

IEPs: GETTING CONTENT RIGHT

By: ELENA M. GALLEGOS

WALSH, ANDERSON,
GALLEGOS, GREEN
and TREVIÑO, P.C.

ATTORNEYS AT LAW

www.WalshAnderson.com

505 E. Huntland Drive Suite 600 Austin, TX 78752 (512) 454-6864	100 N.E. Loop 410, Suite 900 San Antonio, TX 78216 (210) 979-6633	909 Hidden Ridge Suite 410 Irving, TX 75038 (214) 574-8800
500 Marquette Ave., N.W. Suite 1360 Albuquerque, NM 87102 (505) 243-6864	6521 N. 10th Street Suite C McAllen, TX 78504 (956) 971-9317	10375 Richmond Avenue Suite 750 Houston, TX 77042 (713) 789-6864

A legally defective or poorly drafted IEP can have serious consequences both for the student and for the school district. Learn the ins and outs of the IDEA's IEP content requirements from attorney Elena Gallegos, a former special educator. She'll review and discuss drafting accurate and relevant present levels of performance, measurable annual goals, statements of special education and related services, and much more. You'll leave with a thorough understanding of the federal IEP content rules to help you avoid potential litigation.

Learning Objectives

- The audience will be able to identify:
 - The core content requirements of an IEP;
 - When a BIP is required as part of an IEP;
 - The discretionary and nondiscretionary postsecondary transition goals;
 - The relationship between present levels and annual goals;
 - Qualities of a legally sound annual goal;
 - Ways to measure progress;
 - Whether methodology must be specified in the IEP; and
 - The level of specificity required with regard to frequency and duration of services.

1. How should we approach the development of our IEP?

We think you should have a written agenda that follows the regulatory content requirements in a logical sequence that tracks the regulations.

I. INTRODUCTION

II. STUDENT PROFILE

34 CFR 300.324(a)(1). In developing each child's IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

III. CONSIDERATION OF SPECIAL FACTORS

34 CFR 300.324(a)(2)

- A. For children whose behavior impedes learning
- B. For children with limited English proficiency
- C. For children who are blind or visually impaired
- D. Communication needs including for children who are deaf or hard of hearing
- E. Assistive technology needs

IV. TRANSITION SERVICES

34 CFR 300.320(B)

V. PRESENT LEVELS OF PERFORMANCE

34 CFR 300.320(a)(1)

VI. MEASURABLE ANNUAL GOALS

34 CFR 300.320(a)(2)

VII. HOW PROGRESS WILL BE MEASURED AND WHEN PERIODIC REPORTS OF PROGRESS WILL BE PROVIDED

34 CFR 300.320(a)(3)

VIII. SUPPLEMENTARY AIDS AND SERVICES (ACCOMMODATIONS/MODIFICATIONS)

34 CFR 300.320(a)(3)

IX. SPECIAL EDUCATION

34 CFR 300.320(a)(3)

X. RELATED SERVICES

34 CFR 300.320(a)(3)

XI. EXPLANATION OF EXTENT, IF ANY, TO WHICH THE STUDENT WILL NOT PARTICIPATE WITH NONDISABLED STUDENTS

34 CFR 300.320(a)(4)

XII. STATE AND DISTRICTWIDE ASSESSMENT

34 CFR 300.320(a)(5) and 34 CFR 300.320(a)(6)

XIII. PROJECTED DATE FOR BEGINNING OF SERVICES, FREQUENCY, LOCATION AND DURATION OF SERVICES

34 CFR 300.320(a)(7)

XIV. TRANSFER OF RIGHTS AT AGE OF MAJORITY

34 CFR 300.320(c)

XV. SIGNATURES AND PRIOR WRITTEN NOTICE

34 CFR 300.503

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

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

Construction. Nothing in this section shall be construed to require —

- (i) That additional information be included in a child’s IEP beyond what is explicitly required in section 614 of the Act; or
- (ii) The IEP Team to include information under one component of a child’s IEP that is already contained under another component of the child’s IEP.

