



## Concurrent Session: Providing a Free Appropriate Public Education (FAPE): Lessons Learned From the Due Process Hearing Front Transcript

**Nicholas Coukoulis:** So, we can go to the next slide. So today, hopefully everyone's well familiar with the zoom dynamics by now, but just be sure to keep yourself muted throughout the meeting unless you are speaking. You can turn off your video as desired, but just for engagement purposes I'd recommend, you know, being present on video if you're asking any questions during Q and A time. Closed captioning is available for those who need it. You see, in the toolbar to access it as the screenshot there shows, and, as I already invited you to do feel free to use the chat for any comments or reactions.

So, we can go next. I did just want to give a quick plug before we get too deep into any discussion for the PROGRESS Centers law related modules. So, we've already released one, it's the Introduction to Federal and State Laws Impacting Students with Disabilities. And so, you can read a little bit about it there. I also just kind of wanted to give a quick plug that it's part of an overall law series, and so we have another one coming out very soon, it's going to be Understanding the Sources of the Law and so that one's going to get a little bit deeper into identifying and describing primary sources of law in the U.S., kind of teasing out the relationship between Federal and State law, a little bit more, and how it relates to special education and then really understanding the impact and role for sources of law with or for students with disabilities and their families. So, you can go to [promotingprogress.org](http://promotingprogress.org) and learn more about our modules there and feel free to reach out to me with any questions. I'm happy to answer as well. And I can drop my email in the chat as well as some links here in a minute. With that I will turn it over to David and Mitch.

**Mitchell Yell:** Okay, well, thank you very much, Nick, what David and I are going to be talking to you today is providing a free appropriate public education, lessons from the due process hearing front and in a later slide we'll talk a little more about our experiences in conducting due process hearings, but I wanted to first start with the definition of free appropriate public education. Now, that is, you know, is the primary requirement of the Individuals with Disabilities Education Act and our crucial obligation to special educators, that is, we are to develop individualized education programs or IEPs that provide a special education and related services to our students that confers a free appropriate public education or FAPE. And so will be probably mostly using the term FAPE in future slides. And the next slide you can see, this is how the federal, this is how Congress defined FAPE way back in 1975 and the Education for



All Handicapped Children Act, it is still a definition that is used in the Individuals with Disabilities Education Act which is of course just the new name for the Education for All Handicapped Children Act at any rate.

In 1975 Congress defined FAPE as special education and related services that are provided at the public expense, meet the standards of the state education agency, include preschool elementary or secondary education, and are provided in conformity with the IEP. Now let me spend just a few minutes talking about those. That means public expense, of course means what we put in the IEP, parents do not have to pay for that. It's at public expense. It meets the standards of the state. That means, if your state, state you live in has any requirements or rights and responsibilities given to youngsters with disabilities in excess of the federal law, you have to follow those. So, for example in South Carolina where I am, The Federal Government says transition services must begin at age 16, but in South Carolina our law says they have to begin at age 13 and a half, so, in terms of transition, we have to follow the State law because it actually provides clearer rights than the does the federal law.

And the final one is provided in conformity with the IEP. Now this, of course, is the document that is the blueprint of the FAPE for all youngsters with disabilities. And you can see it doesn't really define what appropriate is very clearly, and that was purposeful. As you can see, in the next slide one of the co-sponsors of the idea, Robert Stafford was a Senator from Vermont, wrote an article in 1978 in the Vermont law review, in which he said we Congressional authors of the IDEA did not attempt to define appropriate, but instead we established a baseline mechanism, a written document, called the IEP or individualized education program. So, in other words that was, they did that deliberately, they didn't want to define failure for a given child they wanted us as the special educators, to define what a FAPE was.

Now we have gone to the next slide what we'll see is that we have a decision in 1982, not too long after The Education for All Handicapped Children Act was passed, we have a number of cases occurring trying to define what exactly is this thing called a FAPE. And in in about 1981 one of these cases, a case out of New York was submitted or appealed to the US Supreme Court in 1982. The High Court decided to take on the case of Board of Education of the Hendrick Hudson School Districts v Rowley. So that was a very important case because, as you know, not many cases that appeal to the Supreme Court are heard by the High Court and, in fact, this was the very first case in special ed and, unlike the court, The Supreme Court essentially is asked a question to answer or question or two and the question presented to them well, what is the level of educational benefit that schools must confer on children with disabilities to provide them with a FAPE as guaranteed by the then the Education for All Handicapped Children act. So that was the question the High Court. Okay, essentially, what is, what is a FAPE and the Supreme Court answered it by ruling on this case and in fact they ruled that the Hendrick Hudson school district had provided a free appropriate education, public education. And they developed a two-part test where all hearing officers, all judges, when they hear a FAPE case have to answer.

