



**WEBINAR FOR N.Y. IMPARTIAL
HEARING OFFICERS (IHOS)**

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Course Code:

2017-333-251

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THE AFFIRMATION FORM.**



FAILURE TO IMPLEMENT: THE THIRD DIMENSION OF FAPE



Purpose of this Webinar

To familiarize IHOs with the various, not completely crystallized approaches to failure-to-implement (FTI) claims of denial of FAPE.



IHO Significance

- FTI claims are increasing in frequency.
- The partially inchoate state of the law represents both a problem and opportunity for IHOs.
- The sources of confusion are the related but separable claims of denial of FAPE.



Overall Organization

- Review and initial responses to case scenario
- Separation of related claims of FAPE denial
- Continuum of the alternate approaches
- Current status of case law in N.Y.
- Re-visitation of the case scenario
- Shared identification of practice pointers



Case Scenario

- Child: 6th grader with language-based SLD and history of developmental problems
- IEP for grade 7:
 - 2 gen. ed. classes w. consulting sped T
 - small-group special class for reading
 - 1 hr./wk. for OT and same for SLT
 - AT device: Neo 2

Case Scenario (cont.)

- Findings of IEP non-implementation in grade 7:
 - consulting sped T not certified
 - OT and SLT for 50 rather than 60 minutes per week
 - Neo 2 not available in the classroom and not accessed by the child



Code #2:

Happy Feet 123

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Separable Claims

- ability-to-implement (i.e., could not) – recognized in Second Circuit
- theoretical FTI (i.e., would not) – rejected in Second Circuit
- actual FTI (i.e., did not) – recognized in Second Circuit but not yet with clearly differentiated approach

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

Liability



Non-Liability





FTI Continuum

Strict side:

I. Per Se Approach

- denial of FAPE for any non-implementation more than a de minimis shortfall – with denial of benefit irrelevant
- only state complaint procedures process and 9th Cir. dissent

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

Liability



Non-Liability



0%



de minimis FTI



Extent of IEP Implementation

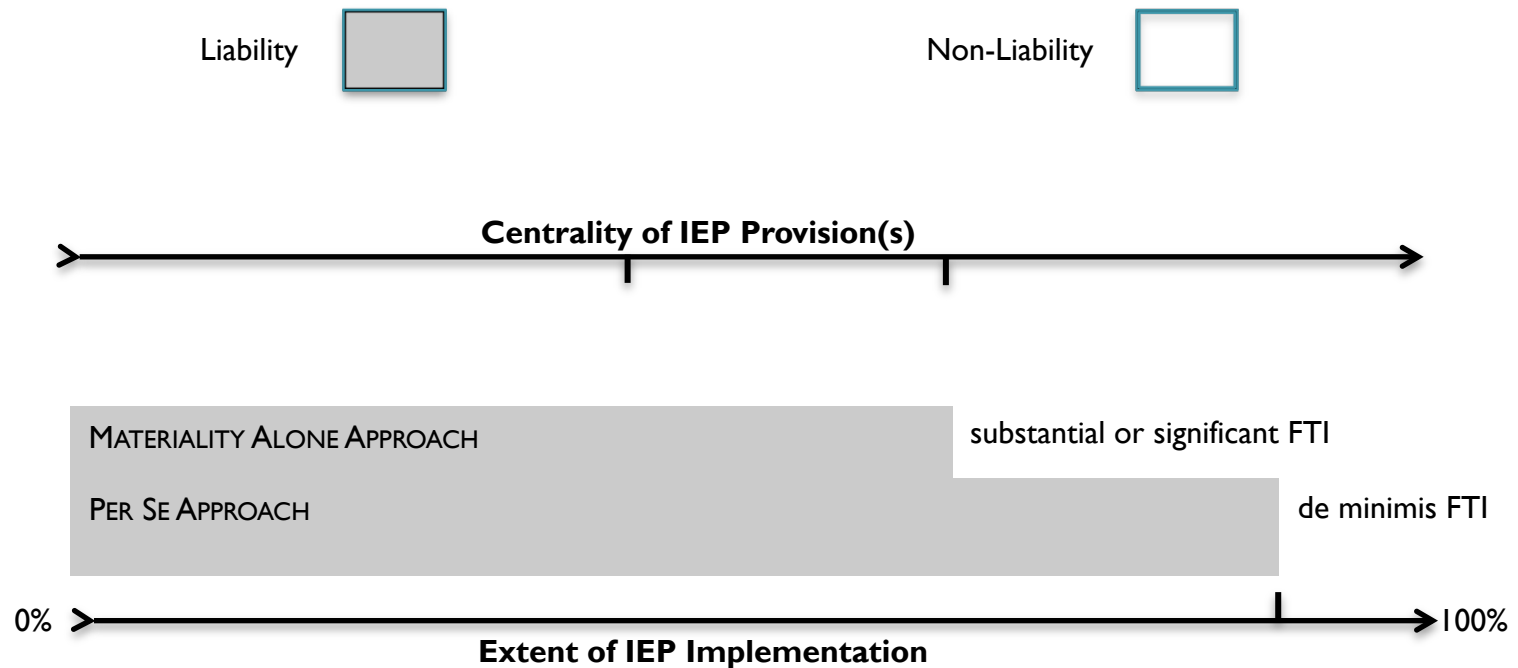
FTI Continuum (cont.)

