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Children with Disabilities and Equity in Education: Connecting Standards and Practice to Law and Ethics

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Abstract

Some of the most controversial education policy concerns and methods of practice have been over Special Education. Students between the ages three to twenty-one with disabilities compromise 13% of student enrollment between prekindergarten and twelfth grade (U.S. Department of Education, National Center for Education Statistics, 2013) (Appendix A, Table 1,2,3). From the late eighteenth century to current times, the legal system and court case outcomes have played a major role in the development of public education in America. The Supreme Court's 1954 ruling in Brown v. Board of Education not only ruled racial segregation as unconstitutional, but became a landmark case that opened the doors for court involvement in refining educational policy concerning Special Education. Standards of practice, which have evolved through the years, began to take form to support educational leaders in how they approached adhering to laws and policy concerning the education of students identified as special needs learners. Chief Justice Earl Warren who spoke for the Supreme Court of the United States in Brown v. Board of Education (1954), stated:

> *In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms (Brown v. Bd. of Educ., 347 U.S. 483, 1954).*

This case dispelled the notion that education could be offered to any group under the premise of separate but equal that had earlier been established in Plessy v. Ferguson (1896). Plessy v. Ferguson (1896) is a landmark United States Supreme Court decision in the jurisprudence of the United States, upholding the constitutionality of state laws requiring racial segregation in public facilities under the doctrine of "separate but equal" (Maidment, 1973).

Keywords

educational policy, special education, educational law, Brown v. board of education, the Individuals with Disabilities Education Act (IDEA), Free and Public Education (FAPE)

1. Introduction

The most important right given to students-with-disabilities is the right to a Free Appropriate Public Education (FAPE). Under The Individuals with Disabilities Education Act (IDEA), a FAPE is not just a privilege given to eligible students at the convenience of school districts but rather a right that must be made available to all eligible students. According to IDEA, a FAPE is "special education and related services" that (a) are provided at public expense, under public supervision and direction, and without charge, and (b) meet standards of the state educational agency, that includes appropriate education in preschool, elementary, and secondary school levels and are delivered in conformity with the child's IEP (20 U.S.C. §1401(9). Since the definition of FAPE does not clearly define all levels of educational quality, there has been conflicting interpretations. This has escalated problems and caused court cases to surface that address the rights of families and students to a fair and equitable education.

2. Method

Educational law review documents not only clarify what policies shape the role of education; but also present the history of the current rules, assess the status quo, and present reform proposals. To make theoretical arguments more plausible, legal practitioners apply outcomes of past cases, refer to statutes, review political debates, and examine related sources. Legal scholars highlight examples unsystematically and explore them armed with only the tools for doctrinal analysis. Unsystematic examples can better develop plausible theories; however, rarely suffice to convince the public that these theories are true, especially when plausible alternative explanations exist. This project presents methodological insights from multiple social science disciplines and from history that could strengthen legal scholarship by improving research design, case selection, and case analysis. Qualitative techniques are utilized that are scarcely found in law review writing; such as, process tracing, theoretically informed sampling, and related case design. (Table 1)

The 1954 Supreme Court decision in *Brown v. Board of Education* had declared state laws, establishing separate public schools for black and white students, unconstitutional and the notion of "separate but equal" became unacceptable thought. This movement forward in education was important for students with disabilities, because the concept of equal opportunity was applicable to them, as well as to minority students (Brown v. Bd. of Educ., 347 U.S. 483, 493, 1954). *Brown v. Board of Education* was based on the Fourteenth Amendment's Equal Protection and Due Process clauses and not just the "right" to education. With this action by the courts, there was increased legislation and litigation that dealt with the allocation of authority over educational decision-making. Courts have become more actively involved in aspects of education that were once left entirely to the discretion of school administrators and school

boards. Teachers', students', and parents' rights have been asserted in legal actions against school authority producing a vastly expanded field of judicial precedents which have had a huge impact on American education.

In 1982, the U.S. Supreme Court provided a definitive interpretation of the statutory language. Its decision remains the Court's most important pronouncement on the IDEA, and its interpretation has been the binding precedent for all FAPE cases in all the courts in the country. Several cases heard in the U.S. Supreme Court gave clarity to FAPE. One such case is *McEuen v. Missouri State Board of Education* (2003) that defines the FAPE as not requiring the school district to maximize a student's capabilities, but to provide a free appropriate public education consistent with the provisions set forth in state and federal regulations implementing IDEA McEuen v. Mo. Bd. of Educ. 120 S.W.3d 207, 209, Mo. 2003). There has been a many cases, mimicking *McEuen v. Missouri State Board of Education*, litigated under the IDEA in an attempt to answer the questions about what is required of schools in providing special education. Many questions remain unanswered, and expanding statutory, regulatory, and judicial law continues to bring up new questions. As the increase of cases was brought to the U.S. Supreme Court amendments were made to IDEA in order to define the remedy for failure to develop a reasonable IEP for a student to enable him to receive a meaningful education (Larson v. Independent Sch. Dist. No. 361, 2004). An individualized education program for each eligible student with a disability is the heart of the IDEA. It is the primary tool for individualizing services for each eligible student, and it establishes resources on behalf of the student. It is the key mechanism for gaining participation by parents in the development of the student's specially designed instruction and provides an important opportunity for solving disagreements between home and school. Additionally, it provides a means both to monitor the delivery of special education and to evaluate its effectiveness (Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*; 34 C.F.R. §§ 300 *et seq.*). In order to assure that students are given a FAPE it is important for school systems to develop appropriate IEP's that clearly meets the need of the individual student.

The evolution of the role of the courts in education began between 1789 and 1850 when the federal and state courts ignored education. Courts were rarely called to intervene in school matters. State control of education grew stronger from approximately1850 to 1950 with state courts asserting that education was only a state and local issue. This focus at the state level created case law that, in theory, would contradict federal constitutional standards and requirements. During that time, however, federal courts were only willing to question the validity of state statutes under the U.S. Constitution and ignored the idea that cases involving schools could be brought to court based on an infringement of individual rights. Next the reformation stage began in the 1950s with *Brown v. Board of Education* and continues today (Janto and Harrison-Cox, 1992). The federal Court recognized the failure of state education laws to meet individual's constitutional rights and began to issue decisions that offered constitutional guidance for educational institutions (Brown v. Board of Educ., 347 U.S. 483, 1954).

