



Fagen Friedman & Fulfrost LLP

Here and Now

The Focus of FAPE— From Preschool to Postsecondary Transition



What's On the Agenda . . .

Things To Do	
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- Review of Andrew F. and the IDEA's FAPE Standard
- Providing FAPE to Preschool Students with Disabilities
- Providing FAPE to Students Transitioning from High School to Postsecondary Activities



Introduction

- Endrew F. substantive FAPE standard applies to all IDEA-eligible students
- Emphasis on how FAPE is provided can vary with student's age
 - Typically, for school-age students, focus of FAPE is on academic success
 - But there are some unique aspects to FAPE for students at each end of IDEA-eligibility age spectrum



I. Review of Endrew F. and the IDEA's FAPE Standard



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”



Review: Andrew F. FAPE Standard

- “Rowley sheds light on what appropriate progress will look like in many cases: For a child fully integrated in the regular classroom, an IEP typically should be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade’”



Review: Andrew F. FAPE Standard

- But if education in the general classroom is not a reasonable possibility for a child, “the IEP need not aim for grade-level advancement”
- “Educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom”



II. Providing FAPE to Preschool Students with Disabilities



Overview

- Preschool children between ages of 3 and 5 may qualify for special education and related services if they meet eligibility requirements
- FAPE and LRE obligations (including all procedural requirements) apply equally to preschool children and school-age students
 - But some important nuances in providing appropriate services and placement are unique to preschoolers



Transition from Early Childhood

- For children who might be IDEA-eligible, transition steps necessary for movement into preschool must be written into IFSP
- District must participate in transition conference between 90 days and nine months prior to preschool
- Part C services coordinator must be invited to initial IEP meeting if parents request

(34 C.F.R. § 303.209; 34 C.F.R. § 300.124(c); 34 C.F.R. § 300.321(f))



Eligibility

- Generally parallels K-12 eligibility
- Preschooler also may be eligible if he or she has an “established medical disability”
- Must need specially designed instruction or services
- Must have needs that cannot be met with modification of regular environment in home and/or school without ongoing monitoring or support

(Ed. Code, § 56441.11)



Eligibility and RTI

- IDEA “does not require, or encourage, [a district] or preschool program to use an RTI approach prior to a referral for evaluation or as part of determining whether a 3-, 4- or 5-year-old is eligible for special education and related services”

(Memorandum to State Directors of Special Education (OSEP 2016) 116 LRP 21359)



IEP Content Requirements

- All rules pertaining to IEP content apply to IEPs for preschool children
- Except: For preschoolers, “as appropriate,” statement of “present levels” must contain description of “the manner in which the disability affects his or her participation in appropriate activities”

(34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(1)(B))



Programs, Services and Settings

- If preschooler meets eligibility requirements for special education and related services, districts must offer appropriate services along a continuum of placements

(20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56435)



Focus on Family

Early education for preschooler must include:

- Specially designed services to meet unique needs of child and family
- Both individual and small group services available in a variety of typical age-appropriate environments, including home
- Opportunities for active parent involvement

(Ed. Code, § 56441.2; Ed. Code, § 56441.3)



Early Education Services

- Services must include:
 - Observing and monitoring behavior and development in child's environment
 - Activities that are developmentally appropriate
 - Interacting and consulting with family, preschool teachers and other service providers
 - Assisting parents to seek and coordinate other services
 - Opportunities for child to participate in play and exploration activities, to develop self-esteem and to develop pre-academic skills
 - Access to appropriate equipment/materials
 - Related services that include parent counseling/training

(Ed. Code, § 56441.3(a))



Provision of Services

- Duration of group services must not exceed 4 hours/day unless IEP team determines otherwise
- Adult-to-child ratio depends on needs of child, but must be less than ratios established by law for nondisabled preschoolers (1:8)
 - Cannot exceed 1:5 if child has severe disabilities

(Ed. Code, § 56441.3; Ed. Code, § 56441.5.)



