




SPECIAL EDUCATION INFORMATIONAL BULLETIN

Bulletin 18-02

June 2018

TO: District Administrators, CESA Administrators, CCDEB Administrators,
Directors of Special Education and Pupil Services, and Other Interested Parties

FROM: Carolyn Stanford Taylor, Assistant State Superintendent 
Division for Learning Support

SUBJECT: Free Appropriate Public Education

Introduction

On March 22, 2017, the United States Supreme Court, in the case of *Endrew F. v. Douglas County School District*, (137 S.Ct. 988), issued a unanimous ruling on what it means to provide a free appropriate public education (FAPE) to a student with a disability through an individualized education program (IEP) tailored to the student's unique needs. The purpose of this information update is to provide guidance in light of the recent Supreme Court decision and to highlight particular circumstances that could impede the provision of FAPE. We have included links to a 5-Step Process for developing College and Career Ready (CCR) IEPs to help ensure an IEP is developed to meet the student's unique disability-related needs and promote positive student outcomes.

1. What is FAPE / what is the standard for FAPE?
2. Must IEP goals for all students with disabilities be aligned with grade-level content standards?
3. Must students with the most significant cognitive disabilities be held to grade-level standards?
4. Must the IEP guarantee progress?
5. What happens if the student is not making progress toward IEP goals and in the general education curriculum or the progress is not sufficient?
6. Must the IEP address instructional methodology?
7. May a district refuse to provide a specific service if it is not offered in the district?
8. When does bullying affect FAPE?
9. What role do behavioral supports play in providing FAPE to students with disabilities?
10. What happens if the parent disagrees with the IEP that is developed?
11. How does the age of the student or graduation affect FAPE?
12. Must a district provide FAPE if a student drops out of school and then reenrolls?

1. What is FAPE / what is the standard for FAPE?

A free appropriate public education (FAPE) means special education and related services that are provided at public expense, under public supervision and direction, in conformity with an individualized education

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program (IEP) *see* 34 CFR § 300.17. FAPE must be available to all students with disabilities ages 3 through 21 enrolled in a public school district, including students with disabilities who have been suspended or expelled from school.

In 1982, the U.S. Supreme Court first addressed the FAPE standard in *Hendrick Hudson Dist. Bd. Of Ed v Rowley* *see* 458 U.S. 176. Amy Rowley was a first grade student with a hearing impairment. She received instruction in the regular education classroom with supplementary aids and services, performed above grade level expectations, and advanced from grade to grade. Amy's parents wanted additional services so that Amy would have an "equal opportunity" compared to children without disabilities. *Id.* at 185, 198. In applying these facts, the Court held that FAPE is achieved when an IEP is reasonably calculated to enable the child to receive educational benefit. For children fully integrated in the regular classroom, this would typically require an IEP reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* at 204.

In applying the *Rowley* standard, courts disagreed over how to determine "educational benefit" and used differing standards, such as the "de minimus" standard. Under this standard, if a child's IEP was reasonably calculated to provide more than trivial or a minor educational benefit, then the FAPE requirement was met. Other courts applied more rigorous standards. *Questions and Answers on U.S. Supreme Court Case Decision Andrew F. v. Douglas County School District Re-1 (USDE Dec. 7, 2017).*

Consequently, in January 2017, the United States Supreme Court clarified the FAPE standard in the case of *Andrew F.* Andrew F. is a student who has autism and who was found eligible for special education services. By fourth grade, Andrew's parents believed his academic and functional progress had stalled. His IEPs largely carried over the same basic goals from one year to the next, suggesting that he was not making progress toward his goals. When the school district proposed a fifth grade IEP that resembled those from past years, Andrew's parents removed him from public school and enrolled him in a private school. The private school developed a behavioral intervention plan for the student, and through implementation of this plan, the student's behavior significantly improved, which allowed him to make academic progress. After the student attended the private school for six months, the parents met with district staff who presented the parents with a revised IEP. The parents were concerned that the behavioral supports in the revised IEP did not meaningfully differ from the previous IEP, despite the fact that the student's experience at the private school suggested a different approach might be more successful. His parents ultimately sought reimbursement for the private school tuition. *Id.* at 996-97.

