Failure to Implement: The Third Dimension of FAPE

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I. INTRODUCTION

A. The Supreme Court's decision in *Board of Education v. Rowley*[1] established the primary two dimensions of FAPE, with standards for each one: procedural[2] and substantive.[3]

B. More recently, various lower courts have recognized a third dimension of FAPE concerning IEP implementation (referred to here as "failure-to-implement"), with a continuum of approaches for the appropriate standard. Although overlapping and not yet fully developed, three approaches have emerged that mark successive segments of the continuum: (1) a strict per se standard, (2) a more relaxed materiality standard, and (3) a materiality/benefit standard that is at least partially akin to the two-part test for procedural FAPE. The Second Circuit has not firmly adopted one of these approaches, thus representing a notable challenge and opportunity for New York impartial hearing officers (IHOs). The purpose of this webinar is to provide an overall awareness of current state of the law with regard to this continuum of approaches so as to facilitate thoughtful and defensible written decisions for failure-to-implement claims.

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[1] 458 U.S. 176 (1982).

[2] "First, has the [district] complied with the procedures set forth in the Act?" *Id.* at 206. The 2004 amendments to the IDEA codified a second requisite step for procedural violations in terms of a cognizable loss to the child or the parents. 20 U.S.C. § 1415(f)(3)(E).

[3] "And second, is the [IEP] . . . reasonably calculated to enable the child to receive educational benefits? *Bd. of Educ. v. Rowley*, 458 U.S. at 207. The Supreme Court is currently revisiting this dimension in terms of whether the requisite standard is "some" benefit, "meaningful" benefit, or another formulation altogether. *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, 137 S. Ct. 29 (2016) (granting cert.).

C. As a matter of context and contrast, the Second Circuit and federal district courts in New York recently have led the development of a fourth dimension, which is derivative of but distinct from the third dimension—(4) ability to implement the IEP.[4] This separable dimension, along with the Second Circuit's modified four corners (or "retrospective evidence") approach,[5] will only receive secondary attention due to the limited extent of their overlap with applicable failure-to-implement case law.[6]

D. This outline provides a current and concise overview of the three approaches for the failure-to-implement issue. The sequence follows the order of the chronological development and jurisdictional popularity of the three approaches. However, the caveat bears repeating that although these approaches correspond to a continuum from the most relaxed to the strict side of district accountability, the case law concerning failure-to-implement claims has yet to crystallize into completely distinct standards.

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[4] Courts alternatively use the term "capacity to implement" the IEP. E.g., *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 244 (2d Cir. 2015). An alternate way to keep the implementation claims distinct from each other is to separate "could not" (able to implement), "would not" (speculative distractor) and "did not" (failure to implement).

[5] The Second Circuit established the modified four-corners approach under the heading of retrospective evidence, defining it as "testimony that certain services not listed in the IEP would actually have been provided to the child if he or she had attended the school district's proposed placement." *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012). The ruling was to prohibit only retrospective testimony "that materially alters the [IEP]," not "that explains or justifies the services listed in the IEP." *Id.* at 185.

[6] These two issues were the focus of Attorney Merced's January 2016 webinar "The Aftermath of *R.E.*: Prospective Challenges to a Child's Proposed Placement."

II. THE MATERIALITY/BENEFIT (AKA "*BOBBY R.*") APPROACH

A. This approach, in short, requires both a material (i.e., more than minor) shortfall in implementation of significant or central IEP provisions plus a loss of benefit to the student.

B. The Fifth Circuit's[7] original iteration in *Houston Independent School District v. Bobby R.*[8] is as follows:

> [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.[9]

The emphasis is on the centrality of the IEP provisions at issue—i.e., whether they are substantial or significant. However, while first characterizing this approach as equating with benefit,[10] the *Bobby R.* court added this gloss:

> [D]etermination of what are "significant" provisions of an IEP cannot be made from an exclusively *ex ante* perspective. Thus, one factor to consider under an *ex post* analysis would be whether the IEP services that were provided actually conferred an educational benefit."[11]

B. The subsequent applications by and within the Fifth Circuit applied the two steps of this approach—materiality and benefit—on an intertwined basis.

1. Whether the child received the requisite educational benefit is (a) one factor to determine whether the district failed to implement

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[7] At least part of the difficulty in generalizing this approach to other jurisdictions is that the Fifth Circuit uses a four-part test to apply the *Rowley* standard for substantive FAPE, with the last two parts most often intertwined with failure-to-implement claims. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 257 (5th Cir. 1997): "(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."

