



Fagen Friedman & Fulfroft LLP

# Here and Now



IEP Lessons Learned  
Since Endrew F.

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# What We'll Examine Today . . .



- Recap of Endrew F. Decision
- Emerging and Essential IEP Issues in Post-Endrew F. Era
  - Designing “Appropriately Ambitious” Goals
  - “Connecting the Dots” During IEP Development Process
  - Formulating “Clear Written Offer” of FAPE
  - Ensuring Parental Participation and Parent Input in IEP Process
- IEPs, Endrew F. and COVID-19



# **I. Recap and Analysis of Andrew F. Decision**



# Review: Andrew F. FAPE Standard

- In order to meet their substantive obligation to provide FAPE under IDEA, districts must offer IEPs that are “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”
  - Program must be “appropriately ambitious”



# Review: Andrew F. FAPE Standard

- Supreme Court declined to establish any “bright-line” standards for IEPs
- “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created”



# Review: Andrew F. FAPE Standard

- “The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials”
- “The [IDEA] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents. . . .”



# Review: Andrew F. FAPE Standard

- Courts should not “substitute their own notions of sound educational policy for those of the school authorities which they review”
  - “By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances”



## **II. Emerging and Essential IEP Issues in the Post-Andrew F. Era**



# A. Designing “Appropriately Ambitious” Goals



# IEP Content Requirements

- Every IEP must include statement of measurable annual goals, including academic and functional goals, designed to:
  - Meet the needs of student that result from disability to enable student to be involved in and make progress in general education curriculum; and
  - Meet all other educational needs of student that result from disability

(34 C.F.R. § 300.320 (a)(2); Ed. Code, § 56345, subd. (a)(2))



# IEP Content Requirements

- Each IEP also must contain description of how student's progress toward meeting annual goals will be measured and when periodic reports on such progress will be provided
  - Includes progress toward meeting postsecondary transition planning goals

(34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3); Letter to Pugh (OSEP 2017) 69 IDELR 135)



# IEP Content Requirements

- IEPs must “show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided”
  - To be measurable, goals must be based on accurate present levels of performance
  - OAH: “Appropriateness of placement can only be examined by looking to the implementation of goals”

(Cal. Code Regs., tit. 5, § 3040; Student v. Paso Robles Joint Unified School Dist. (OAH 2011); Student v. Los Angeles Unified School Dist. (OAH 2010))



# USDOE Guidance

- Annual goals are statements that describe what student can reasonably be expected to accomplish within 12-month period
- IEP team must write IEP goals in way that allows for objective measurement of progress toward achieving those goals
- Annual IEP goals should be aligned with state academic content standards for grade in which student is enrolled

(Letter to Butler (OSERS 1988) 213 IDELR 118; 71 Fed. Reg. 46662 (Aug. 14, 2006); Dear Colleague Letter (OSERS/OSEP 2015) 115 LRP 53903)



# USDOE Guidance

- Endrew F. requires IEP teams to ensure that goals are appropriately ambitious and that all children have opportunity to meet challenging objectives
- Districts should examine current practices for engaging and communicating with parents throughout school year as goals are evaluated and IEP team determines whether student is making progress

(Questions and Answers on Endrew F. v. Douglas County School District RE-1 (USDOE 2017) 71 IDELR 68)



# Recent Case Example #1

## Poway Unified School Dist. (OAH 2020)

### ■ Facts and Decision

- ❑ Parent claimed District's 10 goals for 15-year-old with multiple disabilities were "dumbed down," vague, not measurable and unclearly drafted
- ❑ ALJ disagreed, finding that all goals were "appropriately ambitious" under Andrew F. standard
  - ❑ District was not required to draft goals in manner that Parent found optimal
  - ❑ Credible witnesses testified that goals were "challenging" and structured so that Student could achieve them within one year
  - ❑ All 10 goals were based upon Student's present levels of academic achievement and functional performance

(Student v. Poway Unified School Dist. (OAH 2020) Case No. 2019120533)



