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Use of Legally Compliant IEPs for Inclusive Programming

Keith J. Hyatt, EdD and Aaron B. Perzigian, PhD, Western Washington University

The purpose of this article is to review major components of an Individualized Education Program (IEP) from the perspective that the IEP process serves to facilitate inclusive opportunities for students with disabilities. The IEP is a legally binding contractual agreement between a school district and a family, thus it is imperative for the process to be procedurally compliant and completed in a substantively meaningful manner consistent with the six key foundational principles of special education law (Turnbull, Stowe, & Huerta, 2007). An IEP is one of the foundational principles of the Individuals with Disabilities Education Improvement Act (IDEA) of 2004, and this article will primarily focus on three legal criteria needed to develop a meaningful IEP.

The first, Free Appropriate Public Education (FAPE) is the ultimate goal of special education and is related to the other two important criteria: Least Restrictive Environment (LRE), and parent participation, including the development of Annual Goals and Short-Term Objectives. Given the importance of the IEP in helping ensure that students with disabilities receive FAPE, it is crucial for all parties involved in the development of the IEP to have an informed understanding of their rights and responsibilities. We begin by discussing the use of people-first language and the Congressional Findings regarding the education and placement of students with disabilities, as these findings represent foundational understandings necessary for a critical review of IEPs.

People-First Language and Congressional Intent

The significance of language use in reference to individuals with disabilities has been addressed by many in the field (e.g., Snow, 2012), and numerous professional organizations, including TASH and the American Psychological Association (APA), require use of people-first language in their publications. This linguistic practice helps place focus on the individual while avoiding negative stereotypical generalizations associated with disability labels. We acknowledge that disagreements exist regarding the use of people-first language, for example, some individuals prefer being called a deaf person rather than a person with a hearing impairment. However, in this paper we operate under the assumption that language does influence the ways in which individuals with disabilities are viewed by the public and ultimately served in schools. Hunt (1966), a disability rights activist, discussed the relationship between language, stigma, and treatment of individuals with disabilities across many facets of society, and that using a disability label to identify a person may result in a higher level of social segregation. In essence, the use of people-first language should be the default and changed only when requested by the individual with a disability.

As will be described below, more than 40 years since the initial passage of special education law, one still encounters situations wherein students with significant disabilities are assumed to require placement in a segregated setting based solely on disability label, and under faulty assumption that restrictive placements result in more specialized interventions (Taylor, 2004). For instance, in some districts the presumed educational placement for a student with an intellectual disability is a self-contained classroom based entirely on disability label rather than educational needs of the individual. Thus, it is important for IEP teams to use people-first language when referring to students with disabilities, since recognition of the individual before the disability can be a first step in shaping inclusive school-wide perceptions and fostering a student-centered focus.

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As noted in the following verbiage from the preamble to PL 108-446 (IDEA), the Congressional intent was to specifically recognize special education as a service, not a place. Congress also noted the importance of family involvement, high expectations for students with disabilities in the regular classroom, and the provision of professional training to meet these assumptions:

601(c)(1): Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

601(c)(5): Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by:

having high expectations . . . and ensuring access to the general education in the regular classroom, to the maximum extent appropriate;

(B) . . . families to have meaningful opportunities to participate in the education of their children;

(C) . . . special education can become a service . . . rather than a place . . .

(D) providing appropriate special education and related services, and aids and supports in the regular classroom . . . whenever appropriate; and

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities.

Despite these recognitions, data from the National Center for Educational Statistics (2014) showed a relatively stagnant and segregated placement rate for students identified as having an Intellectual Disability (ID) or Multiple Disabilities (MD) during the 2010, 2011, and 2012 school years. Approximately 49% of students with ID and 47% with MD were educated in regular education less than 40% of the school day, and 6% of students with ID and 19% with MD were educated in separate schools. Clearly, improvements in regular education placement rates are needed to meet our national goal of providing services that will enable individuals with disabilities to participate in full school communities and the richness of American life. In the following

section, we discuss FAPE, and in subsequent sections LRE and parent participation, including the development of Annual Goals and Short-Term Objectives.

