Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education

David Ferster

*United States Court of Appeals for the Eleventh Circuit*

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BROKEN PROMISES: WHEN DOES A SCHOOL’S FAILURE TO IMPLEMENT AN INDIVIDUALIZED EDUCATION PROGRAM DENY A DISABLED STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION

DAVID FERSTER†

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I. INTRODUCTION

Alex is an eleven-year-old student with Asperger’s Disorder, a mild form of autism that impairs his social-emotional development, verbal processing, and fine motor skills.1 He has

† Law Clerk, Sr. Judge Emmett Ripley Cox, United States Court of Appeals for the Eleventh Circuit; J.D., summa cum laude, 2009, University of Georgia School of Law; M.Ed., 2005, Kennesaw State University; B.S. Ed., 2000, Edinboro University of Pennsylvania.

1 See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF THE AMERICAN PSYCHIATRIC ASSOCIATION (4th ed. 2000). “Motor delays or motor clumsiness may be noted in the preschool period. Difficulties in social interaction may become more apparent in the context of school [when] particular idiosyncratic or circumscribed interests . . . may appear . . . . As
successfully completed fifth grade at a public elementary school and is excited to transition to the middle school for sixth grade. His learning disabilities, eccentric behavior, and inability to empathize impact his ability to function in a typical school setting. He is prone to fixating on topics unrelated to school, and he engages in behaviors that are not age-appropriate, making it difficult for him to complete academic tasks without regular adult support and supervision. However, Alex is very bright and can complete grade-appropriate assignments when he works in a controlled environment with dedicated, talented teachers.\(^2\)

Had Alex been of school age prior to the 1970s, it is possible he would have never set foot in a classroom, as children with disabilities were systematically denied access to public schools.\(^3\) Alex may not have had the opportunity to learn, thrive or become an independent adult. Today, however, Alex and millions of other disabled students are served in America’s public schools under the Individuals with Disabilities Education Act\(^4\) (IDEA). IDEA guarantees Alex and all disabled students a Free Appropriate Public Education (FAPE).\(^5\)

IDEA requires that Alex be served under an Individualized Education Program (IEP) — a written, individualized curriculum that includes statements of his present levels of performance, special education and related services, annual goals, and supple-

\(^2\) Alex and disabled students like him are often served in general education classrooms. Roughly 54% of special education students receive at least 80% of instruction in the general education setting. See Nat’l Ctr. for Educ. Statistics, Fast Facts, http://nces.ed.gov/fastfacts/display.asp?id=59 (last visited May 10, 2010).

\(^3\) See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 462-63 (1985) (Marshall J., concurring) (“[R]etarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them...Society portray[ed] the ‘feeble-minded’ as a ‘menace to society... responsible . . . for many, if not all, of our social problems.’”).


\(^5\) Id. §§ 1401(9), 1412.
mentary aids that assist him in attaining his annual goals. IEPs are highly individualized, detailed documents. Alex’s IEP, if written well, would guide his teachers and support staff in planning most aspects of his school day. A team consisting of Alex’s parents, a general education teacher, a special education teacher, and a school psychologist meet at least once per year to develop an IEP. The team met this spring at Alex’s elementary school, to plan his transition to the middle school.

Due to Alex’s fixations and inappropriate social behaviors, he needs regular one-on-one support, and his fine motor deficits prevent him from writing legibly. He must use a computer or word processor for all written assignments. While it would be most convenient for the school to offer these supports and services in a self-contained, small group setting, Alex’s IEP team has agreed that because he is capable of completing grade-level work, he would best be served in a general education setting. To better support him in the mainstreamed classroom and with the transition to middle school, Alex’s IEP team agreed to provide one-on-one assistance from a paraprofessional in all classes and access to a portable word processor, so he could type his assignments. The team was confident that given these services, Alex could succeed in attaining his goals and objectives without needing a restrictive, self-contained classroom. However, without these supports and accommodations, the team felt Alex would require a much more

6 Id. § 1414(d)(1)(A).
7 Most disputes over the adequacy of special education services will center on whether an IEP is appropriate for the student. See Pam Wright & Pete Wright, From Emotions to Advocacy: The Special Education Survival Guide 115-31 (2d ed. 2006) (advocating SMART IEPs that are “specific, measurable, use action words, are realistic and relevant, and time-limited.”).
restrictive environment. While Alex’s parents were concerned about their son’s ability to function in the middle school, they left the IEP meeting optimistic, feeling that the supports offered in the IEP would ensure Alex could receive an appropriate education the following school year.

Alex’s fifth grade teachers took the lead role in developing the IEP. They considered the supports and services that most benefitted Alex in the elementary school, primarily the one-on-one aide and word processor, and assumed those same resources were available in the middle school. The middle school, however, does not usually mainstream disabled students into the general education setting. Instead, it places students who need significant supports in self-contained classes, where they receive remedial instruction. Consequently, the middle school does not employ one-on-one aides or offer students personal portable word processors. When Alex arrived for his first day of school, his middle school teachers could not adequately implement the IEP. They were faced with the choice of either placing Alex in the general education setting unsupported, where he would be overwhelmed, or placing him in the self-contained class, where he could work on individualized, grade level assignments and have access to a personal computer on which to complete his work.

The middle school chose to place Alex in a self-contained classroom; the principal promised Alex’s parents he would immediately attempt to hire a one-on-one aide and purchase the necessary equipment to support Alex in the general education classroom. However, two months have passed, and the school has yet to locate a qualified one-on-one aide. Alex is still in the self-

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10 While IDEA includes a preference for mainstreaming special education students and mandates they be served in the least restrictive environment, many schools serve special education students largely in self-contained settings. See generally Kenneth A. Kavale & Steven R. Forness, History, Rhetoric, and Reality: Analysis of the Inclusion Debate, 21 REM. & SPECIAL EDUC. 279, n.5 (2000) (examining history of inclusion debate).

11 Often, middle schools send representatives to elementary school IEP meetings to ensure the IEP better reflects the resources available at the middle school. See 20 U.S.C. § 1414 (d)(1)(B) (2006) (defining IEP team).
contained classroom, and complains often that his assignments are too basic. While his recent standardized test scores show he is performing above grade level and making progress on his IEP goals and objectives, Alex’s parents are not satisfied. They would never have enrolled Alex in the public middle school had they known he would not receive the services set forth in the IEP in the general education setting. They feel the middle school has denied Alex a FAPE.