# Recent Case Example #2

## Rocklin Unified School Dist. (OAH 2020)

### ■ Facts and Decision

- District offered goals in written expression, executive skills, social skills and behavior for 12-year-old with OHI (anxiety and ADHD)
- ALJ found:
  - Written expression, executive functioning and social skills goal were measurable and appropriate
  - Behavior goal was not measurable because it failed to include amount of time needed for task or activity to determine if Student was making progress; District staff acknowledged that they lacked enough baseline data to include specific time period
  - But Parents could not show deprivation of educational benefit and District subsequently addressed ambiguity

(Student v. Rocklin Unified School Dist. (OAH 2020) Case No. 2019101186)



# “Appropriately Ambitious” Goals



## Practical Compliance Keys

- ❑ Remember that it is student’s individual needs, not eligibility classification, that drive goal development
- ❑ Baselines are starting point for each annual goal; they must be accurate and should relate specifically to goal
- ❑ Beware of writing goals that are not robust enough, especially in wake of Andrew F.
  - ❑ Determine how long it has taken student to get to certain learning level to help determine what an ambitious goal should look like



## **B. “Connecting the Dots” During IEP Development Process**



# “Connecting the Dots”

- Remember: IEPs must “show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided”
- This is the “connect the dots” approach

(Cal. Code Regs., tit. 5, § 3040)



# The 5 Dots to Connect

- **Present Levels**
- **Areas of Educational Need**
  - For which special education is required
  - Maybe related services
- **Goals**
- **Placement (Special Education)**
  - Supplementary Aids and Services
- **Supports for General/Special Education**
  - Related Services
  - Supplementary Aids and Services
  - Accommodations/Modifications



# Recent Case Example #1

## San Dieguito Union High School Dist. (OAH 2020)

### ■ Facts and Decision

- ❑ District sought order seeking to implement IEP for 13-year-old Student with autism and SLI after Parents refused to consent
- ❑ ALJ found direct and appropriate connection among all components of proposed IEP
  - ❑ Identified Student's significant needs and developed 10 measurable goals to address those needs, each with appropriate baselines
  - ❑ Team properly used proposed goals based on Student's identified needs to determine services and accommodations
  - ❑ IEP offered Student placement at NPS where special education and related services could be implemented

(Student v. San Dieguito Union High School Dist. and San Dieguito Union High School Dist. v. Student (OAH 2020) Case Nos. 2019090124 and 2019100015)



# Recent Case Example #2

## Bellflower Unified School Dist. (OAH 2020)

### ■ Facts

- ❑ District developed IEP in February 2018 for 11-year-old with OHI
- ❑ Parents refused consent and obtained independent assessment, which was completed in January 2019
- ❑ Assessor believed Student required intensive behavior programming, academic intervention and other services based on Student's poor performance in third grade
- ❑ IEP team met to review independent assessors report but did not make significant changes to February 2018 IEP
- ❑ Parents claimed District's proposed January 2019 IEP failed to provide appropriate goals and services



# Recent Case Example #2

## Bellflower Unified School Dist. (OAH 2020)

### ■ Decision

- ❑ ALJ ruled in favor of Parents
- ❑ Despite Student's poor academic performance – along with assessor's findings of deficits in reading comprehension, mathematic calculations, and written expression – District did not update Student's present levels of performance or goals
- ❑ "Without updating the present levels of performance, or offering goals in all areas of need, there is not a direct relationship between Student's needs and the services offered"

(Student v. Bellflower Unified School Dist. (OAH 2020) Case No. 2019040565)



# “Connecting the Dots”



## Practical Compliance Keys

- ❑ Use “connect the dots” approach for IEPs; IEP team meeting agenda; and as guide for IEP team discussions and development
- ❑ Complete and accurate assessments used to determine accurate present levels of performance are foundation for “connecting the dots”
  - ❑ Faulty assessments likely will result in faulty present levels of performance, faulty goals, and, consequently, in faulty IEP