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

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

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

See also, *R.E. v. New York City Dep’t of Educ.*, 56 IDELR 131 (S.D.N.Y. 2011), adopting a four corners rule.

In contrast, in *M.F. v. Irvington Union Free School District*, 54 IDELR 288 (S.D.N.Y. 2010), the court ruled for the school district and declined to adopt a strict “four corners” rule for assessing IEPs. The parents argued that the IEP’s validity and adequacy should be judged strictly from what is written within the “four corners” of the document. The court noted persuasive authority to this effect from other circuits, but none from the 2d Circuit. And the court refused to adopt such a rule in this case. The specific issue was the fact that the IEP did not identify a particular

developmental reading class as one the student would be taking. However, it was undisputed that the IEP Team discussed the class and agreed that the student would take the class. Additionally, the student's class schedule reflected the class. Moreover, the class in question was a regular mainstream class available to all students and thus not normally identified on the IEP. Finally, the student actually took the class.

4. *Does it matter where we state it on the IEP?*

Lessard v. Wilton-Lyndeborough Cooperative School District, 49 IDELR 180, 518 F.3d 18 (1st Cir. 2008). They also dismissed the argument that the student's IEP was inadequate and incomplete because it did not contain a "transition plan." The proposed IEP in this case included a wide array of transition services, scattered throughout the document. Thus the parents failed in their argument that the absence of a specific, separate "transition plan" doomed the IEP. While the IDEA requires that the IEP must include a statement of transition services, the court stated that it does not require that "those statements be articulated in a separate component of the IEP." Thus, says the court, "merely pointing to the absence of a stand-alone transition plan cannot form the basis for a founded claim of procedural error."

M.H. and S.R. v. New York City Dept. of Educ., 56 IDELR 69 (S.D.N.Y. 2011). The court held that the district had offered FAPE despite the fact that the Related Services section of the IEP was left blank. The court noted that minutes of the meeting indicated that the student was to receive counseling.

CONSIDERATION OF SPECIAL FACTORS

34 CFR 300.324(a)(2)

5. *What consideration of special factors does IDEA require?*

The IEP Team must —

- (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
- (ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;
- (iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;
- (iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
- (v) Consider whether the child needs assistive technology devices and services.

34 CFR 300.324(a)(2).

6. *Are an FBA and BIP required when behavior interferes with learning?*

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS 2009), Question E-1. “Under 34 CFR 300.324(a)(2)(i), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others. The requirement that a child with a disability receive, as appropriate, an FBA, and a BIP and modifications designed to address the child’s behavior now only applies to students whose behavior is a manifestation of their disability as determined by the LEA, the parent, and the relevant members of the child’s IEP Team under 34 CFR 300.530(e). However, FBAs and BIPs must also be used proactively, if the IEP Team determines that they would be appropriate for the child. The regulations in 34 CFR 300.530(d) require that school districts provide FBAs and behavior intervention services (and modifications) ‘as appropriate’ to students when the student’s disciplinary change in placement would exceed 10 consecutive school days and the student’s behavior was not a manifestation of his or her disability. See 34 CFR 300.530(c) and (d).”

7. *Under what circumstances must an IEP Team use FBAs and BIPs outside of the disciplinary context?*

Lathrop R-II School District v. Gray, 54 IDELR 276 (8th Cir. 2010). “The IDEA does not however require an IEP to create specific goals with regard to behavior. If a behavior impedes a child’s learning, the IEP team need only ‘consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.’” [Emphasis in the court’s decision].

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS 2009), Question E-2. “An FBA focuses on identifying the function or purpose behind a child’s behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior. ...For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a BIP is appropriate ... the IEP Team must include a BIP in the child’s IEP to address the behavioral needs of the child.”

R.K. v. New York City DOE, 56 IDELR 212 (E.D.N.Y. 2011). The judge’s decision adopts a Magistrate’s Report, which can be found at 56 IDELR 168. The court held that the absence of an FBA and a BIP in the IEP for a student with autism was a serious omission which, when coupled with other defects, rendered the IEP inappropriate.

