ARTICLE

THE MEANS JUSTIFY THE ENDS: STRUCTURAL DUE PROCESS IN SPECIAL EDUCATION LAW

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This Article addresses the theoretical and functional role of due process in special education law under the Individuals with Disabilities Education Act ("IDEA"). Thirty years ago, the Supreme Court interpreted the IDEA to grant very limited substantive rights but to provide robust procedural protections for disabled children and their families. Since that decision, the federal courts have been in an unrecognized state of disarray when analyzing procedural violations under the IDEA. This Article looks to the historical context in which the IDEA was drafted and interpreted, in the midst of the so-called due process revolution, to better understand the meaning of its proceduralist values. The Article revisits the once lively academic discussion of the nature and function of procedural civil rights protections in the education context that engaged scholars during the 1970s and 1980s, updating that analysis to apply to current special education law. The Article applies the historical and theoretical insights from those earlier inquiries to develop a structural due process vision of the IDEA, distinguishing two separate stages at which due process protections apply under the Act, and deriving three distinct principles that constrain the school district's decision-making process in developing an individualized educational program for a disabled student: collaboration, individualization, and contractualization. Finally, it argues that this theoretical inquiry has significant practical import because the three structural due process principles map precisely onto a recent amendment to the IDEA such that the theoretical vision described in the Article is directly relevant to deciphering the procedural challenges raised under the IDEA that have bedeviled the courts for more than three decades.

I. INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA"),[1] enacted in 1975, guarantees that school districts offer disabled children a "free, appropriate public education" ("FAPE") through the mechanism of an "individu-

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[1] Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended in scattered sections of 20 U.S.C. §§ 1400–1482 (2006)). For ease of reference, this Article will refer to the Act as the IDEA, the acronym by which it has been known since the 1990 amendments. Individuals with Disabilities Education Act (IDEA), Pub.

alized educational program" ("IEP") that determines the child's special educational services and placement.[2] The IDEA mandates that school districts develop the IEP in conjunction with the parents of the disabled child through a highly specified set of procedures mandating the scope of information that must be considered, the composition of the group that is to consider that information, and the issues that the group must resolve.[3]

The Supreme Court interpreted the IDEA in a 1982 decision, *Board of Education of Hendrick Hudson Central School District v. Rowley*,[4] in ways that continue to dominate judicial and scholarly analysis of the Act three decades later. The IDEA, as interpreted by *Rowley*, views special education law through a strongly proceduralist lens: *Rowley* dictates that the process by which the IEP is created is of far more importance than the substantive content of the resulting IEP.[5] *Rowley*'s central holding was its establishment of a two-part test for assessing when a school district[6] has violated the IDEA such that liability attaches. A reviewing court must ask two questions: "First, has the State complied with the procedures set forth in the Act [in developing the IEP]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"[7] The first question is a procedural assessment and the second is a substantive one. Neither courts nor commentators, however, have been able to articulate a coherent vision of the procedural rights granted by the IDEA.

In the few years preceding the IDEA, and in the decade following *Rowley*, numerous commentators in prominent articles and books engaged in

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L. No. 101-476, 104 Stat. 1142 (1990) (codified as amended in scattered sections of 20 U.S.C. §§ 1400–1482 (2006)).

[2] Bd. of Educ. v. Rowley, 458 U.S. 176, 205–06 (1982).

[3] *See, e.g.*, Winkelman v. Parma Sch. Dist., 550 U.S. 516, 523–26 (2007) (citing, inter alia, 20 U.S.C. §§ 1414–1415 (2006)).

[4] 458 U.S. 176 (1982).

[5] *See infra* Part III.B.

[6] Under the IDEA, the technical term is a "local educational agency" ("LEA"), 20 U.S.C. § 1401(19) (2006), or, in limited circumstances, the "state educational agency" ("SEA"), 20 U.S.C. § 1401(32) (2006). For ease of comprehension, this Article refers to the "school district" rather than the LEA.

[7] *Rowley*, 458 U.S. at 206–07. There is strong reason to believe that the *Rowley* majority was incorrect in concluding that Congress intended to provide to disabled children only access and some measure of educational benefit, rather than relative equality of opportunity with nondisabled children. *See, e.g.*, *id.* at 213–18 (White, J., dissenting) (reviewing the extensive legislative history supporting substantive equality of educational opportunity for disabled children); Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 412 (1990) ("Strictly on the legislative history, the dissenters in *Rowley* have the better argument."). There is also strong reason to believe that amendments to the IDEA since *Rowley* have heightened the degree of substantive protection the Act affords. *See, e.g.*, Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 367 (2008) (arguing that "substantive changes to the underlying statute since *Rowley* was decided . . . have modified the meaning of FAPE"). The scope of the Act's substantive protections are beyond the scope of this Article, but are not in tension with the more robust understanding of procedural protection argued for here.

serious analysis of the process required by the IDEA[8] and the consequences of enhanced proceduralism in education and special education law. These scholars assessed the theoretical and practical implications of "legalizing" special education law through the imposition of rigorous procedural protections coupled with minimal substantive constraints.[9] In the more than two decades since this wave of scholarly attention, however, academic focus has turned away from the fundamental question of the meaning of the IDEA's procedural guarantees to other areas of special education law, such as discrimination, mainstreaming, and eligibility,[10] leaving behind a rough consensus that the IDEA's procedural protections are not effective in practice and are not particularly important, even in theory.[11]

Similarly, though *Rowley*'s two-part test seems straightforward in the abstract, courts have been hopelessly confused about what *Rowley*'s proceduralist vision actually entails.[12] Specifically, courts lack clarity on whether a procedural violation of the IDEA in the absence of a substantive violation of the Act always, sometimes, or never results in a denial of FAPE and thus a judgment for the family of the disabled child. In attempting to answer that question, courts of appeals have issued decisions that are inconsistent and stated general principles that, while sensible, are opaque, malleable, and undefined.[13]

In a 2004 amendment to the IDEA almost entirely overlooked by both scholars and the courts, Congress ostensibly resolved the question of what consequences follow procedural violations by defining the circumstances under which a procedural violation of the IDEA warrants a finding that a

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[8] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 35–40, 81–86 (1990); William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7 (1985); David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166; Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988); Sheila K. Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 8 (1981); David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976); David L. Kirp, William Buss & Peter Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 115–50 (1974); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Weber, *supra* note 7; Mark G. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891.

[9] *See, e.g.*, David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63 (1985).

[10] *See, e.g.*, Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171 (2005); Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 808 (2006); Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 71–76 (2007); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83 (2009) (discussing substantive IDEA eligibility standards).

[11] *See infra* Part III.D.

[12] *See infra* Parts III.C, III.F.

[13] *See infra* Part III.C.

FAPE has been denied and the Act as a whole has been violated.[14] Congress's solution, however, was simply to adopt wholesale three sensible, if vague, principles articulated in court of appeals decisions that struggled to derive common threads from prior case law.[15] The cases stated that procedural errors would be sufficient to deny a FAPE if such errors "[1] compromised the pupil's right to an appropriate education, [2] seriously hampered the parents' opportunity to participate in the formulation process, or [3] caused a deprivation of educational benefits."[16] The decisions provided little explanation of the meaning of these principles, and did not explicate whether the three categories were co-extensive, overlapping, or entirely distinct. The 2004 congressional amendment adopted these three principles as a tri-partite test, resulting in a standard that remained opaque, malleable, and largely undefined.

Since the amendment, judicial disarray has—predictably—not abated.[17] A paradigmatic example of this disarray is the Ninth Circuit's fractured decision in *M.L. v. Federal Way School District*,[18] in which each judge on the panel wrote separately to provide his perspective on the consequence of the school district's violation of the IDEA's procedural requirement that a regular education teacher serve on the IEP team. A single panel of judges managed to conclude that such a procedural violation, standing alone, always,[19] sometimes,[20] and never[21] results in judgment for the parents.

While confusion reigns in the courts of appeals, the Supreme Court has not revisited the issue of procedural error since *Rowley*. This silence is unfortunate because the societal importance of special education has only increased since the IDEA's enactment: "the number of children receiving services under the IDEA has skyrocketed over the last three decades" such that approximately one-tenth of all schoolchildren today receive special education services.[22] Spending on special education also represents a significant

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[14] 20 U.S.C. § 1415(f)(3)(E) (2006); *see also infra* Part III.E.

[15] *See, e.g.*, Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990); *accord* Amanda J. *ex rel.* Annette J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 892 (9th Cir. 2001).

[16] *Roland M.*, 910 F.2d at 994.

[17] *See infra* Part III.F.

[18] 394 F.3d 634 (9th Cir. 2005).

[19] *Id.* at 644–48 (Alarcón, J., writing for the court, but in the minority on this issue) (concluding that procedural violation was a per se violation of the IDEA because it was a "structural error" in the process used to develop the IEP).

[20] *Id.* at 651–57 (Gould, J., concurring in part and concurring in the judgment, but in the majority on both issues in the case) (stating that "we cannot readily conclude that the statutory violation . . . was harmless").

[21] *Id.* at 658–64 (Clifton, J., dissenting) (concluding that procedural error is irrelevant if, as a substantive matter, "the IEP provides for the best program for the student").

[22] Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1149 & n.13 (2007); *id.* at 1149 n.14 ("[S]pecial education numbers increased by 35% in the 'last decade . . . while school enrollment grew only 14%.'" (quoting Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072–73 (2005))).

and increasing proportion of growing school budgets,[23] highlighting the practical importance of clarity in understanding the Act's procedural demands.

The uncertainty caused by the lack of a coherent theory of proceduralism results in many disabled students being denied the meaningful procedural rights of collaboration, individualization, and contractualization afforded them by the IDEA.[24] In addition, it results in school districts misdirecting funds and attention to tangential or technical procedural requirements that they, in any event, fail to understand—dotting t's and crossing i's, as it were, rather than complying with the meaningful procedural obligations the IDEA actually imposes.

This Article revisits the discussion over the IDEA's proceduralist vision begun thirty-five years ago and largely abandoned since, examining the historical context in which the IDEA was enacted and interpreted—the so-called due process revolution of the 1960s and 1970s. The Article seeks to document the astonishing degree of judicial disarray concerning the consequences of procedural error under the IDEA that has prevailed since *Rowley* and sets forth a structural due process vision of the IDEA that explains why procedural protections are of great theoretical and practical import. Ultimately, the Article aims to draw on *Rowley* to take seriously the procedural guarantees established in the IDEA, explaining how the IDEA's proceduralism should be understood to provide meaningful rights. It attempts to demonstrate that the IDEA's procedural protections, properly understood, are far more coherent and meaningful than courts and commentators have suggested.

Part II briefly describes the evolution of special education law, moving from early cases approving school districts' wholesale refusal to educate disabled children, through highly influential law reform cases in the early 1970s that set the stage for the IDEA's proceduralist approach, to the IDEA's enactment in 1975. Part III then highlights the serious, and under-recognized, analytical disarray in the courts of appeals' approaches to procedural violations of the IDEA.

Finally, Part IV sets forth a structural due process vision of the IDEA. Part IV.A.1 explores the historical context of the IDEA—its birth during the so-called due process revolution[25]—to better understand the procedural vision that animated the Congress that enacted the IDEA and the Court that interpreted it in *Rowley*. Academic commentary on proceduralism outside the context of special education is illuminating regarding the values of proceduralism, with Professor Laurence Tribe's theory of structural due pro-

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[23] *See* Thomas B. Parrish, *Who's Paying the Rising Cost of Special Education?*, 14 J. SPECIAL EDUC. LEADERSHIP, no. 1, 2001 at 1, 1, *available at* http://www.csef-air.org/publications/related/jsel/PARRISH_JSEL.PDF.

[24] *See infra* Part IV.A.2.b.

[25] *See, e.g.*, Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 789 (1990) (discussing the "so-called due process revolution").

cess being particularly informative. Part IV.A.2 uses those theoretical underpinnings to derive the principles necessary to understanding the IDEA's procedural requirements.

Two key insights emerge. First, Part IV.A.2.a explains that descriptions of the Act's due process protections generally fail to differentiate the two stages at which process is due in special education. Most accounts emphasize the litigation stage, after an IEP has been created, at which a family has the right to file suit seeking an "impartial due process hearing"[26] to challenge a district's alleged error. Assessments of due process rights often slight the more novel and important locus of the IDEA's procedural protection: the procedural obligations mandated in the IEP formation process that sharply constrain the school district's determination of appropriate educational placement and services. The IDEA's procedural rights thus implicate far more than the familiar due process balancing test.[27] That test provides individuals possessing a liberty or property interest with some measure of notice and meaningful opportunity to be heard before a government body that is applying pre-defined statutory or regulatory substantive criteria. Importantly, the IDEA provides for structural due process because the means by which the district reaches its determination of services is sharply constrained by predefined statutory and regulatory procedural criteria, but substantive benchmarks are almost entirely open-ended.

Part IV.A.2.b develops the second core insight. The IDEA's procedural principles, which are applicable at the IEP decisionmaking stage, fall into three distinct categories: (1) collaboration, the district's duty to work cooperatively with the disabled student's parents in formulating the IEP; (2) individualization, the district's obligation to consider the full scope of relevant information about the particular child, and to have a properly composed IEP team assess the full range of potential placements and services that might be appropriate; and (3) contractualization or guaranteed implementation, the district's obligation, after arriving at an IEP through a valid process, to provide the services promised in the IEP.

Finally, Part IV.B explains that these three conceptual categories map directly onto 20 U.S.C. § 1415(f)(3)(E), the tri-partite statutory test for procedural violations established by Congress as an IDEA amendment in 2004, giving meaning to the otherwise opaque language of that amendment. Thus, the theoretical arguments in the Article are, in fact, already the law, and these principles can be brought to bear on the resolution of the procedural claims under the IDEA that courts have struggled with for more than thirty years.

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[26] 20 U.S.C. § 1415(f) (2006).

[27] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

II. The IDEA and its Judicial and Legislative Forebears

A. *Case Law Addressing Education of the Disabled Through the Dawn of the Civil Rights Era*

Until well into the civil rights era, federal law did not concern itself with education of the disabled. Congress and the state and federal courts deferred in matters of education to the decisions of local educational authorities or to parents, at times granting parents constitutional rights against those authorities to make decisions about their children's education.[28]

While the Supreme Court itself deferred to local school districts, the Court reserved space for parents to have meaningful input into and control over their children's education, such as opting out of the public schools[29] or insisting their children be taught a foreign language.[30] Thus, while the federal government, and in particular the judiciary, did not consider itself to have institutional warrant or competence to second-guess the decisions of local educational authorities, the Court did recognize its role in ensuring the involvement of parents in local authorities' decisions.

Parental rights did not extend, however, to guaranteeing parental input into the education of their disabled children. State statutes often expressly authorized local authorities to exclude the disabled from attending school.[31] Moreover, when litigants challenged local educational authorities' decisions to bar disabled children from attending school, state supreme courts were highly deferential to these official determinations.[32]

Following *Brown v. Board of Education*,[33] the Supreme Court began to take special education seriously as an area of constitutional inquiry. Between the mid-1970s, when the IDEA was enacted, and the mid-1980s, when it was interpreted in *Rowley*, the Court seemed open to understanding education[34]

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[28] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923).

[29] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[30] *Meyer*, 262 U.S. 390.

[31] *See* Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. Mich. J.L. Reform 331, 343 & n.40 (1994) (citing various state statutes).