IDEA provides that students may pursue relief for denial of a FAPE through a due process hearing, and after exhausting administrative remedies, through a civil action in state or federal court. The hearing officer or district court is authorized to grant “appropriate relief” and can award attorneys fees to parents who are prevailing parties. Most commonly, parents seek equitable remedies, such as specific school placements, specialized services, private school tuition, and compensatory education. In Alex’s case, his parents would likely seek an injunction forcing the school to implement his IEP and compensatory education for the two months he has been placed in the self-contained classroom. Unfortunately for Alex, however, under certain interpretations of

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13 Id. § 1415(i)(2) (“any party aggrieved by the findings and decision . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section.”).
14 Id. § 1415(i)(2)(B)(iii).
15 Id. § 1415(i)(3).
IDEA, the school will be found to have offered a FAPE even though it did not fully implement his IEP.

IDEA has generated considerable litigation over what constitutes a FAPE. Disputes over the adequacy of an IEP are relatively common; parents and schools often disagree over which services and supports are necessary for a disabled student to receive an “appropriate” education. Alex’s case, however, presents a different sort of conflict, since the parents and the school were able to reach an agreement over the contents of the IEP. Instead, Alex’s case involves a dispute over implementation of the IEP. Alex’s school has failed to implement his IEP in a timely manner, and his parents allege that this has denied him a FAPE. Few courts have addressed this issue. Some have applied a “materiality standard,” under which a school is found to offer a FAPE even when it fails to implement portions of an IEP as long as those provisions are not deemed substantial, and the student otherwise makes progress on his annual goals. Because Alex progressed on his goals and objectives, and he has completed assignments in the small group classroom similar to those he would receive in the general education setting, the school may be found to have offered a FAPE.

This article contends the materiality standard, while a permissible interpretation of IDEA, is inconsistent with the purpose of the Act to ensure students with disabilities receive a meaningful educational benefit. Instead, this article suggests that courts adopt a per se approach to implementation cases. Whenever a school agrees in an IEP to provide certain services or supports the law should require it fully implement those services.

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20 See infra Part II.B (describing Rowley standard).
21 See id. (describing materiality standard).
II. BACKGROUND

A. Defining Free Appropriate Public Education: The “Some Benefit” standard and the “Meaningful Benefit” standard

The Education for All Handicapped Children’s Act (EAHCA) of 1975\(^{22}\) opened the doors of public schools to students with disabilities. Prior to the Act’s passage, more than one-half of the children with disabilities in the United States did not receive appropriate educational services.\(^{23}\) Today, over six-million students with disabilities are served under the Act in public schools.\(^{24}\) Through EAHCA, Congress not only offered children with disabilities access to public education, but also guaranteed them a free appropriate public education (FAPE).\(^{25}\) While EAHCA has been amended and reauthorized a number of times,\(^{26}\) and is now known as IDEA,\(^{27}\) its original promise remains its purpose today, to ensure every student with a disability receives a FAPE.\(^{28}\)

\(^{23}\) Prior to EAHCA, the right to public education for students with disabilities was recognized by some courts on equal protection and due process grounds. See Pa. Ass’n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (finding state was required to afford disabled children a public education); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.C.D.C 1972) (finding total exclusion of disadvantaged children from public education violated due process clause).
\(^{27}\) While the Act is commonly known as IDEA, some commentators refer to it as the Individuals with Disabilities Education Improvement Act (IDEIA), a reference to the 2004 amendments. See, e.g., Philip T.K. Daniel & Jill Meinhardt, Commentary, Valuing the Education of Students with Disabilities:
IDEA does not clearly articulate standards for FAPE; it defines FAPE as “special education and related services that have been provided at public expense . . . meet the standards of the state educational agency . . . include an appropriate preschool, elementary school, or secondary school education . . . and are provided in conformity with [an] individualized education program . . . .” 29 The Act does not clarify the meaning of “appropriate,” instead leaving to courts the task of developing standards for interpreting the meaning of FAPE.30 Consequently, there has been “an extraordinary amount of litigation”31 regarding FAPE, framed largely by the Supreme Court’s opinion in Board of Education of the Hendrick Hudson Central School District v. Rowley.32

In Rowley, a hearing-impaired student claimed a school denied a FAPE by failing to provide a sign-language interpreter.33 The Rowley decision came early in the life of IDEA, seven years after Congress first enacted the law to “open the schoolhouse doors” to students with disabilities.34 The Court held the school district was not required to provide an interpreter, rejecting the district court’s reasoning that as part of a FAPE, the student was entitled to “an opportunity to achieve [her] full potential commensurate with the opportunity provided to other [non-

28 See 20 U.S.C. § 1400(d)(1)(A) (2006) (stating purpose is “to ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for further educational, employment, and independent living . . . ”).
29 Id. § 1401(9) (emphasis added).
30 See infra Part II.B. (describing standards for FAPE).
31 See Daniel & Meinhardt, supra note 27, at 517.
33 Id. at 176.
The opinion reflects the original intent of the Act, not to ensure an optimal education, but to ensure disabled students have access to public schools. 35

Justice Rehnquist’s majority opinion in Rowley begins by noting that the Act failed to clarify “appropriate education” and left to the courts the responsibility of “giving content” to the requirement. 36 The opinion “gave content” by establishing a “minimalist” 37 definition of FAPE: “implicit in the congressional purpose of providing access to a ‘free and appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” 39 The Court went on to describe FAPE in terms of access to basic services by explaining “the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” 40 The opinion stressed the importance of complying with procedural requirements of the act, 41 establishing a two-step test to analyze FAPE claims:

Therefore, a court’s inquiry in suits brought under 1415(e) (2) is twofold. First, has the state complied with the procedure set forth in the Act? And second, is the

36 See Johnson, supra note 34, at 563 (noting Congress sought to make public education available to handicapped children).
37 Rowley, 458 U.S. at 186.
39 Rowley, 458 U.S. at 200 (emphasis added).
40 Id. at 201 (emphasis added).
41 See id. at 206 (stating that congressional emphasis upon full participation of concerned parties demonstrates that adequate compliance with procedures would in most cases assure what Congress wished in way of substantive content in an IEP).
individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.\textsuperscript{42}

This limiting definition of FAPE appears to protect schools from most substantive claims unless a student’s educational program is not reasonably calculated to enable the child to receive \textit{any} educational benefit.\textsuperscript{43} Some courts have adhered to this definition, dismissing most claims of denial of a FAPE as long as schools provide an IEP containing some version of the enumerated requirements listed in IDEA.\textsuperscript{44} For example, the First Circuit, in \textit{L.T. T.B. ex rel. N.B. v. Warwick School Committee},\textsuperscript{45} considered whether a school offered a FAPE to an autistic child through the school’s curriculum or whether the law required an alternative autism curriculum preferred by the parents.\textsuperscript{46} Finding for the school district, the court held that the program offered by the school was adequate.\textsuperscript{47} Because the school’s program offered \textit{some} educational benefit, the court refused to address the parents’ claim that their preferred curriculum would better serve the needs of the child, explaining “[o]nce the determination is made that the IEP was adequate, that ends the inquiry. We need not consider whether other programs would be better.”\textsuperscript{48} Similarly, in \textit{O'Toole ex rel.}

