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The Individuals with Disabilities Education Act (IDEA)[1] is the major growth sector within K–12 education litigation.[2] The "central pillar of the IDEA"[3] is the public schools' obligation to provide each eligible student, via an individualized educational program (IEP),[4] a "[f]ree appropriate public education" (FAPE),[5] which in turn accounts for the bulk of IDEA litigation.[6]

Based on the Supreme Court's landmark IDEA decision, *Board of Education of Hendrick Hudson Central School District v. Rowley*, the two long-established dimensions of FAPE are procedural and substantive.[7] More specifically, the *Rowley* Court enunciated the following two-part test for determining whether the school district met its FAPE obligation: (a) Did the school district comply with the various applicable procedures? and (b) Is the IEP "reasonably calculated to enable the child to receive educational benefits?"[8] For

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1 20 U.S.C. §§ 1400–1419 (2012).

2 *E.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (revealing the upward trajectory of IDEA litigation within the leveling off of K–12 litigation within the past three decades).

3 Sytsema v. Acad. Sch. Dist., 538 F.3d 1306, 1312 (10th Cir. 2008).

4 20 U.S.C. § 1414(d)(1)(A) (2012). The IEP is the "cornerstone" of this central pillar and represents the detailed specification of the individual eligible child's FAPE, which the required team members, including the parents, have agreed upon. Murray v. Montrose Cty. Sch. Dist. RE-1J, 51 F.3d 921, 923 n.3 (10th Cir. 1995).

5 20 U.S.C. § 1412(a)(1) (2012).

6 *E.g.*, Perry A. Zirkel, *Case Law under the IDEA*, IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS 709 (2014) (showing the distribution of published court decisions under the IDEA). This predominance is based on not only the cases specific to the issue of FAPE but also those in the overlapping category of remedies for denials of FAPE, particularly tuition reimbursement and compensatory education. *See, e.g.*, Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013) (analyzing procedural and substantive denials of FAPE in IDEA hearing/review officer and court decisions for the period 2000–2012 in terms of the resulting remedial relief).

7 458 U.S. 176 (1982).

8 *Id.* at 207.

the procedural side, the subsequent lower court decisions developed variations of a two-step harmless error approach[9] that Congress codified in the 2004 amendments of the IDEA.[10] For the substantive side, the subsequent lower court decisions developed a corresponding variety of approaches, largely based on whether the requisite educational benefit must be "meaningful"[11]—an issue currently before the Supreme Court.[12]

In recent years, however, a third dimension of FAPE, which *Rowley* did not address, has become increasingly prominent. More specifically, and perhaps simply a sign of the evolution of the IDEA, in some cases the plaintiff-parents have asserted a denial of FAPE

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9 For an overview of these variations that typically required preponderant proof of not only one or more procedural violations (as the first step) but also a prejudicial substantive effect on the student or parent (as the second step), see, for example, Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?*, 15 CONN. PUB. INT. L.J. 1, 3–12 (2016).

10 20 U.S.C. § 1415(f)(3)(E)(ii)(I)-(III) (2012) (requiring as the second step for procedural violations that such violations "(I) impeded the child's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits.").

11 For an overview of these approaches on a circuit-by-circuit basis, see, for example, Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education after Rowley?*, 39 SUFFOLK U. L. REV. 1 (2005); Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 EDUC. L. REP. 1 (2009); Michele L. Beatty, Note, *Not a Bad Idea: The Increasing Need to Clarify Free Appropriate Public Education Provisions under the Individuals with Disabilities Education Act*, 46 SUFFOLK U. L. REV. 529 (2013); Scott Goldschmidt, Note, *A New Idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATHOLIC U. L. REV. 749 (2011). Perhaps the most distinct variation is the four-factor test in the Fifth Circuit. *See, e.g.*, Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997) (examining whether "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated."). For a synthesis of various proposal for revising *Rowley*'s substantive standard, see Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE under IDEA?*, 79 EXCEPTIONAL CHILD. 497, 498–500 (2013).

12 Endrew F. v. Douglas Cty Sch. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015), *cert. granted*, 137 S. Ct. 29 (2016).

based on the school district's failure to implement the IEP.[13] Unlike the procedural and substantive alternatives, this implementation dimension has largely escaped analysis in the legal literature.[14] The early court decisions facing this issue were less than clear about the applicable standard,[15] but—as the subsequent parts of this article show—the case law has developed three alternative approaches.

Principally prepared for the primary adjudicators under the IDEA, impartial hearing officers (IHOs),[16] this article provides a

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13 Referred to herein under the shorthand rubric of "implementation," this failure to implement encompasses the intersecting issues of its extent—(1) particular provision(s) or the entire IEP, and (2) complete or, if partial, how much? Moreover, as a further development in the evolution of special education law, a recent fourth form of alleged denial of FAPE is based on whether the proposed placement has the capacity to implement the IEP. This hybrid of the substantive and implementation dimensions thus far is concentrated largely in New York City cases. *See, e.g.*, M.O. v. N.Y.C. Dep't of Educ., 793 F.3d 236, 244–45 (2d Cir. 2015); GB v. N.Y.C. Dep't of Educ., 145 Supp. 3d 230, 255–56 (S.D.N.Y. 2015); J.W. v. N.Y.C. Dep't of Educ., 95 F. Supp. 3d 592, 603–04 (S.D.N.Y. 2015); S.W. v. N.Y.C. Dep't of Educ., 92 F. Supp. 3d 143, 162 (S.D.N.Y. 2015); *see also* S.T. v. Howard Cty. Pub. Sch. Sys., 627 F. App'x 255, 256 (4th Cir. 2016).

