




FAPE – What To
Watch Out For:

*New, Hot-Button Issues
& Adaptive Problem-
Solving*



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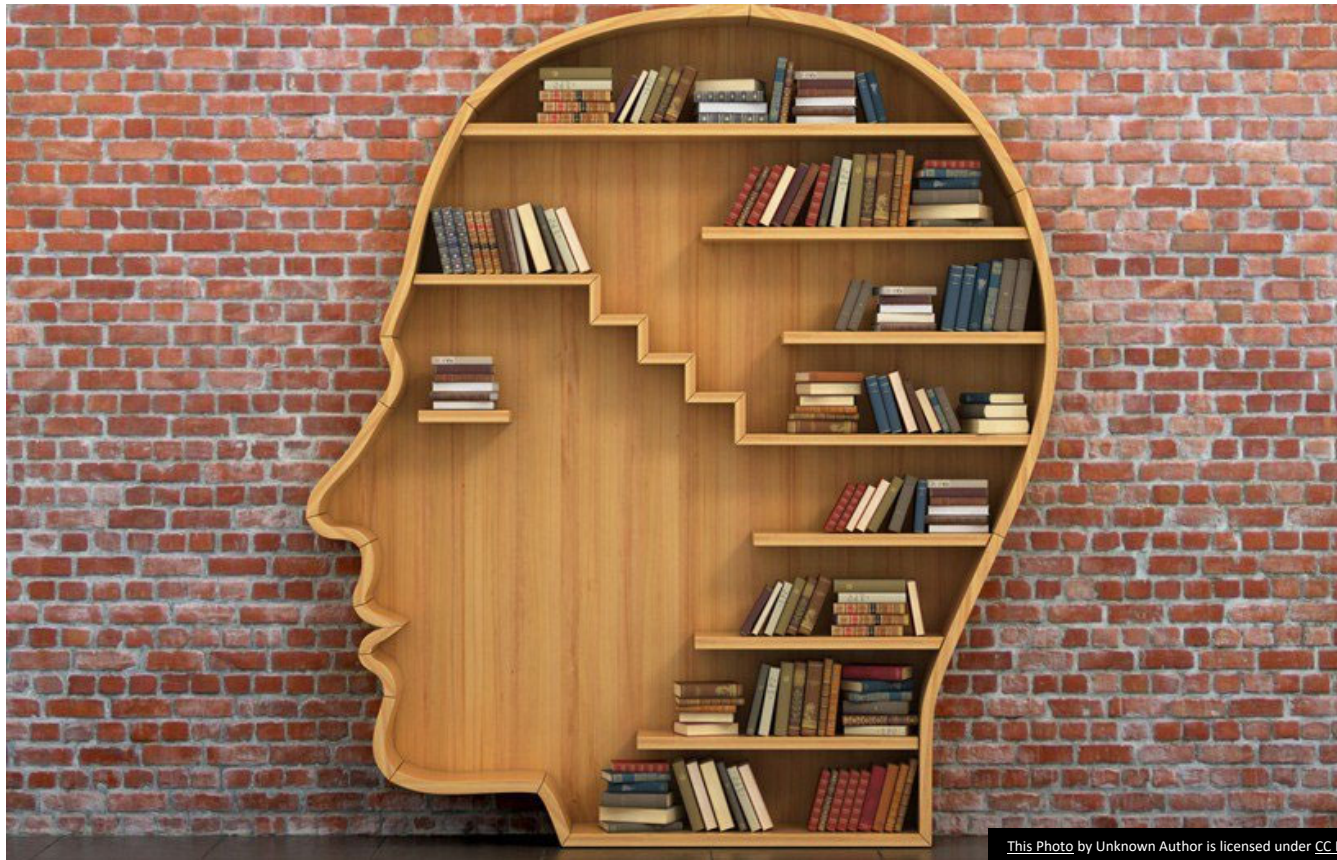
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Getting
Ourselves
Warmed
Up ...



To Begin ...

