



F3 Law

What Every School Leader Must Know

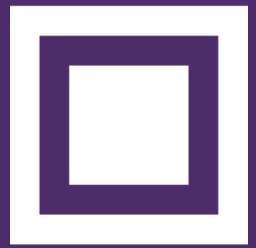
Blue Jeans Conference

March 11, 2025

Presented by: Jan E. Tomsy

Leader's Guide to Compliance

1. History and Background
2. What is FAPE
3. Child Find
4. Eligibility and Need for Special Education
5. Some Common Mistakes and Pitfalls in IEP Development
6. Least Restrictive Environment
7. Behavior
8. Section 504



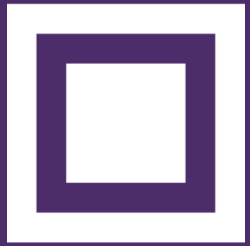
1. History and Background

A Bit of History . . .

- Throughout 1950s and 1960s
 - States maintained a nearly universal practice of providing separate classes, schools for disabled
 - Little contact with students in “regular” classes
- Curricula for students with disabilities was very limited
 - Featured the arts, using music, drama, visual arts, and construction projects to address physical and cognitive disabilities

The IDEA

- In 1975, Gerald Ford signs “The Education of all Handicapped Children Act of 1975”
 - Was enacted after, and as a result of, two federal district court cases decided in Pennsylvania and District of Columbia
 - Established requirement for “free appropriate public education” (FAPE)
 - Act renamed in 1990: Individuals with Disabilities Education Act
 - Revised in 1997 and 2004
 - Contains comprehensive implementing regulations



2. What Is FAPE?

The Rowley Standard

- First U.S. Supreme Court case related to special education is heard in 1982 (Rowley v. Board of Educ. Of Hendrick Hudson Cent. Sch. Dist.)
 - Amy Rowley was student with a hearing impairment who was educated primarily in the general education setting, with some supports
 - Achieving at or above grade level
 - Was not able to fully understand, because of hearing impairment
 - District offers an FM system; parents want a sign language interpreter
 - Parent files, arguing that the IDEA mandates “equal opportunity” for all students
 - District Court rules against school district
 - IEP is not appropriate unless it offers the child an opportunity to achieve her full potential

The Rowley Standard

- Second Circuit agrees with District Court
- Case ultimately reached U.S. Supreme Court
- 1983 SCOTUS ruling stated that IDEA statute set no actual standard of FAPE
- Decision used phrase “some educational benefit” as standard for whether school district has complied substantively with IDEA
- Rejected “maximization of potential” standard

The Rowley Standard

- Rowley two-prong test for determining whether a student was offered FAPE
 - Substantive: Is the IEP reasonably calculated to enable the student to achieve passing marks and advance from grade to grade?
 - Procedural: Has the district complied with the procedures set forth in the IDEA?

Test of Procedural Compliance: Target Range (Now Part of IDEA)

1. Impeded right to FAPE
2. Significantly impeded parents' right to meaningfully participate in the decision-making process
3. Caused educational deprivation

Andrew F.

- Over the years, Circuit Courts across the country also struggled with various interpretations of “some educational benefit” substantive FAPE standard as set forth in Rowley
- U.S. Supreme Court revisited FAPE in 2017 (Endrew F. v. Douglas County Sch. Dist. RE-1)

Andrew F.

- 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”
- Each child’s educational program must be “appropriately ambitious”

Andrew F.

- Court explicitly rejected the “merely more than de minimis” test for educational progress applied by 10th Circuit
- Andrew F. does not overturn Rowley
- Instead, it expands scope of Rowley’s “some educational benefit” standard

Andrew F.

- 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”
 - Goals must be “appropriately ambitious”
 - Court: Absence of such bright-line rule should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review”

Andrew F.

- Court rejected argument by parents that IDEA requires districts to provide students with educational opportunities that are substantially equal to the opportunities afforded children without disabilities



3. Child Find

Introduction . . .