14 For the limited exceptions, see David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Education*, 28 BUFF. PUB. INT. L.J. 71 (2009) (advocating the per se approach); David G. King, Note, Van Duyn v. Baker School District*: A "Material" Improvement in Evaluating a School District's Failure to Implement Individualized Education Programs*, 4 NW. J. L. & SOC. POL'Y 457 (2009) (advocating the materiality approach).

15 *E.g.*, Ross v. Framingham Sch. Comm., 44 F. Supp. 2d 104, 117, 119 (D. Mass. 1999) (distinguishing *Rowley*'s substantive standard but posing three "guidelines" that appeared to incorporate this standard).

16 20 U.S.C. § 1415(f)–(h) (2012) (establishing the administrative adjudication process preceding judicial review, including the option for a second, review officer tier). For a snapshot of the varying state IHO systems, including the trends toward a single tier and full-time administrative law judges, see 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). The other IDEA dispute resolution mechanism, which is purely administrative and largely without judicial review, is the state complaint resolution process. 34 C.F.R. §§ 300.151–300.153; *see generally* Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 EDUC. L. REP. 1 (2015). Finally, the overlapping coverage of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA) provides the corresponding complaint process of the U.S. Department of Education's Office for Civil Rights (OCR). *See, e.g.*, PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (2011).

comprehensive yet concise synthesis of the three approaches to IEP implementation cases.[17]. More specifically, Part I summarizes the materiality/benefit approach, which—like the two-step approach for procedural violations but on a more intertwined basis—requires both a substantial non-implementation and an insufficient benefit.[18] Part II summarizes the materiality-alone approach, which requires only a substantial failure. Part III summarizes the per se approach, which results in a denial of FAPE for any failure to implement beyond one that is clearly *de minimis*.[19] Finally, Part IV provides conclusions and recommendations for IHOs in light of the incomplete precedential pattern to date.[20] The overall purpose is to provide an objective canvassing of the pertinent case law so that IHOs make defensible decisions in IDEA failure-to-implement cases. This purpose is particularly significant for informed and independent choice in the many jurisdictions without clearly settled judicial authority.[21]

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17 The alternative approaches for this issue arise after a threshold determination that the proof is preponderant that the district has not fully implemented the IEP. For examples of cases resolved in the district's favor at this threshold step (by finding full implementation), see L.C. v. Utah State Bd. of Educ., 125 F. App'x 252, 260 (10th Cir. 2005); Rosinsky v. Green Bay Area Sch. Dist., 667 F. Supp. 2d 964, 986–88 (E.D. Wis. 2009); J.W. v. Fresno Unified Sch. Dist., 611 F. Supp. 2d 1097, 1123 (E.D. Cal. 2009); Williams v. Milwaukee Pub. Sch., 58 IDELR ¶ 252, at *6-7 (E.D. Wis. 2012), *aff'd*, 562 F. App'x 672 (7th Cir. 2013). Conversely, the coverage of this article does not extend to related issues separate from the applicable standard. *See, e.g.*, N.D. v. Haw. Dep't of Educ., 600 F.3d 1104, 1117 (9th Cir. 2010) (concluding that a failure-to-implement claim does not trigger the IDEA's stay-put provision). Similarly, it does not extend to the specialized situation of failure-to-implement claims for stay-put cases. *See, e.g.*, L.J. v. Sch. Bd. of Broward Cty., 850 F. Supp. 2d 1315, 1325–26 (S.D. Fla. 2012).

18 *See infra* Part I and accompanying notes 22–40. In this article, "material" and "substantial" (or "significant") are used interchangeably because the cited case law to date has used these terms without differentiation.

19 *See infra* Part II and accompanying notes 41–48.

20 *See infra* Part III and accompanying notes 49–60.

21 The scope does not extend to failure-to-implement case law under Section 504 and the ADA. *See, e.g.*, CTL v. Ashland Sch. Dist., 743 F.3d 524 (7th Cir. 2014) (ruling that minor deviations in implementing 504 plan do not amount to requisite discrimination under § 504); Beam v. W. Wayne Sch. Dist., 67 IDELR ¶ 88 (W.D. Pa. 2016) (denying dismissal of § 504 and ADA failure-to-implement claims upon sufficient allegations of deliberate indifference). The coverage also does not extend to IDEA failure-to-implement claims resolved on threshold

I. THE MATERIALITY/BENEFIT STANDARD

The leading decision for this benefit-based approach is the Fifth Circuit's decision in *Houston Independent School District v. Bobby R.*[22] One way to interpret the court's ruling is to limit the approach to the extent of implementation based on the following part of the court's opinion:

> [W]e conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.[23]

