THE IMPACT OF ENDREW F. V. DOUGLAS COUNTY AND JUDICIAL IDEOLOGY ON
INDIVIDUALS WITH DISABILITIES EDUCATION ACT FAPE DETERMINATIONS IN
UNITED STATES DISTRICT COURTS

by

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Dedication

This dissertation is dedicated to my grandmother, Lorena Rainey, and my mother, Patrice L. Rainey. May this accomplishment help keep your legacy alive.
Abstract

THE IMPACT OF ENDREW F. V. DOUGLAS COUNTY AND JUDICIAL IDEOLOGY ON INDIVIDUALS WITH DISABILITIES EDUCATION ACT FAPE

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The Individuals with Disabilities in Education Act (IDEA) is legislation intended to ensure that children with disabilities receive a free and appropriate public education (FAPE). Over the last 35 years, the FAPE standard by which special education services were evaluated was determined by the U.S. Supreme Court (SCOTUS) ruling in Board of Education of the Hendrick Hudson Central School District v. Rowley (“Rowley”) in 1982. On March 22, 2017, the Rowley 1982 standard of FAPE was altered with the U.S. Supreme Court ruling in Endrew F. vs. Douglas County School District (commonly referred to as Endrew F.). The law allows parents and/or guardians of students with disabilities the right to a third-party hearing if the provision of a FAPE is ever called into question.

This study examined how parents have fared in United States District Courts when challenging the adequacy of the education their children have been offered or received from school districts under the IDEA. Specifically, the impact of the Endrew F. ruling on judicial decision making in litigation regarding FAPE disputes was investigated. Logistic regression was used to predict which parties (i.e. school districts vs. parents) were more likely to emerge as victors. Four variables were used in the analyses which included 1) Decisions made Before and After Endrew F., 2) Party-Of-Appointing President, 3) Judges’ Gender, and 4) Autism or Other
Disabling Condition. The impact of judge ideology on FAPE case decision-making is represented by the Party-of-the-Appointing President.

These results suggest that the four independent variables utilized in this study did not yield a statistically significant result. However, reasons for the possible outcomes of this research are addressed. Additionally, limitations of this study were discussed and suggestions for future research is recommended.
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Chapter 1

Introduction

In the last 54 years, Congress has enacted legislation intended to ensure that children with disabilities receive an appropriate public education. Chief among these laws is the Education for All Handicapped Children Act of 1975, later renamed the Individuals with Disabilities Education Act in 1990 (“IDEA”). The primary goal of the IDEA is to require recipients of federal financial assistance under the act to provide adequate educational services to students with defined disabilities.

IDEA provides a complex scheme of administrative and judicial remedies for parents who believe their children have not been provided adequate services under the Act. The term of art applied to program and service sufficiency is known as Free Appropriate Public Education (“F.A.P.E.”). Thus, if IDEA-eligible children receive less than adequate services under the Act, the educational agency is said to have committed a FAPE violation.

This study examined how parents have fared in United States District Courts when challenging the adequacy of the education their children have been offered or received from school districts under the IDEA and was guided by two general questions:

1. Has the 2017 United States Supreme Court decision known as *Endrew F v. Douglas County School District* which appears to have made IDEA’s FAPE standard more demanding, enhanced the success enjoyed by parents who challenged, in court, school districts as to the adequacy of their children’s programs?

2. Does the ideology of a United States District Court judge, impact decision making in FAPE cases brought under the IDEA?
To answer these questions, I set up a paradigm with judicial ideology and legal precedent, defined as cases being decided either before or after \textit{Endrew F.}, serving as independent variables and judicial voting, measured by a pro-parent or pro-school district voting, as the dependent measure. I deployed one measure of judicial ideology: party-of-the appointing president. In light of the dichotomous nature of the dependent measure, logistic regression was deployed as the principal statistical device to assist in answering the research questions.

\textbf{Background}

Over the last 35 years, the FAPE standard by which special education services were evaluated was determined by the U.S. Supreme Court (SCOTUS) ruling in \textit{Board of Education of the Hendrick Hudson Central School District v. Rowley} (“Rowley”) (458 U.S. 176) (1982). The \textit{Rowley 1982} decision was the first case heard by the U.S. Supreme Court articulating what the FAPE standard meant under the (IDEA) (Johnson, 2012; Seligmann, 2012). \textit{Rowley} preserved the equality of educational opportunity of students with disabilities, without regard to the financial burden it placed on educational entities, at both the state and local levels. However, \textit{Rowley} did not stipulate that special education services had to be provided with such rigor that students with disabilities would attain parity in achievement with their grade level peers; by using vague language as “equal access” when describing students with special needs (Seligmann, 2012), the case seemed to emphasize participation in programs with non-disabled students rather providing a guarantee of any substantive curricular outcome.

While advocates and educators alike comprehended the importance of this inaugural case, they had reservations about it serving as a prototype for IDEA FAPE determinations. These reservations were rooted in the fact that Amy Rowley was atypical … a deaf third grader who possessed high cognitive functioning which is not reflective of the majority of students who
qualify for special education services under IDEA specialized services. How could the FAPE standard applied to Amy be easily translated to other more typical children who receive special education services? In addition, the school district in question, the Hendrick Hudson School District, had provided a variety of specialized and intense supports to Amy when, at this time, many disabled students were receiving little to no services. Lastly, the political climate was conservative in the early 1980s, and it was feared this case would be used to reverse the constitutionality of the Education for all Handicapped Children Act of 1975 (EAHCA) (Smith, 1996).

Like other rulings from the Supreme Court, Rowley 1982 was met with varying interpretations in the lower courts and within the education community. Some opponents of the ruling felt as though students with disabilities would not receive a quality education because of the low bar set for FAPE determinations, while others agreed with the operationalized definition of “appropriate” education defined by the SCOTUS (Hammel, 2018; Yell, Katsiyannis, & Hazelkorn, 2007).

Under IDEA, the FAPE determination is made by evaluating the adequacy of the student’s Individualized Education Plan (IEP). An IEP is a legally binding document created and updated annually by both parents and educators that specifies the goals and objectives toward which a child with a disabbling condition will work, while being supported with special education services in the school setting.

Parents and/or guardians of students with disabilities may file a written complaint if they believe their local school or district has failed to adequately identify, evaluate, place, or service their child with a suspected and/or identified disabling condition as delineated in IDEA. IDEA requires parents to exhaust administrative remedies with local or state educational agencies
before they are permitted to sue school systems in court over the denial of FAPE to their
children. IDEA, thus, contemplates giving local and state educational agencies the opportunity to
rectify IEP deficiencies before resorting to judicial actions to obtain relief. Under IDEA FAPE,
disputes between educators and families are first adjudicated before administrative law judges
before parties are permitted to take an “appeal” in state or federal court.