The district court acknowledged that the student had not made immense educational growth under his previous IEPs, but that the annual changes to the student's goals were sufficient to show a pattern of, at least, minimal progress, and the 10th Circuit Court of Appeals affirmed the district's court decision. The 10th Circuit, relying on the "de minimus" standard, found that the school district had met its FAPE obligation because the student's IEPs were reasonably calculated to enable the student to make some progress. *Id.* at 997. The United States Supreme Court, in a unanimous decision, reversed the 10th Circuit's decision, and held that the FAPE requirement was markedly more demanding than the "de minimus" standard. *Id.* at 1000.

In *Andrew F.*, the Supreme Court clarified that *FAPE requires an IEP to be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.* This court noted that for most students this means an IEP designed to allow the student to progress from grade to grade, but if that is not possible, the IEP should be appropriately ambitious in light of the child's circumstances. *Id.* at 999. The court noted that goals may differ, but each and every child should have the chance to meet challenging objectives. *Id.* at 1000.

Both cases highlight the importance of an IEP designed to meet the student's unique disability-related needs. As stated in *Andrew F.*, an IEP is not a form document, but rather it is constructed only after careful consideration of the particular student, and that "the adequacy of a given IEP turns on the unique circumstances of the student for whom it was created." *Id* at 999. What is considered appropriate for one student may not be appropriate for another. Developing an IEP that is reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances requires a prospective judgment by the IEP team, based on careful consideration of information particular to that student, and one which is informed by the expertise of the school officials and of the student's parents.

2. Must IEP goals for all students with disabilities be aligned with grade-level content standards?

Yes. In order to hold each and every student to rigorous academic standards and high expectations, an IEP for a student with a disability must be aligned with the academic content standards for the grade in which the student is enrolled. *Dear Colleague Letter, Office of Special Education and Rehabilitative Services* (November 16, 2015). The cornerstone of IDEA is the entitlement of each student with a disability to FAPE that emphasizes special education services designed to meet the student's unique needs and prepare the student for further education, employment, and independent living. In order to make FAPE available to a student with a disability, the IEP must be designed to enable the student to be involved in and make progress in the general education curriculum, the same curriculum as for nondisabled students. This will provide the opportunity for the student to meet challenging academic achievement standards and prepare for college, careers and independence.

An IEP that focuses on ensuring that the student is involved and making progress in the general education curriculum for the grade in which the student is enrolled will necessarily be aligned with the academic content standards for that particular grade. To accomplish this, the IEP team must first understand the student's current level of performance compared to the academic standards and functional expectations for all students (*see Step 1 of the College and Career Ready (CCR) IEP 5 Step Process*).

Having high expectations for students with disabilities includes ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible. The IEP must include the specially designed instruction necessary to address the student's disability-related needs and ensure access to the general education curriculum and environment, including providing needed supplementary aids and services, so that the student can meet the academic content standards that apply to all students.

3. Must students with the most significant cognitive disabilities be held to grade-level standards?

Yes. IEP goals for students with the most significant cognitive disabilities must reflect high expectations, be aligned with content standards for the grade in which the student is enrolled, and be appropriately ambitious in light of the student's circumstances. IEP teams are required to determine whether a student with the most significant cognitive disability will receive instruction aligned to the general education achievement standards or aligned to alternate academic achievement standards. To help make this decision, IEP teams may use the document *Guidance for Determining if a Student has the Most Significant Cognitive Disability*. Wisconsin has alternate academic achievement standards called *Essential Elements* which are aligned with grade-level academic content standards. In Wisconsin, the statewide administered alternate assessment is the Dynamic Learning Maps (DLM) assessment. DLM is based upon the Essential Elements. More information about the DLM is available at <https://dpi.wi.gov/assessment/dlm/>.

