

**WHICH PROCEDURAL PARTS OF THE IEP PROCESS
ARE THE MOST JUDICIALLY VULNERABLE?***

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Case Scenario: Facts

Steven Phillips is a sixth grader with specific learning disability in reading. He currently receives small group, direct instruction in reading and math in a special education classroom. During the past year, he has shown unexpected improvement in his academic skills.

At Steven's most recent annual IEP meeting, the district proposed a placement in a newly established co-taught more inclusive classroom. The regular education teacher from the proposed classroom was not in attendance at the meeting. Due to Steven's progress in the smaller, more specialized class during the past year, Mrs. Phillips was apprehensive about the proposed placement change. She attempted to express her concerns that (a) the change appeared to be based on an administrative decision to implement the co-teaching model rather than individualized consideration of Steven's specific needs, and (b) the IEP did not include present educational levels, and the goals were not objectively measurable. The special education director who chaired the meeting, interrupted Mrs. Phillips, assuring her that the team had already considered these matters and concluded that the IEP, including the more inclusive placement, was appropriate.

Mrs. Phillips filed for a due process meeting and, subsequently, for judicial review under the Individuals with Disabilities Education Act (IDEA). She alleged various procedural violations concerning membership of the IEP team, contents of the IEP, and predetermination that denied her the opportunity for meaningful participation in the IEP process. What is the likelihood that Mrs. Phillips will ultimately prevail in court on these procedural claims?

Overall Purpose

To determine:

- (a) which alleged procedural violations of the IDEA most frequently subject to adjudication?
- (b) and, among them, the ones courts conclude to be a denial of free appropriate public education (FAPE)?

Legal Framework

- A FAPE for a student with disabilities is the “central pillar of the IDEA” (*Sytsema v. Academy School District*, 2008, p. 1312).
- The “cornerstone” for this central pillar is the individualized education program (IEP) (*Murray v. Montrose County School District RE-1J*, 1995, p. 923 n.3).
- In its landmark decision in *Board of Education v. Rowley* (1982), the Supreme Court provided a two-pronged (i.e., respectively, procedural and substantive) standard for determining whether the district met its FAPE obligation: (a) Did the school district comply with the various applicable procedures? and (b) Is the IEP “reasonably calculated to enable the child to receive educational benefits?” (pp. 206–207).¹
- The many lower court decisions in the immediate decades after *Rowley* developed variations of what amounted to a “harmless-error” approach for the procedural prong, which required not only preponderant proof of the alleged violations but also a harmful effect in terms of the substantive, benefit prong.

¹ The Supreme Court’s recent decision in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017) only addressed the second, substantive prong, changing the standard to whether the IEP is “reasonably calculated to enable [the] child to make progress appropriate in light of the child’s circumstances.”

- The 2004 amendments to the IDEA codified this two-step model for procedural violations, specifically requiring as the second step that the proven procedural violations “impede[d] the child’s right to FAPE,” “cause[d] a deprivation of educational benefit,” or “significantly impede[d] the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE” (IDEA, 20 U.S.C. § 1415[f][3][E]).

Special Education Presentations and Publications

- ← fusing and confusing legal requirements with professional recommendations
- ← relying on selective experience and legal defensiveness
- identifying “fatal” procedural violations and “procedural disasters”
 - predetermining the IEP
 - failing to provide required notices to parents
 - not having all of the required IEP team members in attendance

Method

(a) comprehensive sample of court decisions within carefully demarcated boundaries:

- LRP’s Special Ed Connection[®] – topical index category “200.035 – Procedural Violations as Denial” from July 1, 2005 effective date of IDEA 2004 to July 1, 2015
- initial sample of 169 court decisions screened to final sample of 132 decisions
 - selection criterion: at least one ruling based on one or more of the IEP-related procedural requirements in (a) the IDEA regulations, such as the prescribed composition of the IEP (§ 300.320) or membership of the IEP team (§ 300.321), and/or (b) state special education laws that either paralleled or extended these federal requirements

- other exclusions: (a) IEP-related procedural cases resolved entirely on threshold technical grounds, such as mootness (e.g., *Patterson v. District of Columbia*, 2013), and b) cases limited to procedural rulings specific to the marginally overlapping issue of child find (e.g., *Lauren G. v. West Chester Area School District*, 2012)