In 1919 in *State ex. Rel. Beattie v. Board of Education*, the Wisconsin Supreme Court refused to admit a student with cerebral palsy to a public school. The court judged the condition to be "repulsive" to the other children and disturbing to the teachers. The Supreme Court of Wisconsin upheld the exclusion of a student with a paralysis. The student had normal intelligence, but his condition caused him to drool and make facial contortions. The student attended public schools through grade five but was excluded thereafter, since school officials claimed that his physical appearance nauseated teachers and other students. Sec. 13-1375 relieves the State Board of Education from any obligation to educate a child whom a public school psychologist certifies as uneducable and untrainable. The burden of caring for such a child then shifts to the Department of Welfare which has no obligation to provide any educational services for the child. School officials recommended that he attend a day school for students with hearing impairments and defective speech, but he refused and was supported by his parents (State ex rel. Beattie v. Board of Ed. of Antigo, 169 Wis. 231, 232, 172 N. W. 153, 1919). During this time the courts frequently sanctioned the exclusion of students. Another court case bringing to light the issues surrounding the appropriate education of a student with special need is the *Board of Education of Cleveland Heights v. State ex rel. Goldman* (1943). In this situation a child with an IQ below 50 was excluded from a school in Ohio. Again, the court of appeals ruled that such exclusion was acceptable for children deemed idiot or imbecile. In 1958 the Supreme Court of Illinois, in *Department of Public Welfare v. Haas*, ruled that the state's compulsory attendance legislation did not require the state to provide a free education for the "feeble minded" or to children who were "mentally deficient". During this time each court case did not breeched the issue of what was considered a free appropriate public education and there was little attention given to establishing a clear and defined set of rules that gave guidance to the education of the disabled. As late as 1969, a North Carolina statute remained on the books allowing the state to label a child "uneducable" and made it a crime for parents to challenge the decision. Between the late 1950s and early 1970s the federal government became involved in securing the right to a public education for students with disabilities. In 1958 Congress passed Grants for Teaching in the Education of Handicapped Children (P.L. 85-926) which awarded grants to institutions of higher learning to assist them in providing training for teachers related to the teaching of the mentally retarded. One million dollars was allocated for ten fiscal years to accomplish this training. In 1961 the legislation expanded to include funds for the education of teachers for the deaf and hard of hearing as well (P. L. 89-10). The Elementary and Secondary Education Act passed by Congress in 1965 attempted to compensate for the neglect of students with disabilities by allocating federal money to the states and giving states control over the education programs for students with disabilities. This law created the Bureau of Education for the Handicapped to administer all federal programs designed for children with disabilities. During the next four years, Congress amended the act three times to provide for testing, experimental preschool programs for children with disabilities. In 1970 this legislation was replaced by the Education of the Handicapped Act, which added more money to the programs and expanded available services (P.L. 91-230).

Public Law 93-380 passed in 1974 included amendments that changed the Elementary and Secondary Act to the Education of the Handicapped Act Amendments of 1974. The **Education Amendments of 1974** (Public Law 93-380) provided for the consolidation of certain education programs and established the National Center for Education Statistics (NCES). It also established two laws: The Education of the Handicapped Amendments of 1974 and the Family Education Rights and Privacy Act (FERPA), which gave parents and students over 18 the right to view student's personal school files. In addition it amended the Bilingual Act and the Equal Education Act. Its new mandates included the following:

•States were required to develop timelines for offering full educational opportunities to all children with disabilities.

•Mainstreaming children with disabilities to the extent possible.

•Procedural safeguards were to be put into practice.

Each amendment supported the goal in providing all students with the right to a FAPE and federal policies and regulations continued to take shape and gain clarity.

Despite a school district's good faith effort to provide appropriate programs and related services for students with disabilities, litigation continued to increase, impacting upon an expanding interpretation of FAPE. Courts had now increased their overall supervision of education. The Individuals with Disabilities Act (IDEA), 20 U.S.C. §§1400 et seq., provides federal funds to assist the states in assuring that each child with a disability receive a free appropriate public education (FAPE). The current history of IDEA began in 1975 with the passage of the Education for All Handicapped Children Act of 1975 (P.L. 94-142). Although the Act has been amended several times to add provisions relating to the education of infants and toddlers (P.L. 99-457), attorneys' fees (P.L.99-373) and its name was changed to Individuals with Disabilities Education Act in 1990 (P.L. 101-476), the first comprehensive revision of IDEA occurred in 1997 with the passage of the 1997 IDEA Amendments (P.L.105-17).

Two court cases giving children with disabilities the right to a public education moved Congress into further action. In 1971, in the case of *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania* the parents of students with mental retardation filed a class action suit challenging a Pennsylvania law that excluded the students from public schools.

The following year, parents of students with disabilities in Washington D.C. challenged the exclusion of their children from public education. *Mills v. Board of Education* (1972) involved a broader range of students than did PARC (1971), including those with behavioral problems, emotional disturbance, and hyperactivity. Seven students brought about this suit after being excluded from the District of Columbia's public school system without due process of the law (Minow, 2004).

As a result of the case, the federal court in the District of Columbia extended the right to a public education to all groups of students with disabilities. The court ruled that no child with a disability could be excluded from a regular school assignment unless that child was provided with adequate alternative educational services suited to the child's needs. The court also ordered the District to provide due process safeguards. The court clearly outlined due process procedures for labeling, placement, and exclusion of

students with disabilities. The procedural safeguards included the following: (a) the right to a hearing with representation with an impartial hearing officer, (b) the right to an appeal, (c) the right to have access to records, and (d) the requirement of written notice at all stages of the process. These safeguards became the framework for the due process component of the Education of All Handicapped Children Act of 1975 (Levine, 1975). This grant formula legislation encompassed most of the significant legal protections to be found in the Individuals with Disabilities Education Act (IDEA), which renamed it in 1990. A Free Appropriate Public Education (FAPE) was guaranteed to all children with disabilities and procedural safeguards for their families were strengthened. Federal dollars were made available to help states meet these increased legal requirements.

Judicial rulings in *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania* (1971) and *Mills v. Board of Education* (1972) first recognized the rights of children with disabilities to a public school education (Kirp, 1973). During the pendency of the P.A.R.C. and Mills cases, federal legislators drafted the Education of the Handicapped Act (EHA) outlining the minimal requirements with which the States and D.C. must comply to receive federal assistance funds for providing education for handicapped students. The Education for All Handicapped Children Act (EAHCA) or Public Law 94-142 (1975), later renamed the Individuals with Disabilities Education Act (IDEA) (1990), furthered the rights of students with disabilities by guaranteeing a free and appropriate public education (FAPE) (Yell, Conroy, Katsiyannis, & Conroy, 2013). Since the enactment of P.L. 94-142, school districts, parents, advocates, hearing officers, and courts have struggled to define the standard for delivery of a free and appropriate public education to students with disabilities. One of the most frequently litigated issues in the area of special education is the appropriateness of a student's education, and who is responsible for providing that education. The IDEA (1990) guarantees each student with a disability an appropriate public education, yet does not clearly define the term appropriate, nor does the IDEA provide sufficient guidance for compliance by educators. Courts vary on rulings identifying what are and are not sufficient offerings and accommodations for students with disabilities. Many school administrators struggle with the question of what services must be offered to students with disabilities, and what constitutes an appropriate education for a student with a disability (Learning Disabilities [legislation], 2001).

In response to the need for clarity, Section 1401(a) (18) of the Individuals with Disabilities Education Act (1997) added a clear definition of FAPE by adding the following to the ruling:

> The term "free and 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, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414 (a) (5) of this title (Beatty, 2013).

Judicial decisions since the enactment of P.L. 94-142 (1975) have increased concern about the rights of students with disabilities and the provisions of specific accommodations and services. The litigation

trend of recent years is of great concern to public school educators and to school districts. *Hendrick Hudson Board of Education. v. Rowley*, 458 U.S. 176 (1982) was the first Supreme Court case regarding special education set the standard for what is a "Free Appropriate Public Education" (Johnson, 2003). Amy Rowley was a deaf student attending Furnace Woods School in Hendrick Hudson Central School District in NY. Before her school attendance, her parents and the school administrators decided to put her in a regular class to determine what kind of supplemental services she would need. It was decided that Amy should remain in regular class, but would be provided with hearing aid. She completed kindergarten year without any difficulty.

