

# Better IEPs

How to develop legally correct  
and educationally useful programs

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**FIFTH EDITION**

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Company**

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# Introduction

**t**he purpose of this book is to give special educators, regular educators and parents the confidence and know-how to develop Individualized Education Programs, or IEPs, which are both legally correct and educationally useful. Currently, many IEPs are neither.

The IEP process is the centerpiece, the heart and soul, of the Individuals with Disabilities Education Act (IDEA). It is the procedure for fashioning the “free appropriate public education” (FAPE) to which every eligible child who has a disability and needs special education is entitled. In this book, we explain the role of the IEP in the larger context of the IDEA, and we present a child-centered, three-step IEP process.

**Chapter One** highlights the main components of the IDEA (Part B). We explain the sequential and interdependent relationships of evaluation, IEP development and placement. We also briefly review the IDEA’s funding and due process provisions, which protect the rights of children and their families and govern dispute resolutions.

**Chapter Two** takes a close look at the IEP team and how it functions.

**Chapter Three** answers the most fundamental questions about how to prepare a squeaky-clean, legally correct IEP:

- ▶ **Who** develops it?
- ▶ **How** does the IEP team operate?
- ▶ **When** must the IEP team convene?
- ▶ **Where** does the IEP meeting happen?
- ▶ **What** must the IEP contain?

**Chapter Four** explains how not to develop IEPs. We dissect real-world examples of flawed IEPs and identify several common errors in IEP process and content.

**Chapter Five** describes a better way. We present the “Non-Form” and explain how to create an educationally useful IEP. We focus particular attention on the three-step IEP development process, illustrating each step with examples.

**Chapter Six** examines and evaluates standards-based IEPs.

**Chapter Seven** tackles some troublesome issues that have plagued schools since the IDEA was first enacted. We look at judicial decisions and agency rulings that elaborate and clarify these issues.

The US Department of Education Office of Special Education Programs (OSEP) is the federal agency responsible for promulgating regulations for and administering the IDEA. Some of the information in this book is found in two OSEP documents called Appendix C (1981) and Appendix A (1998) to the IDEA Regulations. They are a valuable resource for anyone who wishes to be knowledgeable about IEPs and the way OSEP interprets IDEA requirements. It is, of course, important to consider these interpretations in the light of later IDEA amendments, which may render some of them obsolete. However, our position is that the portions not in conflict with later changes represent good practice and offer helpful guidelines. In addition, we turn for guidance to topical Question and Answer documents that

OSEP publishes from time to time<sup>1</sup> and OSEP letters<sup>2</sup> in response to inquiries regarding the interpretation of IDEA. Although the federal regulations promulgated by OSEP have the force of law, the OSEP guidance is advisory but not legally binding.

A well designed IEP can change a child's schooling experience from one of repeated failure, loss of self-esteem and limited options to one of achievement, direction, and productivity. Sadly, our experiences persuade us that legally correct and educationally useful IEPs are all too rare. We sincerely hope and believe this book can help change that situation.

## Notes

1. Available at <http://idea.ed.gov/explore/home>
2. Available at <http://www2.ed.gov/policy/speced/guid/idea/index.html> and <http://www2.ed.gov/policy/speced/guid/idea/letters/revpolicy/index.html>

# The IEP in perspective

**S**ince 1977, every child in the United States who has a disability and needs special education has been entitled to a free appropriate public education (FAPE) under a federal law that is now called the Individuals with Disabilities Education Act (IDEA). The IDEA (Part B) has five major components:

1. Evaluation and Identification
2. Individualized Education Program and Related Services
3. Placement
4. Funding
5. Procedural Safeguards

In 1997, Congress amended the IDEA with the intention of: (a) strengthening the role of parents; (b) ensuring access to the general education curriculum and reforms; (c) focusing on teaching and learning while reducing unnecessary paperwork requirements; (d) assisting educational agencies in reducing the costs of improving special education and related services to children with disabilities; (e) increasing accommodation of racial, ethnic and linguistic diversity to prevent

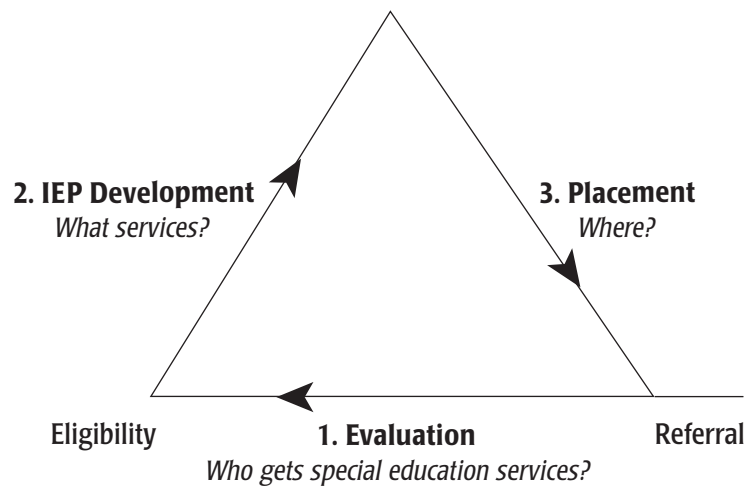
inappropriate identification and labeling; (f) ensuring schools are safe and conducive to learning; and (g) encouraging parents and educators to work out their differences by using nonadversarial dispute resolution.