# “Connecting the Dots”



## Practical Compliance Keys

- ❑ Bring current data to IEP meeting to determine present levels of performance
  - ❑ Information that is not current can lead to a flawed IEP
- ❑ Check to make sure that for every goal, there is corresponding remark in present levels of performance that provides data and explains where student currently stands on that particular skill



# **C. Formulating a “Clear Written Offer” of FAPE**



# Union v. Smith

- 9th Circuit quotes:
  - “The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any”
  - “This formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously”

(Union School District v. Smith (9th Cir. 1994) 15 F.3d 1519, 20 IDELR 987, cert. denied, (1994) 513 U.S. 965)



# Union v. Smith (cont'd)

- Purpose of the Written Offer:
  - To alert parents of need to consider seriously whether district's proposed placement is appropriate under IDEA
  - To help parents determine whether to oppose or accept placement with supplemental services; and
  - To ensure that district is more prepared to introduce sufficient relevant evidence of appropriateness of its placement at due process



# Union v. Smith (cont'd)

- The decision in Union established following definition of a procedurally valid offer of FAPE:
  - It is the formal offer for services and educational placement
  - It meets IDEA requirements for prior written notice
  - It is in writing
  - It is presented to the parent



# Union v. Smith: Impact and Interpretation

- Although Union involved District's failure to produce any formal written offer of placement, principles outlined by 9th Circuit have been expanded and used to support numerous judicial and administrative decisions invalidating IEPs that, although formally offered, were insufficiently clear or specific with respect to services and/or placement



# Union v. Smith: Impact and Interpretation (cont'd)

- Glendale Unified School Dist. v. Almasi:  
Union requires “a clear, coherent offer which [Parent] reasonably could evaluate and decide whether to accept or appeal”
  - District offered Parents choice of four possible placements
  - Court held that when district offers multiple placements and forces parents to choose from list, such offer places an undue burden on parents to eliminate potentially inappropriate placements, and does not comply with Union

(Glendale Unified School Dist. v. Almasi (C.D. Cal. 2000) 122 F. Supp. 2d 1093)



# Union v. Smith: Impact and Interpretation (cont'd)

- Mill Valley Elementary School Dist. v. Eastin: District's placement offer must be described as clearly and specifically as possible
  - "Mere skeletal outline" of plan did not constitute "formal, written offer" of placement required by Union
  - District's failure to make any firm commitment to anything other than an unspecified, modified general educational program was more than a technical error

(Mill Valley Elementary School Dist. v. Eastin (N.D. Cal. 1999) 32 IDELR 140)



# Recent Case Example #1

## Temple City Unified School Dist. (OAH 2019)

### ■ Facts

- ❑ Parents sought full inclusion for 9-year-old Student who had ID and was legally blind
- ❑ District's proposed IEP offered Student mainstreaming for 12 percent of his school day, which would include some portion of general education academic classes, as well as lunch, recess and PE
  - ❑ Teachers believed Student would benefit from some inclusion in core academic classes
- ❑ Parents claimed District denied their participation in development of Student's IEP because it did not make clear written offer of FAPE



# Recent Case Example #1

## Temple City Unified School Dist. (OAH 2020)

### ■ Decision

- ❑ ALJ: District did not identify Student's inclusion in clear manner, such that Parents would reasonably be able to understand what placement was being offered
  - ❑ IEP did not identify any specific "classes" Student would attend and did not specify how much time each day or each week Student would be included in general education class
  - ❑ District witnesses acknowledged that 12 percent inclusion percentage would only allow time for Student to participate in lunch and recess, and was not sufficient for inclusion in general education core classes
  - ❑ District was ordered to develop IEP that would "identify with specificity Student's mainstreaming in [general education class]"

(Student v. Temple City Unified School Dist. and Temple City Unified School Dist. v. Student (OAH 2019) Case Nos. 2018060785 and 2018070829)



