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**Legal Updates and Hot  
Topics on SLP/Audiology  
Issues**

April 20, 2017

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**READ ALL ABOUT IT!  
HOT OFF THE PRESS!!**

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**Andrew F./FAPE**

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**FAPE**

What standard, or level, of educational benefit has to be afforded to children with disabilities?

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**IDEA Defines FAPE Procedurally**

20 U.S.C. § 1401(9)

FAPE: special education and related services that are

- free;
- meet the state standards;
- include appropriate preschool, elementary, or secondary education; and
- are provided in conformity with the student's IEP.

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**Rowley Defines FAPE Substantially**

*Board of Education of Hendricks Hudson School District v. Rowley* (U.S. 1982).

A school district provides FAPE to a child with a disability if it develops the child's IEP in accordance with IDEA procedures and the IEP is "reasonably calculated to enable the child to receive educational benefits."

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**Andrew F. v Douglas Cnty. Dist.  
Re-1, No. 15-8827, 2017 WL  
1066260 (U.S. March 22, 2017)**

Re-visitation of *Rowley* standard.

- FAPE is not currently defined in IDEA or its regulations in terms of level of educational benefit.
- This case addresses the required level of educational benefit in a unanimous decision.

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**Andrew F./FAPE Background...**

- The case was brought by the parents of Andrew F., a child with autism who attended kindergarten through fourth grade in Douglas County schools.
- During that time, he progressed academically and socially but continued to exhibit problem behaviors. Andrew's parents unilaterally placed him in a private school and requested tuition reimbursement, claiming the district had failed to provide FAPE.

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**Andrew F./FAPE Background...**

- U.S. Court of Appeals for the 10<sup>th</sup> Circuit upheld HO and district court's decisions that Andrew had been receiving a FAPE, as defined in its precedent.
- Parents petitioned the US Supreme Court to hear the case, noting a split in the circuits about whether the substantive prong of the FAPE test requires a showing of something more than trivial *de minimis* educational benefit.

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### Andrew F./FAPE Even More Background...

- SCOTUS invited the Solicitor General to file a brief expressing the views of the U.S.
- SG filed an *amicus* brief August 18 telling the Court:
  - There is an entrenched and acknowledged circuit conflict on the question presented.
  - The Tenth Circuit's "merely\*\*\*more than *de minimis*" standard is erroneous.
  - The question presented is important and recurring, and the court should resolve it in this case.

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### Andrew F. Decision and Where FAPE Is Going

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The Decision (March 22, 2017):

- To meet its substantive obligation under the IDEA, a school must offer an IEP "reasonably calculated to enable a child to make progress appropriate in **light of the child's circumstances.**"
- The [*Rowley*] Court was not concerned with precisely articulating a governing standard for closer cases... And the statement that the Act did not "guarantee any particular level of education" simply reflects the unobjectionable proposition that the IDEA cannot and does not promise "any particular [educational] outcome."...No law could do that—for any child.

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### Decision continued...

- To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires **a prospective judgment by school officials.** ... The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians... **Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.**

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### Decision continued...

- *Rowley* sheds light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom "whenever possible." ... When this preference is met, "the system itself monitors the educational progress of the child." ... "Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material." ... Progress through this system is what our society generally means by an "education." And access to an "education" is what the IDEA promises. ... Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

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[Footnote 2]: This guidance should not be interpreted as an inflexible rule. We declined to hold in *Rowley*, and do not hold today, that "every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE]."

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We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. **This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."**

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At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. ... By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a **cogent and responsive explanation for their decisions** that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

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**FAPE CLAIMS:  
Practical and Proactive  
Solutions**

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**Procedural Compliance?**

- Did the Parent attend the IEP meeting? With proper notice?
- Were all other required team members present or properly excused?
- Was the meeting held within required timelines under state regulations?
- Is there evidence of parental input?
- Were parental concerns both noted and addressed?
- Did the IEP team consider other required components?
- Assistive Technology?
- Extended School Year?
- Nonacademic Services?
- Are the IEP goals specific, measurable, attainable, and based on recent and meaningful data?
- Is there evidence of predetermination?

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**Substantive Compliance?**

- Was the evaluation preceding the IEP's development thorough and use appropriate instruments?
- Are the present levels statements based on data reflected in the evaluation information gathered to assemble the IEP?
- Do the statements reflect the extent to which the child's disability reflect the child's ability to be involved and participate in the general education curriculum? Do the statements reflect the difference between benchmark and target in the goals to follow?
- Are there goals in state content standard areas? If so, are those goals aligned with the state content standards?
- Can the Team explain the basis for the projected progress?
- Are the service hours sufficient to allow the child to progress toward those goals?
- Is the least restrictive environment determination based on considerations like service hours and progress toward IEP goals?

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**Educational Benefit/Evidence of Progress?**

- Did the student meet each of his or her IEP goals? If not, was there progress?
- What is the evidence supplied for progress on each IEP goal? Data collected?
- Do we have "apples-to-apples" data to compare from year to year?
- Did the student make progress in the general curriculum?
- Pass classes? Advance to the next grade? Standardized tests?
- How about social performance? Behavior? Functional skills?
- If no progress on a goal, what accounts for it?
- Attendance?
- Wrong goal?

