



Providing a FAPE: Lessons from the Due Process Hearing Front

Riley O'Donnell: Thank you again for joining us today's session, "Providing a FAPE: Lessons from the Due Process Hearing Front". I am here and joined by Mitchell Yell and David Bateman. They are both advisors at the PROGRESS Center, and I'm going to turn it over to them in a little bit to talk more about this topic.

Before we get started, we just wanted to introduce some PROGRESS resources that relate to this topic as well. We have a self-paced training module called "The Introduction to Federal and State Laws Impacting Students with Disabilities". This is a short 30-minute self-paced training module that explains the difference between civil rights, civil right laws and funding laws. It identifies where the individuals with Disability Act or IDEA fits within the continuum of Federal laws. It identifies other Federal laws that have direct implications for students with disabilities and helps you understand how State laws may expand Federal laws impacting students with disabilities. And we'll drop the link to all of these resources later throughout this presentation.

And we do have another self-paced training model on the module on the PROGRESS Center website as well: "Introduction to Special Education Law: Understanding the Sources of the Law". Similarly, to the other module, it is a 30 minute self-paced training module. In this module, you will identify and describe the primary sources of the law in the United States, explain the relationship between Federal and State laws, as well as better understand the impact of the role and levels of the adjudicative source of the law.

And with that I'm going to turn it over to Mitchell, and he is going to get us started on today's presentation.

Mitchell Yell: Okay. Well, thank you, Riley. David and I thought that probably since we're going to be talking about free, appropriate public education., that would be a good place to begin with, actually defining it. And we want you to understand, that's really the primary requirement. The crucial obligation of special educators is to develop and implement an IEP that confers a free, appropriate public education. Now, in the next slide, you can see that definition of FAPE is unchanged since the original law was passed back in 1975. The education for all handicapped children acting essentially says, a FAPE is special education and related services that are provided. Public expense can't charge you put it in the IEP. It's the responsibility of the school district must meet the standards of the State Education Agency.

Some States grant rights for kids with disabilities in excess of what the Federal Government does, and you have to make certain that you follow them. I can give you a real quick instances. I'm from South Carolina. The Federal law requires a transition services be provided at age 16; South Carolina requires age 13. So we have to follow that because it's a standard of our State. Now, the State cannot provide less, they can only provide more rights, not less rights. It includes preschool, elementary or secondary education, and finally is delivered in conformity with a child's or students IEP.

Now the IEP thus really becomes the real touchstone of what a FAPE is, because you developed that. You and the in the child's parents developed that together. Now, as you'll notice, the law doesn't really say

what appropriate is, and there was a reason for that. That Senator Robert Stafford, in 1978, who was actually Senator from Vermont, a co-sponsor to the original law, said we did not even attempt to define appropriate, but instead, we established this baseline mechanism: the IEP. So the IEP is obviously how it's going to be the blueprint of a FAPE for any given child in special education.

Now, in the next slide we can see that because appropriate has not been defined, it's what is called the kind of statutorily gray area. And when this area is sort of gray, it's really not clearly explained. So it often falls to the courts to provide an explanation. And in 1982, a case out of New York made it all the way to the Supreme Court. That that case was called Board of Education of the Hendrick Hudson School District v. Rowley. It involved a young girl who was profoundly deaf, and had just entered school, and the parents wanted her to have a sign language interpreter, and the school did a very good job of having an IEP meeting and providing services. But they stopped short at providing a sign language interpreter. So she sued under the law, went to due process hearing and ended up going to the Federal District Court system, to the finally, to the Supreme Court. And the question they presented was, what is the level of educational benefit that school districts must confer on children with disabilities to provide them with the FAPE or with a free, appropriate public education guaranteed by the IDEA.

So, they were saying, well, the law doesn't really say what's appropriate. Here's we think it is. We think it's it means that you will develop a program that allows our child Amy, to achieve your maximum extent appropriate, the maximum extent that she receive an education equal to all other children. So that wasn't really answered in the in the law itself. So the Supreme Court had to answer that, and in a footnote they said, you know we wish we could wish for a little more of a definition. But this is what we got, and we have to use this.

So what the Supreme Court did is they created a 2 part test to determine if Amy was actually receiving a FAPE. They said, first, we have to determine, did the school district comply with the procedures set forth in the law. Okay, these procedures are very important, and the Supreme Court rightly noted, the IDEA is filled with procedures that we have to follow. So that was their first question. Did the Henrik Hudson school district comply with the procedure set forth in the IDEA. And in fact, the Supreme Court found that that the a school that Amy attended, Furnace Woods elementary school had done a very good job on the procedures, therefore they passed the first part of the Rowley two part test. But then the Supreme Court had put in another part. And the second part had to do with the amount of educational benefit that Amy received from her program. So the question the Supreme Court put in the test is the following: is the IEP reasonably calculated to enable the student to receive educational benefit?