- tracking each of the cases to the final decision on the merits

(b) carefully established categories and subcategories for analysis

- the IDEA procedural regulations specific to the IEP process, starting with the procedural requirements for initial evaluation (within §§ 300.304–300.305) and ending before the IDEA’s dispute resolution provisions, such as the impartial hearing process (e.g., §§ 300.511–300.512)

- four categories:

- IEP Components (primarily § 300.320
- IEP Team (primarily § 300.321
- Other Parent Participation (primarily § 300.322);
- IEP Development, Effectuation, and Review/Revision (primarily §§ 300.323–300.324)

- designated subcategories:

ex. IEP components:

- present levels (§ 300.320[a][1])
- measurable goals (§ 300.320[a][2])
- progress monitoring (§ 300.320[a][3])
- special education/related services (§§ 300.320[a][4] and 300.324[a][7])
- testing accommodations (§ 300.320[a][6])
- transition services (§ 300.320[b]
- FBA-BIP (§ 300.324[a][2][i]
- other (e.g., IEP’s LRE provisions (§§ 300.324[a][4][iii] and 300.324[a][7])

(c) numerical tabulation of frequency and outcomes with due differentiation of the units of analysis (i.e., the 132 cases and, within them, the 268 relevant rulings):

1 st Entry (Requirement/Violation Determination)		2 nd Entry (Ultimate Outcome)	
1	Not a procedural requirement	S	Conclusively in favor of school
2	Unproven or uncertain violation		
		(I)	Inconclusive
3	Proven or assumed violation	S	Conclusively in favor of school
		P	Conclusively in favor of parent

Questions and Results

1. What were the frequency and outcomes overall for the procedural FAPE rulings and cases?

Distribution of Outcomes of the Rulings and, on Best-for-Parent Basis, the Cases

Rulings (n=268)				Cases (n=132)	
1 st Entry	%	2 nd Entry	%	%	
Not a procedural requirement	5%	Conclusively in favor of school	81%	Conclusively in favor of school	71%
Unproven or uncertain violation	50%	Inconclusive	2%	Inconclusive	4%
Proven or assumed violation	45%	Conclusively in favor of parents	18%	Conclusively in favor of parents	25%

2. Which alleged IEP related procedural violations are most frequently adjudicated . . .

- (a) by category:

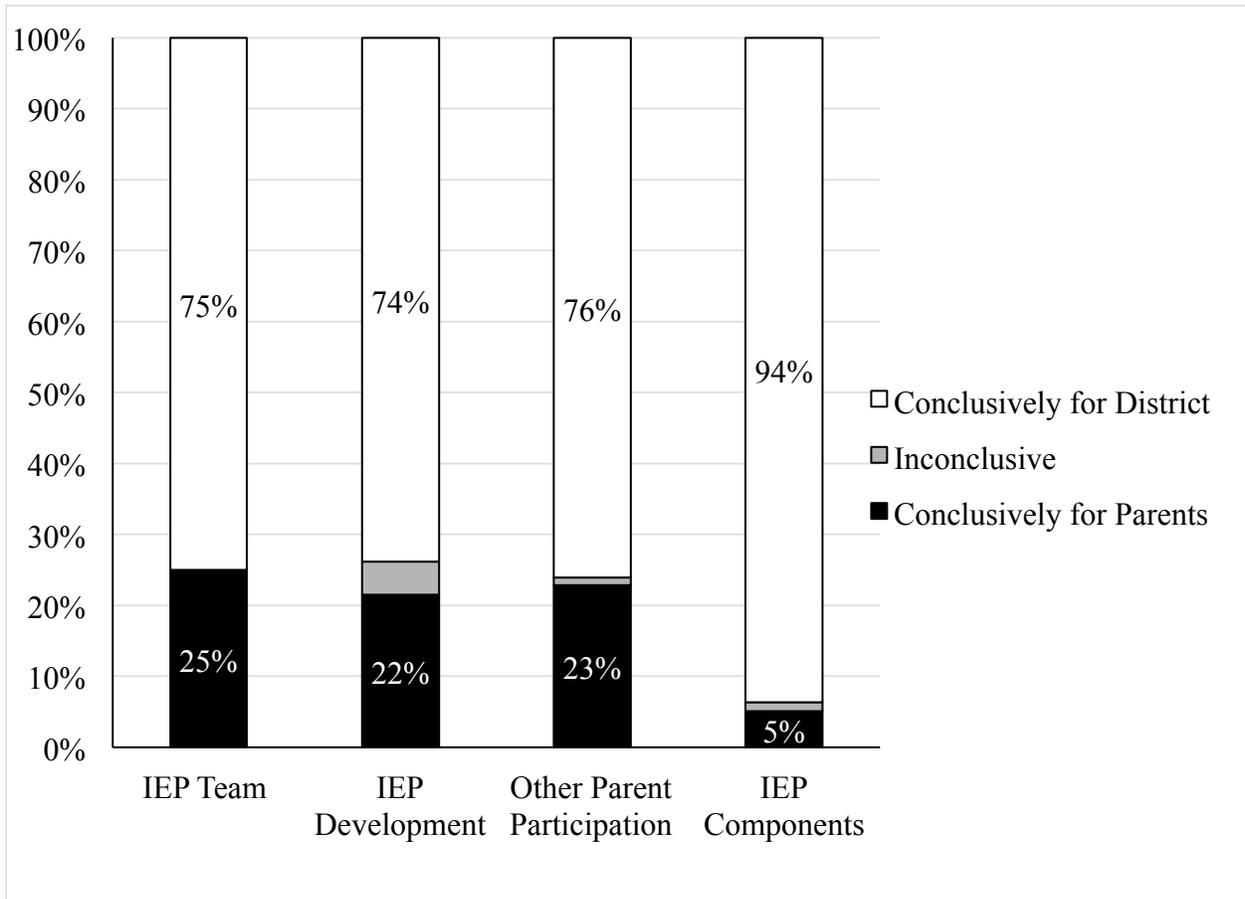
- Other Parent Participation (n=92)
- IEP Components (n=79)
- IEP Development (n=65)
- IEP Team (n=32)

- (b) by subcategory:

- meaningful parental participation (n=70)
- predetermination (n=26)
- evaluation/ reevaluation (n=24)
- FBA/BIP (n=22)
- IEP timelines (n=19)
- measureable goals (n=18)
- special education/related services (n=17)
- regular education teacher (n=12)
- prior written notice (n=10)

3. Which alleged IEP related procedural violations have the most parent-favorable outcomes in terms of rulings . . .

- (a) by category?



Review of this Figure reveals that the corresponding percentages of conclusive rulings for districts and parents amounted to approximately a 3:1 ratio for each category except IEP components, which favored districts by more than a 15:1 ratio. Supplemental analysis revealed that (a) the most frequent parental participation claim, predetermination, had a success rate of only 15%, with the remaining 22 of the 26 rulings being conclusively in favor of the district based in almost every such instance on a judicial determination of lack of preponderant proof, and (b) converting the outcome distribution from rulings to cases on a best-for-parent basis only slightly mitigated the pro-district skew.

• by subcategory?

Regulatory Subcategory		Frequency		Outcomes			
		Rank ^a	No.	P	Incon- clusive	S	Rank ^b
<i>IEP Components:</i>							
300.320(a)(1)	Present levels	11	8	0%	0%	100%	--
300.320(a)(2)	Measurable goals	5	18	0%	0%	100%	7(tie)
300.320(a)(4) ^c	Special ed./Related services	6	17	0%	0%	100%	7(tie)
300.320(b)	Transition services	9(tie)	9	22%	11%	67%	--
300.324(a)(2)(i) ^d	FBA/BIP	3	22	9%	0%	91%	6
Misc.	Other: transition between schools	14(tie)	5	0%	0%	100%	--
<i>IEP Team:</i>							
300.321(a)(1)	Parents	18(tie)	2	0%	0%	100%	--
300.321(a)(2)	Regular ed. teacher	7	12	33%	0%	67%	1
300.321(a)(3)	Special ed. teacher	9(tie)	9	22%	0%	78%	--
300.324(a)(4)	District representative	18(tie)	2				
Misc.	Other: private school rep.	16(tie)	3	0%	0%	100%	--
“	Other: behavior specialist	18(tie)	2	0%	0%	100%	--
<i>Other Parental Participation:</i>							
300.322(a)-(e) ^e	Opportunity, including information	1	70	21%	1%	77%	4
300.322(a)(1)-(b)	IEP meeting notice	13	6	17%	0%	83%	--
300.322(f)	IEP copy	16(tie)	3	33%	0%	67%	--
300.503	Prior written notice	8	10	30%	0%	70%	2
<i>IEP Development, Effectuation, and Revision:</i>							
300.502(c)(1)	Consideration of IEEs	12	7	14%	0%	86%	--
300.323(a)	Annual timeline	4	19	26%	5%	68%	3
300.324(b)	Periodic review and revisions	14(tie)	5	60%	0%	40%	--
300.303–300.305	Evaluations/Reevaluations	2	24	13%	4%	83%	5