- **Child find** is one of the most important special education legal obligations for school districts
- It is a cornerstone of the IDEA – along with IEPs and parental participation – and is the foundation of FAPE
- Child find mistakes are common . . . and are frequently litigated
- IDEA imposes **affirmative, ongoing duty** to **identify, locate and evaluate** all children with disabilities residing in the state who are in need of special education

Two Components to Child Find

- General “public notice” responsibility
 - Inform and educate public about need to locate and identify all children with disabilities
- Obligation to specific child
 - Triggered when district knows – or should know – that student may have a disability

General Responsibilities

- IDEA does not specify which general activities are sufficient to meet child find obligations
- U.S. Department of Education guidance:
 - Child find generally includes, but is not limited to, activities such as:
 - Widely distributing informational brochures
 - Providing regular public service announcements
 - Staffing exhibits at health fairs and other community events
 - Creating direct liaisons with private schools
- Staff training is essential component of continuous child find responsibilities

Obligation to Individual Students

- Triggered when district has knowledge of – or reason to suspect – student has disability
 - Threshold for suspicion is “relatively low”
 - Appropriate inquiry: Whether student should be referred, not whether child will qualify for special education
 - Child find violated if district overlooks clear signs of disability and offers no rational justification for not evaluating
 - But child find does not guarantee eligibility

Obligation to Individual Students

- Affirmative obligation to act
 - Not dependent on parent request for evaluation
 - Child find not excused even when parent interferes with process
 - Passive approach – deciding not to “push” or to “wait and see” – equates to active and willful refusal to take action

What Triggers Child Find Duty?

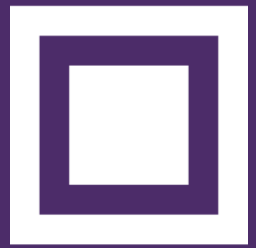
- Could be any one of numerous indicators, including:
 - Declining academic performance
 - Problematic behavior issues
 - Bullying (either target or perpetrator)
 - Extended illness
 - Medical diagnosis of recognized disability
 - Nonattendance, school refusal or anxiety
 - Psychiatric hospitalization and/or attempted suicide
 - Parental request for assessment
- Also unique child find issues arise regarding:
 - English learners; also RTI process

Violations of Child Find

- Issue of whether district had reason to suspect disability must be viewed based on what information it possessed at relevant time
 - “Snapshot” – not a retrospective
- Violation of child find duty is “procedural” violation and amounts to denial of FAPE only if:
 - Impedes right of student to a FAPE;
 - Significantly impedes opportunity of parents to participate in decision-making; or
 - Causes deprivation of educational benefits

Practice Pointers

- To avoid confusion over child find process and staff responsibilities
 - Ensure everyone has copy of – and understands – district's child find policies and procedures
 - Conduct child find training – with periodic review – that includes all relevant staff



4. Eligibility and Need for Special Education

Definition of Eligible Student

- To be eligible under IDEA, student must:
 1. Meet definition of at least one of 13 identified disabilities;**and**
 2. Require special education and related services as a result of such disability

The 13 Eligibility Categories

1. Autism
2. Deaf-Blindness
3. Deafness
4. Emotional Disturbance
5. Hearing Impairment
6. Intellectual Disability
7. Multiple Disabilities
8. Orthopedic Impairment
9. Other Health Impairment
10. Specific Learning Disability
11. Speech or Language Impairment
12. Traumatic Brain Injury
13. Visual Impairment, including blindness

Definition of Eligible Student

- Law defines each of the 13 disabilities
 - For example, IDEA defines “visual impairment” as “impairment in vision that, even with correction, adversely affects a child’s educational performance”
 - Note: Most disability definitions also includes requirement that the disability have “adverse effect” on “educational performance”
 - Neither term is defined by law
 - Court and IHOs/ALJs interpret on case-by-case basis

Exceptions

- IDEA: Student may not be found eligible if –
 - Determinant factor is:
 - Lack of appropriate instruction in reading or math; or
 - Limited English proficiency; and
 - Student does not otherwise meet the eligibility criteria under 34 C.F.R. § 300.8(a)

Remember, even if disability definition is satisfied, student must require special education in order to be found eligible



So What Is Special Education?

- IDEA definition:
 - “Specially designed instruction”
 - Provided “at no cost” to parents
 - Intended to meet “unique needs” of student

So What Is Special Education?

