

working solutions

**JORDAN SCHOOL DISTRICT  
SPECIAL EDUCATION SUMMER CONFERENCE  
August 3, 2020**



## Today's Agenda

- Overview of Special Ed
- Review of FAPE
- Core Concepts
- Top Mistakes
- Student Records
- Case Law Update

## Introduction

- Where are We and How Did We Get Here?
  - Recap of IDEA
  - Understanding of FAPE

# Right to a Free Public Education

## Utah Constitution

### Article X Education

#### **Article X, Section 1 [Free nonsectarian schools.]**

The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.

# Right to a Free Public Education

## **Article X, Section 2 [Defining what shall constitute the public school system.]**

The public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature may designate. The higher education system shall include all public universities and colleges and such other institutions and programs as the Legislature may designate. Public elementary and secondary schools shall be free, except the Legislature may authorize the imposition of fees in the secondary schools.

# Education of Children with Disabilities – Federal Laws

Rehabilitation Act of 1973, aka Section 504

- First civil rights legislation protecting the rights of people with disabilities in programs and activities receiving federal financial assistance
- “No otherwise qualified individual with a disability in the United States, as defined in Section 705(20) of this title, shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by an Executive agency or by the United States Postal Service.”

# Education of Children with Disabilities

Until the adoption of federal civil rights legislation, students with disabilities were routinely excluded from public schools, leading to lots of litigation in the 60s-70s

- Rehabilitation Act of 1973, aka Section 504
  - Regulations not adopted until April 28, 1977;
  - Implementation date of September 1, 1978
- Education for All Handicapped Children Act of 1975
  - Implementation date of September 1, 1978







## Education of Children with Disabilities – Federal Laws

Education for All Handicapped Children Act of 1975

- “It is the purpose of this Act to assure that all handicapped children have available to them ... a free **appropriate** public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.”

## Education of Children with Disabilities – EAHCA/EHA

Education for All Handicapped Children Act of 1975

- “The term ‘free appropriate public education’ means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5).”

# Individuals with Disabilities Education Act

- In 1990, the Education for All Handicapped Children Act of 1975 was re-authorized, amended, and renamed the Individuals with Disabilities Education Act.
  - Public Law No. 94-142
- 1997: Re-authorized again
  - Public Law No. 105-17
- 2004: Individuals with Disabilities Education Improvement Act
  - Public Law No. 108-446

## Education of Children with Disabilities – Utah Law

The principles of these federal laws are now also enshrined in Utah state statutes:

“All students with disabilities, who are 3 years old or older but younger than 22 years old and have not graduated from high school with a regular diploma, are entitled to a free, **appropriate** public education.”

Utah Code § 53E-7-202(1) (2018)

## What Is FAPE? (1982-2017)

*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982)

- United States Supreme Court case interpreting the meaning of FAPE under the EAHCA
- 6-3 decision
- Rejected maximizing standard in favor of two relevant questions:
  - Have the procedures of the Act been followed?
  - Is the IEP developed through use of those procedures reasonably calculated to enable the child to receive some educational benefit?

## What Is FAPE? (1982-2017)

- Definition of FAPE did not change when IDEA was adopted in 1990 or amended in 1997 and 2004.
  - See 20 U.S.C. § 1401(9).
- Post *Rowley* decisions were not always consistent in their interpretation of what it meant to receive “some” educational benefit.
- *Rowley* stated that the intent of Congress was to set a basic floor of opportunity.
- Subsequent lower court decisions interpreting *Rowley* used different language:
  - Meaningful educational benefit (3<sup>rd</sup> Circuit) vs. more than “de minimis” benefit (10<sup>th</sup> Circuit)

## What Is FAPE After *Endrew F.*?

*Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017); 117 LRP 9767

Held: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

- Focus is on specially designed instruction to meet a child's unique needs through an individualized education program.
- Requires prospective judgment



## What Is FAPE After *Endrew F.*?

*Endrew F. v. Douglas County School District RE-1, (2017)*

- For children who are fully integrated in the regular classroom, it is easy to determine if the child is receiving an appropriate amount of educational benefit because it is measured by the achievement of grade to grade advancement.
- Is focused on progress in the general education curriculum.
- The *Rowley* case centered on a child who was progressing smoothly through the regular curriculum.

## What Is FAPE After *Endrew F.*?

- For children who are not fully integrated in the regular classroom and not able to achieve on grade level, the IEP need not aim for grade-level advancement if that is not a reasonable prospect.
- But the child’s educational program must be “appropriately ambitious” with the “chance to meet challenging objectives.”
- Supreme Court rejected parents’ argument that children with disabilities must be provided educational opportunities that are “substantially equal to the opportunities afforded children without disabilities.”