School Board of the City of Norfolk v. Brown, 56 IDELR 18 (E.D. Va. 2010). The court found substantial evidence in the record to support the hearing officer’s conclusion that the school should have developed a BIP and/or conducted an FBA prior to the imposition of long-term discipline. The hearing officer and court called this a “child find” violation, noting that there was adequate reason to suspect disabilities in addition to the disability already identified (OHI). The court considered this both a failure to evaluate in all areas of suspected disability, and a failure to include necessary services in the IEP.

8. *How can an IEP address behavior?*

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS 2009), Question E-3. “When a child’s behavior impedes the child’s learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior (34 CFR 300.324(a)(2)(i)). Additionally, the Team may address the behavior through annual goals in the IEP (34 CFR 300.320(a)(2)(i)). The child’s IEP may include

modifications in his or her program, support for his or her teachers, and any related services necessary to achieve those behavioral goals (34 CFR 300.320(a)(4)). If the child needs a BIP to improve learning and socialization, the BIP can be included in the IEP and aligned with the goals in the IEP.”

TRANSITION SERVICES

34 CFR 300.320(B)

9. *When and what must the IEP include with respect to transition?*

Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include –

- (1) Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR 300.320(b).

10. *Must an IEP include measurable postsecondary goals in each of the areas of training, education, employment, and independent living skills?*

Questions and Answers Secondary Transitions, 57 IDELR 231 (OSERS 2011), Question B-1. “Under 34 CFR 300.320(b), the IEP for each child with a disability, must, beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually thereafter, include (1) appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) the transition services (including courses of study) needed to assist the child in reaching those goals. The Department explained in the Analysis of Comments and Changes section of the preamble of the August 2006 final Part B regulations that ‘...the Act requires a child’s IEP to include measurable postsecondary goals in the areas of training, education, **and** employment, and, where appropriate, independent living skills. Therefore, the only area in which postsecondary goals are not required in the IEP is in the area of independent living skills.... It is up to the child’s IEP Team to determine whether IEP goals related to the development of independent living skills are appropriate and necessary for the child to receive FAPE.’ [Emphasis added] 71 Fed. Reg. 46668 (2006).”

11. *Are there any circumstances in which goals for training and education can be combined?*

Questions and Answers Secondary Transitions, 57 IDELR 231 (OSERS 2011), Question B-1. “Regarding postsecondary goals related to training and education, the IDEA and its implementing regulations do not define the terms ‘training’ and ‘education.’ However, the areas of training and education can reasonably be interpreted as overlapping in certain instances. In determining whether postsecondary goals in the areas of training and education overlap, the IEP Team must consider the unique needs of each individual student with a disability, in light of his or her plans after leaving high school. If the IEP Team determines that separate postsecondary goals in the areas of training and education would not result in the need for distinct skills for the student after

leaving high school, the IEP Team can combine the training and education goals of the student into one or more postsecondary goals addressing those areas. For example, for a student whose postsecondary goal is teacher certification, any program providing teacher certification would include education, as well as training. Similarly, a student with a disability who enrolls in a postsecondary program in engineering would be obtaining both education and occupational training in the program. The same is true for students with disabilities enrolled in programs for doctors, lawyers, accountants, technologists, physical therapists, medical technicians, mechanics, computer programmers, etc. Thus, in some instances, it would be permissible for the IEP to include a combined postsecondary goal or goals in the areas of training and education to address a student's postsecondary plans, if determined appropriate by the IEP Team. This guidance, however, is not intended to prohibit the IEP Team from developing separate postsecondary goals in the areas related to training and education in a student's IEP, if deemed appropriate by the IEP Team, in light of the student's postsecondary plans."

PRESENT LEVELS OF PERFORMANCE

34 CFR 300.320(a)(1)

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

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

13. *What does "academic achievement" mean?*

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

14. *What does "functional" mean?*

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

15. *What is the relationship between the present levels statement and the annual goals?*

As the U.S. Department of Education has pointed out, the requirement of a present levels statement "directly corresponds" to the requirement of a statement of annual goals. As a result, the U.S. Department of Education has stated that it does not "believe further clarification is needed regarding the alignment of a child's present levels of performance with the child's annual goals." 71 Fed. Reg. 46662 (2006).

