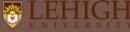


**The Four “Faces”  
of FAPE**

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**FAPE Overall**

“Free appropriate public education” (FAPE) is the core obligation of the Individuals with Disabilities Education Act (IDEA).

FAPE accounts for the overwhelming bulk of IDEA litigation. In addition to the direct cases, FAPE overlaps with the threshold issues of child find/eligibility, the simultaneous issue of LRE, and the subsequent issue of discipline, because it is the basis for the lengthening lines of cases for the remedies of tuition reimbursement and compensatory education (e.g., Zirkel, 2013).

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**FAPE Overall (cont.)**

The dimensions of FAPE have gradually evolved during the 40-plus year history of the IDEA (Zirkel, 2017a).

The Supreme Court’s decision in *Board of Education v. Rowley* (1982) delineated the first two dimensions of FAPE—procedural and substantive. Congress re-visited the procedural dimension in the 2004 amendments of the IDEA, and the Supreme re-visited the substantive dimension in *Endrew F.* (2017).

The final two dimensions, which concern implementation, are still crystallizing in the lower courts.

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## Dimension 1: Procedural FAPE

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### Procedural FAPE - Background

The *Rowley* Court (1982) viewed the IDEA (then the EHA) as primarily procedural – “First, has the [district] complied with the procedures set forth in the Act?”

The *Rowley* lower court progeny eroded the presumably strict procedural dimension with a two-step harmless-error approach that focused on whether any violation(s) resulted in substantive loss to the child.

IDEA 2004 codified the two-step test, broadening the second step to extend to participatory loss to the parents.

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### Procedural FAPE - Step 1 of the Test

As a result, here is the first step of the adjudicative analysis for alleged procedural denials of FAPE, which inevitably has two component sub-steps:

1. Did the district violate IDEA (and corollary state law) procedural requirements?
  - a. Is there an applicable procedural requirement?
  - b. If so, is the proof preponderant that the district violated it?

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### Procedural FAPE - Step 2 of the Test

Here is the second step, which applies contingently in flowchart-like sequence:

- 2. If so, did the violation(s) result in the requisite loss?
  - a. Was there a deprivation of educational benefits to the student? OR
  - b. Did the violation significantly impede the parents' opportunity for participation in the IEP process?

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### Procedural FAPE - Applications

Although the state complaint process tends to be one-step, the courts have clearly followed the two-step approach.

In the post-2004 court rulings (Zirkel & Hetrick, 2016), the most frequent alleged violation was for parental participation, but the most parent-favorable outcomes were for the general education teacher on the IEP team and evaluation/ reevaluation in the IEP process.

Although not frequently applied, IDEA 2004 expressly authorizes prospective relief to fix the violation in the absence of the requisite student or parental loss.

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## *Dimension 2: Substantive FAPE*

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## Substantive FAPE: Background

The *Rowley* Court delineated the substantive standard as: “Is the [IEP] developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?”

In applying this test, the circuits subsequently split between “some” benefit and “meaningful” benefit (Wenkart, 2009).

Revisiting this substantive standard, the *Endrew F.* Court did not choose either of these two approaches, instead refining *Rowley* in a different way.

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## Substantive FAPE: The Current Test

**Holding:** “Is the IEP reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances?”

**Dicta:**

- “reasonably” – confirming that optimal is not the standard
- “calculated” – confirming that the judgment is prospective (i.e., snapshot approach - Zirkel, 2018) and does not guarantee “any particular outcome”
- “progress” – “functional and academic advancement” as the essential function of the IEP

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## Substantive FAPE: The Test (cont.)

Seeming LRE-Based Sub-Parts (Zirkel, 2017b):

- If the child is in a fully integrated setting, is the IEP reasonably calculated at least to enable the child to achieve passing marks and advance from grade to grade?
- If the child is not in a fully integrated setting and not able to achieve on grade level, 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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### Substantive FAPE: Applications

In the two-plus years after the March 22 decision, the lower courts that applied *Andrew F.* largely remained at the macro-level of the test, ignoring the seeming subparts and most of the rest of the dicta. Moreover, during this period the substantive FAPE rulings did not at all result in a game-changing difference from the hearing officers' pre-*Andrew F.* corresponding rulings in the same cases.

For an example in your jurisdiction of an affirmed ruling in favor of the school district and brief mention of ambitious goals, see *Rosaria M. v. Madison Cty. Bd. of Educ.* (N.D. Ala. 2018).

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### Substantive FAPE: Applications (cont.)