Well, when they turn to answering that question. Amy being a very bright child and hit a measured IQ of, I think, 125. She was academically able, one of the best students in the class, and was passing from grade to grade. And so they said, well, clearly Amy must have received the educational benefit because she was passing from grade to grade. Therefore we determined that the Henrik Hudson School district met the second part of the test. So because the Henrik Hudson school district met both parts of the task, they prevailed.

Many people would say it was a little unfortunate that this was the first test ever heard by the Supreme Court of Special Education, because Amy was not a typical child of the students that were getting special ed. Like I said, very bright, very academically able. The Supreme Court also mentioned a footnote. Our test, the way we applied it with Amy going passing from grade to grade, really only applies to Amy. This test had to be applied with every student when you're testing FAPE. So when you're determining if school is met FAPE. So as we'll talk about later, both David and I have been hearing officers. If we had a



FAPE case prior to 2017, this is the test we had to use to determine if the school district had followed FAPE. Now what happened is, the first part was very easy for most school districts. They just looked at the procedures and of the law, and they said, did the school district follow these? The second part did not prove to be that easy.

So in the next slide, what you see here is different FAPE standards. This is a map of geographic boundaries of the different circuit courts, which are the courts right under the Supreme Court in the Federal system in terms of importance. And you'll see there's 3 circuits that used a higher standard. Actually, the circuit that David used to live in had a higher standard, where they use the term "meaningful benefit" for a child. For a hearing officer or a judge to apply the two-part test, the second part of the test was, meaningful educational benefit in these circuits? The fifth, the sixth, and the third, a hearing officer or judge would have to be determined to the school offer a meaningful educational benefit. Then, if you look at the others, there's 3 5 other circuits in green, and those circuits developed a lower standard, a fair amount lower than the meaningful benefit standard. It was closer to some benefit, trivial benefit, those sorts of things. They not as not as high. The ninth circuit they actually were all over the map. Some of the courts were saying some of the panels were saying, Hi! Meaningful. Some were saying lower, so they were very confused in that way. Well, anytime you have a difference between circuits like this, it makes it much more likely the Supreme Court is going to hear a case. Well, because they had a difference in the interpretation of the second part of the Rowley test that made it likely the Supreme Court was going to hear another case, and that happened in 2017, and David will talk about that.

David Bateman: Thank you, Mitch and I appreciate how you articulated that there were differences between what was going on, and the fact that there's also the phrase in between the various circuits. But there's also the phrase that that bad facts make bad law. And it so we had been living with how to define, "appropriate", based on a very low incidence disability child who's deaf with a very high IQ. I'm willing to bet the vast majority of you have not worked with individuals who are deaf with high IQs. I did once, and it was. It was a great challenge to me, but we needed a case to help us clarify exactly what we met by "appropriate".

So here are some pictures from the Endrew case. The Endrew case was heard in the Douglas County school district, which is the district just immediately south of Denver on I25. And these pictures are taken at different times of the year. It's not like one day is snow, one day is green. But the parents of Endrew attended Summit View elementary in Denver County, the school to the left, and the parents were seeking reimbursement for him to attend a Firefly Autism House, which is located in Southern Denver. And they were basically saying that there was he was not receiving an appropriate education, that the goals and not been changing, there was nothing really done to addresses is increasing behavior problems. It was a tuition reimbursement case, which one of the questions of any tuition reimbursement case, is whether the child's receiving an appropriate education. And so as the courts this, through the litigation all the way up before the Supreme Court, they were affirming the district's presentation that they were doing exactly what they were supposed to be doing. And so they actually appealed this, the parents appealed this all the way to the Supreme Court, and the Supreme Court does not hear many cases in special education.

I'm very serious about that. They did hear a case this past year, but that was that was done in a case that probably won't change much of what you do on a daily basis, and the previous one, was in 2017. So there's not many cases in special education that they that are appealed to the Supreme Court. I'll be

candid with you as a hearing officer. There were times when parents would say, I'm going to appeal this all the way to the Supreme Court; I wanted to be a part of a case that made it to the Supreme Court as a hearing officer. It never happened, and I had several to make it to the third circuit when I was working in Pennsylvania, but it was I wish, I wish. But the tenth circuit is the case where this this one was heard. And what we had here is the basically the benefits standard was this, it must be merely more than de minimis, which basically means barely more than nothing. And there was all sorts of problems with all the IEP was being progressive or not progressing for him, and the behavior problems and his behavior problems are escalating. And you may be aware of this, as kids grow, they get larger, and it becomes increasingly difficult to actually deal with some of the behaviors that they manifest. So it posed a problem for him and approach a problem for the school district as a part of this.

But the parents appealed this, and this is the question that they presented to the Supreme Court. And this is a question that we needed, based on, as Mitch very nicely articulated, how different things were. And I'll be candid with you. For almost 3 decades I lived in Pennsylvania, and we would have families who had moved to Pennsylvania from other States. I lived in Carlisle, which was the home of the US Army War College. And we had families that had moved there from some of the low circuits and they were there, and really it was amazing how different they talked about the education that their child was receiving at the time. We would find that families would then up at, because they only come to the World College for one year, they would they be posted off into the Pentagon and other locations that families would stay there, because it's the first time that they're we've realized that their child is receiving appropriate education.