The IDEA Amendments of 2004 reaffirmed the intentions of IDEA 97 but made a few changes, some good and some worrisome. On the positive side, they reflected increased emphasis on scientifically based interventions, improved academic and functional performance checks for students with disabilities, early intervening services, positive behavioral interventions, efforts to better serve minority students, and providing more effective transition services.

At the same time, however, parents' roles were significantly weakened, and short-term objectives or benchmarks were no longer required for a majority of special education students. Only time will tell how wise these changes have been. Except for the possible removal of short-term objectives, the essential components of IDEA have not changed since the law was first passed in 1975.



**FIGURE 1.1** The Right Way



Wisely, many districts have retained objectives, in spite of the change.

The heart of the IDEA is the **Individualized Education Program (IEP)**. The centrality of the IEP is apparent in many ways. The **Evaluation and Identification** provisions determine who is eligible to have an IEP and contribute to understanding the unique needs of each child, which form the basis of the IEP. The **Placement** component calls for case-by-case placement decisions, based on a child's completed IEP. The **Funding** requirements guarantee a **free** appropriate public education, placing squarely upon school districts (or states) the financial burden of determining eligibility and implementing IEPs for children with disabilities. Finally, the **Procedural Safeguards** create a safety net for children and their parents. They were designed to ensure the development and provision of appropriate IEPs, to place parents and the school districts on a level playing field (although the US Supreme Court has changed this<sup>1,2</sup>), and to facilitate dispute avoidance and resolution.

In order to appreciate the role of the IEP, it is helpful to diagram the primary components in the sequence in which they affect a student (see Figure 1.1).

The first step of the process involves evaluating a child and making a decision on eligibility for

FAPE. The second step is the development of an IEP based upon the child's unique needs. The third step is the determination of an appropriate placement based upon the IEP. Reordering this sequence violates the letter and intent of the IDEA.

The following sections of this chapter include brief descriptions of the five components of the IDEA. Each section ends with "Do's and Don'ts" in the form of advice to those wanting to employ practices that are both legally correct and educationally sound.

## EVALUATION AND ELIGIBILITY

The purposes of the evaluation and identification provisions of the law are to gather academic, functional and developmental information necessary to determine whether a child has one of the disabilities defined in the IDEA, whether the child needs special education and related services, and the child's present levels of performance and individual educational needs.<sup>3</sup>

Both the 1997 and the 2004 Amendments to IDEA focused attention on the importance of the evaluation/assessment procedures exploring all the child's unique educational needs. Many evaluations prior to these Amendments looked only at eligibility. Now the eligibility determination, while still crucial, is on an equal footing with

## FIGURE 1.2 IDEA 2004 Provisions: Evaluation and Eligibility

### Evaluation

- ▶ The timeline from receipt of parental consent for evaluation through eligibility and needs determination is 60 days (or state timeline).
- ▶ Screening to determine appropriate instructional strategies to implement curriculum is **not** part of the evaluation process.
- ▶ Both eligibility **and** the child's educational, functional and developmental needs must be determined by the evaluation/eligibility team comprised of qualified professionals and the parents.

### Eligibility

- ▶ States **may prohibit** and **may not require** the use of **discrepancy** between ability and achievement as a criterion for SLD eligibility; states **must allow** Response to Intervention (RTI) as part of the SLD determination.
- ▶ A child may **not** be found IDEA-eligible if the determinant factor is lack of "appropriate instruction in the essential components of reading instruction (i.e., in phonemic awareness, phonics, fluency, vocabulary and comprehension strategies) or math."
- ▶ To be IDEA-eligible a child must (a) fit a category of disability as defined by IDEA **and** (b) must therefore need **special education** as defined by IDEA (i.e., "specially designed instruction").

the needs determination. Important changes to eligibility and evaluation made by the 2004 Amendments are shown in Figure 1.2. Every child who is eligible for an IEP is also entitled to an IEP team that has available to it a current, accurate description of his or her priority educational needs. These needs become the beginning point for the development of the all-important IEP. Every IEP team should insist on knowing these educational needs.

Evaluation must cover all areas related to a child's suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communication needs, and motor abilities.