[32] *See, e.g.*, Dep't of Pub. Welfare v. Haas, 154 N.E.2d 265 (Ill. 1958) (permitting exclusion of a mentally disabled child); Watson v. City of Cambridge, 32 N.E. 864, 865 (Mass. 1893) (holding that the local school committee had authority to decide whether to exclude disabled children because they engaged in "certain acts of disorder"); State *ex rel.* Beattie v. Bd. of Educ., 172 N.W. 153, 154 (Wis. 1919) (upholding school board's exclusion of physically disabled student whose difficulty speaking and "unclean appearance" "produce[d] a depressing and nauseating effect" and "interfere[d] generally with the discipline and progress of the school").

[33] 347 U.S. 483 (1954).

[34] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973) (refusing to rule out the possibility that complete denial of education might be unconstitutional, as might an educational "system [that] fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process"); *see also* Plyler v. Doe, 457 U.S. 202 (1982) (seemingly apply-

and disability[35] as issues warranting some measure of meaningful judicial involvement. Although that apparent solicitude never resulted in the Court's finding education a fundamental right or disability a suspect classification, the IDEA's procedural protections came into being when the right to education and the right of the disabled to equality in governmental decisionmaking were potent background constitutional forces. Indeed, the underlying principles the plaintiffs sought to establish in *Plyler* and *Rodriguez* had been raised successfully in 1971 and 1972 in two district court cases challenging inadequate special educational services.[36] These two legal challenges, *Pennsylvania Association for Retarded Children v. Pennsylvania* ("*PARC*"),[37] and *Mills v. Board of Education of the District of Columbia*,[38] were of paramount importance to congressional enactment of the IDEA.

B. Judicial Recognition of the Educational Rights of the Disabled in PARC *and* Mills

PARC and *Mills*, both brought by lawyers in the disability rights movement,[39] were instrumental in crystallizing the nascent societal sense that disabled children could and should be educated in the public schools.[40] *PARC*, brought in 1971 to challenge Pennsylvania's treatment of mentally retarded children, was the first notable challenge to exclusion of disabled children from the schoolhouse. The court resolved the case with a consent decree recognizing that "mentally retarded" children in Pennsylvania had a right to a "free" and "appropriate" "public program of education,"[41] and also "specif[ying] a full range of due process procedures" for determining the child's free and appropriate public education.[42] The court's remedial order in

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ing a standard of review stricter than rational basis while assessing an equal protection challenge to Texas's exclusion of children of undocumented immigrants from public education).

[35] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (deciding not to apply strict scrutiny to classification turning on mental retardation, though seeming to apply a standard more exacting than traditional rational basis).

[36] Despite the fact that *Rodriguez* and *Plyler* did not result in doctrinal advances, their "ideas of equal entitlement and of the fundamental importance of education . . . were not utterly infertile. In two important cases, courts used these core ideas to extend free, suitable public education to children with mental and physical disabilities." Nussbaum, *supra* note 10, at 71.

[37] 334 F. Supp. 1257 (E.D. Pa. 1971), *and* 343 F. Supp. 279 (E.D. Pa. 1972).

[38] 348 F. Supp. 866 (D.D.C. 1972).

[39] *See, e.g.*, David L. Kirp & Donald N. Jensen, *What Does Due Process Do?* PARC v. Commonwealth of Pennsylvania *Reconsidered*, 73 PUB. INTEREST 75, 80 (1983) (describing the "venturesome" "ambitions of the *PARC* advocates," and quoting plaintiff's attorney Thomas Gilhool as seeking to "transform education").

[40] *See* Neal & Kirp, *supra* note 9, at 67–70; *see also* Bd. of Educ. v. Rowley, 458 U.S. 176, 192–94 (1982) (describing *PARC* and *Mills*).

[41] *PARC*, 343 F. Supp. at 302.

[42] Neal & Kirp, *supra* note 9, at 69; *see PARC*, 343 F. Supp. at 302–06 (setting forth Stipulated Consent Agreement detailing numerous procedural requirements imposed on a district wishing to change educational services provided to a child because of his or her mental retardation).

Mills followed shortly thereafter, extending protections very similar to those in *PARC* to all disabled children in the District of Columbia.[43]

As *Rowley* notes at some length,[44] *PARC* and *Mills* (and the three dozen parallel cases filed shortly thereafter)[45] played a key role in prompting congressional enactment of the IDEA, and in shaping its proceduralist focus.[46] *Rowley* observes that "[b]oth the House and the Senate Reports attribute the impetus for the Act and its predecessors to" *PARC* and *Mills*, thereby placing significant interpretive weight on those cases.[47] Specifically, the *Rowley* Court grounded much of its justification for its proceduralist construction of the IDEA on its reading of *PARC* and *Mills*, reasoning that "[n]either case purports to require any particular substantive level of education. Rather, like the language of the Act, the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children."[48]

C. *Enactment of the IDEA*

It was not until 1966 that Congress first examined specific problems in educating disabled children, taking some tentative steps toward studying—and encouraging—their education.[49] In 1974, shortly after the decisions in *PARC* and *Mills*, Congress passed an interim measure that significantly increased federal funding of special education, established a goal of educating all disabled children, and initiated hearings to assess the practical realities of educating disabled students.[50] Congress was spurred to action by increased focus on the needs and educational rights of disabled children reflected and reinforced by these cases.[51]

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[43] *Mills*, 348 F. Supp. at 878–83.

[44] *Rowley*, 458 U.S. at 192–94.

[45] Neal & Kirp, *supra* note 9, at 70 & n.33.

[46] *See Rowley*, 458 U.S. at 180 & n.2; Engel, *supra* note 8, at 171–74 (explaining link between *PARC* and *Mills* and the enactment of the IDEA); Samuel Flaks, Note, *Nathan Isaacs's IDEIA: Legal Evolution and Parental Pro Se Representation of Students With Disabilities*, 46 HARV. J. ON LEGIS. 275, 286 (2009) (citing H.R. REP. NO. 94-332, at 3–4 (1975); S. REP. NO. 94-168, at 8 (1975)) ("The legislative history of [the IDEA] indicates that Congress sought to codify the principles of *PARC* and *Mills*.").

[47] *Rowley*, 458 U.S. at 192.

[48] *Id.* at 193–94. While the cases involved a significant, substantive strain of equality of educational opportunity between disabled and non-disabled children, *see, e.g.*, *Mills*, 348 F. Supp. at 875, the majority of the Supreme Court brushed aside those aspects of *PARC* and *Mills*.

[49] *See* Stemple v. Bd. of Educ., 623 F.2d 893, 896–97 (4th Cir. 1980) (reviewing congressional special education enactments in the decade preceding the IDEA); Lora v. Bd. of Educ., 456 F. Supp. 1211, 1224 (E.D.N.Y. 1978) (same), *vacated*, 623 F.2d 248 (2d Cir. 1980).

[50] Education Amendments, Pub. L. No. 93-380, §§ 611–621, 88 Stat. 579, 579–85 (1974) (codified as amended in scattered sections of 20 U.S.C. §§ 1400–1461 (2006)).

[51] S. REP. NO. 94-168, at 5–6; *see also* Jeffrey A. Knight, Comment, *When Close Enough Doesn't Cut It: Why Courts Should Want to Steer Clear of Determining What Is—and What Is Not—Material in a Child's Individual Education Program*, 41 U. TOL. L. REV. 375, 379–81 (2010) (describing the influence of *PARC* and *Mills* on passage of the IDEA).

In 1975, Congress enacted the Education for All Handicapped Children Act ("EAHCA"),[52] which established the basic contours of the statute that would later become known as the IDEA. The EAHCA created a federal grant program to help districts educate disabled children, conditioning funding on states' compliance with the Act's extensive procedural requirements.[53] The Act incorporated many of the robust procedural rights granted to disabled children in *PARC* and *Mills*.[54]

The updated IDEA mandated that states accepting federal funds provide a "free appropriate public education" that is "tailored to the unique needs of the handicapped child" through an "individualized educational program," or IEP.[55] The IDEA did not define the substance of a free appropriate public education ("FAPE") beyond general language stating that the education must be "appropriate" and must be "provided in conformity with the individualized education program."[56] The IEP, a specific plan setting forth the placement and services to be provided the child that is individually tailored to that child's particular educational needs and that has been developed jointly by the district and the child's family, has become the cornerstone of special education.[57]

In contrast to its vague substantive guarantees, the IDEA imposed a detailed set of procedural requirements.[58] The IDEA establishes the local

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[52] Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended in 20 U.S.C. §§ 1400–1482 (2006)).

[53] Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). As part of the same movement toward protecting the rights of the disabled, Congress passed § 504 of The Rehabilitation Act of 1973 to prohibit disability discrimination in federally funded programs. Rehabilitation Act, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794(a) (2006)). *See generally* Christopher J. Walker, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-*Schaffer *Public School*, 58 STAN. L. REV. 1563, 1580–85, 1602 (2006).

[54] *See* Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1105 (1979).

[55] *Rowley*, 458 U.S. at 181; *see also id.* at 188–89 ("[A] 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child.").

[56] The full provision of the IDEA states the following:

> The term 'free appropriate public education' means special education and related services that-
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program . . . .

20 U.S.C. § 1401(9) (2006).

[57] *See, e.g.*, Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 523–26 (2007).

[58] *See* 20 U.S.C. §§ 1414–1415. In *Winkelman*, the Supreme Court described the core of those procedural requirements:

> IDEA requires school districts to develop an IEP for each child with a disability, with parents playing "a significant role" in this process. Parents serve as members of the team that develops the IEP. The "concerns" parents have "for enhancing the

school district's obligation to work collaboratively with the parents of a disabled child to develop an IEP that is individualized so as to be appropriate for that particular child's needs; in doing so, the district is subject to numerous procedural requirements addressing the timing and scope of evidence that must be gathered and considered during the development of the IEP, the composition of the district's IEP team, and the open-minded way in which the team's placement and services determinations must be made, all of which must be documented in the IEP.[59] Parents, if they are unsatisfied with the results of this process, are accorded a detailed set of due process rights to challenge the district's decisions, administratively and then in court.[60]

Congress thus embraced the IEP process, consistent with *PARC* and *Mills*, in order to advance special education without intrusion on the prerogative of local authorities and educators to make substantive determinations free from federal micro-management. As Professors Neal and Kirp explain, the IEP is:

> an ingenious device in terms of political acceptability. It avoids attempting to mandate specific services; it recognizes the rights of recipients, empowers them, and involves them in the process. It avoids encroaching on the professional discretion of teachers and potentially enhances their influence over placement decisions. It provides a means of holding local administrators accountable while paying some deference to the belief that the federal government should not interfere too much with local autonomy in education.[61]

Through the IDEA, the federal government constrains *how* the district's decision about special education is made, not *what* decision is made—the process, not the substance.

III. Judicial Construction of Process Due Under the IDEA

A. *Judicial Chaos Pre*-Rowley

Given the relative opacity of the Act's substantive requirements, and of the consequences of procedural violations, courts were understandably uncertain about how to interpret the IDEA in the years immediately following

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education of their child" must be considered by the team. IDEA accords parents additional protections that apply throughout the IEP process. The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child.

550 U.S. at 524 (citations omitted).

[59] *See* 20 U.S.C. §§ 1414–1415; *see also Winkelman*, 550 U.S. at 524; Neal & Kirp, *supra* note 9, at 74.

[60] *See* 20 U.S.C. § 1415.

[61] Neal & Kirp, *supra* note 9, at 72.

its enactment. Courts issued confused decisions, many of which were at odds with the underlying purpose and structure of the IDEA. For example, the Fourth Circuit considered procedural and substantive challenges under the IDEA in *Stemple v. Board of Education of Prince George's County*.[62] The court read the Act's procedural requirements to bar parents from being reimbursed for their expenses in appropriately educating their child during the pendency of litigation, even if the parents proved in the suit that they had been required to pay for those services because the district had failed to provide a FAPE. This odd conclusion was later rejected unanimously by the Supreme Court in an opinion drafted by then-Justice Rehnquist.[63]

In another early case, *Anderson v. Thompson*,[64] the Seventh Circuit held that "the [statutory] context makes clear that 'appropriate' relief [under the IDEA] was generally intended to be restricted to injunctive relief, the statutory language giving the district judge wide latitude to fashion an individualized educational program for the child."[65] This conclusion is entirely inconsistent with congressional intent to *limit* judicial power even to *review* the substantive propriety of an IEP, let alone craft an IEP. It is hard to contemplate something further from the intent of Congress than permitting federal judges to disagree with the substantive conclusions of the school district contained in the IEP and to roll up the sleeves of their judicial robes to craft an IEP the judges believe to be appropriate.

Professor Hyatt argued the year before *Rowley* was decided that "Congress' decision to eschew more specific guidelines [in the IDEA] has created a fertile source of disagreement, dispute and ultimately, litigation, as parents, educators and schools attempt to address problems upon which there may not be professional agreement."[66] Courts were at sea in assessing the legal consequence of a procedural violation of the IDEA until the Supreme Court's decision in *Rowley*.

B. Rowley

The Supreme Court decided *Rowley* in 1982, seven years after passage of the IDEA.[67] The case concerned Amy Rowley, a deaf girl who was doing well in school despite the district's refusal to provide her with a sign language interpreter, who would have helped her understand far more.[68] Reflecting the unhelpful state of lower court decisions concerning the IDEA, neither the majority nor dissenting opinions cited to *any* court of appeals

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[62] 623 F.2d 893, 896–98 (4th Cir. 1980).
[63] *See* Sch. Comm. of Burlington v. Dep't. of Educ., 471 U.S. 359, 369–70 (1985).
[64] 658 F.2d 1205 (7th Cir. 1981).
[65] *Id.* at 1211.
[66] Hyatt, *supra* note 8, at 8.
[67] Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).
[68] *See id.* at 185–86.

decision—other than briefly referencing the decision on which it had granted certiorari.[69]

Rowley—rejecting the position of the United States as amicus curiae—largely read substantive protections out of the Act,[70] instead enshrining procedural safeguards as the Act's animating force. The five-justice majority relied on what it described as 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."[71] That is, the IDEA reflected Congress's belief that opening the schoolhouse doors and requiring that districts listen to parents' input would ordinarily result in substantively appropriate IEPs, without the need for any significant administrative or judicial review of the IEPs' substantive content.

Accordingly, the Court refused to engage in any serious substantive review of Amy Rowley's IEP. The Court held that her IEP was substantively adequate given that she was performing better than the average student in her class and advancing easily from grade to grade[72] even though she understood "considerably less of what [went] on in class than she could if she were not deaf and thus [was] not learning as much, or performing as well academically, as she would without her handicap."[73] In effect, the Court determined that she was not entitled to educational opportunity commensurate with that given non-disabled children.[74]

In reaching this understanding of the IDEA, the Court noted that the substantive definition of the "appropriate" education mandated by the Act "tends toward the cryptic."[75] The Court stated that the congressional findings focused on wholesale exclusion of disabled students from the classroom.[76] In stark contrast, the Act contained numerous, detailed procedural protections.[77] The Court thus concluded:

> When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would

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[69] *See id.*

[70] *See id.* at 192 ("[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.").

[71] *Id.* at 206.

[72] *See id.* at 209–10.

[73] *Id.* at 185 (quotation marks omitted).

[74] *See id.* at 214 (White, J., dissenting).

[75] *Id.* at 188 (majority opinion).