- When you think about problem-solving around FAPE and LRE in your school(s), what comes up for you?
 - Please jot down 2-3 issues/scenarios.
 - Be as specific as possible.
 - Shorthand is fine – these examples are for you. Hopefully, they will help you think about what you would like to most get out of this session.
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Individuals with Disabilities Education Act

- 20 U.S.C. §§ 1400 *et seq*
- Requires that schools provide students with disabilities a free appropriate public education (“FAPE”)
- Establishes procedures for identification, evaluation and placement of students with disabilities
- Establishes procedural safeguards for parents of students with disabilities, which include discipline procedures (more on this later ...)

Andrew F. v. Douglas County School District – Understanding It

- In its March 2017 *Andrew F.* decision, the US Supreme Court interpreted IDEA’s FAPE mandate to require the LEA to offer an IEP “reasonably calculated” to enable a child to make progress appropriate in light of the child’s circumstances.
- The IEP’s educational program must be “appropriately ambitious” in light of the student’s circumstances; the educational goals may differ, but “every child should have the chance to meet challenging objectives.” Not a guarantee of educational performance or certain amount of academic proficiency.
- From [ID’s Special Education Manual, Chapter 2 Resource Titled “Revisiting the FAPE Standard”](#), Sept. 2021:

“IEP teams must carefully consider each child’s present levels of achievement, functional performance, disability, and potential for growth. If a child is not making expected progress, the IEP team must revisit the IEP with the *Andrew F.* standard in mind and revise it as necessary to ensure the student is receiving appropriate special education and related services, and that the goals are individualized and ambitious.”

Endrew F. v. Douglas County School District – Applying It

How much is enough?

- No bright line rule – but definitely need measurable progress
- IEP goal mastery or at least demonstrable progress; progress on objective assessments

What has changed?

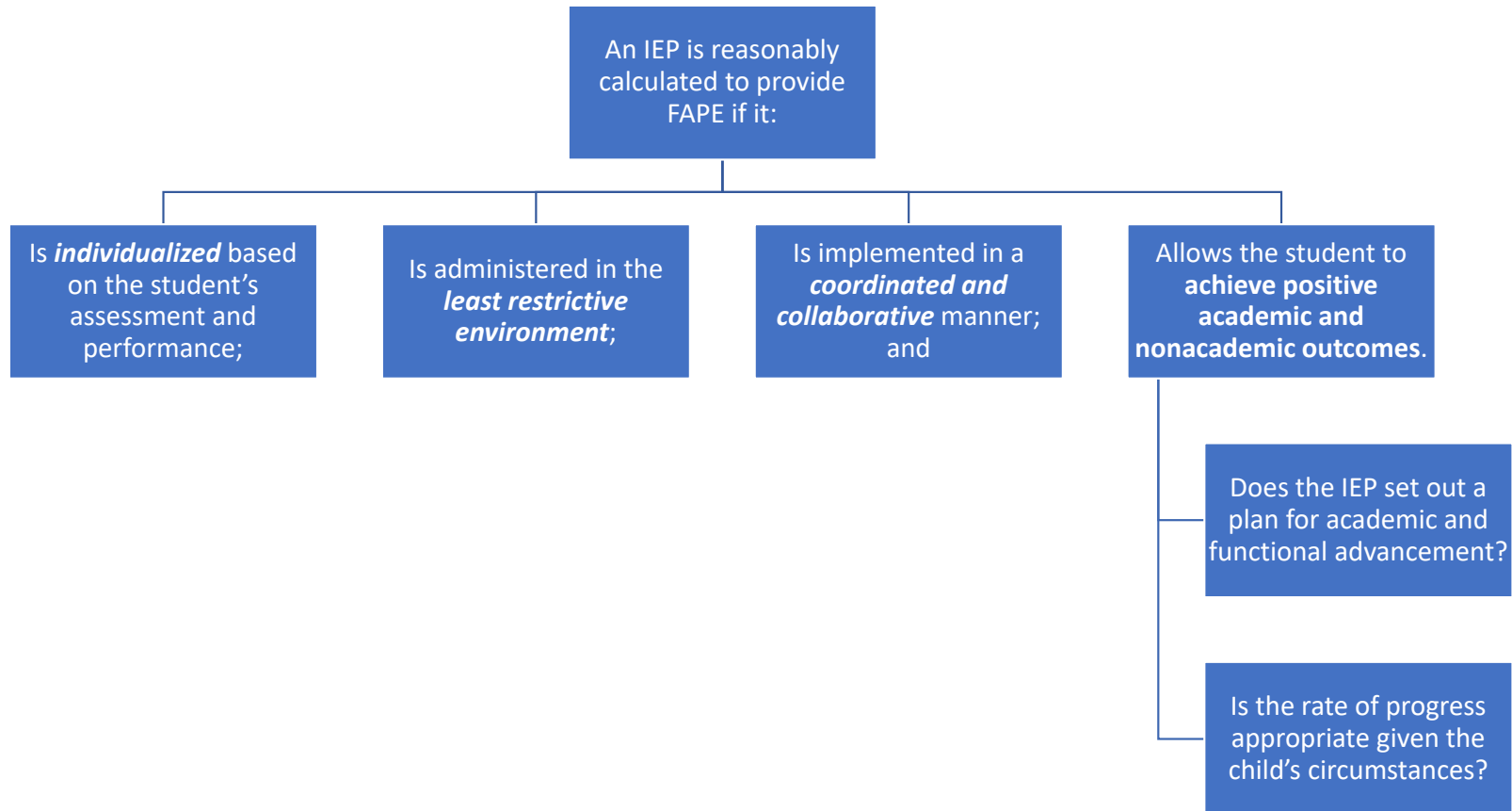
- *Endrew F.* did not change much in 9th Circuit
- Already required “meaningful educational benefit”