And it really did change a lot of what's going on. But this is now a national thing that we need to pay attention to. But what is the level of educational benefits school districts must confer, and children with disabilities, and order them to receive FAPE. And that that's an important question.

There are Mitch and I back about 6 years ago. We've changed a lot since then, haven't we? We've changed, we're both better looking, which is really cool. And so what's interesting about this, we attended the oral arguments for this and listened to what the Supreme Court did say about this. And what's interesting about this, and I don't mean to dismiss this, but what I want to share with you is that the parents, as a part of their case, we're demanding that all kids making years worth of progress each year. Why I go back to this and look at this, if you ever get the chance to go to oral arguments on something that you know something about, you will be very impressed with how very well prepped the Supreme Court justices are. I mean, they were spot on. It was the only case they heard that day. They were very spot on with their prescient question questions about the needs, how to do this, implications for this. So if you're ever lacking in your faith, and what's going on in government, go there. They're very well prepped to pay attention to this.

What was interesting about this, so about 2 months later, it just about 6 years ago, the Supreme Court issued a decision that rejected the merely more than de minimis standard. That's what's important. They rejected this, and they remanded the case back to this. But pay attention to the second half of this slide here. To meet its substantive obligations under the IDEA, schools must offer an IEP reasonably calculated enabled child to make progress. It's no longer a benefit, but to make progress in light of the child's circumstances, which is important. And Chief Justice John Roberts asked this question multiple times with the parent's attorneys when they were saying this, because the parent was asking for years for the progress. Each year, he said, what about kids with really significant disabilities? He was more articulated

than I was. But he was basically asking these questions. So basically, progress based on the students like level things like this.

So keep this in mind as we talk about this because we're going to use this to reflect on where we're going with this, so we can have a better understanding. But we've highlighted some words here for you, and you may be able to pay attention to what the highlighted words are that may stand out and jump out at you. But the IEP must enable the child to make progress. After all, the essential question of IEP is, and pay attention to how parse these words out: it's the academic and functional advancement. It's not just academic advancement. And so, what we have to think about this is, how are we going to push these kids forward? How are we going to encourage them? How are we going to move them forward as a part of the system? And it's so that they actually receive an appropriate education. That's what is good. But it's not just academics. It's also functional performance. Because too often, when you get to the functional performance, it's hard. It's some of these things are hard to measure. And the behaviors, there's not standardized ways of actually encountering how many times this student engages with others during the course of the day, or how much off task time. There's not like a quick aims web thing that we can use with them to make these determinations. But those are important variables that are often posing problems for these kids, because we're not doing a good job or training general education teachers to help them understand what their roles and responsibilities are in provision of these services for these kids. So, keep this in mind as we talk about this and keep this in mind as we address this.

Okay, so Mitch earlier highlighted what was happened as a part of the Rowley case. We had the Rowley 2-part standard, and that was from 1982. And some of you don't remember in 1982. But don't It's interesting about this is 1982. Yes, was a good year. I was in college, but it was that they paid attention to this.

The first is the procedural part, as is does the state comply with the procedure set forth by the law. This is again, while why your special [education] directors make sure that you're following the timelines, that you have the right people in the room. But the thought behind this is that fair procedures will provide fair outcomes. And so, if you all follow fair procedures, we're going to have to outcomes that will help us as part of this the second part, and this is going to be the hard one.

Is the resulting IEP recently calculated to enable us to make progress appropriate in light of his or her circumstances. And so, the term is that we're obligated to provide an appropriate education. We're not obligated to do a best education. And that's something that we need to pay attention to. And that's it. That's where a lot of the antagonism exists between parents and school districts because of the push-pull. Because parents often want what's best for their child, and our legal obligation is not to do what's best. But our legal obligation, it's to do what's appropriate. The problem is appropriate as often in the eye of the beholder.

So, we're going to emphasize some points that will help you clarify this, because many of the cases that I've been involved in this last year or not procedural ones. They're not procedural ones. I can count days, I can tell you if the persons in the room, I can tell you if they have the right information, those kinds of things. It's whether the kid is making progress. And that's the important part.

So, the final part of the Endrew case is the parents appealed this to the back to The Court of Appeals. The District Court of Colorado was peeled down. And they basically determine the IEP was not appropriately ambitious. And after 7 years of litigation, Endrew was still in school. The school district of Douglas County paid a lot of money to helps move this case forward as a part of this. So, when we talk about this is that

the implications of this, there's a lot that we need to pay attention to and a lot we need to have to address. So, keep these things in mind because there are increasingly people who are pursuing litigation in special education because they feel that's where the money is. And because if you're if you're gen. ed., if you sue about gen. ed., there's not a guarantee to services. There's not a right to services such as in many States. So there there's not an obligation for districts to have to pay up because there's no preventing the appropriate gen. ed. services. It's only special, Ed. So, there's money involved in this.

