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REGULAR EDUCATION TEACHERS FORMULATING SPECIAL EDUCATION PLANS:

M.L. v. FEDERAL WAY SCHOOL DISTRICT AND THE IDEA

I. INTRODUCTION

The world of special education is governed today by a body of statutory law known as the Individuals with Disabilities Education Act (IDEA).¹ The IDEA mandates that each special education student receive an “individualized education plan” (IEP) specifically formulated to accommodate that student’s individual needs. The IDEA has many detailed requirements, one of which demands the inclusion of a regular education teacher, or one who teaches “regular” rather than “special” education classes, at IEP development meetings. This requirement is primarily aimed at giving special education students the opportunity to integrate at an appropriate level into regular education classrooms. The regular education teacher adds an important perspective to the IEP regarding the needs and capabilities of a student with special needs among his regular education peers.

The importance of the regular education teacher’s involvement in the development of a special education plan drives the main issue in *M.L. v. Federal Way School District*.² M.L. was a young kindergarten student whose experience in a regular preschool suggested the possibility of at least some integration into a regular kindergarten classroom.³ The presence at his IEP development meeting of a regular education teacher, particularly his regular preschool teacher, would have been extremely valuable in formulating optimal educational opportunities for M.L. The failure of the Federal Way School District to include a regular education teacher in M.L.’s IEP development meeting constituted a procedural violation of the IDEA.

This case note deals with judicial treatment of IDEA procedural violations and, in particular, the Ninth Circuit’s treatment of a school

1. 20 U.S.C.A. §§ 1400–1482 (West 2005).

2. 394 F.3d 634 (9th Cir. 2005), *cert. denied*, 125 S. Ct. 2941 (2005).

3. *Id.* at 637

district's failure to include a regular education teacher in an IEP. Should courts automatically invalidate an IEP for which the development process was procedurally flawed, or should invalidation also require a showing that the procedural error caused substantive harm? Should the question turn on the nature of the procedural error? IDEA procedural violations constitute a somewhat undeveloped area of law, and yet emerging trends in federal courts lean toward at least some analysis of substantive harm. *M.L.* represents one of very few federal cases addressing the regular education teacher requirement of the IDEA. Judge Alarcon, writing for the Ninth Circuit in *M.L.*, adopts an unconventional approach that leaves educators, students and courts still wondering what treatment IDEA procedural violations ought to receive in federal courts. Under his approach, procedural defect precludes the court's review of substantive harm. The other two judges in the three-judge panel disagreed with this analytical framework, and called for a more conventional harmless error component as part of the analysis.

A reading of the *M.L.*'s majority, concurring and dissenting opinions begs the questions: Is there still a gap in the law? What do the procedural requirements of the IDEA, such as the regular education teacher requirement, mean? How should courts, in the Ninth Circuit and elsewhere, respond to such violations in the future? Although the Ninth Circuit addresses these questions in *M.L.*, it provides few clear answers. This case note addresses these questions from a variety of perspectives. Part II provides important background information, detailing the relevant provisions of the statute and describing the legislative history of the regular education teacher requirement in the 1997 amendments to the IDEA. Part III offers the facts and procedural history of *M.L.* and places the Federal Way School District's procedural violation in the context of the legislative requirement. Part IV canvasses federal case law, controlling and otherwise, related to the regular education teacher requirement. Finally, Part V asks how this requirement is viewed and implemented in public schools throughout the country. Part VI constitutes a brief conclusion.

II. THE REGULAR EDUCATION TEACHER REQUIREMENT AND ITS LEGISLATIVE BACKGROUND

A. The Statute

The IDEA's many requirements are all designed to provide educational opportunity, or a "free appropriate public education" (FAPE), for children with special needs. The development of an IEP offers individual attention to each child with special needs and results in

the creation of an educational plan tailored to the child's specific needs. As a part of this effort, the IDEA spells out exactly who should participate in the development of the IEP. According to the federal statute, the IEP team should include parents, special education teachers or providers, other school officials, and "not less than [one] regular education teacher . . . (if the child is, or may be, participating in the regular education environment)."⁴ The IDEA further describes the regular education teacher's participation in IEP development as follows:

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel⁵

Thus, the IDEA qualifies the regular education teacher requirement in two ways. First, the regular education teacher's involvement is necessary only *if* the student has a chance of participating in a regular education environment. Second, the regular education teacher is required to participate only "to the extent appropriate," or to the extent to which the regular education teacher might be needed to offer suggestions for positive support.⁶

B. History of the Statute

The legislative history of the IDEA and its amendments offers some explanation of Congress' reasoning and intent in both including and also limiting the regular education teacher requirement. First, including a regular education teacher on the IEP team is consistent with the IDEA's effort to mainstream students with special needs. The requirement also provides an opportunity for necessary collaboration between the student's regular education and special education teachers and invites the regular education teacher's necessary perspective on the needs of the special education student in a regular education classroom. Finally, a reading of the legislative history of the IDEA brings into focus the legislators' intent that a regular education teacher's involvement be limited to those aspects of the IEP which are relevant to this teacher's interaction with and teaching of the student.

First, involving regular education teachers in the schooling of special education students is a necessary aspect of mainstreaming these students.

4. 20 U.S.C.A. § 1414(d)(1)(B) (composition of the IEP team) (italics added).

5. *Id.* at § 1414(d)(3)(C) (requirement with respect to regular education teacher).

