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Parental Participation: The Paramount Procedural Requirement under the IDEA?

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Initiated as funding legislation in 1975 and amended periodically upon funding reauthorization,[1] the Individuals with Disabilities Education Act (IDEA)[2] provides a detailed framework of procedural requirements for school districts that establishes a "core . . . cooperative process [with] parents."[3] The IDEA represents the major growth sector of litigation in K-12 education.[4] The "central pillar of the IDEA"[5] is the public school's obligation to provide each eligible student, via an individualized educational program (IEP),[6] a "free appropriate public education" (FAPE),[7] which in turn accounts for the bulk of IDEA litigation.[8] In the landmark

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[1] Its original version was the Education of the Handicapped Act, and Congress subsequently amended the act in 1986, 1990 (when its name changed to the IDEA), 1997 and—most recently—2004. *See, e.g.*, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY. 1, 2 n.2 (2011).

[2] 20 U.S.C. §§ 1400 *et seq*. (2012). For the corresponding regulations of Part B of the IDEA which apply to school districts, see 34 C.F.R §§ 300.1—300.818 (2014).

[3] Schaffer v. Weast, 546 U.S. 49, 53 (2005).

[4] *See, e.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1, 3 (2011) (revealing the upward trajectory of IDEA litigation within the leveling off of K–12 litigation within the past two decades).

[5] Sytsema v. Acad. Sch. Dist., 538 F.3d 1306, 1312 (10th Cir. 2008).

[6] 20 U.S.C. § 1414(d)(1)(A) (2012).

[7] *Id.* § 1412(a)(1) (2012).

[8] *See, e.g.*, Perry A. Zirkel, *Case Law under the IDEA*, in IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS 709 (2014) (showing the distribution of published court decisions under the IDEA). Empirical analysis provides indirect evidence that the procedural side of FAPE accounts for a significant segment of the litigation; Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214, 226–27 (2013)

case of *Board of Education v. Rowley*[9] more than 30 years ago, the Supreme Court concluded that FAPE has two prongs, the first being procedural compliance, and the second being a relatively relaxed substantive standard.

This article focuses on the procedural side of FAPE, with an empirical analysis of the case law concerning alleged parental-participation violations as the centerpiece. Part I consists of the following subparts: (a) a brief foundational analysis of the *Rowley* decision, with special attention to the procedural prong and parental participation; (b) a continuum-type overview of the alternative interpretations of *Rowley*'s procedural prong; (c) an illustrative synthesis of the case law in relation to these alternative interpretations for the period between *Rowley* and the 2004 amendments of the IDEA; and (d) the resulting codification in IDEA 2004 for denials of FAPE based on the procedural prong. Part II provides the methodology and result of the empirical analysis of the parental-participation FAPE case law in the wake of the 2004 amendments. Part III recommends an approach for future case law that is based on providing controlling and full force to the parental-participation language in the IDEA 2004 provision specific to denials of FAPE based on procedural violations.

I. FOUNDATION AND FRAMEWORK

A. The Landmark Rowley Decision

In the Supreme Court's first and only interpretation of the IDEA's FAPE requirement, the majority read the statute as evincing Congressional intent to provide access to individualized instruction via a prescribed set of procedures.[10] Re-emphasizing the procedural side of FAPE, with particular attention to parental participation, the Court observed:

> When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon

(finding that procedural violations, alone or in combination with substantive violations, accounted for almost half of the denial of FAPE decisions at the hearing/review officer and judicial levels for the period 2000–2012).

[9] Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

[10] *Id.* at 189.

> the measurement of the resulting IEP against a substantive standard.[11]

As a result, the Court enunciated the following two-part test for FAPE, "[first], has the State complied with the procedures set forth in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?[12] In this case, the compliance with the procedural prong was not part of the appeal,[13] and the Court concluded that the district's IEP for Amy Rowley met this relatively relaxed substantive prong.[14]

B. The Procedural Prong Options

For the subsequent lower court case law, the potential interpretations for the procedural compliance prong of *Rowley* represent a three-category continuum for the potential two steps of the violation and the effect: (1) a per se approach, which strictly treats a violation of any one or more of the various school district procedural requirements as a denial of FAPE; (2) a hybrid approach that selects some particular violation(s) as a per se denial of FAPE and that requires a second-step substantive effect for other procedural violations to amount to a denial of FAPE; and (3) a general harmless-error approach that requires the second-step substantive effect for all procedural violations. However, a more careful conception includes the differentiation of the alternatives at the second step, which may be limited

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[11] *Id.* at 205–06. The reasoning continued in terms of the structural design of the statute, demonstrating "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206. In the introductory part of the opinion, the Court also noted the importance of parental participation in the design of the Act: "The requirements that parents be permitted to file complaints regarding their child's education, and be present when the child's IEP is formulated, represent only two examples of Congress' effort to maximize parental involvement in the education of each handicapped child." *Id.* at 182 n.6. Reiterating this core principle the Court subsequently observed: "Congress sought to protect individual children by providing for parental involvement in the . . . formulation of the child's [IEP]." *Id.* at 208.

[12] Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982). Apparently focusing on the unqualified "benefit" element of the substantive standard, the Court warned:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a . . . child [with a disability] who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

Id. at 202.

[13] *Id.* at 210 n.32.

[14] *Id.* at 209. The evidence was preponderant that Amy, a first grader with deafness, was performing well in a mainstreamed, i.e., regular class based on her IEP, which provided an FM hearing aid, a tutor for the deaf one hour per day, and speech therapy for three hours per week. Her parents claimed that FAPE also entitled Amy to a qualified sign-language interpreter for her academic classes. *Id.* at 184–85.

to a substantive effect on the student, whether specific to the *Rowley* student-benefit standard, or may instead extend to other effects, such as a parent's substantive rights under the IDEA.[15] Table 1 depicts this fuller categorization, with "x" representing any procedural violation(s), "X" representing one or more selected procedural violations, "S" representing the substantive effect on the student, and "P" representing the substantive effects on the parent.

TABLE 1. THE POTENTIAL ALTERNATIVE INTERPRETATIONS OF *ROWLEY*'S PROCEDURAL PRONG

	Per Se	**Hybrid**		**Harmless Error**	
Step 1	**A** x	**B-** X	x	x	
Step 2			**-C** S Alone	**-D** S or Other (e.g., P)	**E** S Alone	**F** S or Other (e.g., P)

Under this full conception of the procedural prong, the potential issues for adjudication under *Rowley* are, in flowchart-like sequence, at Step 1 (a) whether the alleged procedure is legally required, and, if so, (b) whether the proof was preponderant that the district violated it, and to the extent that Step 2 applies, whether the violation resulted in a cognizable substantive loss, including but not necessarily to the student or parent.[16] Moreover, in light of the focus of this Article, parental participation may apply to Step 1 and/or Step 2.[17]

C. The Rowley *Progeny*

The lower court case law in the wake of *Rowley* adamantly adhered to its relaxed substantive standard despite the Court's explicit warning of its intended narrow scope[18] and successive waves of legal commentary

[15] For these potential differentiations at the second step, including the parents' substantive rights, see *infra* notes 61–68 and accompanying text.

[16] The potential nuances, at least theoretically, include a differentiation within "S" between the educational benefit and any other arguable student substantive rights and beyond "P" to other arguable cognizable Step 2 effects for denial of FAPE.

[17] The "and" potentially comes into play in Table 1 at the second subcategory of the hybrid and harmless-error categories, respectively.

[18] *See supra* note 12.

advocating its elevation based initially on the 1997 amendments and eventually on the 2004 amendments of the IDEA.[19]

However, for the procedural prong, the *Rowley* progeny has not been consistent among or within the federal circuits.[20] Yet, at least part of the problem is confusing judicial analysis and less than clear conceptual categorization. For example, pointing out inconsistency within the Fourth, Fifth, and Sixth Circuits, Romberg characterized the early post-*Rowley* interpretations as the strict, per se approach.[21] The seminal citation for this characterization was the Fourth Circuit's early decision in *Hall v. Vance City Board of Education*.[22] Referring to the school district's repeated failure to provide parents with the required procedural safeguards notice, the court reasoned, in affirming the lower court's ruling in favor of denial of FAPE, that "these failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school failed to provide [the child] a FAPE."[23] Although this language appears at first to support the per se category (i.e., cell "A" in Table 1 *supra*), the court opinion's preceding emphasis on parental participation[24] may equally suggest a selective, or hybrid[25] approach (i.e., cell combination "B-D" in Table 1 *supra*), while its succeeding agreement with the lower court that the district failed to meet the substantive standard for FAPE[26] would seem instead to support a two-step harmless-error approach (i.e., cell "E" or "F" in Table 1 *supra*).[27]

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[19] For successive summaries of the scholarly commentary (and the judicial nonresponsiveness) see, e.g., Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free Appropriate Public Education?,"* 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 397, 403–06 (2008); Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE Under IDEA?*, 79 EXCEPTIONAL CHILD. 497, 498–500 (2013).

[20] *See, e.g.*, Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. LEGIS. 415, 419, and 429 (2011) (describing the post-*Rowley* interpretations of the procedural prong as reflecting an "astonishing degree of judicial disarray" and constituting "judicial chaos").

[21] *Id.* at 431.

[22] Hall v. Vance City Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

[23] *Id.* at 635.

[24] *Id.* at 634 (reasoning that "*Rowley* recognizes that parental participation is an important means of ensuring state compliance with the Act. Unless school systems apprise parents of their procedural protections, however, parental participation will rarely amount to anything more than parental acquiescence, because parents will presume they have no real say, and the participatory function envisioned by *Rowley* will go unfulfilled.").

[25] Additionally, because the procedural violation was less directly parental participation as compared, for example, with failing to provide the parent with the opportunity to be a member of the IEP team, it is unclear whether the selective emphasis is at the first or a second step of procedural analysis. *See supra* text accompanying note 15.

[26] *Hall*, 774 F.2d at 635–36 (affirming that the district's proposed IEP was not reasonably calculated to provide the child with educational benefit).

[27] Indeed, in subsequent decisions the Fourth Circuit repeatedly characterized *Hall* as representing a two-step, harmless error approach. *See, e.g.*, DiBuo v. Bd. of Educ. of Worcester Cnty., 309 F.3d 184, 191 (4th Cir. 2002) (citing three intervening Fourth Circuit decisions that confirmed this clarification). Moreover, as the Ninth Circuit recognized, the Fourth Circuit's harmless error approach was tied to the student's, not the parent's, substantive rights at the second step. *See, e.g.*, W.G. v. Bd. of Tr. of Target

Tracing the Ninth Circuit's post-*Rowley* interpretations of the procedural prong illustrates the lack of clarity, even if the inconsistency were excused as doctrinal evolution. In the first pertinent decision, *W.G. v. Board of Trustees of Target Range School District*,[28] the procedural violations centered on the school's unilateral development of the IEP without various required team members, including the parents and the child's teacher.[29] The Ninth Circuit announced this two-step test for denials of FAPE under the procedural prong: (1) procedural inadequacies that (2) result in either "the loss of educational opportunity [citation omitted[30]] or seriously infringe the parents' opportunity to participate in the IEP formulation process [citations omitted[31]]."[32] However, the *W.G.* court's application of this test was less than clear-cut. On the one hand, in affirming a denial of FAPE in this case, the court seemed to require the second step, interpreting *Hall* as requiring a substantive violation and thus rejecting a per se approach.[33] Yet, the court did not reach the second step in terms of either the student's or parents' substantive rights, using alternative reasoning that found the second step superfluous in terms of student benefit[34] and ignoring its own recitation of the test in terms of

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Range Sch. Dist., 960 F.2d 1479, 1485 (9th Cir. 1992) ("The decision in *Hall* did not rest on the procedural errors alone, because the court found that the services actually provided to the child were not reasonably calculated to enable him to receive educational benefits."). This same imprecision applies to the other decisions that Romberg, *supra* note 20, at 431 nn.94–95, cited for the inconsistency in these circuits. Indeed, Romberg at least partially recognized this fuzziness. *Id.* at 432 n.96.

[28] *W.G.*, 960 F.2d 1479.

[29] *Id.* at 1484. Oddly, in terms of *Rowley*'s emphasis on parental participation and *W.G.*'s own announced test (see *infra* text accompanying notes 30–32), the court focused most pointedly on the absence of the private school representative. *Id.*

[30] The cited case was a Fourth Circuit decision that, in turn, cited *Hall* and that found harmless error in terms of the student's substantive right to FAPE, albeit ambiguously as to the role of the *Rowley* benefit standard. Burke Cnty. Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990).

[31] The cited cases were *Hall* and a First Circuit decision that mentioned parental participation as a second-step alternative, but instead relied on lack of parental cooperation to nullify shortfalls in the IEP contents and team. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990).

[32] *W.G.*, 960 F.2d at 1484. ("The decision in *Hall* did not rest on the procedural errors alone as the court found that the services actually provided to the child were not reasonably calculated to enable him to receive educational benefits.").

[33] *Id.* at 1485. Indeed, in a post-*Hall* decision, the Fourth Circuit seemed to regard the second step as limited to the substantive effect on the student, remanding the case to determine whether the procedural violations had this trumping result with this explanation:

> We have no doubt that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child . . . But *often* is not the same as *always*.

DiBuo v. Bd. of Educ. of Worcester Cnty., 309 F.3d 184, 191 (4th Cir. 2002).

[34] The two reasons that the court offered were neither clear nor consistent. The first one seems to focus on the substantive standard of student benefit, finding it superfluous because it was obvious: "No IEP was completed and offered to [the student in this case], and no services were actually provided to [him], so we are concerned primarily with the first part of the *Rowley* test: procedural compliance." *W.G.*, 960 F.2d at 1485. However, the second one seems to suggest a per se approach: "Because [the district] failed to develop the IEP according to the [required] procedures . . . we need not address the question of whether the proposed partial IEP was reasonably calculated to enable [the student] to

parent participation.[35] Perhaps the court was implicitly suggesting a residual Step 2 landing between the scope of the *Rowley* student-benefit standard and the more nebulous and broader scope of its "loss of educational opportunity" referent,[36] although such a possibility amounts to mere speculation.