[76] *See id.* at 191.

[77] *See id.* at 187–89.

result in individualized consideration of and instruction for each child.[78]

The Court also recognized the central role that *Mills* and *PARC* played in the congressional design of the Act, explaining that although both cases held that handicapped children must be given access to an adequate, publicly supported education, each focused on the procedure necessary for creating an individualized education program rather than the program's substance.[79] The Court expressly addressed the central importance that Congress placed on the process of IEP formation, in which parents and districts would work together to arrive at an appropriate individualized educational plan.[80]

The Court relied heavily on the existence of the IDEA's rigorous procedural protections to explain why Congress intended very little in the way of substantive protections.[81] The majority characterized the substantive protections of the Act as consisting solely of a determination of whether the IEP as drafted is "appropriate," which it defined as being "personalized" to the child such that the IEP is "reasonably calculated" to "permit the child to benefit educationally."[82]

The three dissenting justices, along with Justice Blackmun in concurrence,[83] sharply disagreed with the majority about the scope of the IDEA's substantive protections. The dissenters contended that the legislative history of the IDEA should be understood to "directly support[ ] the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children."[84] These four justices largely put to the side the Act's procedural protections.

Setting aside the questionable merits of the majority's view on substantive protections,[85] the current interpretation of the IDEA is based largely on

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[78] *Id.* at 189.

[79] *Id.* at 193–94.

[80] *See id.* at 208–09.

[81] *See id.* at 205–06.

[82] *Id.* at 203–04. The Court provided modest further elaboration:

> Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. Additional requirements added in later amendments, such as the obligation for the child to be placed in the least restrictive environment in which he or she can receive an appropriate education are beyond the scope of this Article. *See, e.g.*, Colker, *supra* note 10, at 807.

[83] Justice Blackmun agreed with the three dissenters that the substantive protections afforded by the Act were broader than those recognized by the majority. *See Rowley*, 458 U.S. at 210–12 (Blackmun, J., concurring in the judgment).

[84] *Id.* at 214 (White, J., dissenting).

[85] *See supra* note 9.

the majority's asserted primacy of procedure. As the *Rowley* Court explained:

> 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 the measurement of the resulting IEP against a substantive standard.[86]

The Court announced a two-part test for whether the district has complied with the IDEA: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"[87] Substantive compliance thus consists only of the minimal requirement that the IEP be reasonably calculated to lead to some educational benefit.[88] Procedural compliance is also necessary and, by contrast, is of great importance.

Left entirely undefined by *Rowley*, however, is what happens if a court concludes that some procedural error has occurred: do the parents automatically win their lawsuit? Is a procedural violation relevant only if it results in a substantive violation of the Act, i.e., if it precludes the IEP from being reasonably calculated to lead to educational benefit? Or is the answer somewhere in between, so that some procedural errors result in a violation of the statute as a whole, even in the absence of a substantive violation, as determined by some unarticulated further assessment of the nature and gravity of the procedural error?[89] In the wake of *Rowley*, the judiciary struggled to resolve these questions.

C. *Judicial Chaos Post-*Rowley

Following *Rowley*, the lower courts were only modestly more consistent in interpreting the practical consequences of failure to comply with the Act's procedural protections. The courts of appeals were now able to quote the controlling test, but repeatedly stumbled in applying that test to the facts

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[86] 458 U.S. at 205–06 (citations omitted).

[87] *Id.* at 206–07 (footnotes omitted).

[88] The courts of appeals differ on whether the standard should be understood as requiring any degree of educational benefit, or whether "meaningful" educational benefit is required. That dispute as to the scope of the substantive guarantee is beyond the scope of this Article.

[89] *See infra* Parts IV.A.2.b, IV.B (explaining that the correct answer is the third option, and defining the elements of the further assessment required).

before them. Courts often referred to the Supreme Court's insistence on the primary importance of the IDEA's procedural protections, but were at a loss when attempting to figure out what those protections actually meant. Courts even had difficulty understanding the difference between procedure and substance under *Rowley*.[90] Even when courts recognized the existence of procedural errors, they reached widely differing conclusions as to the implications of those procedural violations of the Act and what further assessment, if any, was required before finding a denial of FAPE and thus a violation of the Act as a whole.

1. Varying Judicial Approaches

Rowley concluded that the IDEA's procedural protections are of paramount importance and that the judiciary has little competence or statutory warrant to assess the substantive appropriateness of an IEP.[91] But what did the Court's emphasis on process actually mean? In particular, if a school district had committed a procedural error, but the IEP was nonetheless reasonably calculated to lead to benefit—and thus the district had not violated the Act's minimal substantive requirements—did that mean that the parents should always, sometimes, or never prevail in their suit against the district?

Some courts held that procedural violations only resulted in a violation of the IDEA as a whole if the procedural defect resulted in denial of the child's substantive rights under the IDEA. For example, the Eleventh Circuit concluded twenty years after *Rowley* that acknowledged procedural errors in a student's IEP formation could not result in liability when the resulting IEP—however badly compromised its process of creation was—ultimately provided the child with educational benefit.[92] In other words, because the IEP was reasonably calculated to provide some educational benefit, any procedural error in its formation was simply analytically irrelevant. Similarly, in *Evans v. District No. 17*, the Eighth Circuit rejected the parents' challenge to

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[90] For example, in *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999), the Eighth Circuit determined the parents' allegation that "the School District . . . based the IEP on an inadequate diagnostic evaluation" and "inaccurately administered one of the [diagnostic] tests" to be "substantive claims." *Id.* at 658–61. These are procedural rather than substantive claims, focusing on the process of IEP formation and not whether the IEP as written was reasonably calculated to lead to benefit.

[91] Substantive "appropriateness" is measured by the minimal requirement that the IEP be reasonably calculated to lead to educational benefit. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).

[92] Sch. Bd. of Collier Cnty., Fla. v. K.C., 285 F.3d 977, 982–83 (11th Cir. 2002) (rejecting the hearing officer's conclusion that the IEP "failed to provide [the child] with any educational benefit"); *see also* Garcia v. Bd. of Educ., 520 F.3d 1116, 1125–26 (10th Cir. 2008) ("[L]iability under IDEA [for a procedural error is assessed] by determining whether the preponderance of the evidence indicates that the school district's procedural failures resulted in a denial of educational benefit to the student."); T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090, 1093 n.2 (10th Cir. 2001) ("If there has been no substantive deprivation, procedural defects do not amount to a denial of FAPE.").

the district's numerous and significant procedural shortcomings, finding that none had been proved to harm the child's "educational progress."[93]

The courts that adopted this standard failed to recognize its logical incoherence under *Rowley*. Such an approach treats procedural violations—the *Rowley* Court's chief concern—as irrelevant because the Act is violated only if the district violates the IDEA's substantive provisions. *Rowley*'s two steps, procedural and substantive, collapse into one, a single substantive assessment.

In sharp contrast, opinions in the Fourth, Fifth, and Sixth Circuits held that procedural violations were of paramount importance. Thus, commission of a procedural violation resulted in the district's per se liability under the Act, regardless of the district's substantive compliance in rendering an appropriate IEP.[94] Judge Oakes, in his perceptive opinion for the Second Circuit in *Heldman v. Sobol*,[95] explained how the IDEA's core procedural requirements were properly understood to be ends in and of themselves, independent of whether educational benefit was denied as a substantive matter:

> IDEA's procedural guarantees . . . serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of IDEA. Congress addressed the problem of how to guarantee substantive rights to a diverse group by relying on a process-based solution. Thus, Congress envisioned that compliance with the procedures set forth in IDEA would ensure that children with disabling conditions were accorded a free appropriate public education. The central role of the IDEA process rights bears witness that Congress intended to

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[93] 841 F.2d 824, 829–31 (8th Cir. 1988). The court of appeals brushed aside as irrelevant the district's abundant procedural shortcomings, including its failure to conduct a re-evaluation of the child, as required every three years, even after the child "made little or no progress under the IEP of 1984-85 . . . [and] [i]t had become clear to nearly everyone involved . . . that changes would have to be made in her education," and even though the district failed to develop or offer any written IEP for the 1985-86 school year. *Id.* at 831.

[94] *See* Jackson v. Franklin Cnty. Sch. Bd., 806 F.2d 623, 628–29 (5th Cir. 1986) (citing Hall v. Vance City Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985)); *see also* Babb v. Knox Cnty. Sch. Sys., 965 F.2d 104, 107–09 (6th Cir. 1992) (citing *Hall*, 774 F.2d at 635; *Jackson*, 806 F.2d at 629); *accord* Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 826 (9th Cir. 2007) (Ferguson, J., dissenting) (arguing that failure to implement IEP as promised was per se violation, not subject to a materiality assessment); M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 644 (9th Cir. 2005) (Alarcón, J.). Indicative of the disarray in judicial interpretation, subsequent Fourth and Fifth Circuit decisions, and an earlier Sixth Circuit decision, expressly adopted the contrary position. Adam J. *ex rel.* Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 (5th Cir. 2003); Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001) ("[A] procedural violation of the IDEA is not a *per se* denial of a FAPE."); Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997) ("[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.").

[95] 962 F.2d 148 (2d Cir. 1992).

> create procedural rights the violation of which would constitute injury in fact.[96]

This per se violation approach properly recognizes the centrality of the procedural guarantees and the fact that those procedural requirements are not merely guideposts or even constraints, but rather form the core set of rights afforded by the Act.

This per se approach to procedural violations demonstrates greater fidelity to *Rowley* and to the IDEA itself than the approach taken by the Eleventh and Eighth Circuits, which effectively found procedural violations to be irrelevant. The per se approach properly recognizes that some procedural violations should result in liability under the Act regardless of substantive effect. But this approach admits of little in the way of nuance and flexibility[97]: should parents prevail if a district commits a minor procedural violation when it can be determined with confidence that there is no effect on the resulting IEP or on the appropriateness of the education planned or provided? The answer, even to those inclined to read the Act's proceduralist vision as of paramount importance, would seem to be no: compliance with the overarching procedural scheme *is* of overriding importance under the Act and under *Rowley*, but that does not mean that a district's failure to comply perfectly with every technical requirement should be fatal.

Yet a third set of cases was not so Manichean in its approach to the procedural guarantees of the IDEA. Instead, these cases adopted a framework that required some combination of procedural error and substantive consequence to determine that the IDEA had been violated.[98] However, this set of cases improperly focused on only one means by which a procedural error could result in a violation of the Act. These cases pointed to procedural errors resulting in "loss of educational opportunity."[99] Other cases took similar—if somewhat more vague—approaches, requiring an unspecified degree of substantive harm to arise from the procedural error for an overall violation to exist.[100]

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[96] *Id.* at 155 (citation omitted).

[97] To be fair, some of these cases did not expressly hold that every procedural violation was a per se violation of the Act, but instead implicitly suggested that procedural violations were ordinarily sufficient, in and of themselves, to result in a statutory violation, regardless of substantive effect on the IEP. But none of these decisions provided anything approaching a meaningful benchmark for assessing when that was true.

[98] *See* Heather S. v. Wisconsin, 125 F.3d 1045, 1059 (7th Cir. 1997) (citing W.G. v. Bd. of Trs. of Target Range Sch. Dist., 960 F.2d 1479, 1484 (9th Cir. 1992)); *see also* J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 (2d Cir. 2000) (citing Burke Cnty. Bd. of Educ. v. Denton, 895 F.2d 973, 982 (10th Cir. 1998) ("[R]elief is warranted only if we find, based on our independent review of the record, that the forty-five-day rule violation affected J.D.'s right to a free appropriate public education."); *Heather S.*, 125 F.3d at 1059; *W.G.*, 960 F.2d at 1484).

[99] *See* M.M. v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 533 (4th Cir. 2002).

[100] *See Knable*, 238 F.3d at 765. *Knable* held that:

> [A] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the

Similarly, some courts arrived at a nebulous middle ground, holding that procedural violations were important, but would not result in liability if they were merely technical or de minimis. Loss of educational benefit was one way that procedural errors could result in liability under the Act, but not the only way. The Ninth Circuit, for example, held that some procedural errors in IEP formation resulting in missing information could be excused if the missing information was well known to parents and to school officials, and the IEP was otherwise developed in full collaboration with the parents.[101] But other procedural errors would result in a violation of the Act as a whole, regardless of their substantive effect on the child's education:

> When a district fails to meet the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE. The significance of the procedures provided by the IDEA goes beyond any measure of a child's academic progress during the period at issue.[102]

The Ninth Circuit thus recognized that procedural violations in IEP formation may deny a FAPE, thereby violating the Act, even if the resulting IEP is substantively adequate because it is reasonably calculated to—and does—result in educational benefit.[103] These courts, however, neglected to provide a meaningful benchmark for determining when procedural error, standing alone, would violate the Act.

Finally, a few thoughtful court of appeals cases drew on these various strains, citing the standards articulated in a range of cases and distilling them down to three broad categories of procedural error that violate the IDEA: (1) compromising the right to a FAPE; (2) seriously hampering the parent's right to participate in IEP formulation; or (3) depriving educational benefit.[104]

> child or his parents. . . . [P]rocedural violations that deprive an eligible student of an [IEP] or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA.

Id.; *see also* Weiss v. Sch. Bd. of Hillsborough Cnty., 141 F.3d 990, 996 (11th Cir. 1998) ("For the [parents] to prove that [their child] was denied a FAPE, they must show harm to [their child] as a result of the alleged procedural violations. Violation of any of the procedures of the IDEA is not a *per se* violation of the Act.").

[101] *W.G.*, 960 F.2d at 1485 (citing Doe v. Defendant I, 898 F.2d 1186, 1190–91 (6th Cir. 1990)).

[102] *Id.*

[103] *Id.*

[104] Courts must strictly scrutinize IEPs to ensure their procedural integrity . . . [but b]efore an IEP is set aside, there must be some rational basis to believe that 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.

Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990).

> Not every procedural violation . . . is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, "will not render an IEP invalid." On the other hand, "procedural inadequacies that result in the loss of

These cases, while significantly clearer than the others, did nothing to clarify the content of or relationship among the three criteria they announced. Were these standards merely different ways of articulating the same underlying benchmark? Were some or all of the three principles partially overlapping? Or did some or all of the principles constitute discrete categories of procedural violation that were properly assessed under different standards? Were any of these categories per se violations, or should courts always assess whether the procedural error resulted, in some sense, in substantive harm? The courts of appeals almost uniformly did not ask these questions, let alone answer them.[105]

2. *Case Studies of Confusion: The Fourth and Ninth Circuits*

Perhaps the most overt demonstration of the multiplicity of judicial approaches for addressing the consequences of procedural violations comes from the Ninth Circuit's three-way split decision in *M.L. v. Federal Way School District.*[106] As the majority opinion explained: "To date, the Supreme Court has not expressly determined whether a violation of the procedural requirements of the IDEA is subject to harmless error review."[107] The three-judge panel issued majority, concurring, and dissenting opinions that each reached differing views.

The procedural violation at issue in *M.L.* was the district's failure to ensure, as required by the IDEA, that at "least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom."[108] Judge Alarcón[109] reasoned that this procedural violation was a "structural error" resulting in a per se violation of the Act because "we have no way of determining whether the IEP team would have developed a different program after considering the views of a regular education teacher."[110] His argument, in essence, was that the IDEA guaranteed to parents that school districts would make decisions about their child's educational pro-

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educational opportunity," or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that "caused a deprivation of educational benefits," clearly result in the denial of a FAPE.