However, the court preceded this statement by setting forth the *Rowley* substantive standard as the framework for its analysis,[24] and further embedded it within the context of the aforementioned[25] Fifth Circuit four-factor approach for substantive FAPE.[26] More specifically, finding no dispute about the first two factors, the *Bobby R.* court not only applied the third factor with this "substantial or significant" non-implementation standard, but also, in direct tandem with it, concluded, as the fourth factor, that the student had received more than trivial benefit from the IEP.[27] The court reinforced this

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adjudicative grounds, such as waiver or statute of limitations, rather than on the merits. *See, e.g.*, C.R. v. Lodi Unified Sch. Dist., 68 IDELR ¶ 134 (E.D. Cal. 2016) (dismissing the claim for failure to exhaust the available administrative remedy); Ricci v. Beach Grove Sch., 68 IDELR ¶ 67 (N.D. Ohio 2016) (ruling that plaintiff waived their claim by failing to address it in their opening brief and to develop it with supporting legal authority).

22 200 F.3d 341 (5th Cir. 2000).

23 *Id*. at 348–49 (citing Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd on other grounds*, 932 F.2d 551 (6th Cir. 1991)).

24 *Id*. at 347 ("Therefore, the issue is whether the IEP was 'reasonably calculated to enable [the child] to receive an educational benefit.'").

25 *See supra* note 11.

26 *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d at 347–48.

27 *Id*. at 349–50. For the intertwining of the substantial failure and educational benefit steps, see *id*. at 349 ("[if] significant provisions of [the] IEP were followed, … [then] he received an educational benefit") and 349 n.2 ("one factor to consider

intertwined two-step interpretation with its summative benefit-based conclusion.[28]

In its subsequent decision in *Houston Independent School District v. V.P. ex rel. Juan P.*, the Fifth Circuit reaffirmed its two-step approach, and clarified that the question of educational benefit is relevant to *both* steps of the test.[29] In particular, the court explained that in determining whether a school district has failed to implement "substantial or significant" provisions of the IEP, which is step one, the trier of fact should consider, among other factors, whether the student derived an educational benefit from the IEP services that the district provided.[30] Next, clarifying the second step, the court emphasized that the "ultimate legal issue" is whether the child "was receiving a meaningful educational benefit from the services provided for her under her IEP."[31]

Additionally, other decisions within and beyond the Fifth Circuit that relied on *Bobby R.* have also applied this intertwined two-step analysis.[32] For example, in a post-*Bobby R.* decision within the Fifth Circuit, a federal district court rejected the parents' implementation claim by finding overall benefit as determinative of this test: "[I]f the IEP would have been acceptable with the level of services actually

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under an *ex post* analysis would be whether the IEP services that were provided actually conferred an educational benefit").

[28] *Id.* at 350 ("In sum, we find that the IEP was reasonably calculated to provide [the child] a meaningful educational benefit . . . . ").

[29] 582 F.3d 576, 587–88 (5th Cir. 2009).

[30] *Id.* at 587 ("What provisions are significant in an IEP should be determined in part based on 'whether the IEP services that were provided actually conferred an educational benefit.'") (quoting *Bobby R.*, 200 F.3d at 349 n.2).

[31] *Id.* at 591. The court ultimately concluded that the child did not receive meaningful educational benefit, rejecting evidence of passing grades and advancement as "the product of unapproved deviations from the IEP." *Id.* at 590–91.

[32] *See, e.g.*, B.B. v. Catahoula Parish Sch. Dist., 62 IDELR ¶ 50, at *10 (W.D. La. 2013) (citing *Bobby R.* for the proposition that "[s]ignificant provisions are determined in part based on whether the IEP services that were provided actually conferred an educational benefit"); Slama v. Indep. Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 889 (D. Minn. 2003) (intertwining significant/substantial with educational benefit); Manalansan v. Bd. of Educ. of Baltimore City, 35 IDELR ¶ 122, at *10–12 (D. Md. 2001) (borrowing second step from procedural FAPE).

provided, then the implementation must have been adequate."[33] Conversely, in a decision in the Fourth Circuit, a federal district court ruled in favor of the parents' failure-to-implement claim, finding not only that one of the three alleged failures was substantial[34] but also that the IEP did not result in educational benefit.[35] A pair of subsequent Fourth Circuit decisions appeared to adopt this intertwined test by ultimately relying on lack of benefit, but the adoption was less than clear-cut due to conflation of the two steps.[36]

Similarly less than definitively, the Third Circuit appears to have adopted the two-part materiality/benefit approach, having interpreted and applied the *Bobby R.* test as follows:

> To prevail on a claim that a school district failed to implement an IEP, a plaintiff must show that the school failed to implement substantial or significant provisions of the IEP, as opposed to a mere *de minimis* failure, such that the disabled child was denied a meaningful educational benefit.[37]

The ambiguity is the use of "such that" in this formulation. Rather than the two-step categorization, an alternate interpretation is that materiality equates to benefit, thus being a one-step *Rowley* benefit test. Contributing to this lack of clarity, the Third Circuit, in another more recent unpublished decision, cited *Bobby R.*, but without