In its second major decision,[37] *Amanda J. v. Clark County School District*,[38] the Ninth Circuit recited the *W.G.* two-step test with an added twist for the second step. In particular, the court identified a third alternative criterion specifically in terms of student benefit,[39] thus reinforcing the ambiguity as to the scope of the first alternative criterion—"loss of educational opportunity."[40] Its application in this case avoided these two student-related options, but nevertheless on balance seemed not to fit a one-step, per se approach. Although not clearly applied sequentially, the Ninth Circuit appeared to follow a two-step approach. First, the court upheld the finding of a violation of the procedural requirement to provide the parents with the student's relevant records.[41] Second, the court concluded that this violation "interfere[d] with parental participation in the IEP formulation process . . . ."[42] The language reinforcing this substantive effect on parents[43] seems to outweigh a per se categorization of *Amanda J.* as the court's concluding "in and itself

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receive educational benefits." *Id.*

[35] For example, the lack of parental participation on the IEP team served as a Step 1 violation in combination with the other missing members. However, it also arguably could have served alone as the requisite Step 2 effect for denial of FAPE, based on the premise that the lack of other knowledgeable members significantly impeded the parents' opportunity for meaningful involvement. Yet, the *W.G.* court's Step 2 analysis is devoid of mention of the parents. *Id.*

[36] *See supra* note 30 and accompanying text.

[37] In an intervening decision, the Ninth Circuit did not mention or reach either the second step or the per se alternative because the court found that the district court had complied with the procedural requirements of the IDEA. Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1400 (9th Cir. 1994).

[38] Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877 (9th Cir. 2001).

[39] *Id.* at 892 (third alternative effect of "a deprivation of educational benefits") (citing *Roland M.*, 910 F.2d at 994). For the previous use of the same part of this First Circuit decision, see *supra* note 31.

[40] *See supra* text accompanying note 30. Arguably, the first and third alternatives constitute repetition for the sake of emphasis, especially because *Roland M.* was cited as the basis both. *See supra* notes 31 and 39. This First Circuit decision formulated the test in terms of three second-step alternatives, but the first and third seem to converge on the *Rowley* substantive standard for FAPE, which is specific to the student: "[where] procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefit." *Roland M.*, 910 F.2d at 994.

[41] *Amanda J.*, 267 F.3d at 891–93 (citing 20 U.S.C. § 1415(b)(1)).

[42] *Id.* at 892. In doing so, the court characterized *W.G.* as focusing on parental participation. *Id.* ("We therefore held that Target Range's refusal to include the child's parents in the IEP process denied the child a FAPE and that his parents were entitled to reimbursement for the cost of providing an appropriate education.").

[43] *Id.* at 893–94 ("[T]his is a situation where the District blatantly violated one of the Act's procedural requirements, preventing full and effective parental participation . . . these procedural violations, which prevented Amanda's parents from learning critical medical information about their child, rendered the accomplishment of the IDEA's goals—and the achievement of a FAPE—impossible.").

den[ial]"[44] dicta merely eliminates the need to proceed to the student-benefit alternative in light of the parental-participation effect at the second step.

In its next pertinent decision, *Shapiro v. Paradise Valley Unified School District No. 69*,[45] the Ninth Circuit found two procedural violations: (1) failing to include the child's private school teacher on the IEP team; and (2) failing to make sufficient efforts to have the child's parents participate at the IEP team meeting.[46] However, while affirming the district court's ruling that the district had denied FAPE to the child, the Ninth Circuit did not make clear whether it was applying a hybrid or general harmless error approach. The reasons for this unclear differentiation were: (1) although repeating the *W.G.* test,[47] the court ambiguously treated the student's substantive right and entirely ignored the alternative parent participation criterion;[48] and (2) an intervening footnote muddied the water by characterizing the district's other violations, specific to the required elements of the IEP, as substantive.[49]

The final major Ninth Circuit decision,[50] *M.L. v. Federal Way School*

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[44] *Id.* at 895 ("Because we hold that the District failed to develop the IEP in accordance with the procedures mandated by the IDEA and that this failure in and of itself denied Amanda a FAPE, we do not address the question of whether the proposed IEPs were reasonably calculated to enable Amanda to receive educational benefits.").

[45] Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072 (9th Cir. 2003).

[46] *Id.* at 1076–78 (relying primarily on *W.G.* for the first violation and *Amanda J.* for the second). Additionally, the court reasoned: "After-the-fact parental involvement is not enough. Nor does the [district's] inclusion of the [parents] in certain parts of the process excuse the district's failure to include [them] in the . . . IEP meeting; involvement in the 'creation process' requires the [district] to include the [parents] unless they affirmatively refused to attend." *Id.* at 1078.

[47] *Id.* at 1079. While ignoring the subsequent, *Amanda J.* three-option version of the test, the court relied on loss of educational opportunity without specifically explaining its scope and application.

[48] *Id.* (citing *Amanda J.,* 267 F.3d at 895 ("Because we conclude that the [district's] procedural violations of the IDEA resulted in a loss of educational opportunity for [the student], it is unnecessary for us to address the second [i.e., benefit] prong of the FAPE analysis.")).

[49] *Id.* at 1078 n.6 ("Because we conclude . . . that the [district] violated the IDEA's procedural mandates by failing to include a representative from [the private school] and [the] parents at the . . . IEP meeting, which contributed significantly to its creation of a defective IEP and denied [the student] a FAPE, we need not address the [district's] substantive violations of the IDEA"). Specifically, these violations were the absence in the IEP of present educational levels and progress data. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1078 (9th Cir. 2003). Yet, courts generally regard these and the other elements of the IEP process as procedural, not substantive, issues. *See, e.g.*, A.G. v. Paso Robles Unified Sch. Dist., 561 F. App'x 642 (9th Cir. 2014); M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131 (2d Cir. 2013); G.N. v. Bd. of Educ. of Twp. of Livingston, 309 F. App'x 542 (3d Cir. 2009); Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060 (7th Cir. 2007); Nack v. Orange City Sch. Dist., 454 F.3d 604 (6th Cir. 2006); Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007 (8th Cir. 2006). *But see* N.B. v. Demopolis City Bd. of Educ., 60 IDELR ¶ 66 (S.D. Ala. 2012) (treating goals as substantive); *cf.* R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117 (9th Cir. 2001) (conflating procedural and substantive IEP issues); D.B. v. N.Y.C. Dep't of Educ., 966 F. Supp. 2d 315 (S.D.N.Y. 2013).

[50] During the intervening period, the Ninth Circuit ruled that the district did not violate Step 1, thus not proceeding beyond the threshold of the procedural prong test. More specifically, the court concluded that the district did not violate three of the four procedural requirements that the parent alleged, including one specific to parental participation, and its violation of the fourth, which concerned prior written notice, was minor deviation that was rendered harmless by a reasonably subsequent

District,[51] arose before the 2004 amendments of the IDEA, although the court issued its amended opinion a year later. Here, the alleged procedural violation at issue on appeal was the district's failure to have a regular education teacher on the IEP team.[52] Each of the three members of the appellate panel wrote a separate opinion. All three agreed that the district had violated this IEP team requirement in the specific context of this case, which concerned—in relation to the overlapping and overriding FAPE obligation—whether the IEP conformed to the IDEA's least restrictive environment (LRE) mandate.[53] The two judges that constituted the majority for the result, which was to rule in the parent's favor, used two different approaches to get there.

Tracking the reasoning of each of the three opinions reveals a different majority for the approach than for the result. The lead opinion employed a hybrid, i.e., selective per se approach, that appeared to extend at least to the required composition of the IEP team, concluding that "the failure to include at least one regular education teacher, standing alone, is a structural defect that prejudices the right of a disabled student to receive a FAPE."[54]

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written notice. Ms. S. *ex rel*. G. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1129–36 (9th Cir. 2003).

During the period after *M.L.* for cases that arose before, although decided after, the codification in the 2004 amendments, the Ninth Circuit did not resolve the inconsistencies. In the first of these cases, the Ninth Circuit did not squarely address or apply the procedural prong, concluding on a threshold basis that the child did not qualify for IDEA relief. R.B. v. Napa Valley Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007). In the second of these cases, the Ninth Circuit recited the *Amanda J.* three-option version for Step 2 but, after ruling that the failure to evaluate the child in all areas of suspected eligibility was a Step 1 procedural violation, only addressed the student-benefit standard in finding harm at Step 2. N.B. v. Hellgate Elementary Sch. Dist., 358 F. App'x 788 (9th Cir. 2008). In the third of these cases, the Ninth Circuit repeated the *W.G.* test, emphasizing the "significantly" qualifier for the parental-participation prong and generically referring to this two-step test as follows: "Once we find a procedural violation of the IDEA, we must determine whether that violation affected the substantive rights of the parent or child." L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 909–10 (9th Cir. 2009). The fourth case imprecisely identified and applied a broad-based, two-option version of Step 2, mixing procedural and substantive issues at Step 1. S.J. v. Issaquah Sch. Dist., 326 F. App'x 423 (9th Cir. 2009). The most recent in this cluster of cases similarly did not advance the doctrinal development; the court recited the *Amanda J.* version of Step 2 but applied the three options only in cursory, alternative manner, not finding any of the alleged procedural irregularities as a proven violation. J.L. v. Mercer Island Sch. Dist., 592 F.3d 938 (9th Cir. 2010).

[51] M.L. v. Fed. Way Sch. Dist., 387 F.3d 1101 (9th Cir. 2004), *amended*, 394 F.3d 634 (9th Cir. 2005).

[52] *Id.* at 643–44 (amended version). More specifically, the IDEA regulations require that the IEP team include at least one regular education teacher of the child "if the child is, or may be" mainstreamed, i.e., placed at least in part in regular education classes. 20 U.S.C. § 1414(d)(1)(B)(ii) (2013).

[53] 20 U.S.C. § 1412(a)(5) (2013).

[54] M.L. v. Fed. Way Sch. Dist., 394 F.3d at 648. He derived this structural approach from two constitutional due process cases in the criminal law context from other jurisdictions. *Id.* at 646–48. Arguably, but imprecisely limning the boundaries of the structural approach, his previous sentence is: "I am persuaded by [these two cases] the failures to include the individuals identified by Congress as necessary participants in evaluating whether entitlement to benefits has been demonstrated is applicable to an administrative proceeding under the IDEA." *Id.* at 648. The concurring judge characterized the lead judge's opinion as "posit[ing] no . . . stopping point prohibiting future courts from applying a structural error approach to virtually any IDEA procedural error violation." *Id.* at 655. However, even

However, the other judge who reversed the lower court's ruling arrived at this result via the general two-step harmless error approach. In the absence of any dispute about parental participation, he followed the aforementioned[55] *W.G.* test to conclude that the omission of the regular education teacher constituted, in the specific circumstances of this case, the loss of an educational opportunity. He based this conclusion on what he regarded as "the strong likelihood that mainstreaming opportunities for [this child] would have been better considered had a regular education teacher taken part in the [IEP's] preparation, and that more mainstreaming may have been permitted for [him] under the IEP."[56]

The third judge, who dissented, agreed with the second judge that the two-step *W.G.* test applied, but agreed with the lower court that the failure to include the regular education teacher was a harmless error. More specifically, he ruled that the effect was not a loss of educational opportunity for the child, but that based on his opposing conclusions that the IEP conformed to the LRE mandate, the presence of the regular education teacher would not have changed this placement.[57]

Thus, as all three judges observed,[58] the majority of the *M.L.* court continued the *W.G.* harmless error approach, rejecting its replacement with the structural per se approach. Yet, in specifically avoiding the *Amanda J.* three-option version, the Ninth Circuit left the relationship between the *W.G.* educational loss standard and *Rowley*'s student-benefit standard lacking in clarity and consistency.[59]

In sum, as this canvassing of the line of decisions in the Ninth Circuit illustrates, the applicable approach for the procedural prong of *Rowley* was subject to question in part based on the identification of the standards and even more so based on their application. Although the appellate case law had effectively eliminated, in both formulation and application, the strict general per se category, it left minority authority for a hybrid approach[60]

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at the outermost, the lead judge provided an intended, albeit indefinite, limit, of "a significant violation of the structural requirements." *Id.* at 651.

[55] *See supra* text accompanying notes 30–32.

[56] M.L. v. Fed. Way Sch. Dist., 394 F.3d at 657. He explained that he viewed this issue as a question of mixed law and fact, which is generally entitled to de novo review under the IDEA. *Id.* at 656 n.9. In dicta, the first judge posited application of the harmless error approach more directly, but structurally in terms of the *Rowley* substantive standard. *Id.* at 650 n.9 (positing that "had a material and inherently harmful impact on the ability of the defective IEP team to develop [an IEP] reasonably calculated to enable [the child] to receive educational benefits").

[57] *Id.* at 664–65. In contrast with the second judge, he used a clearly erroneous review standard for this analysis. *Id.* at 662–63.

[58] *Id.* at 650 n.9, 652–53, 658–59.

[59] The lead opinion did not reach Step 2 based on its per se approach, but in dicta did so in terms of the *Rowley* student benefit standard. M.L. v. Fed. Way Sch. Dist., 387 F.3d 1101 (9th Cir. 2004), *amended*, 394 F.3d 634, 650 n.9 (9th Cir. 2005). The second opinion found it unnecessary to reach the FAPE benefit standard based on its focus on LRE at Step 2 in the cloak of loss of educational opportunity. *Id.* at 657. The dissenting judge reached this Step 2 standard but did so with a rather opaque differentiation from the Step 2 loss of opportunity standard. *Id.* at 661 n.3.

[60] *See supra* note 54 and accompanying text. For an example elsewhere, see Doe v. Ala. State

and on a more pronounced basis, left unsettled the specification and scope of the Step 2 standards.

D. Codification in IDEA 2004

The 2004 amendments of the IDEA addressed, for the first time, the procedural prong of *Rowley* in terms of denial of FAPE. More specifically, the amendments provided:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit.[61]

Although confirming a two-step, harmless-error approach in terms of the student and parent effects, this provision compounds rather than resolves the unsettled issue of the specification of the student side. More specifically, in lieu of the amorphous "loss of educational opportunity [of the child]" standard of the Ninth Circuit[62] and various other circuits[63] during the intervening period,[64] the amendments adopted a broad, seemingly circular "impeded the child's right to FAPE" standard as well as a more narrow *Rowley* benefit standard for the two variations of the substantive student effect.[65]

Nevertheless, in between these two student-effect criteria, the amendments recognize parental participation alternative in language that,

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Educ. Dep't, 915 F.2d 651, 662 (11th Cir. 1996) (limiting per se approach to full participation of either the concerned parties or the parents in the IEP process); Doe v. Defendant I, 898 F.2d 1186, 1190–91 (6th Cir. 1990) (limiting per se approach ambiguously to either IEP team composition or parental participation).

[61] 20 U.S.C. § 1415(f)(3)(E) (2013).

[62] *See supra* text accompanying note 30.

[63] *See, e.g.*, Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 (5th Cir. 2003); MM *ex rel.* DM v. Sch. Dist. of Greenville Cnty, 303 F.3d 523, 533 (4th Cir. 2002); T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090, 1095 (10th Cir. 2001); Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001); Heather S. v. State of Wis., 125 F.3d 1045, 1059 (7th Cir. 1997).

