

**AN ADJUDICATIVE CHECKLIST OF CRITERIA FOR  
THE FOUR DIMENSIONS OF FAPE UNDER THE IDEA\***

**Perry A. Zirkel**

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The Individuals with Disabilities Education Act (IDEA)<sup>1</sup> accounts for a significant and expanding segment of P–12 education litigation.<sup>2</sup> The bulk of the litigation<sup>3</sup> is specific to the IDEA’s core obligation,<sup>4</sup> “free appropriate public education” (FAPE).<sup>5</sup> Although the landmark case of *Board of Education of Hendrick Hudson Central School District v. Rowley*<sup>6</sup> demarcated procedural and substantive dimensions of FAPE, subsequent litigation not only crystallized the contours of these two dimensions but also started the development of standards for two additional dimensions—failure to implement the IEP<sup>7</sup> and capacity to implement the IEP.<sup>8</sup>

Intended as a handy outline, this checklist provides a snapshot of the current adjudicative standards and applicable authority for each of these four dimensions. Depending on the dimension(s) at issue, each of the four respective items consists of a cluster of questions for an

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<sup>1</sup> 20 U.S.C. §§ 1400 *et seq.* (2013).

<sup>2</sup> E.g., Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 Ed.Law Rep. 1 (2011) (showing the increasing segment within the P–12 context); *see also* Zorka Karanxha & Perry A. Zirkel, *Longitudinal Trends in Special Education Case Law: Frequencies and Outcomes of Published Court Decisions*, 27 J. SPECIAL EDUC. LEADERSHIP 55 (2014) (showing the continuing increase specific to the IDEA context).

<sup>3</sup> E.g., Perry A. Zirkel, *Case Law under the IDEA: 1998 to the Present*, in *IDEA: A HANDY DESKBOOK REFERENCE TO THE LAW, REGULATIONS, AND INDICATORS* 709 (2014) (showing predominance of FAPE cases, including those in the compensatory education and tuition reimbursement categories, in annotated compilation of published court decisions under the IDEA).

<sup>4</sup> E.g., *Sytsema v. Acad. Sch. Dist.*, 538 F.3d 1306, 1312, 236 Ed.Law Rep. 94 (10th Cir. 2008) (characterizing FAPE as the “central pillar of the IDEA”). The vehicle for FAPE under the IDEA is the individualized education program (IEP). E.g., *Murray v. Montrose Cnty. Sch. Dist. RE-IJ*, 51 F.3d 921, 923 n.3, 99 Ed.Law Rep. 126 (10th Cir. 1995) (referring to the IEP as the “cornerstone” of this central pillar).

<sup>5</sup> 20 U.S.C. §§ 1402(9) and 1412(a)(1).

<sup>6</sup> 458 U.S. 176 (1982).

<sup>7</sup> See *infra* note 17 and accompanying text.

<sup>8</sup> See *infra* note 18 and accompanying text.

IDEA hearing officer or, upon judicial review, a court to answer in terms of denial of FAPE and the resulting remedies.<sup>9</sup> Thus, potential or actual parties may use these items as the basic criteria.<sup>10</sup> For the most established dimension, which is procedural FAPE, the cluster is in a flowchart-type sequence. For the remaining three dimensions, the adjudicative test is successively less established, resulting in only tentative sub-questions for substantive FAPE, a choice of questions for failure to implement, and thus far only a single broad question for capacity to implement.<sup>11</sup>

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<sup>9</sup> For the two most frequent remedies, see, e.g., Perry A. Zirkel, *Compensatory Education Services: The Next Annotated Update of the Law*, 336 Ed.Law Rep. 654 (2016) (canvassing the case law concerning compensatory education); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785 (2012) (outlining the multi-step test, with illustrative case law support). These two retrospective remedies, however, are far from exclusive in terms of the applicable remedial authority; which extends, for example, to purely prospective orders for revisions in the IEP and/or changes in the child's placement. For the various equitable remedies available to IDEA adjudicators, see, e.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011).

<sup>10</sup> However, for the criteria for denials of FAPE, the alternate decisional avenue of the IDEA, which is the state complaints procedures system, generally uses a more rigorous application of the second and third dimensions of FAPE. See, e.g., Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 1 (2017).