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[33] Clear Creek Indep. Sch. Dist. v. J.K., 400 F. Supp. 2d 991, 996 (S.D. Tex. 2005*)*; *see also* Reyes v. Manor Indep. Sch. Dist., 67 IDELR ¶ 33, at *10 (W.D. Tex. 2016) (rejecting failure-to-implement claim in light of student's benefit); Corpus Christi Indep. Sch. Dist. v. C.C., 59 IDELR ¶ 42 (S.D. Tex. 2012) (finding only de minimis failure to implement within four-factor analysis that also found sufficient benefit); L.P. v. Longmeadow Pub. Sch., 59 IDELR ¶ 169 (D. Mass. 2012) (finding implementation deficiencies that did not result in requisite loss of benefit); Doe v. Hampden-Wilbraham Reg'l Sch. Dist., 715 F. Supp. 2d 185, 198 (D. Mass. 2010) (rejecting failure-to-implement claim where the "administrative record support[ed] a conclusion that the services [the child] received were sufficient to permit him to benefit").

[34] J.P. v. Cty. Sch. Bd., 447 F. Supp. 2d 553, 568–74 (E.D. Va. 2006), *rev'd on other grounds*, 516 F.3d 254 (4th Cir. 2008).

[35] *J.P. v. Cty. Sch. Bd.*, 447 F. Supp. 2d at 587.

[36] O.S. v. Fairfax Cty. Sch. Bd., 804 F.3d 354, 360–61 (4th Cir. 2015); Sumter Cty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484–86 (4th Cir. 2011).

[37] Melissa v. Sch. Dist. of Pittsburgh, 183 F. App'x 184, 187 (3d Cir. 2006) (citing *Bobby R.*, 200 F.3d at 349).

mentioning the second step, possibly because the court found that any non-implementation was *de minimis*.[38] After both of these decisions, the lower courts in the Third Circuit have largely, but not entirely, followed the intertwined two-step approach.[39]

Finally, a lower court in the Tenth Circuit issued an unpublished decision that did not cite *Bobby R.*, but nevertheless used the child's reasonably calculated benefit to contribute to the conclusion that the discrepancies in implementation were minor.[40] Thus, the approach was not distinctly clear.

II. THE MATERIALITY-ALONE APPROACH

The leading case for the materiality approach is the Ninth Circuit's 2-to-1 decision in *Van Duyn ex rel. Van Duyn v. Baker School District 5J*.[41] Although citing the "substantial or significant" language of *Bobby R.* with approval,[42] the *Van Duyn* majority opinion diverges from the Fifth Circuit standard by articulating a one-step test that does *not* require proof of denial of educational benefit:

> [W]e hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the

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38 Fisher v. Stafford Twp. Bd. of Educ., 289 F. App'x 520, 524 (3d Cir. 2008).

39 Butler v. Mt. View Sch. Dist., 61 IDELR ¶ 290, at *4 (M.D. Pa. 2013); Shadie v. Forte, 56 IDELR ¶ 71, at *4 (M.D. Pa. 2011), *aff'd on other grounds sub nom.* Shadie v. Hazleton Area Sch. Dist., 560 F. App'x 67 (3d Cir. 2014); High v. Exeter Twp. Sch. Dist., 54 IDELR ¶ 17, at *4 (E.D. Pa. 2010); Vicky M. v. Ne. Educ. Intermediate Unit, 689 F. Supp. 2d 721, 735 (M.D. Pa. 2009); Derrick F. v. Red Lion Area Sch. Dist., 586 F. Supp. 2d 282, 299 (M.D. Pa. 2008); *cf.* J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 362, 378–79 (D. Del. 2010) (relying on lack of materiality based on *Bobby R.*, but separately mentioned benefit as part of the overall standard based on *Rowley*). *But see* Sch. Dist. of Phila. v. Drummond, 67 IDELR ¶ 170 (E.D. Pa. 2016); Sch. Dist. of Phila. v. Williams, 66 IDELR ¶ 214 (E.D. Pa. 2015) (denial of FAPE based on materiality alone).

40 M.S. v. Utah Sch. for the Deaf & Blind, 64 IDELR ¶ 11 (D. Utah 2014), *vacated on other grounds*, 822 F.3d 1128 (10th Cir. 2016).

41 502 F.3d 811 (9th Cir. 2007).

42 *Id.* at 821. The Ninth Circuit also cited with agreement an Eighth Circuit decision, which addressed the implementation issue only indirectly. Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

> services a school provides to a disabled child and the services required by the child's IEP . . . . [W]e clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail.[43]

The first difference is that the material failure in implementation under *Van Duyn* is in relation to the extent of the discrepancy in services, whereas under *Bobby R.* it is in relation to substantial or significant provisions of the IEP. Second, the *Van Duyn* opinion leaves no doubt that, contrary to the *Bobby R.* approach, evidence of educational benefit is not a mandatory component of the decisional calculus.[44] Nevertheless, the difference is arguably more a matter of shading than a bright line, because the *Van Duyn* court qualified that "the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided."[45]

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[43] *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d at 822. Applying this standard, the majority concluded that the failures were not material, thus deciding in favor of the defendant district. However, the dissent reached the opposite conclusion based on a per se analysis. *Id.* at 827 (Ferguson, J., dissenting) ("A school district's failure to comply with the specific measures in an IEP to which it has assented is, by definition, a denial of FAPE, and, hence, a violation of the IDEA.").