Provision of Services

- Trans-disciplinary team approach
- Responsibilities of early education program staff include:
 - Consultation with regular preschool program providers
 - Consultation with other specialists
 - Assessment services
 - Direct services

(Ed. Code, § 56441.6)



Provision of Services

Services can be provided:

- Directly by district
- Through an interagency agreement
- Through contract with another public agency
- Through contract with certified NPS or NPA
- Through contract with nonsectarian hospital

(Ed. Code, § 56441.8)



Preschool Services Case Example #1

Los Angeles Unified School Dist. (OAH 2011)

- 4-year-old with significant medical needs
- District offered 30 minutes/week PT, 50 minutes/week OT, 50 minutes/week at OT clinic
- Parents claimed services insufficient to “close the gap” between Student and peers and asked District to double the amount of all services
- ALJ found for District, stating that Parents “merged or confused Student’s medical needs with his educational needs”





Practice Pointer: FAPE Standard

- Remember that districts are not required to provide instruction or services that maximize or optimize student's abilities
- District simply must provide related services student needs to access educational program



Preschool Services Case Example #2

Elk Grove Unified School Dist. (OAH 2014)

- 3-year-old with cerebral palsy placed in integrated preschool setting where children transitioned between various locations for play activities
- Parents claimed District should have provided accommodations/modifications to address safety
- ALJ found Student's IEP should have addressed unique safety issues
- Ambulatory difficulties required IEP provision to guarantee close supervision in classroom/playground



Preschool Services Case Example #3

Los Angeles Unified School Dist. (OAH 2013)

- Preschooler with ID received 1:1, hour-long, twice weekly speech/language Part C services
- When Student turned 3, District's IEP proposed group therapy and reduced length of sessions
- ALJ upheld District's offer
- Two 30-minute weekly group services could meet Student's needs
- "Early-Start" Part C program was not intended as FAPE offer





Practice Pointer: Early Intervention and FAPE

- When child transitions from Part C to Part B, district is not necessarily required to match intensity of prior (Part C) services
- But when designing initial IEPs for preschoolers, it is especially important that districts be aware of all of child's needs and address them in IEP as appropriate



Settings for Preschool Services

Appropriate settings can include:

- Regular public or private nonsectarian preschool
- Child development center or family day care home
- Child's regular environment that may include home
- Special site where preschool programs for both disabled and nondisabled children are located close together
- Special education preschool with nondisabled children also attending
- Public school setting with age-appropriate environment

(Ed. Code, § 56441.4)



LRE for Preschoolers

- All IDEA LRE requirements apply
- Full continuum of placements must be made available
- 9th Circuit's Rachel H. balancing test for general ed inclusion applies to preschoolers

(34 C.F.R. § 300.116; 71 Fed. Reg. 46587 (Aug. 14, 2006); A.R. v. Santa Monica-Malibu School Dist. (C.D. Cal. 2013) 61 IDELR 213, aff'd, (9th Cir. 2016) 66 IDELR 269)



Placement

If district does not operate general education preschool, must explore other options that can meet LRE requirement

- Programs operated by other public agencies (such as Head Start or community-based child care)
- Private preschool programs for nondisabled children (at no cost to parent)
- Locating classes in elementary schools
- Home-based services

(Dear Colleague Letter (OSEP 2017) 69 IDELR 106)



Preschool Placement Case Example #1

Encinitas Union School Dist. (OAH 2008)

- Parents objected to District's offer of SDC placement for preschooler with autism
- Claimed Student was "severely distractable" and needed at-home ABA services
- ALJ and court upheld District's placement
- Student needed setting that allowed interaction with typical peers for social interaction and language modeling
- Proposed SDC was quiet with minimal distractions



Preschool Placement Case Example #2

Irvine Unified School Dist. (OAH 2014)