# Recent Case Example #2

## Burbank Unified School Dist. (OAH 2019)

### ■ Facts

- ❑ District placed Student with autism in SDC preschool placement known as “SEED” program
- ❑ SEED program had no typically developing peers and was located on a different corridor and in different classrooms from general education preschool
- ❑ IEPs proposed inclusion for 15 percent of school day
- ❑ Parents alleged that District failed to make clear written offer of FAPE in each of three IEPs it developed for Student between March 2018 and February 2019



# Recent Case Example #2

## Burbank Unified School Dist. (OAH 2019)

### ■ Decision

- ❑ ALJ upheld Parents' claim, citing numerous examples of ambiguity and vagueness
  - ❑ Unclear whether Student would attend SEED in morning or afternoon (general ed preschool only had morning sessions)
  - ❑ Degree, type, location and timing of interaction, if any, with general education preschoolers was not specified
  - ❑ IEP had no behavior support plan and no behavior goals, so it was unclear how offered behavior intervention services would be implemented
  - ❑ Meaning of "closer supervision during unstructured and outside activities" was unclear
  - ❑ Lack of clarity in March 2018 IEP carried over to subsequent IEPs

(Student v. Burbank Unified School Dist. and Burbank Unified School Dist. v. Student (OAH 2019) Case Nos. 2018100167 and 2019040544)



# “Clear Written Offer” of FAPE



## Practical Compliance Keys

- ❑ What to avoid:
  - ❑ Do not fail to put offer in writing merely because parents have stated that they will not agree to proposed placement
  - ❑ Do not offer multiple placements
  - ❑ Do not offer a type of placement (e.g., SDC) and leave it up to the parents to select school site



# “Clear Written Offer” of FAPE



## Practical Compliance Keys

- ❑ If team members and staff are uncertain how to interpret district’s offer, chances are parents are uncertain as well
  - ❑ Always ask entire IEP team if they understand offer; if they do not, or if there is any uncertainty, be sure to entertain and answer questions until there is no room for doubt
- ❑ Focus on details: Include the duration and frequency for all services on the IEP; include the start and end date for all services on the IEP; specify how services will be delivered (individual, group, etc.); and always try to avoid the phrase “as needed”



# **D. Ensuring Parent Participation and Parent Input in the IEP Process**



# Parent Attendance/Participation

- Parents must be afforded an opportunity to participate in meetings with respect to the identification, evaluation and educational placement of student; and the provision of FAPE to student
- Parents' right to be involved in development of their child's IEP is among most important of IDEA's procedural safeguards
- Andrew F. emphasized that parental input is essential
  - Significant increase in due process complaints alleging districts failed to ensure adequate parent participation

(34 C.F.R. § 300.501(a); Ed. Code, § 56500.4; Doug C. v. Hawaii Dept. of Educ. (9th Cir. 2013) 720 F.3d 1038.)



# Parent Attendance

- Districts must take steps to ensure that one or both parents are present at each IEP meeting
  - Including providing ample notice and scheduling meeting at mutually agreed-on time and place
  - Notice must be early enough in advance to ensure that parents will have opportunity to attend
- Parents and district may agree to use alternative means of participation for IEP meetings, including video conferencing and conference calls
  - Both parties must consent
  - If additional costs result, district is responsible

(34 C.F.R. § § 300.501(a); 300.322(c), 300.328; Ed. Code, § 56500.4; Doug C. v. Hawaii Dept. of Educ. (9th Cir. 2013) 720 F.3d 1038; 71 Fed. Reg. 46687 (Aug. 14, 2006))



# Parent Attendance

- Meetings may be conducted without parents only if district “is unable to convince parents that they should attend”
- Must keep records of attempt to arrange meeting
  - Log of phone calls
  - Copies of correspondence
  - Document visits to home/work
- Failure to take appropriate steps to convince parents to attend IEP meeting can result in denial of FAPE

(34 C.F.R. § 300.322(c), 300.328; Ed. Code, § 56341.5)