^a Overall among subcategories except singletons; ^b Only for the subcategories with $n > 9$; ^c Also, § 300.320(a)(7); ^d Including state regulations similar or adding to § 300.324(a)(2)(i); ^e Also, § 300.324(a)(ii), § 300.501(b)–(c), and references to “meaningful” parental participation w/o citation of other regulation(s), but excluding next two rows (meeting notice and IEP copy).

Overall, for each of the regulatory subcategories that have an n of at least 10, the balance of conclusive rulings was strongly skewed in favor of the district. Conversely, among the procedural subcategories with a frequency of 10 or more, the rulings for the IEP Components of measurable goals and specified special education and related services were 100% in favor of the districts. The specific category that was most vulnerable, considering *both* frequency (yellow rank) and outcomes (aqua rank), was opportunity for parental participation.

Case Scenario: Results

The absence of the regular education teacher was a violation due to the factual fulfillment of the IDEA regulatory requisite that “the child is, or may be, participating in the regular education environment” (§ 300.321[a][2]). Similarly, the absence in the IEP of present educational levels (§ 300.320[a][1]) and, if proven, goals that were not “measurable” (§ 300.320[a][2][i]), which does not strictly require that the measurement be objective, constitute to procedural violations. Likely more difficult to prove, Mrs. Philips’ perception that the IEP was based on collective convenience is counter to the individualized appearance of the IEP development process; she would have the burden to show, for example, that the team failed to consider the enumerated child-specific factors in formulating the IEP (§ 300.324[a]). Finally, Mrs. Phillips’ account that the district chair of the IEP meeting interfered with her participation will face an uphill slope whether under the derivative claims non-meaningful participation or predetermination under the general regulatory rubric (§ 300.322) or the more specific but slippery requirement to “consider” parental concerns in the IEP’s development (§ 300.324[a][ii]). Assuming that Mrs. Philips preponderantly proves some of these procedural violations, the second as equally essential step is to show that they either (a) resulted in either a substantive denial to Steven, i.e., that his IEP was not reasonably calculated to yield appropriate progress,² or (b) significantly impeded Mrs. Philip’s opportunity to participate in the FAPE decision-making process. In light of Steven’s apparently notable progress and his parent’s participation, which was not optimal but also not blatantly denied, the judicial odds—as the results of the foregoing analysis reveal—are not in favor of the parent prevailing. Nevertheless, depending on witnesses, the attorneys, the judge, and the hearing officer’s decision that is under

² For the fuller recitation of the refined substantive standard per the recent decision in *Endrew F.*, see *supra* note 1.

appeal, this case could be in the 25% successful subgroup in the first Table (on page 8 above).. The key to the judicial outcome, ironically, is the substantive side of FAPE, including whether the child's progress the prior year supports his proposed inclusionary placement for the year at issue. Nevertheless, depending on careful and comprehensive cost-benefit analysis, revising the facts by providing more effective steps in the IEP process, including a clearer and more complete IEP, full attendance of the IEP team, and more meaningful partnership in the IEP development may be the chosen route based on proactive practices rather than legal requirements.

Finally, as a different decisional alternative under the IDEA, if the district did not engage in preventive practices and/or an early settlement, the parent's outcome odds would have likely been significantly higher by resorting to the state education agency's complaint procedures process (and/or the corresponding complaint investigation and resolution process of the Office for Civil Rights under the overlapping coverage of Section 504).