[64] However, the case law for these circuits has not been entirely consistent in this regard. *See supra* notes 30, 33 (Fourth Circuit), 38–40 (Ninth Circuit) and accompanying text. For other circuits' variations, see, e.g., Weiss v. Sch. Bd. of Hillsborough Cnty., 141 F.3d 990, 997 (11th Cir. 1998) ("harm to [the student]"); Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186, 1196 (1st Cir. 1994) ("the pupil's right to an appropriate education or . . . a deprivation of educational benefits").

[65] Very few of the prior court decisions formulated a closely approximated, much less identical, standard. *See, e.g.*, Indep. Sch. Dist. No. 83 v. S.D., 88 F.3d 556, 562 (8th Cir. 1996); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990) ("[only if] procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.").

similar to wording in *W.G.*,[66] is qualified in terms of "significantly" interfering with the "opportunity" rather than amounting merely to any interference with actual participation. An initial systematic examination of the subsequent procedural FAPE case law revealed that alleged parent-related violations predominated, but it did not extend to singling out these cases for an in-depth examination in terms of the IDEA 2004 denial-of-FAPE codification.[67] Thus, the purpose of the next section is to provide an empirical analysis of the court decisions concerning parental participation at Step 1 and/or 2 of the codified test for the procedural prong of FAPE cases.[68]

II. EMPIRICAL ANALYSIS

A. Method

The pool for potentially pertinent decisions included: (1) the court case citations in the aforementioned[69] springboard study, which used as its primary source the citations listed for the selected topical index subheadings (e.g., "FAPE-Procedural Violations as Denial") in Specialedconnection®, the electronic database for LRP's Individuals with Disabilities Education Law Reports (IDELR); (2) the results of a Boolean search on Westlaw using various combinations of the terms "Individuals with Disabilities Education Act," "free appropriate public education," "procedural," "parent!," and "20 U.S.C. § 1415(f)(3)(E)(ii)"; and (3) the parental-participation court decisions cited within these decisions.

The selection criteria for pertinent court decisions were that: (1) the IEP(s) at issue arose after the July 1, 2005 effective date of the IDEA[70]; and (2) the court opinion included one or more rulings specifically related to parental participation at Step 1 and/or 2 of FAPE analysis.[71] Conversely, the excluded cases were: (1) those that, due to the prospective-only effect of the 2004 amendments,[72] arose before, but were decided after the July 1, 2005 effective date of the amendments;[73] (2) those that were

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[66] *See supra* text accompanying note 31.

[67] Perry A. Zirkel & Allyse Hetrick, Which Procedural Parts of the IEP Process Are Most Legally Vulnerable? (2015) (unpublished manuscript that is under review and on file with the Author).

[68] The added reason for the focus is the central importance of parents under the IDEA. *See supra* text accompanying note 11. The scope includes both steps for the sake of comprehensive coverage of this focal area. *See supra* text accompanying note 17.

[69] *See* Zirkel & Hetrick, *supra* note 67.

[70] 118 Stat. 2647, 2803 (P.L 108-446, § 302(a)(1)) (Dec. 4, 2004).

[71] The results were limited to these procedural-prong rulings. Thus, the unit of analysis is the relevant ruling, not the entire decision.

[72] *See, e.g.*, A.A. v. Exeter Twp. Sch. Dist., 485 F. Supp. 2d 587, 589 n.5 (E.D. Pa. 2007); T.T. v. District of Columbia, 48 IDELR ¶ 127, at *548–49 n.1 (D.D.C. 2007).

[73] *See, e.g.*, Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419 (8th Cir. 2010); E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 F. App'x 156 (2d Cir. 2009); T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247 (2d Cir. 2009); Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060 (7th Cir. 2007); R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932 (9th Cir. 2007); Bd. of Educ. of Twp. High Sch.

based on technical grounds rather than on the merits[74]; and, although this dividing line was not a bright one;[75] (3) those in which the ruling was not sufficiently specific to either the IEP process[76] or parental participation for FAPE.[77] Moreover, although the Step 2 scope of parental participation was relatively obvious,[78] the Step 1 coverage encompassed two overlapping sub-areas. One group consisted of those cases, even if not reaching or otherwise qualifying under Step 2, that addressed the procedural requirements of the IDEA specifically and directly applicable to parental

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Dist. No. 211 v. Ross, 486 F.3d 267 (7th Cir. 2007); Nack v. Orange City Sch. Dist., 454 F.3d 604 (6th Cir. 2006); Paolella v. District of Columbia, 210 F. App'x 1 (D.C. Cir. 2006); Bell v. Bd. of Educ. of the Albuquerque Pub. Sch., 52 IDELR ¶ 161 (D.N.M. 2008); Melodee H. v. Dep't of Educ. of Haw., 50 IDELR ¶ 94 (D. Haw. 2008); J.D. v. Kanawha Cnty. Bd. of Educ., 48 IDELR ¶ 159 (S.D.W. Va. 2007); E.P. v. San Ramon Valley Unified Sch. Dist., 48 IDELR ¶ 66 (N.D. Cal. 2007); Mr. & Mrs. "M" v. Ridgefield Bd. of Educ., 47 IDELR ¶ 258 (D. Conn. 2007); Virginia S. v. Dep't of Educ. of Haw., 47 IDELR ¶ 42 (D. Haw. 2007); B.B. v. Haw. Dep't of Educ., 483 F. Supp. 2d 1042 (D. Haw. 2006); W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134 (S.D.N.Y. 2006); Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366 (S.D.N.Y. 2006). At the margin of this exclusion is the occasional case that, despite arising before their effective date, cited the pertinent provision of 2004 amendments despite its prospective effect. *See, e.g.*, Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 819 (9th Cir. 2007). On the other side of the margin, the coverage included the pertinent part of the few cases that addressed IEPs both before and after the amendments' effective date. *See, e.g.*, Winkelman v. Parma City Sch. Dist., 109 LRP 76161, *adopted*, 53 IDELR ¶ 215 (N.D. Ohio 2009); K.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995 (N.D. Cal. 2008).

[74] *See, e.g.*, T.P. v. Bryan Cnty. Sch. Dist., 794 F.3d 1284 (11th Cir. 2015) (disposing on mootness grounds parent's claim that district's failure to provide independent educational evaluation at public expense significantly impeded their opportunity to participate in the IEP process); R.B. v. N.Y.C. Dep't of Educ., 589 F. App'x 572 (2d Cir. 2015) (ruling that parents waived the parental-participation issue); FB v. N.Y.C. Dep't of Educ., 923 F. Supp. 2d. 570 (S.D.N.Y. 2013) (not reaching parental participation issue at Step 1 due to waiver or failure to exhaust); *cf.* Lofton v. Dist. of Columbia, 7 F. Supp. 3d 117 (D.D.C. 2013) (not specifically addressing hearing officer's parental-participation ruling upon judicial review).

[75] Approximately ten percent of the cases in the final sample were noted to be marginal, usually due to the pertinent part of the court's opinion being rather cursory or otherwise cryptic.

[76] *See, e.g.*, Simmons v. Pittsburg Unified Sch. Dist. 63 IDELR ¶ 158 (N.D. Cal. 2014) (ruling that the failure to evaluate the child for possible eligibility upon parental request was a FAPE violation in terms of the parental participation prong). Although the IEP process ultimately extends to this threshold stage, the selection criterion specific to IEPs led to this exclusion in the narrow context of the case sampling.

[77] *See, e.g.*, A.H. v. Dep't of Educ. of City of New York, 394 F. App'x 718 (2d Cir. 2010); Anello v. Indian River Sch. Dist., 355 F. App'x 594 (3d Cir. 2009); Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006); FB v. N.Y.C. Dep't of Educ., 923 F. Supp. 2d. 570 (S.D.N.Y. 2013) (not differentiating parent effect from student effect in application of Step 2); W.H. v. Schuykill Valley Sch. Dist., 954 F. Supp. 2d 315 (E.D. Pa. 2013) (ruling on other violations at Step 1 and not reaching parental-participation issue at Step 2); R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173 (11th Cir. 2014) (ruling for predetermination limited to tuition reimbursement's equities step); Alloway Twp. Bd. of Educ., 63 IDELR ¶ 12 (D.N.J. 2014); Anthony C. v. Dep't of Educ. of Haw., 62 IDELR ¶ 257 (D. Haw. 2014) (ruling that rejected predetermination claim was incidental to LER rather than FAPE); D.A. v. Meridian Sch. Dist., 62 IDELR ¶ 205 (D. Idaho 2014) (subsuming parental participation within substantive issue of student's eligibility); K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806 (E.D. Pa. 2011) (ruling that hearing officer permissibly relied on parents' lack of cooperation, pointing out that parents did not claim denial of meaningful participation).

[78] The dividing line between inclusion and exclusion was whether the court specifically addressed the parental opportunity option of either the IDEA amendments or the prior case law, such as *W.G.* rather than merely reciting this option without applying it with differentiation from the student-related (i.e., loss of educational opportunity or student-benefit) options.

participation in the FAPE process,[79] which primarily are the rights for:

- Informed consent;[80]
- Prior written notice[81] and procedural safeguards notice;[82]
- IEP team membership[83] and attendance;[84]
- Access to the child's records.[85]

In addition to these core statutory rights for parents and the corresponding judicial principles for "parental participation"[86] and against "predetermination,"[87] the scope of this group extended to similarly direct parental participation requirements specified solely in the overlapping IDEA regulations.[88] However, although marginal, the IDEA regulations' possible related service of parent counseling or training,[89] even when strengthened in corollary state special education regulations,[90] did not

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[79] For an extensive catalog of the parental rights under the IDEA extending beyond the specific scope of this analysis, see, e.g., Lynn M. Daggett et al., *For Whom the Bells Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REFORM 717, 727–35 (2005).

[80] 20 U.S.C. § 1414(a)(1)(D)(i) (initial evaluation and initial services); 20 U.S.C. § 1414(c)(3) (reevaluation).

[81] *Id.* § 1415(b)(3); *see also id.* § 1414(b)(4)(B) (copy of the evaluation report).

[82] *Id.* § 1415(d)(1)(A).

[83] *Id.* § 1414(d)(1)(B)(i); *see also id.* § 1414(b)(4)(a) (eligibility determination); *id.* § 1414(c)(1) (evaluation and reevaluation); and *id.* § 1414(e) (placement).

[84] *Id.* § 1414(d)(1)(C); *see also id.* §1414(f) (alternative means of parental participation).

[85] *Id.* § 1415(b)(1).

[86] *See, e.g.*, M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 851 (9th Cir. 2014) ("A core principle throughout the IDEA is meaningful participation by parents"); W.G. v. Target Range Sch. Dist., 960 F.2d at 1485 ("Participation must be more than a mere form; it must be *meaningful*."). The Supreme Court forged the descriptor "meaningful parental participation" as an umbrella for the panoply of procedural safeguards in the IDEA specific to parents. Honig v. Doe, 484 U.S. 305, 311–12, 324 (1988).

[87] *See, e.g.*, H.B. v. Las Virgenes Unified Sch. Dist., 239 F. App'x 342, 344 (9th Cir. 1988) ("predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives."). The principles of meaningful participation and predetermination obviously overlap. *See, e.g.*, Deal v. Hamilton Cnty. Bd. of Educ., 392 F.2d 840, 857 (6th Cir. 2004) ("Because it effectively deprived Zachary's parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived Zachary of a FAPE.").

[88] *See, e.g.*, 34 C.F.R. § 300.300(b)(4) (revocation of consent for IEP services); § 300.309(b)(2) (parental right to continuous progress monitoring data during identification of specific learning disabilities); § 300.322; § 300.501(b)–(c) (more specific requirements for parental participation at IEP team meetings); §300.324(a)(ii) (requirement for consideration of parental concerns in developing IEP); § 300.345(f) (parental right to copy of the IEP).

[89] *Id.* § 300.304(a).

[90] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8, § 200.13(d) (mandatory for children with autism). Indeed, parent training or counseling was at issue only in a long tangent of unsuccessful FAPE court decisions arising in New York. *See, e.g.*, T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145 (2d Cir. 2014); C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68 (2d Cir. 2014); M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131 (2d Cir. 2013); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013); L.O. v. N.Y.C. Dep't of Educ., 94 F. Supp. 3d 530 (S.D.N.Y. 2015); P.L. v. N.Y.C. Dep't of Educ., 56 F. Supp. 3d 147 (E.D.N.Y. 2014); B.K. v. N.Y.C. Dep't of Educ., 12 F. Supp. 3d

alone suffice for this Step 1 coverage. The second group, including the relatively rare parent counseling or training case that qualified on this basis,[91] was for other procedural requirements not within the direct parental participation purview where the court's consideration extended to the Step 2 scope of coverage either by reaching Step 2 or at least by identifying parental participation as a separable substantive Step 2 option.[92]

This systematic search yielded an ample sample[93] of 145 pertinent court decisions available as of the final collection date of June 30, 2015.[94] The decisions spanned the eight-year period from 2007 to early 2015. For each of the 145 decisions, the author compiled the following entries for the pertinent procedural violations only: (a) where the case arose in terms of the federal appellate regions; (b) whether the ruling focused on Step 1 and/or Step 2; (c) whether the outcome was in favor of the parent or the district at each of the applicable steps; and (d) whether the court applied the three-option approach of IDEA 2004 or a distinguishable version based on the case law prior to the Amendments. For the resulting spreadsheet see the Appendix.

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343 (E.D.N.Y. 2014); N.K. v. N.Y.C. Dep't of Educ., 961 F. Supp. 2d 577 (S.D.N.Y. 2013); FB v. N.Y.C. Dep't of Educ., 923 F. Supp. 2d 570 (S.D.N.Y. 2013); E.Z.-L v. N.Y.C. Dep't of Educ., 763 F. Supp. 2d 584 (S.D.N.Y. 2011). *But cf.* C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68 (2d Cir. 2014) (ruling that district denied FAPE based on combination of this and various other procedural violations in combination with substantive student-benefit denial). The courts in all of these cases analyzed this particular violation in terms of either no violation of the student's, not the parent's, substantive rights at Step 2. The only two of them included in this empirical analysis—*B.K.* and *N.K.*—met the designated Step 1 or Step 2 selection criteria independent of this New York requirement.

[91] *See, e.g.*, P.S. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 255 (S.D.N.Y. 2014).

[92] *See, e.g.*, K.M. v. N.Y.C. Dep't of Educ., 65 IDELR ¶ 143 (S.D.N.Y. 2015) (lack of functional behavioral assessment); Turner v. District of Columbia, 952 F. Supp. 2d 31 (D.D.C. 2013) (lack of special education teacher on IEP team); J.H. v. Lake Cent. Sch. Corp., 64 IDELR ¶ 98 (N.D. Ind. 2014); A.D. *ex rel.* L.D. v. Sumner Sch. Dist., 166 P.3d 837 (Wash. Ct. App. 2007) (lack of sufficient evaluation data). Although the boundary line is not a bright one, merely reciting the Step 2 options without providing the specific relevance of the parental participation option for the applicable analysis did not qualify for coverage for those cases that did not reach Step 2.