When she began her first grade, an IEP was prepared, saying that she should be in a regular class, receive hearing aid, instruction from a tutor for the deaf and a speech therapist. Her parents agreed, but also wanted a sign language interpreter in her classes. But during her kindergarten year, the sign language interpreter reported that she did not need his services after a two-week trial period. The school concluded that Amy did not need an interpreter during her first grade after considering testimony from people familiar with her academic progress. The Rowley party demanded a hearing before an independent examiner. The examiner also agreed that an interpreter was not necessary because Amy could do well academically and socially without assistance. The Rowley family brought the case to the district court, claiming that the denial of sign language interpreter was a violation of a "free appropriate public education" (Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192-194, 199, 102 S.Ct. 3034, 3043-3045, 3047, 1982). The district court found that Amy could advance from grade to grade, but did not perform as well as she could if she were not deaf. Because of the difference between her performance and her potential, the court decided she did not receive a "free appropriate public education", which they defined as an opportunity to achieve her full potential. The court of appeals also agreed with the district court. The court decisions determined that since both district court and court of appeals failed to provide evidence that the school violated the Act, or evidence that Amy's educational program failed to comply with the requirement of the Act, the Supreme Court reversed and remanded the case. Decisions were based on the fact that the Supreme Court focused on the definition of a "free appropriate public education". There was no requirement that the state had to maximize the potential of handicapped children. The specialized educational service for handicapped children did not mean that the service had to maximize each child's potential since it was impossible to measure and compare their potential.

From the history of the cases the Court decided, the intent of the Act was to give handicapped children access to public education. It did not guarantee any level of education for them. The ruling provided children with disabilities access to public schools that also provided a basic floor of opportunity. Not the best education but one where the child has passing grades in classes and is advancing to higher grades.

It wasn't until 1990 that IDEA further expanded the scope of federal regulations in the area of educating children with disabilities (Huefner, 2008). Federal funds were to be provided to states and districts for

educational programs for children with disabilities under the determined conditions set by IDEA. States were required to ensure that:

•All children and youth with disabilities, regardless of the severity of their disability, will receive a Free Appropriate Public Education (FAPE) at public expense.

•Education of children and youth with disabilities will be based on a complete and individual evaluation and assessment of the specific, unique needs of each child.

•An Individualized Educational Program (IEP), or an Individualized Family Services Plan (IFSP), will be drawn up for every child or youth found eligible for special education or early intervention services, stating precisely what kinds of special education and related services or the types of early intervention services, each infant, toddler, preschooler, child, or youth will receive.

•To the maximum extent appropriate, all children and youth with disabilities will be educated in the regular education environment.

•Children and youth receiving special education have the right to receive the related services necessary to benefit from special education instruction. Related services include transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in school, and parent counseling and training (C.F.R.: Title 34; Education; Part 300.16, 1993, No. 96-1973).

•Parents have the right to participate in every decision related to the identification, evaluation, and placement of their child or youth with a disability.

•Parents must give consent for any initial evaluation, assessment, or placement, be notified of any change in placement that may occur and be included, along with teachers, in conferences and meetings held to draw up individualized programs.

•Parents may challenge and appeal any decision related to the identification, evaluation, and placement of their child. Any issue concerning the provision of FAPE, for their child is protected by clearly spelled-out, extensive due process procedures. A “stay-put” provision requires that the child remain in the current placement until any challenge is ruled upon, including all appeals (20 U.S.C. §§ 1400 et seq. (2004) and 34 Part 300 (2006)).

•Parents have the right to confidentiality of information. No one may see a child’s records unless the parents give their written permission.

The Individuals with Disabilities Education Act is both a grants statute and a civil rights statute. It provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a Free Appropriate Public Education (FAPE). One of the major ways FAPE is ensured is by the creation and implementation of an Individualized Education Program

(IEP). The IEP is the blueprint for the education and related services that the Local Educational Agency (LEA) provides for a child with a disability, together with the goals, academic assessment procedures, and placement of the child. The statute also contains detailed due process requirements to ensure the provision of FAPE. Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities, and to judicial decisions requiring that states provide an education for children with disabilities if they provided an education for children without disabilities. However, the statute contains no specific provision relating to which party has the burden of proof in a due process hearing. Generally, when a statute is silent about the burden of proof, the burden is placed on the party initiating the proceeding. However, this is not an absolute rule and other factors such as policy considerations, convenience, and fairness may change the allocation of the burden of proof.

In the 30 years since the special education law was enacted, the U. S. Supreme Court has only heard a few cases that directly involved special education cases. The most important ones that have changes legislation over time began with the *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley 458 U.S. 176 (1982)*. This was the first decision in a special education case that defined the term "free appropriate public education." Cases that followed included *Burlington Sch. Committee v. Mass. Bd. of Ed., 471 U. S. 359 (1985), Honig v. Doe, 484 U.S. 305 (1988), Florence Co. School District Four v. Shannon Carter, 510 U.S. 7, (1993), Cedar Rapids v. Garret F. (1999), Schaeffer v. Weast (2005) and Forest Grove v. T.D., 129 S. Ct. 987 08-305, 109 LRP 13476 (2009).*

Burlington Sch. Committee v. Mass. Bd. of Ed., 471 U. S. 359 (1985) clarified procedural safeguards, parent role in educational decision-making and tuition reimbursement for private placement and a child's placement during dispute about FAPE. The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. § 1401 et seq., requires participating state and local educational agencies "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education" to such handicapped children. § 1415(a). These procedures include the right of the parents to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a proposed IEP with which they disagree. § § 1401(19), 1415(b), (d), (e). Where as in the present case review of a contested IEP takes years to run its course, important practical questions arise concerning interim placement of the child and financial responsibility for that placement.

Honig v. Doe, 484 U.S. 305 (1988) was important in the area of school discipline as it relates to students with disabilities. Jack, who attended a developmental center for students with disabilities, was described as a socially and physically awkward teenager who had considerable difficulty controlling his impulses and anger. In response to taunts, he attacked and choked a fellow student and kicked out a window. The U.S. Supreme Court determined that the LEA could not indefinitely suspend students with disabilities like Jack's but that, because LEA officials have an interest in maintaining a safe learning environment for all their students, they could seek an injunction to remove him from his "then current educational placement" in public school pending outcome of administrative and judicial proceedings

(Hersh & Johansen, 2007). This case made favorable decisions on behalf of emotionally disturbed children who had academic and social problems. Court clarified procedural issues designed to protect children from school officials and that schools shall not expel children for behaviors related to their handicaps.

Florence Co. School District Four v. Shannon Carter, 510 U.S. 7, (1993) was a case involving tuition reimbursement for families of children with disabilities. If the public school program does not provide an appropriate education and the parents place the child into a private program where the child does receive an appropriate education, the parents are entitled to reimbursement for the child's education. This decision opened the door to children with autism who receive ABA/Lovaas therapy. After respondent Shannon Carter, a student in petitioner public school district, was classified as learning disabled, school officials met with her parents to formulate an individualized education program (IEP), as required under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Shannon's parents requested a hearing to challenge the proposed IEP's appropriateness. In the meantime, Shannon's parents enrolled her in Trident Academy, a private school specializing in educating children with disabilities. After the state and local educational authorities concluded that the IEP was adequate, Shannon's parents filed this suit, claiming that the school district had breached its duty under IDEA to provide Shannon with a "free appropriate public education," §1401(a)(18), and seeking reimbursement for tuition and other costs incurred at Trident. The District Court ruled in the parents' favor, holding that the proposed IEP violated IDEA, and that the education Shannon received at Trident was "appropriate" and in substantial compliance with IDEA's substantive requirements, even though the school did not comply with all of the Act's procedures. In affirming, the Court of Appeals rejected the school district's argument that reimbursement is never proper when the parents choose a private school that is not approved by the State or that does not comply with all of the requirements of §1401(a)(18). In this situation, A court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and put the child in a private school that provides an education that is otherwise proper under IDEA, but does not meet all of §1401(a)(18)'s requirements.

