The "Snapshot" Standard under the IDEA: An Update*

by

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The adjudicative dispute resolution process under the IDEA, starting with an impartial hearing,[1] is "ponderous."[2] In this time-consuming process, it is not uncommon for the hearing officer, the review officer in states with two tiers of administrative adjudication,[3] or the court upon judicial review to face the central issue of whether the individual child's individual educational program (IEP)[4] meets the school district's central obligation of providing a free appropriate public education (FAPE) months and months or even years after the IEP's issuance.[5] In cases of the substantive side of free appropriate public education (FAPE),[6] does the applicable frame of reference take into account this retrospective determination of what the IEP team was viewing prospectively?

This update of a previous overview[7] traces the development of the "snapshot" standard as the answer to this question in the First, Second, Third, Eighth, and Ninth Circuits, along with the

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[1] *E.g.*, Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).

[2] *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

[3] *E.g.*, Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010).

[4] The clear majority of litigation under the IDEA concerns FAPE via an IEP. *See, e.g.,* Perry A. Zirkel, *Case Law under the IDEA: 1998 to the Present, in* IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS, AND INDICATORS 709 (2014).

[5] *E.g.*, Perry A. Zirkel, *Autism Litigation under the IDEA: A New Meaning of "Disproportionality"?* 24 J. SPECIAL EDUC. LEADERSHIP 292 (2011) (finding an average time lag of 2.8 between the filing for the impartial hearing and the final judicial decision within a sample of FAPE court decisions for students with autism).

[6] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (refining the *Rowley* standard for substantive FAPE to require the IEP to be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"). For the other dimensions of FAPE, including the procedural standard, see, e.g., Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE under the IDEA*, 346 Ed.Law Rep. 18 (2017

[7] Perry A. Zirkel, *The "Snapshot" Standard under the IDEA*, 269 Ed.Law Rep. 455 (2011).

comparatively less settled state of the law in the remaining jurisdictions. Additionally, the Supreme Court's recent IDEA decision seemed to provide at least indirect cross-jurisdictional support for this approach at least for substantive FAPE cases by characterizing the retained "reasonably calculated" part of the *Rowley* standard as "reflect[ing] a recognition that crafting an appropriate program of education requires a prospective judgment by school officials."[8] As a result, the D.C. Circuit appears to have joined the ranks of the adoptive federal appellate courts.

The Adoptive Circuit Courts of Appeal

Addressing this key question, the First Circuit established the "snapshot standard," using this photographic metaphor to fix the controlling time as that of the IEP team upon its formulation of FAPE. Thus, in examining the various translations of this standard, be careful that "retrospective" and "hindsight" in are from the point of view of the adjudicator, not the IEP team. Also note the distinction between this standard's application to evidence of subsequent progress v. subsequent lack of progress. Here is the First Circuit's original formulation:

> An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.[9]

The Third Circuit subsequently adopted the snapshot approach. More specifically, the concurring opinion in *Fuhrmann v. East Hanover Board of Education* provided this elaboration:

> Actions of school systems cannot, as the [parents] and the dissent suggest, be judged exclusively in hindsight. As the Court of Appeals for the First Circuit has observed, an [IEP] is a snapshot, not a retrospective … [citing *Roland M.*].

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[8] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 999 (refining the *Rowley* standard for substantive FAPE to requiring the IEP to be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances").

[9] *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992, 62 Ed.Law 408 (1st Cir. 1990).

> In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.[10]

The *Fuhrmann* majority adopted this view with further clarification:

> Judge Mansmann's concurring opinion underscores and emphasizes the importance of this threshold determination. Neither the statute nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement. Thus, Judge Mansmann and I are in complete agreement as to the time when we must look at the "reasonable calculation" made pursuant to *Rowley.*[11]

The *Fuhrmann* majority proceeded to clarify the role of FAPE facts arising subsequent to the formulation of the IEP:

> Events occurring months and years after the placement decisions had been promulgated, although arguably relevant to the court's inquiry, cannot be substituted for *Rowley's* threshold determination of a "reasonable calculation" of educational benefit. Therefore, evidence of a student's later educational progress may only be considered in determining whether the original IEP was reasonably calculated to afford some educational benefit.[12]

In a subsequent decision, the Third Circuit addressed the converse situation of subsequent evidence of lack of progress:

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[10] *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041, 83 Ed.Law Rep. 71 (3d Cir. 1993) (Mansmann, J., concurring). For recognition and resolution of the distinction between the concurrence and the dissent as it relates to after-acquired evidence upon judicial review, see *Susan N. v. Wilson Sch. Dist.*, 70 F.2d 751, 762, 105 Ed.Law Rep. 23 (3d Cir. 1995).

[11] *Furhrmann,* 993 F.2d at 1040.

[12] *Id*.