ID Special Education Practices

- How many LEA's are in the room?
- How many single-site LEA's are in the room?
- How big is your special education team (staff and support staff)?
 - > 20?
 - >15?
 - >10?
 - >5?
 - <5?
- Are you generally satisfied with the quality of the service providers with whom you work?
- Biggest challenge?

FAPE & Least Restrictive Environment



Then Enters ... COVID

FAPE during COVID?

- Yes.
 - If LEA provides general student population with educational services, then FAPE must be provided to SWD.
- But, how?
 - Some disability-specific modifications and services may be effectively provided online – extensions of time for assignments, videos with accurate captioning or embedded sign language interpreting, accessible reading materials and speech or language services through video conferencing.

LRE during COVID?

- Yes. But, how?

Least Restrictive Environment Before ...

LRE before COVID:

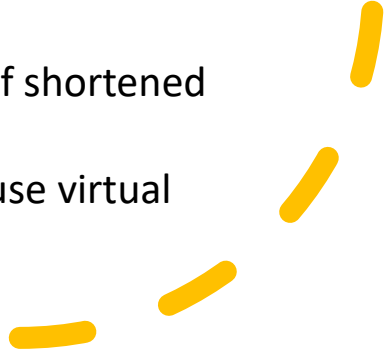
- While recognizing the necessity for a variety of educational settings, IDEA instructs SWD be educated in regular educational environments with nondisabled peers to the maximum extent appropriate – this includes regular classrooms and other settings in schools, such as lunchrooms and playgrounds, and extracurricular programs/activities.
- Only remove students from general education classroom if meaningful educational benefit cannot be conferred with the use of supplementary aids and services.
- LEA cannot exclude SWD from general education classroom based on need for a modified curriculum and/or one-to-one assistance.
- LEA must ensure a continuum of alternative placements is available to meet needs of SWD for special education and related services. Goal is to separate SWD from their nondisabled peers and community the least amount possible. Fact intensive, student-centered inquiry.
- [Idaho Special Education Manual](#) – Updated October 2018

... During ...
And After ...

LRE during COVID:

- USED didn't issue guidance on how LRE should/could be provided to students who are learning from home during the pandemic.
- USED has stated when a SWD with a high risk of severe medical complications is excluded from school during a COVID outbreak but the school remains open, the exclusion constitutes a change of placement if it exceeds 10 school days and IDEA procedural protections apply.

