

THE BENEFITS OF GOOD DATA COLLECTION AND REPORTING ON IEP PROGRESS

By

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- I. Documenting Progress is Important for Establishing FAPE and for Proof of Achievement of IEP Goals.
 - A. Cases
 1. Data collection should match student's abilities.
 - a. In the Matter of Kimi R., by and through her Parent, Malia V. v. Department of Education, State of Hawaii, 65 IDELR 12, 115 LRP 5160 (D. Haw. 2015). Articulation goals were not appropriate for a student who functioned as a two-year-old. "...[T]o teach a student with cognitive functioning as a two-year old, to teach them later developing sound, it doesn't make too much sense because they're not cognitively ready for those sounds yet." Goals on the IEP must match with the student's ability level or progress will not be possible.
 - b. Q.W., by his Next Friends and Parents, M.W. and K.T.W. v. Bd. of Educ. of Fayette County, Kentucky, et al., 64 IDELR 308, 115 LRP 2199 (E.D. Ky. 2015). Student was not eligible under the IDEA where the documentation collected by the team revealed that the student "...functions 'at levels well above that of his peers in cognitive and academic areas.'"
 2. The frequency of data collection will be determined by the IEP team.
 - a. County School Board of Henrico County v. Z.P., et al., 285 F. Supp. 2d 701, 45 IDELR 96 (E.D. Va. 2005). ZP was diagnosed with autism at age two. He was referred to child study, and before the evaluations were completed, ZP's parents placed him in a private school. The school board identified ZP as developmentally delayed and thus eligible for special education and related services. The school board proposed a public placement. ZP's parents

rejected the school board's IEP and initiated a due process hearing seeking reimbursement for the costs associated with the private placement. The due process hearing officer found in favor of the parents. He concluded that the proposed IEP was inappropriate and the private school was an appropriate placement. Thus, the hearing officer ordered the school board to fund the private placement. The district court concluded that the hearing officer's findings were not entitled to due weight because he did not give proper deference to the school board's educators. Thus, it reversed the hearing officer's decision. The parents appealed to the Fourth Circuit which concluded that the district court erred by failing to treat the hearing officer's findings as presumptively correct.

Upon remand, the district court concluded the public placement was appropriate even though it did not collect daily data. "However, this claim is based on a desire for optimization and the fact that daily data collection is an integral part of the ABA model. The TEACCH model provides educational benefit without detailed daily data collection."

- b. M.D., individually and on behalf of her minor child, J.D. v. State of Hawaii, Department of Education, et al., 864 F. Supp. 2d 993 (D. Haw. 2012). "The Court concurs with the administrative hearings officer's conclusion that Plaintiffs do not identify any basis in the record for their claim that State Defendants failed to collect sufficient data to address Student's needs. In fact, State Defendants' five-volume set of exhibits provides overwhelming evidence of careful and detailed data collection, analysis, including speech/language therapy data, monthly service plans and reviews, and behavioral health data collection sheets."

3. Data does not take one form.

- a. D.A., a Minor, by and through his Guardian Ad Litem, Latisha Adams v. Fairfield-Suisun Unified School District, et al., 62 IDELR 17, 113 LRP 38164 (E.D. Cal. 2013). There are different modes of collecting data. "Test scores are only one metric by which to assess progress. Another metric, one with particular significance in the IEP process, is a student's progress on goals. IEP meeting notes, the IEPs, and teacher testimony established that Student continued to make progress on his reading goals."
- b. A portfolio of school work may be appropriate data collection for some students. Don't assume that one type of data is all that is needed.