> In any event, appropriateness is judged prospectively so that any lack of progress under a particular IEP, assuming *arguendo* that there was no progress, does not render that IEP inappropriate.[13]

In the same case, the court applied this applied this view to two successive IEPs, using the term "retrospectively" in terms of the court, not the IEP team:

> [The student's] failure to make progress in the 1991-92 IEP, a judgment made retrospectively, does not render either the 1991-92 IEP or the 1992-93 IEP inappropriate. Of course, if a student had failed to make any progress under an IEP in one year, we would be hard pressed to understand how the subsequent year's IEP, if simply a copy of that which failed to produce any gains in a prior year, could be appropriate.[14]

Next, the Ninth Circuit also adopted this approach. More specifically, in its 1999 decision in *Adams v. State of Oregon*, the Ninth Circuit ruled:

> Actions of the school systems cannot ... be judged exclusively in hindsight .... [An IEP] is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted… [citing *Fuhrmann*]. Thus, we examine the adequacy of [the infant child's] IFSPs at

[13] *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 530, 102 Ed.Law Rep. 450 (3d Cir. 1995).
[14] *Id*. at 534.

> the time the plans were drafted.[15]

More recently, the First Circuit refined the approach with regard to evidence of subsequent progress v. lack thereof as follows:

> Actual educational progress can (and sometimes will) demonstrate that an IEP provides a FAPE … [citing *Rowley* and *Roland M.*]. But to impose the inverse of this rule—that a lack of progress necessarily betokens an IEP's inadequacy—would contradict the fundamental concept that "[a]n IEP is a snapshot, not a retrospective." [citing *Roland M.*]. Where, as here, a school system develops an IEP component in reliance upon a widely-accepted methodology, an inquiring court ought not to condemn that methodology ex post merely because the disabled child's progress does not meet the parents' or the educators' expectations [citing a Seventh Circuit methodology decision].[16]

A few years later, two other circuits added their endorsement. In 2011, the Eighth Circuit adopted the snapshot approach.[17] The following year, after earlier consideration,[18] the Second Circuit

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[15] *Adams v. State of Oregon*, 195 F.3d 1141, 1149, 139 Ed.Law Rep. 820 (9th Cir. 1999). An "IFSP," or individual family service plain, is the counterpart of an IEP under Part C of the IDEA, which is for children with disabilities age 0 to 3. However, relying on alternate language in this decision (*id.*) and imprecise citations to this case in subsequent Ninth Circuit opinions, *J.W. v. Fresno Unified Sch. Dist*., 626 F.3d 431, 439 (9th Cir. 2010); *J.G. v. Douglas Cty. Sch. Dist.,* 552 F.3d 786, 801, 240 Ed.Law Rep. 87 (9th Cir. 2008), a federal district court concluded that the time for the snapshot is at the implementation, not the formulation, of the IEP. *Marc M. v. Dep't of Educ., State of Haw.*, 762 F. Supp. 2d 1235, 1244, 267 Ed.Law Rep. 189 (D. Haw. 2011). For subsequent Ninth Circuit applications of the snapshot standard, see *E.M. v. Pajaro Valley Unified Sch. Dist*., 652 F.3d 999, 271 Ed.Law Rep. 765 (9th Cir. 2011); *K.S. v. Fremont Unified Sch. Dist*., 426 F. App'x 536, 270 Ed.Law Rep. 555 (9th Cir. 2011).

[16] *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29, 230 Ed.Law Rep. 485 (1st Cir. 2008). The cited Seventh Circuit decision emphasized the substantial deference accorded to local and state officials in methodology cases under the IDEA, but it did not address the snapshot standard. *Lachman v. Ill. State Bd. of Educ*., 852 F.2d 290, 297, 48 Ed.Law Rep. 105 (7th Cir. 1988).

[17] *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 808, 270 Ed.Law Rep. 479 (8th Cir. 2011) (citing *Roland M*.). The Eighth Circuit's earlier citation of *Roland M*. with approval was at least a partial signal of its movement in this direction. *CJN v. Minneapolis Pub. Sch*., 323 F.3d 630, 639, 174 Ed.Law Rep. 854 (8th Cir. 2003). For recent examples of the lower court progeny in the Eighth Circuit, see *Indep.*

joined the majority view, although its adoption fused with a modified four-corners approach.[19] More specifically, in *R.E. v. New York City Department of Education*, the Second Circuit declared:

> We now adopt the majority view that the IEP must be evaluated prospectively as of the time of its drafting and therefore hold that retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a [tuition reimbursement] proceeding.[20]

Finally in the wake of the aforementioned[21] language in *Endrew F.,* the D.C. Circuit Court of Appeals intoned:

> The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP it offered was reasonably calculated to enable the specific student's progress. [citing *Endrew F.*]. As the district court aptly explained, that standard calls for evaluating an IEP as of "the time each IEP was created" rather than with the benefit of hindsight [citation omitted]. At the same time, the district court observed, evidence that "post-dates" the creation of an IEP is relevant to the

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Sch. Dist. No. 283 v. E.M.D.H., 73 IDELR ¶ 17 (D. Minn. 2018); *Johnson v. St. Louis Pub. Sch*., 72 IDELR ¶ 266 (E.D. Mo. 2018).