The differing opinions on the interpretation and implementation of FAPE in the public-
school setting have resulted in thousands of administrative due process hearings and court cases
between school districts and parents (Mueller, 2015). These due process hearings are held to
defend the rights of special needs students under IDEA; however, when the judicial system
becomes involved in FAPE disputes, they impose a financial cost to disputing parties and require
increased time expenditure, while potentially damaging the relationship between community and
schools (Blackwell & Blackwell, 2015).

On March 22, 2017, the Rowley 1982 standard of FAPE was altered with the U.S.
Supreme Court ruling in Endrew F. vs. Douglas County School District (commonly referred to as
Endrew F.), 580 U.S. ___. In contrast to Rowley 1982, the high court concluded in Endrew F.
“an IEP [individual education plan] need not aim for grade-level advancement but must be
appropriately ambitious in light of [the child’s] circumstances. This standard is “markedly more
demanding than a ‘merely more than de minimis’ test for educational benefit” (Endrew F. v.
Douglas Cnty. Sch. Dist, 2017, p. 1). While this higher standard of services is a “laudable
victory” for special education advocates, the consequential impact of this decision is still

Under the Rowley 1982 standard, school districts have been on average more victorious
in FAPE hearings in comparison to parents (Blackwell & Blackwell, 2015; Hill & Kearley, 2013;
Schanding, Cheramie, Hyatt, Praytor, & Yellen, 2017). Specifically, these cases involved students identified with an Autism Spectrum Disorder (ASD), whose parents challenged the adequacy of their child’s individualized educational plan. Zirkel (2011) reported almost one third of published court decisions involving free appropriate public education (FAPE) and least restrictive environment (LRE) violations included students identified with an ASD. This study further found “that when comparing this litigation percentage with the autism percentage in the special education population for the period 1993 to 2006, the ratio was approximately 10:1” (Zirkel, 2011, p. 92), highlighting the increase of FAPE related court cases for this specific population of students.

Similarly, Hill and Kearley (2013) also examined the litigation outcome trends decided in the courts in regard to FAPE violations of students who receive Special Education services. Specifically, Hill and Kearley examined trends in judicial rulings occurring in 2010 of students identified with an Autism Spectrum Disorder and confirmed an increase in the number of FAPE court proceedings of students served under IDEA (Individuals with Disabilities Education Act) in comparison to students identified with other disabilities. The court cases selected for the current study were decided at the district, circuit, or state levels. This is relevant as the current precedent for ruling on FAPE disputes was established in the case of Endrew F., a student identified with an ASD. Additionally, educators may need to have a heightened awareness when planning and creating individualized educational plans of students identified with ASDs due to the possible legal implications.

In Endrew F., the court determined that in addition to receiving reasonably calculated instruction that allows for a student with disabilities to progress in General Education, a FAPE is provided when the IEP “standard is markedly more demanding than a “merely more than de
minimis” test for educational benefit” (Endrew F. V. Douglas Cnty.Sch. Dist., 2017, p. 1). This raises the empirical question as to whether the more demanding standard established in Endrew F. has increased the number of FAPE violations as determined by the United States district courts. FAPE violations as determined by the district courts before and after Endrew were compared as part of the current study. An increase in FAPE violations of students with an ASD, coupled with the outcome of the Endrew F. decision, may shift school districts from emerging as victors in FAPE disputes. The main findings of the frequency analysis highlight that more than half of the rulings decided went in favor of the school district with a little over a third of the rulings being made in the parents’ favor.

Schanding, Cheramie, Hyatt, Praytor, and Yellen (2017) studied the due process hearings in special education proceedings occurring in the state of Texas between 2011 and 2015. This study extrapolated and analyzed data for students identified with every category recognized by IDEA. There were 139 cases that went before hearing officers during this five-year period in Texas. Each case used in this study was coded by the disability criteria met by the student impacted in the hearing. The cases were further coded by consistent concerns that appeared throughout the cases. Concerns of how special education services were being provided for student with disabilities by parents and/or guardians who felt these services were not being addressed at all or failed to be addressed well by the local school system. These issues of conflict included: evaluation disagreements, failure to provide extended school year services, special education identification, and other Free and Appropriate Education related matters. The analysis revealed 72% of school districts were victorious over parents in the court rulings. Students who were identified with an Autism Spectrum Disorder were the most likely to be involved in due
process hearings. There are no studies that have addressed a comprehensive comparison across all 50 states on due process hearing trends.

Similarly, Blackwell and Blackwell (2015) conducted a longitudinal study that examined 258 special education due process hearings occurring from 2006-2013 in the state of Massachusetts. Each case was coded for FAPE issues (e.g. procedural concerns or specialized service implementation disputes). The outcome of each hearing was categorized as a win, loss, or mixed (both parent and school district benefited). School districts were found to have been victorious in 55% of the hearings examined with 24% of the cases ended in a mixed victory. Only 21% of parents were victorious in due process hearings. These findings suggest that school districts are falling short of the 100% mandated IDEA compliance under the Rowley standard.

With the inauguration of the Endrew F. decision, it is concerning to think about the civil rights of students with disabilities that will be violated under the elevated standard since school districts have not been able to achieve 100% IDEA compliance with a lesser precedent.

However, as more FAPE cases are heard in U.S. courts, it may prove impossible for school districts to provide the caliber of services mandated under Endrew F. without an increase in Special Education budgets or resources. The cornerstone for the plaintiff’s arguments in the Endrew F. case was the great improvement Endrew made toward progress on his Individualized Education Plan (IEP), while he attended a private school, with a smaller student to teacher ratio than can be easily attained in most public schools across the country. Buescher, Ciday, Knapp, and Mell (2014) investigated the financial impact of Autism Spectrum Disorders (ASDs) on a country’s economy. Both the United States (U.S.) and the United Kingdom (U.K.) were compared. The authors provided estimates of the costs associated with living with an ASD across the lifespan. According to the authors, they have synthesized the data in three unique ways:
providing a wide range of costs associated with ASDs, presenting cost comparisons for two different countries, and distinguishing cost impairments of individuals with an ASD who have an intellectual disability from those who do not. Results from this investigation confirmed the highest costs associated during childhood of those with an ASD were for parental productivity lost and Special Education services received in both the U.S. and U.K. Again, this study only investigated one of the 13 special education categories without further inquiry into the costs linked to providing services to students identified with other special education eligibilities outside of an ASD. However, it also highlighted the costly impact of serving students with an ASD under the Rowley 1982 standard of services. Financial burdens are not a legal justification to consider when creating an IEP to serve a student with disabilities. Yet, it is a pragmatic factor that school districts must account for in their budgets. Since the ruling of Endrew F., local public education agencies are now liable to provide each child with a disabling condition a quality of services similar to those provided to Endrew F., while in a small private school, to advance progress on their IEPs. These educational support service will have to be provided to all six million American students identified with a disabling condition protected under IDEA.