# Parent Participation

- Mere parental presence at IEP team meeting is not enough to demonstrate that parents have had adequate opportunities to participate
  - IEP team must consider parents' input (but it need not necessarily follow parents' wishes)
- Districts must take whatever steps are necessary to ensure that parents understand meeting proceedings, including arranging for interpreter for parents with deafness or whose native language is other than English

(Gregory K. v. Longview School Dist. (9th Cir. 1987) 811 F.2d 1307; Ed. Code, § 56341.5)



# Predetermination

- Occurs when districts decide on IEP content/issues prior to IEP meeting, thereby precluding meaningful parental participation
  - “Take it or leave it” approach evidences predetermination
- Allegations of predetermination frequently arise with respect to:
  - Preparatory meetings
  - Draft IEPs
  - (Lack of) meaningful discussion at IEP meeting



# Predetermination

- Districts may engage in preparatory activities to develop proposal (or response to parent proposal) that will be discussed at later meeting
- Permissible to develop draft IEP
  - Share with parents before or during meeting
  - Must be used for discussion purposes only
  - Cannot be presented as completed document
  - Make clear to parents at outset of meeting that draft is preliminary recommendation for review and discussion

(34 C.F.R. § 300.501(b); Letter to Helmuth (OSEP 1990) 16 IDELR 503; 71 Fed. Reg. 46678)



# Recent Case Example #1

## Los Angeles Unified School Dist. (OAH 2019)

### ■ Facts

- ❑ District attempted to schedule annual IEP meeting for third-grader with autism prior to summer break
- ❑ Ultimately, meeting was held without Parents after scheduling attempts were unsuccessful
  - ❑ District had refused Parents' request to reschedule meeting
- ❑ District claimed it acted reasonably by holding meeting because:
  - ❑ Parents had adequate notice of each proposed meeting
  - ❑ Meeting had to be held prior to beginning of school year to comply with IDEA
  - ❑ District offered to convene new IEP team meeting during following school year



# Recent Case Example #1

Los Angeles Unified School Dist. (OAH 2020)

## ■ Decision

- ❑ ALJ ruled in Parents' favor, ordering training and compensatory education
- ❑ Adequate notice was not valid factor
- ❑ District improperly prioritized its staff's scheduling over parental participation
- ❑ Holding meeting in following school year after IEP had been developed was not permissible
  - ❑ "[A]fter-the-fact parental involvement is not enough" because IDEA contemplates parental involvement in "creation process"

(Student v. Los Angeles Unified School Dist. (OAH 2019) Case No. 2019071112)



# Recent Case Example #2

## Mountain View School Dist. (OAH 2020)

### ■ Facts and Decision

- ❑ District did not invite NPA behavior technician aide to IEP team meeting for 7-year-old with autism
- ❑ Parent claimed aide was essential member of team
- ❑ ALJ disagreed
  - ❑ Aide had declined Parents' invitation to attend, desiring only to work with Student and not wanting to take sides
  - ❑ Aide merely provided data entry for NPA supervisors
  - ❑ Supervisors did not believe it was appropriate for aide to attend
  - ❑ Supervisors answered all Parents' questions and Parents meaningfully participated in IEP process

(Student v. Mountain View School Dist. (OAH 2020) Case No. 2019100681)



# Recent Case Example #3

## Alta Loma School Dist. (OAH 2020)

### ■ Facts and Decision

- ❑ Parent alleged that draft IEP and placement discussion during August 2019 meeting indicated that District had predetermined placement
  - ❑ Claimed District should have actively discussed specific location of placement (SDC that was not at Student's home school)
- ❑ ALJ found no evidence of predetermination
  - ❑ Credible testimony that all team members had "open minds"
  - ❑ Team specifically informed Parents that IEP was only a draft
  - ❑ ALJ also noted that location does not equal placement and that "Parent was not going to accept [SDC] placement offer, which had nothing to do with the class's location"

(Alta Loma School Dist. V. Student (OAH 2020) Case No. 2019090362)