I'm going to turn it back over to Mitch, who's going to talk about this the basic process of litigating a FAPE so that we all understand that process. So therefore, we can talk about the recommendations we're going to make as a result of this.

Mitchell Yell: Okay, so thank you, David. Before we get into that litigating FAPE, I want to spend a little bit of time talking about litigation because we live in a very litigious field. We work, I should say, in a very litigious field, that there are often situations in which parents and school districts have a disagreement about their child's education that they cannot settle. When they cannot settle it, the idea contains what are called procedural safeguards. One of the ultimate procedural safeguards is a parent can issue a complaint. One common way of doing this is by requesting a due process hearing. And as we'll talk about later, both David and I have done this. But after a hearing there is a whole other type of litigation procedures that may come about.

In the next slide what you can see, what we have here is the litigation done the typical way. This is the Federal system, by the way, it's not the State system. Every State has their own system, that is virtually the same thing as the federal system. They are sometimes called the courts by different names, but there's always an initial level and an appeals level and what's called a court of last resort.

Now, the reason we're going to be talking mostly about the Federal system is that probably about 90 – 95% of all special Ed cases go through the federal system. So, this is the way they go. Every State has between one and 4 Federal District courts. That's often called a trial court. And what happens in the trial court is, you have a judge, there's a jury, attorneys present their cases. Now like I said, some states like the big States like California, New York, have as many as 4 district courts. The smaller States, like South Carolina, has one. But if we looked at all of the district courts the United States, there are 94 of them.

Now, if a case is heard at that level, and a decision is made, the party that loses could appeal that decision, and they go to the next higher-level courts, which is the Us. Courts of Appeals. There's 13 of them United States. And here are our are the different circuits, and David was always quite confused seeing Guam and Alaska, both under California and we had to explain it. No, they're not there. That's just for the picture. But these are the different circuits, and you can see they start up in the first, go all the way to the ninth. Now David used to live in the third. Now he lives in the fourth. I live in the fourth in South Carolina. Now every one of those States has at least one district court. So, South Carolina, I'll use that example, only has one. If you look real closely, you'll see California has a lot of little dotted lines in it. That's because California has 4. If you look up to Washington, there's dotted line. They have 2 district courts. So, when a case is heard at the District Court level, if appeal is made, it goes to the Circuit Court that that State is in. So, David and I are in the 4th circuit. So, if there's an appeal of a case in South Carolina, Virginia, it goes to us, Court of Appeals for the fourth circuit. Now the final appeal, as David said, could be made to the Supreme Court. Now they don't hear every case. They hear very few cases. And there is only one of them. But that is law, when they say something that's law everywhere, all lower courts have to follow that. And so, you see, they're very important decisions.

Now if you look, if we go to the next slide, one of the things that we thought is, you know, litigation in special education is special, because we have a slightly different system. In most states there is what is called a local due process, and a due process hearing will be held. So, if a parent files for a hearing, it goes to the local hearing officer, and David did many of those cases when he was in Pennsylvania, and he acts like a judge. He, their parents and their attorney are on one side, unless they don't have attorney, which is called going pro se. And the school district, and their attorney are on the other side. And witnesses are called, exhibits are entered. It's just like going to court.

Now, in some States, actually very few states, there's only 7 states, there is a second tier, which means, if the person that loses at the hearing, tier one hearing, could appeal, but instead of appealing to the court system, it goes to the second review hearing, which is called the State Review officer. And he or she re reviews it. And that's what I do now for South Carolina and David is going to be doing. What we do is, sit down and look and read the transcripts of the hearing, and decide if the hearing officer made a correct legal decision.

Now, if our decision is appealed. Then it goes to the court. So, you have the Trial Court, which is the US District court, the Intermediate Appellate Court, which is the US Court of Appeals, and eventually all the way to the highest Court, the US Supreme Court, which is called the Court of Last Resort. Because you can't go any further than that. And you'll notice in this little figure, that we have the orange represent States. So, there are 3 levels of courts in the State, but because most special ed cases are heard in the Federal court system.

That's what we'll talk about now. The Rowley case and the Endrew case were both heard at the Supreme Court. But most cases never go that far. As David said, most cases don't actually go beyond hearing or review hearing. And so, what we're going to be talking about today is our experiences hearing officers. And it's very important, I think, that we pay attention to due process hearings, for a number of reasons.