The IDEA specifies who participates in the evaluation process. First, the child's IEP team, including the parent, and "other qualified professionals" review existing evaluation data

and decide what additional data are needed. The district then administers any needed tests and conducts other evaluation procedures. Finally, "a team of qualified professionals and the parent" makes an eligibility determination.

The team assembled to make the eligibility-needs determination **must** include members with the appropriate expertise to make the necessary decisions. The disability areas where the availability of this essential expertise is most problematic are learning disabilities, autism, traumatic brain injury, and intellectual disability (ID).

The difficulty with finding essential expertise in learning disabilities (LD) is that almost **one-half** of all identified special education students are labeled LD, and yet few (and fewer all the time) institutions offer advanced graduate work specifically in LD. With autism spectrum disorders

(ASD) the problem is the phenomenal and not fully understood explosion in numbers of children being diagnosed with ASD.<sup>4</sup> Traumatic brain injury is a relatively rare disability, but one whose diagnosis and educational planning require an extremely high level of training and expertise. The number of available experts is limited. Intellectual disability (ID) has become a disfavored diagnosis, to the extent that teams make an extraordinary effort, with or without deliberate intention, to avoid that diagnosis. Multiple disabilities, ASD, language disorders, emotional disturbance, or developmental disability are preferred. The upside of avoiding the ID diagnosis is that expectations can readily remain high. The downside is also that expectations can readily remain high, too often unrealistically so. Parents, perhaps more than some professionals, recognize the dangers inherent in misleading euphemisms.

The following “Do’s and Don’ts” for school districts are derived from the law and from observation of practice in the real world.

### **Do’s: Evaluation and Identification**

- ▶ **Do** notify and fully inform the child’s parents about the proposed evaluation, and obtain their written consent before conducting an initial evaluation, administering any new test as part of a reevaluation, or under other circumstances as required by state law or district policy. Remember that parents may withdraw their consent at any time.
- ▶ **Do** ask parents to participate in the evaluation and identification process and recognize their input as valuable to the evaluation process.
- ▶ **Do** inform parents that they have a legal right to an independent educational evaluation at public expense if they disagree with the district’s evaluation and the district does not go to hearing and prove that its evaluation was appropriate.
- ▶ **Do** consider requesting a due process hearing or mediation if a child’s need for special education is clear but the parents refuse consent for evaluation.

- ▶ **Do** use a variety of assessment materials and strategies that provide sufficient reliable and valid information to: (1) judge whether the child fits into one of the IDEA eligibility categories; (2) decide if the child, because of the disability, needs special education; and if so (3) determine the child’s educational needs, laying the foundation for the content of the child’s IEP.
- ▶ **Do** administer tests and other assessment materials in the child’s native language or other appropriate mode of communication and rely extensively on observations, work samples, interviews, records, and other real-world data. Test scores can be important, but no more so than other data.

### **Don’ts: Evaluation and Identification**

- ▶ **Don’t** single out a child for testing, interviewing, or overt observation without notice to parents.
- ▶ **Don’t** unreasonably extend prereferral intervention programs, such as “early intervening services” (**not** to be confused with early intervention services, which are totally different) and “response to intervention (RTI),” which have, or may have, the effect of delaying a child’s special education evaluation or IEP. The child is entitled to a full, individualized special education in **all** areas related to the suspected disability and in all areas of educational need, even if not commonly related to the suspected disability. This entitlement to a thorough evaluation arises as soon as the district suspects or has reason to suspect the child has a disability.
- ▶ **Don’t** equate evaluation with testing. Evaluation should also include observations, work samples, interviews, information provided by parents, cumulative files, etc. No one test comes close to being an adequate evaluation, legally or professionally. Some prefer the term “assessment.” Either “evaluation or “assessment” must be broad-based and extend far beyond “testing.”

- ▶ **Don't** rely on any particular battery of standardized assessments, and most definitely don't select tests solely from those "tableted" for use in a formula, or for any other purposes. Also beware of state or district policy which mandates or limits choice of "tests." Professional judgment must be the determining factor.
- ▶ **Don't** rely exclusively on any formula or quantitative guidelines to determine eligibility. The more elaborate the formula, the sillier it will appear to a judge. The law requires the exercise of expert professional judgment.
- ▶ **Don't** ask a professional, such as a physician or psychiatrist, whether a child has a particular disability. Instead, provide the IDEA disability definition, and ask whether the child fits that definition, especially if there are mental health issues. Without this precaution, the professional may rely on DSM-IV, DSM-IV-TR or, after 2012, DSM-V. IDEA definitions must prevail.
- ▶ **Don't** use evaluation methods that discriminate on the basis of race, culture, or native language. Evaluation that discriminates on the basis of sex is forbidden by other federal laws (ESEA, Title IX), but it is well known that almost twice as many boys as girls are in special education. It is noteworthy that no ethnic or racial disproportion approaches the size of the sex disproportion in special education.