## What Is FAPE After *Endrew F.*?

- Schools must be able to offer “a cogent and responsive explanation” for the decisions of the IEP team that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.
- Requires a fact-intensive exercise informed by the expertise of school officials and by the input of the child’s parents/guardians.
- “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.”

# PROVIDING FAPE: CORE CONCEPTS UNDER IDEA

# Core Concepts

- Child Find (Identification)
- Evaluation
- IEP Teams/Meaningful Parental Participation
- Least Restrictive Environment
- Continuum of Placements
- Extended School Year
- Written Prior Notice

# Core Concepts – Child Find

- Child Find (Identification)
  - School districts must identify, locate and evaluate all children with disabilities within the jurisdiction of the LEA, birth to age 21, who are in need of special education and related services, regardless of the severity of their disabilities
  - Includes children who are suspected of being a child with a disability even though they are advancing from grade to grade

# Core Concepts - Evaluation

- Evaluations
  - LEA must conduct a full and individual initial evaluation before the initial provision of special education and related services
  - Must use a variety of assessment tools and strategies to gather functional, developmental, and academic information
  - May not use any single measure or assessment as the sole criterion
  - Must use technically sound instruments

# Core Concepts - Evaluation

- Evaluations
  - Child must be assessed in all areas related to the suspected disability
  - The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified



# Core Concepts - Evaluation

- Evaluations & Assessments Must Be:
  - Selected and administered so as not to be discriminatory on a racial or cultural basis;
  - Provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
  - Used for the purposes for which the assessments or measures are valid and reliable;
  - Administered by trained and knowledgeable personnel; and
  - Administered in accordance with any instructions provided by the producer of the assessments.

# Core Concepts – IEP Team & Parent Participation

- IEP Team Includes:
  - Parents;
  - Not less than one regular education teacher (if the child is or may be participating in regular ed.);
  - LEA representative
  - Individual who can interpret the instructional implications of evaluation results
  - Other individuals who have knowledge or special expertise regarding the child, including related services personnel
  - The child, whenever appropriate

## IEP Team - The Role of the LEA Rep.

IEP Team must include a representative of the LEA who:

- Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;
- Is knowledgeable about the general education curriculum;
- Is knowledgeable about the availability of resources of the LEA

(USER III.E.4.)

Note, LEA means the District as a whole, not just the school!

# Core Concepts – Least Restrictive Environment (LRE)

- Least Restrictive Environment Basics
  - Students with disabilities should receive their education alongside non-disabled peers to the maximum extent appropriate;
  - Students should not be removed from the general education classroom unless learning cannot be achieved, even with the use of supplementary aid and services

# Core Concepts – Continuum of Alternative Placements

- Each public agency must ensure that a continuum of alternative placements is available
- The continuum must include:
  - Regular classes;
  - Special classes;
  - Special schools;
  - Home instruction;
  - Instruction in hospitals and institutions
- The continuum must make provisions for supplementary services to be provided in conjunction with regular class placement

# Core Concepts – Continuum of Alternative Placements

- Home Instruction vs. Remote/Virtual Instruction
  - Schools that are entirely online still have obligations to provide FAPE
  - In dealing with COVID-related placement issues, distinguish between placement (home instruction) and setting/methodology (in-person vs. virtual)
  - Utah Special Education Rule VI.F.: “Students with disabilities enrolled in public education virtual settings remain entitled to special education and related services until determined no longer meeting eligibility criteria, graduate with a regular high school diploma, or reach maximum age.”

# Core Concepts – Continuum of Alternative Placements

- Home Instruction vs. Remote/Virtual Instruction
  - “Distance learning” could be high or low tech – it is generally understood to refer to situations where the student and instructor are in different locations.
  - Try not to conflate “home instruction” which is an IDEA placement with “distance learning”

# Core Concepts – Extended School Year

- Extended School Year is an extension of the traditional school year to provide special education and related services to a student with a disability
- Common problem areas:
  - Considering only regression/recoupment data
  - Not making timely decisions regarding eligibility
    - Decisions must be made in sufficient time to permit accessing dispute resolution options of the Procedural Safeguards

Utah Admin. Code R. 277-751

- <https://rules.utah.gov/publicat/code/r277/r277-751.htm>



## Written Prior Notice

- Under IDEA parents are afforded the right to meaningfully participate in their children's education
  - This right is protected by IDEA's procedural safeguards;
  - One element of the required procedural safeguards is the concept of written prior notice, aka, prior written notice or "PWN";
  - Concept is found at 34 C.F.R. § 300.503 and Utah Special Ed. Rule IV.D. (2016).