- Special education can include:
 - Instruction conducted in classroom, home, hospitals and institutions, and other settings
 - Instruction in physical education

“At No Cost” and “Unique Needs”

- “No cost” does not preclude incidental fees normally charged to all students as part of general education program
- “Unique needs” not defined by law
 - 9th Circuit: More than academic subjects; can also include “social and emotional needs that affect academic progress, school behavior and socialization”

And What About “Specially Designed Instruction”?

- IDEA definition:
 - Adapting, as appropriate to student’s needs, the content, methodology or delivery of instruction to:
 - Address student’s unique needs resulting from student’s disability; and
 - Ensure student’s access to general curriculum so that student can meet educational standards that apply to all students within district

And What About “Specially Designed Instruction”?

- Adapted or modified content = knowledge and skills being taught to student are different from what is being taught to typical same-age peers
- Adapted or modified methodology = different instructional approaches are used to teach content to student than are used for typical same-age peers
- Adapted or modified delivery = way in which instruction is delivered to student is different than delivery method for typical same-age peers

And What About “Specially Designed Instruction”?

- Distinguish “specially designed instruction” from “accommodations”
- Accommodations
 - Do not change what is being taught
 - Do not alter strategies used to teach content
 - Do not change how instruction is delivered

And What About “Specially Designed Instruction”?

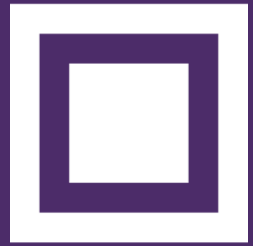
- Determining whether specific intervention is “specially designed instruction” can be difficult
 - “Fuzzy line” between general and special education
- One possible test: “Specially designed instruction” when:
 - Adaptations in content methodology or delivery;
 - Necessary, rather than beneficial, for student;
 - Designed or implemented by certified special education personnel; and
 - Not available regularly in general education

A Word About Related Services

- IDEA definition:
 - “Transportation and other developmental, corrective and supportive services as may be required to assist student in benefiting from special education”

Special Education vs. Related Services

- If student meets definition of one or more disabilities identified by IDEA, but only needs related services and not special education:
 - Student is not eligible under IDEA
 - Except if related service that student requires is considered “special education” under state standards



5. Some Common Mistakes and Pitfalls in IEP Development

Mistake No. 1

Making an Unclear Offer of Placement *(or not making an offer at all!)*

- No Offer of Placement – remember Union v. Smith
- Make sure the offer is specific!
- And put it in writing!
- The failure to write it down can be costly!

Mistake No. 1

Making an Unclear Offer of Placement *(or not making an offer at all!)*

Who decides?

- Administrator's role to ensure that an offer of placement is made
- If district staff members cannot agree, the administrator should:
 - Take a break
 - Continue the IEP team meeting
 - Attempt to bring the team to a consensus
 - In the end...make an offer

Mistake No. 1

Making an Unclear Offer of Placement *(or not making an offer at all!)*

Best Practices:

- Don't offer services you can't deliver or implement
- Make sure temporary services are temporary
- Don't make compensatory education part of the program and services
- Rewrite the offer in the Comments if you don't have enough space on Program/Services page

Mistake No. 1

Making an Unclear Offer of Placement *(or not making an offer at all!)*

Where to Make It:

- The best place to do it is at the IEP meeting and on the IEP
- May be finalized or clarified in a letter/PWN to parents

Mistake No. 1

Making an Unclear Offer of Placement *(or not making an offer at all!)*

Don't Do This:

- Don't fail to put the offer in writing because parents have stated that they will not agree to that placement
- Don't discuss multiple placements, but fail to specify the placement being offered in writing
- Don't offer multiple placements if only one is FAPE
- Don't offer a type of placement (i.e., an SDC) and allow the parent to select a school site
- Don't discuss multiple placements at an IEP and then tell the parents to choose one

Mistake No. 1

Making an Unclear Offer of Placement *(or not making an offer at all!)*

Specify Frequency, Location & Duration of Service Levels:

- By including frequency, location, and duration of services on the IEP, the parent can tell what the student will be receiving and what the parent is agreeing to
- Stating that services will be provided “individual and group; direct and consult” is not sufficient

Mistake No. 2

Procedural Errors

Remember the FAPE Equation

Procedural + Substantive =FAPE

Mistake No. 2

Procedural Errors

Examples of Procedural Flaws:

- Assessment without an assessment plan
- IEP meeting on day 65 after assessment plan is signed
- Improper/late notice of IEP team meeting
- No procedural safeguards
- Excusal form provided at the IEP team meeting
- Interpretation/translation problems
- No gen ed teacher at IEP team meeting
- Failure to consider continuum of options

Mistake No. 2

Procedural Errors

- Procedural flaws in the IEP process do not always amount to the denial of a FAPE
- Remember: Denial of a FAPE occurs only if the procedural defect:
 - Impeded the child's right to a FAPE
 - Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or
 - Caused a deprivation of educational benefit

Mistake No. 3

Absence of Key IEP Team Members

- **IEP team must include:**
 - Parent(s) or a representative of parent(s)
 - At least one regular education teacher
 - At least one special education teacher or, if appropriate, a special education provider
 - A representative of the district
 - An individual who conducted an assessment or is knowledgeable about the assessment procedures and qualified to interpret the results

Mistake No. 3

Absence of Key IEP Team Members

- **IEP team should also include:**
 - Student, if appropriate
 - Agencies providing transition services (with parent consent)
 - NPA staff
 - Student's private school teacher, or provider, if appropriate
 - (Optional) Other individuals who have knowledge or special expertise of student

Attendance is for the entire IEP team meeting; not just a part of it

Mistake No. 3

Absence of Key IEP Team Members

- **Excusals:**

- Don't rely on waivers when attendance is important to the IEP process
- The comments to the federal IDEA regulations state: "We encourage LEAs to carefully consider, based on the individual needs of the child and the issues that need to be addressed at the IEP Team meeting whether it makes sense to offer to [excuse] a particular IEP Team member ... or whether it would be better to reschedule the meeting so the person could attend and participate in the discussion"

Mistake No. 3

Absence of Key IEP Team Members

- **Which teachers are key?**
 - District is required to have at least one special and one general education teacher at a student's IEP meeting. But, just selecting any one special or general education teacher may not suffice . . .
 - Invite a teacher who has taught the student, and is the best source of knowledge regarding the student
 - Current special ed teacher
 - Cases have held that where a student receives and will continue to receive education outside of the mainstream, the failure to include a general education teacher is not, per se, a denial of FAPE

Mistake No. 4

Missing Important Assessment Information

- Students should be assessed in all areas of suspected disability
- This is the basis on which everything else will build
- Incorrect assessments can lead to violation of child find, misidentification or overidentification

Mistake No. 4

Missing Important Assessment Information

- Post-Endrew F.:
 - Districts must "offer a cogent and responsive explanation for their decisions..."
 - How do you know what are the child's "circumstances"?
 - CAREFUL, THOROUGH AND WELL THOUGHT OUT ASSESSMENT determines "circumstances" and provides the "cogent and responsive explanation" for the FAPE offer

Mistake No. 4

Missing Important Assessment Information

- **5 Dots to Connect:**
 - Present levels
 - Areas of Educational Need
 - Goals
 - Placement (Special Education)
 - Supplementary Aids and Services
 - Supports for General/Special Education
 - Related Services
 - Supplementary Aids and Services
 - Accommodations/Modifications

Mistake No. 4

Missing Important Assessment Information

- **Assessment pointers:**

- Team should review report before meeting
- Recommendations for classroom interventions
- Summarize key elements
- If academics are key issue, focus on classroom performance
- If behavior is the key issue, focus on all elements of behavior in relationship to learning

Mistake No. 4

Missing Important Assessment Information

- **Remember - Connect the Dots:**
 - Each step in the IEP process builds on the prior step; an assessment is the foundation for this approach
 - **Identify key sources of information:** Assessment reports, information from parents and teacher, and any outside assessments provided by parents

Mistake No. 5

Problems with Goals

- General Review:

- Goals must be revised annually based on student progress
- If new or different needs arise, discuss new or additional goals when the need arises
- Goals should be written in all areas of need (*and not in areas where there is no need*)

Mistake No. 5

Problems with Goals

- General Review:
 - Must include present levels of performance
 - Goals must be measurable (including mastery criteria)
 - Identify method by which progress will be evaluated
 - Who? How?