## **INDIVIDUALIZED EDUCATION PROGRAM AND RELATED SERVICES (PROGRAM PLANNING)**

Every child found eligible for IDEA services is entitled to an IEP. An IEP is a written document that describes a child's educational needs, and details the special education and related services the district will provide to address those needs. The IDEA lays out mandatory procedures for IEP development. Among other things, the law prescribes the membership of the team that designs an IEP, and it outlines the required components of an IEP. The remaining chapters of this book explore these requirements in detail, but brief highlights follow here.

## **Do's: Program Planning**

- ▶ **Do** individualize the child's program. The IEP must reflect the child's unique needs, not the present availability of services in the district.
- ▶ **Do** figure out what supports the child might need to participate in the general curriculum. If there is no need for modifications or supplementary aids and services in the regular classroom, there is reason to question the child's eligibility. Every IDEA-eligible student must need and receive special education.
- ▶ **Do** consider the child's strengths and the parents' concerns for enhancing their child's education.
- ▶ **Do** specify and describe (not just name or list) all necessary special education, related services, supplementary aids and services, program modifications, and support for school personnel.
- ▶ **Do** include positive behavioral interventions and discipline strategies (a behavior intervention plan) when there is reason to believe that behavior is or may be an issue.
- ▶ **Do** meticulously observe all procedural requirements for IEP development and content.
- ▶ **Do** ensure full, equal, and meaningful parental participation.
- ▶ **Do** include objectives or other "progress markers" for each goal, even though IDEA no longer requires them on all IEPs.

## **Don'ts: Program Planning**

- ▶ **Don't** worry about "opening floodgates." Providing certain services to one child does not set a precedent for other children. IEPs address the unique needs of individual children, so what one child needs has no implications for what the district must provide to others.
- ▶ **Don't** clutter IEPs with detailed goals and objectives for all the content standards in the general curriculum. Instead, focus on the accommodations and adjustments an

individual child needs for appropriate **access** to and **participation** in the general curriculum. Goals should be prioritized and deal with large, important areas.

- ▶ **Don't** include more than three or four objectives or progress markers for each annual goal. Progress markers should describe “how far, by when” the child should progress toward achievement of each annual goal and ordinarily should coincide with grading periods.
- ▶ **Don't** use lack of funds or staff as an excuse for failure to provide a FAPE.
- ▶ **Don't** ever provide services categorically! For example, don't say that only emotionally disturbed students may have behavioral components in their IEPs, or that only students with learning disabilities may be allowed extra time on tests. All services must be based upon the individual child's needs without regard to disability category.

The US Supreme Court has held that a program is appropriate if it was developed according to the procedures required by the law, and if it is “reasonably calculated” to allow the child to benefit educationally. The Court offered the following guidance on the measure of appropriateness for certain students:

The IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classroom of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. . . .<sup>5</sup>

The Supreme Court's analysis in *Rowley* dealt with the situation where a student with a disability is performing better than nondisabled children in the same regular classroom. Lower courts are still struggling with the issue of **how much** benefit is necessary for the program to be deemed appropriate when the student is not performing at the high level of Amy Rowley. There is, however, general agreement that the benefit must be “meaningful” and take into account the child's potential.

## PLACEMENT

Placement lies at the center of an ideological storm in special education. Proponents of “full inclusion” insist that the proper learning environment for all children, with and without disabilities, is the regular classroom. The inclusionist movement has resulted in increased numbers of children with disabilities being placed full-time in regular classes. Many educators, adults with disabilities and advocacy organizations are resisting this trend, arguing that full inclusion deprives many children of the specialized services they need to meet their unique educational needs (see, e.g., Kauffman & Hallahan, 2005; Zigmond & Kloo, 2011).

While the storm rages, the law quietly remains unchanged. There is not now, and has never been, a requirement in the IDEA that all children with disabilities be “included” or “mainstreamed” in the regular classroom. In the 2004 Amendments, Congress again removed any doubts about a possible change in federal policy on this issue. The law continues to express a preference rather than a mandate for placement of children with disabilities in the regular classroom:

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, and 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 of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>6</sup>

“To the maximum extent appropriate” is the key phrase here. The IDEA recognizes that regular classroom placement might be inappropriate for some children. Least restrictive environment (LRE) is not a synonym for regular classroom. Technically, LRE refers to a set of procedures and requirements found in the IDEA regulations, and the least restrictive placement for a particular child is the placement decided on by the team, compliant with procedural requirements, and

individually selected from a full continuum of alternative placements.

Once a placement has been selected, a district cannot change a student's placement unilaterally (except in some disciplinary situations) if the parents object to the change. If parents request a hearing to challenge a proposed change in placement, the child remains in the current placement until all administrative procedures and at least a first appeal (if any) are completed. This is called the "stay-put" provision.

