

**PRACTICAL GUIDELINES AND ANALYSIS:
Free Appropriate Public Education (FAPE)**

A free appropriate public education (“FAPE”) is broadly defined as special education and related services that:

- (a) Are provided at public expense, under public supervision and direction, and at no cost to the parents;
- (b) Meet the standards of the state education agency;
- (c) Include an appropriate preschool, elementary school, or secondary school education; and
- (d) Are provided in conformity with an individualized education program (IEP) developed according to the IDEA’s procedural requirements.

“Special education” means individually designed instruction, provided at no cost to the parents, to meet the unique needs of the child. It includes physical education, as well as those related services, such as speech, physical, or occupational therapies, that are necessary for the child to access his or her special education program.

The incorporation of state educational standards permeates the IDEA, ranging from private schools to highly qualified teacher requirements. The law clearly recognizes that education traditionally has been a state, rather than federal, government function. State standards addressing licensure and certification of providers of special education or related services are incorporated throughout the IDEA.

The contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student. The question of whether a child’s IEP provides him or her with FAPE employs a two-pronged analysis. First, has the school district complied with the IDEA’s procedural requirements? Second, does the resulting IEP provide the student with some educational benefit?

In analyzing the substantive question, the Supreme Court has noted the importance of complying with the IDEA’s procedural requirements. Though courts have held that procedural violations are only actionable to the extent that they result in the denial of educational opportunity, the Supreme Court has also stated that where the procedural requirements of IDEA are so extensive but the substantive requirements so vague, adherence to the IDEA’s procedural requirements will likely result in an IEP that substantively satisfies the Act as well. In other words, an IEP that is based upon comprehensive evaluations, was developed by a properly constituted IEP team based upon the input of knowledgeable teachers, service providers and parents, and includes all of the necessary components of the IEP, is likely to be reasonably calculated to allow the student to achieve educational benefit, *i.e.*, provide the student with FAPE.

FREQUENTLY ASKED QUESTIONS

What if the student's parents insist on a particular placement that the educators do not feel is appropriate?

Do not “cave” to parental demands if they do not constitute FAPE. While the parents are certainly an important part of the IEP team, it is ultimately the school district's responsibility to provide the child with a free appropriate public education, and thus the decision of the educators – who have training and expertise – as to what constitutes an appropriate placement. Don't agree or acquiesce to an IEP if, as an educator, you couldn't testify under oath that it is appropriate for the child.

What if the parents are insisting on their choice of placement because it is better than the placement offered by the school district?

The school district is not required to accede to parental demands for a particular placement as long as it offers an IEP that is appropriate. The FAPE analysis is not a comparative one, *i.e.*, the appropriateness of the IEP is not judged based upon whether it is as good as or better than the placement requested by the parents. The school district must offer an appropriate placement, but it need not offer the best placement, or even a placement as good as or better than the placement requested by the parents.

The parents do not disagree with the goals and objectives or the placement offered by the IEP, but are insisting upon a particular instructional methodology. The school district staff want to employ a different methodology that is appropriate. What should we do?

Questions of methodology should be left to the discretion of the teachers and staff implementing the IEP. In fact, in most cases, it would not be necessary or appropriate to include specific methodologies or instructional programs in the IEP.

The parents have insurance coverage that could cover the cost of some of the services or therapies included in the IEP. Can we insist that they obtain payment from their insurance company for IEP services?

No. The definition of FAPE includes the requirement that services in the IEP be provided at public expense, under public supervision, and at no charge to the parents. If the IEP team determines that the service or therapy is necessary for the child to receive FAPE, then the school district must pay for it.

How much educational benefit is enough?

The IDEA does not require school districts to maximize a student's educational potential, *i.e.*, provide a student with every educational service from which a student might benefit. Rather, the Supreme Court held that the IDEA is designed to provide disabled children with a "basic floor of opportunity" that is reasonably calculated to provide a disabled student with some educational benefit, *i.e.*, allow the student to make meaningful and adequate gains in the classroom. In a recent Colorado case, *Thompson RJ-2 School District v. Luke P.*, the U.S. Court of Appeals for the Tenth Circuit (which includes Colorado) reviewed the standard for FAPE and reiterated that a school district is providing a student with appropriate special education programming if the program is reasonably calculated to allow the student to make "some progress" on his or her IEP. Thus, the IEP need not provide the student with the best possible educational program, but rather need only provide the student with an educational that is appropriate and that allows the student to make some progress.

If the student fails to achieve all the goals on the IEP, or doesn't seem to be making much progress, does that mean that the school district denied the student FAPE?

Not necessarily. The IDEA is not designed to guarantee success for a particular student. As the Supreme Court has said, the intent of the IDEA "was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level once inside." Thus, the determination of whether an IEP provides FAPE is made by looking at the IEP at the time it was developed (*i.e.*, what information the IEP had at the time and whether, based upon that information, the team developed an educational program that was reasonably *calculated* to provide the student with educational benefit). It is a prospective, not retrospective, analysis.

IMPORTANT: If a student with a disability is having difficulty making progress under an IEP, the school district should convene an IEP meeting to determine what, if any, changes should be made to the child's program.

A behaviorally impaired student is making appropriate educational progress in school and in the classroom, but is having difficulty at home. Does the IEP team need to offer services that will allow the child to make progress in the home as well?

No. In 2009, the U.S. Court of Appeals for the Tenth Circuit (which includes Colorado) ruled in *Thompson R2-J School District v. Luke P.* that an autistic student who made adequate gains in school, but no progress at home, was still considered to be receiving an educational benefit. Only when a student's inability to generalize skills across environments prevents him from making any educational progress will a lack of generalization amount to a denial of FAPE. Thus, a student who exhibits behavioral problems in noneducational settings, but nonetheless is achieving the goals and objectives in his IEP, is receiving FAPE.

How do field trips fit into a special education program?

If field trips are related to the general curriculum (and ideally, they should be), then students with disabilities should be participating in them to the extent possible. Determinations about whether it is appropriate for disabled students to participate in field trips must be made on a case-by-case basis, based upon the student's individual needs and abilities. If participation in field trips is included on the student's IEP, then the IEP must be adhered to. To the extent students with disabilities are excluded from field trips, the burden will be on the School District to demonstrate that the students should not participate.

Does earning a GED end a student's right to FAPE?

No. A student's right to FAPE ends either by "aging out" of eligibility (age 21 in Colorado) or earning a regular education diploma.