Number one, they highlight emerging trends in the field. So, for instance, there are a number of hearings regarding COVID. There's very little case law yet. It's going to be coming, and that's because hearings have to be held under a relatively short timeline. If David gets a hearing in Pennsylvania, I suspect you had 45 days to hear the case and make the decision. If it gets appealed, I here, as a State Review Officer, I have 30 days to read the case, make my decision. But when it goes to the courts, there is no timeline, so that can take quite a bit longer. But nonetheless, we often see emerging trends coming first in hearings. Emerging trends, at least in special ed. Now another thing is, hearings can set precedence. David can set precedent, which means, if courts agree with the hearing officer, and render the same decision, that sets a precedent, which means lower courts are lower hearing officers, have to follow that decision now. David said he had always hoped he would be heard in the Supreme court, and it usually doesn't happen. But nonetheless, hearings are also important, because they can be very expensive for school districts. The recent averages I've read are anywhere from a school district will spend \$18,000 to \$50,000 on a hearing. And that expense is borne by the school district I would say, in the in the last hearing, I would think, if the school district got away with \$50,000, that was a good deal, because it was a very complex case that was heard for 5 days and attorneys have to go in. David now prepares witnesses, there's money for that. So, it's a very expensive procedure.

And also hearing officers in either level can use certain remedies. They could order that a school pay tuition reimbursement; they could order compensatory education, for example. The only thing they can't do, is they cannot order attorney's fees. That can only be done by a court.



Now, if we look at the next slide, what we see is that as hearing officers, David and I have heard lots of cases. I've reviewed a lot of cases. And what we've really tried to break this presentation down in into 3 types of school/district errors that we're more likely to see. I'll go through these 3 types and then we'll spend more time on them. But the first type is really procedural, and that's what David said. That's why special ed. directors spend so much time talking to you about the different procedures in the law, because we need to know what the law requires, and then follow those requirements. And that was the first part of the Rowley test. The procedures are very important. In fact, there's certain procedural layers that can could lead to a denial of FAPE in and of themselves.

The second type of school district error is called a substantive error. And what that refers to, as Julie Weatherly would say, is made in the content of the IEP. It's for some reason there's something wrong with the IEP that's developed, and it just doesn't provide education that enables the student to make progress. So that's the substantive part. Now, in 2004, Congress, when they reauthorize the IDEA, they said the substantive part is really kind of more important than the procedural part. You have to get the procedures right. But what is really important is, did the child make progress appropriate in light of his or her circumstances, and that would be using the Rowley terms. So those are the first 2 types, procedural, substantial.

The next type is implementation errors. Now, the Supreme Court has never heard a case on implementation of an IEP. But essentially what this means is, if the school fails to enact a student's, IEP as agreed upon in the IEP meeting, that is an implementation error, and it may be a denial of FAPE.

So, what we're going to do is we are going to spend some time going over these 3 types of errors and tell you what we have found in our experience as hearing officers and reading the Case Law, or what are the most serious school district errors committed.

First let me talk about procedural. And then we're going to move to substantive. And David's going to talk about that. But there are really 4 major procedural errors that we have seen that likely will lead to a denial of FAPE. If it is found this that the school district committed these errors, and the first error is failing to involve a student's parents in the IEP formulation and monitoring. In fact, many people would say it is the essential procedural safeguard of the IDEA is that a student's parents must be involved in not only developing the IEP, but in monitoring the IEP. Recall that we have to be reporting to a student's parents on their progress. That is monitoring. So that's a very crucial error. That doesn't mean that you that, if I was a teacher for 16 years, and I know, and many of you will had this, too. You can't get parents; you can't find them. You can't convince them. Well, you still have the responsibility for writing an IEP. But if you have to make good faith efforts to get the parent involved.

A second major error is predetermining a child's program or placement. And what that essentially means is you make a final decision, the school makes the final decision, without the parents. For instance, they write an IEP, and the parent is not involved, and when the parent comes in, they [the school] say, here's the IEP. Take it or leave it. You know that that would be predetermination. We must never predetermine a child's program or placement. We can have informal meetings about it, but we can't make a final decision until we have the parents there in the IEP meeting. That's where the final decision is made. Predetermination is not good. Don't do it.

Third, failing to properly conduct child find activities. And this is more of a school district, a procedure that many school districts have, such as kindergarten round up. And there's referral systems to find children. We have an affirmative duty to find students with disabilities.

And fourth, one that is really been coming up a lot lately. In cases I've done is failing to seriously consider the resolution session. In 2004 there was a step put between mediation and the due process hearing, called the resolution session, and it involves the last attempt to meet and make an agreement on a child's program before going to due process, and failing to do that is a very serious procedural error.

So those are the procedural errors that we have found to be the most the most serious and the most likely to lead to a denial of FAPE. Another is if you do, multiple procedural layers, even small ones, courts have sometimes said that multiple procedural layers, even if they don't deny FAPE in and of themselves, could mount up to be a denial of FAPE. So next we're going to move on, and David's going to talk about the serious substantive errors.

David Bateman: Thank you, Mitch. I appreciate you teaming that up very nicely. The procedural parts are the ones that we all pay attention to, and there they in many respects they're the easy ones, and they're ones you need to absolutely pay attention to. The Supreme Court has affirmed both in 1982 and 2017.