Free Appropriate Public Education

The provision of FAPE is the ultimate goal of special education and all activities should be coordinated to ensure the student receives such. The 1982 U.S. Supreme Court first visited the issue in *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*. The Court noted that Congress had not provided a complete definition of the meaning of FAPE, particularly a definition of what was meant by “appropriate.” When defining the concept, the Court recognized legal requirements which included that special education and related services must be provided at public expense and under public supervision and delivered as agreed upon in the IEP. The Court determined the law did not require school provide a “gold standard” wherein a student’s potential would be maximized. Rather, the law mandated access to individually designed educational programming (i.e., IEP) that is “reasonably calculated to enable the child to receive educational benefits.” While noting there is no guarantee a student will achieve the agreed upon goals, there is the legally enforceable expectation the school will deliver the supports and services identified in the IEP.

Exactly what constitutes “educational benefit” has remained controversial and on January 11, 2017, the U.S. Supreme Court heard oral arguments in an appeal of the 10th Circuit Court decision in *Andrew F. v Douglas County School District RE-1*. While there were several issues considered, a primary concern was with the 10th Circuit Court’s determination that merely more than a *de minimis*, or trivial, level of educational benefit was a sufficient standard when considering FAPE. The March 22, 2017, unanimous U.S. Supreme Court decision in *Andrew F. v. Douglas County School Dist. RE-1* nullified the standard applied by the Circuit Court and effectively raised the bar for determining whether a child with a disability received educational benefits. While not providing a specific test for determining receipt of education benefits, the Supreme Court did note that “this standard is markedly more demanding than the ‘merely more than *de minimis*’ test applied by the 10th circuit.” The Court also noted that “When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” Prior to the Supreme Court decision, the Circuit Courts were split on what level of achievement was meaningful, with some having much higher standards than that

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of the 10th Circuit. Now, children with disabilities throughout the nation can reasonably expect to receive educational benefits that are clearly more rigorous than simply *de minimis*. (See text box for additional information.)

Least Restrictive Environment

While provision of FAPE is the overarching goal of IDEA, it is closely aligned with the contentious issue of Least Restrictive Environment (LRE). The principle of LRE has been a component of special education law since inception in 1975, yet it continues to an area of controversy. There are advocates for restrictive special education placements who believe that removal from a regular education setting allows schools to better meet the needs of students with disabilities. The discussions justifying such beliefs and practices may perpetuate the notion of different LREs for different students or that a particular student's LRE may change over time (Heward, 2016; Kauffman, 1995). There are others (e.g., Taylor, 2004) who argue the continuum of alternate placements, Section 300.115 of the implementing regulations for IDEA, ranging from regular education to residential treatment presupposes restrictive environments and erroneously associates the most segregated settings with most intensive supports. As Taylor suggests, this assumption fails to consider significant supports can often be provided in a regular classroom, a regular work environment, or a regular residential setting. Similar to Taylor's stance and that of TASH, are others (e.g., Hyatt & Filler, 2011; Sailor et al., 1989) who argue that the law clearly identifies LRE as the regular education environment for all students. They emphasize the regular education environment as the starting point and note that the law does permit a more restrictive placement, but only if needed to provide FAPE. If an IEP team does decide for a placement other than the regular education setting, then the student must be placed in the least restrictive setting (along the continuum of alternative placements) necessary to provide FAPE. However, moving a student to a more restrictive setting than needed for educational benefit would be a denial of FAPE. The LRE requirement is also applicable to nonacademic activities, extra-curricular activities, and other school-sponsored events.