\textsuperscript{42} Id. at 206-07.
\textsuperscript{43} Id. at 207.
\textsuperscript{44} See, e.g., Sioux Falls Sch. Dist. v. Koupal, 526 N.W.2d 248, 252 (S.D. 1994) (holding teacher training not a related service required in IEP); Alex R. \textit{ex rel.} Beth R. v. Forestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603, 615 (7th Cir. 2004) (denying claim based on defects in behavioral intervention plan (BIP) because IDEA lists only procedural, not substantive BIP requirements).
\textsuperscript{45} 361 F.3d 80 (1st Cir. 2004).
\textsuperscript{46} Id. at 86. The school offered the multi-modality approach of Treatment and Education of Autistic and Related Communication-Handicapped Children (TEACHH). The parents advocated Discreet Trial Training (DTT). Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
O'Toole v. Olathe District Schools Unified School District Number 233, the Tenth Circuit considered whether a school denied FAPE after a hearing impaired child failed to make adequate progress on academic goals in the IEP. The court held for the school, reasoning that IDEA does not require the best possible education for a student, nor require that IEPs be designed for the child to achieve optimal results. The court held the “IEP, even if not optimal, was calculated to, and did, confer educational benefits as required by the IDEA.” This strict interpretation of Rowley, applied in L.T. T.B. and O'Toole, is often referred to as the “some or adequate benefit” test; it has been adopted in the First, Eighth, Tenth, Eleventh and D.C. Circuits. Other circuits, however, apply a more flexible interpretation of Rowley, more favorable to students alleging a denial of a FAPE.

While Rowley appears to tilt the scales in favor of schools with respect to denial of FAPE claims, some courts have developed a broader definition of FAPE, which calls for greater educational benefits. In many cases, schools have been found to have denied a FAPE even though they provided an IEP that conveyed educational benefit. The “some educational benefit”

49 144 F.3d 692, 708 (10th Cir. 1998).
50 Id.
51 Id.
52 Daniel & Meinhardt, supra note 27, at 519 (summarizing interpretations of FAPE since the Rowley decision).
54 See, e.g., Scorah v. Dist. of Columbia, 322 F. Supp. 2d 12, 20 (D.D.C. 2004) (holding student who transferred from public special education program to private school and showed marked improvement was denied FAPE in public school); Fisher v. Bd. of Educ. Christina Sch. Dist., 856 A.2d 552, 559 (Del. 2004) (finding student who made progress under IEP in early grades but later regressed was denied FAPE); L.B. ex rel. K.B. v. Nebo Sch. Dist., 379 F.3d 966,
standard has broadened in many jurisdictions to a “meaningful benefit” standard, under which FAPE requires “significant learning” and calls for “more than trivial educational benefit.” For example, the Sixth Circuit in *Deal ex rel. Deal v. Hamilton County Board of Education* considered, like the First Circuit in *L.T. T.B.*, differing opinions regarding an appropriate autism curriculum. The school offered its “standard ‘eclectic’ program for teaching autistic children,” while the parents preferred an applied behavior analysis approach. Unlike the First Circuit, however, the Sixth Circuit did not solely measure the adequacy of the program offered by the school, and reasoned “there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of a FAPE.” The court concluded it would be insufficient to require a school to provide educational services that offer little more than de minimis educational benefit. Instead, it explained “IDEA requires an IEP to confer a meaningful educational benefit gauged in relation to the child at issue.” This “meaningful benefit test” has been adopted by the Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits.

This shift away from *Rowley*’s minimalist interpretation of FAPE may, in part, reflect evolving views of special education and the purpose of IDEA. *Rowley* interpreted a statute passed when over four-million children with disabilities in the United States did

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978 (10th Cir. 2004) (holding district denied FAPE by placing autistic student in a setting with children with many different types of disabilities).

55 *Ridgewood*, 172 F.3d at 247.

56 See 392 F.3d 840, 845 (6th Cir. 2004).

57 Id. at 845-47.

58 Id. at 862.

59 Id. at 861 (citing Doe *ex rel.* Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989)).

60 Id. at 862. The court reversed the district court’s judgment for school and remanded the case to allow the court to determine whether the IEP offered a meaningful educational benefit. Id. at 865.

61 See Daniel & Meinhardt, supra note 27, at 518-20 (summarizing interpretations of FAPE since the Rowley decision).
not receive appropriate educational services, and one-million were excluded entirely from the public school system. Within this context, the Court interpreted FAPE in terms of access to educational opportunity. Thanks in part to the success of IDEA, however, disabled students no longer face barriers to accessing public schools. The modern focus of IDEA has become the adequacy of the education provided under the Act.

Congress has not altered the statutory definition of FAPE since 1975. Over time though, old words gain new meaning, and what Congress means by FAPE today encompasses more than mere access to the public schools. Through amendments to IDEA

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65 See 20 U.S.C. § 1400(c)(2-3) (2006) (describing increased access to education); see also Id. § 1400(c)(10-12) (describing over-identification of minorities as disabled).
67 During the 2004 IDEA reauthorization process, Congresswoman Susan Davis proposed broadening the definition of FAPE by adding “the language contained in the Supreme Court Decision known as Rowley, which states that the goal for a child with disabilities is the same as for all other children— to have the educational and related services necessary for that child to access the general curriculum.” H.R. Rep. No. 79- 108, at 3 (2003) (summarizing amendments).
68 Legislative history of the original statute focuses on the large numbers of children not receiving special education services. See H.R. Rep. No. 94-332, at 11-12 (1975) (noting 1,750,000 students receive no public schooling). Legislative history of reauthorizations focus on adequacy of services and higher expectations. See H.R. Rep. No. 105-95, at 85 (1997) (describing authorization
over the past quarter-century, Congress has raised the “floor of opportunity” to ensure high expectations for educational achievement, participation in the general curriculum and preparation for independent living in adulthood.\(^6\) IDEA amendments in 1997 imposed new procedural requirements on schools\(^7\) that in effect increase students’ substantive rights to an adequate education.\(^8\) IDEA now calls for IEPs to include thorough descriptions of a student’s social and academic functioning, lists of necessary supports to increase access to general education, and detailed plans for improving academic, social and behavioral functioning.\(^9\) Some courts find that these new requirements conflict with a minimal FAPE standard because providing only some educational benefit could never permit children to attain Congress’s broadened goals for IDEA.\(^{10}\) Congress reauthorized IDEA again in 2004, expanding

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\(^6\) See 20 U.S.C. § 1400(5) (2006) (“Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations, ... in order to meet developmental goals ... and be prepared to lead productive and independent adult lives ...”).