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

16. Must the IEP include baseline data?

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

Gray first argues, as the administrative panel concluded, that D.G.’s 2002 and 2003 IEPs were procedurally flawed because they lacked “baseline data.” The IDEA does not explicitly mandate such specific data, however. What it does require is “a statement of the child’s present levels of educational performance,” including “how the child’s disability affects the child’s involvement and progress in the general curriculum[.]” and “a statement of measurable annual goals, including benchmarks or short-term objectives[.]” 20 USC 1414(d)(1)(A).

A preponderance of the evidence establishes that the challenged IEPs contained both detailed present level statements and measurable goals. ... The 2002 IEP enumerated twenty seven distinct and specific goals. Each had internal benchmarks and most indicated D.G.’s present ability relative to the goal. ...The 2003 IEP was similarly detailed and thorough.

...

Neither the panel nor Gray in his appellate brief specified which goals lacked “baseline data.” In any event, we will not compel a school district to put more in its IEPs than is required by law. ...

Nack v. Orange City School District, 454 F.3d 604, 46 IDELR 32 (6th Cir. 2006). “The primary shortcoming of the sixth-grade IEP was its failure to provide a baseline by which to measure David’s future progress. However, as the IHO noted, David’s test results, which he scored at or above proficiency standard in all categories, along with Maxine Rosenbaum’s probes showing David’s progress, demonstrated that he derived educational benefits from the 6th grade IEP as implemented....In the end, the minor procedural violations of the 6th grade IEP cannot be said to have caused David any substantive harm.”

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

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

17. *Must the present levels include grade equivalencies?*

Hailey M. v. Matayoshi, 57 IDELR 124 (D. Hawaii 2011). Plaintiffs argued that the goals and objectives were not measurable or meaningful because they lacked baselines or grade equivalencies. The court rejected these arguments, holding:

The goals and benchmarks are specific, capable of measurement and directly relate to Student's areas of weakness identified in the PLEPs. Finally, the IEPs clearly included the required description of how Student's progress toward meeting the annual goals would be measured and when periodic reports would be provided. See 20 USC 1414(d)(1)(A)(i)(III). In sum, the Court finds that the IEP complied with 20 USC 1414(d)(1)(A)(i), the IDEA's requirements with respect to the PLEPs, goals and objectives. The Court CONCLUDES that Plaintiffs have failed to meet their burden of proof as to their argument regarding whether goals and objectives were measurable and meaningful.

MEASURABLE ANNUAL GOALS

34 CFR 300.320(a)(2)

18. *What areas must the goals target?*

The IEP must include:

- (i) A statement of measurable annual goals, including academic and functional goals designed to
 - (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (B) Meet each of the child's other educational needs that result from the child's disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

34 CFR 300.320(a)(2).

Klein ISD v. Hovem, 55 IDELR 92 (S.D. Tex. 2010). The student was very bright and scored over 600 on reading and math on the SAT, but had a severe disability affecting writing skills. The court faulted the district for maintaining the same IEP for three years despite a lack of progress in the area of disability-related weakness. The court noted that "the record supports a finding that KISD ignored Per's area of weakness and even chose to obscure it by highlighting Per's success in areas not impacted by his learning disability." The court noted that KISD was not excused from addressing Per's areas of weakness "merely because he is highly intelligent and ahead of

many regular education students in his areas of strength.”

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

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

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

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

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

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

[W]hile there is no Part B requirement that an IEP include separate annual goals...for related services, the goals...in the IEP must address all of the student’s identified needs that the IEP Team has determined warrant the provision of special education, related services, or supplementary aids and services, and must enable the Team to determine the effectiveness of each of those services.

For example, if the IEP Team has determined that a student needs speech and language therapy services as a component of FAPE, the IEP must include goals...that address the student’s need to develop and/or improve communication-related skills. It would not be necessary, however, to label the goals...as “speech therapy” goals....Therefore, if the IEP includes goals...which appropriately address the student’s need to develop communication-related skills, no additional or separate “therapy” goals...would be required.