The Code of Federal Regulations, Section 300, provides specific guidance for implementing the law. For example, §300.114, titled Least Restrictive Environment, states the following:

- (2) Each public agency must ensure that:
 - (i) 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 nondisabled; and

- (ii) Special classes, separate schooling, or other removal for children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

As clearly required by (2)(ii) of the LRE provision, an IEP team must begin developing the IEP with the presumption that the student will be educated in the regular education environment, otherwise the team fails to meet the standards for considering whether removal is necessary. For example, if a team was completing an annual IEP for a student who was currently placed in a segregated setting due to behavioral needs and, as a matter of practice, began that IEP meeting under the assumption that the student would continue to be placed in the segregated setting, the team would likely be committing an error of making a predetermined placement. In this example, the placement was predetermined because the team made the placement decision at the beginning of the meeting before developing Annual Goals and Short-Term Objectives and determining whether they could be met in the regular setting with the use of supplementary aids and services.

Placement in the regular education environment is often referred to as a *rebuttable presumption*, due to the premise of regular education placement, which may only be rebutted, or overruled, if needed to ensure FAPE. The justification for removal from regular education is not meant to be a simple academic exercise. However, for some students, it may be relatively simple to justify removal. For example, it would be straightforward to justify removing a student from the regular education setting if part of her IEP (thus FAPE) incorporated community-based job exploration activities not available at the school setting. However, the IEP team could still recognize the important fundamental assumptions of LRE by ensuring the student was placed in activities with typically developing peers or adults, rather than at a sheltered workshop or in an enclave in which groups of students with disabilities worked together in teams, which for all practical purposes mirrored segregated placements. The importance of parent participation and the development of Annual Goals and Short-Term Objectives in the IEP process are discussed in the following sections.

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Parent Participation

Consistent with key principles of IDEA and the preamble to the law, is the importance of parental participation in the IEP. Schools must invite parents to IEP meetings and inform them of the participants (e.g., physical therapist) the school intends to include (§300.332(b)). Parents, however, are not required to inform schools of whom they may bring (e.g., family advocate). While schools are not required to conduct IEP meetings outside of regular school hours, they are encouraged to arrange for a variety of participation methods if a parent is unable to attend at the school (e.g., phone conference)

When preparing for an IEP meeting, it is advisable for parents to consider what outcomes they want for their children. Although specific curricular understandings might be beyond their expertise, parents may have identified and prioritized skills (e.g., communication). Additionally, key skills or skill areas can be identified through a person-centered planning process, such as MAPS (Vandercook, York, & Forest, M., 1989) prior to the IEP. In all likelihood, many of the target skills could be addressed in a range of environments, which would help the team recognize an inclusive placement as a viable option.

Section 300.321(a)(2) states “no less than one regular education teacher of the child (if the child is, or may be participating in the regular education environment)” must be a member of the IEP team. However, the regulations do contain procedures by which a required member of the IEP team may be excused if both the parent and the school agreed (§300.321(e)). Nonetheless, a school should avoid excusal. Given the LRE provisions specify the regular education setting as the presumed placement, IEP teams should exercise caution if not inviting a regular education teacher to the meeting. Failure to do so, because the school team decided that the student would not be participating in the regular education environment prior to development of the IEP, would indicate that the school engaged in actions resulting in a predetermined placement. This is a procedural error of such significance that it could result in determination of a failure to provide FAPE. Similarly, disallowing parents to contribute in the development of the IEP, including any placement decision, is a procedural error of comparable gravity.

Prior to the 2004 reauthorization, schools were prohibited from bringing draft IEPs to an IEP meeting. That prohibition was rescinded, but the practice is discouraged in the accompanying regulations (71 Fed. Reg. 46678, 2006). If a school does

complete a draft IEP, it must be clearly marked as a draft, and the school team should be cognizant that bringing a draft IEP to a meeting may stifle the conversation with the parents and effectively minimize parental participation. Further, if the school team brings a completed IEP form with placement already identified, it runs the risk of being accused of making a predetermined placement.

If the purpose for bringing a draft IEP is to facilitate a more efficient meeting, then an IEP team may be better served introducing suggested IEP goals and objectives written on separate paper. The prepared goals/objectives could be discussed and finalized at the actual meeting. Alternatively, the suggestions could also be shared with parents prior to the IEP meeting, thereby allowing time to review items and participate in meaningful goal and objective development. Following these guidelines increases the likelihood for the IEP to provide FAPE and promote inclusion of family priorities.