LRE after COVID:

- Changed for good?
 - USED Sept. 30th SPED guidance
 - Oregon lawsuit – what is the appropriate use of shortened school days?
 - LRE and virtual learning – how do we not overuse virtual learning?
 - Compensatory education
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USED Sept 30, 2021 Guidance

- On September 30, 2021, USED Guidance issued [“Return to School Roadmap: Development and Implementation of IEP in LRE’s Under IDEA”](#)
- Restatement of established laws, regulations, practices
- Key Categories:
 - Ensuring IEP’s Are in Effect at the Start of the School Year
 - Convening the IEP Team
 - Consideration of Special Factors
 - Considering the Assistive Technology Needs of a Child with a Disability
 - Addressing the Social, Emotional, Behavioral and Mental Health Needs of Children with Disabilities
 - Addressing the School-Related Health Needs of Children with Disabilities with Underlying Medical Conditions
 - Determining Appropriate Measurable Annual Goals & Considering the Child’s Need for Compensatory Services
 - Making Extended School Year Services Determinations
 - Considering Secondary Transition Services
 - Making Educational Placement Decisions
 - Resolving Disagreements Regarding a Child’s Educational Program
- [Webinar summarizing this guidance](#) – Center for Learner Equity
- Key Takeaways: (1) SWD have been significantly, even disproportionately, negatively impacted by the pandemic; (2) signaling SEA’s and LEA’s must ensure SWD’s receive the services and supports needed; (3) emphasizing quality, not just minimal compliance – strong focus on examples/applications

Oregon Litigation: Shortened School Days

- In the lawsuit, *J.N. v. Oregon Department of Education*, plaintiffs allege that public schools throughout Oregon systematically and unnecessarily shorten the school day of children whose disabilities lead to challenging classroom behaviors, and that the state violates federal law by failing to take the steps necessary to ensure that these students receive the education to which they are entitled.
 - [Complaint](#) filed January 22, 2019 – notably, before pandemic-related school closures
 - Asserts violations of IDEA, ADA, Section 504
 - Trial court [denied state's motion to dismiss](#) (state argued plaintiffs lacked standing, which court rejected)
 - Court [granted class certification](#) (class = students eligible for services under IDEA who are subjected to shortened day or are at substantial risk of being subjected to a shortened day due to disability-related behaviors)
- What does this mean? Case is pending as a class action in federal trial court; if the parties do not settle the case, the court would decide this case and it could eventually be appealed to the Ninth Circuit.
- Suit was filed by National Center for Youth Law (NCYL), Council of Parent Attorneys and Advocates (COPAA), Disability Rights Oregon (DRO), the Bazelon Center for Mental Health Law, and pro bono attorneys.
- What does this mean for you?

Shortened School Days - Overview

- Students with IEP's must attend school for the same number of hours and minutes as non-disabled students, unless a student's IEP team determines otherwise.
- The only time it is appropriate to shorten the school day for a student with a disability is when the student's IEP team determines a shortened day is required to address the student's unique disability-related needs.
 - For example, if because of the student's medical needs, the student is physically unable to tolerate a full school day, a shortened day may be appropriate.
- Before deciding to shorten the student's day, the IEP team must consider if there are other ways to meet the student's needs, including providing additional supports and services.
- When a student's school day is shortened, the IEP team must meet to discuss this decision and documentation of the following must be included in the student's IEP:
 - an explanation of why the student's disability-related needs require a shortened day; and
 - a plan for the student's return to school for a full day, including a plan to meet more frequently to review student data and determine whether the student is able to return to school full-time.
- When a school day is shortened, the IEP team should continuously monitor and review the student's progress and plan frequent IEP team meetings to determine whether a shortened school day continues to be necessary to meet the student's unique, disability-related needs.
- The student should return to a full day as soon as he or she is able, and under most circumstances, a shortened day should be in place for only a limited amount of time.
- Student must still receive FAPE in spite of shorter day.