[93] Although very likely representative due to the carefully comprehensive coverage, these 145 decisions do not constitute the total population of pertinent decisions because (1) FAPE procedural cases are very frequent and, in the absence of a discrete index subcategory, the identification of all the court decisions that met the designated selection criteria were inevitably less than complete, and (2) the overlapping general Westlaw and specialized Specialedconnection® databases do not contain every pertinent case. For an exploratory analysis of the unpublished decision in the IDEA context, see, e.g., Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483 (2012).

[94] The author canvassed the course of initially selected cases to limit the final selection to the most recent relevant decision. Thus, the final sample did not include (1) lower court decisions that were subject to appeal, with the limited exception of conflating the relevant rulings from a lower court decision with the citation to a summary affirmance, and (2) any subsequent decisions that were limited to attorneys' fees or other issues not within the designated selection criteria.

B. Findings

With respect to the federal appellate regions, the Second Circuit (n=40) and the Ninth Circuit (n=40) were the clear leaders, together accounting for 55% of the 145 cases.[95] Within these two leading regions, New York, California, and Hawaii accounted for most of the cases.[96] In comparison to other frequency analyses, this regional and state distribution was only partially attributable to the overall IDEA litigation rates within each circuit.[97] For example, the Second Circuit region was in first place for both overall litigation and FAPE procedural litigation, whereas the Ninth Circuit had a higher rank for the FAPE procedural cases, which continued its prominent activity from the pre-IDEA 2004 period.[98]

For the two steps of procedural violations,[99] Table 2 displays the distribution of the frequency and the outcomes of the rulings, including those that appeared to be based on both steps on either a sequential or fused (i.e., not clearly differentiated)[100] basis.[101]

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[95] The distribution for the remaining regions were as follows in descending order of frequency: Third Circuit – 23 cases; D.C. Circuit – 10 cases; Sixth Circuit – 7 cases; Seventh Circuit – 6 cases; First and Eighth Circuits – 5 cases each; Fourth Circuit – 3 cases; Fifth Circuit – 2 cases; Tenth Circuit – 1 case; and Eleventh Circuit – no cases. The distribution is according to the boundaries of, not the levels within, the federal circuits. For example, for the federal appellate level, the Third and Ninth Circuit Courts of Appeals were the leaders, each accounting for 10 cases, followed by the Second Circuit with 7 cases. Conversely, the Ninth and Seventh Circuit regions included 2 and 1 state court cases, respectively.

[96] All but two of the cases in the Second Circuit arose in New York, mostly in New York City. For the Ninth Circuit, 18 arose in California and 15 in Hawaii.

[97] Although the time periods and databases for the overall IDEA litigation only overlapped with the sampling in this study, the most recent frequency studies revealed a notable but far from complete correlation. More specifically, for published court decisions for the period 1998–2012, Karanxha and Zirkel found that for IDEA litigation overall the frequency rankings of the federal appellate regions were as follows: 1-Second Circuit; 2-Third Circuit; 3-Ninth Circuit; 4-D.C. Circuit; 5-Fourth Circuit; 6-Seventh Circuit; 7-First Circuit; 8-Fifth Circuit; 9-Sixth Circuit; 10-Eighth Circuit; 11-Eleventh Circuit; and 12-Tenth Circuit. Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law*, 27 J. SPECIAL EDUC. LEADERSHIP 55, 59 (2014). On a state-by-state rather than regional basis for the wider scope of the IDEA court decisions in the Special Ed Connection® database for the period 1979–2013, the leaders were as follows: 1-New York; 2-Pennsylvania; 3-District of Columbia; 4-California; 5-Illinois; and 6-New Jersey. Tessie Rose Bailey & Perry A. Zirkel, *Frequency Trends of Court Decisions under the Individuals with Disabilities Education Act*, 28 J. SPECIAL EDUC. LEADERSHIP 3, 7 (2015).

[98] *See supra* note 28–59 and accompanying text. Moreover, perhaps attributable in part to the long, evolving line of cases for the prior period, including the emergence of the similar formulation in *Amanda J*. (see *supra* text accompanying notes 61–62), a significant segment of the post-codification cases cited the Ninth Circuit precedents rather than the superseding language in IDEA 2004. Yet, the courts in the Ninth Circuit and elsewhere cited the two-option version of W.G. more often than the three-option version of *Amanda J*.

[99] *See supra* Table 1.

[100] *See, e.g.*, D.B. *ex rel*. Roberts v. Santa Monica-Malibu Unified Sch. Dist., 606 F. App'x 359 (9th Cir. 2015); M.M. v. Dist. 0001 Lancaster Cnty. Sch., 702 F.3d 479 (8th Cir. 2012); K.L. v. N.Y.C. Dep't of Educ., 59 IDELR ¶ 190 (S.D.N.Y. 2012), *aff'd*, 530 F. App'x 81 (2d Cir. 2013); S.W. v. N.Y.C. Dep't of Educ., 92 F. Supp. 3d 143 (S.D.N.Y. 2015); C.U. v. N.Y.C. Dep't of Educ., 23 F. Supp. 3d 210 (S.D.N.Y. 2014); S.A. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 73 (E.D.N.Y. 2014); H.D. *ex rel.* A.S. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614 (E.D. Pa. 2012).

TABLE 2. STEP-BY-STEP FREQUENCY AND OUTCOMES OF PERTINENT PROCEDURAL RULINGS

	Step 1 Only	Step 2 Only	Both Steps	Total
Ruling for Parent	8	12	14	34 (23%)
Ruling for District	62	27	22	111 (77%)
Total	70 (48%)	39 (27%)	36 (25%)	145

[101] The most frequent claim, which usually focused on Step 1 but occasionally extended to Step 2, was predetermination, often overlapping with alleged lack of meaningful participation. The outcome in most of these cases was in favor of the district. *Compare* C.B. v. Garden Grove Unified Sch. Dist., 575 F. App'x 796 (9th Cir. 2014); R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. 2012); M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217 (2d Cir. 2012); M.B. v. Hamilton Se. Sch., 668 F.3d 851 (7th Cir. 2011); K.D. *ex rel.* C.L. v. Dep't of Educ. State of Haw., 665 F.3d 1110 (9th Cir. 2011); G.W. v. Rye City Sch. Dist., 61 IDELR ¶ 14 (S.D.N.Y. 2013), *aff'd*, 554 F. App'x 56 (2d Cir. 2014); L.M. v. Downingtown Area Sch. Dist., 65 IDELR ¶ 124 (E.D. Pa. 2015); S.W. v. N.Y.C. Dep't of Educ., 92 F. Supp. 3d 143 (S.D.N.Y. 2015); P.G. v. N.Y.C. Dep't of Educ., 65 IDELR ¶ 43 (S.D.N.Y. 2105); D.N. v. N.Y.C. Dep't of Educ., 65 IDELR ¶ 34 (S.D.N.Y. 2015); Cupertino Union Sch. Dist. v. K.A., 75 F. Supp. 3d 1088 (N.D. Cal. 2014); Lofisa *ex rel.* S.S. v. Haw. Dep't of Educ., 64 IDELR ¶ 163 (D. Haw. 2014); West-Linn Wilsonville Sch. Dist. v. Student, 63 IDELR ¶ 251 (D. Or. 2014); Suffield Bd. of Educ. v. L.Y., 62 IDELR ¶ 203 (D. Conn. 2014); S.P. v. Scottsdale Unified Sch. Dist. No. 48, 62 IDELR ¶ 86 (D. Ariz. 2013); A.M. v. District of Columbia, 933 F. Supp. 2d 193 (D.D.C. 2013); Shafer *ex rel.* L.G.D. v. Whitehall Dist. Sch. Bd. of Educ., 61 IDELR ¶ 20 (W.D. Mich. 2013); K.K. v. Alta Loma Sch. Dist., 60 IDELR ¶ 159 (C.D. Cal. 2013); Z.F. v. Ripon Unified Sch. Dist., 60 IDELR ¶ 137 (E.D. Cal. 2013); DiRocco *ex rel.* M.D. v. Bd. of Educ. of Beacon City Sch. Dist., 60 IDELR ¶ 99 (S.D.N.Y. 2013); A.B. v. Franklin Twp. Cmty. Sch. Corp., 898 F. Supp. 2d 1067 (S.D. Ind. 2012); J.G. and R.G. *ex rel.* N.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011); M.C.E. v. Bd. of Educ. of Frederick Cnty., 57 IDELR ¶ 44 (D. Md. 2011); Hazen v. S. Kingstown Sch. Dep't, 55 IDELR ¶ 289 (D.R.I. 2010), *adopted*, 56 IDELR ¶ 16 (D.R.I. 2011); S.T. v. Weast, 54 IDELR ¶ 83 (D. Md. 2010); M.S. v. N.Y.C. Dep't of Educ., 2010 WL 9446052 (S.D.N.Y. Mar. 12, 2010); Winkelman v. Parma City Sch. Dist., 53 IDELR ¶ 215 (N.D. Ohio 2009); R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283 (S.D.N.Y. 2009); Z.D. v. Niskayuna Cent. Sch. Dist., 52 IDELR ¶ 250 (N.D.N.Y. 2009); A.G. v. Frieden, 52 IDELR ¶ 65 (S.D.N.Y. 2009); S.K. *ex rel.* N.K. v. Parsippany-Troy Hills Bd. of Educ., 51 IDELR ¶ 106 (D.N.J. 2008); Danielle G. v. N.Y.C. Dep't of Educ., 50 IDELR ¶ 247 (S.D.N.Y. 2008); M.M. and H.M. *ex rel.* A.M. v. N.Y.C. Dep't of Educ., 583 F. Supp. 2d 498 (S.D.N.Y. 2008); K.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995 (N.D. Cal. 2008); *cf.* Cooper v. District of Columbia, 77 F. Supp. 3d 32 (D.D.C. 2014) (proven at Step 1 but lost at Step 2 parental option), *with* L.B. v. Gloucester Twp. Sch. Dist., 489 F. App'x 564 (3d Cir. 2012); Berry v. Las Virgenes Unified Sch. Dist., 370 F. App'x 843 (9th Cir. 2010); P.C. v. Milford Exempted Vill. Sch., 60 IDELR ¶ 129 (S.D. Ohio 2013).

In partial contrast, lesser in frequency and more mixed in outcome, the most common factual scenario within the 145 cases was holding the IEP meeting without the parent being present. *See, e.g.*, D.B. *ex rel.* Roberts v. Santa Monica-Malibu Unified Sch. Dist., 606 F. App'x 359 (9th Cir. 2015); Doug C. v. State of Haw. Dep't of Educ., 720 F.3d 1038 (9th Cir. 2013); D.A. v. Fairfield-Suisun Unified Sch. Dist., 62 IDELR ¶ 14 (E.D. Cal. 2013); Jalloh v. District of Columbia, 968 F. Supp. 2d 203 (D.D.C. 2013); Rachel L. v. State of Haw. Dep't of Educ., 59 IDELR ¶ 244 (D. Haw. 2012); Johnson v. District of Columbia, 873 F. Supp. 2d 382 (D.D.C. 2012); L.I. v. State of Haw. Dep't of Educ., 58 IDELR ¶ 8 (D. Haw. 2011).

Table 2 shows that almost half of the rulings arose at Step 1, with vast majority resulting in a ruling in favor of the district,[102] whereas this district-favorable majority was less marked when the court reached Step 2 due to the sifting skew of this flowchart-like sequence.[103] On an overall basis, the outcomes of the 145 cases[104] favored districts over parents on slightly more than a 3-to-1 ratio. It is not clear whether this ratio is less favorable to parents than the district-deferential trend of IDEA litigation more generally.[105]

Finally, Table 3, which is on the next page, summarizes the three overall categories of approaches reasonably detectable[106] in the 145 cases and the majority and minority variations within each category.[107]

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[102] For these Step 1 rulings, the two successive sub-steps were determining (1) whether the alleged violation was based on a legal requirement, and, if so (2) whether the proof was preponderant that the district violated said requirement. The majority of the rulings in favor of district was at the second of these two Step 1 sub-steps.

[103] Within the often not clearly differentiated combined category, the cases using a per se approach were relatively few, with those favoring parents even fewer, and with none providing a specific analysis in relation to the codified standard. *See, e.g.*, K.R. and S.R. *ex rel.* Matthew R. v. N.Y.C. Dep't of Educ., 107 F. Supp. 3d 295 (S.D.N.Y. 2015) (coming the closest but still less than a precise, careful analysis in footnote 120); J.T. *ex rel.* Renee and Floyd T. v. Dep't of Educ. State of Haw., 59 IDELR ¶ 4 (D. Haw. 2012) (basing its per se conclusion on similar but not identical parental option in *W.G.* approach); *cf.* Bd. of Educ. v. Schaefer, 923 N.Y.S.2d 579 (App. Div. 2011) (basing its conclusion on IDEA 2004 codified version but providing a cryptic analysis that does not clearly identify and delineate a per se approach).

[104] Although collected and reported on a case-by-case basis, the unit of analysis is the pertinent procedural-FAPE ruling within each case. *See supra* note 71. Thus, although the references to "cases" is accurate in terms of the frequency and outcomes of these rulings, they do not extend to the rulings for the other claims, which often are multiple, in each case.

[105] Although the most recent national outcomes study of IDEA litigation generally found a 3:1 ratio in favor of districts, the differences included a broader time period, unit of analysis, and outcome scale but a restriction to published court decisions. Karanxha & Zirkel, *supra* note 97, at 58.

[106] *See infra* note 114 and accompanying text.

[107] For the relatively few cases that cited as the basis both the statutory codification and the prior case law, the specific language that the court used determined the category for the approach. *See, e.g.*, J.W. v. Governing Bd. of Educ. Whittier City Sch. Dist., 473 F. App'x 531, 532–33 (9th Cir. 2012) (using the language of *W.G./Amanda J.,* although also citing the IDEA codification, for the three-option approach).

TABLE 3. DISTRIBUTION OF APPROACHES FOR COURTS' PERTINENT PROCEDURAL RULINGS

	Legislated Approach[108]	**Pre-Amendments Judicial Approaches**	**Unclear**
Predominant	Direct - 51	*W.G./Amanda J.*[109] - 29	Not reached - 9
Other	Indirect[110] - 18	Various[111] - 29	Unspecified[112] - 9
Total	69 (48%)	58 (40%)	18 (12%)

An examination of Table 3 reveals that only 48% of the cases relied on the three-option test in the 2004 Amendments, and then only indirectly in 18 (26%) of these 69 cases, whereas 58 (76%) of the remaining 76 cases relied on the distinguishable judicial approaches that preceded the Amendments. The other 18 cases did not have a reasonably detectable approach either because they did not reach the full test (n=9) or resolved the matter with a cursory conclusion that did not identify the basis (n=9).[113]

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[108] *See supra* note 61 and accompanying text.