<sup>11</sup> The final item, or theory for denial of FAPE, is the least well developed, thus amounting to a single question at this point. It may be viewed as a branch of the third item, but also may encompass the second, substantive item.

## 1. Procedural FAPE<sup>12</sup>

- a) Did the district violate IDEA (and corollary state law) procedural requirements?<sup>13</sup>
  - i) Is there an applicable procedural requirement?
  - ii) If so, is the proof preponderant that the district violated it?
- b) If so, did the violation(s) result in the requisite loss?<sup>14</sup>
  - i) Was there a deprivation of educational benefits to the student? OR
  - ii) Did the violation significantly impede the parents' opportunity for participation in the IEP process?

## 2. Substantive FAPE<sup>15</sup>

- a) Is the IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances?<sup>16</sup>
  - i) If the child is in an integrated setting, is the IEP reasonably calculated at least to enable the child to achieve passing marks and advance from grade to grade?
  - ii) If the child is in a self-contained setting, is the IEP appropriately ambitious, including challenging objectives, even if the same advancement through the general education curriculum is not a reasonable prospect?

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<sup>12</sup> For an empirical analysis of judicial application of this multi-part test, see Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?* 83 EXCEPTIONAL CHILD. 219 (2016).

<sup>13</sup> E.g., *Bd. of Educ. v. Rowley*, 458 U.S. at 206.

<sup>14</sup> 20 U.S.C. § 1415(f)(3)(E)(ii). In the absence of such loss, the hearing officer still has authority to order prospective procedural relief. E.g., *Dawn G. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (citing 20 U.S.C. § 1415(f)(3)(E)(iii)).

<sup>15</sup> For applying this standard, most of the circuits have adopted the "snapshot approach." See, e.g., Perry A. Zirkel, *The "Snapshot" Standard under the IDEA*, 269 Ed.Law Rep. 455 (2011).

<sup>16</sup> *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). For initial analyses of this decision, see, e.g., Janet R. Decker & Sarah Hurwitz, *Post-Andrew Implications for Students with Autism*, 344 Ed.Law Rep. 31 (2017); Perry A. Zirkel, *The Supreme Court's Decision in Andrew F. v. Douglas County School District RE-1: A Meaningful Raising of the Bar?* 341 Ed.Law Rep. 545 (2017).

### 3. Failure to Implement: Three Competing Approaches<sup>17</sup>

- a) Per se: Is the failure more than de minimis? OR
- b) Materiality: Is the failure significant or substantial? OR
- c) Materiality/Benefit: Is the failure not only significant or substantial but also resulting in deprivation of benefit?

### 4. Capacity to Implement<sup>18</sup>

- a) Is the school capable (in terms of staffing and facilities, for example) to implement the proposed IEP?

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<sup>17</sup> E.g., Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IDEA Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409 (2016). Only a minority of the federal circuit courts of appeal has adopted one of these approaches. For the materiality approach, see, e.g., *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, 502 F.3d 811, 225 Ed.Law Rep. 136 (9th Cir. 2007). For the materiality/benefit approach, see *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 141 Ed.Law Rep. 62 (5th Cir. 2000). For the per se approach, which no circuit has yet adopted, see *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d at 827 (Ferguson, J., dissenting).

<sup>18</sup> E.g., *Y.F. v. N.Y.C. Dep't of Educ.*, 659 F. App'x 3, 338 Ed.Law Rep. 52 (2d Cir. 2016); *B.P. v. N.Y.C. Dep't of Educ.*, 634 F. App'x 845, 330 Ed.Law Rep. 23 (2d Cir. 2015); *S.T. v. Howard Cnty. Pub. Sch. Sys.*, 627 F. App'x 255 (4th Cir. 2015); *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 320 Ed.Law Rep. 77 (2d Cir. 2015); *McNeil v. District of Columbia*, 217 F. Supp. 3d 107, 342 Ed.Law Rep. 529 (D.D.C. 2016). For the Second Circuit, which is the predominant source of this dimension of FAPE, the intersecting evidentiary issue is the qualified four-corners approach adopted in *R.E. v. New York City Department of Education*, 694 F.3d 167, 186, 284 Ed.Law Rep. 629 (2d Cir. 2012).