The first part of the test is, has the state or the school district complied with the procedure set forth in the law. And the second is the following is the resulting IEP reasonably calculated to enable the student to receive educational benefit. So, the first part of the test was kind of a procedural litmus test, where the hearing officer would look at how the school district had proceeded with a FAPE to develop the child's IEP and ensure that they follow the procedure set forth in the law. If the court was or hearing officer felt the procedures for set forth, then they properly, then they would go on to the second part of the test: is the resulting IEP reasonably calculated to provide educational benefit. So, in the next slide we'll have David take over, I think.

**David Bateman:** So, what's important about this, what's important about this case is that the Rowley case is pretty much probably the case that many of you had when you were going through your training to become teachers or building level administrators. That was the case that defined what we meant by how much, how much progress or benefit of child is supposed to make. We put together this map and I just want to make sure that you understand that this map is not drawn to scale because Guam is nowhere near Alaska. But it's one thing that you need to pay attention to is that, as a result of the Rowley case from the 1980s, is that bad cases sometimes make bad laws.

And why we talk about this is, think about your special education population that you deal with, and I mean it literally. Think about the prevalence numbers of what you are expected to do, to address. What's important about this is Amy is deaf and had a higher IQ—depending on which test, or which determination you listen to, it was somewhere between 131-142. I'm willing to bet that the vast majority of kids with whom you work with are not deaf with high IQ like this, and that is a very small number of kids we're dealing with. And it's a result of that case from the 1980s, which was written by the Chief Justice at that time, Rehnquist is what they came up with we came up with very different standards of how this was being interpreted across the United States, and you can see, depending on where you live.

Mitch, and I both now live in the fourth circuit. Up until a few weeks ago I lived in the third circuit, which had a higher standard, but I recently moved to the fourth circuit. What's interesting about that is you could see higher standards versus lower standards and that posed a significant problem and when the court heard this, decided to hear this case, the next case we're going to talk about—one of the factors that we need to pay attention to, it shouldn't matter where you live, the level of education, your child receives. And I'll highlight this for you, because up until about two months ago I lived in Carlisle, Pennsylvania, which is home of US army war college. And what's interesting about, that is, we got a colonel, or colonels to be, from all over the United States coming through war college who had kids with disabilities and talking about how very different the standard was in different locations and it was really palpable with the problems that they had. So, we had differences, we had a bad case, yes, probably, you probably studied when you're going through your training program but what it did, is it didn't clarify enough to provide consistency across the United States.

So, we needed a case to help us clarify this. This, in addition to the standard for education, had changed from 1982. Think about this. Since 1982 we've had, we've had the expectations of what we're supposed to do with kids with disabilities has risen—meaning the expectations that kids with disabilities who are eligible for special education, now take the same standardized tests as everyone else because the accountability measures have changed. We had the Goals 2000 we've had multiple reauthorizations of that the law—we're still waiting on another one—but it, we've had multiple of these reauthorizations that helped move the case, and what we raised what's going on. I have to remember when the Rowley case was basically heard, one of the quotes that they use to describe this was the law is a basic floor of opportunity. Now we, the child defined is not really a big issue, we were getting kids in schools and what we have to think about is, what can we do to provide appropriate services, so we needed a case that help with this.

So, the Supreme Court took this, and they took this case out of out of Colorado, and these are two pictures that I took when I was in Colorado two different times, not the same time and I'm not trying to imply that one is a snowy place the other ones are green place, but it just happened to be from two different visits to the fair state of Colorado. But you can see that Summit View Elementary is where Drew went to school it's located in the school district just immediately south of Denver. If you go down I-25 you see Castle Rock to the left. That's the school district, if you go to around the left of this building, you will see the skyline of Denver in the background. His parents where he was attending this school and what's interesting about this is he pretty much had the same kind of level of expectations, same kind of goals, no real progress. And he was also more consistently with what we're experiencing in special education, he was an individual with a behavior problem, he had autism he had a lower IQ. He had attention problems much more reflective of what we needed than what we had with any Rowley. So, we needed this. His parents were dissatisfied with the program that was being offered by the local school district, and they enrolled him where it's green and the flowers are blooming at the Firefly Autism House. Again, it was a very it was a different, it was a winter picture versus a summer picture I should do better next time I'm out there. But they enrolled him in a private school in southern Denver and sent the tuition bill back to the to the school district because they felt that they were not receiving an appropriate education. And what's interesting about this is they went through to get the Supreme Court, you have to go through the process and Mitch, is going to talk about this process in a few minutes.