[44] *Id.* at 821 n.3 (explaining that the discussion of educational benefit in *Bobby R.* "was responsive to one of [the] . . . factors that govern in the Fifth Circuit," and that such factors are not binding within the Ninth Circuit). The court also noted that it "would disagree with *Bobby R.* if it meant to suggest that an educational benefit in one IEP area can offset an implementation failure in another." *Id.*

[45] *Id.* at 822. The court added the following explanation by way of example: "For instance, if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material." *Id.* For examples of subsequent lower court decisions in the Ninth Circuit where this factor proved fatal for the parents' claim, see Meares v. Rim of the World Sch. Dist., 66 IDELR ¶ 39 (C.D. Cal. 2015); Tyler J. v. Dep't of Educ., State of Haw., 65 IDELR ¶ 45 (D. Haw. 2015); Alex U. v. Dep't of Educ., State of Haw., 62 IDELR ¶ 104, at *7 (D. Haw. 2014) (concluding that "[p]ursuant to *Van Duyn*, the evidence of educational progress indicates that there was no material shortfall in instruction and services for [the child]"). Other lower court decisions in the Ninth Circuit were resolved short of this non-essential factor. *See, e.g.*, C.L. v. Lucia Mar Unified Sch. Dist., 62 IDELR ¶ 202 (C.D. Cal. 2014), *aff'd mem.*, 646 F. App'x 524 (9th Cir. 2016) (rejecting

Various federal district courts have followed the *Van Duyn* approach—the largest concentration of such courts outside the Ninth Circuit being in the District of Columbia.[46] This line of decisions has developed a qualified proportionality standard for materiality. For example, in *Wilson v. District of Columbia*, the court evaluated "the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific *service that was withheld."*[47] Examples in other jurisdictions are generally limited to scattered, largely unpublished decisions.[48]

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two separate failure-to-implement claims based on fidelity and reasonableness, respectively).

[46] *See, e.g.*, James v. District of Columbia, 2016 U.S. Dist. LEXIS 80370 (D.D.C. June 21, 2016); Damarcus S. v. District of Columbia, 2016 U.S. Dist. LEXIS 67178 (D.D.C. May 23, 2016); Holman v. District of Columbia, 153 F. Supp. 3d 386, 393 (D.D.C. 2016); Joaquin v. Friendship Pub. Charter Sch., 66 IDELR ¶ 64, at *4–5 (D.D.C. 2015); Johnson v. District of Columbia, 962 F. Supp. 2d 263, 269 (D.D.C. 2013); Turner v. District of Columbia, 952 F. Supp. 2d 31, 40–41 (D.D.C. 2013); Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 (D.D.C. 2012); Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275–76 (D.D.C. 2011); S.S. v. Howard Rd. Acad., 585 F. Supp. 2d 56, 68 (D.D.C. 2008); Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008). These decisions represent a gradual shift in the jurisdiction's approach from those before the Ninth Circuit's decision in *Van Duyn*, which were not clearly limited to the first step in *Bobby R*; *see, e.g.*, Catalan v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Nevertheless, the D.C. Circuit has not yet specifically addressed this issue, and the foregoing district court decisions often cite *Bobby R.* and/or *Van Duyn* without clear distinction or demarcation.

[47] *Wilson*, 770 F. Supp. 2d at 275. The post-*Wilson* cases have focused on proportionality rather than centrality. As one of the recent D.C. decisions explained, "a material deviation from the prescribed IEP is *per se* harmful under IDEA . . . . The "crucial measure" under the materiality standard is the "proportion of services mandated to those provided" and not the type of harm suffered by the student." *Holman,* 153 F. Supp. 3d at 393 (citing *Wilson*).

[48] *See, e.g.*, Ms. M. v. Falmouth Sch. Dep't, 67 IDELR ¶ 265 (D. Me. 2016) (rejecting the magistrate judge's harmless-error approach); Sch. Dist. of Phila. v. Williams, 66 IDELR ¶ 214, at *6 (E.D. Pa. 2015) (citing *Van Duyn* for the proposition that a party challenging the implementation of an IEP need not demonstrate educational harm to prevail); Colon-Vazquez v. Dep't of Educ. of P.R., 46 F. Supp. 3d 132, 143-44 (D.P.R. 2014) (same); P.K. v. Middleton Sch. Dist., 56 IDELR ¶ 105, at *4 (D.N.H. 2011) (same); Burke v. Amherst Sch. Dist., 51 IDELR ¶ 220, at *8 (D.N.H. 2008) (same). For an early iteration, see Gillette v.

III. PER SE APPROACH

Finding a denial of FAPE based on any proven lack of complete implementation of IEP provisions beyond a clearly *de minimis* shortfall is thus far without binding case law authority. Instead, the judicial support is limited to the Ninth Circuit panel's dissenting opinion in *Van Duyn*.[49]

Yet, the reasons for a per se approach are rather compelling. The reasons include the following: 1) the IEP represents the district's commitment as the result of the mutual determination or partnered negotiations with the parents for FAPE;[50] 2) this commitment, as reflected in the "four corners" approach to the IEP's FAPE used in *R.E. v. New York City Department of Education*[51] and *Sytsema ex rel. Systema v. Academic School District No. 20*,[52] is, in effect, contractual;[53] 3) the IDEA and its regulations unconditionally require districts to provide the special education and related services specified in the IEP;[54] 4) FAPE, as the IEP team has specified in the IEP, is not only a district obligation but also a unitary concept, thus

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Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd on other grounds*, 932 F.2d 551 (6th Cir. 1991)).