## Written Prior Notice

- Written prior notice must be given to the parents of a student with a disability a reasonable time before the LEA:
  - Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student; or
  - Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student

## 7 Required Elements

1. A description of the action proposed or refused by the LEA.
2. An explanation of why the LEA proposes or refuses to take the action.
3. A description of each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action.
4. A statement that the parents have protection under the procedural safeguards and how to obtain a copy of them.

## 7 Required Elements

5. Sources for parents to contact to obtain assistance in understanding their rights.
6. A description of other options that the IEP team considered and the reasons why those options were rejected.
7. A description of any other factors that are relevant to the LEA's proposal or refusal.

## In Addition...

- The written prior notice must be:
  - Written in language understandable to the general public; and
  - Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.
- If the native language or other mode of communication of the parent is not a written language, the public agency shall take steps to ensure
  - That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
  - That the parent understands the content of the notice; and
  - That there is written evidence that the requirements have been met.

## Decisions Requiring WPN

- Proposal/Refusal to initiate identification or change identification
- Proposal/Refusal to initiate or change an evaluation
- Proposal/Refusal to initiate or change educational placement
- Proposal/Refusal to initiate or change the provision of FAPE

## Decisions Requiring WPN

- Bottom Line: If the parent won't sign and consent to the IEP, you probably have something requiring written prior notice of refusal
- Try to reach consensus, but don't put off making a final decision
  - One of the biggest procedural traps teams can fall into is being afraid to disagree with the parent and therefore, not making a decision
  - If you are up against a deadline, don't let the parent hijack the meeting
- Use a meeting summary form to make sure you understand why the parent won't agree – this will be your reference for the PWN of refusal

## Explaining the Basis for the Refusal

- Focus on the needs of the child and how the IEP that has been developed and services offered meet those needs.
- For example: “The evaluations that have been conducted do not support the conclusion that Billy has a need for physical therapy. Billy’s identified deficits in hand-writing are appropriately addressed through the inclusion of occupational therapy services and goals.”



## What Not to Say

- Avoid categorical statements suggesting pre-determination:
  - “These are the standard accommodations for a child with ADHD.”
  - “We don’t offer in-home ABA.”
  - “That’s just how we do it here.”
  - “The District won’t authorize a private/residential placement.”
- Don’t base a refusal on expense:
  - “We can’t afford that.”

## What Not to Say

- Teams cannot base a refusal on lack of authority:
  - One of the requirements of a properly constituted IEP Team is that there must be someone there with decision-making authority and the ability to bind the LEA
  - If the request is for something outside the LEA's authority that the team feels is in fact necessary to provide the child with FAPE, get the necessary authority in advance. If that is not possible, re-convene the meeting ASAP, inviting someone that has the necessary authority.
  - If the request is for something that the team does not feel is necessary to provide FAPE, refusal is on that basis, not on the grounds that it doesn't have authority.

## Why Issue a WPN of Refusal?

- If parent eventually requests a due process hearing, claims that should have been barred by statute of limitations might not be!
- IDEA/USER IV.M.6 provides:
  - A parent or LEA shall request an impartial due process hearing within 2 years of the date the parent or LEA knew or should have known about the alleged action that forms the basis of the complaint.
  - This timeline doesn't apply to a parent if the parent was prevented from filing for due process due to:
    - Specific misrepresentations by the LEA;
    - The LEA's withholding of information from the parent that was required to be provided.

## Top IEP Mistakes

1. Failing to have all required team members present;
  - Unless parental rights have been terminated, both parents should be invited!
  - Be careful to follow excusal rules: see USER III.F.
2. Missing assessment information/failure to explain evaluation results;
3. Documented needs that don't have an associated goal/service;
4. Failing to review prior goals;
5. Failing to include MOO goals: measurable, observable, objective;

