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The Four Faces of a Free, Appropriate Public Education

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Abstract

This article delineates the four successive dimensions of the Individuals with Disabilities Education Act's (IDEA) central obligation of "free appropriation public education" that the courts have developed thus far: (a) procedural, (b) substantive, (c) incomplete implementation of the last Individualized Education Program (IEP), and (d) incomplete implementation of the next IEP. This current snapshot cites illustrative cases and, to the extent available, empirical analyses. The final recommendation warns against lowering practice and policies to the minimum legal standards for each of these four "faces," instead using them as organizing counter-markers for a proactive professional orientation.

Keywords

IEP process, law/legal/policy

The Individuals with Disabilities Education Act (IDEA, 2018) accounts for an extensive and expanding segment of U.S. P–12 education litigation (Zirkel & Johnson, 2011). The bulk of the litigation is specific to the "central pillar" of the IDEA (*Sytsema v. Academy School District*, 2008, p. 1312)—the school district's obligation to provide the eligible child with a "free appropriate public education" (FAPE). The child's Individualized Education Program (IEP) is the "cornerstone" for this central pillar (*Murray v. Montrose County School District*, 1995, p. 923).

In the decades since the 1975 enactment of the IDEA, the courts and Congress have gradually developed the specific meaning of the FAPE obligation to have separable dimensions. This legal evolution proceeded in two overlapping stages, with the first stage focusing on the formulation of the IEP and the second stage focusing on the implementation of the IEP. The result thus far is the delineation of four faces of FAPE, with two in each successive stage. Illustrating an underlying theme, progress is a defining feature for the first pair of faces but is only a secondary or potential factor in the second, implementation pair of faces.

The purpose of this column is to provide a current synthesis of the basic contours of these four faces of FAPE from an impartial legal perspective. The resulting legal literacy is useful for practitioners in fulfilling both the letter and spirit of the IDEA. For example, the leading FAPE claim to date arising from the COVID-19 context in both adjudications and state complaints is alleged failure to implement the IEP (Zirkel & Jones, 2020). Thus, this framework serves as a basic foundation for, but should not be confused with, a manual or checklist for constructing the upper floors of professional practice.

Formulation of the Individualized Education Program

The Supreme Court's landmark decision in *Board of Education of Hendrick Hudson Central School District v. Rowley* (1982) set forth the foundation for the first two faces of FAPE, the *procedural* and *substantive* dimensions. More specifically, the Court arrived at two questions for adjudication: "First, has the State complied with the procedures set forth in the Act? And second, is [IEP] . . . reasonably calculated to enable the child to receive educational benefits?" (pp. 205–206).

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Procedural Free Appropriate Public Education

In the 2004 amendments of the IDEA, Congress codified the procedural face of FAPE that the hundreds of lower courts after *Rowley* had developed under its first question. This face represents a harmless error approach that requires two steps: (a) Did the district violate one or more of the procedural requirements of the IDEA or the corollary state law, and (b) if so, did the violation(s) either result in a substantive loss to the student or "significantly impede the parent's opportunity to participate in the decision-making process" (§ 1415[f][3][E][ii])?

The subsequent court decisions that have applied this two-part standard for procedural FAPE have largely favored school districts (Zirkel & Hetrick, 2016). At the second step, the districts faced a soft landing in the relatively relaxed substantive standard, and the court has been rather slow and stingy in applying the alternative requisite loss to the parents in terms of meaningful participation (Zirkel, 2016).

For example, in *R.F. v. Cecil County Public Schools* (2019), the Fourth Circuit Court of Appeals addressed a district's unilateral reduction in the limited hours in general education for a first grader with severe autism without any prior written notice to the parents or convening of an IEP team meeting. The court concluded that this action was a procedural violation under the IDEA but that it did not result in substantive loss to the child or significant impeding of parental participation. For the child's side of the second step in its conclusion, the court relied on the special education teacher's judgment that the child was struggling in general education and would make more progress in the self-contained special education class. For the parents' side, the court pointed to (a) the parents' previous opposition to time in the general education classroom and (b) their opportunity for participation in the IEP team meeting a few months later.

Substantive Free Appropriate Public Education

The concurrent refinement of the substantive standard for FAPE similarly consisted of a long line of post-*Rowley* case law that culminated in a generalizable crystallization, although by the U.S. Supreme Court rather than Congressional amendment. More specifically, the lower courts had largely divided between a "some" and "meaningful" qualifier as to the applicable level of educational benefits in the aforementioned second question in *Rowley*. Yet, the Supreme Court in *Endrew F. v. Douglas County School District RE-1* (2017) sidestepped this differentiation by adopting the following generalized refinement of the substantive standard: "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (p. 999). The first change was rather nominal. Specifically, the substitution of "progress" for "benefit" has a positive spin, but the intervening long line of intervening decisions that had applied *Rowley's* substantive standard typically operationalized benefit in terms of progress. The second change, which was to use the qualifier "appropriate" was similarly and more strongly circular. The reasons are that (a) the focus is to define appropriate, which is the "A" in FAPE, and (b) the addition of the child's circumstances merely represents the "it depends" context for the overriding individualized qualifier, which is the "I" in IDEA.

Thus far, the lower courts' application of this rather imprecise standard has not changed the pro-district outcomes pattern for substantive FAPE cases prior to *Endrew F*. under *Rowley* (Moran, 2020; Zirkel, 2019a). The courts are unlikely to take a more activist approach in the foreseeable future in light of the recent appointments to the federal judiciary, especially but not at all exclusively to the Supreme Court. However, the ultimate test lies in professional practice, which may exceed whatever the courts determine to be the minimum, or "at least," standard. Thus, any significant impact on the expected level of services will rest on the interpretations of *Endrew's* Rorschach-like standard at the local level, starting with IEP teams.