49 Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 827 (9th Cir. 2007) (Ferguson, J., dissenting).

50 Given the lack of differentiation and precision in the substantive definition of FAPE, the partnering process recognizes the likelihood of differing subjective perceptions of the reasonable calculation of benefit. The implementation of the team process may well entail negotiations in either an informal or, when the parents and/or districts bring their attorneys, a more formal sense. See, e.g., Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 194 (2005) (analogizing the IEP process to a private contract and observing that "the negotiation process leading to the formulation of an IEP is . . . crucial").

51 694 F.3d 167, 186 (2d Cir. 2012).

52 538 F.3d 1306, 1315 (10th Cir. 2008).

53 Although the IEP is not formally a contract, as the commentary to the original IDEA regulations recognized, it has the same binding effect in terms of documenting the district's legal obligation to provide FAPE. As the commentary to the current regulations make clear, the IEP amounts to the district's "commitment of resources." 71 Fed. Reg. 46,667 (Aug. 6, 2006).

54 20 U.S.C. § 1401(9)(D); 34 C.F.R. § 300.323(c)(2).

not subject to further differentiation;[55] 5) as the *Van Duyn* dissent observed, "[j]udges are not in a position to determine which parts of an agreed-upon IEP are or are not material. . . . [and judicial] review is not appropriate where, as here, all parties have agreed that the content of the IEP provides FAPE";[56] and 6) to the varying but notable extent it plays a role in the materiality/benefit and materiality-alone approaches, *Rowley* did not address this dimension of FAPE at all and reducing the implementation's commitment to its "rather sketchy" substantive standard[57] renders this dimension, like procedural FAPE,[58] superfluous. With the exception of occasional absences, which may be regarded as *de minimis*, the IDEA's administering agency has provided some support for this strict interpretation.[59] In any event, the IDEA's complaint resolution process and the corresponding § 504/ADA complaint resolution process, which are enforcement mechanisms alternative to the IDEA

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[55] On one side, a court lacks authority to order remedial relief under the IDEA in the absence of a denial of FAPE. E.g., N.W. v. Boone Cty Bd. of Educ., 763 F.3d 611 (6th Cir. 2014) (reversing an award of tuition reimbursement where there was no finding that the district had denied FAPE). On the other side, where there is a denial of FAPE, the remedy is generally unitary without regard to what a district may regard as partial or extra FAPE. See, for example, Linda E. v. Bristol Warren Reg'l Sch. Dist., 758 F. Supp. 2d 75 (D.R.I. 2010) (rejecting district's claim of partial provision of services). Similarly, with the exception of equitable circumstances, in tuition reimbursement cases, the reimbursement is for the full cost of the unilateral placement even if it arguably exceeds the substantive standard for FAPE. Thus, like pregnancy, FAPE is a matter of yes or no without any gradations. The clarity of the dichotomous nature of FAPE is particularly acute in implementation, as compared with formulation, cases.

[56] 502 F.3d at 827.

[57] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982).

[58] For the two-step, harmless error approach for procedural FAPE, see *supra* notes 9–10 and accompanying text.

[59] Letter to Balkman, 23 IDELR 646 (OSEP, April 10, 1995) (interpreting the IDEA as requiring the district to implement all of the special education, including related services, identified in the IEP with the sole exception of occasional personnel absences not associated with the student's disability). The agency's more recent policy letter clarified that whether such interruptions of service constitute a denial of FAPE "is an individual determinantion that must be made on a case-by-case basis." Letter to Clarke, 48 IDELR ¶ 77 (OSEP, Mar. 8, 2007). However, its accompanying brief reference to the "impact . . . on the child's progress" left the overall implementation approach less than clear-cut. *Id*.

adjudicative process,[60] both tend to apply the per se approach.[61]

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[60] See, for example, Perry A. Zirkel & Brooke L. McGuire, *A Roadmap of Legal Dispute Resolution for Students with Disabilities*, 23 J. SPECIAL EDUC. LEADRSHIP 100 (2010) (canvassing the adjudicative and investigative enforcement processes for the overlapping coverage of the IDEA and both Section 504 and the ADA).