21. What qualities make the goals legally defensible?

See excerpts from *C.D. and R.D. ex rel. E.D. v. Bedford Cent. Sch. Dist.*, 57 IDELR 191 (S.D.N.Y. 2011):

“These goals are specific enough to provide E.D.’s teachers, speech-language therapist and counselor with direction regarding the expectations of the [IEP Team].”

“Courts have held that goals should identify the extent or level to which the student would demonstrate identified skills, behavior or knowledge. *W.S. v. Rye City School District*, [46 IDELR 285] 454 F. Supp. 2d 134 (S.D.N.Y. 2006). However, even where certain goals are overly broad, courts have found an IEP to be satisfactory where short-term objectives concretely outline targeted sub-skills, identify criteria for mastery, set

forth procedures to be used for measuring progress and specify a date by which that progress was to be made. (Id.).”

“The SRO found that the goals developed by the [IEP Team] for the IEPs in question were measurable and aligned with E.D.’s needs. (SRO Dec. pp. 27, 28, 37). Ms. Burke testified at length as to how each goal was to be measured. (T.411-23). In terms of his social and emotional goals, Dr. Kant testified specifically as to how she would have assessed E.D.’s progress towards each of the goals set forth in his IEP. (T.315-16). The SRO specifically ruled that each of the annual goals addressed the student’s needs and specified which type of service provider would be primarily responsible for implementing each goal with the student with respect to study skills, reading, mathematics, speech-language skills and social/emotional behavioral skills. (SRO Dec. 27-28, 37). The law requires no more.”

22. *How do you draft a measurable writing goal?*

T.G. v. Midland School District 7, 58 IDELR 104 (C.D.Ill. 2012). The court found that the goals in the IEP were measurable. The most interesting part of the ruling concerned the goals for writing:

Plaintiffs do not explain what an appropriately objective measurement of writing progress would be, and the Court does not find that having a teacher evaluate a student’s progress on a numerical scale, as provided by the IEP, is improperly subjective. Writing is not a discipline that can truly be quantified, as a content-based subject, such as history or mathematics, might be; writing does not lend itself to multiple choice tests. It is not unreasonable to provide for a teacher to qualitatively measure a student’s writing, and, indeed, the Court does not see any other means of measuring progress in writing skills.

HOW PROGRESS WILL BE MEASURED AND WHEN PERIODIC REPORTS OF PROGRESS WILL BE PROVIDED 34 CFR 300.320(a)(3)

23. *How often do we have to inform the parent of the child’s progress on the IEP goals?*

The IEP must include a description of:

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

The U.S. Department of Education explains:

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

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

Yes. “The Act does not require goals...to have outcomes and measures on a specific assessment tool.” 71 Fed. Reg. 46662 (2006).

25. *What kind of measuring tools are adequate?*

Bridges v. Spartanburg County School District, 57 IDELR 128 (D.S.C. 2011). The court held that the goals in the IEPs were adequately measurable. The court pointed out that “the inclusion of teacher observation does not, in and of itself, make for an ineffective IEP. Additionally, the School District’s use of percentages does not automatically deem the IEP deficient.” With regard to the percentages, the court stated:

A close review of the IEPs reveals that the goal percentages in F.B.’s IEPs were tied to discrete tasks, such as completing a specific mathematical task, and were often related to a particular reference to a grade level. While the goals were not expressed in the manner that Plaintiffs consider to be the optimal manner, the goals were sufficiently measurable to reasonably gauge F.B.’s progress.

Alternatively, the court held that any technical defect in the IEP did not deprive the student of FAPE.

SUPPLEMENTARY AIDS AND SERVICES, SPECIAL EDUCATION, RELATED SERVICES
34 CFR 300.320(a)(4)

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

The IEP must include:

A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 CFR 300.320(a)(4).

27. *What does “based on peer reviewed research to the extent practicable” mean?*

The U.S. Department of Education explains:

States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there

is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. 71 Fed. Reg. 46665 (2006).