And the fact, why we're talking about this because we both have served in the world of hearing officers and what we talked about this is the parents went through the hearing officer, got through the process, went through their hearing went through the circuit courts and then went to the 10th circuit. And you can see the 10th circuit, the 10th circuit's mandate at that time when we have to think about this is must be merely, be more than de minimis—and so we'll talk about this in a minute—but they have parents, they were not, they were not winning. And it's interesting about this, I worked, I've worked in a lot of lawsuits. If I'm working with the parents, we lose it the first-tier, with the

administrative law level and they send it to the Court level, and if this circuit court level, the fact that yeah do you think you're going to appeal and when that chance on this one. The parents appeal. The parents appeal to the Supreme Court and this was the question that was presented to them, okay. And it's interesting about this and I want you to read the, pay attention, pay very close attention to the verbiage to this—What is the level of educational benefit school districts must confer on children with disabilities to provide them with free appropriate public education guaranteed by IDEA? How much benefit or progress was a child, expected to make? Because the law says, as Mitch articulated earlier, we're supposed to provide individuals eligible for special education a free appropriate public education. Appropriate is very much in the eye of the beholder and I just I'll give you a visual representation is, and I just want you to think about this—in the March right before COVID, we refer to affectionately as the pre times I was, I was doing a speaking tour in southern California and I was happy to be there during spring break week. There were people wearing things that I did not feel were appropriate. And I don't have, we don't have images to share with you, but I want you to have these analogies that I have flossed with more what things that are wider than what they were wearing. So, what is appropriate, is often very much in the unique needs and take of what an individual thinks about.

And so that has been the one of the big disputes that we have in special education. So maybe we should get a picture of that one for the next presentation Mitch. What's interesting about that is so they appealed it and it heard oral arguments on January 11, 2017. And there we are. We have both lost weights, since then, by the way. And so we're fitter, stronger, faster. But it's interesting about this, is what is interesting about this, is at that time there were only eight Supreme Court justices. They had not seeded a replacement to Justice Scalia who had passed away about 10 months prior to that. But then they issued their ruling just two months later and what's interesting about this, and I want you to pay attention, this is because it was a unanimous decision. And there are rare unanimous decisions from the Supreme Court. And I want you to understand with unanimity that they presented this is a part of this. So, what they rejected, and the Supreme Court very eloquently rejected.

And those of you who would like a copy of the decision, or the FAQs from the Department of Education don't hesitate to reach out to me, I'll make sure you get a copy of these. But it really is worth reading. They rejected the “merely more than de minimis” standard and they came to the decision remanded back. Well what you have to think about this, and it was Chief Justice John Roberts who wrote this very, very, very good writer, by the way.

I'm not going to read things to you, but I'm just going to make sure to emphasize this part to you. Is to meet its substantive obligations under the IDEA the school district must offer an IEP reasonably calculated to enable the child to make progress, appropriately with the child circumstances. Remember under the Rowley standard from the 80s, it was benefits now we're expecting kids to make progress.

And what we have seen as a part of this is changes as a result of this and that's what's happening, so we are expecting kids now to make progress in their special education and that's what's important. And that's what important we need to pay attention to this as we move forward. But here, and we, and we highlighted some phrases from some words from this. Maybe you can figure out which words we specifically highlighted, for your entertainment value. But the IEP must enable the child to make progress, they think about this and pay attention the essential function of the IEP is—I'll skip the non-highlighted parts—to make academic and functional advancement, it's not just academics, that we want kids to make, and we want kids to make functional advancement on things, so they include them. And social events, we want them to improve on just the ability to interact with others, and also to get around and participate in what's going on to the school. So, these are two very important things, important things we need to pay attention to as a part of this now.

So, it's interesting, I want to make sure that you understand is that the Rowley standard that Mitch articulated has been tweaked and tweaked by the scene like this, so what we refer to this now, as the Rowley/Endrew two-part test. And this is first, has the state complied with the procedures that has taken place, the procedure set by federal law. And this is still, this is why your special ed directors hound you to make sure you follow the timelines, that you have that the people in the right room, and that you have everyone in there, you have all the information by the by the right time. This is very specific, and this is, this is, this is not going to change. And it's still part of this. What is the what the rationale behind this? Is if we follow fair procedures, we're going to get fair outcomes, that is, in part, what we're expecting as a part of this, that we need to follow fair procedures and follow this, so we understand precisely what's going on. The second part of this test, and this is the subtle wording difference is the resulting IEP reasonably calculated to enable the student to make progress, appropriate in light of his or her circumstances.