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"An IEP is a snapshot, not a retrospective, and we must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *K.E. v. Independent School District No. 15, St. Francis, Minnesota*, 647 F.3d 795 (8th Cir. 2011).

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### IEP Reminders

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### CCC Procedures

PAR makes introductions, clarify the purpose of the CCC and offer/explain "Notice of Procedural Safeguards"

CCC participants will consider ALL information

If student qualifies or continues to qualify for special education services, the participants will review strengths/needs prior to developing IEP



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### Implementation of IEP

- Timeliness – Implement the IEP on time
- Consistency , consistency, consistency
- Monitor IEP goals and objective results
- Review and revise IEP
- Maintain progress reports with IEPs




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### On Time Implementation

A delay can be considered an implementation failure:

Wilson v. District of Columbia, 56 IDELR 125 (D.D.C. 2011)  
 District of Columbia's delay in arranging transportation for student to attend ESY program was an implementation failure and subjected the school to a compensatory education claim.

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### Implementation of IEP

- The IEP must be implemented as written!
- Send home progress reports
- Communicate with the family – especially suggestions which might help if progress or behavior is not improving.
- Document all contacts in a contact log
- Document attendance
- Collect and offer feedback




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### Well-Documented Implementation

An absence of documentation can be detrimental.  
Bartholomew Consol. Sch. Corp. 5 ECLPR 142 (SEA IN 2008)

Because school district did not document the services it provided, it could not prove that it implemented the child's IEP as written.

Only when providing subsequent documentation of compliance did district solve the problem.

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### Follow the IEP



Connor v. Missouri State Bd. of Educ., 109 LRP 56456 (E.D. Mo. 2009)

Evidence showed that school had not provided the physical and occupational therapy services set forth in the IEP.

Thus court permitted the parent to pursue a claim for audio and video surveillance.

If the school had done what was required in the IEP and/or communicated properly with the parents this situation likely would have been avoided.

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### Importance of Staff

All staff working with a student have a role in implementation – teachers, related service personnel, paras, administrators.

*Houston Indep. Sch. Dist. v. V.P. by Juan and Sylvia P.*, 52 IDELR 62 (5<sup>th</sup> Cir. 2009)

The lack of coordination and collaboration among school staff contributed to denial of FAPE.

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**Handling  
Communication Issues**

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**Other FAPE Issues**

**Students with Communication Disorders**

- OCR/DOJ/OSERS 2014 Dear Colleague Letter: let's follow 9<sup>th</sup> Circuit in *K.M. v. Tustin Unified School District*
- In some cases, compliance with IDEA for students who have a hearing, vision, or speech disability may not automatically mean that the school has complied with Title II of ADA

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"A public entity shall take appropriate steps to ensure that communications with [individuals] with disabilities are as effective as communications with others" 28 CFR 35.160(a)(1)

- ADA = equal access vs. FAPE = meaningful access
- So for students with communication disorders, Schools have to meet obligations of IDEA (FAPE), Section 504, and Title II of ADA
- Aids/services have to be *necessary*
- Aids and services must protect the privacy and independence of the individual

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**Practical Tips for Communication Disorders**

- Do a functional communication evaluation
- Take effective communication decisions out of IEP team and put it in the hands of your Title II coordinator. These aides and services must be provided ASAP, even if Article 7 evaluation and IEP processes are still pending.
- Consult an audiologist who understands Cochlear implants and the system being requested (including whether it's age-appropriate)
- Train every staff member who works with a child who is deaf to gain an understanding of auditory impairments, the technology being used, and the limitations of the technology; take data on the effectiveness of any device that is used and whether the child wants it; and make sure the child is always part of the decision-making and feedback process regarding a device

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**Discipline and Behavior Refreshers**

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**Protection for Children Not Yet Eligible**

511 IAC 7-44-9 provides that if a school had knowledge that student had disability before the behavior prompting disciplinary action, student has Article 7 protections.




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### Knowledge of Students Not Yet Eligible



If any of the following occurred before the school rule violation, then school is considered to have had knowledge that student may be disabled:

1. Parents sent something in writing to school staff that s/he believed student might need special education services.
2. Parent or school requested an evaluation
3. Parents requested IEE.\*
4. Student's teacher or other school staff told a supervisor that s/he was concerned about student's pattern of behavior.

\*must be expedited & student remains where school placed.

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### Students Not Yet Eligible

HOWEVER, student will NOT be considered entitled to Article 7 protection if:

1. Evaluation was requested, but parents did not allow evaluation.
2. Evaluation was requested, but school provided written notice that no evaluation would take place and parents did nothing.
3. Student was evaluated and found eligible, but parents did not consent.
4. Student was evaluated and determined not eligible. (and appropriate notice was provided)

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### Functional Behavioral Assessment ("FBA")

The school must convene the CCC to review the FBA within ten (10) business days after:

- 10 cumulative suspension days in a school year;
- Invoking interim alternative education setting ("IAES"); or
- Expulsion.