The exception to stay-put is that the schools may unilaterally place the student in an alternative education setting for no more than 45 school days if the child carries or possesses a weapon at school, knowingly possesses or uses illegal drugs or has inflicted serious bodily injury upon another person.<sup>7</sup> The parent is entitled to an expedited hearing to appeal such action.

Predictably, disciplinary actions are a contentious issue in the placement of students with disabilities. Suspension for more than 10 days and expulsion constitute changes in placement. Schools that use exclusionary discipline for students with disabilities must follow a strict set of procedures (see Figure 1.3), and districts must continue to provide FAPE to students who have been excluded for more than 10 days. However, IDEA 2004 makes it significantly easier for schools to exclude students with disabilities, particularly by making it easier to show the disability did not cause the misconduct. Even so, districts should seek legal advice and proceed with caution before suspending or expelling students with IEPs.

### **Do's: Placement**

- ▶ **Do** remember that program appropriateness is the primary IDEA mandate. As a federal district court judge has explained: "Nowhere in the Act is a handicapped child required to sink or swim in an ordinary classroom. . . . Congress certainly did not intend to place handicapped children in a least restrictive environment and thereby deny them an appropriate education."<sup>8</sup>

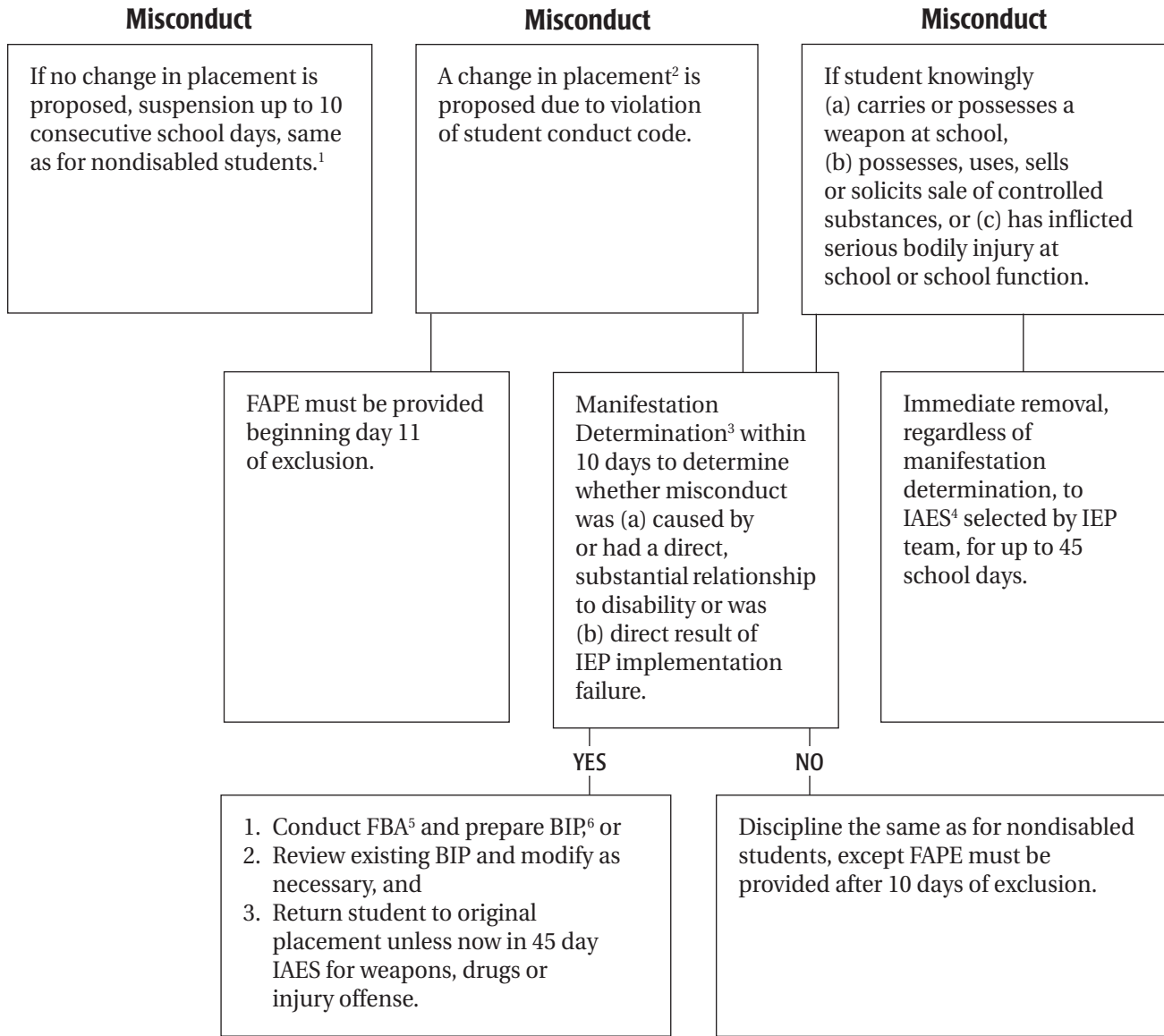
- ▶ **Do** make available the required continuum of various alternative placements, including resource rooms, special classes, special schools, etc., so children with disabilities can learn in the environment that is appropriate for them, based upon their individual needs.
- ▶ **Do** determine each child's placement at least annually. The placement decision must be individualized and based on the child's IEP.
- ▶ **Do** ensure that each placement decision is made by a group of persons, including parents, who are knowledgeable about the child, the meaning of the evaluation data, and the placement options.
- ▶ **Do** consider any potential harmful effects on the child or on the quality of services when selecting the LRE.
- ▶ **Do** make sure each child is educated with and otherwise participates with nondisabled children to the maximum extent appropriate.
- ▶ **Do** place each child in the school he or she would attend if nondisabled unless the IEP requires some other arrangement. IDEA does not entitle or require a child to attend the neighborhood school if the necessary services are better provided elsewhere.