Shortened School Days – Red Flags (and a Resource)

- In addition to documentation and decision-making requirements, there are situations and conditions when shortening a school day is not permitted including:
 - a school or LEA cannot implement a standard shortened school day for all students with disabilities or for a group of students with disabilities
 - a school district cannot implement a shortened school day for a student based on issues related to transportation
 - the decision to shorten a students' school day cannot be made solely on a parent request
 - the decision must be made through an IEP team meeting and based on the student's unique disability-related needs
 - an IEP team cannot shorten a student's school day for administrative convenience (e.g. staffing shortages)
 - an IEP team cannot shorten a student's school day to accommodate regularly scheduled medical or therapeutic appointments
 - an IEP team cannot implement a shortened school day for a student in order to manage student behavior or as a means of discipline
- An LEA may not reduce a student's instructional time as a form of punishment or in lieu of a suspension or an expulsion.
- An LEA may not require a student to "earn" back the return to a longer or full school day by demonstrating good behavior.
- Attendance may also not be conditioned upon the student's taking medication or receiving treatment, therapies, or other outside services.
- [Shortened School Day and Homebound Decision Guidance For Students Receiving Special Education Services](#) – Arkansas Department of Education, February 2021

Virtual Learning & LRE Post-Pandemic

- The Sept. 30th USED guidance specifically addresses continued virtual learning for students with disabilities, noting that pre-pandemic it was considered one of the most restrictive settings.
- However, it goes on to say, “virtual learning provided during the pandemic may be deemed less restrictive if it is available to all children and provides the child with a disability meaningful opportunities to be educated and interact with nondisabled peers in the regular education environment.” (See G-3.)
- So, what now?
 - What is the appropriate use of virtual learning now?
 - How do we consider LRE/change in placement if we put students in home-setting?
 - Schools moving students to virtual learning unilaterally would be a violation of LRE ... but what if a parent requests the home-setting? Then what?

Compensatory Education - Overview

- If a student with a disability did not receive appropriate evaluations or services, including services the school had previously determined the student was entitled to, then the school must convene the IEP team to make an individualized determination whether, and to what extent, compensatory services are required.
- Unlike the FAPE inquiry, which requires the group to determine appropriate services going forward, the compensatory services inquiry requires looking backwards to determine the educational and other benefits that ***likely would have accrued*** from services the student should have received in the first place.
- Sept. 30th, 2021, USED Guidance – compensatory education for students with IEP’s
- [Feb. 17th, 2022, OCR Guidance](#) – compensatory education for students with 504 plans
 - “Providing compensatory services to a student does not draw into question a school’s good faith efforts during these difficult circumstances.”
 - “It is a remedy that recognizes the reality that students experience injury when they do not receive appropriate and timely initial evaluations, re-evaluations, or services, including the services that the school had previously determined they were entitled to, regardless of the reason.”
- Factors that may be relevant to the compensatory services determination include:
 - the frequency and duration of missed services;
 - whether the services provided were appropriate based on the student’s needs;
 - present level of performance;
 - previous rates of progress;
 - results of evaluations;
 - whether evaluations were delayed; and
 - any other relevant information.

Compensatory Education – In Practice

DC Case Study:

Example of innovation and proactive effort;
we had a plan and how it worked out ...

- March 2020 – schools shut down
- End of SY 2019-2020, created comp ed worksheet/game plan
- End of SY/summer 2020-2021, reviewed comp ed worksheet/game plan
- Once schools opened, reality did not align with game plan
- Data is being collected, but comp ed decisions still have not been made in many cases

How about you?

- How many of you have held comp ed meetings already?
- What are your plans/practices?
- How have you started thinking about this?

To Close ...

Going back to the 2-3 issues/scenarios you jotted down at the beginning of the session, did we address them?

- If not, please keep them close at hand. At the end of the day, we would like to hear what issues we have not addressed and what concerns remain for you.

As you reflect on this session, what 2 follow-up actions will you take back to your schools?



We hope you're not feeling like this ...