6. Sen. Rpt. 104-275 at 149 (May 20, 1996).

In the process of creating and passing the 1997 amendments to the IDEA, Congress found that:

[T]o the maximum extent appropriate, children with disabilities [should be] educated with children who are nondisabled and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [should occur] only when the nature or severity of the disability is such that education in regular classes with the use of special education and related services or supplementary aids and services cannot be achieved satisfactorily.⁷

Various testimonials before congressional committees and subcommittees reflected a general understanding that the involvement of a regular education teacher in the creation of a student's special educational plan is part of a larger effort to assimilate disabled students into regular classes where possible. The testimonials also highlighted the benefits of this mainstreaming. Including special needs students in regular classrooms gives them preparation for "real life"⁸ and can even result in increased academic performance for all students.⁹ Furthermore, the integration of regular education and special education students helps "demystify special education and lessen any stigma attached to [special education students]."¹⁰ These benefits and others are derived from the simple placement of a special needs student in a regular classroom.

Second, as special education students are placed in regular classrooms, it is vital that the teachers of these regular classrooms participate in the creation of their students' educational plans. Where regular education teachers are directing some of a student's daily education, an IEP created solely by special education teachers would be particularly inadequate in helping students with disabilities "to be successful in inclusive settings."¹¹ Regular education teachers can provide

7. *Id.* at 38

8. Sen. Subcomm. on Disability Policy of the Comm. on Lab. & Human Resources, *Reauthorization Hearings of the IDEA*, 104th Cong. 98 (May 11, 1995) (testimony of a special education teacher, Ms. Matty Rodriguez-Walling) [hereinafter *Reauthorization Hearings of the IDEA*].

9. Sen. Comm. on Lab. and Human Resources, *Reauthorization of the Individuals with Disabilities Education Act*, 105th Cong. 81 (Jan. 29, 1997) (testimony of a Pittsburgh, PA school board member, Elisabeth T. Healey) [hereinafter *Reauthorization of the Individuals with Disabilities Education Act*]; *Reauthorization Hearings of the IDEA*, *supra* n. 8, at 104, 107 (testimony of a special education teacher, Ms. Sharon Gonder).

10. *Reauthorization Hearings of the IDEA*, *supra* n. 8, at 99 (testimony of a special education teacher, Ms. Matty Rodriguez-Walling).

11. H.R. Subcomm. on Early Childhood, Youth, and Families of the Comm. on Economic and Educational Opportunities, *Hearings on the Individuals with Disabilities Education Act*, 104th Cong. 215 (June 27, 1995) (testimony of an early childhood special education teacher, Miss Marlise E. Stieglitz).

important perspective on “what is possible in the regular class and what is needed for success” in an integrated setting.¹² Collaboration between regular and special education teachers helps avoid the well-documented problem of “unnecessary duplication of instruction and in some cases conflicting instructional programs . . . [which] impede the academic progress of students with disabilities.”¹³ Likewise, appropriate behavior management techniques can be developed where needed.¹⁴ Inclusion of regular education teachers in the development of the educational plan helps prevent these teachers from feeling “that their hands are tied when it comes to children with disabilities”¹⁵ and begins the important process of “giving teachers the tools that they need to teach all children.”¹⁶

Finally, the legislative history of the IDEA amendments and reauthorization clearly demonstrates Congress’ intent to limit regular education teachers’ involvement in IEP formulation to an extent proportional to their involvement with the special education student. A House Report summarizes the statute’s intent as follows:

Very often, regular education teachers play a central role in the education of children with disabilities. In that regard the bill provides that regular education teachers participate on the IEP Team, but this provision is to be construed in light of the bill’s proviso that the regular education teacher, to the extent appropriate, participate in the development of the IEP of the child. The Committee recognizes the reasonable concern that the provision including the regular education teacher might create an obligation that the teacher participate in all aspects of the IEP Team’s work. The Committee does not intend that to be the case and only intends it to be to the extent appropriate.¹⁷

This limitation essentially avoids adding “unnecessarily to the demands on teachers.”¹⁸ One Senate Report describes the requirement as, “to the extent appropriate, at least one regular education teacher *who knows the child or is familiar with the curriculum of the child*, if the child

12. *Reauthorization of the Individuals with Disabilities Education Act*, supra n. 9, at 61 (testimony of Judith E. Heumann, Assistant Secretary, Office of Special Education and Rehabilitative Services).

13. *Reauthorization Hearings of the IDEA*, supra n. 8 (available at 1995 WL 283270) (written testimony of Dr. Herbert Rieth, Professor and Chair of the Department of Special Education at Vanderbilt University).

14. 142 Cong. Rec. H6083 (daily ed. June 10, 1996) (House debates, representative from Hawaii)

15. *Id.*

16. 143 Cong. Rec. H2498 (daily ed. May 13, 1997) (House debates, representative from California).

17. H.R. Rpt. 105-95 at 103 (May 13, 1997).

18. Sen. Rpt. 104-275 at 49 (May 20, 1996)

is, or may be, participating in the regular education environment.”¹⁹ Thus, when Congress directed the inclusion of a regular education teacher on the IEP team, it likely intended that this teacher be one familiar with the specific student and that the teacher’s participation be limited to relevant portions of the IEP.

III. *M.L. v. FEDERAL WAY SCHOOL DISTRICT*

A. Statement of Facts

M.L. was a five-year-old kindergarten student in the Federal Way School District (FWSD) suffering from disabilities including autism, mental retardation, and macrocephaly.²⁰ Prior to his enrollment in an FWSD elementary school, M.L. attended three years of preschool in the Tukwila School District.²¹ His preschool class was an “integrated class”²² and, therefore, included both regularly developing children as well as a few disabled students.²³ During his time in preschool, M.L. received full-time aid from a one-on-one assistant, and gradually M.L. learned to participate to some degree with other students in classroom exercises.²⁴ These preschool years also saw increasing aggressiveness in M.L.’s interactions with others.²⁵

Each year the Tukwila School District was required to create an IEP for M.L. as set forth in 20 U.S.C. § 1414(d)(1)(A).²⁶ The IEP served to measure M.L.’s educational progress and determine the level and type of special educational services to be provided for him during the following year.²⁷ M.L.’s IEP team in the Tukwila School District suggested placement in an integrated kindergarten class for the school year 2000-2001.²⁸ They also outlined other therapy and educational services he would receive in combination with his classroom time.²⁹

M.L.’s family moved from the Tukwila School District into the FWSD shortly before his enrollment in kindergarten.³⁰ The FWSD opted

19. *Id.* at 149 (emphasis added).