### **Don'ts: Placement**

- ▶ **Don't** remove a child with a disability from the regular education environment unless the disability is such that education in regular classes cannot be achieved satisfactorily, even with the use of supplementary aids and services.
- ▶ **Don't** substitute a policy of "full inclusion" for the continuum of various alternative placements required by the IDEA.
- ▶ **Don't** exclude parents from placement decisions.
- ▶ **Don't** forget to follow all the procedural requirements for all "changes of placement" including suspension of more than 10 days, expulsion and significant program changes.

**FIGURE 1.3 Discipline: IDEA 2004**

Case-by-case consideration.  
Notice to parents, including procedural safeguards, on day of decision to discipline student.



Parent may appeal any disciplinary action, including the finding of the manifestation determination, and has the right to an expedited hearing.

<sup>1</sup>Known as 10 “free days.” <sup>2</sup>More than 10 days exclusion, consecutive or “patterned.” <sup>3</sup>Conducted by LEA, parent and selected IEP team members. <sup>4</sup>Interim Alternative Educational Setting. <sup>5</sup>Functional behavior assessment. <sup>6</sup>Behavior intervention plan.

- ▶ **Don't** place a student on the basis of his or her disability category! Regardless of disability category, placement must be based upon the student's IEP.

## THE RELATIONSHIP AMONG EVALUATION, IEP AND PLACEMENT

A firm understanding of the relationship among evaluation, IEP and placement can assist significantly in having IDEA operate smoothly and to the benefit of all.

Think for a moment, in a broad and loose way, about building a house. First, the foundation is laid. Evaluation is the foundation of the IDEA house. Great care is required to insure the foundation is solid. Next comes the framing of the house, built squarely on the foundation, with every nook and cranny corresponding to the foundation. That is how the IEP is supposed to fit on the evaluation. All the needs identified in the evaluation must be covered in the IEP. Finally comes the roof—the placement decision. The roof must fit the framing perfectly, just as the placement must fit (and is based upon) the IEP. If the fit between the evaluation and the IEP and the placement isn't perfect, the IDEA is creaky, leaky, and weak.

## FUNDING

Special education and related services can be expensive, and the IDEA clearly places the financial burden of educating students with disabilities on school districts, with help from the state and federal government. The "F" in FAPE means free to parents. There are no exceptions to the requirement that a **free** appropriate public education must be made available to all children who have a disability and need special education.

Normally, cost may not be a consideration in selection of a child's program or placement. If evaluation reveals that a child with a disability needs a particular service, the district must provide that service even if it is costly. No court has ever allowed consideration of cost for common services, such as reading tutors or daily speech therapy.

In a few narrowly defined circumstances, cost may be a factor. For example, a district may select the less expensive of two suitable facilities for a child who requires residential placement. One circuit court of appeals has ruled that a district may consider costs for a placement so expensive as to impact the budget and significantly reduce the resources available to the other children in the district.<sup>9</sup>

Failure to provide FAPE can be more costly to a district than providing it would have been. Parents who believe their child's IEP is not appropriate may unilaterally place their child in a private school that does provide an appropriate program. Under most circumstances, parents must first notify the district of their dissatisfaction with the offered program, and of their intent to enroll the child in a private school at public expense. A district that receives such a notice should be very certain that its proposed program constitutes FAPE, or it may be ordered to reimburse parents for the cost of the private school. The US Supreme Court has advised that:

... public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.<sup>10</sup>

### Do's: Funding

- ▶ **Do** base the content of the child's IEP on his or her educational needs without considering the cost of meeting those needs, at least sufficiently to constitute FAPE.
- ▶ **Do** make available a continuum of various alternative placements. Cost is no excuse for failure to do so. Small districts may not be able to maintain every conceivable placement a child might need, in which case they may choose to join in regional service plans, contract with other districts, or private facilities, etc.