Mistake No. 5

Problems with Goals

- Review Last Year's Goals:
 - If the student has made little or no progress...take another approach
 - A goal that is completely unchanged begs for scrutiny
 - Do not reuse last year's goals

Mistake No. 5

Problems with Goals

- Form of a Measurable Goal:
 - By when (Typically one year or later)
 - When given what
 - Student (Use his/her name)
 - Will do “what” (target behavior or skill)
 - At what level of proficiency
 - As measured by...

Mistake No. 5

Problems with Goals

- Creating Present Levels – Sources:
 - Initial and 3-year re-evaluations
 - Other assessments
 - Independent evaluations
 - Behavioral data
 - Student work
 - Grades
 - Teacher and parent input

Mistake No. 5

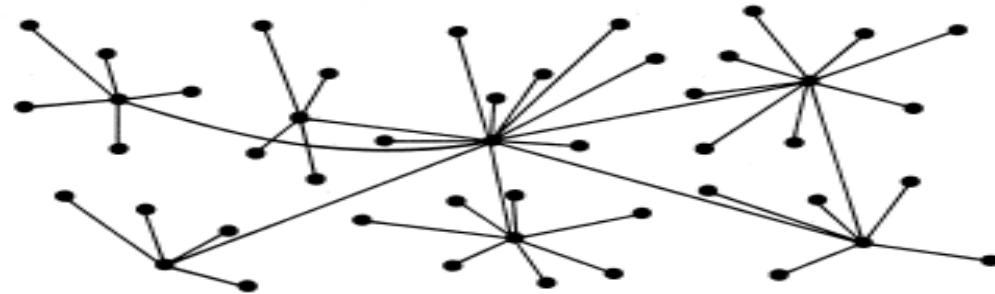
Problems with Goals

- Creating Present Levels – Review and Include:
 - Strengths
 - Areas of need
 - Interests and preferences
 - Impact of disability
 - What student can do successfully
 - Next steps for skill/behavior acquisition

Mistake No. 5

Problems with Goals

- **Connect The Dots—Building on the Assessment:**
 - Review the goals that were previously developed and the student's progress on those goals



Mistake No. 5

Problems with Goals

- **Practice Pointer—Updating Goals:**
 - Goals must be revised annually to reflect the student's current needs
 - But what happens when a student isn't making progress on a goal? Can the goal be continued?
 - Better -- try a new approach – try breaking the goal into parts or addressing the need in a different way

Mistake No. 6

Needs Without Goals

- Connect the Dots — Needs Require Goals:
 - Goals drive services
 - If a need does not have a goal, then there will not be a service to meet the need



Mistake No. 6

Needs Without Goals

- Remember:
 - Don't use informal programs to address needs
 - Once a student is eligible, the student needs goals to address all areas of needs—even if those needs, by themselves, would not qualify a student to receive special education services

Mistake No. 7

Not Ensuring Parent Participation

- Problem:
 - What if parents will not attend an IEP meeting?
 - Or the district has held multiple IEP meetings and has been unable to make its offer?

Mistake No. 7

Not Ensuring Parent Participation

- Review:
 - Parent or guardian must be notified of the IEP meeting early enough to ensure an opportunity to attend
 - IEP meeting must be scheduled at a mutually agreed upon time and place

Mistake No. 7

Not Ensuring Parent Participation

- Legal Requirements:
 - If the parent of guardian cannot attend, the District must use other methods to ensure parent or guardian's participation, including individual or conference telephone calls
 - Document efforts to obtain parent participation
 - IEP invitations
 - Phone calls home
 - Notes sent home
 - Visits made to parents at home or work