[18] In declining to take a position in a case in 2005, the Second Circuit posited the possible distinction between "IDEA claims that dispute the validity of a *proposed* IEP, on the one hand, and suits that question whether an *existing* IEP should have been modified in light of changed circumstances, new information, or proof of failure." *D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist*., 430 F.3d 595, 599 n.3, 203 Ed.Law Rep. 500 (2d Cir. 2005).

[19] The four-corners approach, which originates in contract law, exclusively restricts consideration of FAPE to the final version of the IEP that the school system offered during the IEP process. *E.g*., *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 503, 256 Ed.Law Rep. 22 (3d Cir. 2010); *Sytsema v. Acad. Sch. Dist.*, 538 F.3d 1306, 236 Ed.Law Rep. 94 (10th Cir. 2008); *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 219 Ed.Law Rep. 398 (4th Cir. 2007); *Knable v. Bexley City Sch. Dist*., 238 F.3d 755, 150 Ed.Law Rep. 628 (6th Cir. 2001); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 89 Ed.Law Rep. 449 (9th Cir. 1994).

[20] *R.E. v. N.Y.C. Dep't of Educ*., 694 F.3d 167, 186, 284 Ed.Law Rep. 629 (2d Cir. 2012).

[21] *See supra* note 8 and accompanying text.

> inquiry to whatever extent it sheds light "on whether the IEP was objectively reasonable at the time it was promulgated."[22]

Courts in Other Jurisdictions

In the meanwhile, various lower courts beyond the First, Second, Third, Eighth, Ninth, and D.C. Circuits have adopted and applied the snapshot approach.[23]

However, the Tenth Circuit and, more recently, the Fourth Circuit, have ostensibly at least partially disagreed with the snapshot standard. The Tenth Circuit's view carved out an ambiguous exception that extends beyond distinguishing FAPE-implementation[24] from FAPE-formulation cases:

> Moreover, if we are evaluating an IEP prospectively only, we agree with the Third Circuit which has said that "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.... Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." …[citing *Fuhrmann* and

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[22] *Z.B. v. District of Columbia,* 888 F.3d 515, 524, 353 Ed.Law Rep. 620 (D.C. Cir. 2018). For the effects of the post-IEP part of this directive, see, e.g., *McLean v. District of Columbia*, 323 F. Supp. 3d 20, __ Ed.Law Rep. __ (D.D.C. 2018) (remanding the case to the hearing officer to consider more carefully, inter alia, the progress of the student in the longer period after creation of the IEP).

[23] *E.g.*, *D.J.D. v. Madison City Sch. Dist.*, 72 IDELR ¶ 273 (N.D. Ala. 2018); *M.M. v. Foose*, 165 F. Supp. 3d 365, 334 Ed.Law Rep. 344 (D. Md. 2015); *S.T. v. Howard Cty. Bd. of Educ.*, 64 IDELR ¶ 268 (D. Md. 2015); *Jefferson Cty. Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d 1091, 304 Ed.Law Rep. 280 (N.D. Ala. 2014), *aff'd*, 581 F. App'x 760, 310 Ed.Law Rep. 686 (11th Cir. 2015); *Bd. of Educ. of Evanston-Skokie Cmty. Consol. Sch. Dist. 65 v. Risen*, 63 IDELR ¶ 191 (N.D. Ill. 2013); *A.B. v. Franklin Twp. Cmty. Sch. Corp.,* 989 F. Supp. 2d 1067, 291 Ed.Law Rep. 265 (S.D. Ind. 2012); *Vincent v. Kenosha Unified Sch. Dist.*, 59 IDELR ¶ 242 (E.D. Wis. 2012); *Y.B. v. Bd. of Educ. of Prince George's Cty.*, 895 F. Supp. 2d 689 (D. Md. 2012); *M.W. v. Clarke Cty. Sch. Dist.*, 51 IDELR ¶ 63 (M.D. Ga. 2008); *Mandy S. v. Fulton Cty. Sch. Dist.*, 205 F. Supp. 2d 1358, 166 Ed.Law Rep. 597 (N.D. Ga. 2000); *Suzawith v. Green Bay Area Sch. Dist.*, 132 F. Supp. 2d 718, 151 Ed.Law Rep. 886 (E.D. Wis. 2000); *Roy A. v. Valparaiso Cmty. Sch. Dist.*, 951 F. Supp. 1370 (N.D. Ind. 1997); *Jenna R.P. v. City of Chi. Sch. Dist. No. 299*, 3 N.E.3d 927, 301 Ed.Law Rep. 966 (Ill. Ct. App. 2013).