And what's interesting about this, as we were sitting in the oral arguments Chief Justice John Roberts—and if you get a chance, by the way, to listen to the oral arguments, you can listen to that [[https://www.supremecourt.gov/oral\\_arguments/oral\\_arguments.aspx](https://www.supremecourt.gov/oral_arguments/oral_arguments.aspx)] and it really is it's an hour well spent of your time— is he was actually very prescient and asking what about kids who have significant disabilities, what can we expect, what kind of progress can we reasonably expect for them to make. Because, in the end the parents, even though, even though Endrew had a significant disability, the parents were expecting all individuals to make a basic functional equivalent of a year's worth of progress, every year, and so he would, he kept asking this and you can see how the language came out of this as a result of this. This is where we go with, this is the appropriate progress, appropriate in light of his or her circumstances, so it has to be individually tailored back to the child. And back to the individual needs of that child. We'll make some recommendations in a few minutes about this, but you can see this. As they remanded this back, they remanded it back down to the District Court and said the IEP was not appropriately ambitious because it did not give Endrew the chance to meet challenging objectives and objectives were not the goals were not really that strong. I'm couching my words there. I mean I could use other words but just didn't give him a chance to do

this. So one thing you have to think about, we'll talk about this later, is ensure that you're providing the opportunity for kids to get ambitious goals and ambitious movement towards those, progress towards those goals. Okay, and you can see, this after seven years of litigation the Douglas County School District paid quite a bit of money to settle this case, and so I know most of you probably have an extra \$1.3 million laying around, but for some people that's a lot of money.

But it's really interesting how this works, is that in the end, this has changed the standard for every single kid across the nation who's eligible for special education, every single kid across the nation and its territories who are eligible for special education or related services and the impact of this is dramatic. And so, what we would like to talk about now is shift the gear, since then, how basically first how to litigate this and then some recommendations, based on that kind of go from there okay so Mitch.

**Mitchell Yell:** Okay, thank you well, so what I'm going to talk about is litigating a FAPE. Now, as I mentioned before, and David mentioned both of us have had experience as due process hearing officers, so we'll talk about this a little bit later too.

But if I did a FAPE case prior to Endrew decision. I had to use the Rowley test that was, that was what I used to decide the case. If I decided to case on FAPE after Endrew, I used to Rowley/Endrew tests because all lower courts hearing officers have to go by the law of the land and the Supreme Court is the law of the land. So, this was an extraordinarily important decision. Now if we go on to the next slide what we'll see is that there's kind of a typical way that the courts work in the United States. We have 94 US District courts. Every state has between one and four District Courts. Smaller states like South Carolina have one. Large states like say California will have four.

Now, when a case is heard at the District Court level and the party that loses wants to appeal it then appeal to the next higher-level courts which are the US courts of appeals and then, if the party losing at that point wants to appeal, they only have one option, that is to the US Supreme Court. Which of course is the only one in the United States and that becomes the law of the land.

Now, if we look at the next slide that is a graphic again of the geographic boundaries of the United States in terms of the district and Federal Court. So, if you look real closely, say at South Carolina, you would not see any dotted lines. That means there's one only one district court in South Carolina. But if you look at California, you'll see there's four district courts. Now when a case is heard at the District Court level in South Carolina, that's a really important case for South Carolina. Maybe not so important for California, however, when a case is appealed, it goes to the next, higher level, which are courts that contain multiple states. So, you can see, the fourth circuit includes Virginia, West Virginia, Maryland, North Carolina, South Carolina. So, if there's decision out of Virginia that's appealed to the next higher level, that goes to the US circuit Court of Appeals for the fourth circuit. So that decision is very

important for all those states. It's not as important for those states in the ninth circuit over by California, because they have their own circuit court.

And so, it's just important to understand that when that case this circuit Court of Appeals that goes to the US Court of Appeals or the US Supreme Court, which covers the entire land, it becomes the law of the land. Now our system in special ed is special. It works a little bit differently, and in the next slide you can see how it works differently. We have a due process hearing system set up in the IDEA. There are actually two different types of hearing systems. Most states have what is called a one tier hearing system like Virginia. Where the first level of hearing is at the state level. We in South Carolina are little different because we have two tiers. The first is heard at the local school district level by the due process hearing officer. And as David will tell you and he's done many of these when he was in Pennsylvania, it's like going to court. I mean you have, both sides represented generally by attorney, although not always—sometimes parents will go pro se, which is they argue their own case but there'll be attorneys on each side. Each side will examine witnesses in the other side, then we'll cross examine. It's like going to court and then the hearing officer generally has 45 days to issue their ruling. The losing party, then, can appeal to the next level or the state level review. There are only seven states that have that, and I think it's six now. One of them is South Carolina. That's what I do now, review those. And if the losing party at that point wants to appeal, then it goes into the US district court to the US District Court. Now the attorneys could go the federal or state way but 98% of time they go federal in terms of IDEA cases. So, then it goes into your typical system US District Court, US Court of Appeals, Supreme Court. But what David and I want to talk about more today is what happens at the hearing levels. So next slide you'll see that in in terms of hearing, in terms of the hearings we both have quite a bit of a background in that. David did you want to tell a little about the hearings you heard in Pennsylvania and your background.