But there's some substantive errors that we need to address, and that's the second part, and these are ones you need to pay very close attention to. We'll get to some quick recommendations in a minute, but basically, make sure of the internal consistency of the IEP. The present level statement for me is the very most important part of the IEP because it dictates everything that we're going there, what we need to do relating to the child, then the services, the level and the actual location where we might be able to do this. But if you don't have a tie between what the present level statement says and the services that are being provided in either the goals or what is being provided for a child, you don't have consistency. Where we are with this, I can't tell you how many IEPs I've seen where we have kids who has all sorts of behavior problems, all sorts of functional skills problems, and there's nothing in the IEP to address said behavioral or functional skills issues.

Second, one, failing to craft measurable annual goals. Mitch and I just co-wrote textbook on legally compliant IEPs, and what I was doing as a part of that is, I started a collection of bad IEP goals, but I had to stop because I was afraid that I was going to run out of hard drive space on my computer because I was seeing so many bad goals. We need to make sure that our goals are for measurable things that you can do. We're not going to have goals where the kid will think about reading, or the kid will just consider something. We're going to actually have goals that we can actually visibly see; that we can see and that new teachers can see. Your grandmother can see whether this is happening.

And then the last one is failing to collect and or report data on the students' progress towards their goals. If there is one thing that we can talk about enough, and the next title will highlight this also, we need to dramatically increase the progress monitoring we're doing and make sure that we're reporting this. It'll be one of the recommendations we'll get to in a minute. We can't emphasize enough to do this. I've done witness preparation for due process hearings for years and witness preparation for speech pathologists is always very easy, because they take data pretty much every single time they work with the child. I'm not saying that we need to do that, but we need to increase the amount of data that we have so we have clear trends and understanding, first, where the child's functioning and whether that child is improving or not, improving as a part of their programming that we're providing to them. So those are important characteristics we need to address as a part of this. Okay.

Kathy Mayfield, who just recently retired. She was an attorney in Virginia. And what she said, and this is an important variable that we need to address as a part of this is we have to think about, is that in FAPE cases, when we ask the districts for things, first thing you have to do is say, teachers, give me the

information on your students' progress. And if the teacher doesn't have data, we need to settle. Do we settle often? Yes, we settle a lot of the districts, settle a lot of these cases. And I know there's a class action lawsuit against the Commonwealth of Virginia right now, because in due process hearings parents are only with prevailing in due process hearings 1.5% of the time. But there's a lot of settlements that occur prior to that, and we need to address that and pay attention to this. We need to dramatically increase this and pay attention and address this matter because it's posing significant problems, not only for the kids, but also for understanding precisely where we're in communication with the parents. And I've seen bad statements provided to parents, so they don't have an understanding truly where how their child is functioning or what's going on with them. So, we need to address this further. Just take this further. So substantive is important.

The next one is with some serious district errors, things like this, implementation errors. Okay, implementation errors you have to think about, this is failing to provide the service, the amount of services on the IEP. We spend in an enormous amount of time developing these IEPs. We bring these people together. We write this, bring hub team meetings, we think about this. Make sure they implement the little suckers. Implement the little suckers with the amount of time that we're supposed to be doing this. So, the child is supposed to receive 2 hours of language arts instruction for reading, spelling, and language, give that child 2 hours. Don't just do 30 minutes every other day. Make sure that there's a closer tie between what's going on this. But you have to think about this. IEPs, it's like a contract. It's close, it's not quite like that, perfect like a contract. But it's like a contract. It's a binding commitment by the by this school district to provide the services about what we're going to do for these kids. And we need to all we need to make sure that we're doing this. And we're providing these services for these kids. So, keep this and mind.

So based on this based on this, this is what you've all been teed up for. We're pretty excited because we're going to get to the recommendations. This is where we're going. This, based on our due process hearing experiences, and Mitch and I have not talked about a due process, hearing, oh, at least 24 hours. So, we're kind of on a break right now. What's interesting about this is we're considering this. Some of you watch Netflix. Some of you watch Hulu. Some of you have apple TVs. I'm enjoying this Stef Curry documentary right now, which, when some of you are doing these things. We read case law. My wife tells me I need to get out more often, but this is what I enjoy doing. So just trust me on these things like this. But what we have to think about, we have some clear recommendations that we would like to provide for you that will help you just make it through the day and improve services.

First one. And this is I don't want to say, the low hanging fruit, but this is one that you need to pay attention to. Understand and avoid the procedural violations in the development of IEP that could in themselves constitute a denial of FAPE. Big issue. Make sure you have the right people in the room, and make sure that you have the right people in the room who know what the kid looks like. And I say this because too often, I was working with the district this past year where they would have a PE teacher who had no idea what this kid the kids would look like but was free that period to come to the IEP meetings. Get or have that teacher go cover the class of someone who knows what this kid looks like. It's not a permanent fix, but it's temporary thing where they would go cover the class, so that we at least have someone who understands, what this child's doing, how this child's performing, and can speak to this and understand what's going on. It's the procedural violations that we need to pay attention to. Also make sure that you're not caught by surprise, that you're not caught by surprise when there's an IEP come due. That you actually start thinking about it several weeks ahead of time and start drafting and meeting with the parents and start trying to schedule these things ahead of time so that they don't have

to delay the process. Now the PROGRESS Center has some really good resources, and for each one, but most of all the tips that we're going to be providing for you. There are some really good resources to provide assistance to help where they are. So, I highly recommend these online training resources. And these IEP tip sheets that the PROGRESS Center has developed. They're free. We can't do any better than this, folks. It's the best we can do. They're free. And so please run with these, take these out and pass them out to your teams, get them so that they can understand what's going on with them.