Although the implementation of specialized services occurs in the school setting involving administrators, teachers, students, and parents, IDEA is a mandate influenced by the judges who rule in each level of the courts. Both Rowley 1982 and Endrew F. were first heard in the lower courts before ascending to the U.S. Supreme Court resulting in a difference of FAPE interpretation among judges. Howell (2016) commented “it is important from a legal standpoint, to discuss at length the circuit split and its implications on judicial decision making” (p. 392). A circuit split occurs in the United States judicial system when two different courts in the circuit provide divergent rulings on the same legal concern occurring in the appeals process. Following
a circuit split, parties who seek to appeal to the Supreme Court are required to file a *writ of certiorari*. *Certiorari* represents the review Supreme Court justices conduct to determine which cases will be argued before the high court. The circuit split was necessary in the early 1980s to catapult the *Rowley* case to the high court as justices within the circuit courts did not interpret the law in the same manner in regard to what specialized services were appropriate for Amy Rowley to receive under IDEA.

As any American turns to the courts to establish or maintain their civil rights, there is an extreme gravity of the decisions made by justices as they ensure the rights for all citizens through the judicial process. The courts should represent fairness and impartiality with every ruling. Specifically, the implementation of FAPE is vital to protect students’ rights under the IDEA.

Yet, as the standard of special education services has been elevated with the ruling of *Endrew F.*, it is imperative that school districts understand how this decision will impact their budgets and their ability to win due process hearings. The outcome of the *Rowley 1982* case resolved that students with special needs receive the minimum level of support in the public-school setting, to access instruction, and to pass each year from grade to grade. This ruling determined that public school districts are only required to provide a basic level of services to students with disabilities to guarantee a FAPE. In his written opinion Justice Rehnquist extrapolated the true legal intent of IDEA and how it is written:

> Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly, the language of the statute contains no requirement like the one imposed by the lower courts -- that States maximize the potential of handicapped children “commensurate with the opportunity provided to other children.” 483 F.Supp., at 534. That standard was expounded by the
District Court without reference to the statutory definitions or even to the legislative history of the Act. (Board of Education of the Hendrick Hudson School District v. Rowley, 1982, p. 5)

Justice Rehnquist summarized the importance on adhering to the written law and understanding the historical intent and legislative purpose of a law. His writing challenged decisions in the lower courts that were made without regard to objectively interpreting the special education act. This suggested lower court judges, who ruled in the Amy Rowley proceedings, placed a higher level of responsibility on the implementation of Special Education services than were required by the intent of the law. Therefore, clarifying that in the United States, public schools were mandated to educate students with disabilities but did not have to maximize their potential in the school system. The legal intent of IDEA was to provide students with disabilities an opportunity to attend school similar to their typically developing peers.

As of March 2017, the Rowley 1982 standard was usurped and elevated with the SCOTUS decision in Endrew F 2017 (McAbee, 2017). The long-term significance of Endrew F. is yet to be seen, especially in due process hearings regarding FAPE violations of serving students with disabilities. Currently, school districts are statistically more likely to emerge as victors in FAPE hearings over parents. However, the Endrew F. decision has elevated the level of services public school districts must implement to achieve a FAPE for students with disabilities. This elevated level of standard may impact school districts’ abilities to provide quality services to students and defend themselves in due process hearings. In addition to the uncertainty of student educational outcomes, little is known how this elevated standard of special education will “be counterbalanced by federal, state, and local budgetary restrictions” (McAbee, 2017, p. 974) as this ruling is so new.
Statement of the Problem

The Endrew F. decision altered the operationalized understanding of FAPE and elevated the level of services public school districts are mandated to provide students with disabilities. However, little is known about how Endrew F. will impact specialized services in the school setting. Previously in the introduction, the importance of the judicial branch and its role in securing the civil rights of student with disabilities was highlighted.

The courts interpret the intent of laws and assist citizens with applying them to life situations. Interpretation of laws fall on the presiding judges who are subject to making decision based on their own legal ideals and beliefs. Judges are appointed to their position by a U.S. president, which is often influenced by politics and the state of the economy. As the politics and economy shift, this may also have an impact on the temperaments of presiding judges (Seligman, 2012). Research is lacking on the impact of a judge’s ideology when determining outcomes of decision-making in the United Stated District Courts involving FAPE. The ideology of individual judges and their core beliefs may be impacted, by proxy, of the political party (e.g. conservative or liberal) of their appointing president (Howell, 2016).

Purpose of the Study

The purpose of this study was to seek to examine how parents have fared in United States District Courts when challenging the adequacy of the education their children have been offered or received from school districts under the IDEA. Specifically, the author investigated the impact of the Endrew F. ruling on judicial decision making in litigation regarding FAPE disputes. Logistic regression was used to predict which parties (i.e. school districts vs. parents) were more likely to emerge as victors. Under the Rowley 1982 standard of FAPE, school districts have been statistically more likely to prevail in FAPE hearing. Yet, as this new mandate is requiring an
elevated level of services, it may be difficult for school districts to continuously provide an appropriate level of FAPE, which may cost districts heavily if they begin to lose in FAPE due process hearings. Moreover, to what extent will this elevated standard of FAPE truly protect the civil rights of students with disabilities? The following study included an investigation the impact of the Endrew F. ruling on due process hearings to provide insight to school districts and communities who may be able to use resources to provide a quality FAPE and reduce costly due process hearings. The researcher also examined the impact of judge ideology on FAPE case decision-making.

**Theoretical Framework**

Throughout American history, the final decision on whether civil rights should be granted or not to any citizen has been determined in our courts. Great power lies within the federal courts as it is a policy-making institution (George & Yoon, 2008). The court system is thought to be an impartial system without bias and is supposed to represent “legalistic neutrality” (Badas, 2016). One can then argue the most important task of a judge is to interpret the laws for application but not create the laws they interpret (Badas, 2016). Therefore, any case heard at any level of our court systems should receive a fair trial without any persuasion by the politics, social climate, or a judge’s personal beliefs. However, research has confirmed that courts are institutions swayed by political beliefs of presiding judges (Miller & Curry, 2017; Pinello, 1999; Seabrook, Wilk, & Lamb, 2013).