[8] 200 F.3d 341 (5th Cir. 2000).

[9] *Id.* at 349.

[10] *Id.* ("the significant provisions of [this child's] IEP were followed, and, as a result, he received an educational benefit").

[11] *Id.* at 349 n.2.

substantial or significant provisions of the IEP and also (b) "the ultimate legal issue" in this FAPE determination.[12]

2. "[I]f the IEP would have been acceptable with the level of services actually provided, then the implementation must have been adequate."[13]

C. The majority of *Bobby R.* decisions in other jurisdictions have similarly applied the two steps on an intertwined or conflated basis.

1. The Third Circuit Court of Appeals appears to have conflated the two steps.[14] The Fourth Circuit Court of Appeals seems to have done the same.[15]

2. The lower courts in the Third Circuit[16] and elsewhere[17] have similarly tended to intertwine or fuse the two steps.

D. However, occasional decisions have applied the two steps separately on a sequential basis.[18]

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[12] *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 587–88 (5th Cir. 2009).

[13] *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).

[14] *Melissa v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006) ("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").

[15] *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).

[16] *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). *But see Sch. Dist. of Phila. v. Drummond*, 67 IDELR ¶ 170 (E.D. Pa. 2016) (denial of FAPE based on materiality alone).

[17] *See, e.g.*, *B.B. v. Catahoula Parish Sch. Dist.*, 62 IDELR ¶ 50, at *10 (W.D. La. 2013); *L.P. v. Longmeadow Pub. Sch.*, 59 IDELR ¶ 169 (D. Mass. 2012); *Doe v. Hampden-Wilbraham Reg'l Sch. Dist.,* 715 F. Supp. 2d 185, 198 (D. Mass. 2010); *Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 889 (D. Minn. 2003); *Manalansan v. Bd. of Educ. of Baltimore City*, 35 IDELR ¶ 122, at *10–12 (D. Md. 2001).

[18] *J.P. v. Cty. Sch. Bd.*, 447 F. Supp. 2d 553, 568–74 and 587 (E.D. Va. 2006), *rev'd on other grounds*, 516 F.3d 254 (4th Cir. 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*).

III. THE MATERIALITY ALONE (AKA *VAN DUYN*) APPROACH.

A. This approach requires a material shortfall in the overall extent of IEP implementation, without any emphasis on whether the provisions are substantial or significant or whether the child suffered loss of benefit.

B. 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*.[19] The majority's iteration of this approach is as follows:

> [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 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.[20]

The emphasis here is on the extent of implementation in terms of services rather than centrality. Moreover, reflecting another blurry boundary with *Bobby R.*, the *Van Duyn* majority emphasized that evidence of educational benefit is not a mandatory component of the decisional calculus.[21] Further suggesting that this difference amounts to more like shading than a bright line, the *Van Duyn* court added this qualification: "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."[22]

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[19] 502 F.3d 811 (9th Cir. 2007).

[20] *Id.* 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.").

[21] *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.*

[22] *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.*

C. Various federal district courts beyond the Ninth Circuit have followed the *Van Duyn* approach, with the largest concentration being in the District of Columbia.[23] The D.C. line of decisions has developed a proportionality standard for materiality.[24] Initially, this standard provided a blend with *Bobby R.*,[25] but it subsequently evolved into an unblended standard of proportionality.[26]

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[23] For the scattered decisions beyond D.C., see *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).

[24] *James v. District of Columbia*, __ F. Supp. 3d __ (D.D.C. 2016); *Damarcus S. v. District of Columbia*, __ F. Supp. 3d __ (D.D.C. 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).

[25] E.g., *Wilson*, 770 F. Supp. 2d at 275 (citing the standard dually as "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*").*

[26] E.g., *Holman,* 153 F. Supp. 3d at 393 ("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").

IV. THE PER SE APPROACH

A. This strict standard holds a district accountable for any implementation failure beyond a blatantly *de minimis* shortfall.