Only students with the most significant cognitive disabilities who are participating in instruction aligned with the Essential Elements are eligible to take the DLM alternate assessment. To be identified as having a most

significant cognitive disability, a student must meet all of the following criteria: typically characterized as functioning at least two and a half to three standard deviations below the mean in both adaptive behavior and cognitive functioning; performs substantially below grade level expectations on the academic content standards for the grade in which they are enrolled, even with the use of adaptations and accommodations; and requires extensive, direct individualized instruction and substantial supports to achieve measurable gains, across all content areas and settings.

Whether or not a student has a most significant cognitive disability and participates in the DLM assessment is an IEP team decision. IEP teams must inform parents that their child's achievement will be measured based on alternate academic achievement standards and how participating in the alternate assessment may delay or otherwise affect the student from completing the requirements for a regular high school diploma *see* 34 CFR § 300.160. A student participating in the alternate assessment cannot be precluded from attempting to complete the requirements for a regular high school diploma. Sample IEP Form I-7A, includes parent notification as part of the participation guidelines for the alternate assessment.

4. Must the IEP guarantee progress?

No. The FAPE standard requires that the IEP be reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. Developing an appropriate IEP requires a prospective judgment by the IEP team. The IEP must aim to enable the student to make progress toward the student's annual IEP goals and in the general education curriculum, but there is no guarantee of progress.

A district must offer an IEP that is developed only after careful consideration of the student's present levels of performance, disability-related needs, and potential for growth. *Andrew F. v. Douglas County School District* (137 S.Ct. at 999). In doing so, the IEP team should consider the student's previous rate of academic growth, whether the student is on track to achieve or exceed grade-level standards and expectations, any behaviors interfering with progress, the effectiveness of the special education services, and any additional information and input provided by the child's parents. *Questions Answers on U.S. Supreme Court Case Decision Andrew F. v. Douglas County School District Re-1 (USDE Dec. 7, 2017, p. 5)*.

Furthermore, what is considered reasonable is based on the time the IEP was developed. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st. Cir. 1990). The appropriateness of the IEP may not be evaluated with the benefit of hindsight, but by circumstances as they existed at the time the IEP was developed. *DHA Case No. LEA-15-0005 (Oct. 12, 2015)*. However, one way of showing that an IEP was reasonably calculated to enable the student to make progress, is by demonstrating that the student did, in fact, make progress that was appropriate in light of their circumstances.

5. What happens if the student is not making progress toward IEP goals and in the general education curriculum or the progress is not sufficient?

The IEP team must review a student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved and revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum *see* 34 CFR § 300.324(b). In doing so, the IEP team should consider the effect of the disability on the student's access, engagement and progress in the general education curriculum (or for preschool children, how the disability affects the child's participation in age-appropriate activities) and what might be the root cause of the lack of progress (*see Step 2 of the CCR IEP 5 Step Process*) and make the necessary revisions to address the lack of progress. The instructional methodology should also be reviewed to determine if is effective and appropriate for the particular child. Revisions to the IEP might include changes such as new goals, additional services, changes in location, and/or duration of services. If the student is not making progress or the progress is not sufficient

to meet the annual IEP goals and make appropriate progress in the general education curriculum, the IEP team should meet to discuss the lack of progress and consider meeting more frequently than once a year. Parents also have the right to request an IEP team meeting at any time.

Monitoring and measuring progress both in the general education curriculum and toward IEP goals, is a critical component in ensuring FAPE. Each goal must include a statement of how the student's progress toward achieving the goal will be measured. The method of measuring must be appropriate to the stated goal, and be consistent with the baseline measurement and level of attainment. DPI has created two forms (I-5 and I-6) to assist IEP teams in documenting interim and annual reviews of progress toward IEP goals. (see Step 5 of the CCR IEP 5 Step Process).