Goals/Objectives and Other Useful Information

A critical component for facilitating meaningful and legally compliant IEPs is development of Present Levels and associated Annual Goals/Short-Term Objectives. Present Levels statements should be written in parent-friendly language and provide a clear description of performance in area(s) in which the student will likely receive specially designed instruction. For example, a statement such as “When greeted by peers, Juan responds verbally within 3 seconds on 3 of 5 opportunities” is more helpful than a statement focused on norm-referenced test (NRT) scores, such as “Juan scored at the 2nd percentile in communication skills.” While descriptions from NRTs may be helpful for determining eligibility, they are less helpful when developing learning targets than actual behavior based data. NRT scores simply don't provide information of sufficient specificity needed to develop meaningful Annual Goals or Short-Term Objectives. While it is permissible for a school to develop Present Level statements prior to the IEP meeting, the final statements should include parental input as appropriate.

Once Present Levels are specified, the team can develop Annual Goals and associated Short-Term Objectives. While the Present Levels function as baseline description of a student's current skills, the Annual Goals state how well the team expects that student to perform in one calendar year in the areas in which the student

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will receive specially designed instruction, and the Short-Term Objectives are the intermediate steps associated with each Annual Goal that help determine progress toward attainment of the Annual Goal. The IEP need not identify all skills a student will learn in a year, but it should identify the key skills to be targeted. If the student achieves the goals before yearend, the IEP team can celebrate those successes and develop additional goals for the remainder of the year.

In order for the IEP to be legally compliant, Annual Goals and Short-Term Objectives must be written in measurable terms. If unmeasurable, one could argue that the student is not receiving FAPE as there would be no way to accurately evaluate progress, and opinion is no substitute for data. The following is an example of one measurable Annual Goal in mathematics and associated Short-Term Objectives a student might work toward in relation to addition and subtraction:

- ◆ **Annual Goal:** Given a worksheet with 100 mixed, single digit addition and subtraction problems, Alex will write the correct answer to 90 problems within 2 minutes.
- ◆ **Short-Term Objective 2:** Given a worksheet with 100 single digit subtraction problems, Alex will write the correct answer to 90 problems within 2 minutes on two consecutive opportunities.
- ◆ **Short-Term Objective 1:** Given a worksheet with 100 single digit addition problems, Alex will write the correct answer to 90 problems within 2 minutes on two consecutive opportunities.

This Annual Goal represents a specific skill (single digit addition and subtraction) Alex will exhibit within one year and it is based upon his performance as described in the Present Levels. Note that Annual Goals are not lesson plans nor are they inclusive of all math skills Alex will likely develop during the year. Rather, they identify specific, measurable descriptions of priority skills that the team expects Alex to acquire. In this example, the targeted Short-Term Objectives progress from simple (addition) to more complex (subtraction) culminating in an Annual Goal which requires an even higher level of skill (differentiating addition from subtraction). In Alex's case, it is highly probable that he has additional Annual Goals in mathematics and other academic areas as well as other skill areas, including self-help, communication, etc. if needed.

Following identification and development of Annual Goals and Short-Term Objectives, the team must determine which

supplementary aids and services can support the student in meeting these tasks within regular education environments. It is relatively easy to envision supporting a student who has average cognitive skills and a significant visual impairment and can read braille. The team would likely have no problem recognizing that the texts and other material should be provided in braille, thereby allowing the student to access the general education curriculum. However, when students have significant intellectual disabilities, it is often more difficult for teams to determine how to provide the supplementary aids and services in the regular education environment.