\(^7\) See Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 614, 111 Stat. 73 (codified as amended at 20 U.S.C. §§ 1400-1482 (2006)) (requiring IEPs to provide statements of classroom modifications and “measurable annual goals” sufficient to allow a child to “advance proportionately” toward progress in the general curriculum).

\(^8\) See Tara L. Eyer, Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children With Disabilities, 103 DICK. L. REV. 613, 631 (1999) (“Because the definition of FAPE is primarily procedural, the most facile and effective method to raise the level of substantive rights under the IDEA is to heighten its procedural requirements.”).


\(^{10}\) See Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 864 (6th Cir. 2004) (“Indeed, states providing no more than some educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress.”). But see Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004) (“We do not interpret this statutory language, which simply articulates the importance of teacher training, as overruling Rowley.”).
on some of the 1997 requirements but also amending IEP requirements to focus on substantive outcomes.\textsuperscript{74} As the scope of IDEA has expanded, funding has also increased substantially from two hundred million dollars per year in 1975\textsuperscript{75} to over twenty-six billion dollars per year projected for 2011,\textsuperscript{76} demonstrating commitment to improving special education and related services under IDEA.

By increasing funding and imposing new IEP requirements, Congress may have expanded the scope of IDEA and asked schools to improve education for disabled students.\textsuperscript{77} It clarified the definition of free and appropriate public education by expanding the meaning of “appropriate.”\textsuperscript{78} It should no longer be viewed as a program that “opens the door of public education,”\textsuperscript{79} but it now offers a meaningful education once inside.\textsuperscript{80} Thus, the


\textsuperscript{75} Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 2(e), 89 Stat. 773.


\textsuperscript{77} See H.R. REP. NO. 105-95, at 85 (1997), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:hr095.105.pdf (“Through this legislation the Committee intends to encourage exemplary practices that lead to improved teaching and learning experiences for children with disabilities [that] result in productive independent lives, including employment.”).

\textsuperscript{78} See generally Eyer, supra note 71, at 631 (“Almost every new requirement for the IEP statement is a manifestation of Congress’ stated purpose of achieving greater expectations and educational outcomes for eligible children.”).


\textsuperscript{80} The 2004 amendments of IDEA may affect the interpretation of FAPE. See Mark C. Weber, Reflections on the New Individuals with Disabilities Education Improvement Act, 58 FLA. L. REV. 7, 16 (2006) (describing 2004 amendments). See also Blau, supra note 66, at 6 (claiming coordination of No Child Left Behind requirements into IDEA raises threshold of educational accountability).
“meaningful benefit standard,” applied by a slight majority of the courts of appeals, is considered by many commentators to better reflect the current purpose of IDEA.\(^8\)

### B. IEP Implementation

To comply with IDEA, schools must satisfy the procedural requirements of the Act and provide an appropriate education “in conformity with” an IEP.\(^8\)\(^2\) IDEA has generated much litigation over the contents of IEPs; cases have measured the adequacy of IEPs, analyzing whether they offered FAPE under the “some benefit” or “meaningful benefit” standards.\(^8\)\(^3\) Schools, though, must also implement those IEPs, and IDEA does not include an implementation standard. It leaves open the question: must schools strictly comply with the terms of an IEP, providing each accommodation and service set forth in the plan, or do schools have the freedom to deviate from the IEP, and still be found to offer a FAPE despite a non-material implementation failure as long as the student generally receives an “appropriate” education? If so, is a showing of “some educational progress,” or “meaningful educational progress” sufficient to excuse a failure to implement an IEP? Little case law exists on this issue; most substantive\(^8\)\(^4\) IDEA claims involve challenges to the contents of an IEP.\(^8\)\(^5\) In few cases has a

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\(^8\) See Eyer, supra note 71, at 633-37 (calling for re-examination of Rowley after 1997 IDEA amendments); Valentino, supra note 74, at 167 (“The amendments . . . exhibit intent to implement a heightened substantive meaning of the word ‘appropriate.’”); see also Blau supra note 66, at 18 (advocating a Department of Education Regulation to clarify the standard for FAPE).


\(^8\)\(^4\) IDEA includes procedural provisions, 20 U.S.C. § 1415 (2006), and the substantive FAPE requirement. This analysis considers substantive issues, the adequacy of an IEP and its implementation.

\(^8\)\(^5\) See, e.g., Stephen Lease et al., Annotation, 68 AM. JUR. 2D Schools § 347 (2008) (summarizing cases).
student conceded that an IEP was adequate but alleged that the school denied a FAPE by failing to implement its provisions. Some courts have considered this question and adopted a materiality standard, finding that failures to implement an IEP only deny FAPE if they are substantial or when they prevent the student from receiving educational benefit. This article argues that while the materiality standard may be a permissible interpretation of ambiguous language in IDEA, it is contrary to the purpose of IDEA to provide disabled students with meaningful educational benefit.

C. The Materiality standard

The Fifth Circuit first articulated a materiality standard in *Houston Independent School District v. Bobby R.* The student in *Bobby R.* was entitled to speech therapy under his IEP. The school, however, did not have a qualified speech therapist on staff for one-half of one school year. To compensate for the lost therapy, the school provided twenty-five hours of compensatory speech therapy during the following summer. Also, the school neglected to implement certain IEP modifications and services, including highlighted texts, modified tests, taped lectures, and a multisensory reading program. A hearing officer found these

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86 See Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 818 (9th Cir. 2007) (noting “[w]e have applied the *Rowley* framework in numerous cases ... [but] we have not previously considered challenges to the implementation-as opposed to the content-of an IEP.”) (internal citations omitted).
88 See *infra* Part III (describing ambiguity in FAPE definition calling for services to be provided “in conformity with” an IEP).
89 200 F.3d 341 (5th Cir. 2000).
90 Id. at 344.
91 See id.
92 Id.
93 Id. The school offered compensatory multisensory instruction, but the parents refused to accept these services.
failures constituted a denial of a FAPE, but a district court reversed, finding that the student received a FAPE because “he had shown improvement in most areas of study and therefore had received an educational benefit in accordance with the goals of IDEA.” The Fifth Circuit affirmed, holding that “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 . . . failed to implement substantial or significant provisions of the IEP.” The court ultimately applied the Fifth Circuit version of the Rowley standard to determine if the IEP “conveyed educational benefit.” It emphasized the student’s test scores and grade levels, finding that because improvements were not “trivial,” the district court did not commit clear error in determining the student received educational benefit from the IEP.