Mistake No. 7

Not Ensuring Parent Participation

- Legal Requirements:
 - “Parental participation in prior IEP meetings, or parental receipt of a copy of a district-created offer for parents’ subsequent approval, is not an adequate substitute for lack of participation in the creation of the offer itself” (Shapiro v. Paradise Valley School District (9th Cir. 2003))
 - Parental participation must be “meaningful”

Mistake No. 7

Not Ensuring Parent Participation

- Legal Requirements:
 - If consensus on development of an IEP is not possible, the District still has duty “to formulate the plan to the best of its ability in accordance with information developed at prior IEP meetings [with parents’ input], but must afford parents a due process hearing regarding that plan” (Ms. S. v. Vashon Island School District (9th Cir. 2003))

Mistake No. 7

Not Ensuring Parent Participation

- **Best Practices:**
 - When it's time to make the offer, make the offer
 - Document! Document! Document! All attempts to provide parents an opportunity to attend or otherwise participate in an IEP team meeting
 - After holding an IEP meeting without parents, send them the IEP with a copy of their Parent Rights
 - Offer to convene another meeting to review it

Mistake No. 7

Not Ensuring Parent Participation

- Including the Parent—Consider Room Arrangements:
 - Closed circle or rectangular table encourages eye contact
 - Seating arrangements may suggest participant roles
 - Seating arrangements can influence flow of conversation
 - Ensure parents have most direct contact with the chairperson/facilitator and most familiar staff members

Mistake No. 7

Not Ensuring Parent Participation

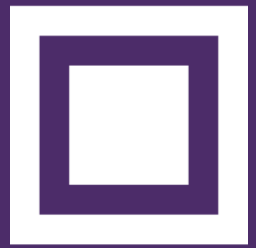
- Including the Parent:
 - Ensure all meeting participants are present and on-time
 - Set the tone of collaboration at the beginning
 - Gain agreement on the agenda and ground rules
 - Early in the meeting, actively solicit the parent concerns for the educational program for student
 - Assist the parent in formulating the issue and/or their interest, not necessarily the solution
 - At the end of the meeting, check to make sure parent issues have been addressed

Csutoras v. Paradise High Sch. (2021)

Decision:

- District court and Ninth Circuit rejected student's claim
- Court applied precedential “deliberate indifference” standard (where “the school’s response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances”)
- District was not on notice of any “obvious” need for social-related accommodation, there had been no prior incidents of bullying/harassment directed at student, and no allegations that district ignored any widespread bullying or harassment of disabled students

(Csutoras v. Paradise High Sch. (9th Cir. 2021) 12 F.4th 960, 79 IDELR 152)



6. Least Restrictive Environment (“LRE”)

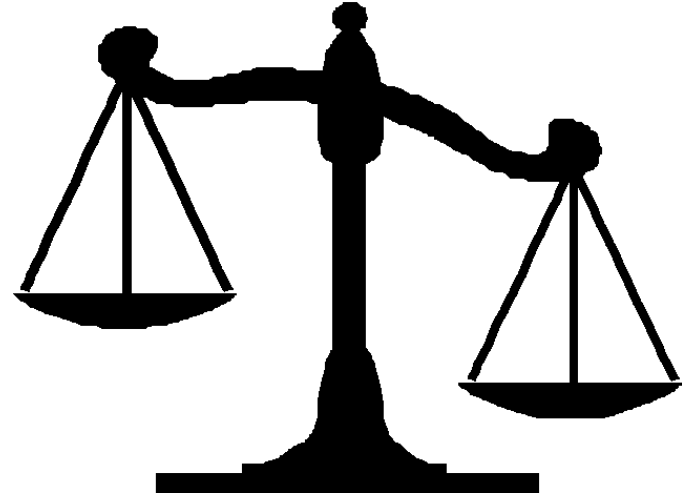
Legal Elements of LRE

- To the **maximum extent appropriate**, children with disabilities are educated with children who are not disabled
- Removal of children with disabilities from the regular educational environment occurs only when the **nature or severity** of the disability of a child is such that education in regular classes with the use of **supplementary aids and services** cannot be achieved **satisfactorily**

The Rachel H. Balancing Test

- Four factors:
 - Academic benefit
 - Non-academic benefit
 - Effect on teacher/students
 - Cost