At the latest look (Zirkel, 2019), which was at the 24-month mark on March 22, 2019, the pattern continued without significant change. In addition to the rather superficial and selective treatment of the dicta, the cumulative results of the 88 rulings (on a net basis after appeals) were as follows:

- No Change: 85% (65 "D-upheld" rulings + 10 "P-upheld" rulings)
- Remanded: 6% (5 rulings)
- Reversed: 9% (8 rulings, including 3 that were originally in favor of P)

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## *Dimension 3: Failure to Implement*

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## FTI FAPE – Alternate Approaches

The lower courts thus far have delineated three potential approaches for failure-to-implement (FTI) claims of denial of FAPE, which are as follows in descending order of strictness (Zirkel & Bauer, 2016):

- per se approach = any shortfall more than de minimis
- materiality alone approach = any substantial shortfall
- materiality/benefit approach = any substantial shortfall that results in substantive loss of educational benefit

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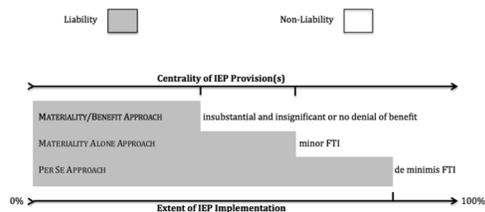
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## FTI FAPE – Visual View

The Three Approaches to Failure-to-Implement (FTI) Claims of Denial of FAPE



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## Jurisdictional Map - Federal Circuits



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### FTI FAPE - Applications

The distribution to date is largely limited to the following jurisdictions:

- per se approach – none (compare complaint procedures avenue under the IDEA)
- materiality approach – 9th Cir. (*Van Duyn*), 11th Cir. (*L.J.*) + D.C. lower courts (proportionality)
- materiality/benefit approach – 5th Cir. (*Bobby R.*) + 3d Cir. and 4th Cir. (conflated)

Most of the rest are either hybrid (e.g., 2d Cir.) or undeveloped.

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## Dimension 4: Ability to Implement

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### Ability to Implement

This fourth dimension, for which the claim of denial of FAPE is that the proposed placement is not capable of implementing the IEP, is just emerging. Its contours are relatively unsettled at this point (Zirkel, 2017a).

The leading jurisdiction is the Second Circuit, but the intervening factors that contribute to the lack of clarity are the peculiarities of New York City and the qualified four-corners approach.

It has also arisen in D.C., 4th Cir., D. Mass., and E.D. Pa. cases.

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### Ability to Implement

The conceptual problems primarily concern the thorny issues of the applicable institutional unit of analysis: placement v. program and district v. school.

The evidentiary problems primarily focus on the scope and nature of the proof, including the extent to which it is only speculative.

Finally, the intervening variable of judicial deference to school authorities is not a clearly settled factor in these cases.

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### *Practical Implications*

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### Tentative Take-Aways

Beware of prevailing views in publications and presentations that fuse and confuse legal requirements with professional recommendations. Instead, for FAPE and other IDEA issues,

- (1) become legally literate about the legal standards that apply in your jurisdiction, and
- (2) make prudent cost-benefit decisions as to your resource allocation priorities for proactive policies, procedures, and practices

The focus should be on locally effective educational outcomes, with “due weight” for risk management in terms of both the investigative and adjudicative avenues of IDEA enforcement.

- the investigative avenue = state complaint process (CP)

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### Tentative Take-Aways (cont.)

For procedural FAPE, consider the cost benefit of optimal adherence to each of the relevant procedures, with special emphasis on parental participation and student progress and with due weight to your local school and community culture. Remember, CP tends to be one-step compliance-oriented.

For substantive FAPE, focus on best practices for measuring and attaining maximum student progress; however, duly differentiate the applicable legal standard, which continues to provide professional latitude, especially if your justification for the individual's outcomes are cogent in light of the child's potential and justifiable LRE context.

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### Tentative Take-Aways (cont.)

For FTI FAPE, consider adopting the per se approach as a matter of best practice, with due attention to the applicable legal approach in your jurisdiction, with compensatory education as an immediate step for any shortfalls that are more than de minimis. CP tends to use this approach, whereas the materiality approach will apply in your adjudicative arena.

For ability to implement, make sure that the proposed school has the facilities, including necessary equipment, and the personnel, including legally applicable qualifications, to reasonably effectuate the provisions, including goals, of the child's IEP.

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\* Free download, along with monthly legal alerts, at [perryzirkel.com](http://perryzirkel.com)

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