The Eighth Circuit articulated a similar standard as the Fifth in Neosho R-V School District v. Clark, in which an implementation failure was deemed substantial so as to deny a FAPE. In Clark, the student’s IEP called for a behavior plan, but for almost an entire school year, the school did not develop and implement such a plan. Applying Rowley, the district court found that because the student needed a behavior management plan and because no plan was timely developed, the IEP was not reasonably calculated to provide an educational benefit. The Eighth Circuit affirmed, finding that the student only made slight academic

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94 Id. at 345 (summarizing district court’s reasoning).
95 Id. at 349. The court cited with approval Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989), which found a failure to provide all the services and modifications outlined in an IEP does not constitute a per se violation of the IDEA.
96 Id. (applying four-step test developed in Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997)).
97 Id. at 349-50.
98 315 F.3d 1022 (8th Cir. 2003).
99 Id. at 1025.
100 Id. at 1026-27 (noting that the analysis set forth in Bobby R. more accurately suits the posture of the case, but the parties did not make that argument).
progress during the school year and the fact that “no cohesive plan was in place to meet . . . behavioral needs support[ed] the ultimate conclusion that [the student] was not able to obtain a benefit from his education.” The Eighth Circuit applied a materiality analysis like in *Bobby R.*, but unlike the speech therapy and other services at issue in *Bobby R.*, the Eighth Circuit found that the failure to implement the behavior management plan was a denial of an “essential element of the IEP that was necessary for the child to receive an educational benefit.”

The Ninth Circuit adopted a materiality standard in *Van Duyn v. Baker School District 5J.* In *Van Duyn*, an autistic student alleged that the school failed to implement key portions of his IEP, including provisions to train teachers, provide the required placement in a self-contained classroom, provide direct teacher engagement, address academic IEP goals, and follow a behavior management plan. An administrative law judge and district court ruled that the school adequately implemented the IEP. The Ninth Circuit affirmed; in doing so, it adopted a materiality standard, reasoning:

[IDEA] counsels against making minor implementation failures actionable given that “special education and related services” need only be provided “in conformity with” the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.

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101 *Id.* at 1029.
102 *Id.* at 1027 n.3.
103 502 F.3d 811 (9th Cir. 2007).
104 *Id.* at 823.
105 *Id.* (noting ALJ ruled the school failed to provide sufficient Math instruction, but this was not an issue on appeal).
106 *Id.* at 821.
The court cited *Bobby R.* and *Clark* with approval and held 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 services a school provides to a disabled child and the services required by the child’s IEP.” The court went on to support its reasoning through an analogy to common law principles, explaining “determining ‘materiality’ has been a part of judging for centuries—for example, deciding whether a contractual breach is material.” It reasoned the materiality standard does not require that the child suffer “demonstrable educational harm” in order to prevail, but educational progress or lack thereof is probative of whether there was a “significant shortfall in services provided.” Applying this standard to the case at hand, the court found none of the implementation failures at issue were material because the discrepancies between services provided and those called for in the IEP were minor, and the child made sufficient progress on academic and behavioral goals.

The Fifth, Eighth, and Ninth Circuits all articulated standards in which *de minimis* minor discrepancies between the services provided and those listed in the IEP do not violate IDEA. These courts rejected a *per se* approach, finding no conflict

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107 The *Van Duyn* Court noted 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.* at 821 n.3. This cautionary language may suggest that the Ninth Circuit would find a denial of FAPE even where a student gained meaningful benefit from the IEP, as long as the failure to implement is deemed material. In *Bobby R.*, the Fifth Circuit found the IEP as implemented conferred meaningful educational benefit. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 350 (5th Cir. 2000). It is unclear whether this factor was determinative or if the court would have found a denial of FAPE regardless of the benefit conferred by the IEP had the failure to implement had been material.

108 *Van Duyn*, 502 F.3d at 822.

109 *Id.* at 823 n.4 (citing *RESTATEMENT (SECOND) OF CONTRACTS* § 241 (1981)).

110 *Id.* at 823.

111 *Id.* at 825 (finding a failure to implement math instruction was remedied after the ALJ’s order).

112 *Bobby R.*, 200 F.3d at 349.

113 *Van Duyn*, 481 F.3d at 780.
between the materiality standard and IDEA’s requirement that services to disabled children must be provided “in conformity with” or “in accordance with” the IEP.\footnote{Id. at 780 n.4 (citing 20 U.S.C. § 1401(9)(D); 34 C.F.R. § 300.323(c)(2)).} These courts favored an approach to implementation cases that affords schools “flexibility in implementing IEP’s, but still holds [them] accountable for material failures and for providing the disabled child a meaningful educational benefit.”\footnote{Bobby R., 200 F.3d at 349.} Nevertheless, there may be a significant difference between the Fifth and Ninth Circuit approaches. In Bobby R., the Fifth Circuit, after finding the plaintiff did not show “more than a de minimis failure to implement,” applied the general Rowley analysis, suggesting that the ultimate question in implementation cases, like in all denial of FAPE cases, is whether the IEP, as implemented, conveys educational benefit.\footnote{Id. at 350.} In contrast, the Ninth Circuit, in Van Dyyn, noted the “materiality standard does not require that the child suffer demonstrable educational harm in order to prevail.”\footnote{Van Dyyn, 481 F.3d at 822.} While the Fifth Circuit standard suggests a school offers a FAPE despite an implementation failure as long as the implemented portions of the IEP convey educational benefit, the Ninth Circuit appears to find a denial of FAPE wherever the implementation failure in and of itself constitutes “a significant shortfall in the services provided,” even if the IEP, as implemented, would otherwise meet the Rowley standard.\footnote{Id.}

D. The Per Se approach

“How much of an IEP do you have to implement?” When asked this question at an education conference, a few hundred special education administrators answered with a resounding, “all
They were surprised to learn that some courts have applied a materiality standard; so too were special education hearing officers. A number of administrative decisions have applied a *per se* rule to implementation challenges, under which a failure to implement *any* portion of an IEP denies a FAPE. In addition, the Second Circuit has held that substantial compliance cannot serve as a defense to a claim of denial of a FAPE, and a dissenting opinion in *Van Duyn* advocated for a *per se* approach.