20. *M.L.*, 394 F.3d at 636-37.

21. *Id.* at 637.

22. *Id.*

23. *Id.* at 637 n. 4

24. *Id.* at 637.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 638.

29. *Id.*

30. *Id.*

to apply the Tukwila IEP until the end of September when it would expire, and M.L. was accordingly enrolled in an integrated kindergarten class.³¹ M.L. attended this class for five days. Each assistant hired to work one-on-one with M.L. quit after one day.³² M.L.'s mother, who attended the kindergarten class during these days, expressed concern to the teacher that other children were teasing M.L., though she admitted she was unsure whether he was actually affected by the teasing since he was wearing headphones and listening to music while the other children were teasing him.³³ M.L. did not return to the integrated kindergarten class after the first five days. His mother refused the FWSD's suggestion of enrolling M.L. in a class designed for disabled students, preferring instead a setting which would allow for greater interaction with regular education students.³⁴

In early October shortly after the Tukwila IEP had expired, M.L.'s mother met with several specialists to evaluate M.L.'s need for special education services. This group of specialists assessed M.L.'s abilities and created a report recommending his placement in a special education program, but again, M.L.'s mother objected to this type of plan.³⁵ In November, FWSD officials attempted to arrange an IEP meeting with M.L.'s parents, but his mother insisted she and her husband could neither attend nor participate via conference call in an IEP on any day between the hours of 7:00 a.m. and 4:00 p.m. Therefore, when the IEP meeting was held, neither of M.L.'s parents attended. Also, no regular education teacher participated.³⁶ The IEP team reviewed M.L.'s school records and determined he should be placed in a smaller classroom designed for autistic students.³⁷ The FWSD mailed this decision to M.L.'s parents with a letter inviting them to help refine or otherwise discuss the IEP. At this point, M.L.'s parents sought a due process hearing before an administrative law judge (ALJ).³⁸

B. Application of Legislative Intent to the Facts of M.L.

The legislative history of the IDEA's regular education teacher requirement has clear implications for M.L.'s story. Prior to his brief stint in a regular education kindergarten classroom, M.L. spent three years in

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 639.

35. *Id.*

36. *Id.* at 640.

37. *Id.* at 640-41.

38. *Id.* at 641.

a regular preschool, which suggested that he should have the option of integration. One might argue that M.L.'s disabilities, though manageable in a preschool classroom, have the potential to make integration more difficult with each passing year. On the other hand, M.L. was still in kindergarten, and aside from his brief five-day stay in that classroom, there had been no indication that he could not continue on a regular education path during his kindergarten year. The legislature intended IDEA to require the involvement of a teacher who knows the potential of a student with special needs, as well as the limitations of a regular classroom, in the development of his IEP.³⁹ The failure to include a regular education teacher, such as M.L.'s preschool teacher or at least the kindergarten teacher that knew him briefly, deprived M.L.'s IEP of the regular education teacher perspective, thus defeating the legislative goals of providing effective mainstreaming benefits to special needs students.

C. Analysis of M.L. by the Courts

The procedural history of *M.L.* presents somewhat conflicting standards for upholding this legislative intent. The due process hearing was held in February 2001 and ran for eight days. The ALJ determined the IEP team was "appropriately constituted."⁴⁰ Then, M.L.'s parents appealed the ALJ's decision to the United States District Court for the Western District of Washington, arguing that the FWSD had failed to meet the IDEA's procedural requirements since no regular education teacher was on the IEP team.⁴¹ The district court granted summary judgment to the FWSD, finding the IEP team adequate and stating that "[e]ven if . . . the district's failure to include a regular education teacher of M.L.'s on the IEP team amounted to a procedural violation of the IDEA, such violation would not necessarily constitute the denial of a FAPE."⁴²

Appealing to the Ninth Circuit, M.L.'s parents argued that the lack of a regular education teacher on the IEP team was a significant procedural violation.⁴³ The Ninth Circuit reviewed the case as a three-judge panel and produced an opinion, a concurrence, and a dissent.⁴⁴ The majority opinion, penned by Judge Alarcon, held that the FWSD's failure to

39. Sen. Rpt. 104-275 at 149 (May 20, 1996).

40. *Id.* The issue of the parents' non-attendance at the IEP meeting was addressed by the ALJ, who found M.L.'s parents' argument as to why they could not attend to be not credible. *Id.* at 640. It does not appear that ML's parents raised this issue at later proceedings. *Id.* at 641-42.

41. *Id.*

42. *Id.*

43. *Id.* at 641-42.