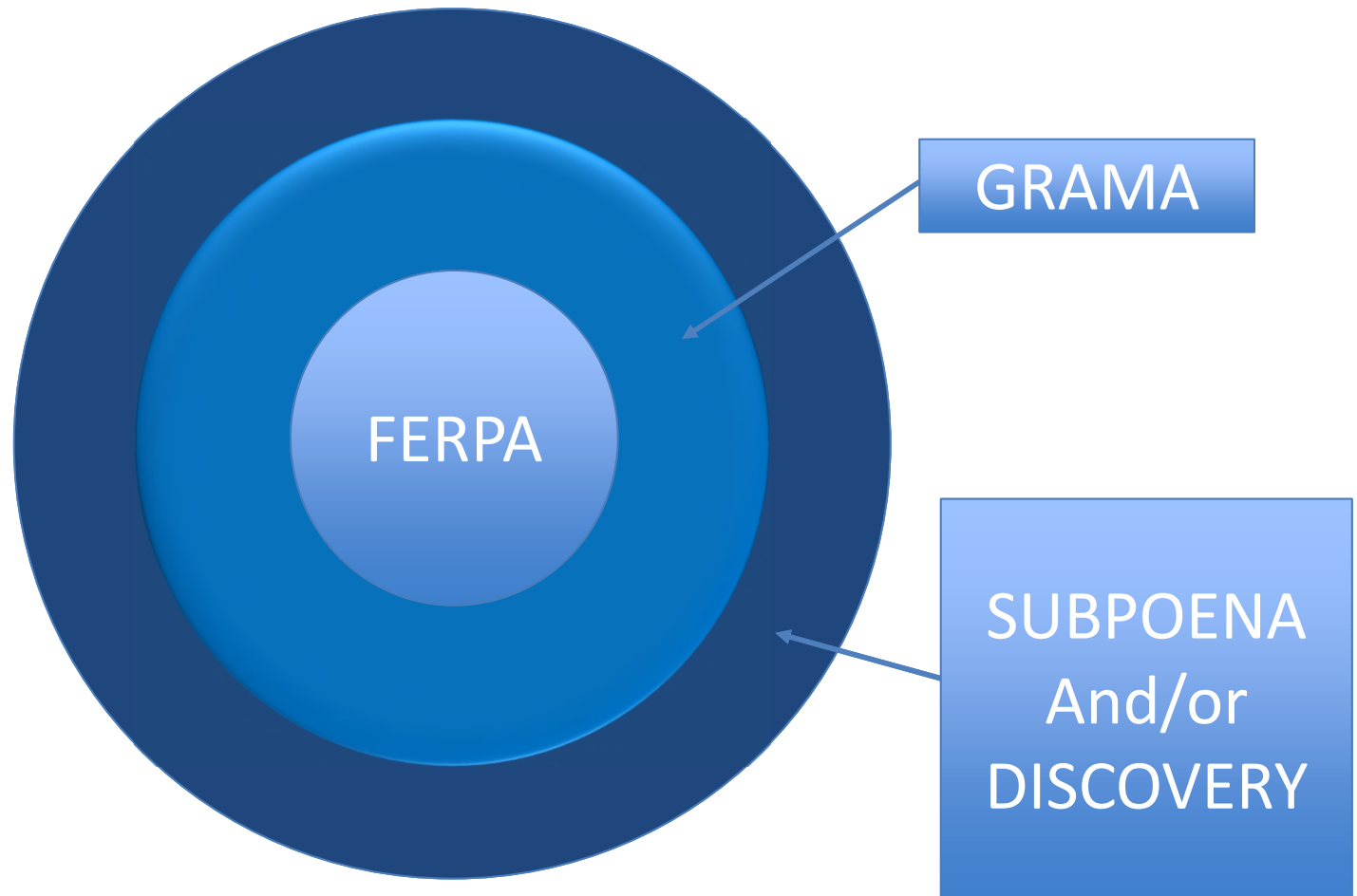
## Top IEP Mistakes

6. Failing to proofread the IEP;
7. Failing to respect parents' time: showing up late, revolving door of participants, etc.
8. Failing to timely address Extended School Year services
9. Lapses of professional judgment
10. Predetermination
11. Lack of IEP Team Accountability – Blaming It On the District
12. Fear of conflict: failing to make recommendations with clarity and finality

# Records Issues

- Circumstances Under Which Records Might Be Disclosed
  - IDEA/State Regulations
  - FERPA
  - GRAMA
  - Subpoena/Discovery Requests

# Records Issues



## Records Issues – IDEA Access Rights

“Each LEA must permit parents or adult students to *inspect and review any education records relating to their student or themselves* that are *collected, maintained, or used* by the LEA. The LEA must comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing or resolution session, and in no case more than 45 calendar days after the request has been made.”

USER, IV.X.4.a. at p. 100



## Records Issues – IDEA Access Rights

The right to inspect and review education records includes:

- The right to a response from the LEA to reasonable requests for explanations and interpretations of the records;
- The right to request that the LEA provide copies of the records if failing to provide the copies would effectively prevent inspection/review;
- The right to have a representative inspect/review the records.

USER, IV.X.4.b. at p. 100

## Records Issues – Access Rights

“Education Records means the type of records covered under the definition of “education records” in 34 CFR 99, implementing regulations for the Family Educational Rights and Privacy Act of 1974, 20 USC 1232g (FERPA).”