- ▶ **Do** remember that attempts to cut corners can backfire. If the district fails to provide an appropriate program, parents can unilaterally place their child in an expensive private facility that does offer an appropriate program, and the district may have to pay for it.

### **Don'ts: Funding**

- ▶ **Don't** compel parents to use private insurance to pay for any services a child needs in order to benefit from special education. If parents voluntarily use their insurance, the district must compensate them for any increases in premiums or reductions in benefits.
- ▶ **Don't** use a related service provider's schedule as a limiting factor on the amount of service available to a child. Districts must determine the frequency and duration of services case by case, based upon the individual needs of each child.
- ▶ **Don't** cite unavailability of personnel as a justification for failure to provide needed services. Districts should employ outside contractors if this is necessary to address a child's needs.
- ▶ **Don't** arbitrarily take a hard line with parents who disagree with their child's IEP. This is a high stakes gamble that the district can lose if it fails to offer FAPE and parents place their child in a private school that does offer an appropriate program.

### **PROCEDURAL SAFEGUARDS**

Built into the IDEA is an elaborate system of procedural safeguards designed to ensure access to FAPE for children with disabilities.<sup>11</sup> Although a detailed discussion of procedural safeguards is beyond the scope of this book, a few points deserve mention here.

Parents have a right to participate in all meetings scheduled for the purpose of making decisions

about their child's identification, evaluation, program, or placement. Districts should keep records that demonstrate a diligent effort to ensure parental participation. Parents need not be invited to informal or chance meetings, or to staff meetings held for the purpose of preparing for a meeting with parents.<sup>12</sup>

The IDEA requires informed parental consent before initial evaluation, initial provision of services and placement in special education, and administration of any new test during a reevaluation. State law may include additional consent requirements. If parents refuse consent for evaluation (but not for initial service or placement) a district may attempt mediation, or may seek a hearing officer's order to proceed without consent if that appears to be in the interest of the child. When considering actions that do not require consent, districts must still provide prior notice, and parents who disagree with the district's plans may file a complaint, initiate mediation, or request a hearing.

Procedural safeguards are effective only when parents know about and make use of them. School districts must provide parents with clear, detailed, and understandable explanations of their IDEA rights. This procedural safeguards notice must explain all safeguards related to: (1) independent educational evaluation; (2) parental notice and consent; (3) access to records; (4) students attending private schools; (5) opportunities to present complaints; (6) dispute resolution processes, including mediation, hearings and civil actions; (7) the child's placement during dispute resolution proceedings—the "stay put" provision; (8) procedures relating to suspension and expulsion; and (9) payment of attorneys' fees.<sup>13</sup>

Concern abounds, on the part of both parents and districts, as to what happens if IDEA procedural violations do occur. In order for procedural violations to constitute a denial of FAPE, a hearing officer must find that a district's procedural inadequacies (a) impeded the child's right to FAPE; (b) significantly impeded the parents' opportunity

to participate in decision making; or (c) caused a deprivation of educational benefit.<sup>14</sup> Hearing officers and courts are becoming increasingly sensitive to what they call “pre-determination,” where districts have foreclosed true parent participation by unilaterally deciding certain matters (typically placement or amount of certain services) beforehand, and not genuinely considering parental input.

IDEA 2004 made several technical changes which make it more important than ever for parents to know the procedural rules and/or to seek assistance from knowledgeable persons. Among other changes it is now more difficult for parents to (a) file an “acceptable” request for a due process hearing; (b) receive reimbursement for private placements even when the district failed to offer FAPE; and (c) collect attorneys’ fees and costs when the parents prevail in a hearing.

Thus it is essential for parents, as well as school district personnel, to obtain totally accurate information on IDEA procedures and procedural safeguards.

### **Do’s: Procedural Safeguards**

- ▶ **Do** send parents prior written notice of proposed actions regarding their child. Parents are entitled to notice any time a district proposes or refuses to initiate or change anything about the child’s identification, evaluation, program, or placement. Notice must describe the district’s proposed action and the basis for it, inform parents of their rights, and be provided in a form that parents can understand.
- ▶ **Do** give parents a complete procedural safeguards notice when they request it and when: (1) their child is referred for evaluation and/or (2) a parent files a complaint or requests a due process hearing. Make sure this notice is provided in parents’ native language, and avoid use of jargon.