44. *Id.* at 636, 651 (Gould, J., concurring in part and concurring in the judgment), 658 (Clifton, J., dissenting).

include a regular education teacher on the IEP team constituted fatal procedural error which invalidated the IEP.⁴⁵ The opinion adopted what the concurring opinion labels a “per se” standard; this particular procedural defect is found to invalidate the IEP regardless of its substantive effect.⁴⁶ The concurring opinion agreed with the majority’s decision to invalidate the IEP but preferred to apply harmless error review, and thus arrived at this result by concluding that not only had there been a procedural violation, but also that this error caused harm to M.L.⁴⁷ The dissent also preferred the harmless error analysis, but in its application arrived at an opposite result, arguing that the lack of a regular education teacher on the IEP team constituted harmless error in this case.⁴⁸

IV. FEDERAL CASE LAW BACKGROUND FOR *M.L.*

Because the particular question of procedural error at issue in *M.L.* has not been definitively answered by the Supreme Court, the *M.L.* majority opinion included a review of several cases dealing with various kinds of procedural violations of the IDEA.⁴⁹ The issue is not one which frequently arises in federal court, thus the *M.L.* court’s discussion was somewhat limited, relying primarily on Ninth Circuit cases and a Supreme Court case. The concurring opinion included a footnote listing several cases from other circuits.⁵⁰ Federal case law on procedural violation of the IDEA is not vast, possibly because students, parents and school districts bring complaints before ALJs before bringing them to federal court as a last resort.

A thorough survey of federal case law on this issue is useful in recognizing trends among those cases which do reach federal court. This section is divided into three parts. The first part surveys cases in which federal courts have addressed various types of procedural violations of the IDEA and the effect of such violations on the substantive promise of the IDEA that each child receive a FAPE. The second part surveys those few cases which specifically address the failure to include a regular education teacher on the IEP team. Finally, the third part compares all of that case law with *M.L.*, arguing that Judge Alarcon’s approach is somewhat unconventional and leaves room for substantially different

45. *Id.* at 651.

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

47. *Id.* at 651–52 (Gould, J., concurring in part and concurring in the judgment).

48. *Id.* at 658 (Clifton, J., dissenting).

49. *Id.* at 644–48.

50. *Id.* at 654 n. 6 (Gould, J., concurring).

interpretations.

A. Federal Court Analysis of Procedural Violation of the IDEA Generally

1. U.S. Supreme Court

The U.S. Supreme Court's opinion in *Board of Education v. Rowley*⁵¹ is commonly recognized as the Supreme Court guidance on procedural violation of the IDEA.⁵² It is interesting, however, that the main issue in *Rowley*, the distinction between maximizing the educational potential of a special education student and simply providing some educational benefit, was not procedural at all.⁵³ As a secondary part of the opinion, the Court addressed the question of what role courts should play in reviewing administrative decisions under the Act.⁵⁴ The Court recognized that the Act is much more specific in delineating procedural requirements than substantive rights and concluded, therefore, that Congress specifically intended procedural compliance as well as substantive.⁵⁵ Thus, the *Rowley* Court dictated that reviewing courts ask (a) if the State has complied with procedural requirements, and (b) if the IEP, created through these procedures, is reasonably calculated to benefit the student.⁵⁶

As the Court applied this two-part inquiry to *Rowley* itself, it addressed the first question in less than a single sentence, briefly noting that the case included no findings that the school district had failed to comply with the procedural requirements of the Act.⁵⁷ Thus, in *Rowley*, the Supreme Court did not even apply a total analytical framework for procedural error. Since no later case has caused the Supreme Court to address the issue of procedural violation of the IDEA, other courts have been left to apply this standard in a variety of ways.

51. 458 U.S. 176 (1982).

52. See e.g. Kern Alexander & M. David Alexander, *American Public School Law* 497 (6th ed., Wadsworth 2005) ("As stated in *Rowley*, a reviewing court must make sure that procedures are followed."); see also Mitchell L. Yell, *The Law and Special Education* 153 (Prentice-Hall, Inc. 1998) ("The first principle of the *Rowley* test establishes the importance of adherence to the procedural aspects of a FAPE.").

53. *Rowley*, 458 U.S. at 203; see Alexander & Alexander, *supra* n. 52, at 499 (describing the rule of *Rowley* as follows: "The 'Free Appropriate Public Education' clause of the EAHCA does not require a State to maximize the potential of each special-needs child.").

54. *Rowley*, 458 U.S. at 204-08.

55. *Id.* at 205-06.

56. *Id.* at 206-07.

57. *Id.* at 209 ("Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act . . .").

2. *The Ninth Circuit*

*Amanda J. ex rel. Annette J. v. Clark County School District*⁵⁸ raised the important issue of parental involvement in IEP formulation. Parental involvement is one of the hallmarks of the IDEA, and the right of parents to participate in directing the education of their special needs child is carefully guarded by a variety of procedural requirements.⁵⁹ Therefore, courts may invalidate IEPs in cases where parents have been denied this participation.⁶⁰ In *Amanda J.*, the Ninth Circuit addressed only the first question of the *Rowley* analysis, finding procedural violations that effectively denied Amanda's parents the right to participate fully in her IEP development and consequently denied Amanda of a FAPE.⁶¹ While the court acknowledged that "[n]ot every procedural violation . . . is sufficient to support a finding that the child in question was denied a FAPE,"⁶² it asserted that a child is denied a FAPE if procedural violations cause "loss of educational opportunity," infringement upon parental right to participate, or "deprivation of educational benefits."⁶³

*Shapiro ex rel. Shapiro v. Paradise Valley Unified School District No. 69*⁶⁴ also dealt with both failure to include parents in IEP development and failure to include a particular teacher (a special education teacher, not a regular education teacher) on the IEP team that knew the student well. The Ninth Circuit held that the failure to include the parents and teacher in question was a procedural violation which denied the student a FAPE.⁶⁵ Following the analytical framework from *Amanda J.*, the court

58. 267 F.3d 877 (9th Cir. 2001).