A sampling of administrative decisions demonstrates that in many cases where a school fails to provide a service called for in an IEP, it has denied FAPE. For example, in cases where schools failed to provide psychological services, reading services, and a climate controlled classroom, as called for in IEPs, the schools were found to have denied a FAPE. These hearing officers did not consider the extent of the implementation failures or whether the IEPs, as implemented, conveyed educa-

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121 See infra notes 124-127 and accompanying text.
122 D.D. *ex rel.* V.D. v. N.Y. City Bd. of Educ., 465 F.3d 503, 510-12 (2d Cir. 2006).
123 *Van Duyn*, 502 F.3d at 828-29.
125 Sanford Sch. Dep’t. 47 IDELR (LRP) 176 (SEA Me. Oct. 31, 2006).
126 Guntersville City Bd. of Educ. 47 IDELR (LRP) 84 (SEA Ala. Aug. 18, 2006).
127 At least one district court case gave lip service to the *Bobby R.* materiality standard but found the services at issue “substantial and material” without analysis. See Manalansan v. Bd. of Educ. of Baltimore, No. Civ. AMD 01-312, 2001 WL 939699, at *11-12 (D. Md. Aug. 14, 2001) (finding denial of FAPE where school failed to provide an aide during all classroom activities as called for in the IEP, and noting it is “hard to see how such services could be anything but substantial and material.”).
tional benefit; they applied the generally accepted “rule” that a failure to implement any portion of an IEP denied a FAPE.\footnote{See Posting of Jim Gerl to Special Education Law Blog, http://specialeducationlawblog.blogspot.com/2008/08/new-hot-button-issue-iep-implementation.html (Aug. 12, 2008, 19:18 EST) (“[T]he Van Duyn decision] came as pretty big news to many of us . . . who thought that the ‘rule’ was that a district pretty much had to implement all of an IEP.”).}

In \textit{D.D. ex rel. V.D. v. New York City Board of Education},\footnote{465 F.3d 503 (2d Cir. 2006).} the Second Circuit declined to apply a “substantial compliance”\footnote{IDEA includes a substantial compliance provision authorizing the Secretary of Education to withhold payments pursuant to the Act if the state has failed to comply substantially with the provisions of the Act. 20 U.S.C. § 1416(e)(3) (2006). The district court wrongly applied this standard to the individual denial of FAPE claim at issue. \textit{D.D.}, 465 F.3d at 510.} standard in the context of a class action; its reasoning appears to reject a materiality standard. In \textit{D.D.}, a class of disabled preschool children assigned to a waiting list for special education placements alleged the New York Board of Education denied FAPE by failing to timely implement their IEPs.\footnote{D.D., 465 F.3d at 505-06. For example, the school district offered one student an IEP in November of 2002, but had not provided any services under it by May of 2003. \textit{Id.} at 507.} They moved for a preliminary injunction ordering immediate implementation of all services required by their IEPs.\footnote{\textit{Id.} at 506.} A district court denied the injunction, holding that the school district was in “substantial compliance” with the provisions of IDEA because it timely provided services to at least 97\% of children with IEPs.\footnote{\textit{Id.} at 509-10.} The Second Circuit reversed, reasoning “IDEA does not simply require substantial compliance; . . . it requires compliance.”\footnote{\textit{Id.} at 512.} It ultimately held IDEA required the school to implement an IEP “as soon as possible” after it has been developed.\footnote{\textit{Id.} at 514 (relying on IDEA implementing regulation 34 C.F.R. § 300.342(b)(1)(ii) requiring an IEP be implemented as soon as possible after the requisite IEP meetings).}
The most thorough argument for a *per se* approach to IEP implementation failures is found in a dissenting opinion in *Van Duyn*, the Ninth Circuit case discussed in part II.B.\textsuperscript{136} The dissenting judge argued:

an IEP is the product of an extensive process and represents the reasoned conclusion of the IEP Team that the specific measures it requires are necessary for the student to receive a . . . FAPE. 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.\textsuperscript{137}

The dissent found the definition of FAPE, which calls for services to be provided *in conformity with* the IEP, requires the school to implement *all* portions of an IEP, not merely those deemed material.\textsuperscript{138} It reasoned:

[j]udges are not in a position to determine which parts of an agreed-upon IEP are or are not material. The IEP Team . . . is the entity equipped to determine the needs of a special education student, and the IEP represents this determination. Although judicial review of the content of an IEP is appropriate when the student . . . challenge[s] the sufficiency of the IEP, such review is not appropriate where, as here, all parties have agreed that the content of the IEP provides FAPE.\textsuperscript{139}

\textsuperscript{136} *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 828-29 (9th Cir. 2007) (Ferguson, J. dissenting). Curiously, the plaintiff-appellant student did not argue the materiality standard was inconsistent with IDEA. *Id.* at 822 n.4 (noting “not even Van Duyn has advocated a per se rule like the dissent’s; indeed, at oral argument his counsel agreed that a standard akin to that endorsed in *Bobby R.* would be satisfactory.”).

\textsuperscript{137} *Id.* at 827.

\textsuperscript{138} *Id.* (citing 20 U.S.C. § 1401(9)(D)(2006)).

\textsuperscript{139} *Id.* (internal citations omitted).
The dissent argued the *per se* standard would not impose an onerous burden on schools, noting the school is free to amend the IEP through required channels if it finds that portions of the program are not essential to providing a FAPE.\textsuperscript{140} It reasoned, however, that permitting the school district to disregard already agreed-upon portions of the IEP would give the district freedom to unilaterally amend the IEP by default.\textsuperscript{141}

As demonstrated by the numerous administrative decisions, the Second Circuit’s reasoning in *D.D.*, and the dissent in *Van Duyn*, the materiality standard is not universally accepted.\textsuperscript{142} IDEA calls for services to be provided *in conformity with* an IEP;\textsuperscript{143} this can be read to require *complete* implementation of a student’s IEP. This article argues this *per se* approach is consistent with the purpose of IDEA.

### III. ANALYSIS

The few courts to have examined IEP implementation issues have offered three possible standards. The *Bobby R.*\textsuperscript{144} approach may not focus on the failure to implement itself; instead, it likely examines the IEP, as implemented, and asks whether it meets either the “some benefit” test or the “meaningful benefit” test discussed in part II.A. The *Van Duyn* approach measures the extent of the implementation failure. If it is deemed material, the school will be found to have denied FAPE even if the IEP, as implemented, meets the *Rowley* standard because the student

\textsuperscript{140} *Id.* at 828.

\textsuperscript{141} *Id.*

\textsuperscript{142} See, e.g., Elexis Reed, Case Note, *The Individuals with Disabilities Education Act—The Ninth Circuit Determines that only a Material Failure to Implement an Individualized Education Program Violates the Individuals with Disabilities Education Act*, 61 SMU L. REV. 495, 500 (2008) (following the dissent in *Van Duyn*; arguing failure to implement any portion of an IEP violates IDEA).


\textsuperscript{144} See *supra* text accompanying notes 115-18 (comparing the Fifth Circuit approach in *Bobby R.* and the Ninth Circuit approach in *Van Duyn*).
gained educational benefit from it. The *per se* approach is most friendly to students; it would find *any* failure to implement an IEP a denial of a FAPE.