Researchers have sought to understand the reasoning and causes of judicial decision-making for over a century. Prior to the dawn of the attitudinal model, legal theory was the model scholars used as a lens to understand judicial decision making. Legal theorists in the 19th century questioned the authority of the law and how it related to written doctrine (Berman, 2014). Two
schools of thoughts existed as some theorists subscribed to the *statutory* approach to law while others endorsed the *common-law* approach (Berman, 2014). The *statutory* approach is of the view that judges must make decisions strictly based on how a law is written. On the contrary, the common-law approach does not adhere solely to the written law as a “judge concludes the correct judgment based on the mores and spirit of the community and its customs” (Berman, 2014, p. 21). The legal model evolved from these two schools of thoughts and “asserted that court decisions derive from the facts of the case as interpreted by ‘the law,’ that is, the plain meaning of the law, the intent of the lawmaker, and judiciary precedents” (Weinshall-Margel, 2011, p. 557). As the 20th century progressed, the behaviorist approach was beginning to emerge amongst scholars of both political and psychological disciplines (McHugh, 2017 & Weinshall-Margel, 2011). The attitudinal model of judicial decision-making evolved during this era as “legal case facts act as shorthand ‘cues’ that trigger ideological or attitudinal responses on the part of judges” (Weinshall-Margel, 2011, p. 557). McHugh (2017) argued that one’s attitudinal control differs from the voluntary control used to move our bodies through the environment.

While this model is typically applied to opinions determined by the U.S. Supreme Court, this research utilizes the framework to predict voting behaviors of District Court judges (Segal & Spaeth, 2002). The attitudinal model asserts “the ideological preferences of the justices- and not the actions or decisions of litigants or their attorneys-that drive legal outcomes on the High Court” (Yates, Cann, & Boyea, p. 848, 2013). In summary, a judge’s individual vote is determined by their policy bias and outcomes of the court are governed by the aggregate ideologies of the justices (Segal & Spaeth, 2002; Yates et al., 2013).

The voting behavior of judges should be of importance to all citizens as the rulings delivered by these individuals impact how we are governed in everyday life. Although judges
represent nonpartisanship in a majority bi-partisan American legal system, researchers have utilized two factors in gaining understanding of a judge’s behavior and in how they will vote. The main factor is party-of-appointing president. In order to receive an appointment, judges are appointed by a president who is affiliated with a specific political party. These political parties often favor issues which are conservative, liberal, or moderate. The concept of party-of-appointing president is discussed further in the literature review.

**Research Questions**

The researcher hypothesized with an increase in the demand of standards of Special Education services mandated with the *Endrew F.* decision there would be an increase in the amount of FAPE victories ruled in favor of parents over school districts. The researcher investigated the following questions:

1. Will the increase in IDEA FAPE standards required by *Endrew F.* result in an increase in parents who prevail in IDEA challenges in the United States District Courts?
2. Does the political ideology of District Court Judges, as measured by the party of the appointing president affect voting in IDEA FAPE determinations?
3. Are there differences in voting outcomes under *Endrew F.* [Pre and Post] for children with Autism compared to children with other disabilities?

**Significance of the Study**

This study is one of the first to investigate the impact of the elevated standard placed on implementing Special Education services following the *Endrew F* ruling.

Findings from this investigation may also be used to direct how educational policies and budgets are created. Results obtained from this research will serve as a cautionary warning to alert school districts to re-examine how special education services are provided and to take
inventory if the services provided are at a minimum or are above and beyond what is needed for that student to access the educational environment. Therefore, the information gathered in this analysis may be used to ultimately reduce the need for costly due process hearings. In addition to gaining an understanding of the educational magnitude of the Endrew F. decision, the ideology of judicial decision-making is explored to provide some insight into how judges are persuaded to rule in FAPE cases. The following section summarizes a review of the literature associated with a history of understanding social needs and legislative responses in addressing Civil Rights matters in the United States which provides context for the evolution of Civil Rights legislation focused on educating children with special needs. Following the literature review, the methodology of the current study is surveyed.
Chapter 2

Literature Review

This chapter synthesizes the political and social catalysts leading to the inauguration of the Education for All Handicapped Children Act (EAHCA) of 1975, which evolved into the modern mandate of the Individuals with Disabilities Education Act (IDEA). The history of chattel slavery in America is discussed as the driving force behind legislative change involving Amendments to the Constitution and legal mandates to protect the rights and freedoms of all children. With the birth of compulsory education at the start of the 20th century, the legacy of establishing of Civil Rights is explored and its influence on the education of American Children. Throughout the review, key concepts and disability categories vital in comprehending the significance of special education are operationalized. Landmark court cases pertinent in guaranteeing the civil rights of students with special needs are discussed. Lastly, an overview of due process hearings and an investigation of the impact of judicial rulings are considered. Major sections include 1) Civil Rights in Early Education, 2) Civil Rights in Education, 3) Civil Rights Act of 1964, 4) Bureau of Education for Handicapped, 5) Individuals with Disabilities Education Act, 6) Qualifying for Special Education Services, and 7) How Cases Get to Court, and 8) Significance of Judicial Behavior.

Civil Rights History in Early America

In the early 17th century, Africans were forcibly brought to America as enslaved humans. The savage act of enslavement set the foundation of unequal treatment of African Americans in this country (Byrnes, 2002). These displaced Africans remained in bondage as chattel for over 400 years in the United States until emancipation occurred following the Civil War. The legal
status of formally enslaved Blacks was solidified in the 13th amendment which freed and abolished slavery (Brown, 2004; Byrnes, 2002).