[61] For these alternative avenues, *see supra* note 16. For the IDEA's state education agency (SEA) complaint resolution process examples, see Paramount Sch. of Excellence, 115 LRP 3638 (Ind. SEA Dec. 22, 2014) (ordering corrective action where school failed to implement child's behavior intervention plan "as written"); Baltimore City Pub. Sch., 115 LRP 17134 (Md. SEA Sept. 4, 2014) (finding a violation where the district "did not ensure that the IEP was implemented as determined by the IEP team."); River Valley Sch. Dist., 114 LRP 43710 (Wis. SEA Aug. 21, 2014) (finding non-compliance where records demonstrated that the district "did not provide all of the required speech and language therapy sessions"); Hillsborough Cty. Sch. Dist., 114 LRP 47356 (Fla. SEA June 23, 2014) (finding per se non-compliance with child's IEP and awarding minute-for-minute compensatory speech therapy services); Pinellas Cty. Sch. Dist., 114 LRP 47346 (Fla. SEA June 16, 2014) (ordering minute-for-minute compensatory language therapy where "[r]ecords indicated that the student was not provided with all minutes of language therapy as specified in the IEPs that were in effect during the period of inquiry"). The corresponding OCR examples are similarly frequent, but some of them are less clear-cut because in recent years they often—but not always—end in voluntary resolution agreements that are generally inconclusive in terms of the remedial effect. *See, e.g.*, Cmty. Consol. Sch. Dist. 15, 115 LRP 51407 (OCR Aug. 19, 2015); 115 LRP 51407 (OCR Aug. 19, 2015); Newton Cty. (GA) Sch. Dist., 115 LRP 40979 (OCR Apr. 24, 2015) (acknowledging district's agreement to resolution agreement before completion of failure-to-implement investigation); Puerto Rico Dep't of Educ., 66 IDELR ¶ 228 (OCR 2015); Lindenhurst (NY) Pub. Sch., 115 LRP 3328 (OCR Nov. 14, 2014) (finding, via investigation, failure to implement related services in child's IEP—resulting in a voluntary resolution to provide compensatory education services if IEP team determines they are needed); Los Angeles (CA) Unified Sch. Dist., 115 LRP 24936 (OCR Dec. 22, 2014) (finding, via investigation, violation for failing to implement behavior intervention plan in IEP, resulting in district's agreement (without admitting violation) to provide training and compensatory education); San Marino (CA) Unified Sch. Dist., 115 LRP 55823 (OCR Aug. 26, 2015) (finding, via investigation, that failure to implement here amounted to significant change in placement, resulting in a resolution agreement providing reimbursement and possible compensatory education); *cf.* Sunflower Cty. (MS) Consol. Sch. Dist., 65 IDELR ¶ 182 (OCR 2014) (acknowledging that any adverse effects of denial of FAPE may be relevant to the remedy). However, in contrast with OCR applications of § 504, the courts, in failure-to-implement cases, require evidence of deliberate indifference. *See, e.g.*, J.S. v. Houston Cty. Bd. of Educ., 66 IDELR ¶ 8, at *4 (M.D. Ala. 2015).

IV. CONCLUSION AND RECOMMENDATIONS

A. Jurisdictional Distribution to Date

The appropriate approach for failure-to-implement claims of denial of FAPE is not clearly settled in most jurisdictions. IHOs in these jurisdictions need to carefully recognize and resolve the issue of which approach applies.[62] In partial contrast, the Fifth Circuit[63] and, less conclusively, the Third[64] and Fourth[65] Circuits have adopted the hybrid materiality/benefit approach, whereas the Ninth Circuit (with less precedential weight) and the district courts in the D.C. Circuit have adopted the materiality-alone approach.[66] However, even in these seemingly settled jurisdictions, the dividing line between these two approaches is blurry.

Reflecting the less than bright line between these two approaches, two other circuits are not as clear-cut as to which one that they have adopted. More specifically, reflecting the lack of clear and consistent differentiation between *Bobby R.* and *Van Duyn*, the Second and Sixth Circuits have straddled these two approaches. In a brief unpublished decision in *A.P. v. Woodstock Board of Education*,[67] the Second Circuit cited both cases but did not reach the possible benefit-based second step due to lack of a material deficiency.[68]

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62 At the same time, if the application results in a ruling of denial of FAPE, IHOs need to consider the separable but interrelated matter of appropriate remedial relief. *See generally* 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). Specifically, in cases under the materiality-alone or per se approaches where the student met the *Rowley* benefit standard, the remedy could be equitable relief in terms of staff training, here directed at consistent and complete IEP implementation. *Cf.* Park v. Anaheim Sch. Dist., 464 F.3d 1025 (9th Cir. 2006).

63 *See supra* notes 22–33 and accompanying text.

64 *See supra* notes 37–39 and accompanying text.

65 *See supra* notes 34–36 and accompanying text.

66 *See supra* notes 41–47 and accompanying text.

67 370 F. App'x 202 (2d Cir. 2010).

68 Reflecting this same ambiguity, two subsequent lower court decisions in the Second Circuit (after citing *Bobby R.* and *A.P.)* concluded that the extent of non-implementation was not material. Thus, the court concluded that it need not

Subsequently, the Sixth Circuit's unpublished decision in *Woods v. Northport Public Schools* cited *Bobby R.*, applied the materiality standard, and then reached the same result, via *Rowley*, without clarifying whether the role of the benefit standard was *essential or, per Van Duyn*,[69] merely supplementary.[70]