28. *Must we specify methodology in the IEP?*

No. “There is nothing in the Act that requires an IEP to include specific instructional methodologies....The Department’s longstanding position on including instructional methodologies in a child’s IEP is that it is an IEP Team’s decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.” 71 Fed. Reg. 46665 (2006).

29. *Does this create a higher standard?*

Ridley School District v. M.R. and J.R., 56 IDELR 74 (E.D. Pa. 2011). The court rejected the argument that IEPs must be based on “peer-reviewed research.” The court noted earlier cases, such as *Joshua A. v. Unified School District* and the congressional language about peer-reviewed research “to the extent practicable.”

Joshua A. v. Rocklin Unified School District, 49 IDELR 249 (E.D. Cal. 2008), *aff’d*, 52 IDELR 64 (9th Cir. 2009). “Plaintiff contends that this Court should consider the *Rowley* standard in light of more recent Congressional language inferring that ‘peer review research’ services are required. The Court declines to do so. It does not appear that congress intended that the service with the greatest body of research be used in order to provide FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE.”

30. *Can a doctor prescribe the services in the IEP?*

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

Concerning the last point, Dr. Trapane was the main source of evidence cited for the proposition that the EDS adversely affects C.D.’s educational performance. And the sole basis of her information was C.D.’s mother. Dr. Trapane evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. In fact, “Dr. Trapane admitted that she has no experience or training in special education and never observed C.D. in the classroom.” [] Her only familiarity with school curricula was with her own children. Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ’s finding. [] (Citations omitted.)

... It was the team’s position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team’s discretion, governed by the applicable rules and regulations. We agree.

31. *How do we determine the need for related services?*

“Related services means transportation and such developmental, corrective, and other supportive services **as are required to assist a child with a disability to benefit from special education**, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.” 34 CFR 300.34(a) (emphasis added).

The standard is not whether the child will benefit from the related service. “Under both the Act and regulations, related services are required to the extent that they are necessary to assist a [disabled] child to benefit from special education.” *Letter to Sturm*, 211 IDELR 33 (OSEP 1978).

32. *Can a needed service be discontinued due to a student’s failure to cooperate?*

Letter to Borucki, 16 IDELR 884 (OSEP 1990). “The obligation of States and school districts to provide appropriate educational services to eligible students with [disabilities] is equally applicable to cooperative and uncooperative students. ...the student’s failure to cooperate with school staff may be an indication of the need for a reevaluation, a revision in the child’s IEP, or a change in the child’s educational placement.”

PROJECTED DATE FOR BEGINNING OF SERVICES, FREQUENCY, LOCATION, AND DURATION OF SERVICES 34 CFR 300.320(a)(7)

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

The IEP must specify:

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

34. *What level of specificity is required?*

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

35. *If we are not sure as to the amount, can we just say “as needed” or “as appropriate”?*

No. *O’Toole v. Olathe Dist. Schs.*, 28 IDELR 177, 144 F.3d 692 (10th Cir. 1998). “We agree with the reviewing officer that the term ‘as appropriate’ fails adequately to specify the level of related services the District committed to provide, as required by the IDEA and Kansas law.”

36. *If the IEP Team determines that the child qualifies for ESY services, does the IEP Team also have to specify the frequency and duration of the ESY services?*

Hailey M. v. Matayoshi, 57 IDELR 124 (D. Hawaii 2011). The court found that the following description of ESY services was sufficiently detailed to provide notice of the anticipated frequency and duration, as well as sufficient information so that the level of the school's commitment of resources was clear:

Due to [Student's] emerging skills in reading comprehension and math computation/reasoning, [Student] requires ESY services during the regular DOE summer session for 2 hours a day to appropriately address her academic goals and benchmarks. In addition to special education [Student] will receive 30 minutes a week of speech therapy to address speech/language goals and objectives.

[Student] will also receive extended school day services for 56.15 hours a quarter to address appropriate academic goals and benchmarks.

The information in this handout was created by Copyright 2012: Walsh, Anderson, Gallegos, Green & Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.