4. Collected data should be shared with parents.

- a. M.M.; E.M., individually and on behalf of their minor son C.M. v. Lafayette School District, et al., 64 IDELR 31, 114 LRP 40327 (9th Cir. 2014). “We conclude that the District did not fail to incorporate the RTI data into the evaluation, but that it violated the IDEA’s procedural requirements by failing to provide the parents with the RTI data.” “Without C.M.’s RTI complete data, his parents were unable to give informed consent for both the initial evaluation and the special education services he received.”
 - b. Forest Grove School District v. Student, 63 IDELR 163, 114 LRP 26109 (D. Or. 2014). High school student exhibited anxiety and, although she made progress, had not sufficiently achieved at a level to be dismissed from services under the IDEA. “[A] parent’s right to participate is not equivalent to the right to have all his or her requests adopted by the IEP team, because the District makes the ultimate decision regarding the extent of services its students require.” The failure of the school district to provide regular reports of progress and notes did not deny FAPE. “[T]he District’s untimely delivery of Student’s progress notes did not seriously infringe on Parents’ right to participate. Parents were regularly in contact with teachers and administrators through meetings, phone calls, and emails. Parents had ample opportunity to seek updates on Student’s progress.”
5. The data to be collected should arise from the IEP.
 - a. Determine the data to be collected, the frequency of the data collection and the consistent application of the criteria for recording of data.
 - b. Training of staff is critical.
 - c. Independent School District No. 701, Hibbing Public Schools v. J.T., by and through his parent, C.L., 45 IDELR 92, 106 LRP 12718 (D. Minn. 2006). The goals and objectives in the IEP were found to be inadequate where they were “vague and immeasurable.”
 - d. Make sure that the data tracks the IEP goals in a easy to follow and to explain method. Complex goals will make it difficult to collect corresponding data.
 - e. Distinguish between behavioral and academic data.
 6. The failure to document proof of delivery of services or data collection can give rise to claims for private placement.

- a. Sumter County School District 17 v. Heffernan, et al., 642 F.3d 478 (4th Cir. 2011). T.H. was a middle school student. He was eligible for special education as a student with autism (moderate-to-severe). At the time of the litigation, he was functionally non-verbal and was very sensitive to noise. His IEP for the 2005-06 school year provided for 15 hours per week of applied behavioral analysis (“ABA”) therapy. The school district, however, only provided approximately 7.5-10 hours per week of ABA therapy instead of the required 15 hours per week. The student did not do well and began exhibiting problematic behaviors, including biting himself and others, wiping his nose until it bled, and wetting his pants several times a day. In January 2006, the student began working with a newly-hired board-certified ABA therapist and lead teacher. The student’s problematic behaviors subsided, and he progressed to the point where he would sit and work with the teacher for 20 minutes at a time.

The IEP for the 2006-07 school year increased the amount of ABA therapy from 15 hours per week to 27.5 hours per week. In August 2006, the ABA therapist took a position with a different school, and a new lead teacher was hired to work with the student. The new lead teacher had no training in ABA therapy. So the school district hired a private educational consulting company to provide ABA training and supervision to the new lead teacher and the classroom aides. Nonetheless, the student did not do well under the new lead teacher, and his problematic behaviors quickly returned. The parents then removed the student from the school district in September 2006, and hired an experienced ABA therapist to provide approximately 30 hours per week of ABA therapy to the student in the home.

On appeal to the Fourth Circuit, the school district acknowledged that it did not provide the student with all of the hours of ABA therapy required by the IEP during the 2005-06 school year, but it contended that it satisfied the IDEA’s requirements by delivering significant portions of the services required by the IEP, which provided some educational benefit to the student. The Court agreed that “the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education.” However, according to the Court, “a failure to implement a material portion of an IEP, violates the IDEA.” While the evidence showed that the student had made some small improvements in certain skill areas during the school year, the Court determined that the evidence was not strong enough to overcome the school district’s failure to properly implement material portions of the IEP, which denied the student a free

appropriate public education (“FAPE”) for the 2005-06 school year.

- b. Capuano, legal guardian for Torda, et al. v. Fairfax Cnty. Pub. Bd., 62 IDELR 81, 113 LRP 43987 (E.D. Va. 2013), aff’d, 517 F. App’x 162, 61 IDELR 4 (4th Cir. 2013), cert. denied, 134 S.Ct. 1538 (2014). A mother, as legal guardian for the adult student, tried again to attack the failure to identify the student as APD in later school years. The Court held that the issue of whether there was a failure to identify APD in the years 2010-2013 was precluded on a theory of collateral estoppel because the parent had no new evidence to support the claim of the existence of undiagnosed APD. The earlier evidence had been reviewed by the Court and a finding made against the parents’ position. See Torda by and through his guardians, Torda and Torda v. Fairfax County School Board at 517 F. App’x 162, 61 IDELR 4 (4th Cir. 2013). The case could not be tried again without new evidence for the Court to consider. Even if there were new evidence, there had been a failure to exhaust administrative remedies through a due process hearing. (Quoting from Torda, 59 IDELR 71 (E.D. Va. 2012)):