**David Bateman:** Yeah, so uh for 10 years I was a first-tier hearing officer. And at that time, Pennsylvania had a two-tier system, and I was the first one. I would go with, I would be the one who would actually go into the local school district, often you sit in the school board office, school board room and then I would then hear the hearing. And then, make the decision and over the 10 years that I was hearing officer, I was, I was just shy of 600 due process hearings and had to write decisions on multiple topics. And then when Pennsylvania changed to just a single tier is when I just started working with school districts and parents when they were part of lawsuits, so that was about 10 years ago. But yeah, and Mitch, has been a second tier so as he's going to talk more about what that is. There's probably not a topic that we haven't heard, given the hundreds, that we have participated in. And so, some of you watch Netflix, some of you, and understand who Inventing Anna is, some of you understand you watch Hulu and know what happened at the bottom of the stairs in Durham, North Carolina. Mitch and I do hearings that's what we do so.

**Mitchell Yell:** David, I mean he acted basically as a judge. Very similar role to a judge in controlling the hearing and in deciding how we would go. Now that was David's background. My background was that



I started out as that, but I switched to a second-tier hearing, which means if the first-tier hearing is appealed it goes to me and I just sit down in my dining room table with 1000 pages of testimony and briefs and probably about 80 or so exhibits and I have to decide, did the first-tier hearing officer make his decision correctly. So that's what our background is in hearings. Now it is important to understand that hearings don't really set precedence. In it's not like a case in the federal system that we all have to perk up and pay attention. Nonetheless, it's very important that we understand that hearings really are a harbinger of things. So, David I have written an article on COVID and how that's affected special ed. We haven't had a lot of cases on COVID yet because they're still really, I think hearing a level, it takes time for them to percolate through the United States courts. But it so it's just very important that we do pay attention. It's also very important that we understand that hearings are costly. School districts can pay there's an average of 10 to \$50,000 per hearing so they're very expensive procedures, I mean you have to have a lawyer. The lawyers interview teachers to what David does now is help prepare witnesses. That costs money so it's a very expensive procedure.

And hearing officers can decide on a number of remedies, they could decide on tuition reimbursement or compensatory education. The only thing they can't decide is attorney's fees, that has to be decided by a court. So, but nonetheless, we need to pay attention to hearings and what David, and I have found over our years in being hearing officers, in the next slide will see, is that there are number of issues that have been very important.

The most serious school district errors and we've divided them into procedural errors, substantive errors and then implementation. So, remember first the procedural part was the first part of the Rowley and now the Rowley/Endrew test. Did a school district follows the procedures of the law? and so as David was telling you that's why you spend a lot of time at the beginning of each year talking about the procedures that use your school district uses, because if you make errors, these errors could in and of themselves lead to a loss in a due process. But there's three major errors that we have found that are procedural that school districts make. One is failing to involve the students' parents in the IEP formulation and monitoring process. That's perhaps the most important procedures and really the reason for the procedures is, we need to involve parents in IEP formulation and also in IEP monitoring and in the whole aspect of IEP development and implementation. A second major error we found is predetermining program or placement. The first error is when schools don't involve parents. Now I know as a teacher for 16 years sometimes it's difficult to get parents involved. In that case, you have to make certain you document that you make good faith efforts to get the parents involved.

The second error really involves school district personnel predetermining a child's program or placement prior to actually having a final meeting. So, predetermination doesn't mean that you can't get together informally and talk about the IEP meeting, it just means you can't finalize the IEP and give it to the parents and tell them, this is, this is what we're offering take it or leave it. A third major error and one would wonder why this is difficult, is failing to properly conduct child find activities, and that essentially that problem usually comes from schools, knowing that a child, may have a disability, but

not evaluating that child. It's very important if you believe a child, with disability that you conduct an evaluation, you get the parents' permission to do so, as Julie Weatherly often says in her, for her presentations is when there's a debate, evaluate. So those are the three major procedural errors that we've we find. Also, sometimes schools so just make a number of procedural errors that in and of themselves can lead to denial of FAPE. Now the second most serious type of procedural errors are what we call a substantive error. That has to do with the content of the IEP. Is the is the IEP internally consistent, that is, did you do a good thorough assessment. Did the assessment lead to the present level statements, did the present level statements lead to services or goals, are both services and goals in the IEP.

A second major problem is failing to craft measurable annual goals. That's a very important problem that we have to remember since 1990 the law has said, measurable annual goals, so we have to have a way of measurement. So, what I always like to say is that if your goal cannot be graphed it's not measurable. And thirdly, failing to collect and or report data on student progress toward the goals could be a very serious, serious procedural error. Now if we go on the next slide, you'll see that we have a quote there a number of years ago, actually, 2015. I was at a law conference and attended a session by Kathleen Mayfield who is attorney for Reed Smith, she just retired. David, I think your father used to live close to her. She was a school district attorney that specializes in FAPE cases and only represented school districts. And she made a statement that really struck me during her presentation, she said when I have a school district, with a FAPE case, the first thing I do is go to the teacher and speak. Give me information on your students' progress. If the teacher doesn't have data, I strongly consider advising the school district to settle.