As slavery ended in the late 19th century and the American population continued to grow, the United States Congress drafted legislation to identify and guarantee rights to those who were American citizens. On January 1, 1866, Congress passed the Civil Rights Act of 1866, declaring all persons born in the United States were citizens no matter their race or color (Shawhan, 2012). As Congressman John M. Broomall of Pennsylvania explained, “The object of the bill is twofold-to declare who are citizens of the United States, and to secure them the protection which every Government owes to its citizens” (Broomall, 1866, p. 1). The Civil Rights Act of 1866 was lauded by many, but opponents of the bill did not want former slaves or their offspring to be granted the rights and protection of citizenship (Shawhan, 2012). Broomall challenged those in opposition of extended citizenship to those of African descent:

The American Negro is civilized, and of necessity must owe allegiance somewhere. And until the opponents of this measure can point to the foreign Power to which he is subject, the African potentate to whom after five generations of absence he still owes allegiance, I will assume him to be, what the bill calls him, a citizen of the country in which he was born. (Broomall, 1866, p.1)

*The Civil Rights Act of 1866.* Thus, the Civil Rights Act of 1866 laid the foundation for the ratification of the 14th Amendment to United States Constitution. This amendment guaranteed citizenship and rights to all-natural born persons including those of African descent (Brown, 2004). In addition to granting citizenship to former enslaved persons, the 14th Amendment “applied the Bill of Rights to State Action, provided expanded due process beyond that found in the 5th Amendment, and gave the U.S. Congress the power to reduce the number of
Representatives in Congress for states found disfranchising Blacks” (Brown, 2004, p.187). In 1870, the 15th Amendment to United States Constitution was ratified giving Black men the right to vote (Brown, 2004; Wallach, 2014).

Despite the great emancipation and the three Reconstruction Amendments, African Americans continued to receive unfair and unequal treatment throughout the country, especially in the war-torn southern states (Goluboff, 2001). As reconstruction commenced in the south, the social position of Black Americans continued to deteriorate as “commanding black lives and black labor by any means necessary” (Litwack, 2004, p. 7) was crucial in rebuilding. It was unfathomable for those in power during enslavement to extend common rights and privileges to those who were once enslaved. Senator Charles Sumner of Massachusetts proposed additional legislation to ensure the rights of African Americans in public places such as restaurants, churches, and schools in the early 1870s (Cooley, 2014). Sumner’s proposed legislation would evolve into The Civil Rights Act of 1875. The first part of the act declared:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color regardless of any previous condition of servitude. (Cooley, 2014, p. 98)

**The Civil Rights Act of 1875.** Similar to the Civil Rights Act of 1866, the Civil Rights Act of 1875 was strongly opposed by congressmen and senators from the south as they did not agree with the comprehensive policies of integration that would impact their daily lives (Cooley, 2014). The final version of the bill would not be voted on until the summer of 1874 following the
death of Senator Sumner. Provisions outlined in the bill ultimately failed to make segregated public schools illegal as these specific sections were removed entirely from the legislation (Cooley, 2014). The Civil Rights Act of 1875 failed to make the legislative impact as desired by Senator Sumner and his supporters as enforcement of the act was inconsistent and regularly disputed in the court of law by those who received citations.

The Civil Rights Act of 1875 was declared unconstitutional by the United States Supreme Court in 1883. The Supreme Court exhibited a pattern of ruling in favor of business owners who had received citations for violating the Civil Rights Act of 1875 under the belief that Congress had no authority to regulate matters of discrimination in the realm of private business (Cooley, 2014; Jager, 1969). This political and social climate influenced the creation of laws across this country legalizing segregation by race and “unambiguously restoring White supremacy” (Wallach, 2014, p. 25). This pervasive belief of White supremacy and attitude birthed a political system of legal segregation known as the Jim Crow laws (Litwack, 2004).

*Plessy vs. Ferguson of 1896.* Consequently, the Jim Crow Laws ushered in an era of de jure segregation. The concept of legal segregation was validated in the 1896 Supreme Court decision of *Plessy vs. Ferguson,* which legalized segregation and determined that “equal but was upheld under the Constitution” (Hoffer, 2014, p.2). The effects of this Supreme Court decision and implementation of the Jim Crow laws would have far-reaching negative impact on the lives of Black Americans for decades to come.

**Civil Rights in Education**

As the 20th century began, compulsory education was solidified in the United States. The American population saw growth because of an influx of immigrants; and families migrated from rural areas to bustling cities. In an effort to protect jobs for adults and ensure an educated
population to maintain the democracy, our industrialized nation began to seek out a formalized public-school system funded through tax revenue (Winzer, 2009). Early public educational institutions were known as *common schools* that taught common ideology to all children (Winzer, 2009). However, the establishment of the public-school system occurred rapidly, leaving no time to address the diversity of needs and students who were to be educated.

Throughout the progression of the 20th century, there were political, social, and cultural forces that began to shape educational reform. Conscientious Americans began to advocate for a truly fair society that no longer oppressed minority citizens or their children. The idea of “separate but equal” failed to exist in practice as people of color grew tired of separate resources that paled in comparison to the quality of resources provided to White Americans. This disparity of resources was especially apparent in comparison of school resources of children of color vs. children of the majority (Byrnes, 2002).

*Brown vs. the Board of Education of Topeka, Kansas.* In 1954, *Brown vs. the Board of Education of Topeka, Kansas* set the precedent that it was unconstitutional to segregate students by race (McLaughlin & Henderson, 2000). Jager (1969) commented on the *Brown* decision that “the Court did what Charles Sumner had urged as early as 1846, interpreting the Constitution not by the hallowed precedents of the past but by the social realities of the present” (p. 350). A social statement drafted by psychologists endorsing the irreparable and harmful effects of forced segregation of a minority group by the majority provided key evidence used to discredit segregation in the schools (Hartung, 2004). This Supreme Court ruling overturned the previous ruling of “separate but equal” that legalized segregation under *Plessy vs. Ferguson*. The decision also validated the role of education as “the most important function of state and local governments in its declaration that segregation had deprived minority children of equal education.
opportunities in violation of their right under the ‘equal protection clause’ of the 14th Amendment” (Brown, 2004, p. 182). Although the court’s ruling in Brown was a step towards obtaining educational and racial equality, desegregation in the schools was met with much resistance and defiance from those who benefitted from segregated public institutions and facilities (Pickren, 2004; Winzer, 2009). Yet, the Brown decision set the precedent that “separate was not equal,” just as the Endrew F. ruling set the precedent that “just enough” was no longer acceptable or sponsored by the United States government.

**Civil Rights Act of 1964**

The Brown verdict served as a foreshadowing catalyst of the social change that was brewing in America. Over the decade following Brown, the fight for Black civil rights reached a climax and was once again in the “forefront of the nation’s conscience for the first time in nearly 100 years” (Howard, 2014, p.100). While the Brown ruling was a step towards equality in education, enforcing the verdict with ubiquity proved difficult because applying sanctions to violators necessitated the resources of collected facts, funds for legal representation, and local plaintiffs who were not fearful of retaliation from pro-segregationists (Brown, 2004). As awareness began to change among the American people, Congress took action to rectify the slow desegregation process in public schools and other public American facilities with the passing of the Civil Rights Act of 1964. This Act gave the Attorney General the power to absorb the legal funds of plaintiffs seeking discrimination suits and authority to the U.S. Secretary of Education to collect information on desegregation and disseminate grants to aid school districts in their efforts to provide factual data (Brown, 2004).