Amanda J. *ex rel.* Annette J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 892 (9th Cir. 2001) (citations omitted).

[105] *Doe v. Alabama State Department of Education*, 915 F.2d 651 (11th Cir. 1990), is among the most perceptive opinions, noting rampant confusion about the standard applicable to procedural violations after canvassing a broad range of prior judicial approaches and attempting to distill underlying principles. *Id.* at 661–63 & nn.9, 11, 12.

[106] 394 F.3d 634 (9th Cir. 2005).

[107] *Id.* at 644; *see also id.* at 661 n.3 (Clifton, J., dissenting) ("*Rowley* does not say what happens when the answer to the first question [of *Rowley*'s two-part test, has the district complied with the IDEA's procedural obligations,] is 'no.'").

[108] *Id.* at 643 (Alarcón, J.).

[109] Judge Alarcón wrote for the court, though his position was functionally a concurrence, because Judge Gould's position carried a 2-1 majority on both disputed issues.

[110] 394 F.3d at 646 (Alarcón, J.) ("The failure to include at least one regular education teacher on the IEP team was a structural defect in the constitution of the IEP team.").

gram in a particular manner, and that if the district failed to do so, it was not the court's role to decide whether the outcome would have been the same had the composition of decisionmakers actually been as the Act required.

Judge Gould, concurring in the result, disagreed with this legal standard, concluding that "our court's procedural analysis under IDEA does not start and end with automatic reversal based on a theory of structural error. Instead, we must assess the school district's error for harmlessness . . . ."[111] Judge Gould nonetheless found in favor of the parents, determining that the failure to include a regular education teacher on the IEP team was not harmless because of the "strong likelihood" that, had a regular education teacher been on the IEP team as required, a different educational placement "would have been better considered."[112] This approach recognizes the central importance of the district's following proper procedure in creating an IEP, with the court reviewing the consequences of a procedural error to determine if the error made no difference in the resulting IEP.

In dissent, Judge Clifton agreed with Judge Gould that harmlessness analysis was proper, but stated his belief that the error in the case before the court was, in fact, harmless.[113] Moreover, Judge Clifton seemed to believe that the error was necessarily harmless because the administrative law judge and district court had determined that the IEP was "appropriate" and provided "the best program" for the student: "IDEA does not and should not impose liability on a school when the IEP provides for the best program for the student, though his parents want a different placement. Even if there was procedural error in preparing this IEP, the student here was not harmed."[114]

The three opinions in *M.L.* deserve praise for acknowledging the confused state of the law and attempting to provide a specific test for assessing the consequence of procedural error. But the fractured decision as a whole left the state of the law in at least as much disarray as it was before the case.[115]

The Fourth Circuit's contortions and reversals over time also provide a revealing case study. In the 1985 case *Hall v. Vance County Board of Education*,[116] the court addressed what it characterized as two procedural errors—failing to provide parents with proper notification of their rights and failing to include a sufficiently specific statement of educational services in the IEP, both of which are required by the IDEA. The court concluded that, "[u]nder

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[111] *Id.* at 651 (Gould, J., concurring in part and concurring in the judgment).

[112] *Id.* at 657.

[113] *See id.* at 658–61 & n.3 (Clifton, J., dissenting).

[114] *Id.* at 664.

[115] *See, e.g.*, Christine Farnsworth, Note, *Regular Education Teachers Formulating Special Education Plans:* M.L. v. Fed. Way School District *and the IDEA*, 2006 BYU EDUC. & L.J. 639, 658 ("[E]ducators and administrators generally remain in the dark . . . . Will this type of procedural defect always result in a decision for the student, or is there room for a showing of no substantive harm? How do the judicial tests apply to other procedural errors, and which test will be applied?").

[116] 774 F.2d 629 (4th Cir. 1985).

Rowley, 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."[117]

In contrast, twelve years later, in *Gadsby v. Grasmick*,[118] the circuit employed loose language in dicta, strongly suggesting that a procedural error only results in a violation of the Act if the procedural error causes a substantive denial of FAPE: "to the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education."[119] The case can be construed as having a narrower holding, given that the particular violation advanced by the parents was a brief delay in the district's sending them a letter, which they received "almost a month" before the hearing at which the letter was arguably relevant.[120]

Finally, in *DiBuo v. Board of Education of Worcester County*,[121] the Fourth Circuit came full circle, expressly relying on the loosely phrased dicta in *Gadsby* as "clarify[ing]" the holding in *Hall*, and "[t]hus [concluding that,] under our circuit precedent, a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement relief."[122] The actual procedural violations at issue in *DiBuo*, in stark contrast to the alleged error in *Gadsby*, were quite serious: the IEP team's "staunch refusal" to consider educational evaluations provided by the parents or the input of the parents about the need for extended school year services.[123]

The court held that the district's procedural error in refusing to consider the parents' input was irrelevant because the administrative law judge ("ALJ") independently reviewed all the relevant information, including the evaluations submitted by the parents and ignored by the district, and determined as a substantive matter that such services were not proper. In other words, the court of appeals held, similar to Judge Clifton's position in *M.L.*, that the school district's *procedural* failure to consider relevant information submitted by the parents or to include the parents in the discussion was analytically irrelevant because the ALJ made a post hoc, independent *substantive* assessment that the district's decision was proper. This judicial and administrative arrogation of the power to make substantive educational decisions, rather than leaving those decisions to a properly constituted and func-

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[117] *Id.* at 635.
[118] 109 F.3d 940 (4th Cir. 1997).
[119] *Id.* at 956.
[120] *Id.*
[121] 309 F.3d 184 (4th Cir. 2002).
[122] *Id.* at 190–91.
[123] *Id.* at 187.

tioning IEP team, could hardly be more inconsistent with the IDEA's proceduralist focus.

D. *Academic Criticism of the IDEA's "Legalization" and its Focus on Procedural Protections*

While courts were tying themselves in knots attempting to untangle the IDEA's proceduralism, academic commentators also took up the challenge. In the period leading up to the IDEA's passage in 1975, numerous scholarly articles discussed the due process revolution, then in ascendancy, including the increasing judicial focus on procedural protections as a locus for civil rights protections generally and for education law specifically.[124] Little attention was paid to the IDEA's proceduralist focus between its passage in 1975 and the Supreme Court's decision in *Rowley* in 1982, save for a thoughtful note in the *Harvard Law Review*, which mentioned the procedural protections briefly and focused on parents' conventional due process right to challenge the district's decision after it was made rather than their procedural right to have the initial IEP decision made in the manner required by the Act.[125]

Following *Rowley*'s overt endorsement of the IDEA's procedural focus—and its express disavowal of meaningful substantive protections—scholarly attention returned. Over the next decade, numerous commentators addressed the IDEA's proceduralization (often termed "legalization") of the educational rights of the disabled in the form of heightened procedural protections. These commentators contended that the IDEA's heightened focus on procedure was misguided, or at best ineffective in practice.[126] Academic criticism focused predominantly on what commentators suggested was the

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[124] *See infra* Part IV.A.1.

[125] Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, *supra* note 54, at 1103; *cf.* Weber, *supra* note 7 (generally discussing legalization and due process in the school context).

[126] *See, e.g.*, Clune & Van Pelt, *supra* note 8, at 55.

> Overall, the failures of the Act seem to have occurred in areas relating to the individualistic ideal of liberal legalism, while the successes have been examples of collective and organizational problem solving. Indeed, the most forceful question which emerges from the implementation studies is whether those legalisms based on the ideal of individual parent participation—the IEP and due process rights—simply should be abandoned. They seem to produce little parental participation at considerable cost.

Id.; *see also* Engel, *supra* note 8, at 169 ("[T]he concept of 'rights' itself has been problematic, particularly when asserted by parents against educators on behalf of children with disabilities. The goals of the [IDEA] may have been thwarted, at least in part, because parents are unwilling to jeopardize relationships by asserting their children's rights.").

> Effective parental participation in the IEP conference . . . proved to be the exception. . . . Furthermore, since they usually did not know the extent of their children's substantive educational rights—and we have seen that the [IDEA] provides little guidance in this respect—they rarely lodged formal appeals alleging a rights violation.

limited efficacy of collaborative parental involvement in IEP development and on the adversarial atmosphere that mandatory collaboration allegedly fostered.[127] Educational professionals were described as resistant to parental involvement, and the underlying power imbalance between parents and school districts was thought to be a formidable obstacle to meaningful parental involvement.[128]

Professor Martin Kotler perceptively analyzed the practical hurdles facing parents asserting rights under the IDEA, lamenting the limited efficacy of the procedural protections for less educated and affluent parents:

> [S]cholars and parents are virtually unanimous in criticizing the manner in which the Act functions. . . . The formalistic procedures to protect parental rights have not served to level the playing fields between parents and educators. Procedural protections all too often have been reduced to empty ritual for all but the most educated and wealthy.[129]

Some of these commentators, while agreeing with much of the consensus critique, recognized some instrumental benefit to involving parents in the process because they believed legalization, though ineffective at accomplishing what it purported to do, was a necessary, radical shock to the system.[130] Legalization, they argued, gave advocates an excuse to get into court to make noisy demands that, while vacuous, could produce change.[131] Some commentators supported this legalist approach because of the possibility that parental involvement might actually be meaningful once some mechanism, in addition to the mere existence of the procedural protections in the Act, were in place such that families would actually be able and willing to exer-

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Id. at 179–80; *see also* Steven S. Goldberg, *The Failure of Legalization in Education: Alternative Dispute Resolution and the Education for All Handicapped Children Act of 1975*, 18 J.L. & EDUC. 441, 441 (1985) ("[S]ubstantial resistance to the legal process occurred when it was introduced into the schools.").

[127] *See, e.g.*, Engel, *supra* note 8, at 179–80.

[128] *See, e.g.*, Goldberg, *supra* note 126, at 441; Handler, *supra* note 8, at 1012 ("The issue of power has not been addressed, and . . . dependent people are not able to participate."); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403, 403–04 (1994) ("Based on more than fifteen years of experience under the due process procedures of the IDEA, observers are increasingly inveighing against the cost-benefits of the present system.").

[129] Kotler, *supra* note 31, at 341; *see also id.* at nn.22–23 (noting critics of the IDEA's "legalism"). This perspective is also echoed in a recent Note in the *Yale Law Journal*. Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1828 (2008); *see also* Stephen Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN'S L.J. 1, 13–14 (2004) ("Complaints about the so-called technical and burdensome requirements of IDEA usually include an attack on students' extensive due process rights or over-reliance on the procedural nature of the school compliance process.").

[130] Neal & Kirp, *supra* note 9, at 75.

[131] *See* Clune & Van Pelt, *supra* note 8, at 30–31, 45–46, 55 (supporting legalization because the IDEA's procedural rights could be used strategically by advocates); *id.* at 45–46 (noting that the "ultimate advantage of legalization is the production of rapid change through substantively empty demand entitlements").

cise their rights.[132] Thus, scholarly consensus—focusing almost entirely on school districts' obligation to collaborate with parents—was quite skeptical of the efficacy of the district's procedural obligations under the IDEA.

E. Congress Enacts 20 U.S.C. § 1415(f)(3)(E) to Clarify the Consequences of Procedural Violations

In 1997, Congress amended the IDEA[133] to place greater emphasis on the improved performance of disabled children, believing that merely opening the schoolhouse doors had not accomplished enough.[134] Congress wanted to increase special education students' achievement in the classroom, and attempted to do so through a continued emphasis on process by, for example, mandating that the IEP contain measurable annual goals for the child and that the district regularly inform the parents of their child's progress toward meeting those IEP goals.[135]

By 2001, however, the perspective in Washington had shifted. A presidential commission chartered by President Bush issued a report that criticized the IDEA for "plac[ing] process above results, and bureaucratic compliance above student achievement, excellence and outcomes."[136] The Commission's Report did not disavow any particular procedural protections, but voiced a strong preference for emphasizing results rather than process.[137] The Report set the stage for the 2004 IDEA amendments.[138]

In the 2004 amendments, Congress enacted 20 U.S.C. § 1415(f)(3)(E), which—ostensibly—resolves the precise question of when procedural errors

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[132] Handler, *supra* note 8, at 1010–12, 1081–82 (describing in approving terms the unusual approach to special education employed in Madison, Wisconsin, under which parental input was actively sought by the school district; mutual respect, trust, and dialogue was encouraged; and parents were provided with "parents advocates" to assist them in their efforts to participate meaningfully).

[133] Individuals with Disabilities Education Act Amendments, Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended in scattered sections of 20 U.S.C. §§ 1400–1491 (2006)). *See generally* Andrea Blau, *The IDEIA and the Right to an "Appropriate" Education*, 2007 BYU EDUC. & L.J. 1.

[134] *See* Mitchell L. Yell, Antonis Katsiyannis & Michael Hazelkorn, *Reflections on the 25th Anniversary of the U.S. Supreme Court's Decision in* Board of Education v. Rowley, FOCUS ON EXCEPTIONAL CHILDREN, MAY 2007, at 1, 7–8.

[135] *Id.*

[136] PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 7 (2002), http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres_Rep.pdf (last updated Jan. 23, 2003).

[137] The Report's first recommendation was that "[w]hile the law must retain the legal and procedural safeguards necessary to guarantee a 'free appropriate public education' for children with disabilities, IDEA will only fulfill its intended purpose if it raises its expectations for students and becomes results-oriented—not driven by process, litigation, regulation and confrontation." *Id.* at 8.

[138] *See* Yell et al., *supra* note 134, at 8–9; *cf.* 20 U.S.C. § 1400(c)(1) (2006) (congressional finding in the 2004 amendments describing "[i]mproving educational results" as "an essential element" of educational policy).

result in a violation of the statute as a whole. Section 1415(f)(3)(E) provides:

> (i) In general
> Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
> (ii) Procedural issues
> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—
> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.[139]

This provision has received little attention from either courts or commentators. This is perhaps not so surprising when one recognizes that § 1415(f)(3)(E)—which has no illuminating legislative history—merely parallels the three opaque principles invoked by various circuit courts to analyze potential procedural violations.[140] The provision fails to provide any explanation whatsoever as to how those three categories of procedural inadequacy should be interpreted.

The few commentators who have addressed § 1415(f)(3)(E) seem to have concluded that Congress intended to make procedural errors effectively superfluous by requiring a substantive violation at step two of *Rowley* in order for the Act to be violated. As one article stated, "Congress clearly intended to ensure that hearing officers examine whether the student was afforded meaningful educational benefits rather than just determining whether the school district adhered to the procedures of the law."[141] The other commentator to have mentioned the provision states opaquely that a "new provision of the reauthorized IDEIA [(§ 1415(f)(3)(E)(ii))] instructs impartial hearing officers to base their determinations on substantive grounds rather than procedural grounds, unless there is a direct link between the procedural violation and the denial of FAPE."[142]

The suggestion in both instances is that a procedural violation cannot result in a violation of the Act unless it directly results in denial of a FAPE, and "denial of a FAPE" is the language the Act uses to describe a substan-

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[139] 20 U.S.C. § 1415(f)(3)(E) (2006); *see also* 34 C.F.R. § 300.513(a)(2) (2010) (mirroring the statutory language).

[140] *See supra* text accompanying notes 15–17.

[141] Yell et al., *supra* note 134, at 9.