6. Must the IEP address instructional methodology?

No. The type of instructional methodology to be used with a student is not required to be documented in the IEP. It is within the district's discretion to determine what instructional methodology will be used in educating students in special education and regular education classes to make appropriate educational progress. Courts have generally held that school districts have the discretion to determine which methodology will be used to educate a child with a disability. However, if the IEP, as written, is not producing sufficient progress, the instructional methodology should be reviewed to determine if it is effective and appropriate for that particular child. *DHA Case No. LEA-16-0015* (April 12, 2017), citing *Lachman v. Illinois State Bd. of Educ.*, 441 IDELR 156 (7th Cir. 1988), and *W.S. v. City Sch. Dist. of the City of New York*, 67 IDELR 242 (S.D.N.Y. 2016).

7. May a district refuse to provide a specific service if it is not offered in the district?

No. The IEP team must develop an IEP designed to address the student's individual disability-related needs to enable the student to advance appropriately toward attaining the annual IEP goals and be involved in and make progress in the general education curriculum. The district is obligated to ensure a continuum of educational placements and to offer a full range of services to meet the individual needs of students with disabilities *see* 34 CFR § 300.115, 320.

If the IEP team determines that in order to receive FAPE, the student requires a particular service that is not offered by the district, the district must ensure the student receives the needed service. An IEP team cannot determine services solely based on existing programming, staffing availability, or cost. If there are multiple ways to meet the child's needs, these factors may be taken into consideration but they cannot be the determining factor. The IEP team must include a representative of the district who is knowledgeable about the availability of resources of the district and has the authority to commit resources. Services described in the IEP must be provided as written.

8. When does bullying affect FAPE?

Bullying affects FAPE when the bullying impacts the student's ability to make appropriate progress in the general education curriculum and toward IEPs goals. Bullying is characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated. Bullying can range from direct physical or verbal aggression to more subtle behavior. It also includes bullying through electronic technology. *Dear Colleague Letter, Office of Special Education and Rehabilitative Services, (August 20, 2013)*.

Districts have an ongoing obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE in accordance with the student's IEP. This obligation exists regardless of whether the student is being bullied based on their disability or because of other reasons. *Dear Colleague Letter, USDE Office for Civil Rights, (October 21, 2014)*. In response to the bullying, districts should reconvene the IEP team to determine whether, as a result of the bullying, the student's needs have changed, and consider whether revisions are required in order to ensure the continuation of FAPE. IEP teams should exercise caution when considering changing the student's placement. Changing placement to a more restrictive environment to avoid the bullying may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE. *Dear Colleague Letter, Office of Special Education and Rehabilitative Services, (August 20, 2013)*. If the student who engaged in bullying is a student with a disability, the IEP team should review the student's IEP to determine if additional services, supports and goals are needed to address the behavior. *Id.*

For information and resources on how to prevent and address bullying, *see* <https://dpi.wi.gov/sspw/safe-schools/bullying-prevention>.

9. What role do behavioral supports play in providing FAPE to students with disabilities?

Failure to address the behavioral needs of a student through the IEP process is likely to result in a student not receiving FAPE. Under IDEA, when a student's behavior impedes the student'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 *see* 34 CFR § 300.324. This requirement applies whenever a student has a behavioral need, regardless of the impairment area under which the student was found eligible for special education.

Dear Colleague Letter, Office of Special Education and Rehabilitative Services (August 1, 2016).

Behavioral supports are provided through special education and related services, supplementary aids and services, and program modifications or supports for school personnel. In addressing the student's behavioral needs, the IEP team should also review grade level functional expectations and develop goals to assist the student in building skills to meet these expectations. (*see CCR IEP 5-Step Process*).

When there are incidents of classroom disruptions, violations of the code of student conduct, inability to attend to instruction, and other behavior that interferes with learning, the IEP team should meet to determine whether behavioral supports should be added to the student's IEP. If the student's IEP already contains behavioral supports, the IEP team should meet to review them, and determine whether revisions or additions are required. The IEP team should also consider whether a functional behavioral assessment might be helpful in understanding the function of the student's behavior and what supports might be most effective.