59. *Id.* at 882 ("Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan."); see e.g. *Rowley*, 458 U.S. at 205-06 ("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."); see also Allan G. Osborne, Jr. & Charles J. Russo, *Special Education and the Law: A Guide for Practitioners* 79-80 (Corwin Press, Inc. 2003) (explaining that the IDEA gives parents "unprecedented" rights to participate in the special education planning of their children); Yell, *supra* n. 52 at 186 (stating that parental involvement in the IEP process was one of Congress' most important goals in the 1997 IDEA amendments).

60. See Yell, *supra* n. 52 at 172 ("IEPs developed without parental input have been invalidated (citation omitted).").

61. *Amanda J.*, 267 F.3d at 895 (stating that since the procedural violations denied Amanda of a FAPE, the court need not address whether the IEP was reasonably calculated to offer educational benefit).

62. *Id.* at 892.

63. *Id.* (citations omitted).

64. 317 F.3d 1072 (9th Cir. 2003).

65. *Id.* at 1076.

decided that it need not address the second prong of *Rowley*.⁶⁶ The court specifically addressed the teacher requirements of the IDEA as a part of its analysis and determined that the “IDEA requires the persons most knowledgeable about the child to attend the IEP meeting.”⁶⁷

3. *Sister Circuits*

Other circuits have also faced the question of how to apply *Rowley* to cases alleging procedural violation of the IDEA. Courts have typically addressed whether these procedural violations resulted in the loss of a FAPE to the student. A reading of these various cases reveals a consistent trend that where there is no showing that a student was denied a FAPE, the court will not find that a procedural error invalidated the IEP. Thus, it is unlikely that those students and their parents will be able to obtain relief in the federal court system without demonstrating lost educational opportunity or lack of parental participation, and the resultant denial of a FAPE.

For example, the Fourth Circuit in *MM* determined that a school district’s failure to finalize an IEP by the beginning of the school year constituted procedural defect, stating that “[w]hen such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA.”⁶⁸ In this instance, the court found procedural defect but did not find that lost educational opportunity resulted from this defect.⁶⁹ In another case in the same year, the Fourth Circuit went on to create an “actual interference” standard, stating that the court could not award relief to parents without “a showing that the violation *actually interfered* with the provision of a FAPE to the disabled child.”⁷⁰ Each of these cases cited *Rowley* for underlying principles expressed by the Supreme Court, but neither expressly followed the *Rowley* two-part analysis. Likewise, the Tenth Circuit cited *Rowley* for the principle that the FAPE requirement is satisfied if the child receives educational benefit.⁷¹ Despite its reliance on

66. *Id.* at 1079.

67. *Id.* at 1076 (citations omitted).

68. *MM ex rel DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir. 2002) (citing *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997)).

69. *Id.* at 535.

70. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002) (emphasis added) (granting no relief to parents where the IEP team opted not to consider services requested by the parents since the team had determined the student to be ineligible to receive these services).

71. *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1091 (10th Cir. 2001) (citation omitted), *cert. denied*, 535 U.S. 927 (2002).

Rowley, the court then addressed procedural violation by stating, “[p]rocedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity.”⁷²

Some circuits addressed the *Rowley* test more explicitly, applying it with varying degrees of specificity and exactness. For example, the Eleventh Circuit directly stated the test as articulated in *Rowley*, but found in applying this test that despite the presence of procedural error, the IEP was reasonably calculated to provide educational benefit.⁷³ The court expressly stated, with regard to the effect of these two prongs on each other, that “the court must consider the impact of the procedural defect, and not merely the defect per se.”⁷⁴

Also, the Sixth Circuit applied the *Rowley* test in much the same way as the Ninth Circuit, by addressing only the first prong.⁷⁵ In fact, the court was not content with merely determining whether there had been procedural violation, but rather saw the question as having a substantive element.⁷⁶ Thus, the court not only determined that the school district’s failure to hold a particular IEP meeting constituted procedural violation but also determined that this defect had denied the student a FAPE. Upon making these determinations, the court concluded that addressing the second *Rowley* prong was unnecessary.⁷⁷

Similarly, the Fifth Circuit addressed the question of whether procedural error (in this case, the failure to follow a few technical requirements of an IEP) could alone invalidate the IEP.⁷⁸ It cited *Rowley* but stated the first part of the two-part test somewhat differently. Rather than merely asking if procedural error existed, the court asked if “a procedural violation of the IDEA produced substantive harm.”⁷⁹ In this instance, the court found that the parents had not made a showing of substantive harm.⁸⁰ Despite variations in the technical application of the *Rowley* test, each federal court seemed to concur that the question of

72. *Id.* at 1095 (holding that a student who claimed violation of the IDEA where his school district did not offer him an exit interview prior to graduation did not make any claim that this alleged violation was a denial of a FAPE and that he therefore was not entitled to relief).

73. *Sch. Bd. of Collier County, Fla. v. K.C.*, 285 F.3d 977, 982–83 (11th Cir. 2002).

74. *Id.* at 982 (citations omitted).

75. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764–67 (6th Cir. 2001), *cert. denied*, 533 U.S. 950 (2001).

76. *Id.* at 764 (“Even if we conclude that [the school district] did not comply with the Act’s procedural requirements, such a finding does not necessarily mean that the [plaintiffs] are entitled to relief. Rather, we must inquire as to whether the procedural violations have caused substantive harm . . .”) (citations omitted).

77. *Id.* at 767.

78. *Adam J. ex rel. Robert J. v. Keller Ind. Sch. Dist.*, 328 F.3d 804, 811–12 (5th Cir. 2003).

79. *Id.* at 812–13.

80. *Id.*

procedural violation goes hand-in-hand with a question of substantive harm.