[142] Blau, *supra* note 133, at 13 n.98.

tive violation in § 1415(f)(3)(E)(i). Thus, the argument appears to be that a procedural error can only result in a violation of the Act if the procedural violation is in one of the three listed categories and also causes a substantive violation of the Act. As explained in Part IV.A.2, this reading is entirely misguided.

F. Judicial Chaos Post-Section 1415(f)(3)(E)

Following enactment of § 1415(f)(3)(E), the proper interpretation of procedural violations under the IDEA would seem to have been resolved, given that Congress amended the IDEA to specifically address the issue. The difficulty is that neither the text nor the legislative history of § 1415(f)(3)(E) provides any clue as to whether the three elements of the provision are different ways to express the same criterion, whether each basis for violation is analytically distinct, or whether the elements are partially overlapping. As one might expect, judicial chaos has continued unabated.

First, a surprising number of cases simply ignore § 1415(f)(3)(E) or cite it as boilerplate and move on to analyze the case without reference to the provision. In the Ninth Circuit's 2005 decision in *M.L.*, none of the three separate opinions grappling with the implications of procedural error so much as cited to § 1415(f)(3)(E).[143] Similarly, in *A.K. v. Alexandria City School Board*, neither the majority nor the dissent in the Fourth Circuit cited to or discussed the relevance of § 1415(f)(3)(E) in determining the nature or consequences of the asserted procedural errors.[144] In a recent opinion, the Third Circuit, while citing the implementing regulation, did not cite to § 1415(f)(3)(E), and quoted and relied on cases predating § 1415(f)(3)(E), holding, inconsistent with the statute, that "a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents."[145]

Second, even if courts were to recognize the existence of § 1415(f)(3)(E) and attempt to apply the section, much confusion remains about the difference between a procedural and a substantive violation. The majority and dissent in *A.K.* disagreed not only about whether the IDEA was violated, but also about whether the school district's failure to specify a proposed educational placement in the IEP was a substantive error, a procedural error, or both.[146] The proper analysis was offered by the majority, which concluded that the failure to name the student's proposed placement in the IEP could be considered both a substantive error (because it meant the IEP

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[143] M.L. v. Fed. Way Sch. Dist., 394 F.3d 634 (9th Cir. 2005).

[144] 484 F.3d 672 (4th Cir. 2007).

[145] C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 66 (3d Cir. 2010) (quoting Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001)).

[146] *Compare A.K.*, 484 F.3d at 679 (majority opinion), *with id.* at 682–83 (Gregory, J., dissenting).

was not reasonably calculated to lead to benefit) and a procedural error (because the IEP did not comply with the procedural requirement that the IEP team consider and specify the nature of and reasons for the educational placement), thus holding that the Act had been violated.[147]

The Supreme Court has not clarified matters, despite an opportunity to do so in *Winkelman v. Parma School District*.[148] Justice Scalia, in a dissent joined by Justice Thomas, would have followed the lead of several courts of appeals by parsing the IDEA so as to grant disabled children both substantive and procedural rights, but to provide parents with solely procedural rights.[149] Importantly, Justice Scalia's approach would appear to bar as unconstitutional any recovery for procedural violations in the absence of proof that the procedural error "adversely affected the [substantive] outcome of the proceedings."[150] Scalia's approach—rejected by seven members of the Court—might have resulted in some clarity (though at the cost of sharply contradicting the text and legislative history of the IDEA) by suggesting that parents have no concrete interest in their own participation in the IEP process independent of the appropriateness of the resulting IEP.

The *Winkelman* majority, valuing fidelity over clarity, noted the tangled and confusing intersection of procedural and substantive rights under the IEP: "The statute's procedural and reimbursement-related rights are intertwined with the substantive adequacy of the education provided to a child, and it is difficult to disentangle the provisions in order to conclude that some rights adhere to both parent and child while others do not."[151] The Court, in holding that the IDEA grants parents independent, enforceable rights, both procedural and substantive, concluded that disentangling and disaggregating those rights "would be inconsistent with the collaborative framework and expansive system of review established by the Act."[152] *Winkelman* thus confirms that procedural protections in the IEP process are vital to the IDEA, but does virtually nothing to clarify the contours of those procedural rights.

IV. Toward a Theory of Structural Due Process Under the IDEA

It is tempting not to take seriously *Rowley*'s paean to the efficacy of procedural rights under the Act. Though neither courts nor commentators have advanced this point, *Rowley*'s two steps of assessing procedure and

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[147] *Id.* at 679 (majority opinion).

[148] 550 U.S. 516 (2007).

[149] *Id.* at 535 (Scalia, J., concurring in the judgment in part and dissenting in part).

[150] *Id.* at 537 n.3. According to Justice Scalia, "[u]nder Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains, here the parents' interest in having their child receive an appropriate education." *Id.* (citation omitted).

[151] *Id.* at 531–32 (majority opinion) (citations omitted).

[152] *Id.* at 531.

substance[153] can fairly be understood as a lot of dancing around without getting much of anywhere. One could plausibly describe *Rowley*'s emphasis on procedural protections as a Potemkin Village of sorts, erecting a façade of procedural rights to obscure the almost complete absence of substantive protections.

Rowley turns on the presence of rigorous procedural protections to justify the absence of exacting substantive protections, but many subsequent cases have written off procedural violations as technical, minor, or irrelevant, unless those procedural errors result in the violation of substantive rights.[154] A skeptic might point out that some lower courts' interpretation of the process afforded by the IDEA over the last twenty years has come full circle such that procedural protections have now also largely been eviscerated.[155]

At a superficial level, this seems entirely reasonable: why should procedural errors matter unless they make a substantive difference? But if the procedural error must cause a substantive violation in order to result in a statutory violation, then the existence of the procedural violation is entirely beside the point; the claim stands or falls on the existence of the substantive violation. Moreover, such an approach is entirely nonsensical when one considers *Rowley*'s central argument: substantive rights are minimal because procedural protections are robust.

Yet, the opposite approach—focusing on procedural errors, standing alone, and disregarding whether procedural errors have made any substantive difference at all—also seems problematic. The IDEA contains many procedural provisions, both grand (such as the requirement of parental collaboration)[156] and pedestrian (such as punctilious compliance with various timing requirements).[157] It seems unfair to school districts, and contrary to the intent of Congress, for all procedural errors to result in statutory violations, regardless of consequence.

The solution to this conundrum is to understand the IDEA in its historical context, and by doing so, to disentangle the separate strands of the procedural protections it affords. The IDEA's procedural requirements are not a single, undifferentiated mass; rather, there are two distinct stages and three distinct core procedural principles embedded in the IDEA, each with a differing meaning and each with a differing requisite nexus between procedure and substance.

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[153] Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).

[154] *See, e.g.*, Urban *ex rel.* Urban v. Jefferson Cnty. Sch. Dist. R-1, 89 F.3d 720 (10th Cir. 1996).

[155] *See, e.g., id.*

[156] 20 U.S.C. §§ 1414(d)(1)(B)(i), 1415(b)(1), 1415(d)(2)(A) (2006).

[157] *E.g.*, 20 U.S.C. § 1414(a)(1)(C)(i)(I) (2006).

A. The Structural Due Process Vision of the IDEA and Its Three Underlying Principles

1. Theoretical Underpinnings: The IDEA's Enactment in the Midst of the Due Process Revolution

Vital to comprehending the IDEA's procedural protections is understanding the intellectual climate in which the IDEA came into being. The IDEA was enacted—and, to a significant extent, *Rowley* was decided—in the midst of what has come to be known as the due process revolution.[158] In the mid-1960s, Charles Reich published an extremely influential article entitled *The New Property* in which he argued that government benefits, even if not constitutionally required, had become a form of property deserving of constitutional protection, including, notably, procedural protection.[159] Within the next few years, the Supreme Court adopted Reich's view, recognizing that government benefits—even in the absence of a substantive constitutional right to those benefits—provided a legitimate source of property rights warranting procedural protection.[160]

Numerous prominent scholarly commentators foregrounded the importance of procedural protections from the early 1970s through the early 1980s, the years surrounding enactment of the IDEA and its interpretation in *Rowley*. Professor Ernest Gellhorn, writing in the *Yale Law Journal* in 1972, argued that the public should be allowed to participate in administrative proceedings in order to enhance the wisdom of the decisions by "[providing] agencies with another dimension useful in assuring responsive and responsible decisions," operate therapeutically to make the public feel that its voice was heard, make those who had participated more accepting of the agency's decision, and "satisfy judicial demands that agencies observe the highest procedural standards."[161] As Professor Kirp wrote just after the IDEA's enactment, "[t]he history of public law during the past decade has been, in no small part, a history of the expansion of procedural protection."[162] Proceduralism, even before the IDEA, was understood to embrace the idea

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[158] *See generally* Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9 (1997) (explaining the history of the due process revolution).

[159] *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); *see also* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

[160] *See* Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1974–81 (1996) (citing Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents v. Roth, 408 U.S. 564 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970)) (tracing, disapprovingly, the "due process revolution" in which "[t]he Court adopted Reich's reasoning in five landmark opinions issued between 1970 and 1972").

[161] Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972).

[162] Kirp, *supra* note 8, at 843; *see also* Neal & Kirp, *supra* note 9, at 65.

that law could require parties with differing interests to engage in dialogue and facilitate a solution that otherwise might never have been reached.[163]

Kirp explained *Goss v. Lopez*,[164] an important procedural due process decision in the education (but not special education) law context, as implicating this dialogic aim: "By the very device of imposing minimal procedural safeguards, premised on a formal (but thin) statutory entitlement, [*Goss*] aspires to increase reliance on informal, nonadversarial procedures, to encourage a kind of collegiality—actual exchange and even negotiation, leading to mutually acceptable outcomes or at least shared understandings."[165] "The outcome of these 'orderly, thoughtful' conversations may well be decisions different in their particulars from what might otherwise have been anticipated."[166] Professor Handler noted the IDEA's ties to the era of its passage, pointing out that "[t]he key institutional innovation [of the IDEA], reflecting the spirit of the times, was the required participation of the parents."[167]

Academics were not the only ones to take note of the increased focus on procedural rights. These notions of proceduralism were prominent in the minds of the Congress that enacted the IDEA and the Court that interpreted it.[168] This theoretical environment had a direct and profound effect on the drafting of the IDEA. As explained in Part II.B, *PARC* and *Mills* were foundational special education cases in the early 1970s that served as important models for the IDEA. Both *PARC* and *Mills* were heavily influenced by the

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> Legalization . . . , at least in its fully developed form under the [IDEA], is fairly new to policymaking in the United States . . . . The characteristic features of legalization include a focus on the individual as the bearer of rights, the use of legal concepts and modes of reasoning, and the employment of legal techniques such as written agreements and court-like procedures to enforce and protect rights. The [IDEA] is filled with legal concepts and procedures: the notion of right or entitlement, the quasi-contractual individualized education program (IEP) meeting in which the right is elaborated, the provision of due process guarantees and appeal procedures, and implicitly, the development of principles through the mechanism of precedent.

Id.

[163] Kirp, *supra* note 8, at 843.

[164] 419 U.S. 565 (1975) (developing the contours of the right to notice and meaningful opportunity to be heard).

[165] Kirp, *supra* note 8, at 864 (analyzing newfound procedural due process protections afforded to students in the context of the pre-suspension disciplinary hearings at issue in *Goss*).

[166] *Id.* at 865; *see also* Kirp, Buss & Kuriloff, *supra* note 8, at 98–150 (discussing proceduralism as a potential avenue for reforming special education law, in light of *PARC*, *Mills*, and an assessment of results in California following enactment of special education legislation in 1971 containing stringent procedural requirements); *id.* at 140 ("A completely different means of taking the classification decision out of the unilateral control of the school administration would be to require that the administration negotiate with parents.").

[167] Handler, *supra* note 8, at 1009.

[168] *See id.* at 1019–22 (discussing and critiquing the role that Reich's concept of "the New Property" played in the procedural due process protections put into place by the IDEA); Neal & Kirp, *supra* note 9, at 68 ("The civil rights movement and the War on Poverty provided the key ideas and context for the movement on behalf of handicapped people" and for the IDEA in particular.).

due process revolution, expressly finding procedural due process rights to be a central element of the constitutional claims presented, and including robust procedural rights—presaging those in the IDEA—in the remedies they embraced.[169]

Rowley expressly looked to *PARC* and *Mills* as highly influential with the enacting Congress, and thus overtly construed the IDEA as of a piece with those cases: "Both the House and the Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments[—*PARC* and *Mills*]. . . . [L]ike the language of the Act, the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children."[170] The due process revolution, as reflected in *PARC* and *Mills*, was thus imported into the IDEA itself.

2. *The Structural Due Process Vision of the IDEA*

a. *The Twin Stages of Process Due Under the IDEA*

What, then, is the procedural vision of the IDEA? Can it be understood in a meaningful way that is theoretically coherent and that provides a plausible way for courts to assess whether a district's procedural error should be held to deny FAPE and thus violate the IDEA?

The first important step in understanding *Rowley* is to unpack the twin stages of procedural due process protections present in the IDEA. Courts and commentators have virtually always considered the IDEA's set of due process protections to be of a piece without deconstructing the two fundamentally different stages at which process is due. The two stages consist of: (1) the standard due process rights granted at the "due process hearing" stage, conventionally thought of as the primary locus of procedural rights granted by the IDEA,[171] in which the family of a disabled child can take advantage of standard due process rights—for instance, by filing suit to challenge asserted procedural and substantive shortcomings related to the IEP that the district has created; and (2) the IEP formation process, in which the structural due process rights granted by the IDEA operate directly to shape creation of the IEP.

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[169] *See supra* notes 39–48 and accompanying text; *see also* Mills v. Bd. of Educ., 348 F. Supp. 866, 875–76 (D.D.C. 1972) (citing Goldberg v. Kelly, 397 U.S. 254 (1970)) (concluding that defendants had denied due process); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Pa. 1972) ("[W]e are convinced that the plaintiffs have established a colorable claim under the Due Process Clause."), *and* 334 F. Supp. 1257 (E.D. Pa. 1971).

[170] Bd. of Educ. v. Rowley, 458 U.S. 176, 192–94 (1982).

[171] *See, e.g.*, *Q and A: Questions and Answers On Procedural Safeguards and Due Process Procedures For Parents and Children with Disabilities*, U.S. DEP'T OF EDUC. (revised June 2009), http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C6%2C (containing a section on "procedural safeguards" and "due process procedures" that exclusively addresses administrative and judicial review without mentioning the procedural rights granted during the IEP formation process).

In the conventional procedural due process context, a statutory scheme sets forth non-discretionary criteria establishing an individual's eligibility for some governmental benefit (or liability for some governmental penalty) implicating a liberty or property interest.[172] The individual may file suit to challenge the government's asserted failure to provide the proper measure of pre-deprivation notice and opportunity to be heard required by due process; the scope of this right is determined by the judiciary's equitable balancing of the competing governmental and private interests involved in the provision of pre-decision procedural safeguards.[173] This procedural right to have some voice in the government decision is general, limited, and judicially constructed from background constitutional principles.

The IDEA, in contrast, involves a statutory scheme that, rather than setting forth defined substantive criteria, is almost entirely discretionary as to the government's substantive conclusions about educational services and placement. Instead, the Act overtly provides robust structural due process rights, expressly set forth in great detail by statute, that shape and tightly constrain the nature of the governmental discretionary decisionmaking stage itself.