Cedar Rapids v. Garret F. (1999) affirmed that schools must provide related services to children who need services to attend school. Garret F., a minor and student in Cedar Rapids Community School District, is wheelchair-bound and ventilator dependent. He requires assistance in attending to his physical needs during the school day. The school district declined to accept financial responsibility for Garret's services in order for him to be able to attend school. The school district believed it was not legally obligated to provide one-on-one care. An Administrative Law judge concluded that the Individuals with Disabilities Education Act (IDEA) required the school district to provide "school health services," which are provided by a "qualified school nurse or other qualified person," but not medical services, which are limited to services provided by a physician. The District Court and the Court of Appeals affirmed despite arguments from the school district that such one-on-one care is too costly and too involved to be

considered anything but medical in nature (*Cedar Rapids Comm. Sch.Dist. v. Garret F. and Charlene F., 1998*).

Schaeffer v. Weast (2005) is a case concerning the educational services that were due, under IDEA, to petitioner Brian Schaffer. Brian suffers from learning disabilities and speech-language impairments. From prekindergarten through seventh grade he attended a private school and struggled academically. In 1997, school officials informed Brian's mother that he needed a school that could better accommodate his needs. Brian's parents contacted respondent Montgomery County Public Schools System (MCPS) seeking a placement for him for the following school year. MCPS evaluated Brian and convened an IEP team. The committee generated an initial IEP offering Brian a place in either of two MCPS middle schools. Brian's parents were not satisfied with the arrangement, believing that Brian needed smaller classes and more intensive services. The Schaffers thus enrolled Brian in another private school, and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education. This outcome of this case puts burden of proof on the party bringing the action in a special education matter. Prior to this, the Seventh Circuit had placed that burden on the school and/or cooperative, without regard to who initiated the action. The court further determined that a school district has no unfair information or resource advantage that would compel a court to reassign the burden of proof to a school system when the parents initiate the proceedings. Noting that Congress enacted the IDEA with the clear intention of deferring to local school authorities the task of developing educational plans for students with disabilities the court saw that it is reasonable to require parents attacking the terms of an IEP to bear the burden of showing why it is deficient. In essence the court found no reason to depart from the general rule that a party initiating a proceeding bears the burden of proof (*Weast v. Schaffer*, 377 F.3d 449, 4th Cir., 2004).

Forest Grove v. T.A., 129 S. Ct. 987 08-305, 109 LRP 13476 (2009) had an outcome in which the Supreme Court decision clarified the federal law. The Supreme Court of the United States determined that the IDEA authorizes reimbursement for private special-education services when a public school fails to provide a free and appropriate public education to students with disabilities. Private school placement would then be determined appropriate, regardless of whether the child previously received services through the public school. The court said: "Moreover, when a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP." The court also noted, "We conclude that IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school." Prior to this, there was a split among the federal court circuits as to whether 20 U.S.C. § 1412(a) (10) (C) created a categorical bar to reimbursement of private school tuition for students who have not "previously received special education and related services" (IDEA § 1412(a)(10)(C)(ii). In a 6-3 decision, the Supreme Court held that this dispute concerns not the adequacy of a proposed IEP but the School District's failure to

provide an IEP at all (Baron, 2009). When a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.

The outcomes of each court case helped shaped the present Policies outlined in IDEA and the specific issues involved when identifying the definition of a Free and Appropriate Public Education. The research into historic court cases concerning FAPE, LRE and the Development of an IEP continues to be revisited as cases are brought to the courts in current events. States must uphold federal policies outlined by the IDEA and the No Child Left Behind initiatives that have evolved from established policies and laws. In 1975 when Congress passed Public Law 94-142, the Education for All Handicapped Children Act (EAHCA), not every public official embraced the bill. President Ford called the Act "the potentially most expensive piece of legislation for disabled people ever passed by Congress." Congressional and presidential concerns were expressed about the final bill however, it "enjoyed widespread bipartisan support and passed by a large margin." Under the EAHCA, when States received federal special education funding, they were required to implement an Individualized Education Program (IEP) for each student with a disability in order to provide the individual with a Free, Appropriate Public Education (FAPE). The Individuals with Disabilities Act (IDEA) provides federal funds to states that develop plans to assure "all children with disabilities the right to a free appropriate public education." A free appropriate public education (FAPE) "must be available to all children residing in the State between the ages of three and twenty-one, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d)."

The determination that a child is eligible for special education services "must be made on an individual basis by the group responsible within the child's local educational agency [e.g., school district] for making eligibility determinations." Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade. The free appropriate public education, mandated by federal law, must include special education and related services tailored to meet the unique needs of a particular child and be reasonably calculated to enable the child to receive educational benefits. The FAPE guaranteed by the IDEA must provide a disabled child with meaningful access to the educational process.

IDEA is a United States federal law that is considered both a grants statute and civil rights statute. This law provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). This law continues to give guidance to public educators and govern how states and public agencies provide early intervention and special education and related services to children with disabilities. It was established as a way of addressing the individualized educational needs of children with disabilities from birth through age twenty-one. As a result of needing to individualize a student's education, Individualized Education Programs (IEPs) were first required in 1975 after Congress passed PL 94-142. The IEP can be considered

a blueprint in child that documents the student's educational and habilitative needs and what services and supports will be provided to help the student make progress. Prior to the Individuals with Disabilities Education Act, it was up to schools whether to provide services and supports to students with disabilities. Once this law was signed schools were provided guidance in what services and supports should be offered to students with disabilities in an effort to comply with the rules and regulations and to continue receiving funding from the federal government. The heart of the law is the child's written IEP, which allows the child with a disability to receive a free appropriate public education (FAPE). The U.S. Supreme Court clarified the requirements of a FAPE in its first special education decision, Board of Education v. Rowley (1982), when it further defined a FAPE as,

> …personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade (Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192-194, 199, 102 S. Ct., 3034, 3047).

According to the U.S. Supreme Court in the Rowley case an appropriate program means, "An individualized Education Program (IEP) which was developed in procedural compliance with the requirements of the law and is reasonably calculated to allow the child to receive educational benefit". Furthermore it was mandated that students with disabilities should be educated with nondisabled children in the general education setting to the maximum extent appropriate (IDEA: 458 U.S. 207). As a result of this court case, the court provided future direction for abiding by the regulations by suggesting a two-part test that asks two questions. 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? (Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192-194, 199, 102 S.Ct., 3044). If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more. IDEA mandates that a "free appropriate education is available to all children with disabilities residing in the state between the ages of 3 and 21," which is consistent with an IEP. Once the child has been diagnosed with one of the twelve categories of disability and it has been determined that an IEP is necessary an IEP must be developed and then implemented, reviewed and updated at least annually. The IEP document is completed at an IEP meeting by an Interdisciplinary Team (IDT) of professionals, including the student's parents or guardian. The IEP meeting often serves as a communication vehicle between the parents and school. As demonstrated by the court cases reviewed in this paper, it is important that families are included in all decisions made concerning the educational program of their child. The greater the

communication and clarity in decisions made for programming, the greater the collaborative efforts between the school and the family become in order to meet the child's needs.