Individualized Education Program Implementation

During the final formation of the two formulation faces of FAPE, a separate pair of dimensions began to take shape concerning implementation of the IEP. The first of these two newer faces focused, as is typical in court claims, on the recent past, alleging that the school district failed to implement the IEP. The second and least established face looks instead to the near future, alleging that the district does not have the capacity to implement the next IEP.

Failure to Implement

A failure to implement presents three potential, alternative approaches that are successively less strict on the district's performance: (a) *per se*, meaning that anything more than a *de minimis*, or negligible, shortfall between what the IEP specified and what the district delivered amounts to a denial of FAPE; (b) *material*, meaning that denial of FAPE requires more than minor shortfall, which only occurs if the district failed to implement substantial or significant provisions of the IEP; and (c) *material+harm*, meaning that denial of FAPE requires not only a material shortfall but also a resulting substantive loss to the child (Zirkel, 2017).

Although no one of these three approaches has become the uniform standard via either Congressional action or judicial consensus, thus far the "material" alternative is the increasing majority approach for failure-to-implement claims of denial of FAPE. The first federal appellate

jurisdiction to adopt this approach was the Ninth Circuit, consisting of the nine states in the Far West. More specifically, in *Van Duyn v. Baker School District 5J* (2007), the Ninth Circuit Court of Appeals ruled that "a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP" (p. 822). Applying this materiality standard, the court concluded that the district's less than complete implementation of the four provisions of the IEP at issue, such as the behavior intervention plan, had been sufficient with a limited exception. The exception was that the district had delivered only half of the IEP's requirement of 8 to 10 hour of math instruction per week, but the court ruled that the district had sufficiently corrected the shortfall by providing 3.3 of the 5 hour of compensatory education that the hearing officer ordered.

The dissenting judge in *Van Duyn* appeared to favor the *per se* approach by concluding instead that "a school district's failure to comply with the specific measures in an IEP . . . is, by definition, a denial of FAPE" (p. 827). However, this alternative has not gained traction in the courts thus far. Conversely, the Fifth Circuit's decision in *Houston Independent School District v. Bobby R.* (2000), although not entirely precise, appears to represent the required addition of the harmful effect in terms of benefit or progress to the materiality standard, equating to the above "material + harm" shorthand designation.

Although various lower courts have cited both *Van Duyn* and *Bobby R.* without clear and consistent differentiation, the materiality standard appears to be gaining sway, with the harm element having only a secondary rather than essential role. In the most recent major decision, the Eleventh Circuit adopted the *Van Duyn* materiality standard, concluding that the various deviations in implementing the IEP did not amount to denial of FAPE (*L.J. v. School Board of Broward County*, 2019). For example, the court concluded that the district's allocation to the child of 54% in general education and 46% in special education did not represent a material deviation from the IEP's specification of 61% in general education and 39% in special education.

Capacity to Implement

The final face of FAPE is the least well developed, having emerged only recently in various lower court decisions largely in litigious jurisdictions on the East Coast, especially New York cases. The focus of the claims that the district is not capable of implementing the most recently formulated IEP tends to be the staffing or facilities for the proposed placement.

The court rulings for the vast majority of these FAPE claims have not been in the parents' favor, due in at least part to the deference that courts tend to accord to school authorities and the burden of persuasion that generally is on the parents in IDEA cases. In one of the rare exceptions to the outcomes trend in the limited number of cases to date, the IEP specified a maximum class size of 12 students for the child, who was going into the seventh grade. Yet, it was undisputed that the district did not have a seventh-grade class of fewer than 15 students. Thus, in the absence of an amendment to the IEP, the court ruled in favor of the parents that the district violated the capable-to-implement dimension of FAPE. The violation in this case led to the remedy of tuition reimbursement at a private school that provided appropriate classes of that size (*Board of Education of Yorktown Central School District v. C.S.*, 2019).

Recommendations for Practitioners

Maintaining current legal literacy is important for both special and general education personnel. However what is legally required as a minimum should not be fused or confused with professional norms of best practice. Moreover, the predominant denomination of legal currency consists of adjudicative interpretations of the IDEA, starting with hearing officer decisions and culminating in successively higher court rulings. These standards and outcomes are not at all identical with those of the compliance-oriented avenues of administrative enforcement, including the IDEA's state complaint process (Zirkel, 2019b) and the overlapping complaint resolution process under Section 504 of the U.S. Department of Education's Office for Civil Rights (2020).

Thus, as an organizing framework, these legal contours of the four face of FAPE represent the minimum requirements that are applicable in adjudicative proceedings. In contrast, in light of the ponderousness of this process, including its high transaction costs, a proactive professional posture is appropriate. Practices that exceed these minimums not only avoid the costs of adjudication and the overlapping complaint processes, but also build trust and collaboration with parents for educational effectiveness. This effectiveness includes the individualized orientation of special education, which may extend with customized adaptation to improved outcomes in general education. In sum, the best way of effectively facing the challenges of special education is to align with but supersede the four legal faces of FAPE.

1. Fulfilling the procedures specified in the IDEA;
2. Aiming at optimal rather than reasonable progress;
3. Committing to full implementation of the present IEP; and
4. Making sure that the district's arrangements for the next IEP have the capacity for continued full implementation.

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