“By the end of January 2008, Joseph met the criteria for or made sufficient progress toward achieving several goals identified in his IEP, including comprehension of sentences on a first grade level, adding and subtracting numbers with manipulatives or a calculator, following simple written and visual directions, demonstrating appropriate socialization skills in a small group setting, and producing certain target speech sounds in phrases and short sentences. . . . The notes of the IEP team and evidence of Joseph’s educational progress demonstrate that Joseph’s educational program during the 2007-08 school year was reasonably calculated to confer, and did confer, some educational benefit on Joseph.” (Citations to record omitted).

- c. J.P. et al. v. County Sch. Bd. of Hanover County, 516 F.3d 254 (4th Cir. 2008). A due process hearing was initiated on behalf of a twelve-year-old student with autism. The student had attended public school in Hanover from January 2001 until May 2003 at which time his parents placed him in a private school, Spiritos School, so that he could receive services using applied behavioral analysis (“ABA”). The student attended Spiritos during the 2003-04 school year. The parents were seeking reentry to the public schools for the 2004-05 school year. Hanover developed an IEP which called for a public school placement, and, by agreement to resolve a due process hearing, agreed to provide some ABA services. Other supports provided by Hanover included a one-to-

one aide, a self-contained placement and the use of some discrete trials when determined appropriate by the staff. Although the parents agreed to the IEP, they quickly became concerned about JP's progress.

In the fall of 2005 the parents enrolled the student in the Dominion School, a private school using the ABA approach and focusing on the education of students with autism. The hearing officer found in favor of the school division, upholding the appropriateness of both the 2004-05 IEP and the proposed 2005-06 IEP.

The parents appealed to federal district court. The district court reversed the hearing officer's decision and found in favor of the parents. The Fourth Circuit determined that the district court failed to give the required deference to the hearing officer's decision. Thus, the Fourth Circuit vacated the district court's judgment and remanded the case with instructions that the district court reconsider the question of the appropriateness of Hanover's proposed IEP.

On remand in a December 16, 2008 decision, the district court then analyzed whether JP had made progress while in the Hanover program and determined that any progress made was minimal at best. According to the district court, the record actually showed that the student regressed in some significant areas and that his progress was stagnant in other areas. The district court took issue with Hanover's data collection and progress reports.

“[T]he three main sources of documentation of progress offered by HCPS—the IEP benchmark scores, the discrete trial records, and the speech therapy log—were irregularly kept and are missing critical data. Further, there is evidence that many of the activities which were used to generate the data that fills these forms were improperly administered, particularly in the case of the discrete trial data. The record establishes, rather clearly, that the documentary evidence on which HCPS bases its position is simply not reliable support for the conclusions urged by HCPS.”

According to the district court, the progress logs skipped many days of therapy, contained no explanation for the gaps in recording, contained no standardized, test-based measures of JP's progress, and the progress reports themselves contained only conclusory benchmark scores.

The district court held that the lack of discrete trial data inhibited the student's progress. "The only graphing done regarding the HCPS discrete trial method data was performed by JP's father [Moreover,] the data sheets reflect, and [the father's] analysis of them confirmed that the data was collected irregularly." The data was collected in a sporadic fashion, and the data sheets failed to indicate the specific details of tasks given to JP. The district court also noted that JP's aide was under-trained: "She received only six days of training, which the testimony of knowledgeable experts indicates, without refutation, was insufficient." As a result of these problems, the district court determined that Hanover failed to correctly implement the discrete trial method, which was a material portion of the student's IEP.

The district court also determined that the testimony offered by the parents' experts was more credible, and, thus, more persuasive than that of Hanover's expert witnesses. The record, taken as a whole, clearly refutes the testimony given by Hanover's witnesses. The parents' experts, however, "formed their opinions based on properly conducted, recorded, and analyzed testing data."

7. The data that is collected can be useful in determining eligibility for extended school year services and the benefits of the IEP.
8. If the data shows that the student is not succeeding, be sure to revise the IEP.
9. Share the analysis of the data with the parents.