B. Judicial Treatment of Failure to Include a "Regular Education Teacher" on the IEP Team

The Sixth Circuit's analysis of procedural defect in *Deal v. Hamilton County Board of Education*,⁸¹ (which was argued, decided and filed during the same time period as *M.L.*) relied heavily on the legislative purpose of the regular education teacher requirement.⁸² In this case, the district court found that the failure to include a regular education teacher on the IEP team did not cause substantive harm. The Sixth Circuit agreed that this defect did not cause substantive harm, but nevertheless reversed the lower court's holding, citing the close connection between this requirement and the IDEA's important "least restrictive environment" goal.⁸³ While the court recognized that not all procedural violations merit relief without a showing of resultant substantive harm,⁸⁴ it basically said failure to include a regular education teacher was one exception. In essence, the court awarded the parents some level of relief despite a determination that the defect had not substantively affected their child's placement or educational opportunity.

A federal district court in New York offered a well-reasoned opinion on the issue of the regular education teacher requirement in *Arlington Central School District v. D.K. ex rel. C.K.*⁸⁵ With little or no precedent with regard to this specific procedural violation, the court reviewed other federal circuit courts' conclusions with regard to other types of procedural violations that only procedural errors which actually result in substantive harm can invalidate an IEP.⁸⁶ The facts of *Arlington*, as the court explained, suggested that a regular education teacher could provide valuable input into the IEP development.⁸⁷ Given these facts and the legislative preference for mainstreaming where possible, the court determined that there was a "rational basis" for finding that the lack of a regular education teacher's perspective resulted in an inadequate IEP.⁸⁸

81. 392 F.3d 840 (6th Cir. 2004), cert. denied, 126 S. Ct. 422 (2005).

82. *Id.* at 860-61.

83. *Id.* at 860-61, n. 15 ("The regulation explicitly requires the attendance of a 'regular education teacher of the child.' . . . The regulation does not state an exception where other knowledgeable people are present.").

84. *Id.* at 854.

85. 2002 WL 31521158 at *9 (S.D.N.Y. Nov. 14, 2002).

86. *Id.* at *8.

87. *Id.* at *9.

88. *Id.* at **8-9.

In essence, once the court found a procedural violation, it then asked if there was any rational basis for believing the procedural violation could result in substantive harm.

These cases, however, do not control the Ninth Circuit's decision in *M.L.* The closest the Ninth Circuit has come to addressing the failure to include a regular education teacher on the IEP team is in the 1992 case, *W.G. v. Board of Trustees of Target Range School District No. 23*.⁸⁹ Arising before the 1997 IDEA amendments which specified the inclusion of a "regular education teacher," this case dealt with the failure to include the student's "regular classroom teacher," or in other words, the teacher that was most knowledgeable about the student.⁹⁰ The IEP team in *Target Range* failed to seek input from any teacher at the student's private school who was knowledgeable about the student.⁹¹ The Ninth Circuit formulated for the first time its application of the first prong of the *Rowley* test, suggesting that this prong seeks not only a finding of procedural error but also a finding that this error resulted in the denial of a FAPE.⁹² This analysis essentially created a precedent suggesting that the failure to include a required teacher is a procedural violation which results in denial of a FAPE.

C. Comparison of Case Law Precedent and *M.L.*

In *M.L.*, Judge Alarcon adopted a structural defect approach which differs from the former approaches of the Ninth Circuit or its sister circuits in analyzing procedural error. The general trend in federal courts has been to review the procedure for error and then analyze whether that error had the substantive effect of denying a child a FAPE, inferring this denial where the student showed lost educational opportunity or lack of parental involvement. The failure to include a regular education teacher has rarely arisen in federal court, and on these occasions courts have been particularly sensitive to this defect because of its clear connection to the legislative goals of mainstreaming. Likewise, Judge Alarcon was sensitive to the importance of this particular procedural requirement, but his approach is distinctly unconventional. His arguments were similar in substance to more typical procedural error analysis (i.e. that the facts suggest *M.L.* might have been placed in a regular classroom,⁹³ that the

89. 960 F.2d 1479 (9th Cir. 1992).

90. *Id.* at 1484.

91. *Id.* at 1482, 1484.

92. *Id.* at 1484. The Ninth Circuit continued applying the first prong of *Rowley* in this manner in other cases. See *supra* nn. 51-67 and accompanying discussion of *Amanda J.* and *Shapiro*.

93. *M.L.*, 394 F.3d at 648.

procedural violation was therefore “significant”⁹⁴ and deprived the IEP team of the general education perspective, and that this error essentially denied M.L. educational opportunity⁹⁵), but he arranged these arguments under the label of “structural defect,” which “precludes” a review of the substantive effect of this error.⁹⁶ This “per se” standard raises the question of how such a standard might be applied to other types of procedural errors which are perhaps of lesser substantive significance.⁹⁷ In short, Judge Alarcon’s unconventional approach left the door open; the issue of procedural error and its effect on an IEP remains unpredictable.

V. REALITY CHECK: APPLYING IDEA AND ITS REGULAR EDUCATION REQUIREMENT

How does *M.L.* relate to the reality of IEPs as viewed by educators and education scholars throughout the country? Articles in various special education journals articulated for their readership the significant changes in the 1997 amendments of the IDEA—among these changes, the requirement that a regular education teacher be involved in the IEP process. This requirement is generally recognized by educators as one which serves the IDEA’s goal of more effectively mainstreaming special education students. These and other articles emphasize the value of mainstreaming; in particular, teacher communication and training are vital components of this mainstreaming process. However, while the regular education teacher requirement is viewed as a good thing by many educators, it also has a few practical and real difficulties. As school districts make the changes necessary to bring IEP procedures into full compliance with the IDEA 1997 amendments, the question of judicial involvement also remains uncertain.