Most commentators and courts, when speaking about the IDEA's procedural protections, emphasize the parents' right to file "for due process," i.e., file suit and proceed to the "due process hearing" granted by the IDEA.[174] The due process inquiry in these hearings provides a retrospective opportunity for parents to challenge asserted substantive inadequacies in the IEP itself and procedural errors in IEP formation. But the right to file suit and participate in a hearing is of little value unless there is a meaningful right one can assert in that suit. In the IDEA context, the disabled child's family possesses only a minimal right to challenge the substance of the educational decisions reflected in the IEP that the district has created. In contrast, the family has a valuable right to challenge the district's failure to comply with the structural due process obligations imposed on the district concerning how it goes about the IEP formation process.

Even more important than the parents' due process right to file suit to retrospectively challenge the district's failure to comply with its procedural obligations are the underlying structural due process obligations themselves; these requirements fundamentally shape the IEP that is drafted, prior to and regardless of any subsequent lawsuit. The purpose of these structural due process rights is two-fold: first, as an instrumental matter, the structural requirements are intended to enhance the fairness and wisdom of the resulting substantive decisions. Second, insofar as the structural requirements mandate the meaningful participation of the family in the decisionmaking process concerning their child, this is a normative good, in and of itself.

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[172] *See, e.g.*, *Goldberg*, 397 U.S. at 262.

[173] *Id.*

[174] *See supra* note 125 and accompanying text.

These core values of the IDEA's procedural protections are presaged in academic writing about the due process revolution. Professor Owen Fiss briefly but cogently references these notions.[175] Fiss discusses procedural fairness as an end in itself, addressing the twin planes of process involved in the due process revolution cases generally: (1) the procedural protections involved at the stage of a lawsuit reviewing the propriety of a government actor's decision; and (2) the intrinsic, *substantive* value of procedural fairness provided in the course of the initial decision.[176] Some forms of procedural fairness, Fiss explains, inhere in reasoning that is dedicated to the "elaboration of ends," whereas "some [are dedicated] to the means for achieving those ends."[177] "The latter," he explained, "tend to dominate the remedial phase of a law suit . . . . On the other hand, [at earlier stages,] the explication of the ideal of procedural fairness . . . is not technocratic or instrumental, but deeply substantive or normative. It focuses on ends, not means, and on the relationship of these ends or values to social practices . . . ."[178] Thus, the participatory right of genuine collaboration between the district and the family—not a mere right to an opportunity to be heard, but an actual right to collaboration—is a vital normative goal.

This and other deeply normative aspects of proceduralism were explored in depth by Professor Laurence Tribe in an illuminating article written immediately before the IDEA's enactment.[179] Tribe coined the phrase "structural due process" to refer to proceduralist values applied to the underlying decisionmaking process.[180] Though Tribe's article does not mention special education law, applying its insights to the IDEA context deeply informs this Article's project.

In setting up his argument, Tribe first describes the two conventional arenas for due process rights: (1) substantive due process, which protects

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[175] Fiss, *supra* note 25, at 790–91.

[176] *Id.*; *see also* Clune & Van Pelt, *supra* note 8, at 40–41 ("Two kinds of procedures established by the Act should be distinguished for analytical purposes: the organizational routines, such as IEP's, required of all schools for all children; and litigation entitlements, which establish the right to complain on the part of enforcement agencies and parents."); Peter J. Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, LAW & CONTEMP. PROBS., Winter 1985, 89, 89–90 ("[T]he EAHCA established one set of procedures for giving substance to the right to education and another set to protect that right.").

> If school districts' decisions in matters of services and placement could be challenged only ex post, by means of costly hearings or judicial proceedings, families with scarce financial resources would simply have no chance of participation. By contrast, parental involvement in IEP drafting is in principle status-blind. There is sufficient anecdotal evidence of families devoid of financial means, but armed with a profound understanding of their children's needs, with a serious commitment to their education, and with much determination.

Caruso, *supra* note 10, at 180.

[177] Fiss, *supra* note 25, at 790.

[178] *Id.* at 791.

[179] Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

[180] *Id.*

fundamental rights from undue incursion; and (2) procedural due process, narrowly conceived of as policing the fairness of the means the government uses to determine distribution or denial of benefits.[181]

Tribe then explains a third strand of due process, which looks to the contours of the government's original decisionmaking process as the locus for vital *structural* procedural protections:

> The central purpose of this Article is to suggest a third category of [due process] limitation—a category that focuses neither on the substantive content of policies already chosen nor on the procedural devices selected for enforcing those policies but rather on the structures through which policies are both formed and applied, and formed in the very process of being applied.[182]

This "structure[ ] through which policies are both formed and applied" precisely describes the IEP process because it is in the structured IEP process that the district and families collaboratively develop educational policies individually tailored for the particular needs of the child.

Tribe further details his notion of structural due process in a manner that aptly describes the governmental role in the IEP process: "[T]he very phrase 'due process of law' might lead us to consider for a moment a more dynamic and less instrumental picture of policy and its formation in which we are as interested in the process of decision itself as with the outcomes produced."[183]

b. The Three Principles of the Structural Due Process Vision

The second vital step in understanding *Rowley*'s vision of the IDEA is to disentangle the IDEA's three distinct structural due process requirements: (1) collaboration (between the district and the family to jointly make the substantive determinations in the IEP); (2) individualization (requiring the district to employ the full set of proper decisionmakers to assess specified areas and to detail particular conclusions, focused on the needs and abilities of the particular child rather than inflexible policy); and (3) contractualization (which guarantees the family's right to implementation of the collaborative, individualized decision that the school district made and documented in the IEP).

These three principles mesh seamlessly with the intent of the drafters of the IDEA. Professors Neal and Kirp interviewed a "policymaker"[184] involved in drafting the IDEA who explained that the drafters specifically:

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[181] *Id.* at 269.
[182] *Id.*
[183] *Id.* at 290.
[184] Undoubtedly a congressional staffer. Neal & Kirp, *supra* note 9, at 72 n.39.

> intended to strengthen the hands of parents . . . . It was a way of individualizing and contractualizing the relationships and involving parents in the process . . . . It's a way of enforcing what should be delivered to kids. While it's said not to be a contract, it is a contract for service.[185]

This quotation concisely captures each of the three prongs of the structural due process vision.

Courts and commentators, when providing a shorthand description of the IDEA's structural procedural guarantees, however, have repeatedly focused almost exclusively on parents' right to collaborative involvement.[186] While collaboration is undoubtedly an important right, focusing on it alone slights the two other structural obligations borne by school districts: open-minded, individualized assessment of all information relevant to, and decisions made in, the IEP process, and contractualized fulfillment of the IEP that was formed through a collaborative, individualized process.

These often-overlooked structural due process principles, too, are latent in Tribe's conception, which contends that "[t]he continuing structure of the dialogue between the state and those whose liberty its laws constrain (structural due process) seems no less appropriate a concern of the judiciary" than conventional procedural and substantive due process rights.[187] Tribe's theory thus observes that in circumstances in which the government is constraining liberty in a manner that requires the exercise of discretion, rather than application of fixed, bright-line rules, there is a need for two principles of structural due process: (1) the necessity for *individualized* decisionmaking (here, about the education appropriate for the particular child); and (2) the *collaborative* obligation of dialogue (here, between the school district and the child's family).[188] Dean Minow, in her book discussing disability and difference, sounds a similar theme, arguing that "the procedural dimensions of the [IDEA] give parents leverage to express their preference for whatever individualized attention or special programs their children can receive."[189]

What this means in practice is that the IDEA's procedural requirements establish a decentralized yet constrained locus of power in the school district. This approach neither leaves school districts free to do (or not do) as they please, nor does it impose substantive command and control from the federal government above, dictating the substance of educational decisions that are highly dependent on local and individual circumstances. Instead, the

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[185] *Id.*

[186] *See, e.g.*, Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, *supra* note 54, at 1103. In doing so, courts and commentators often conflate the standard "procedural" due process right to challenge governmental conduct—the parents' right to administrative and judicial review—and one of the core structural procedural due process rights, the parents' right to collaborative involvement.

[187] Tribe, *supra* note 8, at 310.

[188] *Id.*

[189] MINOW, *supra* note 8, at 30, 36–37.

IDEA establishes a mandatory approach—a process—that school districts must use in determining a child's IEP.

In brief, and as detailed below, the district has three distinct procedural obligations in the course of the IEP decisionmaking process. First, it must collaborate with the child's family in making its decisions. Crucially, the collaboration requirement affords the family an opportunity to convince the district that what is appropriate is more than, or different from, a mediocre IEP that would be sufficient to pass muster under the IDEA's unexacting substantive benchmark.

Second, the district's decisionmaking process must be individualized, attuned to the specifics of the particular child. For example, the IDEA requires the district to consider a full set of individualized inputs, specifying such matters as the scope of the information that the IEP team must consider,[190] the decisions it must reach,[191] and the composition of the IEP team.[192]

Finally, after the district has arrived at this collaborative, individualized set of decisions documented in the IEP, the resulting document is, in effect, a contract. Services and placement that the district had no obligation to provide in the first place have now been determined by the district to be appropriate, and thus must be implemented, establishing the third and final structural due process element: contractualization.

i. Collaboration

At the core of the IDEA's vision is a collaborative process whereby the school district engages in dialogue and makes decisions in conjunction with the child's parents[193] (and, if appropriate, the child),[194] rather than unilaterally determining the child's educational program.[195] There are at least two reasons for this requirement of collaboration. First, the district will tend to make a

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[190] *E.g.*, 20 U.S.C. § 1414(d)(3) (2006).

[191] *E.g.*, 20 U.S.C. § 1401(a)(20) (2006); 20 U.S.C. § 1414(d)(4)(A) (2006).

[192] 20 U.S.C. § 1414(d)(1)(B) (2006).

[193] Conduct implicating the parental participation prong includes the district's obligation to (1) notify parents about their procedural rights under the IDEA; (2) inform parents of the proposed time and place of IEP meetings and make concerted efforts to schedule and structure the meetings so that parents are able to participate in person or, if necessary, by phone; (3) notify parents about relevant information concerning their child (such as diagnoses and the range of services and placements available) so the parents can offer informed input concerning the substance of the IEP; (4) document and consider the parents' concerns about their child and the information and opinion the parents provide about their child's educational needs; and (5) explicate the reason for decisions that differ materially from the parents' views. 20 U.S.C. §§ 1414(d)(1)(B)(i), 1415(b)(1), 1415(d)(2)(A) (2006).

[194] This Article at times employs the conventional terminology of referring to the collaborative right of parents, but when the disabled child is able to participate meaningfully, the child also shares the collaborative right, and thus the family's collaborative rights may well be at issue.

[195] "Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." Honig v. Doe, 484 U.S. 305, 311 (1988).

wiser and more informed decision if it has a broader range of data regarding the individualized needs and abilities of the child, information that the parents are well-situated to provide.

Second, apart from any effect on improving the substance of the resulting IEP, the right of parental participation is a normative good in its own right. The policy of the IDEA is to provide families a right to be heard on matters concerning their children. Significant impairment of the right to participate in the decisionmaking process violates that procedural norm. Such a violation is problematic even if the resulting IEP passes muster under the IDEA's substantive benchmark—or, indeed, even if a hearing officer or judge believes the IEP to represent an appropriate, or the most appropriate, educational approach. The right of collaboration is not merely instrumental in furthering the objective wisdom of the district's choices, such that it can be trumped by a judge or hearing officer's assessment of what is appropriate. Rather, the parents have the procedural right to attempt to convince the district of what *they* believe to be appropriate. That is to say, the collaborative right is a normatively valuable procedural right to participation and influence—not merely a substantive right to an IEP that a hearing officer or judge determines is at least as substantively good as if the parents had been involved.

Collaboration, one of the IDEA's three core procedural protections, is well-recognized. Commentators have noted it[196] and courts have, in fact, been particularly attuned to the right of parental involvement. But both courts and commentators have often failed to grasp that significant impairment of this procedural right violates the core structural protections of the Act, regardless of substantive consequence. In the absence of such a robust understanding of what the collaborative right means, a boilerplate quote about the importance of parental involvement runs the risk of becoming an empty platitude.[197]

The contours of the right to collaboration are helpfully informed by Tribe's structural due process vision. Tribe describes "the commitment to real dialogue [as] the heart of an adequate notion of legitimacy," rejecting the propriety of an agency's refusal to consider the individual reality and viewpoint of those whom it regulates.[198] This conception of structural due process rejects agency decisions that "depart[ ] from the ideal of conducting

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[196] *See, e.g.*, Handler, *supra* note 8, at 1062, 1071 (discussing "dialogism" and "communal judgment" made possible by mandating procedures that require cooperation and discussion between parties with differing interests, such as school districts and families of disabled children); *see also id.* at 1081 (discussing successful implementation of special education reforms in Madison, Wisconsin that included not only procedural changes, but also conscious efforts to modify community norms and to empower families of disabled children to participate in the educational decisionmaking process in a meaningful manner); *cf.* Zietlow, *supra* note 158, at 54 & n.307 (noting "'the promotion of participation and dialogue' as goals of the due process system").

[197] *See, e.g.*, Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001).

[198] Tribe, *supra* note 8, at 305–06.

dialogue within a mutually acceptable frame of reference when limiting important areas of liberty," such as education.[199] Tribe speaks of structural due process as implicating a "fraternal," or dialogic, notion of due process in which the government is required to engage in a receptive discussion with someone about whom it is making an individualized assessment.[200]

Though Tribe did not discuss special education—he was writing after *PARC* and *Mills* but before enactment of the IDEA—he did discuss the Supreme Court's 1975 decision in *Goss*, in which the Court had found procedural due process rights to apply in the school context, mandating that students be provided notice and at least an informal opportunity to be heard prior to suspension for asserted disciplinary violations. Tribe argued that:

> the hearing requirements outlined by the Court [in *Goss*] do not seem solely the product of the formally-oriented, interest-balancing analysis the Court has employed in other situations where it had to decide what process was "due." Instead, the Court seems to have given weight to the fraternal concerns in the case—the intrinsic value of a certain kind of relationship between student and teacher or principal.[201]

This reasoning about the dialogic structural due process norm applies in the special education context with all the more force. The IEP process is not merely a fact-finding mission; the ultimate discretionary decision implicates fraternal values of participation between parents, children, and school districts.

Because of the intrinsic value of this norm, school district actions (or failures to act) that significantly impede parents' right to participate meaningfully in the IEP formation process should be recognized as resulting in a per se violation of the Act.[202] Thus, such cases as *DiBuo v. Board of Education of Worcester County*[203] are incorrect in holding that significant impairment of parental involvement is not a per se violation.

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[199] *Id.*

[200] *Id.* at 310–11.

[201] *Id.* at 313 n.128 (distinguishing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970), as involving a more conventional, non-structural understanding of due process). Professor Kirp has a similar reading of *Goss*, which he finds "implies the desirability of colloquy and exchange of information, rather than one-way communication of values . . . . In short, the *Goss* majority elevates to constitutional status a particular view of how public school officials should relate to their students," or, in the IDEA context, to the student and his or her family. Kirp, *supra* note 8, at 851.

[202] This approach is consistent with that employed when a trial court has erroneously refused a litigant's right to self-representation. In such circumstances, the appellate court's substantive conclusion that court-appointed counsel has done an exemplary job—better than the litigant could have done himself—is entirely irrelevant to the per se violation of the litigant's structural right to represent himself.