USER, IV.X.1.b. at p. 99

## Records Issues – Access Rights

- There has been an explosion in the type/number of “education records” maintained by LEAs.
- Often, when parents of a disabled student request their student’s education records, they are given an incomplete response.
- Note USER IV.X.7: “On request, the LEA must provide parents or adult students with a list of the types and locations of education records collected, maintained, or used by the LEA.”

# 10<sup>th</sup> Circuit Update

## Federal Courts 101

- **Supreme Court** = Binding law of the land in all 50 U.S. states and territories
- **10<sup>th</sup> Circuit** = Binding in Utah, Oklahoma, Kansas, New Mexico, Colorado, and Wyoming plus Yellowstone National Park.
  - Unpublished decisions are not binding, but may be persuasive
- **Federal district courts** = Non-binding but potentially persuasive, particularly those from within 10<sup>th</sup> Circuit



## Recent Cases from Within the 10<sup>th</sup> Circuit

*Albuquerque Public Schools v. Sledge*, 2019 WL 3759479 (D. N.M. 2019); 74 IDELR 291; 119 LRP 30096

- Student has Dravet Syndrome and has had life-threatening seizures since infancy; case was brought under both IDEA and Section 504
- Student was qualified to receive cannabis for seizures under New Mexico's compassionate use act (CUA);
- However, at the time, the CUA did not extend a waiver of civil or criminal penalties to school staff who administered cannabis to qualified students; school refused to administer;
- Was not a problem to refuse to administer at school (cannabis still illegal under federal law), but district didn't offer an alternative that would provide FAPE

## Recent Cases from Within the 10<sup>th</sup> Circuit

*C.W. by B.W. and C.B. v. Denver County School Dist. No. 1*,  
2019 WL 4674331 (D. Co. 2019); 119 LRP 37315

- Case involved a twice exceptional student – gifted with multiple disabilities
- District offered a residential placement, without specifying where
- This was found to be a denial of FAPE
- The court stated: “This case therefore presents an excellent example of the circumstances under which inclusion of a particular school in an IEP can be determinative of whether a FAPE has been offered – the offer of an unspecified residential facility that may not even exist is no offer at all.”
- Case is on appeal to Tenth Circuit



## Recent Cases from Within the 10<sup>th</sup> Circuit

*Nathan M. v. Harrison School District No. 2.*, 2018 WL 6528127 (D. Colo. December 12, 2018); 118 LRP 50369

- When we met last year case was on appeal to 10<sup>th</sup> Circuit with oral argument scheduled for September 25, 2019.

## Recent Cases from Within the 10<sup>th</sup> Circuit

*Nathan M. v. Harrison School District No. 2.*

District court homed in on key differences between proposed district placement and private placement:

- Focus at private school was on behavioral intervention (ABA);
- No non-disabled children among the approximately 27 children at the private autism school;
- No certified teachers on the private school staff, and child had made little academic progress, particularly in writing.

## Recent Cases from Within the 10<sup>th</sup> Circuit

*Nathan M. ex rel Amanda M. v. Harrison School District No. 2*, 942 F.3d 1034 (10<sup>th</sup> Cir. 2019):

- 10<sup>th</sup> Circuit decision issued on November 14, 2019
- District and parents did not dispute that Nathan's case was technically moot but the parent argued it was capable of repetition;
- Court relied on *Steven R.F. v. Harrison School District*;
- Held that appeal was moot because "although Parent and the District may continue to lock horns over Nathan's educational placement" there was no specific legal controversy that remained.

## Recent Cases from Within the 10<sup>th</sup> Circuit

*Matthews v. Douglas County School District RE1*, 2018 WL 4790715 (D. Colo. October 4, 2018); 118 LRP 41825

- Substantive Requirements (*Endrew F.*)
  - Court applied *Endrew F.*'s new legal standard to the ALJ's earlier factual findings, which were made under prior law.
  - For children integrated into regular classrooms, an IEP must be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."
  - For children not "fully integrated in the regular classroom and not able to achieve on grade level the IEP must be appropriately ambitious in light of his circumstances."

## Recent Cases from Within the 10<sup>th</sup> Circuit

### *Matthews v. Douglas County School District RE1*

- Substantive Requirements (*Endrew F.*)
  - Although this new standard is more demanding than the Tenth Circuit's prior standard, it does not require that an IEP "provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and to contribute to society that are substantially equal to the opportunities afforded to children without disabilities."
  - Each child is unique and appropriate progress is different.