Legal conclusions about what services, programs, and accommodations are necessary to provide FAPE in the LRE to students with special needs are limited to the holdings in and logical extensions of the cited case law. Students may require additional (or fewer) services, programs or accommodations based on assessments and evaluations. Furthermore, because of the way disabilities manifests in each individual student, what may be deemed appropriate services, programs and accommodations for one student may be inappropriate or unnecessary for another student. Eligibility teams must apply the eligibility criteria to each student in an individualized, but consistent, manner, and IEP teams similarly must determine IEP services, goals, and objectives in an individualized, but consistent, manner. In Board of Education of Hendrick Hudson Central School District v. Rowley, the United States Supreme Court mandated that a reviewing court conduct a two prong inquiry to determine whether a student's IEP fulfils the school district's obligation to provide a FAPE. Under the first prong, the reviewing court must determine whether the state has complied with IDEA's procedural requirements. Under the second prong, the reviewing court must determine whether the IEP is reasonably calculated to confer some educational benefit on a disabled child. In that regard, the Supreme Court added to the definition of a FAPE by including that a FAPE must provide disabled children with a "basic floor of educational opportunity ... [which] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." (Karger, 2004). Yet, it is important to note that the IDEA does not require a school district to provide a child with the best possible education. Nor does the statute require a school district to furnish every special service necessary "to maximize each handicapped child's potential." Instead, the Second Circuit Court of Appeals has held that a school district can satisfy its obligation to provide a disabled child with a FAPE by providing "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." (458 U.S. 176, 182, 1401 18). A school need not "provide the optimal level of services, or even a level that would confer additional benefits." The Eleventh Circuit Court of Appeals has held that "appropriate education" means "making measurable and adequate gains in the classroom. If 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, they are not required" by the IDEA.

The Court set the standards for identifying a FAPE by developing a two-pronged inquiry for determining whether a school district had provided a student with FAPE. This was to include the following:

1) Compliance with the procedural requirements of the statute;
2) Development of an IEP reasonably calculated to enable the child to receive some educational benefit (458 U.S. at 206-07) (Karger, 2004).

Applying the two-pronged test, the Court found that the school district in *Rowley* had complied with the procedural requirements of the statute and that the student was receiving educational benefit because she was performing better than the average student and was advancing easily from grade to grade.

The *Rowley* two-pronged test became highly utilized by courts to interpret further the meaning of FAPE. The importance of procedural compliance began to gain attention when some courts found that a procedural violation alone can constitute a denial of FAPE. For the most part, however, courts have held that a procedural violation, without evidence of loss of educational opportunity to the student, does not constitute a denial of FAPE. With respect to the second prong, courts continued to struggle with determining the adherence to policies in the development of the IEP. Some courts have held that although FAPE does not require students to receive the maximum potential benefit, the benefit must be more than minimal. This issues has been raised in court cases such as; *Doe v. Smith and Polk v. Cent. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 179-80 (3d Cir. 1988). On the other hand, other courts have held that the amount of educational benefit does not have to be meaningful. For example, in *JSK v. Hendry County School Board,* the Eleventh Circuit held that under *Rowley,* districts were required to provide students with disabilities only a "basic floor of opportunity" - i.e., meaningful "access to a public education," *not* meaningful "educational benefit" (941 F.2d 1563, 1572, 11th Cir. 1992).

In 1982, in *Board of Education v. Rowley,* the United States Supreme Court first interpreted the meaning of an "appropriate" education under FAPE (458 U.S. 176 (1982). Over the years, the courts have helped define what FAPE is and is not. There was no discussion of what 'appropriate' services meant or how and where services would be provided to children with disabilities and remained at the complete discretion of the local education authority. In 1974, Congress addressed 'appropriate' education for children with disabilities by passing the Education of the Handicapped Act amendment and the subsequent passage of P.L. 94-142. The Education for All Handicapped Children Act of 1975 mandated FAPE and ensured due process, Individual Education Programs (IEPs), and Least Restrictive Placements (LREs). It required local education authorities to provide educational services within the community, which allowed children with disabilities to remain living with their families. Although children were provided access to schools within their districts, this still created two educational tracks—one for non-disabled children and a second for children with disabilities. FAPE has been part of the federal special education law from this time of its inception. The law requires states to make FAPE available to children whose disabilities qualify them for special education and related services. In addition to the free appropriate public education requirement, IDEA's preference is for disabled children to be educated in the least restrictive environment capable of meeting their needs. IDEA sets forth a strong congressional preference for integrating children with disabilities in the regular classrooms (Oberti v. Board of Education, 995 F. 2d 1204 (3d Cir., 1993). School districts must evaluate whether a child with a disability can be educated in a regular classroom if provided with supplementary aids and services. The Act's least restrictive environment requirement is met when the child with a disability is educated in the regular classroom, or when the child who cannot be fully included is mainstreamed to the "maximum extent possible.

In 1990, the law was reauthorized and renamed the Individuals with Disabilities Education Act (IDEA) and continues to provide access to general education services for children with disabilities by

encouraging that support and related services be provided to children in their general education settings as much as possible. This assists policy leaders and stakeholders in identifying, disseminating, and aligning evidence-based outcome producing practices with the Federal Government's commitment to leaving no child behind in the attainment of a free appropriate public education. The Federal laws mandate that special education and related services be provided to students with individualized educational programs (IEPs).

The definition of FAPE has changed over the years, however, did not change at all in the most recent reauthorization of the Individuals with Disabilities Education Act in 2004. IDEA's current definition of FAPE is found in the implementing regulations at §300.17.

> *Free appropriate public education* or *FAPE* means special education and related services that—
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;
>
> (b) Meet the standards of the SEA [state education agency], including the requirements of this part;
>
> (c) Include an appropriate preschool, elementary school or secondary school education in the State involved; and
>
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §300.320 through 300.324.

FAPE is the fundamental core of the IDEA and the IEP documents how a FAPE is provided for the student. Conceptually, FAPE is both the goal and the path to reaching the goal and is an entitlement of a child with a disability. IDEA defines that term in which a FAPE is provided and the IEP serves as a means by which this entitlement is mapped out (Individuals with Disabilities Education Act, 20 U.S.C. § 1400, 2006).

Educators and policy makers are confronted with the issues of defining a free and appropriate public education when the reality remains that it is defined differently *for each child with a disability*. While each child's education must be free and while a public agency provides and pays for that education, what is "appropriate" for one child will not necessarily be appropriate for another. Determining what is appropriate for a specific child requires an individualized evaluation in which the child's strengths and weaknesses are identified in detail. It also requires gathering information about the child's participation in the general curriculum and other matters. Information gathered through this type of evaluation then illuminates the dimensions of an "appropriate" education for a given child. In any and every case however, the school is responsible for providing the child with a free appropriate education (FAPE) and the child's Individualized Education Program (IEP) must be developed acting as a roadmap that describes how the school will meet this requirement.