B. Thus far, its application under the IDEA prevails only in the complaint investigation procedure.[27] Its judicial imprimatur thus far is limited to the Ninth Circuit's panel's dissenting opinion in *Van Duyn*.[28]

C. Yet, the reasons supporting this approach are rather compelling when considered together. They 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.[29]

2. This commitment, as reflected in the "four corners" approach to the IEP's FAPE,[30] is, in effect, contractual.[31]

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[27] 34 C.F.R. §§ 300.151–300.153. For example, a District of Columbia complaint investigator ordered compensatory education of 90 minutes of counseling for the failure to implement the IEP's weekly counseling provision for three sessions. OSSE State Complaint 012-2008 (Nov. 21, 2012). For other examples, see Hillsborough Cty. Sch. Dist., 114 LRP 47356 (Fla. SEA June 23, 2014); Paramount Sch. of Excellence, 115 LRP 3638 (Ind. SEA Dec. 22, 2014); Baltimore City Pub. Sch., 115 LRP 17134 (Md. SEA Sept. 4, 2014); River Valley Sch. Dist., 114 LRP 43710 (Wis. SEA Aug. 21, 2014). OCR's overlapping complaint investigation procedure similarly uses the per se approach but on a less clear-cut basis due to frequent culmination in voluntary resolution agreements. 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) Puerto Rico Dep't of Educ., 66 IDELR ¶ 228 (OCR 2015); Lindenhurst (NY) Pub. Sch., 115 LRP 3328 (OCR Nov. 14, 2014); Los Angeles (CA) Unified Sch. Dist., 115 LRP 24936 (OCR Dec. 22, 2014).

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

[29] 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, resulting in a negotiated resolution. 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").

[30] *Cf. R.E. v. N.Y.C. Dep't of Educ.,* 694 F.3d 167, 186 (2d Cir. 2012) (modified four-corners approach).

[31] 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).

3. The IDEA and its regulations unconditionally require districts to provide the special education and related services specified in the IEP.[32]

4. FAPE, as the CSE has specified in the IEP, is not only a district obligation but also a unitary concept, thus not subject to further differentiation.[33]

5. As the *Van Duyn* dissent observed in comparing failure-to-implement FAPE claims with substantive FAPE claims:

> Judges are not in a position to determine which parts of an agreed-upon IEP are or are not material. The IEP Team, consisting of experts, teachers, parents, and the student, 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 or the student's parents challenge 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.[34]

6. To the varying extent it plays a role for 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[35] renders this dimension, like procedural FAPE,[36] superfluous.

7. IHO application of the per se approach would be harmonious with the general use of this approach in the alternative decisional dispute resolution forum under the IDEA—the state's complaint procedures process.[37]

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[32] 20 U.S.C. § 1401(9)(D); 34 C.F.R. § 300.323(c)(2).

[33] 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. E.g., *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).

[34] 502 F.3d at 827.

[35] *Bd. of Educ. v. Rowley*, 458 U.S. at 206. For this standard, *see supra* note 3.

[36] For the current two-step, harmless error approach for procedural FAPE claims, *see supra* note 2.

[37] *See supra* note 27 and accompanying text.

V. THE CHOICE FOR NEW YORK IHOs

A. The Second Circuit has not adopted one of these approaches, and the federal district courts in New York have lacked definitive consistency.[38] The trend thus far is to blend the first two approaches, although this case law is not so settled as to eliminate entirely the possibility of establishing the per se approach. Depending on the IHO's interpretation and justification, the options appear to be (a) cursory citation and application of a blended *Bobby R.*-*Van Duyn* approach; (b) careful selection and distinguishable application of either *Bobby R.* or *Van Duyn*; or, overcoming the current trend, (c) cogent explanation and application of the per se approach. More specifically, the relevant rulings in this jurisdiction are as follows in chronological order:

1 In a brief unpublished decision in *A.P. v. Woodstock Board of Education,*[39] the Second Circuit cited both *Bobby R.* and *Van Duyn* but briefly cited evidence of benefit and limited shortfall w/o clear differentiation.

2. The first pertinent district court decision cited *Bobby R.* and did not address benefit, finding lack of the requisite "failure to implement a substantial portion of the IEP."[40]

3. The second pertinent district court decision briefly intertwined the *Rowley* substantive standard and the *Van Duyn* material failure standards.[41]

4. The next pertinent district court decision cited *Bobby R.* and blended the administrative findings of lack of the requisite failure into its *Rowley* benefit analysis.[42]

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[38] The state review officer has rarely addressed this issue, and it has been far from definitive in terms of choice of the specifically applicable approach. E.g., Student with a Disability, Case No. 11-055, 57 IDELR ¶ 146 (June 30, 2011).