A. The Regular Education Teacher Requirement and Mainstreaming, As Per Educators

Educators view the 1997 IDEA amendments as significantly

94. *Id.* at 646.

95. *Id.* at 646, 648.

96. *Id.* at 636; see also *id.* at 648 (“I conclude that the failure to include at least one regular education teacher, standing alone, is a structural defect that prejudices the right of a disabled student to receive a FAPE.”).

97. *Id.* at 655, n. 7 (Gould, C.J., concurring in part and concurring in the judgment) (“Judge Alarcon’s opinion posits no necessary or logical stopping point prohibiting future courts from applying a structural error approach to virtually any IDEA procedural error.”).

changing IDEA application in schools.⁹⁸ In an article which details these changes for the benefit of teachers and administrators, the authors recognize that individual changes, such as the regular education teacher requirement, reflect a major shift toward educating special needs students in the regular education system where possible.⁹⁹ Thus, general education becomes the basis for all education, and special education takes on the role of supplementing this general education for students with special needs.¹⁰⁰

Since generally there is a perceived gap in communication and understanding between special education and general education teachers,¹⁰¹ educators and scholars feel that an increase in collaboration is vital to the success of mainstreaming efforts.¹⁰² The IDEA '97 mandate to involve a regular education teacher in IEP development with special education teachers and others should help to increase communication

98. See e.g. Dixie Snow Huefner, *The Risks and Opportunities of the IEP Requirements under IDEA '97*, 33 J. Spec. Educ. 195, 195 (2000) (recognizing that the new requirements of the 1997 IDEA have "significant implications for both general and special educators").

99. Mitchell L. Yell & James G. Shriner, *The IDEA Amendments of 1997: Implications for Special and General Education Teachers, Administrators, and Teacher Trainers*, 30 Focus on Exceptional Children 1, 4-5 (Sept. 1997) (noting that the general education teacher requirement "reflects the emphasis on general curricular involvement found throughout the IDEA").

100. *Id.*; Jeannie Kleinhammer-Tramill, *An Analysis of Federal Initiatives to Prepare Regular Educators to Serve Students with Disabilities: Deans' Grants, REGI, and Beyond*, 26 Teacher Educ. and Spec. Educ. 230, 238 (2003) ("For the first time, the legislation attributed primary responsibility and accountability for all students with disabilities to regular education and clarified special education's role as providing support to the regular education system."); Lawrence J. O'Shea et al., *IDEA '97 and Educator Standards: Special Educators' Perceptions of Their Skills and Those of General Educators*, 23 Teacher Educ. and Spec. Educ. 125, 125 (2000) ("IDEA '97 signals that general education curricula must be viewed as the starting place for all students.").

101. See e.g. Roy Brookshire & Jack Klotz, *Selected Teachers' Perceptions of Special Education Laws 4*, http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/28/18/a9.pdf (Nov. 2002) (suggesting that the lack of emphasis on special education in the university curriculum for regular education teachers "tends to build a gap between regular education teachers and special education teachers"); Thomas C. Lovitt & Suzanne Cushing, *Parents of Youth with Disabilities: Their Perceptions of School Programs*, 20 Remedial and Spec. Educ. 134, 136 (1999) (stating that parents are often surprised and dismayed to realize that their child's regular education teacher is unaware of the child's special needs); O'Shea, *supra* n. 100, at 135 (suggesting that special educators' responses to a survey on general and special education curricula "may reflect a pervasive school culture characterized by a lack of interactions and support between general and special educators") (citation omitted).

102. Various articles by educators and scholars emphasize the need to increase collaboration and offer practical suggestions on doing so. See e.g. Sally Vargo, *Consulting: Teacher-to-Teacher*, Teaching Exceptional Children 54, 54 (Jan.-Feb. 1998) (citation omitted) (recommending a basic model for special education and regular education teacher collaboration); see also Yell & Shriner, *supra* n. 99, at 18 ("A more collaborative relationship between general educators and special educators is likely to be needed. Planning, implementing, and evaluating instructional programs will necessitate more frequent communication across disciplines than is sometimes found in today's schools.").

and thereby lessen that gap.¹⁰³ Educators recognize benefits of complying with the requirement, such as increased opportunity for general education teachers to obtain needed support and to provide insight into educational possibility,¹⁰⁴ as well as acquire greater understanding of special education options.¹⁰⁵

B. Problems and Unanswered Questions in Instituting the Regular Education Teacher Requirement

While educators recognize the regular education teacher requirement and its purpose, they also face practical concerns and questions in its application. One education article deals with the underlying problems of regular education teacher involvement in an IEP, stating that while the value of this involvement is clear, "we [educators] know the reality of what happens in actual practice."¹⁰⁶ The article lists five basic reasons that regular education teachers are not present at IEP meetings: team connection (i.e. lack of a sense that the regular teacher is valued and understood), lack of time, lack of effective preparation, lack of training, and lack of apparent relevance of the IEP to the regular education teacher's interactions with the student.¹⁰⁷

These problems create questions which have not yet been answered. For example, if IEP meetings are scheduled during a teacher's contract day, should funds be allocated to hiring a substitute teacher during these meetings? Could one general education teacher be designated to attend all IEP meetings, or could the assignment to attend IEP meetings rotate through a group of teachers? Could the requirement be filled by a guidance counselor in lieu of actual classroom teachers?¹⁰⁸ In essence, despite statutory limitations on the regular education teacher's involvement, teachers are feeling the strain of additional responsibilities.