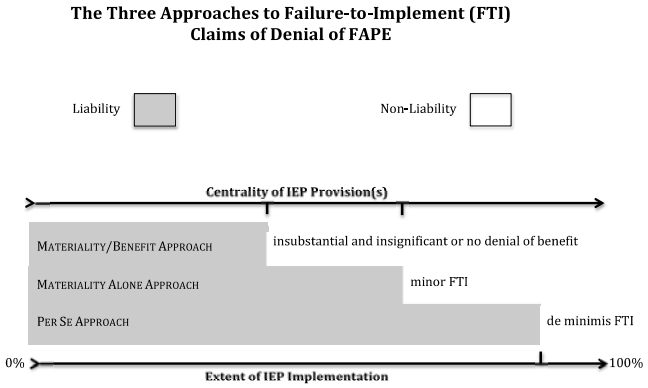
The following figure provides an overall picture of the three approaches, with the upper boundary label of "centrality" simply intended as shorthand for the *Bobby T.* "substantial or significant" language.[71]

consider benefit in its analysis as a second step. V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118–19 (N.D.N.Y. 2013); D.D-S. v. Southold Union Free Sch. Dist., 57 IDELR ¶ 164, at *11–12 (S.D.N.Y. 2011), *aff'd mem*., 506 F. App'x 80 (2d Cir. 2012). In an intervening decision, the court briefly and laternatively relied on *Rosley*'s substantive standard and the material failure standards. R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 (S.D.N.Y. 2012). The most recent lower court decision was similarly ambiguous. R.E. v. Brewster Cent. Sch. Dist., 180 F. Supp. 3d 262, 271 (S.D.N.Y. 2016) (finding the deficiency de minimis and interweaving the failure-to implement and able-to-implement theories).

[69] *See supra* note 44 and accompanying text.

[70] 487 F. App'x 968, 975–76 (6th Cir. 2012); *see also* S.B. v. Murfreesboro City Sch., 67 IDELR ¶ 117 (M.D. Tenn. 2016) (referring to *Van Duyn* materiality approach and *Rowley* benefit standard without clarifying their relationship). As a possible alternative approach some courts may be applying *Rowley* as a separate issue, depending in part on the structure of the parents' claims and the hearing officer's decision.

[71] *See supra* text accompanying note 23.



Two features of this figure bear emphasis. First, the upper and lower arrowed are not entirely consistent with each other. Second, the interior dividing lines are missing. Just as the cursory citations to *Bobby R.* and *Van Duyn* in the case law to dare are not consistently and precisely distinctive, the development of the specific standards awaits thoughtful decision-making on a case-by-case basis, starting with IHOs.

B. Practice Pointers for IHOs Nationally

The recommendations for IHOs follow the sequence of a jurisdictional continuum with regard to the three alternative approaches. First, for the rather small settled groupings of the Fifth and Ninth Circuits, IDEA IHOs need to adhere to the applicable precedents for failure-to-implement rulings. In particular, IHOs within the Fifth Circuit should be mindful that evidence of educational benefit is the central focus of the decisional calculus, while IHOs within the Ninth Circuit (and the District of Columbia) must treat evidence of benefit as a supplementary, non-mandatory

component[72] of their analysis. Moreover, IHOs within the Fifth Circuit should also bear in mind that evidence of educational progress is inapplicable in situations where the child's performance is the product of "unapproved deviations from the IEP."[73] Finally, the focus in the Ninth Circuit (and the District of Columbia) is on extent (or discrepancy) of implementation, whereas the focus in the Fifth Circuit is on the centrality of the IEP provisions at issue—that is, whether they are substantial or significant.[74]

Next, for the Third and Fourth Circuits, where the choice between the first two approaches is only partially clear, IHOs have the opportunity to contribute to a well-chosen solidified standard. Similarly, but even more strongly in light of their straddling position between these two approaches, the Second and Sixth Circuits present IHOs with the challenge of resolving the choice between *Bobby R.* and *Van Duyn*.

Finally, for all of the other circuits, which only have a scattering of largely unpublished lower court decisions[75] and a paucity of decisional support for the per se approach to date, IHOs have a full opportunity and responsibility to shape the law appropriately for

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72 As noted in Part II, *supra*, IHOs applying the *Van Duyn* approach should properly focus on "the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Wilson v. Dist. of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011); *see also* M.S. v. Utah Sch. for the Deaf & Blind, 64 IDELR ¶ 11, at *11–12 (D. Utah 2014); L.J. v. Sch. Bd. of Broward Cty., 850 F. Supp. 2d 1315, 1319–20 (S.D. Fla. 2012).

73 Houston Indep. Sch. Dist. v. VP, 582 F.3d 576, 590–91 (5th Cir. 2009).

74 For early recognition of this distinction, see, e.g., *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007):

> The Fifth Circuit's language [in *Bobby R.*] easily could be misread as contemplating an abstract inquiry into the significance of various "provisions" (however that term may be defined) of the IEP, rather than a contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements. This is a subtle distinction, but, in this court's view, an important one.

75 In crafting their orders, IHOs should avoid the tendency of some lower courts, like *B.F. v. Fulton County School Board*, 51 IDELR ¶ 76, at *21 (N.D. Ga. 2008), to cite *Bobby R.* and *Van Duyn* interchangeably without acknowledging the precise role that educational benefit plays in the analysis (i.e., mandatory versus supplementary).

failure-to-implement claims under the IDEA. Their informed choice as to the applicable approach in the form of well-considered and well-written decisions may well become the judicial law of the land.