[109] The *Amanda J.* three-option version (*supra* text accompanying notes 39–40) was slightly more frequent than the *W.G.* two-option version (*supra* text accompanying notes 30–32), although occasionally the court cited one or both of these decisions for either the parental option only or in combination with case law from other jurisdictions.

[110] The two indirect approaches were via either (1) court decision, with the most frequent example being New York cases that cited the Second Circuit's decision in *R.E. ex rel. J.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012), which in turn cited the three-option approach in the 2004 amendments, or (2) in three cases, citing the corresponding IDEA regulation, 34 C.F.R. § 300.513(a)(2) (2006).

[111] Most of these rulings identified a version of the parent-participation option alone. Although no one judicial basis was particularly frequent, the leading examples within the widely varied subcategory were: *Deal ex rel. Zachary Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), *Knable ex rel. Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2001), and *Matrejek v. Brewster Central School District*, 293 F. App'x 20 (2d Cir. 2008), especially but not at all exclusively in predetermination cases.

[112] In almost every one of these cases, the court used the parent-opportunity option without a citation or otherwise identifying either of the broad categories of approaches, which the other two columns of entries represented.

[113] All of these cases focused on the parental participation option but did not reveal, due to the missing basis, whether it was part of the legislated version or one of the pre-Amendments' judicial formulations.

The findings in Table 3, particularly the reliance on varying pre-Amendments judicial approaches in at least 40% of the cases,[114] were rather surprising in light of the recognized binding authority of federal legislation. If the reason for this diversity is a judicial interpretation that the Amendments intended a different approach for courts than for hearing officers,[115] it would seem highly unlikely in this context,[116] and the lack of any explanation in the court decisions that did not cite the Amendments is rather remarkable.[117] The courts' reliance on previous judicial authority in the light of the Congressional preemption appears to be more in the nature of adhesion than adherence.[118] In any event, even more than the narrowed

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[114] If the 18 cases without a detectable approach are not counted, the proportion of this pre-Amendments judicial category is 46%. Moreover, the judicial basis and the particular formulation attributed to this basis were far from predictable in terms of jurisdiction and interpretation.

[115] This provision in the Amendments expressly singles out hearing officers, but the apparent reason is that they are the initial adjudicators under the IDEA. The exhaustion doctrine is robust under the IDEA, with the exceptions being narrowly limited. *See, e.g.*, Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349 (2009).

[116] Although in other contexts, such as attorney's fees, courts have separable authority under the IDEA, it would be illogical and impractical to have different legal tests for FAPE and other core IDEA issues for hearing officers and their reviewing courts. For recognition of the general coterminous authority of hearing officers and courts, see, e.g., *Cocores v. Portsmouth, New Hampshire, School District,* 779 F. Supp. 203, 205 (D.N.H. 1991) (quoting S-1 v. Spangler, 650 F. Supp. 1427, 1431 (M.D.N.C. 1986), *vacated as moot*, 832 F.2d 294 (4th Cir. 1987)) ("It seems incongruous that Congress intended the reviewing court to maintain greater authority to order relief than the hearing officer . . . .").

[117] It is unclear beyond the institutional gravitation toward stare decisis whether the courts deliberately or neglectfully did not rely on the statutory standard. The contributing factors could potentially include, for example, the scope and strategy of the parties' briefing, the courts' general congested case load, and the specialized, lengthy, and changing contents of the IDEA.

[118] For an examination of this courts' institutional resistance to changes in higher legal authority, see Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901 (2015). For another marked and costly judicial tendency, the timing criterion in the selection process (*supra* note 73 and accompanying text) revealed the disappointing delay between the IEP at issue and the court's ultimate FAPE decision. As the Supreme Court has repeatedly recognized but not resolved, "the review process [under the IDEA] is ponderous." Forest Grove v. T.A., 557 U.S. 230, 245 (2009); Honig v. Doe, 484 U.S. 305, 322 (1988) (citing Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 370 (1985)). The earliest case in our sample represented a two-year delay between the challenged IEP and the court's decision. T.T. v. District of Columbia, 48 IDELR ¶ 127 (D.D.C. 2007). Given the hearing officer and, in some states, an additional, review officer tier, and judicial review not being limited to one level, the interval until the final decision in several of these cases may be futile, if not unconscionable, for the immediate parties. *See, e.g.*, Doe v. E. Lyme Bd. of Educ., 790 F.3d 440 (2d Cir. 2015); T.K. and S.K. *ex rel.* L.K. v. N.Y.C. Dep't of Educ., 32 F. Supp. 3d 405 (S.D.N.Y. 2014) (six-year delay); S.J. v. Issaquah Sch. Dist., 326 F. App'x 423 (9th Cir. 2009) (seven-year delay). The problem is not limited to ascertaining whether the district is appropriately meeting the child's individual needs at the time in question and, if not, correcting the denial as soon as feasible. They stay-put provision may cause the child to remain in an inappropriate placement during the decisional delay. Moreover, the added time increases the transaction costs, including the amounts and allocation of not only attorneys' fees but also remedies. For example, in a tuition reimbursement case, the years for tuition keep increasing. If the parents lose at both the administrative level and at the final judicial level, they are left with a considerable cost that more prompt adjudication would have mitigated. Conversely, it the parents win at the highest administrative tier—the hearing officer or, in a two-tier jurisdiction

but imprecise student contours of the three-option formula,[119] this judicial trend continues rather resolves than the prior problems of lack of clarity and consistency in particular relation to the parental participation option.[120]

III. RECOMMENDED APPROACH

The starting point for the proposed approach is clear and controlling. In light of the *Rowley* Court's repeated emphasis on the procedural prong for FAPE, with central attention to the role of parents under the IDEA structure,[121] and the Supreme Court's continuing priority on this core parental pillar[122] during the subsequent successive amendments of the IDEA,[123] a critical conclusion is now indisputable. Specifically, as a substantive matter overlapping with the student's rights to FAPE, parents have "independent, enforceable rights under [the] IDEA."[124] Unless and until Congress amends the IDEA to raise the low floor of its substantive standard for students,[125] the courts need to accord full force to the core plank in the procedural door.[126] Congress has crafted the specific standard

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under the IDEA, the review officer—the stay-put effect of that decision requires the district to provide reimbursement during the judicial review process, without recoupment, even if the ultimate decision is in its favor. *See, e.g.*, E.Z.-L. v. N.Y.C. Dep't of Educ., 763 F. Supp. 2d 584 (S.D.N.Y. 2011), *aff'd on other grounds*, R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013). In compensatory education cases, where the ultimate decision is that the district denied the child FAPE, the period for the relief is extended and its calculation via a qualitative approach is all the more complex.

[119] *See supra* text accompanying notes 62–65.

[120] *See supra* notes 20–60 and accompanying text.

[121] *See supra* notes 10–11 and accompanying text.

[122] Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007) ("[The IDEA] sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child."); Schaffer v. Weast, 546 U.S. 49, 53 (2005) ("The core of the statute . . . is the cooperative process that it establishes between parents and schools."); Honig v. Doe, 484 U.S. at 311 ("Congress repeatedly emphasized throughout [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness.").

[123] *See supra* note 1.

[124] Winkelman v. Parma City Sch. Dist., 550 U.S. at 526. In reaching this conclusion, the Court recited the three-option version of the FAPE procedural standard. For a previous analysis of the connection. *See, e.g.*, Perry A. Zirkel, *The Problematic Progeny of Winkelman v. Parma City School District,* 248 EDUC. L. REP. 1 (2009).

[125] Despite the 1997 and 2004 amendments increasing priority on outcomes, particularly as defined in tandem with the No Child Left Behind Act's emphasis on standardized student assessments based on state-designated proficiency and as recently adopted in the U.S. Department of Education's "results driven accountability" monitoring of state education agency implementation of the IDEA. *Office of Special Education Programs' Results Driven Accountability Home Page*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/osers/osep/rda/index.html (last visited Oct. 2, 2015). It seems relatively clear that the courts will not raise the substantive standard without clear Congressional mandate. *See* Zirkel 2008/2013, *supra* note 19. Indeed, the finding herein of the judicial "drag" in applying the legislatively prescribed standard for procedural FAPE cases reinforce this conclusion.

[126] For the Court's use of the door and floor metaphors in interpreting the procedural and substantive elements of FAPE under the IDEA, see *Bd. of Educ. v. Rowley*, 458 U.S. at 192 and 201. In the absence of separable and equivalent attention to the parent option, the prevailing focus on the student-benefit option has the effect of making procedural violations under the IDEA meaningless; the

that, like mixed questions of fact and law, is a hybrid, being both procedural and substantive. Thus, the courts need to vigorously and rigorously enforce the parental option, finding a denial of FAPE in cases where district's procedural violation(s) "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child."[127]

In contrast with the relevant case law and commentary[128] to date, the language of this standard is the paramount and preeminent standard for procedural FAPE cases in which parental participation is at issue in terms either step of the applicable analysis. Rather than being neglected in favor of either the inconsistent judicial doctrines that preceded the congressional codification or the student options that merit separate and more carefully differentiated attention, the plain language of this parental option warrants consistent application with full force at all levels of the adjudicative process under the IDEA.

The judge who wrote the leading, but not prevailing opinion in the Ninth Circuit's final major case was correct about a structural rationale,[129] but he missed the central and essential load-bearing column of the IDEA—the parental partner for the school district. Professor Romberg's suggested structural approach[130] comes closer to the mark; although the theoretical vision of the three options in the legislative codification may explain its failure to gain traction in the case law to date,[131] his elaboration and interpretation of the parental option was that "[s]ignificantly impeding the parents' right to collaborate in the IEP process is a denial of a normative procedural principle, and thus the district's conduct violates the IDEA, regardless of any proven effect on the IEP or on the child's education."[132] The problems with this per se interpretation are that it does not sufficiently

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court's determination of whether the district met the *Rowley* substantive standard for FAPE would dictate the outcome of the case regardless of the kind and degree of procedural violations. This interpretation turns *Rowley*'s view of the structure of the IDEA upside down.

[127] *See supra* text accompanying note 61.

[128] With the exception of Romberg, *supra* note 20, the scholarly commentary concerning FAPE under the IDEA has focused on the substantive side and has not yet specifically analyzed the IDEA 2004 provisions for procedural violations. For a synthesis of the FAPE commentary, see Zirkel 2013, *supra* note 19.

[129] *See supra* note 54 and accompanying text.

[130] Romberg, *supra* note 20, at 449 and 466 (positing the underlying structural principles of contractualization, collaboration and individualization). He characterized their meshing with the three respective options of the legislative codification as "fortuitous." *Id.* at 464.

[131] Yet, his differentiation between contractualization and individualization in terms of implementation and the *Rowley* substantive standard is a starting point for the issue not addressed herein—the operational meaning of the other two prongs. *Id.* at 465. Lack of implementation of an IEP is a FAPE issue that *Rowley* did not address and that the legal literature has largely neglected thus far. However, regarding lack of implementation, at least where based on Romberg's contractualization premise, does not fit as a procedural matter.

[132] *Id.* at 465.

track the legislative language,[133] and it does not provide any specific relationship to the scope of the Step 1 violations specified in the IDEA.[134]

Rather, based on the structure of the IDEA, per the Supreme Court's interpretations from *Rowley* to *Winkelman*[135] and culminated in Congress's codification in the latest amendments,[136] the proposed model for adjudicating alleged procedural violations that implicate parental participation[137] is, in terms of Table 1 *supra*, a hybrid approach amounting to the "B-D" combination of cells. The "B-" cell represents the per se part, which applies to IEP membership and attendance. The "-D" cell represents the two-step, or harmless error approach for all other procedural violations, with the second step giving full recognition to the "P" option at Step 2 independent of the "S" option.

More specifically, the proposed judicial approach that uses the legislative language of the parental option as the keystone consists of the following features:

- Eliminate use, as a test or operational standard, "predetermination" and/or "meaningful" parental participation;[138]

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[133] The primary error is equating "right to collaborate" with "opportunity to participate." Congress's choice of "opportunity" plainly focuses equitably on whether the district took affirmative steps to permit the parents' participation and, if so, whether the parent's defaulted by not availing themselves of this opportunity. Rather than an undefined right to collaborate or even the aforementioned (*supra* note 86) inference of "meaningful," the qualifiers of "reasonable" and "in good faith" would appear to be more defensible and useful in terms of the interrelated issue of the adjudicator's equitable authority with regard to the remedies for denial of FAPE. *See, e.g.*, Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 370 (1985) (construing 20 U.S.C. § 1415(i)(2)(C)(iii) as granting broad equitable authority for relief under the IDEA).

[134] Focusing on the theoretical aspects of procedural due process, Romberg analyzed the underlying structural purposes as extending to "meaningful participation of the family in the decision-making process concerning the child as . . . a normative good, in and of itself." Romberg, *supra* note 20, at 447. In doing so, he lost sight of specific content and contours of the IDEA's pertinent procedural requirements. *See supra* notes 79–90 and accompanying text.

[135] *See supra* note 122–124 and accompanying text.

[136] *See supra* note 61 and accompanying text.

[137] Interestingly, in recent years parental participation is increasing in its importance in K–12 education generally and in special education specifically. *See, e.g.*, Christina Samuels, *Equipping Parents on Spec. Ed.*, EDUC. WK., Feb. 10, 2016, at 1; Karla Scoon Reid, *Parent Engagement on Rise as Priority for Schools, Districts*, EDUC. WK., June 3, 2015, at 9. At the same time, the Government Accountability Office (GAO) has identified parent involvement as one of the major deficiencies in the U.S. Department of Education's monitoring system for states under the IDEA. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-390, SPECIAL EDUCATION: IMPROVED PERFORMANCE MEASURES COULD ENHANCE OVERSIGHT OF DISPUTE RESOLUTION (2014), *available at* www.gao.gov/assets/670/665434.pdf.

[138] *See supra* notes 86–87. The reasons for their elimination as operational standards are: (1) they are amorphous doctrines that ignore the much more specific scope of the procedural requirements of the IDEA in relation to parental participation (*supra* notes 80–85 and 88); (2) the common application of predetermination is so slanted as largely to eviscerate the substantive force of the parental-participation pillar (*supra* note 101); and, most importantly, (3) the second option in the IDEA 2004 codification preempts these doctrines with controlling language that is more predictable and balanced in its application.