So okay, that's Recommendation one. I'm going to turn it over to Mitch for recommendation number 2 and let him go at it from there.

Mitchell Yell: Thank you, David. Notice, Riley is putting in links in the chat to these different resources available. And before I go on the recommendation to just comment, Ellen made a very good comment [in the chat]. I always thought, since each hearing is an individual hearing based on IEP, you cannot set precedence. That is correct. I probably wasn't clear enough. The hearing itself doesn't set precedent, but when it goes to a court, courts could. And best example I can think of is a case set out of Iowa, a number of years ago, called Cedar Rapids v. Garrett F. The hearing officer made a decision that was overturned in the Supreme Court. I mean, excuse me, overturned in the District Court. And the Appellate Court went to the Supreme Court, and Bartlett's decision was upheld. So, his decision was precedence if the courts act. But the hearing itself does not set precedence. It's the courts and when courts start hearing it, an Appellate court, and of course the Supreme court are the most important precedence.

Well, let me go into a recommendation two. When developing content in the students IEP and reviewing it and revising it, it needs to be certain that the present levels of performance and annual goals are based on evaluations and current relevant data. In other words, don't use old data. Make certain that you're using new data. Now, in terms of resources that address this area, you'll find Riley is putting this in the chat, there's a really good online training course on goals. So really, look at those, they're excellent.

Now recommendation 3. Ensure that the goals themselves are appropriate, they're ambitious, and they're measurable. Now we are underlying and measurable, of course, because when I started teaching, we just had to write goals in the IEPs. Now we, as of 1990, we had to write measurable goals. You have to be able to write them and then measure them, and you even have to say how you're going to measure them. They also should be appropriate, and as the Endrew case showed us, they should be ambitious and that you want the child the child to actually make. If they may meet their goal, they will actually be making some amount of progress. Now the resources, there are a number of really good resources that are provided that Riley is going to be putting into the chat. But on both writing academic goals, setting goals, and behavioral goals. And there's an excellent module to on monitoring these goals. And so, what we're going to do is move on. David's going to take recommendation four.

David Bateman: Okay, thank you. I appreciate the opportunity again to talk with you. One thing with, and I said this, I alluded to this a few minutes ago, but what I want you to pay attention to is continuously monitor and measure a child's progress, and determining whether that whether the progress has been made. I mean, take frequent data points. And how many data points am I recommending? Like, for instance, in a 9-week marking period, I'm recommending 6 to 7 data points per marking period per goal. Which sounds like a lot. But it not really isn't because you have to think about this and conceptualize it as a series of snapshots instead of a series of long videos. If you take a series of snapshots, you can get a lot of data on a child in a 5 to 10 minutes about how the child is either reading or doing math, or what skills are, or just do some observational things to what they're doing on the playground. You can get really good data on these things. It doesn't have to be a long 2 hours test every time. So, get a series of quick



probes on this child and graph those that are consistent that you can from a representation. So, you can say yeah or nay, whether the child is making progress.

And we have additional resources that help as a part of this graphing and analyzing the data. And where we go with this and being able to make sure that we have some sense of what's going on with this. But keep this informed about what we keep so the people are informed of and understand that you have data so if anyone asks where the child is currently functioning, you have a sense, you have a very clear sense about what's going on with the child. And you have a sense of what? Where we are.

Okay, which brings us to our next recommendation. But there's more okay is, provide frequent and systematic data, based information to the student's parents, and the child's advancement towards their goals, and make sure that you provide database information that they can understand. I have parents who contact me all the time, and don't know if a Dibbles is something that they could hold in their hand? Or is it something that they serve at this special school lunch? So, you make sure that you explain so the parents understand. Parents often don't understand standard scores. So, you have to understand and explain it so that parents can understand and be able to interpret, so they can be informed about this. This is vital that we provide frequent and systematic database reports. We're obligated to do this in the same frequency that nondisabled kids get report cards. That's important. And I think that's wonderful. But we need to make sure that we provide information that the parents can understand. I have seen reading data for parents that say, STEAM's good. That's the data that the parents get. That doesn't tell me any how the child is actually functioning. You need to make sure that it's understandable for everyone. So, you have a short video that hopefully will help clarify this. Okay?

Speaker in Video: Looking at her graphs with her, I feel like we're on the same page because it shows me what her progress is, and it lets me know that she's not just staying at the same level, and she's learning something, getting better and starting to comprehend what she's doing day to day.