- Preschooler had been placed in mild-moderate SDC
- District's subsequent IEP offered no specialized instruction and replaced SDC with group S/L services and individual and consultative OT and PT
- ALJ found denial of FAPE
- Student had not made as much progress as District believed (met only two of 14 goals)
- Student needed classroom setting to generalize skills; delays could not be remediated by services alone



Preschool Placement Case Example #3

Santa Monica-Malibu School Dist. (OAH 2012)

- Parents believed preschooler with autism could make better progress in gen ed class
- Concerned that District's SDC emphasized academic progress at expense of social development
- ALJ applied Rachel H. balancing test, finding Student needed more restrictive setting for FAPE
- Would receive "extremely minimal" benefit in gen ed class and would require significant teacher attention
- SDC offered some mainstreaming opportunities





Practice Pointer: LRE Reminders

- Remind IEP team that LRE requirement does not distinguish between preschool and school-aged children with disabilities
- If district does not operate general education preschool, discuss available options with parents and document those discussions





Practice Pointer: LRE Reminders (cont'd)

- Connect the dots: Remember that preschooler's IEP goals are central to helping IEP team identify his or her LRE
- When IEP team determines that preschooler must be placed in self-contained class or another restrictive setting, be sure to document specific reasons for that decision



“Kindergarten Readiness”

- Education Code states that “as the child approaches the age to enter an elementary environment, the child’s preparation shall be geared to a readiness for kindergarten and later school success”
- Rarely cited by OAH in determining substantive appropriateness of district’s proposed preschool services and placement

(Ed. Code, § 56441.1, subd. (b))



Transportation and ESY

- Districts must provide transportation to preschool programs as a related service if IEP team determines it is necessary for FAPE
- ESY must be available to any student, including preschool students, who need it to prevent regression and allow for recoupment

(Letter to Anonymous (OSEP 2008) 50 IDELR 229; Cal. Code Regs., tit. 5, § 3043)



III. Providing FAPE to Students Transitioning from High School to Postsecondary Activities



Overview

- Stated purposes of IDEA emphasizes special education and related services designed to prepare students for “further education, employment and independent living”
- Additional focus of FAPE for this group of students includes helping them appropriately bridge the gap from high school to postsecondary activities



Transition Plan and IEP

- Postsecondary transition plan must appear in IEP not later than first IEP to be in effect when student turns 16
- Plan may be developed for younger students if determined appropriate by IEP team
- Plan must be updated at least annually (as part of IEP requirements)

(34 C.F.R. § 300.320(b); Ed. Code, § 56043; Ed. Code, § 56345)



IEP Procedural Obligations

- Invite student to IEP meeting
- Invite representative of participating agency (with parents' consent)
- IEP meeting notice must:
 - Include statement that purpose is to consider postsecondary goals and transition services
 - Indicate that student will be invited
 - Identify agency that will be invited

(34 C.F.R. § § 300.321-300.322)



Transition Plan Requirements

- Transition plan must include:
 - Measurable postsecondary goals based on age appropriate transition assessments related to
 - Training
 - Education
 - Employment
 - Independent living skills (if appropriate)
- Transition services needed to assist student in reaching those goals

(34 C.F.R. § 300.320(b))



Assessments and Goals

- Law does not prescribe specific process/procedures for assessments
- Goals must reflect student's desires/plans
- Periodic progress reports should address progress in meeting postsecondary goals
- Goals should be reviewed and updated annually to account for changed interests

(Ed. Code, § 56345.1; Letter to Pugh (OSEP 2017) 69 IDELR 135; Letter to Anonymous (OSEP 2017) 69 IDELR 223)



Assessments and Goals

- IEP team determines if goals related to independent living skills are necessary
- Goals related to training and education can be combined in some instances
- No requirement to monitor goals after student is no longer eligible for FAPE (i.e., graduates or ages out)

(Questions and Answers on Transition (OSERS 2011) 57 IDELR 231)