- ▶ **Do** make mediation and resolution sessions available in order to resolve disputes between parents and schools in a nonadversarial fashion.
- ▶ **Do** provide parents with a genuine opportunity to participate in all decision making meetings relating to their child.
- ▶ **Do** notify parents and students in advance if state law provides for the transfer of parental rights to the student when he or she reaches the age of majority as defined by state law.

### **Don’ts: Procedural Safeguards**

- ▶ **Don’t** take any action regarding a child’s identification, evaluation, program, or placement without sending detailed and understandable prior written notice to parents, as required.
- ▶ **Don’t** restrict parents’ access to their child’s education records. Parents have a right to examine all their child’s records, including student response forms for all tests, even though many districts are unaware of this and do not retain these forms.

Figure 1.4 illustrates the interrelationships among the IDEA components just introduced. The three sequential components—evaluation, program and placement—rest on a solid foundation of procedural safeguards, and public funding of all components ensures that all children with disabilities enjoy equal access to an appropriate education.

### **SUMMARY**

The “IDEA Commandments” (see Figure 1.5) were first handed down in 1975 from “Mount Deecy” to public schools throughout the land, and are just as binding and important now. School districts break these commandments at their peril!

**FIGURE 1.4 IDEA in a Nutshell**

<p><b>EVALUATION of educational needs</b></p>	<p><b>PROGRAM to address those needs at no cost to parents</b></p>	<p><b>PLACEMENT based on IEP</b></p>
<ul style="list-style-type: none"> <li>▶ Individualized evaluation</li> <li>▶ Nondiscriminatory</li> <li>▶ In all areas related to suspected disability</li> <li>▶ Determines eligibility</li> <li>▶ Specifies educational needs</li> <li>▶ Delineates explicit instructional implications</li> </ul>	<p><i>IEP (partial)</i></p> <ol style="list-style-type: none"> <li>1. Child's needs, characteristics, and present levels of performance (PLOPs)</li> <li>2. Special education, related services, supplementary aids and services, accommodations, program modifications, and personnel support to address each need</li> <li>3. Measurable, objective, behavioral goals to assess adequacy of services and to allow meaningful progress reporting at least every grading period</li> </ol>	<ul style="list-style-type: none"> <li>▶ Individualized placement decision</li> <li>▶ Decided after program (IEP) development</li> <li>▶ Selected from full continuum of alternative placements</li> <li>▶ In regular education environment when education there can be achieved satisfactorily</li> <li>▶ Appropriate program is the primary mandate of the IDEA: Congressional preference for mainstreaming is secondary.</li> </ul>
<p><b>WHO is entitled?</b></p>	<p><b>To WHAT services?</b></p>	<p><b>Delivered WHERE?</b></p>

**PROCEDURAL PROTECTIONS**

**FIGURE 1.5 IDEA Commandments**

- ▶ Thou shalt base all eligibility decisions on professional judgment, not on quantitative formulae.
- ▶ Thou shalt open wide the door unto every needed service and placement for each eligible child.
- ▶ Remember thou that categorical delivery of services is an abomination.
- ▶ Each IEP shall be based solely upon the child's needs. He or she who looks instead to availability of services shall know the inferno.
- ▶ Maketh every IEP in the image of its child. An IEP like unto another is a graven image, despised by all who know IDEA.
- ▶ Place not all children in the same setting, but make available the entire continuum of alternative placements.
- ▶ Thou shalt not exclude parents from decisions that affect their children.
- ▶ Thou shalt not burden parents with the cost of their children's special education and services.

## References

Kauffman, J.M., & Hallahan, D.P. (2005). *The illusion of full inclusion* (2d ed). Austin, TX: PRO-ED.

Zigmond, N., & Kloo, A. (2011). General and special education are (and should be) different. In Kauffman, J.M. & Hallahan, D.P. (Eds), *Handbook of Special Education*. NY: Routledge.

## Notes

1. *Schaffer v. Weast*, 126 S.Ct. 528, 546 US 49 (2005).
2. *Arlington v. Murphy*, 126 S.Ct. 2455, 548 US 291 (2006).
3. 20 USC §1414.
4. One child in 10,000 births was diagnosed in the 1980s. As of 2011, it is approximately one in 100.
5. *Hendrick Hudson Bd. of Ed. v. Rowley*, 102 S.Ct. 3034, 458 US 176 (1982).
6. 20 USC §1412(a)(5)(A); 34 CFR 300.114(a)(2).
7. 20 USC §1415(k)(1)(G); 34 CFR 300.518.
8. *Visco v. Sch. Dist. of Pittsburgh*, 684 F.Supp. 1310 (WD PA 1988).
9. *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991).
10. *Florence Co. Sch. Dist. Four v. Carter*, 114 S.Ct. 361, 510 US 7 (1993).
11. 34 CFR 300.500-537.
12. 34 CFR 300.501.
13. 34 CFR 300.504.
14. 34 CFR 300.513(a).