Intermediate segment:

2. Materiality Alone (*Van Duyn*)

- denial of FAPE non-implementation that is “material,” with denial of benefit not essential
- 9th Circuit and various district courts elsewhere, especially D.C.

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



FTI Continuum (cont.)

Relaxed side:

3. Materiality/Benefit (*Bobby R.*)

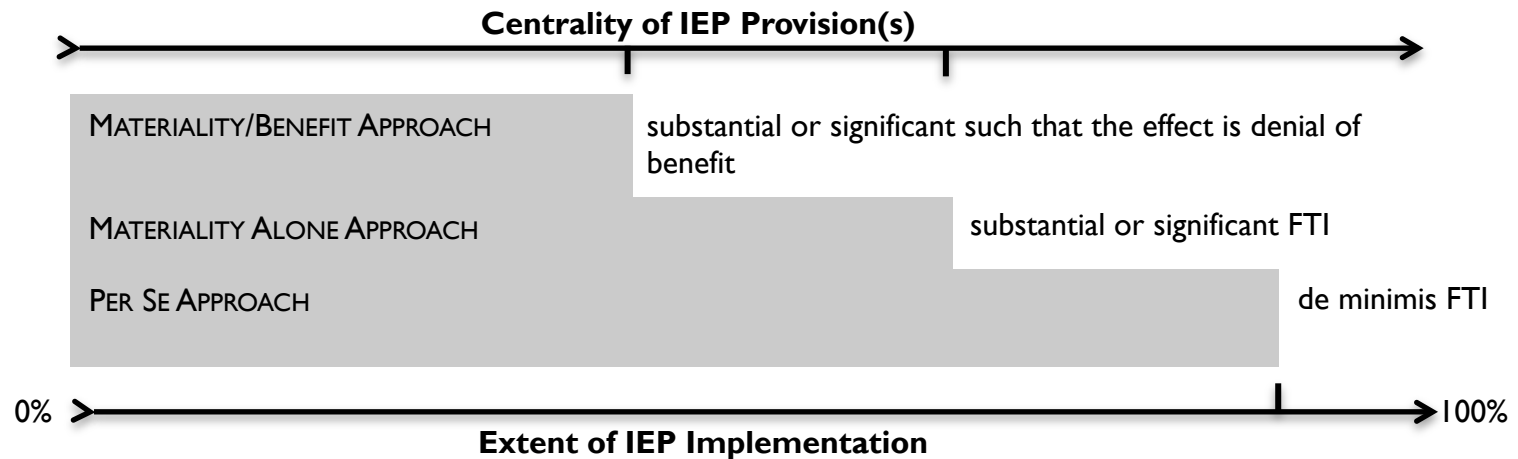
- denial of FAPE non-implementation that is material and entails denial of benefit
- 5th Circuit and, on intertwined basis, 3rd and 4th Circuits

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

Liability



Non-Liability





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New York Jurisdiction

- Second Circuit: unpublished decision that briefly cited *Van Duyn* and *Bobby R.* but did not reach benefit (*A.P. v. Woodstock Bd. of Educ.*, 2010)
- federal district courts: inconsistent use of second and third approaches, without careful differentiation and application



Choice for N.Y. IHOs

- (a) cursory citation and application of a blended *Van Duyn-Bobby R.* approach
- (b) careful selection and distinguishable application of either *Van Duyn* or *Bobby R.*
 - or, overcoming the current trend -
- (c) cogent explanation and application of the per se approach



Caveats

- Be careful to distinguish failure-to-implement from ability-to-implement (i.e., “did not” rather than “would not” or “could not”).
- Consider the applicability, if any, of the *R.E.* modified four corners, or retroactive evidence, rule for evidence.



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Webinar 4 CLE

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Practice Pointers

In your preparation for the hearing:

- Review the complaint to determine whether FTI is an issue.
- If so, review the information in this webinar's reference outline.
- If exceptions are at issue, recognize their judicially construed narrowness.



Practice Pointers (cont.)

At the prehearing conference or at the outset of the hearing:

- Confirm that FTI is at issue.
- If it is, review with the parties what appears to be the applicable approach(es).
- After providing an opportunity for their input, make clear your expectations for evidence for this issue.



Practice Pointers (cont.)

At the hearing:

- Move the evidence along efficiently, maintaining a rifle-like focus on this issue.
- Provide a corresponding opportunity with regard to the remedy specific to this issue.



Practice Pointers (cont.)

In the written decision:

- Identify and justify, with appropriate citations, the choice of approach.
- Apply this approach with specific support in the record.
- Be similarly “careful and thorough” if any remedy is warranted.



Return to Case Scenario

1. Your ruling for the FTI issue?
2. Your ruling if instead the shortfall was only:
 - (a) the consulting teacher?
 - (b) the OT service provider?

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Code #5

Fantastic!

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