It is best practice for state level educational administration and district level faculty members to be aware of the research into past court cases that address the educational rights of students with special needs as outline by the federal IDEA. Assessment and Eligibility determination is the first step that begins the development of an IEP to address a student's individual needs. Administrators and team members

important in the PPT process must focus on best practices in an assessment process and the development of an Individualized Education Program. This begins following a comprehensive evaluation process and appropriate assessment techniques to monitor student performance to determine the need for modifications that address the student's changing needs. However, it must also be noted, that 34 C.F.R. Section 300.101(c) states that a Free and Appropriate Public Education (FAPE), must be available to any child with a disability who needs special education and related services, even if the child has not failed or been retained in a course or grade and is advancing from grade to grade. IEP's must be designed to assure that goals and objectives are designed for the needs of the individual student. Policymakers have set that a FAPE is defined as "the provision of regular or special education and related aids and services that 'are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met'" (Note 1). Provision of FAPE may require that a student with a disability receive specialized instruction and related services under the protection of the IDEA, which provides an IEP and additional procedural safeguards, while also protecting that student from discrimination (Note 2). For a child to meet eligibility for special education and related services under the IDEA, the child's disability must adversely affect educational performance. If this qualifying condition is not met, the child will not be eligible for special education and related services under the IDEA. Best practices for assessment is a process of obtaining information about students so that teachers, other school professionals and parents can make informed decisions about a students' education. A comprehensive and valued assessment is key to ensuring a student's access to appropriate educational opportunities and FAPE.

With respect to the PPT process, assessment decisions focus on (1) determining the student's eligibility for special education and related services, (2) developing the student's Individualized Education Program (IEP), and (3) ongoing measurement and monitoring of student performance. These decisions are made appropriately when assessment is conducted in a comprehensive and valid manner using various sources of information as appropriate such as observations, evaluation measures, ratings scales and normative data (Note 3). Additionally, the measures employed must be considered valid and reliable for the group to which the measures are administered.

Information and involvement from parents/family is essential in designing a comprehensive assessment. Input from parents ensure that the appropriate information is collected, documented, used in determining eligibility and included when the PPT determines that an IEP will be developed. When the PPT engages in designing an initial evaluation or reevaluation to determine eligibility for special education, the IDEA 2004 requires that school personnel collect and consider parental input (Note 4).

Once eligibility for special education services has been established, attention must shift to development of an overall plan that can meet the student's educational needs. In developing the IEP for all special education students it is required that goals, objectives and program characteristics be developed before specific program and education setting decisions are made. The PPT is a means to assure that the student is not abruptly removed from his or her current educational setting to a more restrictive setting. The team

must develop goals and objectives, determine appropriate supports and services and agree on the service providers prior to addressing placement in the least restrictive educational setting. IEP development requires that goals and objectives be written based on the student's profile and current level of performance and that the goals and objectives reflect the appropriate specialized instruction. The definition of special education found in 34 CFR Section 300.39, clarifies that special education and specialized instruction encompass more than only academic instruction. PPTs must consider all aspects of the child's functioning at school, including social/emotional, cognitive, communication, vocational and independent living skills and not limit the development of goals and objectives to academic areas. The referral process, quality assessment, data collection and each step involved in planning for a child's educational program must be conducted in such a manner that all parties are made aware of, and part of the decision making process. Providing a student with a free and appropriate public education as specified in IDEA can only be accomplished if the development and execution of an IEP is carried out by each team member involved in the child's plan.

The PPT determines the least restrictive environment or setting in which the goals and objectives, services and interventions will be implemented. By law, schools are required to provide a FAPE in the LRE that is appropriate to the individual student's needs (Note 5). A student who has a disability identified in IDEA should have the opportunity to be educated with nondisabled peers, to the greatest extent appropriate. Identified students should have access to the general education curriculum. Extracurricular activities or any other program that nondisabled peers would be able to access. The student should be provided with supplementary aids and services necessary to achieve educational goals if placed in a setting with nondisabled peers. While assessment information will be the basis for determining which interventions, strategies and/or services will be written into the student's IEP, along with goals and objectives (Note 6).

Special classes, separate schooling or other removal of children with disabilities from the general education environment occurs only if the nature or severity of the disability is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily (Note 7). Each child requiring special education services should be educated in the schools that he or she would attend if he or she did not require special education and related services unless the IEP requires another placement.

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs, and provides for the use of appropriate special education services (Note 8). Federal regulation requires that an IEP include a statement of the student's present levels of educational performance, including a description of how the student's disability affects his or her progress in the general curriculum (Note 9). School districts may use a variety of assessment techniques such as criterion-referenced tests, standard achievement tests, diagnostic tests, other tests, or any

combination thereof to determine the student's present levels of performance and areas of need (Note 10).

An IEP must also include a statement of the special education and related services and supplementary aids and services to be provided to or on behalf of the student, as well as a statement of the program modifications or supports for school personnel that will be provided to the student (Note 11). Such education, services and aids must be sufficient to allow the student to advance appropriately toward attaining his or her annual goals (Note 12).

An IEP must also include measurable annual goals, including benchmarks or short-term objectives, related to meeting the student's needs arising from his or her disability to enable the student to be involved in and progress in the general curriculum, and meeting the student's other educational needs arising from the disability (Note 13). In addition, an IEP must describe how the student's progress towards the annual goals will be measured and how the student's parents will be regularly informed of such progress (Note 14). In addition, the IDEA mandates that all students with disabilities be educated with nondisabled children to the maximum extent appropriate and may only be removed to a more restrictive environment when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (Note 15). Special education and related services must be provided in the least restrictive setting consistent with a [student's] needs (Note 16) The test for determining whether a school district has complied with the LRE requirement consists of two prongs: 1) whether the student can be educated in a regular classroom with the use of supplemental aids and services, and 2) whether the school district has mainstreamed the student to the maximum extent appropriate (Note 17). Several factors must be considered at each stage of the inquiry. When determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services, these factors include, but are not limited to: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class (Note 18)".

To ensure the appropriate and effective implementation of a student's educational program, a systematic process for monitoring student performance on an ongoing basis should be developed. This process delineates ways in which documentation of all student outcomes written in the IEP can be gathered across all educational settings. This process also guides recommendations for program modifications and changes, monitors timelines and can assist in providing evidence for continued eligibility as a student who requires special education services. Additionally, ongoing assessment provides for daily or weekly data collection and monitoring of student performance, revealing what does and does not work. Progress monitoring drives instructional modifications and changes in the IEP that enable students to succeed (Note 19). When team members have knowledge of data describing student performance, they are better informed and able to contribute to meetings in which important decisions are made (team meetings,

annual reviews, triennial reviews, etc.). Ongoing assessment and progress monitoring provides a record of student performance over a substantial period of time and enables those involved in annual and triennial reviews to make decisions that are based on a substantive data. In other words, the ongoing recording and reviewing of data informs educators about student performance with respect to the goals, objectives and timelines of the educational program (Note 20).

Ongoing assessment also provides the PPT with evidence as to whether the student continues to meet the eligibility criteria for special education and related services. Those included in the administration and implementation of the educational program, such as teachers, parents, students, related services personnel and community liaisons should contribute to the ongoing monitoring of student progress. Anecdotal notes or logs of meetings and conversations that focus on student progress are also recommended. Progress monitoring practices/activities should be designed to illustrate the success of interventions and student progress and achievement of IEP goals and objectives. Communication and documentation are essential elements in the process. The systems and processes by which educational professionals monitor and document progress vary and can best be determined by those most closely involved. For example, a group of teachers in an elementary school might schedule informal meetings where the performance of a student can be reviewed and information shared. Others might choose to employ the use of an assignment notebook, chart and/or journal whereby student work can be recorded and monitored by teachers, parents and the student. At the secondary level, regularly scheduled team planning meetings can highlight the needs and progress of specific students. Such practices and activities provide for the collection of data, the analysis of student performance and the recommendation for appropriate modifications and adjustments to interventions and the IEP. Throughout the progress monitoring process, educators should provide data to parents/families in a manner that is easily understood; engage families in ongoing communication, which focuses on their view of the student's progress. Families should be viewed as partners and participants in the progress monitoring process. Regular and ongoing assessment of student performance through frequent progress monitoring in all areas of focus will facilitate the provision of successful interventions and appropriate specialized instruction and services. Ongoing collaboration between school and family is essential to student success. Collaboration among school, home and private/public agencies is a continuing process. School-based case manager services are assigned by the school district to coordinate the collaboration of multiagency personnel and to assist students.