Consider a 5th grade student with a significant intellectual delay who is working on toileting skills. Many teams may determine that toileting isn't an appropriate skill to teach in a regular 5th grade classroom, so they recommend the student be placed in a self-contained classroom that happens to have a bathroom attached. This would likely be a result of an unjustifiable "we don't do that here" excuse. In essence, the team would be requiring the student develop independent toileting skills and earn his way into the regular classroom. If the team truly considered supplementary aids and services, they could implement a traditional, data-based toileting program, and schedule a time for another adult to come to the room and assist the student with toileting. Toilet training does not have to be completed in a bathroom attached to a special education classroom nor does it need to be done by the regular classroom teacher.

Let's consider one more example in which a 7th grade student with a significant intellectual delay has a communication goal of looking toward a peer within 5 seconds of the peer saying his name. Clearly this is a skill that most 7th grade students acquired years earlier and one could imagine a classroom teacher stating that there is no opportunity to work on that skill during 7th grade algebra class, thus the student should be taught those skills in the self-contained special education class. Rather than devising reasons for removing the student, the team should ask, "What supplementary aids and services can be provided in the algebra class that will allow the student to work on his communication skills with his typically developing peers?" There are many strategies that the teachers could implement, but the point is that the student could work on communication skills in a math class. Of course, he could be working on other IEP skills, too. It might require the special education teacher and possibly the speech therapist to visit the classroom, review the activities, and identify

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which other skills could be addressed in a math class (see Hyatt & Filler, 2016 for a description on using an activity matrix for such a situation). He could potentially be working on several different skillsets, such as communication, mathematics, and motor skills.

All too often students with significant disabilities are assigned a 1:1 paraprofessional rather than building upon the naturally occurring supports available in the environment. If a paraprofessional is assigned, then it is important that the para is in a supporting role rather than be the individual totally responsible for instructional design and content delivery (see Giangreco, Edleman, Luisellin, & MacFarland, 1997 for a discussion of unintended consequences when working with paraprofessionals. Their observations remain relevant some 20 years after initial publication).

In essence, the team must presume that the student will be educated in the regular education classroom with the use of supplementary aids and services and can only be removed if those needs cannot be met. The IEP team may also identify specific supports, including training, provided to the regular education teachers to enable them to meet the student's needs. A student with a disability is first and foremost a regular education student, and it is inappropriate to require that a student "earn" or "learn" her way into the regular classroom.

Conclusion

While periodically overlooked as a strategy for inclusive programming, a strategic IEP is an effective tool for ensuring access to regular education environments. It is imperative that participants have a sound understanding of the IEP process, for parents to have an opportunity to meaningfully participate, and for the IEP to be developed such that it provides a reasonable expectation of educational benefit. Moreover, it is critical for the team to begin with the assumption that the student will be educated within regular education. Should a student require a community-based setting, such as a jobsite, to meet the goals, then the school might meet the LRE intent by ensuring that the student is working with typically developing adults. Applying these foundational concepts of special education law during the IEP process helps to facilitate inclusive programming for students with disabilities.

About the Authors

Keith Hyatt, EdD works at Western Washington University in the Department of Special Education and Education Leadership. His professional interests include disability law, inclusion, the IEP, and evidence-based vs. pseudoscientific practice. He writes, "Disability is natural part of the human condition and an aspect of diversity that is frequently overlooked. High quality instruction in inclusive settings can significantly and positively impact the lives of individuals with disabilities and foster social justice. The law and IEP are two avenues that can support inclusive practices."



Aaron Perzigan, PhD's research examines the efficacy of alternative school contexts (e.g., behavior reassignment programs) and the ways in which social-emotional learning predicts academic performance for students with high-incidence disabilities.



His PhD dissertation (2015) examined ratings of school climate across various school types and the relationship between climate ratings and school achievement (i.e., attendance, behavior referral, and credits earned) in different school categories (i.e., academic remediation, behavior reassignment, school choice innovative, and traditional).

He is actively seeking collaborators in research within special education teacher preparation, social-emotional learning, and alternative schools as well as other opportunities related to strengthening the learning climates -and thereby educational trajectories – for all students.