All three of these approaches appear to be permissible interpretations of IDEA. The definition of FAPE is ambiguous; it calls for FAPE to be provided “in conformity with” the IEP. It is debatable whether this requires services be provided in perfect conformity with the IEP, or whether it permits substantial compliance. Implementing regulations do not offer further guidance. The only regulation on point requires schools to ensure “special education and related services are made available to the child “in accordance with the child’s IEP;” this is also open to interpretation. This article does not attempt to identify an appropriate standard based on textual analysis or principles of statutory construction. Instead, it suggests that the *per se* approach is consistent with the purpose of IDEA. Schools largely control the contents of IEPs, and parents rely on schools to fulfill promises they make during IEP meetings. Also, education hearing officers’ power to provide “appropriate” relief for denials of FAPE ensures schools will not be unduly burdened by the imposition of a strict compliance standard.

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145 See *supra* note 118 and accompanying text.
146 See *supra* notes 124-27 and accompanying text.
148 The majority and dissent in *Van Duyn* disagreed on this point; the majority read the “in conformity” language as counseling “against making minor implementation failures actionable” whereas the dissent found it called for strict compliance. See *Van Duyn*, 502 F.3d at 821, 827; see also Reed, *supra* note 142, at 499 (comparing majority and dissent).
149 34 C.F.R. § 300.323(c)(2) (2007).
150 This is not to suggest that courts should decline to consider issues of statutory construction. It is not discussed here because this article concedes multiple interpretations are reasonable.
A. Schools’ control over IEP contents

IDEA calls for IEPs to be developed by a team of parents and educators. In the vast majority of cases, however, teachers and administrators have ultimate control over which educational services, modifications and accommodations find their way in to the IEP. Prior to most meetings, a teacher writes a draft IEP, which includes the special education and related services, accommodations, and modifications the teacher feels are appropriate for the student. The teacher has full knowledge of the services that the school typically offers to disabled students and includes only those services the school is capable and willing to provide. At the IEP meeting itself, parents occasionally request additional or

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152 Id. § 1414 (d)(1)(B) (defining IEP team).
154 The U.S. Department of Education condones but does not recommend that teachers write draft IEPs prior to meetings:

We do not encourage public agencies to prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child’s needs. However, if a public agency develops a draft IEP prior to the IEP Team meeting, the agency should make it clear to the parents at the outset of the meeting that the services proposed by the agency are preliminary recommendations for review and discussion with the parents.

34 C.F.R. § 300.322(b) (2006). “It is not permissible for an agency to have the final IEP completed before an IEP Team meeting begins.” Id.
155 Many teachers utilize IEP software that allows them to choose from a list of available services, accommodations, goals and objectives. Because these programs encourage the IEP drafter to select from a menu of available services, they reduce the amount of individualization and the probability that the teacher will include IEP provisions the school is unable or unwilling to provide. See, e.g., Glen Allen, Business Wire, Xperts Releases Version 5.0 of IEP Online; First Fully Web-Based Individualized Education Plan Software for Public School Systems in the United States (July 1, 2002), http://www.allbusiness.com/company-activities-management/product-management/5901278-1.html (describing IEP software).
different services from those included in the draft IEP, but those services will only be included in the IEP if the school consents to them.\footnote{IDEA requires schools provide parents numerous opportunities for involvement in the IEP process. \textit{See generally} 20 U.S.C. § 1415 (2006) (listing procedural safeguards). However, none of the procedural safeguards require the school to comply with parents' requests or demands for services as long as the school offers a FAPE. \textit{See supra} Part II.A. (describing FAPE standard).} The IEP development process, in most cases, involves a teacher selecting from a menu of supports and services, and the parents accepting the recommendations of the teacher. Given the control the school exerts over the contents of an IEP,\footnote{See Daniel, \textit{supra} note 153, at 3-4 for an argument of IDEA's procedural protections: \textit{[Do] not reconceptualize the connections between parents and school officials. One reason is that the legislation is largely precatory; educators need take only minimal steps toward governmental ideas about collaboration with parents. The legislation creates opportunities for expanding partnerships of parents and teachers, but affords few consequences if this does not occur. According to researchers, "[a]bsent clear legislative or constitutional mandate[s], the normal parent-school relationship is permissive, i.e., schools may respond to [a] parental request/demand regarding their children's education, but cannot be required to accommodate the request." (citation omitted).}} it is reasonable to expect the school to fulfill its promises by fully implementing the IEP.\footnote{When a parent takes an active role in IEP development and disputes over the contents of an IEP arise, this will not result in a failure to implement. In these cases, the \textit{Rowley} framework is appropriate. \textit{See supra} Part II.A (describing \textit{Rowley} standard).}

To illustrate, re-consider Alex’s case, where the elementary teachers developed an IEP based on the services they thought were available at the middle school. Because the middle school administrators declined to send a representative to the IEP meeting to ensure its contents would match the resources available at the middle school, it is reasonable to expect them to either implement the IEP as written, or consult with Alex’s parents to modify the
IEP. The middle school teachers should not be free to ignore IEP provisions they are unwilling or unable to implement.

B. Implementation as a procedural requirement of IDEA

IDEA’s procedural protections are extensive; this led the Rowley court to emphasize procedure over substance in establishing a definition of FAPE that defers to schools’ judgments as to what constitutes an appropriate education. This procedural emphasis suggests a stricter standard for IEP implementation than for measuring the adequacy of IEPs. Implementation is essentially a procedural IDEA requirement. It involves the school district fulfilling its promise to provide the services agreed upon in the IEP meeting. As the dissent in Van Duyn noted, allowing the school to ignore portions of the IEP would “essentially give the district license to unilaterally redefine the content of the student’s plan by default. Such license undermines the collaborative role of the IEP team and ignores the parental participation provisions of the IDEA.” Because parents have so little control over the contents of the IEP, IDEA’s procedural protections become essential, and they would be seriously undermined if a school could decline to implement IEP provisions.

It is helpful to revisit Alex’s case to illustrate. His parents worried about his transition to the public middle school and

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159 See 20 U.S.C. 1414(c)(3)(F) (2006) ("Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.").

160 See id. § 1415.


162 See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 828 (9th Cir. 2007) (Ferguson, J., dissenting) (arguing low standard in assessing IEP content does not imply schools have flexibility in implementing IEPs).