- For the IDEA's procedural requirement for membership and attendance at the IEP team,[139] which are not only the most central to the FAPE decision-making procedures but also the most commonly subject to dispute,[140] use a per se approach by focusing directly on whether the district has significantly impeded the parent's opportunity for participation;[141]

- For all of the other parentally-related procedural requirements, whether direct or indirect, [142] use the established two-step approach, with Step 1 following the well-settled analysis[143] and Step 2 giving full force to the Congressionally prescribed language of the parental option to the extent that it is asserted and proven.[144]

For the recommended approach, which is limited to FAPE adjudication, [145] the final consideration is the remedy. The issue of

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[139] *See supra* notes 83–84 and 88. In this context, the "IEP team" reference includes its functions at the threshold stage of FAPE—determining the child's eligibility. 20 U.S.C. § 1414(b)(4)(A) (2012).

[140] *See supra* note 101. For these Part II cases, the courts have tended to focus on the metaphoric nuances of closed v. open (v. blank) minds under the predetermination concept and its interrelated notion of meaningful participation (*supra* notes 86–87). For the original use of this metaphor in the predetermination context, see Doyle v. Arlington Cnty. Sch. Bd., 806 F. Supp. 2d 1253 (E.D. Va. 1992), *aff'd*, 39 F.2d 1176 (4th Cir. 1994) (interpreting a previous Fourth Circuit decision as meaning that "school officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind."). The results of the predetermination cases do not square with the carefully balanced and more operationally clear congressionally prescribed parental participation standard.

[141] For assorted but not carefully and comprehensively previous formulations of per se approach on a hybrid, or partial, basis, see *supra* notes 34, 59, 60, 103. Alternatively, if courts were to interpret the prescribed language as reserved for Step 2, Step 1 for the IEP meeting cases would present relatively low and uniform hurdles in the form of the related regulations (*supra* note 88), with the real and more consistent test in the form of this parent-option language. Thus, the outcome would be basically the same, showing the efficiency of the per se alternative for this core area.

[142] In this context, "direct" refers to the aforementioned (*supra* notes 80–85, 88) requirements specific to parental participation, whereas "indirect" refers to the other procedural requirements ranging from the marginal provision for parental training and counseling (*supra* note 89 and accompanying text) to the specifications for evaluation and reevaluation (e.g., 20 U.S.C. § 1414(a)(1)(C), (b) (2012)), the contents of the IEP (e.g., present educational levels and measurable goals – *id.* § 1414(d)(1)(A)(i)), and the other members of the IEP team (e.g., child's teacher - *id.* § 1414(d)(1)(B)) that allegedly affect the requisite Step 2 opportunity for participation.

[143] *See supra* note 102.

[144] In doing so, courts should give careful attention to the scope of the successive terms of "significantly" and "opportunity." For the first term, see, e.g., L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 909–10 (9th Cir. 2009) (emphasizing and applying the "significant" restriction under the analogous parental option in the *Amanda J.* version of the procedural-FAPE template). For the second term, the following other cases in Part II *supra* illustrate the applicable equitable analysis: Turner v. District of Columbia, 952 F. Supp. 2d 31 (D.D.C. 2013); D.A. v. Fairfield-Suisun Unified Sch. Dist., 62 IDELR ¶ 17 (E.D. Cal. 2013); Rachel L. v. State of Haw. Dep't of Educ., 59 IDELR ¶ 244 (D. Haw. 2012); Kasenia v. Brookline Sch. Dist., 588 F. Supp. 2d 175 (D.N.H. 2008).

[145] The other parent-oriented aspects of IDEA enforcement merits simultaneous attention. *See, e.g.*, Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory,*

appropriate relief under the IDEA's broad delegation of equitable authority to judges[146] has not been particularly problematic in most other cases for two interrelated reasons: (1) the "spaghetti strategy"[147] of bringing multiple claims in FAPE cases, often accompanying an asserted procedural violation with others and/or with an alternative claim of a substantive denial;[148] and (2) the rather stingy proportion of successful cases.[149] In the procedural cases conclusively decided in favor of the parents based on a substantive student denial, the typical retrospective remedy is compensatory education or tuition reimbursement[150] in addition to any prospective relief and attorneys' fees.

However, under the proposed approach that provides independent substantive force to the parental option, what is the appropriate equitably

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Adversarial in Fact, 32 J. NAT'L ASS'N AMIN. L. JUDICIARY 423 (2012) (suggesting increased public enforcement of the IDEA along with expansion of free and low-cost legal services); Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733 (2014) (offering three suggestions for supporting parental competence and conserving parental resources, including uniform IEPs for children with similar needs); Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107 (2011) (proposing IDEA amendments to strengthen the balance in the IEP and private enforcement process); Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 199 PENN. ST. L. REV. 485 (2014) (proposing recognition of a full disclosure obligation under the IDEA, including informing parents of the contours of an optimal IEP for their child); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2012) (proposing strengthened public enforcement in light of the socioeconomic disparity of the adjudicatory mechanism); Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802 (2008) (proposing free educational advocate services); Margaret M. Wakelin, Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263 (2008) (similarly but more specifically suggesting IDEA amendment adding legal advocates to the IEP team based on the disparity between parents' "social power" and "their legal power" in the private enforcement process); *cf.* Tracy Gershwin Mueller, *Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, 26 J. DISABILITY POL'Y STUD. 135 (2015) (proposing expansion of alternate dispute resolution, such as stakeholder training and IEP facilitation.

[146] 20 U.S.C. § 1415(i)(2)(C)(iii) (2012). For a comprehensive analysis of IDEA remedies in terms of the derivative authority of hearing officers, *see generally* Zirkel, *supra* note 1.

[147] *See, e.g.*, Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 346 (2011) (alternatively identifying the strategy as "kitchen sink" or "shotgun" pleadings, observing in the litigation challenging the use of restraints for children with disabilities that "the plaintiff-parents in most of these cases employ the spaghetti strategy of throwing everything against the wall and hoping something sticks.").

[148] *See, e.g.*, Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785, 790 n.36 (2012) (finding combined procedural and substantive claims accounting for at least one third of the FAPE cases within the court decisions concerning tuition reimbursement in New York); Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525, 550, 553 (2014) (finding for the hearing/review officer levels the average case consisted of 2.5 issue categories, each encompassing more than one claim, with FAPE substantive and FAPE procedural being the leading issue categories but without a separate count of the number of combinations).

[149] *See supra* text accompanying note 105.

[150] *See*, *e.g.*, Perry A. Zirkel, "*Appropriate" Decisions under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 242, 255–59 (2013).

tailored retrospective remedy for a denial of FAPE that is based solely on this ground, i.e., without a denial of FAPE based on the student-specific options? For these situations, in addition to prospective injunction, i.e., an order for the defendant district to cease and desist from significantly impeding the parents' opportunity for participation in the future FAPE decision-making for the child and attorneys' fees (confirming prevailing party status by changing the positions materially by adding retrospective relief), the answer appears to be available. Specifically, the court, upon efficient decision-making,[151] should order training for the IEP team in how to more effectively facilitate parental participation under the rubric of compensatory education.[152]

Although the primary focus of these recommendations is for adjudicators under the IDEA, whether at the hearing and review officer levels or upon judicial review, this Article inevitably should have suggestions for other scholars. Here are at least a few recommended directions for further research: (1) conducting a similarly empirical-styled analysis of the case law relating to the other two options under the Congressional codification for procedural FAPE;[153] (2) providing a more

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[151] Undue delay calls into question the efficacy of remedial relief in terms of both the child and the school system. *See supra* note 118. Although not excusing inefficiency, interests beyond those of the immediate parties provide a balancing factor in terms of taking the time for a well-founded decision that contributes to wider body of case law. Exemplifying this wider view, a commentator who focused on the substantive side of FAPE in autism cases, offered this recommendation to judges:

> To the extent possible, courts should conduct their judicial review in away that develops and further defines this process so as to provide guidance for the future, including assistance to the hearing officers who continue to be the final arbiters of many more IDEA disputes than will reach judicial review.

Terry Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 287–88 (2005).

[152] Courts have upheld the broad equitable boundaries for compensatory education in other circumstances. *See, e.g.*, Park *ex rel.* Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1034 (9th Cir. 2005) (upholding, for a lack of implementation claim in a case where the district otherwise provided FAPE and where it was merely speculative whether the child would benefit from additional services, an award of compensatory education in the form training for the child's teachers); *cf.* P. *ex rel.* Mr. and Mrs. P. v. Newington Bd. of Educ., 546 F.3d 111, 123 (2nd Cir. 2008) (affirming the hearing officer's compensatory education relief in a case based on a violation with regard to a violation with regard to behavioral issues and the least restrictive environment, which ordered the district to continue the employment of a specialized behavioral consultant to facilitate the IEP team's completion of a functional behavioral assessment). In the only case in Part II *supra* that addressed such a situation, the court upheld a limited compensatory education award to the student on the unusual basis that the violation of the parent's substantive participation rights, in the absence of a denial of FAPE for the student, caused the parent to revoke consent for this particular service. Stepp v. Midd-West Sch. Dist., 65 IDELR ¶ 46 (M.D. Pa. 2015). However, this resolution is of limited use here because only the parent brought the appeal, unsuccessfully seeking a larger compensatory education award for the child. The court did not specifically address the basis for the award, which arguably implicates a substantive denial to the student and which appears to be at least a questionable causal connection without cogent expert evidence.

[153] For the loss of educational opportunity standard that may be differentiated into any one of the three codified options, see, e.g., R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. 2012); M.B. *ex rel.* Berns v. Hamilton Schools, 668 F.3d 851 (7th Cir. 2011); Drobnicki v. Poway Unified Sch. Dist., Dep't of Educ., 358 F. App'x 788 (9th Cir. 2009).

traditional legal analysis that comprehensively covers all three options under the codification, with their recommended differences and interrelationship; and (3) formulating recommendations for revising the procedural and substantive standards for FAPE in the next Congressional reauthorization, based on the more than three decades of funding, research, practice, and litigation under the IDEA.

APPENDIX: CITATIONS AND RELEVANT RULINGS OF THE 145 CASES IN THE FINAL SAMPLE

A **Case Name**	B **Citation**	C **Court/ Year**	D **Step: (1) and/or (2)**	E **Outcome: Ruling for (+) or Against (–) Parent**	F **Approach (# Options)/ Basis (L=Legislation)**	G **Comments**
Doe v. E. Lyme Bd. of Educ.	790 F.3d 440	2d Cir. 2015	1	–	unclear (not reached)	D,E-Step 1 – no violation for issuance w/o parent present after participatory IEP meeting
John M. v. Cumberland Pub. Sch.	65 IDELR ¶ 231	D.R.I. 2015	2	–*/	P option (~) (?)	D,E-Step 1 – no violation (oppty. to view classroom but w/o students) – marginal case due to focus on prevailing party atty fees issue
Pollack v. Reg'l Sch. Unit 75	65 IDELR ¶ 206	D. Me. 2015	2	–	3 L	D,E-Step 1 was assuming arguendo lack of notice and particip. unproven at Step 2
D.B. *ex rel*. Roberts v. Santa Monica-Malibu Unified Sch. Dist.	606 F. App'x 359	9th Cir. 2015	1-2	+	P option (~) *Amanda*, *Doug C.*	D,E-IEP mtg. w/o parent – not inability exception (*Shapiro*) – unclear differentiation (cryptic – maybe per se)
L.M. v. Downingtown Area Sch. Dist.	65 IDELR ¶ 124	E.D. Pa. 2015	1	–/	3 R (L)	D,E-predet. – unproven G- *C.H. – D.B*. but not per se
K.R. v. New York City Dep't of Educ.	107 F. Supp. 3d 295	S.D.N.Y. 2015	1/2	+	3 *R.E.* (L)	D,E-excluded from IEP decisions – prejudicial (but n.120 – substantive harm to P not needed)
J.G. v. Baldwin Park Unified Sch. Dist.	78 F. Supp. 3d 1268	C.D. Cal. 2015	1/2	+	~3-*Amanda J.* *Amanda J.*+ esp. P	D,E-various re IEP team composition/process G-strict especially for placement decisions
Lainey C. v. Dep't of Educ., Haw.	594 F. App'x 441	9th Cir. 2015	(1)/2	/–	P option (~) ?	D,E-failure to explain one sp.ed item-no viol. G-cryptic and cursory (other proced. challenges waived)
S.W. v. New York City Dep't of Educ.	92 F. Supp. 3d 143	S.D.N.Y. 2015	1-2	–	3 *R.E.* (L)	D,E-predet. – fused application though probably Step 1 (plus add'l parent member per state law-no viol. at Step 2)
K.M. v. New York City Dep't of Educ.	65 IDELR ¶ 143	S.D.N.Y. 2015	2	/–	3 L	D,E-lack of FBA – unproven harm to P N.B. marginal case
W.D. v. Watchung Hills Reg'l High Sch. Bd. of Educ.	602 F. App'x 563	3d Cir. 2015	1/2	–	~3-*Amanda J. D.S.*	D,E- no response to inquiries re methodology – not violation but fused with P at Step 1 or 2
M.L. v. New York City Dep't of Educ.	65 IDELR ¶ 96	E.D.N.Y. 2015	1	–/	3 *R.E.* (L)	D,E-particip. in placement meeting-unproven N.B. considered lack of parent training, per state law, remediable substantive defect
P.G. v. City Sch. Dist. of New York.	65 IDELR ¶ 43	S.D.N.Y. 2015	1	–/	3 *R.E.* (L) esp. P	D,E- predet. - unproven
D.N. v. New York City Dep't of Educ.	65 IDELR ¶ 34	S.D.N.Y. 2015	1	/	3 L	D,E-predet. - unproven
Cupertino Union Sch. Dist. v. K.A	75 F. Supp. 3d 1088	N.D. Cal. 2014	1	–/	~3-*Amanda J. N.B.*	D,E-predet. - unproven

