

PROGRESS MONITORING—PART II

by
Kathleen S. Mehfoad, Esquire
Reed Smith LLP
901 E. Byrd St.
Suite 1700
Richmond, VA 23219
kmehfoud@reedsmith.com

It is advisable to start the school year with a full understanding of federal requirements for the provision of progress reports for students with disabilities. These reports provide valuable information to the parents about the success of the student's special education program and documentation for the school division that progress is occurring. The provision of progress reports is not optional as these reports are required by federal law and by state regulations. After setting forth the federal provisions regarding progress reports, the article will answer a number of questions regarding these reports.

The federal statute provides at 20 U.S.C. Section 1414(d)(1)(A)(i)(III), that the IEP must contain *“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”*. The federal regulation, at 34 C.F.R. 300.320(a)(3), tracks the federal statute and also requires that the IEP contain *“A description of---(i) How the child's progress toward meeting the annual goals...will be measured and (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.”*

Who must receive a progress report? A progress report must be provided to the parents of any student who has an IEP. As a result, the threshold question is whether the student has an IEP. If the student is identified under the IDEA as a student with a disability and has an IEP, progress reports must be provided for the student.

Who decides how often progress reports are provided? The IEP team determines how often progress reports will be provided. It is anticipated, but not required, that progress reports would be given at least as frequently as report cards are given. Once the IEP team decides how often progress reports will be provided, the IEP must contain a provision which reflects that decision. Importantly, progress reports must be given as frequently as the IEP specifies. It is a violation of the IDEA if the reports are not provided as specified. Make sure that teachers understand the importance of the legal obligation to provide progress reports.

Are daily progress reports required? As noted above, the determination of the frequency by which progress reports will be made is determined by the IEP team. There is nothing in the IDEA which requires daily progress reports. Thus, an IEP team can legally refuse to provide a report of progress on a daily basis. If the IEP team voluntarily determines that it will place a provision in the IEP to provide daily progress reports, then the school division is responsible for

providing reports with that frequency. It is advisable that the IEP team not agree to provide reports of progress with a daily frequency as the school division will have a hard time with compliance. It is recommended that the onerous burden of daily reports not be voluntarily assumed. An individual teacher may elect to provide voluntary, daily progress reports and not write this obligation in the IEP. If that method is utilized, then there should not be problems with IEP compliance.

Who decides how progress will be measured? In addition to deciding how often progress is reported, it is the function of the IEP team to decide how progress will be measured. Progress may be measured a number of different ways: delineation in goals/objectives, classroom participation, tests, quizzes, assessments, observation, homework and other methods. The IEP must designate which of these procedures will be used to decide if the student is making progress on the goal. Information must be collected in each of the chosen areas consistent with the IEP goals.

What information should be contained in a progress report? At each report interval specified in the IEP, a progress report is issued to the parents by the school division. Typically, the special education teacher of the student or case manager is responsible for preparing and sending the progress reports to the parents. The progress report sets forth each of the annual goals on the student's IEP and then recites how the student is progressing toward meeting the goal. It is important that staff be sure to report on the goals from the student's current IEP. In order to report on progress, the school staff must collect data and then interpret the data to see if the student is progressing toward mastery of the goal. At each progress report, the staff should have data which support the conclusions regarding progress set out in the report.

How long are progress reports kept? Progress reports must be kept by the school division in the student's educational records and not destroyed at the end of a year. Progress reports would be kept for the same length of time as other information which is maintained in the educational records. The underlying supporting information on which the progress was based should also be maintained. Without specific information about progress, the staff will not be able to recall the growth of an individual student during the course of a school year. The often lengthy delay in requesting a due process hearing is an indication of the need for maintaining this information and in requiring that the information on progress be specific.

Does data need to be collected daily in order to report on progress? There is no requirement to collect data daily, just like there is no requirement for daily reports of progress. It needs to be understood, however, that data must be collected and interpreted as envisioned by the IEP.

Summary

School divisions need to understand the importance of creating progress reports for parents on the schedule designated in the IEP. The provision of progress reports is a legal requirement. The reports must recite how the student is progressing on IEP goals. The reports must be generated based on a collection of data. The progress reports must be maintained in the student's file and not destroyed at the end of the year.

Case Decisions:

Board of Education v. Rowley, 458 U.S. 176 (1982)

An IEP provides FAPE if developed in accordance with the procedures of the IDEA and “reasonably calculated to enable the child to receive educational benefits.” Id. at 206-7.

“The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom. The requirement that States provide ‘equal’ educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.” Id. at 198.

“We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Id. at 201.

“The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied.” It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.” Id. at 202.

Not every child who is advancing from grade to grade in a regular public school is receiving FAPE. Id. at 203, n.25.

T.W. v. Unified S.D. No. 259, 43 IDELR 187 (10th Cir. 2005).

Student with Down syndrome was provided FAPE in a self-contained setting and not in the general education setting. Modifications to the general curriculum were extreme and bore no resemblance to those of the classmates. The few benefits received by student in the general classroom were outweighed by the fact that most progress was gained in one-to-one pull out sessions. While progress reports must be given to parents, the IDEA does not require that parents receive reports “as frequently as the parents may wish.”

Systema, by Systema v. Academy School District No. 20, 538 F.3d 1306 (10th Cir. 2008).

Student with autism was educated for the most part in his home with services provided by his parents. School district offered IEPs. In the IEP meeting for the 2001-02 school year, parents walked out of IEP meeting before the IEP was completed. A full IEP was developed for the

2002-03 school year. In order for the IEP to provide FAPE, it must include a statement of how progress will be measured and when regular reports of progress will be provided. *Id.* at 1312. Where the parents did not cooperate with IEP development, the school district may not be liable for lost educational opportunity. *Id.* at 1314. The IEP under review provided for quarterly progress reports and a parent-teacher conference once per semester. The appropriateness of the draft IEP for 2001-02 would be determined on the sufficiency of the written draft.

Thompson R2-J S.D. v. Luke P., by and through Jeff and Julie P., 540 F.3d 1143 (10th Cir. 2008).

Parents requested that their child with autism be placed in a private residential school. They asserted that he was unable to generalize his learning from the services offered through the IEP in the public schools. The local and state hearing officers ruled for the parents and found that even though Luke was making progress on about a quarter of his goals, he could not generalize his skills outside of school and needed a residential placement. “While we are sympathetic to Luke’s parents’ desire to see their child thrive, the difficulty with their argument is that Congress did not provide in IDEA a guarantee of self-sufficiency for all disabled persons....” *Id.* at 1151. Luke’s difficulty with generalization did not prevent him from making some progress at the public elementary school. The school district had included most of the parents’ desired goals in the IEP. The fact that there had been prior progress under the IEPs was suggestive of continued progress under similar future IEPs. Placement in a residential facility was denied.

O’Toole, by Kevin and Kathy O’Toole v. Olathe District schools Unified S. D. No. 233, 144 F.3d 692 (10th Cir. 1998).

Hearing impaired student’s parents challenged the student’s IEP. The Tenth Circuit held that “However, an IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such.” *Id.* at 702. While the IEP failed to provide for reports of progress, the IEP was reviewed with the parents at least every twelve weeks. The school district’s printed IEP form had called for evaluation of progress every twelve weeks. Additionally, an IEP cannot be determined inappropriate on the basis that the student makes more progress in a different program.