163 Id. (citing 20 U.S.C. § 1414(d)(3)(A) (ii), (e) (2000)).
considered private school as an alternative. Their concerns were assuaged when the school offered to include the support of a one-on-one aide in the IEP. Had they known this IEP provision would not be implemented appropriately, they would not have enrolled Alex in the public middle school. Alex’s case demonstrates that the procedural protections of IDEA will be of little value if the school’s failure to implement the IEP is excused under the materiality analysis.\textsuperscript{164}

C. Limited Remedies

Proponents of a materiality standard are loath to subject schools to judgments of compensatory education\textsuperscript{165} and attorneys’ fees\textsuperscript{166} for minor failures to implement IEPs. Indeed, a per se implementation standard could impose some financial burden on schools for failures to implement that do not significantly impede a student from gaining educational benefit from the IEP. However, remedies under IDEA are limited; hearing officers may grant the relief they determine to be “appropriate.”\textsuperscript{167} Common remedies

\textsuperscript{164} It is unclear whether Alex was denied a FAPE under the Bobby R. or Van Duyn analyses. Because he has made progress on his goals and objectives, the school has likely offered him educational services that meet the Rowley “some benefit” standard. However, placement in a self-contained classroom and denial of the one-on-one aide could be considered a material failure to implement the IEP. See supra text accompanying notes 115-18 (comparing Van Duyn and Bobby R. analyses).


include IEP revisions, a particular student placement, and training or hiring of school district personnel.\textsuperscript{168}

Where a school offers an IEP that is wholly inadequate, a hearing officer or court may award tuition reimbursement for placement at a private school.\textsuperscript{169} This remedy imposes a significant burden on the school, particularly when coupled with IDEA’s fee-shifting provisions.\textsuperscript{170} In contrast, tuition reimbursement is not an appropriate remedy for minor implementation failures;\textsuperscript{171} instead, a hearing officer will merely order the school to implement the IEP as written and award compensatory education services to make up for those lost by the failure to implement. For example, if a student’s IEP called for one hour of speech therapy per week, and the school failed to offer speech therapy for ten weeks, a hearing officer may likely order the school to implement the IEP without delay and provide ten additional hours of speech therapy to compensate for the lost services.\textsuperscript{172} So, the financial burden

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\item \textsuperscript{168} See generally Perry Zirkel, The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act, 58 ADMIN. L. REV. 401 (2006).
\item \textsuperscript{169} See generally Burlington v. Dep’t of Educ., 471 U.S. 359 (1985) (establishing right to tuition reimbursement after parent’s unilateral placement in private school). A three part test is commonly applied to determine if tuition reimbursement is appropriate: (1) is the school’s proposed placement appropriate; (2) if not, is the parents’ unilateral placement appropriate; and (3) if so, what equitable considerations should be taken into account. See Zirkel, supra note 168, at 412.
\item \textsuperscript{171} Major implementation failures could result in awards of tuition reimbursement, but these failures would deny FAPE under either the materiality standard or the \textit{per se} approach. In some circuits, these implementation failures could subject schools to § 1983 tort-like damages. See generally Seligman, supra note 18 (describing availability of § 1983 claims based on IDEA violations).
\item \textsuperscript{172} At least one court has applied a student-friendly version of the materiality standard to a claim of a failure to implement speech therapy provisions of an IEP. See Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) (“[I]n this court’s view . . . few, if any, ‘provisions’ of an IEP will be
imposed on schools by a \textit{per se} approach to implementation cases is not as overwhelming as it first appears.

Given IDEA’s remedy structure, students stand to gain little by seeking a due process hearing to challenge minor implementation failures.\footnote{It is unclear whether full attorneys’ fees should be awarded to partially successful claimants in minor implementation cases. \textit{See} Mawdsley, \textit{supra} note 166, at 776 (explaining some courts deny attorney’s fees when claimants’ success is only \textit{de minimis}).} There is unlikely to be an increase in implementation litigation if courts adopt the \textit{per se} approach.\footnote{A \textit{per se} standard could dissuade implementation litigation due to its clarity. \textit{See} Van Duyn \textit{ex rel.} Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 828 (9th Cir. 2006) (Ferguson, J., dissenting) (arguing materiality standard is vague).} The greatest benefit of imposing the \textit{per se} standard, as opposed to the materiality standard or the general \textit{Rowley} standard, lies in the clear message it sends to schools. If courts find only material failures to implement deny FAPE, schools may choose to ignore provisions of IEPs, and break promises made to parents and students during IEP meetings. Under the \textit{per se} standard, however, it is clear the school must implement all provisions of the IEP.

Alex’s case exemplifies the real-world effects of the different standards. Middle school administrators declined to send a representative to the elementary school IEP meeting, even though they would later implement the IEP developed at that meeting. Had the administrators known they would be called on to provide services in complete conformity with Alex’s IEP, they would have been more likely to attend the meeting and inform the IEP team of the middle school’s available resources. This would have likely prevented the IEP team from including provisions middle school personnel were not prepared to implement. If courts consistently apply a materiality standard or the traditional \textit{Rowley} analysis, however, there is no incentive for the middle school personnel to participate in the IEP meeting, thereby creating the problem discussed in the introduction to this article. As Alex’s case
demonstrates, the implementation standard that courts choose to adopt may have little impact on special education litigation, but it will likely influence the routine practices of school administrators and teachers. Faced with a *per se* standard, schools will be more likely to live up to the requirements and purpose of IDEA.

IV. CONCLUSION

IEP implementation litigation is uncommon. Few courts have addressed whether IDEA’s requirement schools offer a FAPE “in conformity”\(^{175}\) with an IEP means that schools must provide services in *complete* conformity, or merely *substantial* conformity, with the IEP. Three analyses have been suggested; courts could apply the traditional *Rowley* standard to such cases and ask whether the student gained educational benefit from the IEP as it was implemented; they could apply a materiality standard and find substantial implementation failures deny FAPE, but *de minimis* failures do not; or they could apply a *per se* standard and find all implementation failures deny a FAPE.

This article suggests the *per se* standard is consistent with the purpose of IDEA, to ensure that each disabled student gain meaningful educational benefit from their IEP.\(^{176}\) IDEA’s emphasis on procedure seeks to ensure that parents and students fully participate in the development of IEPs.\(^{177}\) However, schools largely control the contents of IEPs, and parents rely on schools to fulfill promises they make during IEP meetings.\(^{178}\) Thus, if courts decline to adopt the *per se* standard to analyze implementation cases, they will undermine the procedural protections that form the bulk of IDEA. Furthermore, education hearing officers’ power to

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\(^{176}\) See *supra* Part II.A. (describing meaningful/some benefit standards).


\(^{178}\) See Wright & Wright, *supra* note 7, at 42 (describing parents’ interests in IEP development).
provide “appropriate” relief for denials of FAPE\textsuperscript{179} lessens the risk that schools will be unduly burdened by the imposition of a strict compliance standard. Adopting the \textit{per se} standard for implementation cases merely reaffirms most teachers’ answer to the question, “How much of an IEP must be implemented?” The answer remains, “all of it.”\textsuperscript{180}


\textsuperscript{180} See Gerl, \textit{supra} text accompanying note 119 (describing common understanding of special education teachers and administrators that IDEA requires complete implementation of IEPs).