Dear Colleague Letter, Office of Special Education and Rehabilitative Services (August 1, 2016).

When a student repeatedly misses instructional time due to disciplinary removals or for other behavioral related reasons, it is likely that the student's opportunity to be involved in and make progress in the general education curriculum and toward their IEP goals has been significantly impeded. Districts must ensure FAPE by providing effective behavioral supports that allow the student to have access to and benefit from instruction. *Id.*

10. What happens if the parent believes that the IEP developed does not provide FAPE?

If a parent and a district are unable to reach consensus, there are special education dispute resolution options available. The department, through the Wisconsin Special Education Mediation System (WSEMS), provides for facilitated IEP team meetings, where an impartial professional facilitator attends the IEP meeting to help keep members of the IEP team focused on the student and the IEP while addressing conflicts and

disagreements that may arise. WSEMS also offers mediation that is conducted by a trained mediator, who is a neutral third party. The mediator assists the parents and the district in working together to identify issues, generate options, and create their own solutions. Because mediation is voluntary, either party may end the process at any time.

Anyone, including the parent, may also file an IDEA complaint with the department if they believe the district has violated state or federal special education requirements. The complaint must be in writing, signed, and it must be about violations of special education law that occurred within one year from the filing of the complaint.

Finally, a parent may request a due process hearing. When a due process hearing is requested, the department, by contract with the Division of Hearings and Appeals, appoints an impartial hearing officer to conduct the hearing.

11. How does the age of the student or graduation affect FAPE?

Once a student graduates from high school with a regular high school diploma, the student is no longer eligible for special education services. This is a change of placement requiring prior written notice. A regular high school diploma is issued by the school board upon successful completion of a high school program. The school board establishes the required elements of its high school program in conformity with section 118.33 (1) of the Wisconsin Statutes.

Students with disabilities who have not graduated with a regular high school diploma have a right to FAPE until the age of 21. If the student turns 21 during the school year, the student is entitled to receive services until the end of the school year in which they turn 21.

If a student will be exiting school at the end of the school year because of graduation or their age, the school district must provide the student with a summary of the student's academic achievement and functional performance that includes recommendations on how to meet postsecondary goals *see* 34 CFR § 300.305(e). The department has developed sample special education forms Notice of Graduation Form P-3 and Notice of Ending of Services Due to Age Form P-4 to provide the parent and adult student with notice of cessation of services and to provide the required summary. This information must be provided a reasonable time before ending services.

For more information on graduation *see* Information Update Bulletin 10.08, Graduation Frequently Asked Questions, and the Graduation Policy Worksheet.

12. Must a district provide FAPE if a student with a disability drops out of school and then reenrolls?

Yes. Once a student is determined to be a student with a disability and eligible for special education services, eligibility for FAPE remains until one of the following events occurs: the student exceeds the age of eligibility for FAPE; the student graduates from high school with a regular diploma; the student is determined, through an evaluation, to no longer be a child with a disability; or the parent revokes consent for special education.

Therefore, if a student with a disability drops out of school and then re-enrolls, the district has an obligation to provide FAPE. If the student does not have a current IEP in effect, the district must provide FAPE consistent with the last IEP until an IEP team meeting is held to develop a current IEP. A reevaluation may also be necessary if the district determines that the educational and related services needs of the student

warrant a reevaluation, the student's parent or teacher requests a reevaluation, or it has been more than three years since the last evaluation *see* 34 CFR §300.303.

If an adult student declines special education services, the school district should notify the student in writing that FAPE remains available until the student reaches the age of 21 or graduates with a regular high school diploma. If an adult student does not attend scheduled services, the district should conduct an IEP team meeting to address why the student is not attending. If the adult student continues to not attend after the district has made reasonable efforts to secure attendance, the district may stop providing services, and notify the student in writing that FAPE remains available until the student reaches the age of 21 or graduates with a regular high school diploma.

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<https://dpi.wi.gov/sped/laws-procedures-bulletins/bulletins>

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