A Case Name	B Citation	C Court/ Year	D Step: (1) and/or (2)	E Outcome: Ruling for (+) or Against (–) Parent	F Approach (# Options)/ Basis (L=Legislation)	G Comments
R.K. v. Clifton Bd. of Educ.	587 F. App'x 17	3d Cir. 2014	2	/–	~3-*Amanda J. D.S.*	D,E-no viol. re student records to P nor expert's observation—but even assuming arguendo, no viol. of Step 2
M.A. v. Jersey City Bd. of Educ.	592 F. App'x 124	3d Cir. 2014	2	/–	P option (~) *C.H.*	D,E-no deficient notice of placement—but even assuming arguendo, no viol. of Step 2
Cooper v. Dist. of Columbia	77 F. Supp. 3d 32	D.D.C. 2014	1,2	+/–	3 L	D,E-predet. proven (in premature placement change) but sufficient P particip. at Step 2
M.M. v. Lafayette Sch. Dist.	767 F.3d 842	9th Cir. 2014	2	/+	~3-*Amanda J. Amanda J.*	D,E-failure to document and share RTI data w. P – no need to consider S at Step 2 – remand for relief issue (possible reimbursement?)
Lofisa v. Haw. Dep't of Educ.	64 IDELR ¶ 163	D. Haw. 2014	1	–/	unclear (not reached)	D,E-predet. - unproven
B.P. v. New York City Dep't of Educ.	64 IDELR ¶ 99	S.D.N.Y. 2014	1	–/	3 L	D,E-IEP mtg. - unproven
J.H. v. Lake Cent. Sch. Corp.	64 IDELR ¶ 98	N.D. Ind. 2014	2	/+	3 L	D,E-eval. data – prejudicial at Step 2 P – cursory (and alternative S denial)
V.S. v. New York City Dep't of Educ.	25 F. Supp. 3d 295	S.D.N.Y. 2014	1	+/	P option (~) ?	D,E- P's rt. in site selection process -> denial of meaningful particip. (inappropriate school at Step 2)
M.S. v. Utah Sch. for the Deaf & Blind	64 IDELR ¶ 11	D. Utah 2014	1	–/	3 L	D,E-P at IEP mtgs. (which she attended)-unproven - compare other procedural violation that was prejudicial but in terms of S
C.B. v. Garden Grove Unified Sch. Dist.	575 F. App'x 796	9th Cir. 2014	1-2	–	~3-*Amanda J. Amanda J..*	D,E-predet. – unproven Cursory w. lack of differentiation of steps
T.K. v. New York City Dep't of Educ.	32 F. Supp. 3d 405	S.D.N.Y. 2014	1/(2?)	+	P option (~) *Cerra*	D,E-failed to address parents' bullying concerns+abstract IEP language (meaningful particip.) – but substantive S too
C.U. v. New York City Dep't of Educ.	23 F. Supp. 3d 210	S.D.N.Y. 2014	1-2	+	3 *R.E.* (L)	D,E-providing IEP to parents on timely basis and not having them participate in school selection process – fused w/o careful analysis of steps (with no S denial)
P.S. v. New York City Dep't of Educ.	63 IDELR ¶ 255	S.D.N.Y. 2014	2	/–	3 L	D,E-lack of parent training – no harm to P at Step 2 – marginal case
West-Linn Wilsonville Sch. Dist. v. Student	63 IDELR ¶ 251	D. Or. 2014	1,2	–/+	2-*W.G. M.L.*	One IEP – predet. – unproven (Step 1) Other IEP – missing reg. ed T+failure to convene IEP meeting – harmful to P at Step 2
Forest Grove Sch. Dist. v. Student	63 IDELR ¶ 163	D. Or. 2014	1,2	+	3 *W.G.* (L)	E-failure to consider IEE (but not the various other parental participation claims), but not clearly per se
Caldwell Indep. Sch. Dist. v. L.P.	994 F. Supp. 2d 811, *aff'd mem.*, 551 F. App'x 140	W.D. Tex. 2014 5th Cir. 2014	1	+	P option (~) *Buser*	D,E-with S for other factors
K.S. v. Strongsville City Sch. Dist.	63 IDELR ¶ 125	N.D. Ohio 2014	1	–/	P option (~) ?	D,E- no denial of meaningful particip.

A Case Name	B Citation	C Court/ Year	D Step: (1) and/or (2)	E Outcome: Ruling for (+) or Against (–) Parent	F Approach (# Options)/ Basis (L=Legislation)	G Comments
B.K. v. New York City Dep't of Educ.	12 F. Supp. 3d 343	E.D.N.Y. 2014	1	–/	3 *R.E.* (L)	D,E-P at Step 1
M.L. v. New York City Dep't of Educ.	63 IDELR ¶ 67	S.D.N.Y. 2014	1	–	3 L	D,E-summer site (and maybe parent counseling/training)-unproven (though aimed specifically at Step 2 P)
S.A. v. New York City Dep't of Educ.	63 IDELR ¶ 73	E.D.N.Y. 2014	1-2	–	3 *R.E.* (L)	D.E-telephonic particip.-fused application – compare parent training, which was harmful (implementation) violation w. focus on S? (comp. ed.)
Bookout v. Bellflower Unified Sch. Dist.	63 IDELR ¶ 4	C.D. Cal. 2014	2	/+	3 L	D,E-lack of placement offer – harmful effect on P at Step 2 - cursory
Suffield Bd. of Educ. v. L.Y.	62 IDELR ¶ 203	D. Conn. 2014	1	–/	P option (~) *Deal*	D,E-predet. (meaningful particip.)– unproven
Porter v. Ill. State Bd. of Educ.	6 N.E.3d 424	Ill. Ct. App. 2014	1	–/	P option (~) ?	D,E-predet. - unproven
Dep't of Educ., Haw. v. Z.Y.	62 IDELR ¶ 137	D. Haw. 2013	2	/+	3 L	D,E-truncated IEP discussion – harmful effect on P (though not S denial)
S.P. v. Scottsdale Unified Sch. Dist. No. 48	62 IDELR ¶ 86	D. Ariz. 2013	1(2?)	–	P option L	D,E,G-predet. – *H.D.* test – unclear whether extended to Step 2
G.W. v. Rye City Sch. Dist.	61 IDELR ¶ 14, *aff'd*, 554 F. App'x 56	S.D.N.Y. 2013 2d Cir. 2014	1	–/	P option (~) *Deal*	D,E-predet. - unproven G-SRO only
D.A. v. Fairfield-Suisun Unified Sch. Dist.	62 IDELR ¶ 14	E.D. Cal. 2013	1/2	–	3 L	D,E-IEP mtg. w/o parent – no harmful effect on P (equitable analysis)
E.F. v. New York City Dep't of Educ.	61 IDELR ¶ 247	E.D.N.Y. 2013	1,2	–/–	3 L	D,E-P at Step 1 – unproven; various, incl. IEP team composition at Step 1 – no harm to P at Step 2
M.S. v. New York City Dep't of Educ.	2 F. Supp. 3d 311	E.D.N.Y. 2013	1	–/	3 L	D,E-"location" (not violation)
Jalloh v. Dist. of Columbia	968 F. Supp. 2d 203	D.D.C. 2013	1	–/	3 L	D,E-viol. of affirmative duty re having P at IEP meeting but no substantive loss to S at Step 2
A.M. v. New York City Dep't of Educ.	964 F. Supp. 2d 274	S.D.N.Y. 2013	2	/–	3 *R.E.* (L)	D,E-IEP team composition – harmless for P (and S) – marginal case
N.K. v. New York City Dep't of Educ.	961 F. Supp. 2d 577	S.D.N.Y. 2013	2	/–	3 *R.E.* (L)	D,E-copy of IEP – harmless on P
Turner v. Dist. of Columbia	952 F. Supp. 2d 31	D.D.C. 2013	2	/–	3 L	D,E-lack of sp. ed. tchr. on IEP team – harmless due to P refusal (equitable analysis)
James v. Dist. of Columbia	949 F. Supp. 2d 134	D.D.C. 2013	1	–/	unclear (not reached)	D,E-"location"-not violation (no trigger for parental particip.)

A **Case Name**	B **Citation**	C **Court/ Year**	D **Step: (1) and/or (2)**	E **Outcome: Ruling for (+) or Against (–) Parent**	F **Approach (# Options)/ Basis (L=Legislation)**	G **Comments**
Doug C. v. State of Haw. Dep't of Educ.	720 F.3d 1038	9th Cir. 2013	1/2	+/+	2-*W.G.* *W.G.*	D,E-IEP mtg. w/o parent separately violated both P and S at Step 2
Gibson v. Forest Hills Sch. Dist. Bd. of Educ.	61 IDELR ¶ 97	S.D. Ohio 2013	1	–/	P option (~) *Nack*, *Kings*	D,E-Step 1 P, include predet.-unclear Step 2 but seems like substantive S
Deer Valley Unified Sch. Dist. v. L.P	942 F. Supp. 2d 880	D. Ariz. 2013	1	–/	unclear (not reached)	D,E-"location"-not violation
A.M. v. Dist. of Columbia	933 F. Supp. 2d 193	D.D.C. 2013	1	–/	P option (~) *Deal*	D,E-predet. (meaningful particip.)
Jenn Ching Luo v. Baldwin Union Free Sch. Dist.	58 IDELR ¶ 158, *aff'd*, 556 F. App'x 1	E.D.N.Y. 2012 2d Cir. 2013	1	–/	3 L	D,E-unproven
Shafer v. Whitehall Dist. Sch. Bd. of Educ.	61 IDELR ¶ 20	W.D. Mich. 2013	2	/–	~3 *Knable* > L	D,E-predet. at Step 1 but not P (eligibility, distinguishing *Deal*) and not S
K.K. v. Alta Loma Sch. Dist.	60 IDELR ¶ 159	C.D. Cal. 2013	1	–/	3 L	D,E- predet. - unproven
P.C. v. Milford Exempted Vill. Sch.	60 IDELR ¶ 129	S.D. Ohio 2013	1,2	+/+	P option (~) *Deal/Knable*	D,E- predet. → (unusual)
Z.F. v. Ripon Unified Sch. Dist.	60 IDELR ¶ 137	E.D. Cal. 2013	1/2	–	3 L	D,E- predet. (detailed but confusing discussion in terms of which step was the linchpin here)-"egregious" std.?
DiRocco v. Bd. of Educ. of Beacon City Sch. Dist.	60 IDELR ¶ 99	S.D.N.Y. 2013	1,2	–/–	3 *E.A.M.* (L)	D,E-Step 1: reg. ed. T missing from IEP team, predet.
K.L. *ex rel*. M.L. v. New York City Dep't of Educ.	59 IDELR ¶ 190, *aff'd*, 530 F. App'x 81	S.D.N.Y. 2012 2d Cir. 2013	1-2	–	3 L	D,E-IEP meeting – fused, cursory analysis – not address on appeal
R.P. v. Alamo Heights Indep. Sch. Dist.	703 F.3d 801	5th Cir. 2012	1	–/	2-*W.G.*, esp. loss *Adam J.* (*W.G.*)	D,E-various incl. predet. G-"loss of an ed'l oppty."
M.M. v. Dist. 0001 Lancaster Cnty. Sch.	702 F.3d 479	8th Cir. 2012	1-2	–	P option (~) *Deal/Lathrop*	D,E-seemingly fused and rather marginal
F.L. v. New York City Dep't of Educ.	60 IDELR ¶ 17	S.D.N.Y. 2012	2	/–	3 L	D,E-various with harmless P at Step 2
H.D. v. Cent. Bucks Sch. Dist.	902 F. Supp. 2d 614	E.D. Pa. 2012	1-2	–	3 L	D,E-IEP mtg. – fused analysis
S.N. v. Washington Twp. Bd. of Educ.	60 IDELR ¶ 20	D.N.J. 2012	1	–/	3 *Winkelman* et al. (L)	D,E-Step 2 P not clearly reached for any of the alleged proced. violations
A.B. v. Franklin Twp. Cmty. Sch. Corp.	898 F. Supp. 2d 1067	S.D. Ind. 2012	1	–/	3 L	D,E- predet.+

A Case Name	B Citation	C Court/ Year	D Step: (1) and/or (2)	E Outcome: Ruling for (+) or Against (–) Parent	F Approach (# Options)/ Basis (L=Legislation)	G Comments
E.A.M. v. New York City Dep't of Educ.	59 IDELR ¶ 274	S.D.N.Y. 2012	(1)/2	–	3 L	D,E-various, esp. discussion of goals
Rachel L. v. State of Haw. Dep't of Educ.	59 IDELR ¶ 244	D. Haw. 2012	1/2	–	2-*W.G.* *L.M.* (*W.G.*)	D,E-absence from 1 IEP mtg.-equitable approach in relation to *Shapiro* and various D. Haw. decisions
M.H. v. New York City Dep't of Educ.	685 F.3d 217	2d Cir. 2012	1	–/	3 L	D,E- predet. + at Step 1 – unproven N.B. The other consolidated case only had P at the equities stage of tuition reimbursement
Ridley Sch. Dist. v. M.R.	680 F.3d 260	3d Cir. 2012	2	/–	3 L	D,E-incomplete sp. ed. in IEP at Step 1 but no denial of P at Step 2 – cursory and marginal
Johnson v. Dist. of Columbia	873 F. Supp. 2d 382	D.D.C. 2012	(1)/2	–	3 L	D,E-absence from 1 IEP mtg. – not denial of P
D.B. v. Gloucester Twp. Sch. Dist.	489 F. App'x 564	3d Cir. 2012	1/2	+	P option (~) R via *Knable*, *C.H.*	D,E- predet. N.B.: explicit no need for S [subsequent award of $414k for atty fees]
B.W. v. Durham Pub. Sch.	59 IDELR ¶ 72	M.D.N.C. 2012	1/2	–	2~*W.G.* *DiBuo* (S only?)	D,E-refusal to discuss shadow aide-minor viol.-unclear next step(s)
Eley v. Dist. of Columbia	59 IDELR ¶ 189	D.D.C. 2012	2	+	3 L	D,E- changing placement w/o IEP mtg. w. parent – harmful at Step 2 (fused application)
L.G. v. Fair Lawn Bd. of Educ.	486 F. App'x 967	3d Cir. 2012	1/2	–	P option (~) ?	D,E-preparatory mtg. w/o parent-not predet. and sufficient part. (not clearly differentiated steps)
Woods v. Northport Pub. Sch.	487 F. App'x 968	6th Cir. 2012	1/2	+	P option (~) *Knable*	D-test protocol and goals outside IEP mtg.-denied P
J.T. v. Dep't of Educ. State of Haw.	59 IDELR ¶ 4	D. Haw. 2012	1/2	+	2~*W.G.* *W.G.*	D-unreasonably held IP mtg. w/o parent - "per se denial of FAPE"
Carrie I. v. Dep't of Educ. State of Haw.	869 F. Supp. 2d 1225	D. Haw. 2012	2	/+	3 L	D,E-various at Step 1 – harmful to P at Step 2 even if not to S
T.L. v. Dep't of Educ. of City of New York	59 IDELR ¶ 213	E.D.N.Y. 2012	2	/–	3 L	D,E-alleged proc. deficiencies at Step 1 (w/o deciding whether they were violations) – no denial of P at Step 2
L.P. v. Longmeadow Pub. Sch.	59 IDELR ¶ 169	D. Mass. 2012	2	/–	3 L	D,E-any proced. violations (w/o deciding them) – no denial of P at Step 2
J.W. v. Governing Bd. of E. Whittier City Sch. Dist.	473 F. App'x 531	9th Cir. 2012	(1?)/2	–	~3 *W.G.*>L	D-post IP mtg. discussion with OT G-cites *W.G.* but borrows from L and/or *Amanda J.*
J.D. v. Crown Point Sch. Dist.	58 IDELR ¶ 125	N.D. Ind. 2012	1	–/	2~*W.G.* *Heather S.* */Hjortness*	D,E-IEP mtg. - unproven
M.D. v. Haw. Dep't of Educ.	864 F. Supp. 2d 993	D. Haw. 2012	1/(2?)	–	P option (~) *Amanda J.*	D,E,G-cryptic unclear test and ambiguous step – marginal case