Professionally, he is both interested and invested in civic education, culturally relevant pedagogy, and meaningful participation of individuals with disabilities in all facets of society. He writes, "I proudly serve on the boards of Communities In Schools of Whatcom County and the Developmental Disabilities Advisory Council of Whatcom County."

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Andrew F. and an End to the “more than ‘de minimus’ Standard”

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In a 2017 decision celebrated by many disability rights groups (e.g., Council of Parent Attorneys and Advocates (COPPA)), the U. S. Supreme Court in *Andrew F. v. Douglas County School Dist. RE-1* issued a unanimous decision clarifying “meaningful educational benefit.” The Justices forcefully affirmed the right of children with disabilities to be afforded ambitious and challenging educational opportunities. In doing so, the Justices reversed a decision by the 10th Circuit Court of Appeals which held that an appropriate level of educational benefit for children with disabilities was simply more than “de minimus” or trivial learning.

Briefly, the facts of the case taken from the Opinion of the Court (580 U. S. ____ (2017)) are as follows. Andrew (Drew) was a student with autism who attended public school in Colorado. Among other things, his parents argued that the district failed to provide Drew with a Free and Appropriate Public Education (FAPE) because his progress in academic and functional skills had stalled. They contended that the IEP goals and objectives were substantively the same from year to year, which was indicative of failure to provide FAPE. Drew’s parents placed him in a private school wherein he was provided with a behavior intervention plan resulting in dramatically improved behavior and academic progress that had not been realized in the public school. They asserted that the district failed to deliver FAPE by not providing Drew with an IEP that was “reasonably calculated to enable [him] to receive educational benefits.” His parents filed a complaint with the state. The district prevailed at the administrative appeals, District Court and Court of Appeals levels; however, Drew’s parents persisted and succeeded at the U.S. Supreme Court.

In the decision, the Supreme Court noted that it had first addressed FAPE and the requirement that the IEP must be “reasonably calculated to enable the child to receive educational benefits” in 1982 (*Hendrick Hudson Dist. Bd. of Ed. V. Rowley*). However, the question of FAPE and the provision of educational benefits was significantly different between *Rowley* and *Andrew*. Since Amy *Rowley* was educated in the regular education setting, advancing through grade levels, and actually achieving at a rate higher than her average classmate, the Court reasoned she was receiving meaningful educational benefit. In the *Andrew* decision, the Court noted that moving through grade levels was not appropriate for all students and stated the following:

If that is not a reasonable prospect for a child, his IEP need not aim for grade level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

...It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot.

When all is said and done, a student offered an educational program providing “merely more than de minimis” progress from year to year can hardly be said to have been offered an education at all. (p. 14).

The decision has significant implications for IEP teams and schools. It clearly raises the bar on the educational expectations for students with disabilities, especially those students who experience the most significant learning and behavioral challenges. While the Supreme Court admittedly did not try to develop a specific test that would determine whether a child was receiving a meaningful educational benefit, it did clarify that trivial learning goals are unacceptable outcomes for student with disabilities. The Court reaffirmed the individualized attention that must be afforded to students and recognized the important role parents play in developing the IEP. The decision and Amici Curiae (friend of the court) briefs submitted on behalf of both Endrew and the district can be accessed at the SCOTUSblog.

Following is a non-exhaustive list of simple guidelines for IEP teams to consider that would facilitate provision of appropriately ambitious learning outcomes “reasonably calculated to enable the child to receive educational benefits” (Rowley):

1. Ensure meaningful parent participation;
2. Develop ambitious IEP goals and objectives that could be met before the annual review;
3. Regularly collect data to determine if the student is making adequate progress and adjust instructional methodology if necessary;
4. Reference the general education curriculum whenever possible, even if at a different grade level;
5. Identify skills that are chronologically age appropriate and socially validated;
6. Maintain high learning expectations for all students;
7. Conduct Functional Behavioral Assessments and develop Positive Behavior Support Plans as necessary; and
8. Consider the range of special education and related services (don’t overlook assistive technology) necessary to meet goals and objectives.

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