Transition Services

Coordinated set of activities that:

- Are within results-oriented process focused on improving academic and functional achievement to facilitate movement from school to post-school activities
- Are based on student's needs, taking into account strengths, preferences and interests
- Include instruction, related services, community experiences, development of employment and post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation

([Questions and Answers on Transition](#) (OSERS 2011) 57 IDELR 231)



Transition Services

- Can be provided as specially designed instruction or related services
- IEP must identify
 - Beginning date
 - Frequency
 - Location
 - Duration

(34 C.F.R. § 300.43(b); 34 C.F.R. § 300.320(a)(7))



Transition Case Example #1

Paso Robles Unified School Dist. (OAH 2013)

- District designed appropriate transition goals and services to facilitate Student's attendance at two-year college and to pursue music interests
- Although Student was expected to fulfill goal by attending junior college, Parent chose not to follow plan
- Moved Student out of District to allow for participation in college band as community participant
- ALJ found plan was appropriate for Student at time it was written





Practice Pointer: “Snapshot” Rule

- This case serves as reminder that IEP—including postsecondary transition goals and services—is evaluated in light of information available at time it was developed, and is not to be evaluated in hindsight



Transition Case Example #2

Santa Clara Unified School Dist. (OAH 2015)

- ALJ upheld all aspects of District's plan for Student with autism
- Activities requiring Student to visit local colleges addressed Student's needs (she believed average age of college student was 40)
- Goal/services to address self-advocacy were appropriate to help Student learn how to ask for supports in school and community (she did not like to be identified as having a disability)





Practice Pointer: Designing Transition Services

- Don't forget to identify appropriate accommodations and supports
- Don't forget to base services on needs
- Don't forget district must ensure provision of services identified by the plan (reconvene IEP if participating agency fails to provide)
- Don't forget LRE!



Transition Case Example #3

Garden Grove Unified School Dist. (OAH 2012)

- Transition plan for Student with autism called for enrollment in junior college, working entry-level job
- ALJ rejected claim that plan did not list all specific goals or services that would help Student gain skills for his post-high school life
- “If District’s . . . plan had specifically discussed all skills Student listed . . ., Student undoubtedly could have raised a dozen other adult-level skills which were not addressed”





Practice Pointer: Avoid Over-Complication

- Impossible for IEP teams to anticipate and address every possible skill a student might require for adulthood
- Too many goals incorporated into long and elaborate transition plan can be unworkable



Transition Case Example #4

Los Angeles Unified School Dist. (OAH 2017)

- Transition plans for Student with severe autism were not supported by any assessments
- Plan was based on relocation from high school to career center at age 18, but did not consider needs resulting from change in environment
- All sections of plan (Education/Training, Employment, Independent Living) lacked individualized goals and did not propose services, accommodations or supports



Transition Case Example #5

Fresno Unified School Dist. (OAH 2014)

- ALJ found all three goals in Student's transition plan were "generic and vague," not measurable and not tied to any goals in IEP (i.e., "upon completion of school I would like to work in a library and/or nursery")
- Activity to support one goal called for participation in workability program, but no program was offered
- No services were offered to assist Student in meeting any goals





Practice Pointer: Goal Writing Tips

- Goals that include phrases such as “Student plans to” or “Student wants to” are not measurable
- Use active language that will ultimately serve as indicator of whether student has or has not done something
- Specifics make goals more measurable





Practice Pointer: Goal Writing Tips (cont'd)

- Either/or statements can make IEP appear vague and disconnected (and service providers may be uncertain as to goal on which to focus)
- IEP goals should relate to and support transition goals



Take Aways . . .



- True “focus of FAPE” for student of any age is ensuring provision of individualized services that are designed to meet his or her unique needs
- Regardless of whether student has just begun preschool or is preparing for postsecondary life, it is essential to foster a collaborative relationship with parents, making sure you are accessible and responsive to their concerns



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