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# Better IEPs

**How to develop legally correct  
and educationally useful programs**

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**FIFTH EDITION**

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*Barbara D. Bateman  
Mary Anne Linden*

**IEP**  
RESOURCES

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*An Attainment Publication*

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Printed in the United States of America.

ISBN: 1-57861-568-2



**Attainment Company**

P.O. Box 930160

Verona, Wisconsin 53593-0160

Phone 1-800-327-4269 Fax 1-800-942-3865

[www.AttainmentCompany.com](http://www.AttainmentCompany.com)

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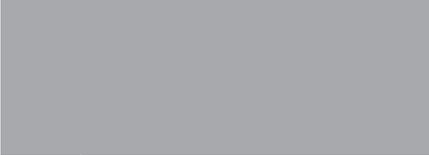
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# Dedication and acknowledgments

**t**o my sister, Jan, and the memory of our brother, Denny—the most loving, supportive and fun siblings on the planet. Sam Kirk, Zig Engelmann, my family and all my “special kiddos” have taught me what is educationally true and useful. I am grateful to them for this and more. In the preparation of this book, which is especially close to my heart because IEPs do matter, sincere thanks go to Tom Kinney, Claudia Vincent, Cindy Herr, and Pamela Bahnsen for their much-needed support.

—*Barb Bateman*

**t**o my late father, who taught me to question conventional wisdom; my mother, who daily models quiet strength; my son, Jeremy, who makes me laugh when I need it most; and my sisters and brothers, who have been through it all with me. To Barb, whose example propelled me through my third year of law school, and who continues to encourage and inspire me. To my students, present and past, who remind me that special education is not a hypothetical endeavor but a real world filled with teachers and students and an apparently infinite number of novel situations that can change lives for better or worse. Last but not least, to Tom Kinney and Pamela Bahnsen, who kept us on task.

—*Mary Anne Linden*

# 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:

- 16 **Who** develops it?
- 16 **How** does the IEP team operate?
- 16 **When** must the IEP team convene?
- 16 **Where** does the IEP meeting happen?
- 16 **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

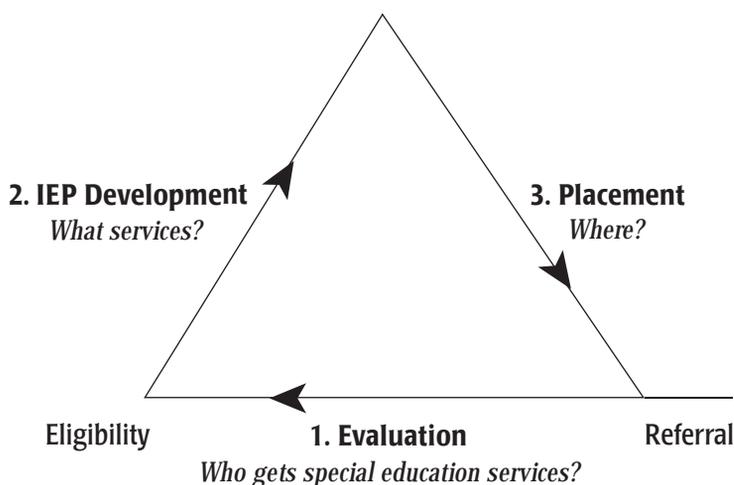
In 1997, Congress amended the IDEA with the intention of: (a) strengthening the role of parents; (b) ensuring access to the general education curriculum and reforms; (c) focusing on teaching and learning while reducing unnecessary paperwork requirements; (d) assisting educational agencies in reducing 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

- 16 The timeline from receipt of parental consent for evaluation through eligibility and needs determination is 60 days (or state timeline).
- 16 Screening to determine appropriate instructional strategies to implement curriculum is **not** part of the evaluation process.
- 16 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

- 16 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.
- 16 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."
- 16 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**

- 16 **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.
- 16 **Do** ask parents to participate in the evaluation and identification process and recognize their input as valuable to the evaluation process.
- 16 **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.
- 16 **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.
- 16 **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.
- 16 **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**

- 16 **Don’t** single out a child for testing, interviewing, or overt observation without notice to parents.
- 16 **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.
- 16 **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.”

- 16 **Don't** rely on any particular battery of standardized assessments, and most definitely don't select tests solely from those "tabled" 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.
- 16 **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.
- 16 **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.
- 16 **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

- 16 **Do** individualize the child's program. The IEP must reflect the child's unique needs, not the present availability of services in the district.
- 16 **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.
- 16 **Do** consider the child's strengths and the parents' concerns for enhancing their child's education.
- 16 **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.
- 16 **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.
- 16 **Do** meticulously observe all procedural requirements for IEP development and content.
- 16 **Do** ensure full, equal, and meaningful parental participation.
- 16 **Do** include objectives or other "progress markers" for each goal, even though IDEA no longer requires them on all IEPs.

## Don'ts: Program Planning

- 16 **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.
- 16 **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.

- 16 **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.
- 16 **Don't** use lack of funds or staff as an excuse for failure to provide a FAPE.
- 16 **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