B. Statutory and Regulatory Requirements for the Collection of Data

1. Data collection may be used to determine the student's progress in the general curriculum. The term "progress in the general education curriculum" is used throughout the IDEA. 20 U.S.C. § 1414(b) (evaluations); 20 U.S.C. § 1414(d)(1)(A)(i) (IEPs); 20 U.S.C. § 1415(k)(1)(D)(i) (discipline).
2. The IEP must state how the child's progress toward annual goals will be measured and when progress reports will be provided. In Virginia, progress reports must be given at least as often as progress reports are given to the parents of children without disabilities. 34 CFR 300.320(a)(3); 8 VAC 20-81-110 (G)(8)
 - a. "(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or

other periodic reports, concurrent with the issuance of report cards) will be provided....” 20 U.S.C. § 1414(d)(1)(A)(i)(III).

C. Practical Considerations Concerning Data Collection and Progress Reporting

1. Data is very important as it is used to make decisions regarding eligibility, IEP content and progress.
2. Decide what data to collect.
 - a. Data areas should reflect the goals and any objectives.
 - b. Data could also track behaviors.
3. Define the data items.
 - a. Each staff member should understand the item for which data is collected.
 - b. Follow up and make sure the same understanding is applied by each collector so that the data collected is uniform across settings.
4. Establish a protocol for collection of data.
 - a. Each staff member should understand the collection system, including what to look for, how the data is recorded and the frequency of collection.
 - b. Create a collection record.
 - c. Provide training.
 - d. Follow up throughout the year to verify consistent implementation.
5. Create worthwhile progress reports.
 - a. Use the data to prepare progress reports and to support the compilation of valid conclusions about progress.
 - b. Complete progress reports and retain copies in the educational record of the student.
 - c. Retain the supporting data.
 - d. Prepare and disseminate progress reports.
 - e. Verify that progress reports are given for each student and that reporting is made on the correct goals and on each goal.

6. Hold follow-up IEP meetings if the progress reports indicate a lack of progress.
7. Collect data on actual IEP goals, but not on proposed goals for which no consent has been obtained.

D. Analyze the Data

1. Data that has been collected and analyzed is a good line of defense under the IDEA.
2. Data that has not been analyzed is not very valuable. Teachers should prepare periodic and annual summaries of the data.

E. Share the Data with Parents

1. Make parents aware of progress that is demonstrated through the collected data.
2. Good communication of progress forestalls disputes.

II. Top Ten Considerations in Documentation of Progress

- A. **Discuss and establish the frequency for measurement of the student's progress at the IEP meeting.** It is fine to have a pre-printed assumption regarding the frequency of these reports as long as the IEP team actually discusses the issue and makes a decision for the individual student.
- B. **Do not fall into the trap of believing that data must be collected daily and reported to the parents on a daily basis.** The IDEA does not require the collection of daily data or the provision of daily progress reports.
- C. **Obtain a good understanding of the student's cognitive functioning as that facet will drive the expectation for the amount of progress to be made under the IEP.** Do not write goals that are at too high a level for the student to achieve in a year's time.
- D. **Develop measurable goals (and objectives) and express them in understandable terms.** Be able to explain the goals and the measurement criteria to the parents. Data must exist in order that progress on the goals and the child's progress in the general curriculum can be discussed at the annual meeting.
- E. **Instruct staff to collect and maintain data as required by the IEP in order to prove that the goals were implemented.** This data must be collected on a regular basis and not all at one time. Data based on "observation" without written documentation will not be sufficient.

- F. **Conduct periodic checks to verify that data is being collected, that the data obtained is valid and that the data provides meaningful information.** Maintain the data in a notebook for each student and broken down by goal and objective. Be prepared to allow the parents to review the data.
- G. **Make sure that staff analyzes the data that has been collected in a meaningful manner.** Data that is collected and not analyzed is of no value. It is not required that data be collected in the format dictated by the parents.
- H. **Prepare meaningful progress reports which are supported by the data which has been collected.** If a level of functioning or percentage of achievement is provided in a progress report, there must be supporting documentation for these levels.
- I. **Share the summary of progress based on the data collection with the parents.** Be specific and be descriptive. It is also important to express the progress in understandable terms even if using graphs.
- J. **Verify that the staff is providing progress reports to the parents at the required intervals as specified in the IEP.** It is also necessary to keep copies of the progress reports.
- K. **Bonus: The ability to collect good data and measure progress is critical to winning due process hearings and to proving that progress was made by the student.**