David Bateman: So, what is important about that is that from the National Center for Intensive Intervention have a wonderful host of great resources for you. Also, the PROGRESS Center and the National Center for Intensive intervention are all under our umbrella, and there's wonderful resources that are available. All of them are free again. We can't do any better than free folks. We're really trying to get you good resources that you can use to be beneficial for your team.

Additionally, there's some great resources to help with this, just to help families be part of the process so they can explain things and understand what's going on. You really, truly need to emphasize getting the parents involved, ensuring the parents are participants and understand what's going on. For instance, we often write evaluation reports on kids at a reading level that the parents can't understand. The Procedural Safeguards Notice is written in a level they can't understand often, because 96% or 48 of the States have a procedural safeguard notice written at a college level or higher. So, we need to think about what we can do to get the parents involved. As a part of this, I'm going to turn it back over to Mitch for recommendation. 6.

Mitchell Yell: Recommendation 6 is when your progress report and other data do not reflect that an annual goal will be met, reconvene the IEP team to determine why and make changes to academic and functional aids and services. And that's a problem. I'm sure David and I both have seen is that when data shows that a change should be made, and it isn't made. Well, that's not a good thing. You want to make certain that you are reacting to the data. Now, in the next slide we have more recommendations that

Riley, I should say that Riley is going to put into the chat box about data teaming tools. There are some excellent resources available

Recommendation 7 is make certain students' IEPs are implemented in special and general education settings as agreed upon in the IEP meeting. Now, courts will make distinctions between material and immaterial layers in IEP implementation. We should not be in; we should not be doing that. We should be thinking that everything we put in the IEP, we want to implement it as much as it is accurately as we can. It's very difficult. But you want to make certain at secondary levels, that all IEP is being, in all aspects of the IEP, is written not only the services and the supplementary service and the program modifications, but also the amount of services that you said you'd provide.

Now in the next slide. More resources available to you that, you know, are really good. And while we go to the next slide, I want to take just a second to answer a question or a query by Mary, that our State passed to State law that requires school districts to allow ABA services, but the law is specific that school is not responsible for paying for these services. Parents want them included in the IEP. The team is, or the school district is resistant to that, because they may have to pay for it. That is one of the reasons often people would say, don't put specific curricula in the IEP, because you're essentially, that is what you're going to be having to deliver. So that this is really a state issue, and not that important. But remember, if the child needs something to make progress, you have to provide it. Okay, we'll turn it back to Riley.

Riley O'Donnell: Awesome. Thank you, David, and thank you, Mitch, for sharing all the information and the resources. And I know for everyone here today we have shared a lot of links in the chat, and it's sometimes hard to keep track of. So, I am going to share to you a link that will be most important and keeps track of all the links that we're shared today. This first one is going to be the Event archive Page, where you can find this PowerPoint slides, all the resources, as well as the recordings for this session, and all the sessions from Prepping for PROGRESS over these last 2 days. The second link is the link directly to these PowerPoint slides, and this is important because all the resources that we shared today are linked directly in those slides. So, if you don't want to keep track of all of them that were shared in this the chat today, just go directly to that PowerPoint and you can get them from there.

But up on this side there are a couple of other resources that we do want to highlight, that we're not shared yet. These are some modules from the IRIS Center, as well as the PROGRESS Center that we dropped those links before. But there are also some great online learning modules from the IRIS Center. This first one is on developing high quality IEPs. It includes an overview of the high-quality IEPs, they explain Endrew F. The Supreme Court decision, IEP process for guidelines and common errors, as well as detailed development steps for IEP content, substantive guidelines, and common errors.

Another one from the IRIS Center is also on the IEPs, and it's on how administrators can support the development and implementation of high-quality IEPs. This explains the administrator's role in particular on overseeing the IEP process. It describes actions that school leaders should take during before and after the IEP meeting. It also explains the legal implications of Endrew F. and includes specially developed info briefs on IEP team member roles, determining LRE, monitoring student progress and common errors and how to avoid them.

Some more resources in case you want to dive a little bit deeper into this topic. The PROGRESS center and the IRIS Center as well as NCII. We also want to highlight the Special Education Law Blog, the IDEA web page that you can access a lot of resources from, as well as Understood, another Center that has resources on this topic.

Mitchell Yell: I'll just say, David and I do the law blog, and we try to update it about every 2 weeks or so.

Riley O'Donnell: Awesome. Thank you. Then we do invite you to stay connected with the PROGRESS Center. You can stay connected with us on Facebook or on Twitter @K12progress, as well as joining our mailing list so you can stay updated with all the most recent updates from the PROGRESS Center. You can join the mail mailing list by going right to promotingprogress.org and entering your name and email to ensure that you're staying updated at all times.

And that is all we have for you today. We thank you for joining the session, and we hope that you found this information useful for you and your role in your work. If there's any last questions for David, or for Mitch before we hop off here, we welcome you to either put those in the chat or come off mute. If not, that is all we have for you today, and we hope you enjoy the rest of your time at Prepping for PROGRESS and thank you for joining us today.