

Free and Appropriate Public Education

FAPE

- FAPE is the **foundational concept of special education**
- In some ways, everything we do in special education is in order to provide FAPE
- FAPE defined as
 - Provided at public expense
 - Meets standards of state
 - Include **appropriate** school education
 - Conforms with IEP

Free

- **Families cannot be charged**
 - If private school/ services are necessary for FAPE, school district must pay for them
 - **Cost cannot be considered in provision of FAPE**
 - Cost can only be considered when choosing between two or more appropriate options

Meets State Standards

- States can always **require more** than federal law (IDEA) does
 - As CA, MA, MI, and NC do
- If they do, it **must be provided to all** students with disabilities

Conforms with IEP

- “IEP is embodiment of FAPE” (p. 184)
 - An **IEP** is what makes a student’s education special and appropriate
- **Failure to develop and implement IEP** properly can be interpreted as **denial of FAPE**
- Does not guarantee that goals will be met, but that a good-faith effort it made

Parent Involvement

- Courts have also considered **parental participation essential** for an appropriate education
- In *Drobnicki v. Poway Unified School District* (2009), 9th Circuit Court of Appeals ruled that lack of effort to involve parents = denial of FAPE

Related Services

- Includes transportation, speech/language, audiology, psychological, counseling, orientation/ mobility, social work, and medical services
- Must be **provided at no cost if required to benefit from special education**
- Courts have **reimbursed parents** for unilaterally seeking services when required for benefit but not provided by school

Related Services

- **Medical services** most often litigated
- School health services provided by qualified nurse or other qualified person required by IDEA (even if extra training required; e.g., catheterization)
- **Does not cover services requiring licensed physician**
- Does not include working with surgically implanted medical device (e.g., cochlear implant)

Related Services

- **Tatro case:**
 - required **catheterization**
 - Supreme Court did not hear case but issued “medical service standard” (bright line test):
 - Student is IDEA eligible
 - **Service is necessary for student to benefit from special education**
 - **Service performed by nurse or other qualified person (not a physician)**

Related Services

- **Garret F case:**
 - Required extensive services (e.g., ventilator, trach supervision and suctioning, catheterization)
 - Parents had paid for nursing, requested school district pay starting in middle school
 - Supreme Court upheld lower rulings that **services were necessary for school, did not require a physician and therefore must be covered**

Rowley (1982)

- First Supreme Court and best known FAPE case
- <http://www.wrightslaw.com/law/caselaw/ussupct.rowley.htm>
- Amy **Rowley**, who is **deaf, included** for first grade; **school felt interpreter was not needed**
- Lower courts ruled that **translator required** because even though **Amy was doing better than most students, she was not achieving her potential**

Rowley

- **Supreme Court overturned** lower rulings
- FAPE was interpreted as instruction designed to meet unique needs of student, supported by services to permit students to benefit from instruction
 - **Schools not required to maximize the children's potential**

Rowley

- Two-part test
 - Has school complied with procedures of IDEA?
 - **Is IEP reasonably calculated** to enable child to receive **educational benefits?**
- Must be applied on an **individual basis**
- Later rulings indicated that
 - **courts should not substitute their judgment** for that of education
 - **No right to best possible education** or to achieve maximum potential

Post-Rowley Litigation: Procedural Violations

- Multiple cases ruled that FAPE denied on basis of **procedural violations**
 - **Not including class teacher in IEP meeting**
 - Delays in evaluation and IEP development
 - Changing placement prior to changing IEP
 - Failing to notify parents of rights
- Other courts ruled procedural violations that did not result in substantive violations did not deny FAPE

Post-Rowley Litigation: Substantive Violations

- **Early cases** reinforced Rowley's notion of **FAPE = minimal benefit**
- In Hall (1985) 4th Circuit Court of Appeals ruled that district had to reimburse parents for private school tuition because **trivial academic advancement was insufficient**
- See also Carter (1991) and J.C. (1996)

Post-Rowley Litigation: Substantive Violations

- In **Polk** (1988), 3rd Circuit Court of Appeals: “Congress intended to afford children with special needs an education that would confer **meaningful benefit**,” which **can only be determined in light of student’s potential**

Post-Rowley Litigation: Substantive Violations

- In **Michael F.** (1997) District Court used **four-prong test** for FAPE:
 - Was program **individualized**?
 - Was program delivered in **LRE**?
 - Were services provided in coordinated and collaborative manner?
 - Were **positive academic and nonacademic benefits** realized?
- **5th Circuit Court of Appeals** upheld District Court finding that district had delivered FAPE using same test

Post-Rowley Litigation: Substantive Violations

- Bobby R. (2000) 5th Circuit Court of Appeals used Michael F. 4-prong test to show **FAPE had been provided based on test data showing “good” improvement**
 - Even if improvement **not commensurate with peers**

Instructional Practices

- In **Lachman (1988)**, court ruled that **parents could not compel school to use a particular practice/ program**
- This and other cases uphold Supreme Court's admonition in **Rowley** that courts should defer to judgment of educators

Instructional Practices

- A number of court cases have provided **reimbursement for or ordered schools to provide Lovaas Therapy for children with autism**
- However, all cases involved **schools not delivering appropriate education**
- Lovaas therapy or any other specific program not required if appropriate education is provided

Extended School Year

- Multiple cases and courts have ruled that **ESY must be provided if required to ensure appropriate education**
 - If **meaningful regression/ lack of recoupment** during break would harm student and prevent FAPE (e.g., meaningful progress)
 - Not required for FAPE if it would just benefit student

Placement

- 7th Circuit Court of Appeals (1991) ruled that **parental hostility** could be considered when determining appropriateness of placement
 - Majority ruled that parents had “poisoned the well” (even though school had provided FAPE in that placement)
 - **Ruling has not spread**

Placements

- Three factors for making placement decisions consistent with FAPE
 - **Based on IEP**
 - In Spielberg (1988) court ruled that **placement decision prior to IEP development was a violation** of IDEA
 - Determined at least annually
 - In **LRE when appropriate** and as close to home as possible
 - **Does not mandate inclusive class in closest school** (Hudson, 1995)
 - Continuum of placements must be available

New FAPE Standard?

- **IDEIA 04** requires that schools provide **instruction grounded in scientifically based research that is peer-reviewed**
- **Case law does not yet provide guidance**, but schools could be at risk if they can't show that instruction is scientifically based

Conclusion

- Standards regarding FAPE have **progressed from**
 - **Minimal progress (Rowley)**
- **To**
 - Meaningful benefit
 - **Good academic and non-academic progress**
 - **Substantive, rather than procedural, violations**
 - **Use of practices grounded in scientifically-based research**
(?)