And that was in 2015. I actually went up to her after the presentation said, do you mind if I quote you and she said absolutely go right ahead. Do think about this, this is a person who only represented school districts and that was the first thing she asked for. Where's your progress data? Very important, and that was 2015, two years before Endrew which now requires that the IEP be reasonably calculated to enable the student to make progress. Now in the next slide you'll see that we have found there's another type of errors that are frequently committed by school districts, and these are what we could call implementation errors. And that just means the IEP has been agreed upon everybody signed, the parents have signed permission for placement, the IEP is put into action, but the school district doesn't fail or fails somehow to implement it as it written upon.

A few years ago, immediately after the Endrew decision of very important decision out of the ninth circuit, the Court said the IEP like a contract embodies a binding commitment and provides notice to both parties, as to what services will be provided to the student. We have to understand the IEP is like a contract in it it's binding we're saying this is what we will provide, and we make good faith efforts to provide those. It's not a contract in that it's not a guarantee of success rather again it's guarantee that we will do our best to meet the obligations that meet the obligations in the IEP. And in fact courts have found that material errors in the IEP development. All but one circuit have decided material errors in



IEP implementation will result in the denial of FAPE. So, what we have next is we're going to talk about Based on our due process hearings experiences, what do we recommend and David's going to take it from here.

**David Bateman:** Thank you Mitch, and I appreciate the opportunity to team up like this. And what's interesting about this is Mitch, and I are involved in a lot of litigation across the nation, and what we rarely are often brought in is after there is litigation or there's a crisis. And what this is a chance for you to hear for lack of better term prophylactically something to prevent things down the way and to take this and use this. And I we mean this literally is the steps and the next things we're going to make is recommendations, are things that you can take back to your school district division to provide appropriate supports to hopefully prevent kids and parents from having to go to litigation.

Mitch and I will talk about this multiple times in multiple venues, is that we are strong opponents of litigation. We want people to settle we want people to get along we wish there did not need to be litigation, but we have to remember the special education is a field defined by a law. And it's often very emotional for the parents who have a child, and they want what's best for their child and, as I said before, our obligation is only to do what's appropriate.

So, we have to pay attention to this, as we go through this. So these are recommendations that we had learned from just all the, I mean I haven't read a due process hearing decision since this morning, so I'm a little out of touch, but what we'll do is we'll try to stay close to date with where we are with this, but we really think you, these are recommendations that will be valid for you and your district to help solve problems down the line. Okay so and so take each one and pay attention to these and we're not trying to talk down to you. We're just trying to be consistent, because we realize that most of you are dealing with new teachers. And most of you are dealing with untrained teachers. You're dealing with and untrained professionals. And many of you are dealing with new principals—what's the statistic is that one in four principals across the nation changed this past year, so keep that in mind as we go through this.

So, what are we doing? Work to understand the procedural violations that could in themselves constitute a denial of FAPE and we mean this literally. Get the right people in the room, get the right information, build a really good present level statement with information from everyone who interacts with that child. Make sure I get a statement from the bus driver, get a statement from the supervisor from the playground, get a statement from anyone who interacts with this child. When I do, when I help with cases, I make sure that there is no stone unturned. That we talked to everyone is a part of this. But make sure that you have good information and could do anything about this from everyone is a part of this but pay attention to this and get it in a timely fashion, okay. And second and I can talk faster, I come from a family of auctioneer so please do so bear, bear with me it's interesting about this okay. When developing the content of the students IEP and subsequently reviewing it, make sure the information you have about this child is current.

The word present means present now, not like last year or two years ago, or three years ago, yes, have that information. But make sure that it's included is what we're talking about this. I can't tell you how many times I've reviewed IEPs, where they have done a whiz bang wonderful review finding the child eligible for services in fourth grade, they cut and paste a lot of that information in the present level statement. And that's there for fourth grade, it's there for fifth grade, it's there for sixth grade, it's there for seventh grade, and there's no information from this fifth, or sixth, or seventh grade teacher, as if the kid has not made any progress in the past three years. Make sure it's some current information. You understand where we are with this and understand precisely what's going on with this child.

That its current information. I can't emphasize that enough okay. Wait there's more, that is, ensure that the IEP goals are appropriately, appropriate, ambitious, and measurable. I mean if you need to say it like, if you need to say measurable with marbles in your mouth go for it, but it's got to be measurable. Mitch highlighted that before. What I say to, I say, I say districts, if you can't count it don't do it and it's it doesn't count. I mean if there's not a number guy, I need I need I'm a huge fan of what's referred to as interocular analysis, I want to eyeball the data and be able to determine yay or nay about whether the kid is making progress. You people say it's like what it's too litigious just, you have the data, you have the data and make sure that you take frequent data points on this and understand what's going on, which I'm getting ahead of myself, but it, make sure it's measurable and make sure its things like that. Because I've seen it piece, where the child will think about writing. Okay I'm thinking about writing right now and then, but you can't measure it, so you understand this, you got to make sure it's something that's clearly, that's measurable.