Comprised of seven titles, The Civil Rights Act of 1964 quashed the de jure segregation protected by Jim Crow. Title I ended unfair voter requirements (with the exception of literacy
tests); Title II terminated discrimination in any public accommodations; Title III prohibited discrimination by state and city governments based on an individual’s ethnic identity, racial group, or the practiced religion; Title IV provided support to the U.S. Attorney General to enforce desegregation in public schools; Title V allowed plaintiffs of civil rights complaints to have counsel; Title VI thwarted public funds distribution to private companies who engaged in discriminatory practices; and Title VII forbid employers from discriminating against employees using their gender, race, nationality, religious beliefs, or skin color (Howard, 2014).

Disassembling universal discriminatory practices in public American places would take years to implement following the Civil Rights Act of 1964. Yet, the importance of this legislation should not be marginalized. Hersch and Shinall (2015) commented:

The Act also opened the door for future legislation as well as judicial interpretation, which in many cases, both broadened the protections available for the original five protected classes (gender, race, nationality, religious beliefs, or skin color) and incorporated new protected classes into U.S. antidiscrimination law. (p. 440)

This was especially true in the education sector as concerns of equity and inclusiveness began to extend beyond race and encompass students with disabilities. Like other marginalized groups in the 1960s and 1970s, parents and advocates of special needs students turned to the courts to rectify discriminatory practices and obtain legislative pull to specifically protect their rights in the public-school setting (Winzer, 2009).

**Bureau of Education for Handicapped**

Following the Civil Rights Act of 1964, President Johnson and his administration began to increase their attention on improving education for American students, especially those who were at-risk. As part of Johnson’s War on Poverty Initiative, the Elementary and Secondary
Education Act (ESEA) was passed by Congress in 1965 that allowed the federal government to impact the education of all school-age children across the country (Jolly & Robinson, 2014). During this era, the federal government funded research efforts to obtain data about the positive and negative aspects of American public schools. Sociologist James Coleman spearheaded a massive study that yielded a 700-page report shedding light on the inequalities and disparities with regard to the education of American children known as the Coleman Report (Coleman, 1966). The Coleman Report provided empirical data showing that American schools were not equal for all students, of different socioeconomic statuses or ethnicities, which neither the government nor the public could ignore. One could make the fair assumption that inequalities could definitely be found among students who had disabilities as many of these students were not allowed to attend school prior to the establishment of specialized educational mandates.

Specifically, during 1965-1967, congressional laws were passed to help protect students with disabilities (referred to as handicapped students in the 1960s). Under Title VI of the ESEA and in conjunction with the Education of the Handicapped Act (EHA; P.L. 89-790), it was required that a specific government agency be created to address the unique needs and challenges of educating students with special needs (Jolly & Robinson, 2014). The agency was titled the Bureau for the Education of the Handicapped (BEH) established in 1966.

Eighty years prior to the creation of the BEH, 19th century scholar Salisbury (1892) argued that it was the responsibility of the government to educate, train, and care for children with special needs (originally referred to as feeble minded) as it was a moral duty of society. Similar to those of people of color, individuals with disabilities have had a tumultuous history in their fight to access a life of dignity, respect, and the fullness promised by the American ideal
through access to education. Salisbury posited the government should mandate a systematic system to educate children with disabilities (Giordano, 2007).

Researcher James Gallagher was selected to serve as the first chief of the BEH. Like Salisbury, Gallagher shared a similar passion about the ethical and moral obligations to provide an equitable education to students with disabilities (Jolly & Robinson, 2014). Gallagher (1968) opined, the BEH was established because “society . . . is no longer satisfied to provide a smothering care with fostered over-dependency. I now seek to bring each handicapped individual to the very limit of his potential” (p. 491). The BEH was comprised of three individual divisions responsible for addressing 1) empirical research, 2) instructional services, and 3) programs of training (Jolly & Robinson, 2014). Funding under the EHA allowed the BEH to provide grants to aid state educational agencies in educating students with disabilities (Jolly & Robinson, 2014).

**Foundational Legislation of IDEA**

Unlike any other government agency before, the BEH was tasked “to stimulate the development of a national commitment to full, equal educational opportunity for every handicapped child” (Martin, 1971, p. 663). While federal legislation was passed to finance and support these efforts, the laws still failed to address required attendance or inclusivity in the general education setting for students with disabilities (Sigmon, 1982-83). Early special education legislation also did not address other points of concern when educating students with special needs. Bicehouse and Faieta (2017) described four problematic special education concerns that legislation did not address in the beginning of the 1970s:

First, the identification and placement of special needs students were haphazard, never the same, and often inappropriate. Second, African-American, Hispanic, and other ethnic children were disproportionately placed in special education programs. Third, parental
involvement in the special education process was commonly discouraged. Fourth, special education placements were more often than not made with the goal of avoiding disruption in the regular classroom setting. Finally, special educators and regular educations often competed for funding and resources. (p. 40)

The *Brown* decision would serve as a cornerstone for the evolution of special education law (Zirkel, 2005). Students with disabilities continued to receive a segregated education with exclusion from other educational programs offered to their typically developing counterparts (Ashbaker, 2011; Giordano, 2007; Winzer, 2009). As the 1970s progressed, parents and advocates of students with disabilities turned to the courts to confront school district violations of due process rights, the denial of a free and appropriate education, and failure to educate many of these students in a least restrictive environment (Ashbaker, 2011).

**PARC vs. Pennsylvania 1972.** On behalf of children with intellectual disabilities (retardation was the original nomenclature used) the Pennsylvania Association for Retarded Children (PARC) filed suit against the state of Pennsylvania for thwarting a public education of children thought not to benefit from school attendance as a result of their cognitive impairment (Ashbaker, 2011; Winzer, 2009). PARC also opposed the deplorable conditions of the Pennhurst State School and Hospital. Thirteen students with cognitive impairments and all school-aged children identified with an intellectual disability served as plaintiffs in the case. Prosecuting lawyers based their argument on the Fifth and Fourteenth Amendments. The Fifth Amendment addressed the failure to a due process while refusing their life and liberty; and the 14th tackled a negligence of providing lawful equal protection (Winzer, 2009). PARC was victorious in the suit and this landmark case was instrumental in opening “school doors to children with severe and profound disabilities and provided an explicit ground work for the adoption of the least
restrictive environment provision in later legislation” (Winzer, 2009, p. 122). Least restrictive environment is a cornerstone term in present day special education legislation representing the rights of students with disabilities to be educated in a setting with their typically developing peers to the maximum extent appropriate as a result of each child’s individual education plan. Following the PARC decree, a student’s educational placement (e.g. General education classroom, all Special Education classroom) could not be determined solely on the classification of the student’s disability.