[203] 309 F.3d 184 (4th Cir. 2002); *see supra* notes 123–124.

ii. Individualization

The second structural due process principle embedded in the IDEA, the duty of individualization, is far less widely recognized than the duty of collaboration.[204] The principle of individualization dictates a wide-ranging set of practices directed to ensuring that the district's IEP team engages in a genuinely particularized assessment of the appropriate educational plan for each individual child. The duty of individualization covers such matters as the scope of information the district must consider,[205] the set of decisions it must make and document in the IEP,[206] the composition of the district's decisionmaking IEP team,[207] and the open-minded attitude it must have in making its decisions—in particular, a focus on what is appropriate for the particular child, rather than adherence to inflexible policy.[208] *Rowley* recognized that, as defined in the Act, "a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child."[209]

Unlike the requirement of collaboration, which is both instrumental and an end in itself, the duty of individualization is solely instrumental: the purpose of requiring individualization is to make it more likely that the district will arrive at better, wiser, more appropriate final decisions. Thus, unlike collaboration, a violation of the individualization principle should not establish a per se violation of the Act as a whole. Instead, the question is whether the individualization error subverted the IEP decisionmaking process such that it is plausible to believe that the error materially impeded the IEP team's opportunity to consider or adopt an IEP that the team would have believed was wiser or more substantively appropriate.[210] Individualization can be undermined by the team's failure to consider the proper range of inputs into their decisionmaking (e.g., not having a properly composed IEP team or failing to undertake or consider the assessments required by the IDEA), or by the district's failure to make an individualized assessment of what is appro-

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[204] For example, the Ninth Circuit in *R.B. ex rel. F.B. v. Napa Valley Unified School District*, 496 F.3d 932 (9th Cir. 2007), completely overlooked the possibility of a procedural violation claim based on a lack of individualization in the IEP determination process, finding that the parents "do not claim that the alleged procedural violations infringed [their child's] opportunity to participate in the IEP formation process. The sole question is whether the procedural violations resulted in a loss of educational opportunity for [the child]." *Id.* at 938 n.3.

[205] 20 U.S.C. § 1414(d)(3) (2006).

[206] 20 U.S.C. § 1414(d)(4)(A) (2006).

[207] 20 U.S.C. § 1414(d)(1)(B) (2006).

[208] *E.g.*, 20 U.S.C. § 1414(d)(3) (2006).

[209] Bd. of Educ. v. Rowley, 458 U.S. 176, 188–89 (1982).

[210] Thus, while Judge Alarcón effectively brought out the importance of a properly composed IEP team, and why the absence of a regular education teacher is a serious problem, Judge Gould had the best of the doctrinal arguments in *M.L. See supra* notes 111–112 and accompanying text. However, the "harmlessness" analysis must not be employed to permit substitution of the judgment of a hearing officer or judge, as Judge Clifton's position in dissent would suggest. *See supra* note 113 and accompanying text.

priate (e.g., the district following a blanket policy, rather than making a good faith determination of what is appropriate for the particular child).

Tribe's structural due process vision is also helpful in developing the norm of individualization. He argues that under "the structural due process perspective" a child excluded from school "is entitled to an *individualized* hearing on the question" of the schooling appropriate for her to receive.[211] The state is prohibited from deciding to deny a student an appropriate education based on generalized policy positions or "irrebuttable presumptions" about what is proper.[212] The underlying norm of structural due process—and of *Rowley*—requires the district to engage in open-minded, good faith consideration of the information relevant to the individual student, as mandated by the IDEA.

Professor Weber discussed the concept of individualization while describing the ways in which lower courts have putatively sidestepped *Rowley*'s narrowly framed substantive protections. One central issue that Weber recognized was that some courts found statutory violations to arise from a denial of the right to individualization. Weber argued that courts inclined to find a violation of the IDEA:

> look for ways to diminish the relevance of *Rowley*['s undemanding substantive test]. Thus, they may assert that the program offered by the district does not confer adequate educational benefit, but they buttress their decisions by also relying on procedural failings on the part of the schools in the schools' decisions to deny the parents' request. The school district may have failed to have a key individual at the meeting at which the decision was made. Or the school might have an unofficial policy never to approve applied behavior analysis services, irrespective of the child's needs, violating the requirement that decisionmaking be truly individual.[213]

Weber thus suggests that courts are using individualization to diminish *Rowley* and its narrow substantive test; this Article argues that these courts quite properly use the structural due process norm of individualization to implement *Rowley*.[214]

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[211] Tribe, *supra* note 8, at 303–05. Tribe, writing before the enactment of the IDEA, uses the example of an unwed mother. *Id.*

[212] *Id.* at 305, 308.

[213] Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 48 (2006).

[214] Weber recognizes individualization as a valid concern, though he does not frame it as a procedural guarantee, and seems to believe it to be an end-run around *Rowley*, rather than one of its core procedural principles. As Weber argues:

> "Individualization" is an awkward word for an elegant concept: the idea that children, especially handicapped children, should be treated as individuals with unique needs requiring specially tailored services. The [IDEA] stresses the need for tailored services in its requirement of an individualized education program with unique and specific goals, objectives, and services for each handicapped child. Many courts

The appropriate test for an individualization error should be whether there is a plausible basis to believe that, but for the error, the IEP team might have reached a different conclusion about what services or placement are appropriate for the child. It should not be a substantive assessment by a hearing officer or judge about whether the procedural error plausibly affected what *that adjudicator* thinks to be educationally appropriate.

Thus, an individualization error is not a per se violation (as with a collaboration violation). Nor is it measured by reference to *Rowley*'s second step, a substantive test under which the resulting IEP is the only relevant consideration: under that test, if the court determines that the IEP is reasonably calculated to lead to educational benefit, the IEP provides a FAPE and there is no violation of the Act—regardless of whether the IEP would have been better tailored to the child but for the individualization error.[215] The impairment of individualization impedes the child's right to an IEP that has been formed through the requisite open-minded, individualized *process*. Therefore, impairment of individualization sufficient to deny a FAPE requires only that it be plausible that in the absence of the error the IEP team would have considered and potentially adopted a materially different IEP.[216]

The principle of individualization calls into question such cases as *O'Toole ex rel. O'Toole v. Olathe District Schools Unified School District No. 233*, in which the Tenth Circuit addressed an IEP it acknowledged was unduly vague because it stated only that many related services would be provided "as appropriate," rather than actually specifying what was appropriate for that particular child.[217] The court held that the IEP, though procedurally deficient, did not violate the IDEA because the student "was never denied any related service her parents sought for her."[218] The district had

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have relied on these portions of the [IDEA] in requiring extensive services for children even after *Rowley*.

Weber, *supra* note 7, at 397.

> [I]ndividualization has furnished a strong argument for invalidating policies against providing some types of services to handicapped students. Many cases have rejected blanket policies, notably those denying handicapped students summer school services, even though these policies appear consistent with *Rowley*'s minimal standards and even though under *Rowley* they should be afforded deference as the product of state decision making.

Id. at 399–400.

[215] Put another way, *Rowley*'s substantive test measures the absolute substantive value of the IEP, as determined by the court. In contrast, assessment of an individualization error is relative, looking to the plausibility that the IEP team would have arrived at a materially different resulting IEP but for the individualization error.

[216] *See, e.g.*, Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990).

[217] 144 F.3d 692, 706–07 (10th Cir. 1998).

[218] *Id.* at 707. The decision is particularly troubling because the court failed to recognize that the lack of individualization had quite reasonably led the parents to remove their child from the district. The court instead held that this removal precluded the district from an opportunity to provide appropriate services, *id.* at 707 & n.19, entirely failing to recognize that the district must make an individualized assessment of appropriateness in the course of the IEP process, not on the fly after that process has ended.

failed to create an IEP individualized to the child; the fact that the parents had not specifically requested any particular services is entirely irrelevant to whether the district fulfilled its own obligation under the IDEA to create an individualized IEP.[219]

Similarly, in *C.J.N. v. Minneapolis Public Schools*, the majority, over a compelling dissent by Judge Bye, found no violation of the IDEA, despite the fact that the district refused to offer anything but its standard behavioral program (punishment and "time outs") for a child with brain lesions and serious behavioral problems, rather than creating an individualized positive Behavioral Intervention Plan, as required by the IDEA[220] and as had been successful for the child previously.[221] Because of the district's refusal to individualize, it was forced to repeatedly place the third-grade child in restraints and in seclusion, and eventually had to call the police to take the child away.[222] The court nonetheless held that the IDEA was not violated, essentially because the student was progressing academically at an average rate.[223] This was a deeply misguided application of *Rowley*'s substantive test as the sole benchmark for reviewing a severe failure of individualization.[224]

iii. Contractualization

The final procedural principle is that of contractualization, the district's binding obligation to implement the IEP that has been created through the obligatory collaborative, individualized process. The IDEA defines a FAPE as including the district's obligation to provide "special education and related services . . . in conformity with the individualized education program."[225] The necessity for an analytically distinct approach to assessing the school district's conduct *after* the IEP has been drafted was almost entirely ignored by courts and commentators until the 2007 decision of a panel of the

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[219] *Cf.* Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994) ("Any failure of the [parents] to turn over portions of a specialist's report cannot excuse the District's failure to procure the same information for itself.").

[220] 20 U.S.C. § 1414(d)(3)(B)(i) (2006).

[221] 323 F.3d 630 (8th Cir. 2003).

[222] *Id.* at 644–45 (Bye, J., dissenting).

[223] *Id.* at 642–43 (majority opinion); *cf.* Doe v. Ala. State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990):

> Because of the importance of the procedural requirements of the EHA, and because most of the procedural requirements are designed to insure both full parental participation and thorough analysis of the various educational approaches available to meet the unique educational needs of the handicapped student, procedural violations will most often have a harmful effect.

Id. at 661 n.9 (citation omitted).

[224] Similarly misguided is *Urban ex rel. Urban v. Jefferson County School District R-1*, 89 F.3d 720, 726–27 (10th Cir. 1996), which reviewed an IEP that was not sufficiently individualized because it contained no statement of transition services appropriate for the child's particular circumstances. The court improperly found that the individualization error was rendered irrelevant because the resulting IEP met *Rowley*'s substantive standard. *Id.*

[225] 20 U.S.C. § 1401(9) (2006).

Ninth Circuit in *Van Duyn v. Baker School District.*[226] Since then, there have been two student comments[227] and an article by a law clerk[228] regarding the district's IEP implementation obligation.

An implementation shortcoming differs from the duties of collaboration and individualization, as well as from the substantive obligation that the IEP, as drafted, be reasonably calculated to lead to educational benefit. The alleged shortcoming in this prong lies not in *how* the IEP was created, nor in *what* it substantively contains. Instead, the asserted problem arises after the district has created a substantively adequate IEP through a procedurally adequate process and then fails to *implement* the substance of what it has promised to provide. In effect, the district has breached a contract, the terms of which it adopted collaboratively with a disabled child's family.

It is not immediately obvious that this sort of error is properly conceived of as procedural rather than substantive. However, under *Rowley*, the sole substantive benchmark is whether the content of the IEP, *as drafted*, is reasonably calculated to lead to educational benefit.[229] How the IEP was drafted is irrelevant to a substantive assessment of the IEP, as is what happens after the IEP is drafted. Substance under *Rowley* is solely the substantive content of the IEP and whether that document is reasonably calculated to lead to benefit—an area in which the district's expertise warrants deference from hearing officers and courts.

The district's implementation obligation to provide what it has determined to be appropriate in the IEP is not an exercise of substantive expertise by educational professionals to which judicial deference is owed. Instead, it

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[226] 502 F.3d 811, 822 (9th Cir. 2007) ("[W]e hold that a material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."); *cf.* Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (noting that the case actually involved an asserted failure of implementation, but because the parties had framed the issue as a question of substance under *Rowley*, the court limited its analysis to whether the IEP was reasonably calculated to provide an educational benefit); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 & n.2 (5th Cir. 2000) (applying a four-factor test that considered implementation shortcomings and educational benefit in conjunction, and finding no violation of the IDEA, despite notable implementation failures, because "significant provisions of [the student's] IEP were followed, and, as a result, he received an educational benefit").

[227] Knight, *supra* note 51; David G. King, Note and Comment, Van Duyn v. Baker School District*: A "Material" Improvement in Evaluating a School District's Failure to Implement Individualized Education Programs*, 4 Nw. J.L. & Soc. Pol'y 457 (2009).

[228] David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 Buff. Pub. Int. L.J. 71 (2010).

[229] *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982). The Court expressly distinguished procedure from substance, characterizing any substantive claims under the IDEA as those relating to the substantive content of the IEP. *See id.* at 206 (recognizing a "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 206–07 (contrasting procedural obligations with "measurement of the resulting IEP against a substantive standard").

is an obligation dictated by the Act[230] that is an essential part of the process by which the district provides appropriate special education and related services to the child. Whereas the district's judgment as reflected in the content of the IEP is substantive, subject to modest, deferential review, the district's procedural obligations in how it goes about forming and implementing that subjective judgment are expressly mandated and closely scrutinized under the IDEA.

There is a compelling analogy to contractual enforcement: the school district has negotiated with the child's parents and has created a document in which it has memorialized its voluntary agreement to provide a particular placement and set of related services that it was not substantively obligated to offer. The district's subsequent failure to comply with what it has voluntarily agreed to do effectively breaches the contract that it has created. By agreeing to the IEP, the district is not promising or guaranteeing any particular substantive outcome, or even that any actual educational benefit will result. But it is guaranteeing that it will provide the contents of the plan to which it has agreed.

Some courts and commentators have noted the potential analogy of an IEP to a contract, but scholars have found the comparison to be inexact and courts have expressly rejected the comparison.[231] It is true that in some senses the parallel is not perfect: in the IDEA context there are not two private parties with equal power who may choose to bargain and enter into a contract if they find doing so mutually beneficial, or who may choose not to enter into any agreement at all. The IEP process is admittedly not parallel with respect to contract *formation* in that, under the IDEA, the parties *must* negotiate, much as with collaborative governance and negotiated rulemaking in administrative law[232] or mandatory bargaining under the National Labor Relations Act ("NLRA").[233] Moreover, it is the district that ultimately has the unilateral power to draft the IEP if agreement cannot be reached, and the parents' only resort is to file suit.[234]

But courts and commentators have failed to observe that *after* the district has agreed to an IEP, the parents' right to *enforcement* of the district's promises made in the IEP is in fact highly contractual in nature. The commitments in the IEP function much like the enforceable terms reached in a

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[230] 20 U.S.C. § 1401(9) (2006).

[231] *See* Caruso, *supra* note 10, at 175, 178; Kirp, *supra* note 8, at 178 & n.58; *see also* Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 820 (9th Cir. 2007) ("[T]he IEP is entirely a federal statutory creation, and courts have rejected efforts to frame challenges to IEPs as breach-of-contract claims. Van Duyn offers no example of a court treating an IEP as a contract, nor have we been able to locate any." (citation omitted)).

[232] *See* Caruso, *supra* note 10, at 173–78; Handler, *supra* note 8, at 1026–28.