A Case Name	B Citation	C Court/ Year	D Step: (1) and/or (2)	E Outcome: Ruling for (+) or Against (–) Parent	F Approach (# Options)/ Basis (L=Legislation)	G Comments
Nalu v. Haw. Dep't of Educ.	858 F. Supp. 2d 1127	D. Haw. 2012	1	–/	P option (~) *W.G.* (w/o qual.)	D,E- IEP mtg. - unproven
B.P. v. New York City Dep't of Educ.	841 F. Supp. 2d 605	E.D.N.Y. 2012	1-2	–	3 L	D-fused after other Step 1's unproven
M.B. v. Hamilton Se. Sch.	668 F.3d 851	7th Cir. 2011	1	–/	1-loss of ed. oppty. *Ross/Hjortness*	D,E-predet. G-distinguishing *Deal* (per se)
Dep't of Educ. State of Haw. v. M.F.	840 F. Supp. 2d 1214	D. Haw. 2011	1	+/	2-*W.G.* *W.G.* (despite n.L)	D,E-no IEP in place at start of year-lack of parental consent (Step 1), but remand to focus on loss of ed. oppty. (S) - marginal case
Madeline P. v. Anchorage Sch. Dist.	265 P.3d 308	Alaska 2011	2	/–	3 L	D-lack of written notice was Step 1 E-not prejudicial to S or to P separately
L.I. v. Haw.	58 IDELR ¶ 8	D. Haw. 2011	1	–/	2-*W.G.* *L.M.*	D,E-continued IEP meeting in parent's absence – she consented – distinguishing *Shapiro*
J.G. v. Kiryas Joel Union Free Sch. Dist.	777 F. Supp. 2d 606	S.D.N.Y 2011	1	–/	3 L	D,E-predet. - unproven
K.D. v. Dep't of Educ. State of Haw.	665 F.3d 1110	9th Cir. 2011	1	–/	P option (~) *W.G.*, *Doyle*	D,E-predet.+ - unproven (didn't reach step 2)
E.Z.-L. v. New York City Dep't of Educ.	763 F. Supp. 2d 584	S.D.N.Y. 2011	1	–/	P option (~) *Cerra*, *T.P.*	D,E-unproven (didn't reach step 2)
B.H. v. W. Clermont Bd. of Educ.	788 F. Supp. 2d 682	S.D. Ohio 2011	1	+/	3 L	G-harmed S (*Knable*), thus not reaching P
S.F. v. New York City Dep't of Educ.	57 IDELR ¶ 284	S.D.N.Y. 2011	1/(2)	–/	3 L	D,E-various incl. location-not violation at Step 1 or no harmful effect (w/o differentiation) – marginal case
A.L. v. Chicago Pub. Sch. Dist. No. 299	57 IDELR ¶ 276	N.D. Ill. 2011	1	+/	1-loss of ed. oppty. *Ross/Hjortness*	D,E-cured by IHO's order to re-convene IEP team (- no harm to S) N.B.: marginal case
A.L. v. New York City Dep't of Educ.	812 F. Supp. 2d 492	E.D.N.Y. 2011	1	–/	3 SRO (L)	D,E-unproven (didn't reach step 2)
B.L. v. New York City Dep't of Educ.	807 F. Supp. 2d 130	E.D.N.Y. 2011	1	–/	P option (~) ?	D,E –lack of meaningful particp. at IEP mtg. - unproven
James M. v. State of Haw. Dep't of Educ.	803 F. Supp. 2d 1150	D. Haw. 2011	1	–/	2-*W.G.* *L.M.*	D,E-unproven (didn't reach step 2)
Long v. Dist. of Columbia	780 F. Supp. 2d 49	D.D.C. 2011	1	–/	P option (~) *I.A.*	D,E-meaningful particp.-marginal case-at least partially waived issue
Hailey M. v. Matayoshi	57 IDELR ¶ 124	D. Haw. 2011	1/2	–	2-*W.G.* *L.M.*	D,E-unclear differentiation depending on whether equal P or just P
Bd. of Educ. v. Schaefer	923 N.Y.S.2d 579	App. Div. 2011	(1)/2	+	3 L	short, cryptic opinion though seemingly per se

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M.C.E. v. Bd. of Educ. of Frederick Cnty.	57 IDELR ¶ 44	D. Md. 2011	1	–/	1-S FAPE only *DiBuo*	D,E-predet. - unproven
K.E. v. Indep. Sch. Dist. No. 15	647 F.3d 795	8th Cir. 2011	1	–/	~3 *Renollett*	D,E-didn't reach step 2 close to but not based on L
N.P. v. E. Orange Bd. of Educ.	56 IDELR ¶ 49	D.N.J. 2011	2	/–	3 R (L)	D,E-late response but enough P(~*D.S.*) N.B.: dicta re prospective injunctive relief for procedural violations
Fort Osage R-1 Sch. Dist. v. Sims	641 F.3d 996	8th Cir. 2011	1	–/	~3 *Lathrop* (*ISD 283*)	D,E-didn't reach step 2 G-8th Cir. case law-close to but not based on L
Davis v. Wappingers Cent. Sch. Dist.	772 F. Supp. 2d 500, *aff'd*, 431 F. App'x 12	S.D.N.Y. 2010 2d Cir. 2011	2	/+	3 L	D,E-both P and S w/o differentiation N.B.: lost TR at next step
Mahoney v. Carlsbad Unified Sch. Dist.	430 F. App'x 562	9th Cir. 2011	1/2	–	3 L	D,E-various re pre-IEP meeting preparations – either no violation or harmless N.B. marginal case due to cursory analysis
E.Z.-L v. New York City Dep't of Educ.	763 F. Supp. 2d 184	S.D.N.Y. 2011	1	–/	3 L	D,E-IEP meeting – unproven (and location – no violation)
W.R. v. Union Beach Bd. of Educ.	414 F. App'x 499	3d Cir. 2011	1	–/	3 *Winkelman* (L)	D,E-P, includ. methodology at Step 1 - unproven
J.P. v. Los Angeles Unified Sch. Dist.	WL12697384	C.D. Cal. Feb. 11, 2011	2	/+	2/3–W.*G./Amanda N.B.* et al.	D,E-lack of PWN of placement offer – "prejudiced" P at Step 2
Hazen v. S. Kingstown Sch. Dep't	55 IDELR ¶ 289, *adopted*, 56 IDELR ¶ 16	D.R.I. 2010 D.R.I. 2011	1-2	–	3 R (L)	D,E-predet. (both steps—other IEP meetings cured lack of notice/invitation)
A.M. v. Monrovia Unified Sch. Dist.	627 F.3d 773	9th Cir. 2010	1	–/	P option (~) ?	D-meaningful particip. - ambiguous as to what the second step is
J.W. v. Fresno Unified Sch. Dist.	626 F.3d 431	9th Cir. 2010	1,2	–/–	2-*W.G.* *W.G.* et al.	D,E-various and mixed application (similar to *C.H.*)- both P/S [only part post Ams.]
Lathrop R-II Sch. Dist. v. Gray	611 F.3d 419	8th Cir. 2010	2	/–	~3 *ISD 283*	D,E-scheduling of IEP mtg. (others alleged violations did not link specifically with P)- marginal (waiver?) – both P/S
Allyson B. v. Montgomery Cnty. Sch. Dist.	54 IDELR ¶ 164	E.D. Pa. 2010	2	/–	3 L	D.E-lack of PWN – no harm to P at Step 2 N.B. cursory and marginal case
C.H. v. Cape Henlopen Sch. Dist.	606 F.3d 59	3d Cir. 2010	2	/–	~1-3 *Amanda*/*Knable* et al./R(L)	D,E-lack of timely notice of IEP meeting-lack of asserted per se effect (other proced. only S)
J.G. v. Briarcliff Manor Union Free Sch. Dist.	682 F. Supp. 2d 387	S.D.N.Y. 2010	1-2	–	3 L	D,E-various but unproven, whether per se or not (parents argued *Winkelman*)—ambiguous whether accepted

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D.S. v. Bayonne Bd. of Educ.	602 F.3d 553	3d Cir. 2010	2	/–	3 *Winkelman* (L)	D-lack of timely response to parent letters (per NJ regs) but parents meaningfully participated
K.L.A. v. Windham Se. Supervisory Unit	371 F. App'x 151	2d Cir. 2010	1	–/	unclear (not reached)	D,E- IEP mtg. – unproven or no violation N.B. short opinion
S.T. v. Weast	54 IDELR ¶ 83	D. Md. 2010	1	–/	3 L	D,E-predet. G-unclear due to concomitant citation for pre-IDEA gen. test case
Berry v. Las Virgenes Unified Sch. Dist.	370 F. App'x 843	9th Cir. 2010	1	+/	unclear (not reached)	D,G-predet. - cursory opinion and preceding one cited *Amanda* et al. w/o clearly reaching whether per se
M.S. v. New York City Dep't of Educ.	WL 9446052	S.D.N.Y. Mar. 12, 2010	1	–/	3 L	D,E-predet.+ - unproven ("loathe")
J.N. v. Dist. of Columbia	677 F. Supp. 2d 314	D.D.C. 2010	1-2	+	2-*W.G. C.M.* et al.	D,E-IEP mtg. w/o responding to parent's reasonable sched. request G-possibly per se based on *Amanda* et al.-limited unclear remedy
Winkelman v. Parma City Sch. Dist.	109 LRP 76161, *adopted*, 53 IDELR ¶ 215	N.D. Ohio 2009	1	–/	3 L	D,E-predet. G-unclear because cited *Deal* (S) [part before Ams.–irrelevant]
Connor v. New York City Dep't of Educ.	53 IDELR ¶ 192	S.D.N.Y. 2009	1	–/	1-S only? ?	D,E-cursory based on deference G-implicitly, albeit ambiguously, student benefit std.-not reached for peripheral P Step 1 alleged meaningful particip. violation – marginal case
T.Y. v. New York City Dep't of Educ.	584 F.3d 412	2d Cir. 2009	2	/–	unclear (not reached)	D,E-"location"-not violated and thus not reaching Step 2P
Drobnicki v. Poway Unified Sch. Dist.	358 F. App'x 788	9th Cir. 2009	1/(2)	+	~3-*Amanda J. Amanda J./L.M.*	D-decisional IEP mtg. w/o parent but loss of ed. oppty. for S?
R.R. v. Scarsdale Union Free Sch. Dist.	615 F. Supp. 2d 283	S.D.N.Y. 2009	1-2	–/–	3 *Matrejek* (L)	C-*aff'd on other grounds*, 366 F. App'x 239 (2d Cir. 2010) D-predet.+ F-no differentiation
Z.D. v. Niskayuna Cent. Sch. Dist.	52 IDELR ¶ 250	N.D.N.Y. 2009	1	–/	3 L	D,E-predet. - unproven
Marcotte v. Palos Verdes Peninsula Unified Sch. Dist.	52 IDELR ¶ 248	C.D. Cal. 2009	1	–/	3 L	D,E-IEP mtg. - unproven
Laddie C. v. Dep't of Educ. State of Haw.	52 IDELR ¶ 102	D. Haw. 2009	1/(2)	–/	~3-*Amanda J. Amanda J.*	E-remand whether knowledgeable team as Step 1 (but parent participated) – not likely P at Step 2, which was not reached

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Rosinsky v. Green Bay Area Sch. Dist.	667 F. Supp. 2d 964	E.D. Wis. 2009	1	–/	1-loss of ed. oppty. *Ross*	D,E-IEP mtg. - unproven
A.G. v. Frieden	52 IDELR ¶ 65	S.D.N.Y. 2009	1	–/	2-*W.G.* *Matrejek*	D,E-predet.+ N.B. Part C case (IFSP)
James D. v. Bd. of Educ.	642 F. Supp. 2d 804	N.D. Ill. 2009	1	–/	3 L	D,E- IEP meeting – unproven
Stanley C. v. M.S.D. of Sw. Allen Cnty. Sch.	628 F. Supp. 2d 902	N.D. Ind. 2008	2	/–	3 L	D,E-various incl. progress reports – even where viol. no harm to P at Step 2 – cursory analysis
Kasenia v. Brookline Sch. Dist.	588 F. Supp. 2d 175	D.N.H. 2008	2	/–	~3 *Roland* et al.	D,E-IEE consid.+P lack of coop. (Step 2) N.B. marginal case
S.K. v. Parsippany-Troy Hills Bd. of Educ.	51 IDELR ¶ 106	D.N.J. 2008	1	–/	unclear	D,E-predet. - unproven
Waukee Cmty. Sch. Dist. v. Douglas L.	51 IDELR ¶ 15	D. Iowa 2008	2	/+	3 L	D,E-lack of notice of sig. change – harm to P at Step 2 (also separate S denial)
Danielle G. v. New York City Dep't of Educ.	50 IDELR ¶ 247	S.D.N.Y. 2008	1	–/	unclear	D,E-predet.
M.M. v. New York City Dep't of Educ.	583 F. Supp. 2d 498	S.D.N.Y. 2008	1	–/	3 L	D-predet. E-written notice viol. (neither P - S) G-not reached
P.K. v. New York City Dep't of Educ.	569 F. Supp. 2d 371	S.D.N.Y. 2008	1	–/	P option (~) *Cerra* et al.	D,E-ignored input at IEP - unproven
K.S. v. Fremont Unified Sch. Dist.	545 F. Supp. 2d 995	N.D. Cal. 2008	1	–/	P option (~) *Shapiro*	D,E- predet. - part under Ams.
Anchorage Sch. Dist. v. N.S.	WL8058163	D. Alaska Nov. 8, 2007	2	/+	P option (~) [*W.G./Amanda*]	D,E-lack of PWN – harmful to P at Step 2
A.D. v. Sumner Sch. Dist.	166 P.3d 837	Wash. Ct. App. 2007	2	/+	2-*W.G.* *W.G.* et al.	arose on the cusp and no dispute that Ams. applied (n.1) D-eval. data for ESY at step 1
T.T. v. Dist. of Columbia	48 IDELR ¶ 127	D.D.C. 2007	1	–/	1-only for S harm *Lesesne*	N.B.: n.1 – Ams. applicable