**Mills v. Board of Education of the District of Colombia 1972.** In 1972, the courts further expanded the rights mandated in the PARC decision by ruling in favor of the plaintiff Mills (Winzer, 2009). The namesake plaintiff of this case involved Peter Mills, a 12-year-old African American student who was prohibited from attending fourth grade in a public school due to exhibiting elevated negative behaviors. Peter’s principal at the time intentionally prevented him from attending school with the rationale that the school district did not have the allocated funds to service students with specialized needs (Ashbaker, 2011). Together with the families of seven other students, *Mills* (1972) was a class action lawsuit of students who had been denied access to a public-school education in the U.S. District of Columbia. Similar to Peter Mills, each student plaintiff in the lawsuit had been suspected of or identified with displaying elevated negative behaviors, emotional regulation concerns, hyperactivity, and or an intellectual disability (categorized as mental retardation at the time of the lawsuit). As a result of their school exclusion, these students were denied access and educational supports to obtain an education. The families of these students argued the school board in the District of Columbia violated the rights of these students to an education and emerged as victors in the lawsuit. In response to
claims of budgetary restrictions as the main reason for not educating the students in the D.C. public schools the court wrote:

If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the “exceptional” or handicapped child than on the normal child. (Mills v. Board of Education in the District of Columbia, 1972, p. 876)

The court determined that budgetary restraints were not an acceptable reason to not educate students, especially those with identified disabilities. The court ordered the school district to readmit Peter and the six other students and provide them with the opportunity to be educated. Prosecuting lawyers also argued the Mills case based on protections provided under the 14th Amendment. The verdict of Mills:

Mandated that due process include the procedures related to labeling, placement, and decision making for a special needs child. The procedures should include a right to a hearing (with representation, a record, and an impartial hearing officer), a right to appeal, a right to have access to records, and a written notice of all phases of the process.

(Bicehouse & Faieta, 2017, p. 40)

Over 36 court decisions would follow PARC and Mills across the country, validating the civil rights of special needs students to have a FAPE and demanding national legislation to protect the education of these students (Ashbaker, 2011).
Education for all Handicapped Children Act 1975. The Education for all Handicapped Children Act of 1975, also known as Public Law 94-142, materialized from the Civil Rights movement of the 1950s and 1960s (EHA; PL 94-142). President Gerald Ford signed PL 94-142 in November of 1975 (Winzer, 2009). Public school districts were obliged to implement the decree outlined in this new legislation by September 1, 1978 (Winzer, 2009). Unlike predecessor laws, PL 94-142 ushered in an era where all children in the United States were mandated to receive a free and appropriate education, especially those with a disabiling condition. PL 94-142 supplied grant reserve resources to states that enacted the rulings determined in PARC and Mills.

Under PL 94-142, states were required to distribute grant reserves “for two groups: (1) handicapped children not receiving and education and (2) children who have the most severe handicaps who are receiving an inadequate education” (Bicehouse & Faieta, 2017, p. 40).

Individuals with Disabilities Education Act

As the world entered the last decade of the 20th century, special education services in the United States were improving to provide equity to all students to reflect the diversity to come in the 21st century. Three federal laws exist to ensure the liberty of a FAPE is provided to students with special needs: 1) Section 504 of the Rehabilitation Act of 1973 (Section 504), 2) The Americans with Disabilities Act, and 3) The Individuals with Disabilities in Education Act (IDEA) (Cortiella & Horowitz, 2014). Specifically, IDEA mandates that students with disabilities are required a FAPE in the United States between the ages of three and 21 (Cortiella & Horowitz, 2014). The following section will provide a brief history on this significant act and its amendments to provide understanding on its legal implications.

Individuals with Disabilities Education Act 1990. In the years following the enactment of EAHCA in 1975, the momentum to protect students with disabilities did not lessen as many
amendments were made to EAHCA to increase equity to students with disabilities. Due to the considerable changes made to EAHCA, the law was renamed to the Individuals with Disabilities Education Act (IDEA; Public Law 101-476). Notable amendments in IDEA included:

- (a) the language of the law was changed to emphasize the person first, including the renaming of the law to the Individuals with Disabilities Education Act (IDEA), as well as changing the terms handicapped student and handicapped child to child or student with disability; 
- (b) students with autism and traumatic brain injury were identified as a separate and distinct disability category entitled to the law’s benefits; and
- (c) a plan for transition was required to be included on every student’s IEP by the time he or she turned age sixteen. (Yell, Katsiyannis, & Bradley, 2011, p. 63)

Consequently, the passing of IDEA in 1990 invalidated the U.S. Supreme Court ruling in Delmuth v. Muth (1989) which provided lawsuit immunity to states (Yell et al., 2011).

**Individuals with Disabilities Education Act 1997.** IDEA would continue to be an act in progress as Congress once again altered the act. IDEA had provided FAPE to student with disabilities and improved educational outcomes for a once vulnerable student population. However, IDEA was “impeded by insufficient focus on translating research to practice and had placed too much emphasis on paperwork and legal requirements at the expense of teaching and learning” (Yell et al., 2011, p. 63). Substantial alterations to IDEA in 1997 included that:

- 1) The Individual Education Plan (IEP) of every student must be comprised of measurable goals that are updated annually and systematic clarification on how a student’s development would be measured;
- 2) IEP teams were mandated to have consistent communication with parents/guardians in regards to their child’s performance on their IEP goals;
- 3) in the event a student failed to make adequate advancement on their IEP goals, then the IEP should be
modified, and if the student is not making progress, then a new IEP must be revised; and 4) Each IEP should allow for students to make progress on their annual goals (Yell et al., 2011). Lastly, concerns of behavior and the authority to discipline students with disabilities was addressed in this re-authorization of IDEA (Winzer, 2009; Yell et al., 2011).