[233] *See generally* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

[234] Doe v. Maher, 793 F.2d 1470, 1489–90 (9th Cir. 1986) (holding that consensus of the IEP team is the ideal, but in the absence of consensus, the district is obligated to draft an IEP, which the parents may challenge).

collective bargaining agreement formed under the procedural obligations of the NLRA.[235] The NLRA imposes the procedural obligation on management that it engage in mandatory, good faith bargaining on certain topics.[236] Management must, as a procedural matter, take part in an open-minded process of negotiation. There is careful review of compliance with the procedural obligation to bargain in good faith; there is scant judicial scrutiny of the substantive terms to which management agrees, pursuant to that obligation; finally, whatever management does in fact agree to is legally binding.

The IEP formation and implementation process shares the same structural due process values, in which the district is obligated to collaborate in good faith with the child's family, and to make an open-minded, individualized assessment of what is appropriate for the particular child, rather than rely on general policies or past practices. Like an administrative agency bound by a "contractarian" approach to regulation,[237] the school district is not required to agree to any substantive term—but once it has bargained in good faith and committed itself to undertake certain actions, it is obligated to follow through on its promises.

The question remains: what is the legal test to be applied to an alleged implementation breach? Courts have wrestled with this issue, recognizing that districts should not be free to ignore the obligations they have assumed in the IEP, but also resisting the idea that any variation from the IEP, however minor, results in a full-fledged violation of the IDEA and a possible judgment in damages against the district to reimburse parents who have unilaterally placed their child with a private service provider.[238]

Some courts have suggested that the proper benchmark is whether the educational services, as actually provided, led to educational benefit, regardless of whether the services the IEP grants the child were actually provided.[239] This approach improperly confuses substance and process. The district need not have agreed to an IEP that substantively provides more than some educational benefit—but if it did so, it must act in conformity with its agreement, or else the entirety of the structural due process rights afforded in the IEP formation context become meaningless. Under a contrary rule, so long as the district provided services that result in some educational benefit,

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[235] *See* Cox, *supra* note 233.

[236] *See id.* at 1411.

[237] *See, e.g.*, David A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 36 (explaining an emerging "contractarian" paradigm in which agencies and regulated entities enter into binding agreements at a local level, rather than command-and-control issuing from statutes, regulations, or even general policy decisions).

[238] *See* cases cited *supra* note 226.

[239] *See* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349–50 (5th Cir. 2000) (rejecting claim of failure to implement—including district's failure to provide any speech therapy for several months—because "we cannot say that the district court committed 'clear error' in its factual determination that [the child] received an educational benefit from his IEP").

the judgments reflected in the IEP that was created through a collaborative, individualized process are rendered irrelevant.

Parents have the right to collaborate in an individualized process in which the district may well decide that what is appropriate is more than the substantive minimum required. Once the district documents in an IEP what it has determined to be appropriate, it cannot insulate itself from liability by pointing out that if the IEP had called for the lesser services that the district ultimately provided the IEP would have passed substantive muster.

But does that mean that any derogation from what was promised in the IEP must be strictly assessed such that a per se violation of the IDEA (and eligibility for reimbursement) results from even the slightest deviation? The resolution to the conundrum is this: the district's IEP commitments *are* contractual, and a breach in implementing the IEP *is* therefore a violation of the IDEA because it deprives the child of the educational benefit that was reasonably calculated to be appropriate in the IEP. But, as an important principle not recognized by courts or commentators, similar to a de minimis breach of contract, the relief appropriate for a violation of the Act may be minimal or non-existent.

The IDEA's remedies of compensatory education (make-up services for those wrongfully denied) and reimbursement (repayment of parental expenditures for services that should have been provided by the district), as well as the availability of attorney's fees, are equitable and discretionary in nature.[240] A statutory violation does not automatically warrant relief. The IDEA is imbued with values, procedural in nature, encouraging communitarian dialogue and fostering fraternal relationships that inform the equities going to relief.

Litigation over trivial non-compliance is highly unlikely, but if it does occur, courts should determine the extent to which a district's shortcoming in implementing an IEP—which *is* a violation of the Act—warrants remedial relief. The proper test is whether the deviation between the services provided and the IEP as drafted might plausibly affect the educational benefit the IEP was designed to provide. Phrased differently, is there any rational basis to believe that the deviation, if it had been known at the time the IEP was drafted, might have been thought to provide the student less educational benefit?

The equitable remedies of compensatory education and reimbursement should not be available when the district's implementation failure does not in any way undermine the purposes of the Act. De minimis variation such as that described in the following examples thus should not be actionable: an occupational therapist might be sick for three sessions, with the school able to schedule a substitute for only two of those sessions; a physical therapy session might be cut five minutes short each week in June because of graduation rehearsals in which the student wishes to participate.

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[240] *See, e.g.*, M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 651 (9th Cir. 2005).

In some cases, modest variation that might plausibly be thought to affect educational benefit may warrant relief. While this may seem unduly strict, there are two reasons why this test is not as onerous as it may seem. First, if circumstances beyond the district's control force the district to deviate from the IEP, the district can and should attempt to provide substitute or compensatory services that offer a similar degree of educational benefit as that calculated in the IEP. Doing so will insulate the district from court-ordered relief and—perhaps more to the point—will, in all likelihood, avoid conflict and further the dialogic, collaborative process by working with the parents to ensure that substituted services are satisfactory.

Second, a violation of the IDEA as a whole, and the propriety of some relief, does not necessarily warrant the full range of remedies available under the IDEA. Most relevantly, courts are empowered to award compensatory education to make up for improperly denied services, which would often be the appropriate remedy for modest variation from the IEP. Thus, six sessions of missed speech therapy for which the district has provided no substitute might well warrant six compensatory sessions. In essence, a strict reading of the district's obligation to implement what it has promised, or provide an equivalent substitute, is tempered by the fact that the remedy can be calibrated to the nature and extent of the implementation violation.

Another available remedy, even as to a modest implementation shortcoming, is reimbursing parents for their unilateral expenses in providing their child with the services the district failed to implement. Given the equitable limitations on the scope of reimbursement, parents might not be entitled to reimbursement if they have permanently removed their child from the public schools without having afforded the district any opportunity to provide substitute services that are reasonably and individually designed to provide equivalent educational benefit following a modest implementation failure. Thus, parents who procure private speech therapy that the district has failed to implement for several sessions would properly be reimbursed, but parents who remove their child from the public school system and place him or her in a private institution after two missed occupational therapy sessions would in all likelihood not warrant reimbursement of the private school tuition.[241]

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[241] It is important that courts begin to take much more seriously than they currently do the fact that parents may well be entirely reasonable in seeing implementation shortcomings (and inadequate efforts to make up for those failures) as casting serious doubt that the district will be able and willing to provide an appropriate education, and thus making more reasonable than is immediately apparent a decision to place the child in a private setting. This is particularly true as the beginning of the school year looms; parents might accurately recognize that the district has not yet agreed to provide a FAPE and also reasonably doubt whether the district will be able or willing to do so by the start of the year. A decision to place their child in a private school under those circumstances—especially when failing to do so would likely preclude the child from attending a school that is able and willing to provide a FAPE for the entire year—might well warrant tuition reimbursement as an equitable matter.

This contractual approach to implementation is consistent with Judge Ferguson's dissent in *Van Duyn*, which reasoned that the court should not assess whether an implementation failure is material before concluding that the IDEA has been violated. As Judge Ferguson pointed out, the IEP team, and not the court, is the proper entity to determine what is educationally material; since the IEP team has determined what is appropriate in the IEP, formed under the guarantees of structural due process, "the failure to implement *any* portion of the program to which the school has assented is *necessarily* material."[242] This does not mean that every implementation failure results in the full scope of remedies available under the Act; it means that the court should exercise its discretion at the remedial stage, in which the Supreme Court has recognized that equitable discretion is warranted,[243] rather than imposing its own view of materiality in deciding whether a violation has occurred.

The *Van Duyn* majority, in contrast, construed *Rowley* as holding that "procedural flaws in an IEP's formulation do not automatically violate the IDEA, but rather do so only when the resulting IEP is not 'reasonably calculated to enable the child to receive educational benefits.'"[244] Yet again, a court of appeals erroneously held that a procedural error must cause a substantive violation of the IDEA for the Act as a whole to be violated.

Building on this improper construction of *Rowley*, the *Van Duyn* majority reasoned that "[w]e do not believe we must interpret the IDEA in such a way that even minor implementation failures automatically violate the statute, nor has any other court done so. . . . [D]etermining 'materiality' has been a part of judging for centuries—for example, deciding whether a con-

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[242] Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 826–27 (9th Cir. 2007) (Ferguson, J., dissenting). As Judge Ferguson reasoned:

> Judges are not in a position to determine which parts of an agreed-upon IEP are or are not material. The IEP Team, consisting of experts, teachers, parents, and the student, is the entity equipped to determine the needs of a special education student, and the IEP represents this determination. Although judicial review of the content of an IEP is appropriate when the student or the student's parents challenge the sufficiency of the IEP, such review is not appropriate where, as here, all parties have agreed that the content of the IEP provides FAPE. Having so agreed, the school district must "provide[ ] [special education and related services] in conformity with the individualized education program."

Id. at 827 (citation omitted) (quoting 20 U.S.C. § 1401(9)(D)).

Other supportive cases that address the issue in passing include *Miller v. Albuquerque Public Schools*, 565 F.3d 1232, 1242 (10th Cir. 2009) (appearing to support the standard that a school district failing to implement elements of IEP must "sustain its burden of showing that their absence had a *de minimis* impact on provision of FAPE"), and *D.D. v. New York City Board of Education*, 465 F.3d 503, 511–12 (2d Cir. 2006) (requiring compliance with provisions of IEP, not merely "substantial compliance").

[243] Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) (holding that the IDEA language directing that courts grant "relief as . . . appropriate" "confers broad discretion on the court").

[244] *Van Duyn*, 502 F.3d at 821 (majority opinion) (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982)).

tractual breach is material."[245] The majority failed to recognize that, although courts regularly determine whether contractual breach is material, a non-material contractual breach is nonetheless a breach. The materiality of a breach is only relevant to the scope of enforcement and remedy,[246] just as should be the case with contractualization under the IDEA.

B. The Fortuitous Mesh Between the Three Underlying Principles of the Structural Due Process Vision and the Three Prongs of § 1415(f)(3)(E)

The final project of this Article is to demonstrate that the three procedural principles derived from the IDEA's historical background and statutory structure mesh surprisingly well with a recent amendment to the IDEA. As explained in Part III.E, 20 U.S.C. § 1415(f)(3)(E) was specifically enacted to resolve the question of when a procedural violation of the IDEA results in a violation of the Act.

The language of the statutory provision (and of its nearly identically phrased implementing regulation),[247] is almost entirely unhelpful; the three prongs set forth in § 1415(f)(3)(E) merely adopt the nebulous language of the leading court of appeals cases, stating that "procedural inadequacies" can deny a FAPE, and thus result in a violation of the Act, when the violations:

> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.[248]

As discussed in Part III.E, this language, without further explication, is far too vague to assist courts in resolving procedural challenges under the IDEA. As may be obvious by now, the theoretical project of this Article maps directly onto these three statutory criteria, explaining what each of the statutory criteria means and what each requires in terms of a substantive assessment. As with the series of articles written about proceduralism two decades ago, theory can meaningfully inform (and be informed by) the practical realities of law in furtherance of civil rights.

What, then, does § 1415(f)(3)(E) mean? This Article argues that the best reading of the statute is to view each of the three prongs as an analytically distinct category of procedural violation that can result in violation of

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[245] *Van Duyn*, 502 F.3d at 822 n.4 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)).

[246] *See* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).

[247] 34 C.F.R. § 300.513 (2010).

[248] 20 U.S.C. § 1415(f)(3)(E)(ii) (2006).

the IDEA as a whole. This is supported by the canon of statutory construction that cautions against interpreting statutory language as superfluous, which would be the case if some or all of the sections were equivalent or overlapping.

Most obviously, § 1415(f)(3)(E)(ii)(II) straightforwardly addresses significant impairment of parental participation in the IEP process. The scope and meaning of parental collaboration is described in Part IV.A.2.b.i. Significantly 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.

The more difficult question of statutory construction is distinguishing § 1415(f)(3)(E)(ii)(I), which addresses impeding the right to a FAPE, from § 1415(f)(3)(E)(ii)(III), which addresses deprivation of educational benefit. Without the theoretical project of this Article, it is extraordinarily difficult to understand what these provisions mean and if or how they differ.

A deprivation of educational benefit under section (III), as explained in Part IV.A.2.b.iii, looks to whether the district's conduct has actually caused a deprivation of educational benefit to which the child was entitled under the IEP; its language is not directed to whether the IEP is reasonably calculated to lead to educational benefit. A violation of this obligation thus occurs when the school district fails in its procedural obligation to implement the IEP that the IEP team has collaboratively determined to be appropriately and individually calculated to provide educational benefit.[249] Deviation from the IEP deprives the child of the educational benefit envisioned by the IEP team because benefit is to be assessed by the IEP team, not the judge.

As explained in Part IV.A.2.b.ii, *impeding* the *right* to a FAPE, as contemplated by section (I), is not the same as substantively denying a FAPE. Instead, it concerns impairment of the *process* of IEP creation—whether the IEP creation process has materially diverged from the structural due process rights inherent in the IDEA. That is, did the school district engage in the open-minded, individualized process of determining an appropriate education mandated by the Act?

The plain statutory language is "impeding the right to a FAPE," a procedural violation that must be understood as analytically distinct from the substantive denial of a FAPE covered under § 1415(f)(3)(E)(i).[250] The distinction lies at the core of this Article: the *denial* of FAPE as a substantive

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[249] This prong also covers the failure to implement the services stated in an IEP because the district has failed to draft an IEP or have the IEP in place on the first day of the school year, as required by the statute. Such errors violate the IDEA under this prong when the district's failure to implement any IEP occurs over a sufficiently long period to deprive the child of educational benefit.

[250] The prong of the statute governing substantive review reads: "Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education," 20 U.S.C. § 1415(f)(3)(E)(i), a formulation that references *Rowley*'s benchmark that the substantive de-

matter means that the school district has created an IEP that is not reasonably calculated to lead to educational benefit. *Impeding* the *right* to a FAPE as a procedural matter, in contrast, means that the process the school district has employed in creating the IEP has diverged from the structural due process right to a collaborative, open-minded, individualized assessment, thereby undermining the legitimacy of the IEP formation process and thus the resulting IEP.

V. CONCLUSION

The project of this Article has been to revisit the academic focus on proceduralism under the IDEA that has largely disappeared over the last twenty years. By taking *Rowley*'s proceduralist values seriously, and by understanding the due process ideals that animated the Act and its interpretation in *Rowley*, this Article has derived a structural due process vision of the IDEA.

Central to that vision is recognizing that the most meaningful locus for procedural rights under the IDEA is the set of structural due process protections afforded in the IEP-creation process, rather than the formal right to file suit after that process has ended. Moreover, for those structural due process rights to be meaningful, they must have force in and of themselves, such that procedural error in IEP creation or implementation can result in a violation of the Act even when the substantive content of the IEP itself is reasonably calculated to lead to educational benefit.

The structural due process values of collaboration, individualization, and contractualization undergird this theoretical vision. These three principles also serve a deeply practical purpose: by lending coherence and meaning to 20 U.S.C. § 1415(f)(3)(E), the statutory provision setting forth the legal standard for procedural violations under the Act, these structural due process principles are able to strengthen the IDEA's procedural protections, as its drafters intended, and harmonize the judicial disarray surrounding the Act's procedural core.

termination of whether a child received a FAPE turns on whether the IEP was reasonably calculated to lead to educational benefit.