPS

BIPS

- Needs a data collection vehicle (i.e.) behavior checklist, behavior log.
- Trend is to track frequency of replacement behaviors.
- ABCs of behavior should be tracked as well as strategies from BIP used when behavior occurs.

Texas Education Code §37.0021

This bill amends Texas Education Code Section 37.002. Under existing law, verbal or written notice needs to be provided to the parent on the date that the restraint occurs and written parental notice is required within 24 hours of the restraint.

This bill requires the notice to include whether the student's BIP should be revised and information on how to request a BIP.

For a student with a BIP, this bill requires documentation of each use of time out prompted by a behavior specified in the student's plan, including a description of the behavior that prompted the time out.

Use of Time-out

- Used for a student to regain self-control.
- The student is separated from other students for a limited period in a setting that is not locked and from which the exit is not physically blocked by furniture, a closed door held shut from the outside, or another inanimate object.
- The room must be at least 50 square feet.

Spring Branch ISD v. O.W. (5th Cir. 2019)

Recent Fifth Circuit case addressing time-out and restraint in special education.

FACTS:

- O.W. was in fifth grade and eventually was determined to qualify as ED.
- When he engaged in inappropriate behavior, the student was directed to a desk in the classroom for 5 or 10 minute intervals.
- During those times, the student could engage in replacement behaviors, such as drawing.
- The student was placed in the desk for the 5 or 10 minute intervals during 16 of his 40 days on the campus.

Spring Branch ISD v. O.W. (5th Cir. 2019)

ADDITIONAL FACTS AND ARGUMENTS:

- Texas law allows time-outs in conjunction with positive behavioral supports.
- The parties agreed that time-out was not included as part of the student's IEP or BIP.
- The parties also agreed that the methods were used on a recurrent basis.
- The district argued that the methods were not time-outs since the desk was in the classroom, the student was not separated from the other students, and he was given an opportunity to do "preferred" activities.

Spring Branch ISD v. O.W. (5th Cir. 2019)

COURT'S DETERMINATIONS REGARDING TIME-OUT:

- If utilized on a recurring basis under Texas law, time-out must be included in the IEP or BIP.
- The court focused on the student's separation from the other students, even for a limited period of time.
- The court determined that it was irrelevant whether the time-out was in the same classroom or the student could pursue preferred activities.
- "An IEP or BIP which does not authorize the recurrent use of time outs effectively prohibits such use."

Spring Branch ISD v. O.W. (5th Cir. 2019)

COURT'S DETERMINATIONS REGARDING TIME-OUT:

During his time at the campus, O.W. was restrained a total of 8 times. The court determined that under Texas law, physical restraints are specifically authorized only in "emergency" situations. The court further stated that "[u]nlike the use of time-outs, the law contains no provision requiring that the use of physical restraints be expressly authorized by a student's IEP."

DATA COLLECTION

Data Collection

Involves the assessment of a student's success on individual items relating to his or her goals and objectives that are not typically assessed by tests, such as socialization, communication and behavior.

Generally, data collection is accomplished through some form of data sheets.

Usually, data sheets measure through percentages, duration, and/or frequency.

Data Collection Tips

- Try to collect and summarize data in “real time”.
- Take data samples with consistent times and activities.
- Review the data on a regular basis to make it functional and not just to “complete paperwork”.
- Use appropriate software to graph the data, if possible

**Studies have demonstrated that teachers who graph and review their data have students who tend to make more progress.

Some Things that Documentation Should Not Reflect

- That decisions were made for financial reasons.
- That the district lacks the resources or staff to implement an IEP.
- In most cases, that the district’s policies will not allow for something.
- That all of the students receive the same amount of therapy time, etc.

IN-HOME TRAINING

An in-home training evaluation is offered to the parent, but the parent declines. How should this be documented?

Make sure the minutes and autism supplement indicate that the in-home training evaluation was offered to the parent, but the parent declined at this time.

What does an in-home trainer need to do if parent keeps cancelling sessions?

Keep documentation of attempts to provide in-home training and at the next ARD meeting, indicate that sessions will be available until the end of the next year.

TRAINING

Training

While not explicitly addressed in the IDEA, training of staff members is an issue that potentially falls under the IDEA. *Heston v. Austin Indep. Sch. Dist.*, 816 Fed. App'x. 977, 981-82 (5th Cir. 2020).

Make sure to train and document that all staff have been trained on the student's IEP.

PROGRESS REPORTS

What does the law require with respect to progress reports?

The IEP must include periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

How Often do IEP progress reports have to be provided to the parent?

IEP progress reports need to be provided at least as often as report cards are provided for nondisabled students.

Can a progress report indicate that the objective is "in progress" or "C"?

The progress report should use the same method of determining progress as is set forth in the measurable objective.

OUTSIDE FACTORS

Medication

- Document the type and amount of medication in the minutes
 - Note the effect of the student's education when on and off the medication.
 - Note that the district has asked the parent to inform staff when the student's medication has changed, if the amount has been altered, or if the student is no longer taking medication.
-

Attendance

If a student is not making progress due to attendance, an ARD meeting needs to be held to address the lack of attendance.