The overriding theme of the IDEA is that IEPs and educational programs for students with disabilities must be individualized. There have been many causes where courts have indicated that IEP are not individualized. Two such cases are: (1) Chris D. v Montgomery County Board of Education, 1990; and Gerstmyer v. Howard County Public School, 1994. Both cases share various accounts of how the court system have dealt with public school district when parents file a due process compliant with allegations that their child is not being provided a free appropriate public education due to the lack of or an inappropriate IEP. Another area in which procedural violations have been discussed relates to three

obligatory statements concerning involvement in the general curriculum that IDEA '97 requires the IEP to contain. The IEP must state: (1) how the student's disability affects his/her involvement in the general curriculum; (2) the goals and objectives that will enable the student to be involved in the general curriculum; and (3) the supplemental aids and services, program modifications and support for personnel that will help the student to be involved in the general curriculum (Note 21).

Claims concerning these three requirements have tended to focus on the sufficiency of the statement in the IEP. For example, in *J.S. & T.S. v. Shoreline School District*, parents claimed that the statement in their son's IEP regarding how his disability affected his involvement and progress in the general curriculum was insufficient (Note 22). The court found that although the IEP made only passing reference to the student's Attention Deficit Hyperactivity Disorder, the impact of the vagueness of this statement was minimal. The court noted that there was no legal authority prescribing a "threshold level of comprehensiveness" for such a statement (Note 23). Therefore, the court concluded that the district had met its obligation and that the student had not been denied FAPE (Note 24). Similarly, in *J.W. v. Contocook Valley School District*, the court found that although some of the IEP goals were not measurable or appropriately related to the general curriculum, the violation was not substantive (Note 25). With respect to the third requirement concerning involvement, in *John M. v. Board of Education of Evanston Community Consolidated School District 65*, the court found that although the IEP contained the sparse statement: "support + consultation as needed and determined by staff," the district had met its obligation because it had made sufficient services available to the student (Note 26). The court noted, "The fact that the IEP does not go into detail cannot be concluded to be a procedural violation of the Act" (Note 27).

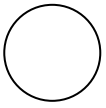
Thus, courts and hearing officers seem to have a minimal standard for sufficiency that is relatively easy for districts to satisfy with respect to these three IEP requirements. This approach is not entirely surprising given the tendency of courts and hearing officers, following *Rowley*, to hold districts to a "basic floor" standard and not to require them to maximize the potential of each child. The interpretation given by the courts and hearing officers means that districts must show that they have met their obligations concerning these statements, but only on a minimal level.

Throughout American history, public schools have functioned as an agency of socialization and social control. As such, schools have continued to evolve in response to the pressures placed upon them by the social organizations they serve. In response to these social pressures, schools continue to change and become more specialized, attempting to develop specific programs for the various student populations. The wealth of court cases involving IDEA has resulted in a refined definition of "free appropriate public education", much deeper and more nuanced than it was when Congress first enacted the law (Note 28). It is difficult to foresee what further changes will be brought about by Congress's reauthorizations or by the new No Child Left Behind legislation. NCLB requires, among other provisions, that States adopt challenging content and achievement standards for all students, including students with disabilities (Note 29). It is likely that, as a result of this requirement in NCLB, future claims brought under IDEA for a

denial of FAPE may very well include consideration of the schools' ability to provide students with disabilities the opportunity to learn the material in a states curriculum frameworks as well as the general curriculum. NCLB has an immediate impact because it is far more specific than past versions of the law and it deals with testing; accountability and Adequate Yearly Progress (AYP); school choice; teacher quality; and para-educator quality (Note 30). Stemming from the Education for all Handicapped Children Act (EAHCA) of 1975, the Individuals with Disabilities Education Act was enacted in its first form in 1997, and then reenacted with new education aspects in 2006 (Note 31). It kept the EAHCA requirements of free and accessible education for all children. The 2004 IDEA authorized formula grants to states and discretionary grants for research, technology and training. It also required schools to use research-based interventions to assist students with disabilities (Note 32).

The amount of funding each school would receive from its "Local Education Agency" for each year would be divided by the number of children with disabilities and multiplied by the number of students with disabilities participating in the school wide programs. Particularly since 2004, policymakers have sought to align IDEA with NCLB (Note 33). The most obvious points of alignment include the shared requirements for Highly Qualified Teachers, for establishment of goals for students with special needs, and for assessment levels for these students. In 2004, George Bush signed provisions that would define for both of these acts what was considered a "highly qualified teacher" (Note 34).

Table 1. Qualitative Methods Approach for Appropriate Law and Policy Review

	Descriptive Claims	**Causal Claims**
Claims about Cases in Sample		Counterfactuals
Claims about Cases in Broader Population	Sampling	Sampling and Counterfactuals

3. Discussion

The lack of a substantive definition of the appropriateness standard has caused substantial litigation between school systems and parents of children with disabilities. Even a general definition of the term "educational appropriateness," as education that supports a quantifiable measure of meaningful and adequate progress towards achieving skills to promote literacy, communication and self-sufficiency, might be enough, if stated within the IDEA itself or within the DOE's regulations. The achievement of educational adequacy can no longer focus upon minimal educational benefit, based on a state's unguided standard of appropriate goals. As long as individualized special education and support services are provided in the LRE, the student is making some progress towards reasonably calculated goals, and proper procedure has been followed, states have been given latitude to do as little as is warranted to comply with the Act. Valid requests for more effective educational methods have been seen as

"maximizing Potential" or providing "utopian" measures (Note 35). Yet, methodological considerations make a substantial difference in the rate or even ability of a child with disabilities to learn what is clearly prerequisite to self-sufficiency as currently mandated within the act. Without a clear federal definition to support the IDEA, a source of controversy, dispute, and litigation may exist for years to come. The DOE has had the opportunity to refine this ambiguous standard by incorporating a definition for the term appropriate within the guidelines they have promulgated for the IDEA. Before the dust settles on the enactment of the DOE's regulations for this very comprehensive and well-crafted Act, it would be wise for this administrative body to insure the inclusion of this long absent definition. States have been awaiting the finalization of the DOE regulations to ensure that their own standards are in compliance with the IDEA. The pressures of the moment make it all the more important for the DOE or some other authoritative federal source to resolve this open question.

One thing that is made certain in this case review is that the definition of Free Appropriate Public Education will continue to evolve as legislation changes and challenges to the act are brought into court. State law should always be checked. Each state has its own statutes and regulations implementing the IDEA. While these state statutes and regulations usually mirror the federal statutes and regulations, this is not always the case. For example, federal statutes and regulations are silent on some points, and Congress has allowed states to develop independent standards in some areas. Further, while the state may not provide fewer rights, some states actually provide more substantive and procedural rights than required under IDEA.