Number four okay is continuously monitor and measure the child's performance on annual goals and maintain data to demonstrate the progress has been made. Now what's interesting about this is, I worked with the school district in the pre times right before COVID, it was taking progress monitoring data only one time per marking period. I asked them to graph that, and they typically drew the X, Y axis give me a data points and things is that going up or down. And they said well it's right here. I said it doesn't tell me anything. So, what we need is multiple data points per marking period. And so, it's interesting people saying what that's just where you test the child all the time. No, there is a difference, and I want to make sure that you use this analogy with your teams. Is understand the difference between a series of snapshots versus long videos. Take a series of snapshots, a five-minute probe, here or six-minute probe there on something graphic data and graph that, as opposed to thinking you have to take a two-hour long test on a child. Give a series of snapshots that can move forward on this and help with this, so we have some sense and how much data well hold on. When I do witness prep, I love witness prep with speech path because they have data from every single session, and I mean this literally. They have data. It's wonderful. It's easy. I'm talking probably pretend a nine-week marking period, I'm thinking probably six to seven data points. Because if you only have three

kids, this is one of those data points you're down to two yes to define a line, but it doesn't tell me the trend where we're going.

So, I want to continuously monitor and measure, so that you make you understand precisely what's going on this okay. Next provide frequent and systematic data-based reports to the students' parents on the child's advancement towards their goals. Make sure the parents are fully informed on this. I mean this literally, is we can handle anything as long as it's not a surprise and you need to keep the parents informed about how the child is doing, where the child is making progress of what's going on and then build on that so that they understand. My dad was a superintendent of schools for many years, and he hated the last week of school, he was in a very large school district, going to get seven high schools in this district. He hated the last week of school because he would get these calls from parents who will for the first time, would find out that their son was not going to graduate from school. They said we've flown in granny from the west coast, we have a cake, we have pictures of his cap and gown, what do we do make sure parents are fully informed of what's going on, they were an equal part. We need to emphasize their equal part of this and keep them fully informed to where we are with this, like provide data on this now. Some parents are going to ignore it, that's that. But we're going to still provide it we're still going to have equal participation with them as part of this. Keep them fully informed about where they're going with us. Because you don't know whose parents are going to talk to you, you don't who parents are going to address, and you need to make sure that they are fully informed with where we're going with this okay wait there's more Okay, and this is the most important one. Not that anything else is going be less important, but this is the most important one.

When I say that you should take regular progress monitoring data, as I did on the previous slide you need to do this but, and this is what's tripping up so many districts, and this would solve so much of the litigation that I'm involved in. How much litigation involved I've been involved in, I think, was 93 lawsuits since the beginning of COVID. Seventy-nine of those we settled really quickly because we didn't have progress monitoring data. Why, you need to make sure your progress monitoring data, but when you have progress monitoring data and you determine the child is not making progress, you graph this, you need to reconvene the team and determine why and make functional and academic changes for this child. And what is, what does this mean? I was involved in case in the pre times, where we knew at the end of the first, the district knew, not we, the district knew at the end of the first marking period, that the child is not making progress, seventh grade boy. They didn't do anything. They knew at the end of the second marking period that the child is not making progress. They didn't do anything. They did I think know at the end of the third marketing period the child's not making progress, well it's too late, the school year we'll just do it at the end of the year, we'll do it for next year. They this district knew at the end of the first marking period this child was not making progress and they did nothing. Who's the slow learner here folks. And that's what I want to emphasize is when you have evidence of this, that the child is not making progress, do something. These children have disabilities at no fault of their own, and what we need to think about is, what can we do to improve their lives, so that they can continue to make progress. And that they don't just flounder, it is our

obligation it's our it's not only it's not only a legal obligation it's a moral obligation to help and provide support to these kids and if we can do this and learn from this, but we will also do better for these kids and that's what we want to emphasize okay.

So now we're going to talk about some additional resources about that we have available for you, that would help with this okay.

**Nicholas Coukoulis:** So, we're just going to highlight really quickly free to progress, David, there's online modules from The IRIS Center on developing high quality IEPs. And really those are going to you know give overviews on forming those according to federal regulations, so definitely make sure that you were checking with your state and local education agencies for additional requirements, but those are some really good resources. Feel free to progress, David.

**David Bateman:** Just to say real fast is Mitch, and I wrote the high quality, Mitch and I wrote the high-quality IEPs one. There is one for teachers and there's one for administrators and they're free they're free resources and vetted by the US Department of Education. We spent an enormous amount of time on them, and we think they're good so right okay.