103. See e.g. Susan G. Clark, *The IEP Process as a Tool for Collaboration*, Teaching Exceptional Children 56, 58, 60-61 (Nov.-Dec. 2000) (recognizing value in the perspective of a general educator in identifying needed supplementary aids or program modification as well as in creating and implementing behavioral goals); Margaret J. McLaughlin et al., *Integrating Standards: Including All Students*, Teaching Exceptional Children 66, 66 (Jan.-Feb. 1999) (noting that the IDEA's regular education teacher requirement "reinforces the importance of collaboration" (emphasis added)).

104. Huefner, *supra* n. 98, at 203.

105. O'Shea, *supra* n. 100, at 135.

106. Ronda R. Menlove et al., *A Field of IEP Dreams: Increasing General Education Teacher Participation in the IEP Development Process*, Teaching Exceptional Children 28, 29 (May-June 1998).

107. *Id.* at 28-32.

108. Each of these possibilities is mentioned in a report consisting of research on the question of the regular education teacher requirement. Natl. Assn. of St. Dir. of Spec. Educ., *Involvement of General Education Teachers in the IEP Process* 4-6, http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/11/43/5b.pdf (Dec. 1998).

As a result, schools may look for creative responses, which may or may not fulfill the legislative requirement.¹⁰⁹

C. *The Issue of the Judicial Role*

Through the IDEA, collaboration between regular and special education teachers, a generally-recognized ideal, becomes a legal requirement and has real legal implications. Some education authors create checklists intended to help school districts comply with the extensive procedural provisions of the IDEA, reminding educators that if these “most critical procedural requirements of IDEA” are not followed, the school district risks legal repercussions.¹¹⁰ One author recognizes that the specific failure to include a regular education teacher may raise a concern of predetermination; that is, school districts risk liability with this particular error because it may imply an inappropriate pre-IEP decision that a student would not qualify for any portion of regular education.¹¹¹ Indeed, M.L.’s story raises this precise concern: does the FWSD’s failure to include a regular education teacher on the IEP team suggest the School District had already determined that regular education was not an option?

While education journal articles warn educators of potential liability for failure to comply with the IDEA, the courts’ role in enforcing this compliance is still somewhat nebulous. One educator laments the potential for “more intrusiveness by the legal system”¹¹² as a result of IDEA changes which “will surely generate a new wave of court cases testing their limits.”¹¹³ She questions what courts will do with the IDEA’s increased emphasis on measurable results or how, if at all, courts will address IEP substance and concludes that “the judicial response to the new IEP requirements bears watching.”¹¹⁴ The Ninth Circuit’s decision in *M.L.* is a piece of this anticipated judicial response. The adoption of a per se standard avoids excessive intrusion, in that any finding of a procedural violation bars substantive review of IEP appropriateness. Thus, the question of substantive compliance remains in the hands of

109. Some sources impliedly refute these creative possibilities. For example, one IEP checklist of “the most critical procedural requirements of IDEA” states that “[t]he general education teacher participating in the meeting should be the teacher who is, or may be, responsible for implementing the IEP.” Erik Drasgow et al., *Developing Legally Correct and Educationally Appropriate IEPs*, 22 Remedial and Spec. Educ. 359, 362 tbl. 1 (2001).

110. *Id.* at 369–70 fig. 2.

111. Clark, *supra* n. 103, at 58.

112. Huefner, *supra* n. 98, at 196.

113. *Id.* at 195.

114. *Id.* at 202.

administrators and ALJs. The plurality opinion in *M.L.*, however, shows that this resolution is far from final and definitive. Indeed, educators and courts alike are still left wondering: what role should federal courts play in the enforcement of the IDEA's procedural and substantive provisions?

VI. CONCLUSION

The IDEA's regular education teacher requirement adds important elements to IEP meetings for special education students. Through this requirement, the special education student receives the benefits of the regular education teacher's perspective and an added focus on mainstreaming opportunities. These benefits can increase educational opportunity for the student. As mainstreaming becomes an increasingly important goal in special education, educators recognize, from the theoretical perspective, the value of collaboration between regular and special education teachers. However, these educators also face various practical difficulties, in fulfilling the requirement, such as limitations on time and resources.

The Ninth Circuit's holding in *M.L. v. Federal Way School District* leaves questions regarding the IDEA regular education teacher requirement essentially unanswered. While the legislature, the courts, and educators all agree that the requirement is a significant and valuable aspect of the IDEA's important goal of including special education students in regular education classrooms, the enforcement of this provision remains unclear. The various opinions arising out of the Ninth Circuit's plurality holding demonstrate the lack of a general consensus with regard to this particular procedural error. While it seems fairly clear that *M.L.* should have had the right to a regular education teacher's perspective in the formulation of his educational plan, educators and administrators generally remain in the dark as to the details of this procedural requirement. 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? Indeed, the adoption of a *per se* standard by Judge Alarcon contradicts the procedural error analysis applied by other circuits, which generally consider whether the error actually resulted in the loss of educational opportunity.

In summary, and perhaps of greatest importance to educators, the plurality opinion in *M.L.* still did not refine for educators how to actually apply the regular education teacher requirement. How far will courts go in analyzing regular teacher participation in IEP development meetings? With the court's lack of consensus, educators cannot discern with any

reasonable certainty if courts will invalidate every procedural error or if courts will be willing to consider whether or not the error actually harmed the student. Although the IDEA expressly limits regular education teacher involvement in order to avoid overburdening teachers, the judicial adoption of a per se standard would infringe on educators' discretion in determining the appropriate level of involvement of the regular education teacher. Educators' concerns about application of the requirement therefore remain unresolved. In short, the issue of a regular education teacher's involvement in IEP development reveals unclear gaps in the law, and the Ninth Circuit in *M.L.* does little to clarify them.

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