(Sacramento City USD v. Rachel H. (9th Cir. 1994))



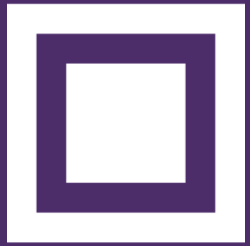
LRE: Practice Pointers

- IEP must include statement explaining why full participation in the general education setting is not possible.
 - Document, on the IEP, supplementary aids and services previously provided and their success or lack thereof
 - Use the word “satisfactorily”
 - Consider the Rachel H. factors

LRE: Practice Pointers

Remember:

LRE changes just like students;
what is LRE one year, might not
be LRE the next!



7. Behavior

When Must Behavior Be Addressed?

- When behavior “impedes” learning—the student’s, or others’
- For certain disciplinary actions resulting from student’s misconduct

Who Determines When Behavior Impedes Learning?

- IEP team decides
- No guidance in either federal or state law
- Extensive case law history offers some guidance and provides examples

Examples . . .

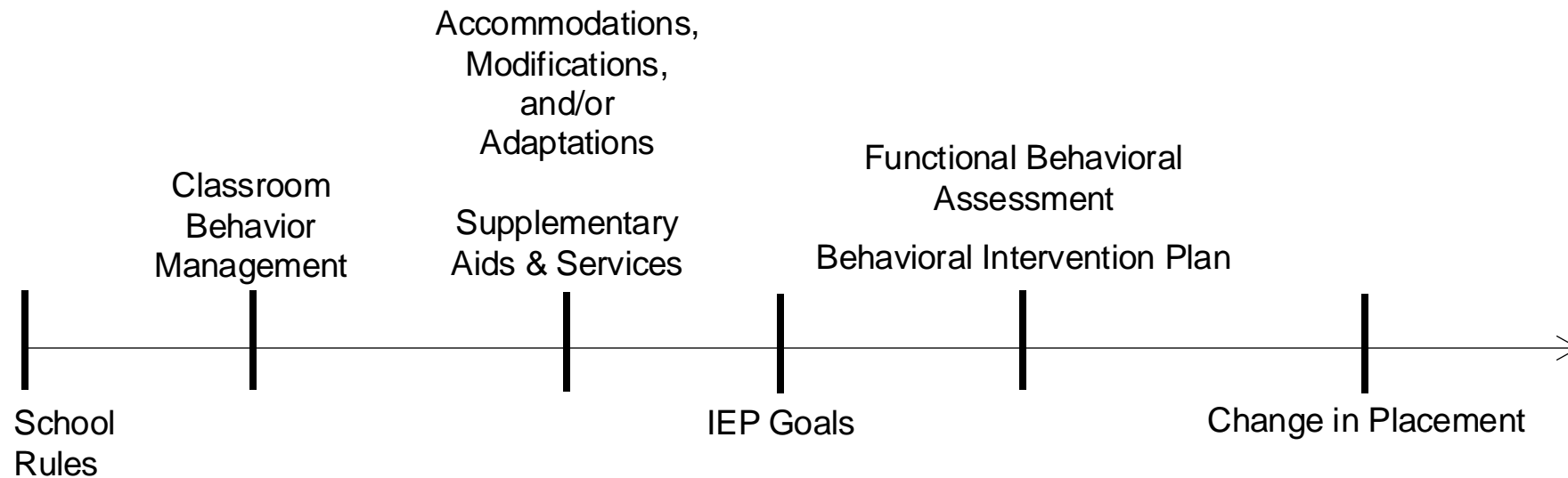
Cases have found behavior impeded learning when:

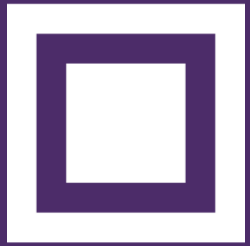
- Repeated disruption of teacher and/or students during classroom instruction
- Refusal to participate and follow directions in class
- Classroom outbursts and/or temper tantrums
- Sleeping in class

IDEA on Behavior

If behavior impedes learning, IEP team must consider positive behavioral interventions, supports, and other strategies to address that behavior

View Behavior Interventions on a Continuum





Final Thoughts . . .