**Nicholas Coukoulis:** And I can drop those links in the chat I know that they're in the there's links to each in the bottom corner there, so I'll be dropping those here in a second. I don't know if you want to say anything more about the other one David. But yeah, quick plug for the just reminder about PROGRESS Center, so most recently released module on the Intro to Federal and State Laws and we will be releasing a couple more within that series to very soon.

**David Bateman:** Here here's some additional resources for you also, and these are important places where you can go for it, this is all free stuff folks. And we, and we can't emphasize enough how important it is for you and then going back to this, go back to those IRIS modules that is actually could be free PD for your district, where you have the ticket in the room is you have your teachers do the IRIS module on legally compliant IEPs it's the first one of those two and then you sit there, and you talk about what is this like our district and kind of go through this like that's the same thing for administrators. I'm doing some administrator training next week and their ticket in the room is for them to have taken the administrator module and understand what's going on about this. It's being used in many states, and multiple territories. But here are some additional resources for you that you can also benefit from and where to go with this, and these are all free resources that you can pay attention to. And wonderful things wonderful places that you can go for information about this. This and I know a lot of a lot of teachers are looking at teacher's page features or going to YouTube for information, this is all valid stuff. This is all good information that you can use and kind of help with this and go from there. Here's how to stay connected with the PROGRESS Center.

**Nicholas Coukoulis:** Yes, feel free to connect with us on Facebook or Twitter. And we also have a mailing list available on our website, [promotingprogress.org](http://promotingprogress.org). and feel free I dropped my email on the chat earlier if you have any questions about those feel free to get in touch.

**David Bateman:** Yeah, I'll put my I put my email in the chat also.

**Mitchell Yell:** Also, I just like actually to put a couple in there, there was a question about the presentation the slides be happy either David or, if you want to email us will be happy to send you those are any.

**Nicholas Coukoulis:** They're available on the PROGRESS Center website, and I can drop the link there as well.

**Mitchell Yell:** Okay, just one last thing I want to mention is that one of the things that Chief Justice Roberts wrote in the Endrew decision is that school authorities can be expected to provide a cogent and responsive explanation as to why the IEP was reasonably calculated to provide, to confer progress, and in light of the child circumstance, so I think the best place—and there was a question about how often should we collect data and from David and I's standpoint, we always say collect it as often as you can. The more and more snapshots as David said, we have the better information will have, and if we have set up our IEPs in such a way as to have measurable goal, was to have services based on the present levels to collect data, we will essentially have bulletproof IEPs. Remember the IEP is not a guarantee of success it's a guarantee that the school-based school district is going to make good faith efforts and make changes, if need be, to the IEP in order to confer a free appropriate public education.

**David Bateman:** So just as a concluding, thank you, mentioned was very nice, I appreciate this is this this whole day of sessions, and this whole the information has been sponsored by the PROGRESS Center. And what's interesting about Mitch, and I are senior advisors, to the project, The PROGRESS Center and we I dropped my email in the chat. I think Mitch did too, but if I know we understand the nature of adult learning is, if you if you, there's been a lot of information, just in the last 55 minutes, but if you think of a question next week, the following week, or next month, do not hesitate to reach out to us and we will do our absolute best to find you a time, get you a timely answer to this. I know I don't know everything. I had two teenagers for years who reminded me of that, but I know where I can get answers to questions and Mitch and I are constantly throwing questions back and forth about how to interpret things. But if you have a question about this down the line, do not hesitate to reach out to us. And we will do everything in our power to get you a timely answer but also continue to monitor the PROGRESS Center because what's going to be there's going to be increasing information thrown out there, that will be provide greater assistance to you and your team down the road. I can't emphasize that enough is the opportunity for you to pay attention what's going on. Since both Mitch and I work with the PROGRESS Center, if you think of things down the line that you would hope that the PROGRESS Center would like to step in and help with, let us know.

And we will run it up the flagpole and, hopefully, you can provide our hopes where we can get additional resources for you about this, but Nick de individuals should be able to access the slides at the PROGRESS Center website is that correct.

**Nicholas Coukoulis:** Exactly they're available for download at that link that I put in the chat.

**David Bateman:** Yeah now, thank you so again, if you guys have questions don't hesitate to reach out Mitch, and I. Where we text each other, a lot, so we know what's going on, so we can get we can get your timely answers and we mean this sincerely, because our goal is to try to prevent litigation. Our goal is to provide appropriate services so that you can spend your money on providing appropriate services to kids who need them instead of having to spend your time on litigation and paying fees and so, and also to also to work to develop better relationships with these families who will be providing the long-term care for these kids. And so that that is our goal that's truly what we're focusing on and that's one part with the PROGRESS Center is to help these kids make progress, so we can understand where to go with this okay. So, all right. Okay well.

**Mitchell Yell:** Thank you very much.

**David Bateman:** Thank you very much. Yeah, enjoy joy your next session, but please do not hesitate to reach out to us.