[39] 370 F. App'x 202 (2d Cir. 2010). The court included an Eighth Circuit decision in this string citation. Yet, adding to the ambiguity, this decision expressly chose instead to decide the issue under *Rowley*'s "pliable" substantive standard. *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

[40] *D.D-S. v. Southold Union Free Sch. Dist.*, 57 IDELR ¶ 164, at *11–12 (S.D.N.Y. 2011), *aff'd mem. on other grounds*, 506 F. App'x 80 (2d Cir. 2012) (minor deviations in implementing IEP's assistive technology provision for a three-day period).

[41] *R.C. v. Byram Hills Sch. Dist.*, 906 F. Supp. 2d 256, 273 (S.D.N.Y. 2012) ("Plaintiffs . . . have not shown that any of [the] alleged defects would have prevented [the child] from progressing or constituted a "material failure" to implement [his] IEP").

[42] *V.M. v. N. Colonie Cent. Sch. Dist.*, 954 F. Supp. 2d 102, 118–19 (N.D.N.Y. 2013) (agreeing that the "failures impacted a significant or substantial aspect of [the child's] IEPs" and concluding that these IEPs met the *Rowley* substantive standard).

5. The most recent pertinent district court decision cited, for its failure-to-implement analysis, a previous decision in the same jurisdiction that was specific to the separable ability-to-implement issue[43] and a D.C. decision that disagreed with the *Bobby R.* approach.[44] In contrast, this decision subsequently cited *A.P. v. Woodstock* for its progress (i.e., benefit) analysis.[45]

D. In making and applying the choice for the failure-to-implement issue, New York IHOs need to avoid confusion with the Second Circuit's directives concerning the separable ability-to-implement issue[46] and the similarly separable evidentiary issue of the modified four corners approach.[47]

1. The ever-expanding line of case law for the ability-to-implement theory for denial of FAPE is distinguishable from, although occasionally confused or interwoven with,[48] the failure-to-implement theory.

2. The Second Circuit not only developed the modified four-corners approach within the tuition reimbursement cases context,[49] but also

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[43] *R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp. 3d 262, 271 (S.D.N.Y. 2016) (citing the lower court decision in *Y.F. v. N.Y.C. Dep't of Educ.,* 659 F. App'x 3 (2d Cir. 2016), which, like its affirmance, was an able-to-implement ruling).

[44] *R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp. 3d at 272 (S.D.N.Y. 2016) (citing *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) for any shortfall being "excusable under the circumstances"). In its pre-*Van Duyn* decision, the *Catalan* court, 478 F. Supp. 2d at 76, critiqued *Bobby R.* as follows:

> [T]he Fifth Circuit's language 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.

[45] *R.E. v. Brewster Cent. Sch. Dist.,* 180 F. Supp. 3d at 272.

[46] *See supra* note 4 and accompanying text. Thus far, the courts in this jurisdiction have differentiated the "could not" with the "would not" variations due to the intersection of the retrospective-evidence limitation. E.g., *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 244 (2d Cir. 2015) (distinguishing between capacity to implement and presumed failure to implement); *G.S. v. N.Y.C. Dep't of Educ.*, 68 IDELR ¶ 154 (S.D.N.Y. 2016); *N.M. v. N.Y.C. Dep't of Educ.*, 68 IDELR ¶ 89 (S.D.N.Y. 2016) (distinguishing between whether the school could and would implement the IEP).

[47] *See supra* note 5 and accompanying text.

[48] *See supra* note 43 and accompanying text.

[49] *R.E. v. New York City Dep't of Educ.*, 694 F.3d at 186 ("We . . . hold that retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a *Burlington/Carter* proceeding"); *see also id.* at 195 ("Speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement").

applied it directly to the substantive and procedural dimensions of FAPE,[50] with subsequent customized and still unsettled application to the ability-to-implement dimension of FAPE.[51] In a failure-to-implement case, its only application would be to the baseline (i.e., what is the IEP). In contrast, the evidence as to the extent and effect of non-implementation are necessarily extrinsic, or retrospective.

E. More importantly, make sure to be careful to not only justify your choice but also to apply it defensibly.

1. The per se approach will require the most compelling justification, because it needs to either distinguish or cause a reversal of the case law in this jurisdiction.