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### Behavioral Intervention Plan (“BIP”)

Plan agreed upon by the CCC and incorporated into the IEP that describes:

- Pattern of behavior impeding student's/other learning
- Purpose or function of behavior as found in FBA
- \*Positive interventions, supports, strategies to address behavior and maximize consistency of implementation across all people and settings in which student involved
- \*Skills that will be taught and monitored to change the pattern of behavior

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### Proactive Strategies for Behavior Issues

ANY discipline of ANY special education student should initiate questions about the student's behavior

Functional Behavioral Assessment (FBA) – process that uses data to identify patterns and determine purpose of the student's behavior

Generally requires written parental consent (evaluation)

FBA informs the development of a Behavior Intervention Plan (BIP)

Best practice for any student with behavior issues to have an FBA/BIP. In certain situations, required by Article 7.

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### Writing the BIP

BIP must have positive intervention strategies in place

Can't be all about what happens when behavior occurs

If you develop short term removals (time-out, take a walk, etc.) as part of BIP and frequency of removals increases, you need a new BIP

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### Violent / Aggressive Behavior

Act proactively

Document strategies used before resorting to more extreme strategies/placement

Do as much as possible through BIP first

Multiple BIPs will be necessary

Request parental consent (and document request) to share information w/ any outside mental health providers

A Good **OFFENSE** Is  
Your **Best** **DEFENSE**  
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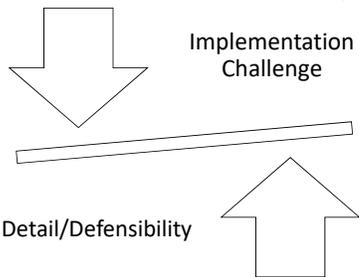
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### Behavioral Intervention Plan ("BIP")



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### Prior Written Notice

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**When is Prior Written Notice Required?**

**20 U.S.C. 1415(b)(3) states:**

Prior written notice is required whenever the local educational agency:

- proposes to initiate or change; or
- refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

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**Prior Written Notice must include:**

- A description of the action proposed or refused by the agency
- An explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- A statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- Sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.];
- A description of other options considered by the IEP Team and the reason why those options were rejected; and
- A description of the factors that are relevant to the agency's proposal or refusal.

20 USC 1415(c)(2)(B)(i)(I) and 34 CFR 300.503(b)  
See also 511 IAC 7-42-7(b)

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**Longstanding practice in Indiana ...**

- Provide the proposed IEP as prior written notice.
- Indiana's Article 7 states that the IEP may be used as part of the prior written notice as long as it meets all the prior written requirements. 511 IAC 7-42-7(c).

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**Prior Written Notice Violations**

*New Mexico Public Education Department, 115 LRP 31994 (March 18, 2015)*

- Complaint filed with the State education department investigated whether prior written notice had been provided to the parents.
- As a team, the school officials and the parent met to review a teacher's concerns regarding student's behavior and academic areas of concern.
- The team developed a intervention plan, that included a referral to the special education department for an evaluation.
- The school stated that the intervention plan constituted prior written notice of its proposal to evaluate.
- This district's assertion that an "intervention plan" constituted proper notice of a proposal to evaluate was unconvincing where the plan indicated the district "may" use various types of assessments, with no basis or explanation for its decision.
- The ED cited the district for its noncompliance. As part of a corrective action plan, the district must demonstrate that it reviewed its policies, procedures and practices regarding prior written notice. It must also develop a timeline for completing the steps outlined in the plan and fully document how it implemented each of those steps.

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**Prior Written Notice Violations**

*Indiana State Educational Agency, CP-067-2015, 115 LRP 26178*

- Student had an IEP stating the LRE was in the general education classroom for 80% of the day.
- Student transferred to a new school and the school placed the student in a self-contained classroom for purposes of remediation and "to monitor the transition to a new learning environment."
- The parent verbally agreed to this change in placement, but there was no prior written notice of this change.
- The complaint investigator found there is no record of any written notice of a proposal to change the educational placement of the student. Thus, a violation of 511 IAC 7-42-7(a) & (b) was found.
- Even with verbal consent, this was a change of placement that triggered prior written notice requirements.

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**Other things to consider with Prior Written Notice**

- When the IEP listed "E-Therapy" as the location of the child's services, prior written notice was required when the district decided to continue providing therapy online and refused the parents requests for services be provided in-person. *Alaska State Educational Agency, 116 LRP 15963 (March 29, 2016)*
- The Ohio Education Department pointed to the absence of the parent's signature on the student's February 2015 IEP when stating there was insufficient documentation that the parent received notice of her safeguards during the 2014-15 school year.
- The ED acknowledged that the IEP stated that the parent received the notice. Moreover, it observed that the district asserted in its response to the parent's complaint that IEP team members provided the notice to the parent at the February IEP meeting. However, "since the Parent did not sign the February 2015 IEP, there is no documentation that the Parent received the Procedural Safeguards at that meeting," the ED wrote. - *Ohio State Educational Agency, 116 LRP 11536(March 11, 2016)*

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**Thank you.**



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