4. Results

The IDEA is a "comprehensive scheme, set up by Congress, to aid the States in complying with their constitutional obligations to provide public education for handicapped children". Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to have access to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute. The IDEA was an attempt to relieve the fiscal burden placed on states and localities by their responsibility to provide education for all handicapped (Note 36). At the same time, however, Congress made clear that the IDEA is not simply a funding statue. The responsibility for providing the required education remains on the states (Note 37). "The IDEA establishes and enforces a substantive right to a free, appropriate public education" (Note 38).

The cornerstone for resolving disputes between parents and districts as to eligibility, FAPE, and other issues under the IDEA, is an impartial administrative adjudication conducted by a hearing/review officer (H/RO). The IDEA gives states the choice of having a one-tiered system, consisting solely of an impartial due process hearing, or a two-tiered system, which includes an additional officer level review. Subsequent to exhausting this administrative adjudication, the aggrieved party has the right to judicial review in state or federal court (Note 39). The IDEA accords judges the authority to award attorneys' fees

in specified circumstances and, without further specification, requires them to grant "such relief as the court determines is appropriate". The IDEA and its regulations, however, are largely silent about the remedial authority of the impartial H/ROs. The language of the IDEA and its regulations are not particularly helpful in this regard, but a growing body of published administrative and case law provides useful and enforceable demarcations that warrant careful consideration by H/ROs and other interested individuals (Note 40). The addition of qualifications for H/ROs in the IDEA reauthorization, concerning H/ROs' knowledge and ability to understand special education law, to conduct hearings, and to "render and write decisions", appears to reinforce the need for H/ROs to be aware of and to act in conformance with the limits on their remedial powers. The codification of the applicable authority, including the boundaries for H/ROs, merits not only the attention of Congress, which has neglected this important area of policy-making as a foundation for state variation, but also customized elaboration in state special education statutes and regulations (Note 41).

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Notes

Note 1. 34 C.F.R. Section 104.33[b] [1].

Note 2. See generally OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM (2000), http://ed.gov/parents/needs/speced/iepguide/iepguide.pdf.

Note 3. i.e., age, gender, ethnicity and language.

Note 4. 34 C.F.R. Sections 300.304[b][1].

300.305[a][l][i] and 300.305[a][2], and 300.306[c][l][i]).

Note 5. LRE refers to the education of students with disabilities to the maximum extent appropriate in a setting together with students without disabilities (20 U.S.C. §1412(a)(5)(A)).

Note 6. Jean B. Crockett and Mitchell L. Yell, 2008. Without Data all we have are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education. *Journal of Law & Education, Vol. 37*, No. 3, 386.

Ibid, p. 387.

Note 7. 34 C.F.R. Section300.114[a][2][ii].

Note 8. Application of a Child with a Disability, Ap.peal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9.

Note 9. 34 C.F.R. § 300.347[a][1].

Note 10. 34 C.F.R. Part 300, Appendix A, Section 1, Question 1.

Note 11. 34 C.F.R. § 300.347[a][3].

Note 12. 34 C.F.R. § 300.347[a][3][i].

Note 13. 34 C.F.R. § 300.347[a][2].

Note 14. 34 C.F.R. § 300.347[a][7].

Note 15. 20 U.S.C. § 1412[a][5][A]; 34 C.F.R. § 300.550[a][2]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1213 [3d Cir. 1993]; Briggs v. Bd. of Educ., 882 F.2d 688, 691 [2d Cir. 1989]; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 [5th Cir. 1989]; Warton v. Bd. of Educ., 217 F. Supp.2d 261, 273 n.1 [D. Conn. 2002]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp.2d 534, 538 n.3 [D. Conn. 2002]; Mavis v. Sobol, 839 F. Supp. 968, 982 n.25 [N.D.N.Y. 1994]; Application of a Child with a Disability, Appeal No. 03-009; Application of a Child with a Disability, Appeal No. 00-093; Application of a Child with a Disability, Appeal No. 94-21).

Note 16. Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 [2d Cir. 1998].

Note 17. (Daniel R.R., 874 F.2d at 1048; Oberti 995 F.2d at 1213; Warton, 217 F. Supp.2d at 274; A.S. v. Norwalk, 183 F. Supp.2d at 542 n.8; Mavis, 839 F. Supp. at 985; Application of a Child with a Disability, Appeal No. 00-093; Application of a Child with a Disability, Appeal No. 98-24).

Note 18. (Oberti, 995 F.2d at 1217-18; see also Daniel R.R., 874 F.2d at 1048-1049; Mavis, 839 F. Supp. at 987-990; Application of a Child with a Disability, Appeal No. 03-009; Application of a Child with a Disability, Appeal No. 00-093; Application of a Child with a Disability, Appeal No. 94-21).

Note 19. Jean B. Crockett and Mitchell L. Yell, 2008. **Without Data all we have are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education.** *Journal of Law & Education, Vol. 37*, No. 3, 386.

Note 20. Ibid, p. 387.

Note 21. 20 U.S.C. §§ 1414(d)(1)(A)(i)-(iii).

Note 22. 220 F. Supp. 2d 1175, 1187 (W.D. Wash. 2002).

Note 23. Id.

Note 24. Id.

Note 25. 154 F. Supp. 2d 217, 222 (D. N.H. 2001).

See also Barber v. Bogalusa City Sch. Bd., 2001 U.S. Dist. LEXIS 8156, 5-6 (E.D. Lo 2001); *John M.*, No. 01-C-1052, 01-C-1063, 2002 U.S. Dist. LEXIS 10931 (N.D. Ill 2002); *Yarmouth Sch. Dept.*, 36 IDELR 148 (Me. SEA 2001); *Board of Educ. of the Penfield Centr. Sch. Dist.*, 38 IDELR 80 (N.Y. SEA 2002); *Ysleta Indep. Sch. Dist.*, 33 IDELR 53 (Tex. SEA 2000).

Note 26. No. 01-C-1052, 01-C-1063, 2002 U.S. Dist. LEXIS 10931 (N.D. Ill 2002).

Note 27. Id.

Note 28. Martin W. Bates, "Free Appropriate Public Education under the Individuals with Disabilities Education Act: Requirements, Issues and Suggestions." *Brigham Young University Education & Law Journal*, spring, 1994, 215, 220-222.

Note 29. Sec. 1111(b)(1)(A)-(B).

Note 30. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 *et seq.* (2001).

Note 31. still referred to as IDEA 2004.

Note 32. Perry A. Zirkel. “The Legal Meaning of Specific Learning Disability for Special Education Eligibility**.”** *Teaching Exceptional Children, 2010, Vol., 42*(5), 63.

Note 33. The Impact of No Child Left Behind on IDEA’s Guarantee of Free, Appropriate Public Education for Students with Disabilities: A Critical Review of Recent Case Law, 2009.

Note 34. Ibid.

Note 35. Polk v. Cent. Susquehanna Indep. Unit 16, 853 F.2d 171, 184 (3d Cir. 1988).

Note 36. 20 U.S.C. Sec. 1400c.

Note 37. Individuals with Disabilities Education Act, 20 U.S.C. Sec.1400c.

Note 38. National Council on Disability, 1995, p. 5; Norlin, 2005.

Note 39. Perry A. Zirkel. “The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update.” *Journal of the National Association of Administrative Law Judiciary*. Spring, 2011, p. 1-28.

Note 40. Ibid.

Note 41. Perry A. Zirkel, The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act, 58 Admin. L. Rev. 401 (2006).