2. The blended approach appears the easiest, but—depending on the parties and, if either or both file for appeal, the review officer and the courts—the most susceptible to not being sufficiently "thorough and carefully considered."[52]

3. The distinction between the other two approaches requires attention not only to the role of the *Rowley* substantive standard but also the difference between the centrality[53] of the provisions (*Bobby R.*) and the shortfall[54] in the services (*Van Duyn*).[55]

F. The attached figure provides a visual depiction of the three approaches, with purposely blurred dividing lines and not clearly consistent bounding limits.

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[50] First, *R.E.* applied this approach to the substantive and procedural dimensions in two of its three consolidated cases. *Id.* at 192–94. Next, *R.E.* distinguished the third consolidated case, rejecting a theoretical implementation-related claim. *Id.* at 195 ("Unlike the other two cases before us, E.Z.-L.'s parents do not seriously challenge the substance of the IEP. Instead, they argue that the written IEP would not have been effectively implemented at [the designated school]").

[51] *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 244 (2d Cir. 2015) ("While it is speculative to conclude that a school with the capacity to implement a given student's IEP will simply fail to adhere to that plan's mandates, . . . it is not speculative to find that an IEP cannot be implemented at a proposed school that lacks the services required by the IEP").

[52] E.g., *R.E. v. New York City Dep't of Educ.*, 694 F.3d at 189.

[53] "Centrality" here is intended as shorthand for the *Bobby R.* references to "substantial or significant." *See supra* text accompanying note 9.

[54] "Shortfall" here is intended as synonymous with disparity in implementation of services. *See supra* note 22 and accompanying text.

[55] For early recognition of this difference, *see supra* note 44.

V. PRACTICAL CONSIDERATIONS

A. In implementing your choice of approach, keep the following in mind when–

1. preparing for the prehearing conference and/or hearing:

a. review the decisions cited in this outline and these practical pointers.

b. review the due process complaint to identify whether the issue is one of failure to implement (possibly among others) versus ability to implement and organize your clarifying questions (e.g., those set forth below).

2. at the prehearing conference or at the outset of the hearing:

a. confirm whether failure to implement, as compared with ability to implement, is an issue in the case.

b. if so, note your understanding of the alternate approaches and allow the parties the opportunity to offer any supplementary information.

c. clarify whether you consider one or more of these approaches as binding for this issue and, in any event, the scope of evidence that you will need to decide this issue.

d. ask the parties to clarify whether the *R.E.* restriction is applicable to resolution of this issue and, if so, specifically in what way and to what extent.

e. with respect to the IEP(s) allegedly not implemented, ask the parties to be prepared to present rifle-like opening arguments and evidence addressing these questions–

i. which specific provisions of the IEP are at issue with regard to implementation?

ii. whether each such provision was a substantial or significant part of the IEP and why or why not?

iii. for each provision not implemented, what was the specific proportional extent of the non-implementation?

iv. whether the IEP, to the extent implemented, resulted in the requisite substantive benefit and what was the effect of the alleged non-implementation on this result?

f. for the remedy that the parent seeks for the asserted denial of FAPE:

i. if compensatory education for this denial, ask the parent to identify the form of services (e.g., tutoring or related services); the amount (e.g., hours/minutes per day/week or monthly); the provider (e.g., teacher, aides, or private contractor); the time (e.g., before school, during school, after school, and/or during the summer); and the approach (e.g., quantitative, qualitative, or hybrid).

ii. if tuition reimbursement for this denial, remind the parties of the other applicable steps for the analysis, including whether the parents provided timely notice and whether they showed that the unilateral placement was proper.

g. if it appears relevant, remind the parties that the burden of production and persuasion is on the district except, in tuition reimbursement cases, for the appropriateness of the parent's unilateral placement.

3. during the hearing:

a. move the evidence along efficiently, with a rifle-like focus as to the previous step's demarcation of the scope for the failure-to-implement issue.

b. provide similarly efficient opportunity for evidence for the previous-step's identified remedy.

4. in writing the decision:

a. make sure your analysis is "careful and thorough"[56] regarding the choice of approach, including the citation and application of relevant authority.

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[56] E.g., *M.H. v. N.Y.C. Dep't of Educ.*, 635 F.3d 217, 246 (2d Cir. 2012) ("where the SRO rejects a more thorough and carefully considered decision of an IHO, it is entirely appropriate for the court to [defer to] the IHO's analysis"). The key to this standard is producing a written decision that is well reasoned and well supported with citations to the record. *Id.*

b. make sure your analysis is equally careful and thorough regarding the application of this approach.

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