# Recent Case Example #4

## Long Beach Unified School Dist. (OAH 2019)

### ■ Facts

- ❑ NPA held monthly clinic meeting to discuss data and Student's progress
  - ❑ Meetings were not held in place of IEP team meeting nor did full IEP team attend
  - ❑ Scheduled informally
- ❑ Parent claimed District should be responsible for holding such meetings so that she could participate
- ❑ Parent requested that District allow her to record monthly clinic meetings held by NPA
  - ❑ Both District and NPA had refused to allow her to record meetings



# Recent Case Example #4

## Long Beach Unified School Dist. (OAH 2020)

### ■ Decision

- ❑ ALJ ruled in District's favor
- ❑ Monthly NPA meetings were not mandated by IEP
  - ❑ Document did not mention monthly clinic meetings as related service, support or accommodation
  - ❑ There was no dispute that Student received all of programs and services specified in his IEPs
- ❑ Absent consent of all participants in monthly meeting, there was no legal basis to allow Parent to record
  - ❑ Exception allowing recording of IEP team meetings under certain conditions did not apply

(Student v. Long Beach Unified School Dist. (OAH 2019) Case No. 2019010600)



# Parent Participation and Input



## Practical Compliance Keys:

If all efforts to convince parents to attend meeting have been exhausted and it is in student's (not staff's) best interest that meeting be held without them, it is important to take the following steps

- ❑ Document written communication, phone logs, voice mails and home visits – along with the results of each such communication
- ❑ Send parents copy of any IEP developed in their absence
- ❑ Offer to reconvene team when parents are available



# Parent Participation and Input



## Practical Compliance Keys:

### Steps to Help Avoid Predetermination Claims

- ❑ Be sure parents understand that any draft IEP document is only a draft
- ❑ Be careful of any statement during an IEP meeting that suggests “here is what we have decided”
- ❑ When option is proposed, seek parents’ input/response
- ❑ Give parents sufficient information about all possible placement options
- ❑ Ensure there is enough time during IEP meetings for parents to ask questions



# Parent Participation and Input



## Practical Compliance Keys

### Steps to Help Avoid Predetermination Claims

- ❑ Consider all information that parents bring to meeting and document team's consideration
- ❑ If parents ask to visit proposed placement, follow district's visitation policy
- ❑ Facilitate team discussion of all placement options
- ❑ Maintain professional decorum
- ❑ Ensure team follows up on any commitments made at meeting and provides answers to questions that were unable to be answered



# **III. IEPs, Andrew F. and COVID-19**



# Consideration of “Circumstances”

- April 2020: USDOE Secretary Betsy DeVos did not recommend any additional waiver authority concerning FAPE and LRE requirements under the IDEA due to COVID-19
  - No reason that access to FAPE cannot continue online, through distance education or other strategies
- What does this suggest about Andrew F. FAPE standard during “normal” times?
  - What are student’s “circumstances” that dictate details of FAPE? Is pandemic included in “circumstances”? Or are circumstances only student’s individual needs?



# New IEP Content Requirements

- SB 98 (New Education Code section 56345(a)(9))
  - IEPs must contain “a description of the means by which the [IEP] will be provided under emergency conditions, . . . in which instruction or services, or both, cannot be provided to the pupil either at the school or in person for more than 10 school days”
  - The description must include:
    - Special education and related services; supplementary aids and services; postsecondary transition services; and ESY
  - Must be addressed at development of initial IEP or next regularly scheduled revision that has not already met new requirements



# New Distance Learning Requirements

- SB 98 (New Education Code section 43503)
  - Any distance learning program offered by LEA must include special education, related services, and any other services required by student's IEP, including new IEP content requirements, with accommodations necessary to ensure that IEP can be executed in distance learning environment



# Take Aways . . .



- Andrew F. decision has spawned increasing litigation over substantive and procedural sufficiency of districts' IEP development processes
  - Goals
  - "Connecting the dots"
  - "Clear written offers" of FAPE
  - Parent participation and input
- IEP teams should continue to collaborate to determine each student's needs, connect needs to measurable goals, design individualized services in an appropriate placement—all to enable the student to make progress in light of his or her circumstances