Communication

Communicate in a manner that your grandmother could understand!



And Always Remember...

Listen . . .

Respond . . .

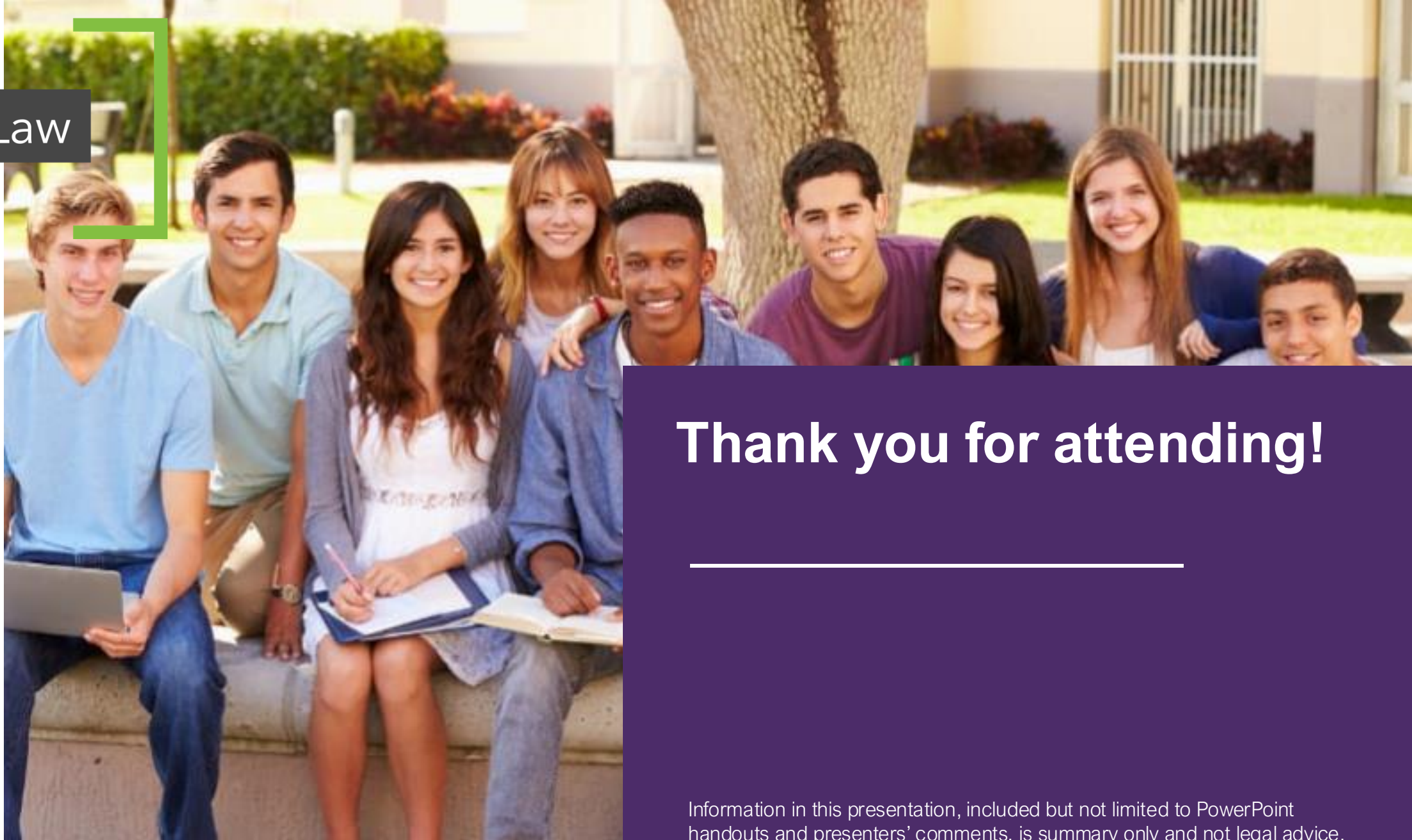
Follow through . . .

Document . . .

Finish



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Thank you for attending!

Information in this presentation, included but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.



F3 Law

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