[24] *E.g.,* Perry A. Zirkel, *Failure to Implement the IEP: The Third Dimension of FAPE under the IDEA*, 28 J. DISABILITY POL'Y STUD. 174 (2017).

> *Roland M.*][25] However, an IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such… [citing Huefner law review article]. Thus, we do not hold that a school district can ignore the fact that an IEP is clearly failing, nor can it continue to implement year after year, without change, an IEP which fails to confer educational benefits on the student.[26]

The final part of this position statement actually closely accords to the Third Circuit's gloss.[27]

The Fourth Circuit similarly distinction between the relevance of subsequent progress v. lack of progress purportedly disagrees with the First and Third Circuit's view but actually tracks the First Circuit's refined formulation:[28]

> Although other circuits have held that an IEP's "appropriateness is judged prospectively so that any *lack of progress* under a particular IEP ... does not render that IEP inappropriate" … [citing *Carlisle* and *Roland M.*], we have concluded that, in some situations, evidence of *actual progress* may be relevant to a determination of whether a

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[25] The Tenth Circuit more recently repeated the first part without discussing the accompanying gloss about subsequent progress or lack thereof. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149, 236 Ed.Law Rep. 179 (10th Cir. 2008). For a recent application of this less than clear-cut exception, see *Tyler V. v. St. Vrain Valley Sch. Dist.*, 56 IDELR ¶ 165 (D. Colo. 2011).

[26] *O'Toole v. Olathe Unified Sch. Dist.,* 144 F.3d 692, 702-03, 126 Ed.Law Rep. 673 (10th Cir. 1998).

[27] See *supra* note 14 and accompanying text.

[28] See *supra* note 16 and accompanying text.

> challenged IEP was reasonably calculated to confer some educational benefit ....[29]

Conclusions

Thus, the snapshot approach has garnered increasing judicial support across the various jurisdictions, with even more support from the Fourth and Tenth Circuits than their outward stance might suggest. This cumulative case law would seem to serve as the basis for the following suggestions for impartial hearing officers (IHOs) under the IDEA, with corresponding implications for the party representatives who bring FAPE and other IDEA claims before them:

1. Consider warning the parties about the snapshot standard during the prehearing process so that they structure their evidence accordingly.
2. Give weight to evidence subsequent to the development of the IEP[30] when:
   - it is a FAPE implementation, rather than formulation, case
   - the evidence was reasonably foreseeable at the time of the IEP's development
   - the evidence was of sufficiently positive progress for procedure-based claims of denial of FAPE due to the harmless error type approach for such claims[31]
3. Although the courts have not reached this use, the logic of the snapshot approach warrant considering even more strongly the application of this same approach to both "child find"[32] and appropriateness of evaluation[33] claims.[34]

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[29] *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 326-327, 240 Ed.Law Rep. 555 (4th Cir. 2009); *see also Schaffer v. Weast*, 554 F.3d 470, 479, 241 Ed.Law Rep. 30 (4th Cir. 2009). The *M.S.* decision cited an earlier Fourth Circuit ruling that faulted the trial court for failing "to consider and accord weight to [the student's] actual educational progress." *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 523, 169 Ed.Law Rep. 59 (4th Cir. 2002).

[30] Overall, such subsequent evidence often becomes less weighty in proportion to the distance in not only time and also location (e.g., unilateral placement cases).

[31] 20 U.S.C. § 1415(f)(3)(E)(ii) (2013); 34 C.F.R. § 300.513(a)(2) (2016).

[32] *E.g.*, Vancouver Sch. Dist., 42 IDELR ¶ 160 (Wash. SEA 2004).

4. The more efficiently the IHO schedules and completes the hearing, the less the snapshot standard—and other transaction costs that divert limited special education resources to this overly legalized, adversarial process[35]—will be an issue.

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[33] *E.g.*, *D.L. v. Clear Creek Indep. Sch. Dist.,* 695 F. App'x 733, 347 Ed.Law Rep. 751 (5th Cir. 2017); *L.J. v. Pittsburg Unified Sch. Dist*., 850 F.3d 996, 341 Ed.Law Rep. 60 (9th Cir. 2017); Lincoln Intermediate Unit No. 12, 34 IDELR ¶ 305 (Pa. SEA 2001).

[34] There is also some support for also applying it to the parent's unilateral placement in tuition reimbursement cases. *E.g.*, *C.B. v. N.Y.C.*, 2005 WL 1388964 (S.D.N.Y. 2005). *But cf. J.T. v. Dep't of Educ., State of Haw*., 695 F. App'x 227 (9th Cir. 2017) (only at the final, equities step).

[35] *E.g.*, Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007); Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 Ed.Law Rep. 35 (2005).