**Individuals with Disabilities Education Act 2004.** In like manner of their predecessors, the United States Congress of the 21st century sought again to make amendments to IDEA to align and improve accountability standards in special education that were being placed upon general educators across the country. In 2001, the Elementary and Secondary Education Act (ESEA) of 1965 was reauthorized and renamed the No Child Left Behind Act (NCLB) of 2001 (Husband & Hunt, 2005; Yell et al., 2011). Signed into law by George W. Bush on January 8, 2002, the goal of NCLB was to provide a quality public school education for all students. While addressing Congress, President Bush explained “We have a genuine national crisis. More and more, we are divided into two nations. One that reads, and one that doesn’t. One that dreams, and one that doesn’t” (U.S. Department of Education, 2004, p. 1). NCLB mandated each state’s education agency to collect data on student achievement and measure academic progress through high-stakes testing (Winzer, 2009). Children who qualify to receive special education services would also be required to participate in high-stakes assessments.

Congress amended IDEA in 2004 to marry it with the ideals written in NCLB. Major changes to IDEA 2004 included: 1) changing the eligibility requirements needed to qualify for services; 2) granting permission for school districts to disseminate 15% of their IDEA budgets on services targeting early intervention; and 3) the process to complete IEPs, addressing discipline, and dispute resolutions were updated (Yell et al., 2011). The dispute resolution section of IDEA 2004 would prove vital in outlining the process to get cases to court, which is
addressed in a later section of this document. In conclusion, IDEA has served and continues to serve as a paramount law protecting and providing educational opportunities and supports for more than 6.5 million students with disabilities across our nation (U.S. Department of Education, 2018).

**Qualifying for Special Education Services**

According to law, a student between the ages of three and 21 who has been evaluated by trained personnel using the appropriate assessments, and who meet the criteria for one of the 13 disability categories, may qualify for special education and/or related services (IDEA, 2004; 34 C.F.R. §300.220; 34 C.F.R. §300.304). The 13 disability categories include 1) Specific Learning Disability, 2) Other Health Impairment, 3) Autism Spectrum Disorder, 4) Emotional Disturbance, 5) Speech or Language Impairment, 6) Visual Impairment (including blindness), 7) Deafness, 8) Hearing Impairment, 9) Deaf-Blindness), 10) Orthopedic Impairment, 11) Intellectual Disability (previously classified as Mental Retardation), 12) Traumatic Brain Injury, and 13) Multiple Disabilities (34 C.F.R. §300.8). Depending on the state, there is also a recognized 14th disability classification known as Developmental Delay.

Prior to receiving specialized services, a student must first have a full and individual evaluation that is requested by the parent, the school district, or the local state education agency (IDEA, 2004). Assessments used to complete evaluations should be not discriminate a child based on their race or have cultural bias against a student. Knowledgeable personnel responsible for conducting full and individual evaluations should obtain multiple sources of data on the child to obtain objective information for appropriate disability identification and educational placement for a student. Once written consent is obtained from parents or guardians to complete the evaluation, the school district must finish the evaluation within 60 days (IDEA, 2004).
Additionally, under IDEA, each state education agency must locate students with disabilities who are infants, toddlers, and those who attend private schools for early identification, intervention, and inclusiveness (20 U.S.C. 1431; 20 U.S.C. 1412). This process of identifying all children who are not enrolled in a public school is referred to as Child Find.

**Individualized Education Program (IEP).** Following the full and individual evaluation, each child who qualifies for special education services is required to have an Individualized Education Program (IEP) which is created by the student’s teachers, service providers, school administrators, and parents/guardians. An IEP is:

- a written statement for each child with a disability that is developed, reviewed, and revisited. Each IEP should have (I) a statement of the child’s present levels of academic achievement and functional performance, (II) measurable annual goals, including academic and functional goals, (III) a description of how the child’s progress toward meeting the annual goals, (IV) a statement of the special education and related services and supplementary aids and services, based on peer reviewed research to the extent practicable…, (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class…, and (VI) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments… (20 U.S.C. § 1414, d, 1, A, i)

Each IEP on every student must be updated and/or adapted annually with the appropriate educational team members as mentioned above (20 U.S.C. § 1414, d, 4, A, ii). In sum, the IEP serves as the legal educational plan that educators must follow to guarantee what, when, and how services are provided to students with disabilities.
**Least Restrictive Environment.** In conjunction with the IEP, IDEA also mandates that students identified with a disabling condition should receive instruction in the least restrictive environment (LRE). LRE pertains to educating students with disabilities in an educational setting that reflects the general education placements of their typically developing peers. The mandate decrees:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (5)(A))

An important safeguard each school district should implement to guarantee an LRE is provided, representing a continuum of alternative placements. According to Yell et al. (2011):

The continuum of services ranges from settings that are more restrictive and specialized. The most typical and least restrictive setting for most students is the (a) regular education classroom or (b) regular classroom and resource room or (c) itinerant instructional. (p. 68)

The continuum of alternative placements may also encompass self-contained special education classrooms, specialized schools, homebound instruction, and hospital settings (Yell et al., 2011). Local school agencies who fail to provide a LRE to students receiving services under IDEA “will result in the failure to provide a child with a disability a free appropriate public
education according to the unique needs of the child as described in the child’s IEP” (20 U.S.C. § 1412 (5)(B) (i)).

Free Appropriate Public Education. A culmination of the lobbying and crusading for students with disabilities has developed into the anchor of the civil rights movement in education equality. This anchor is the foundational right of students with disabilities to have a Free Appropriate Public Education (FAPE). IDEA defines FAPE as:

Special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program… (20 U.S.C. §1401, (9))

As previously mentioned, the developed and agreed upon IEP serves as the base for the specially designed education instruction that a student with disabilities receives. The IEP is vital to ensure a FAPE is provided. In addition to academic instruction, providing a FAPE may also include “developmental, corrective, and supportive services such as speech and language therapy, audiology programs, psychological services, physical and occupational therapy, social work services, and counseling services” (Yell et al., 2011, pp. 67-68). Although the law defines the meaning of FAPE, it has been difficult to comprehend its meaning based on substantive requirements (Yell & Crockett, 2011). Therefore, congressional authors have defined FAPE based on procedural safeguards intended to allow both parents and educators to create educational programs based on a student’s individual needs. The procedural safeguards require school personnel to: (a) provide written notice to parents anytime their child’s IEP was
discussed, (b) extend an invitation to parents for IEP meetings, (c) obtain parental consent prior to conducting evaluations or making changes in educational placements, (d) grant parents access to review their child’s educational records, and (e) authorize parents to receive an independent educational evaluation (IEE) in the event of a dispute with the evaluation conducted by the school district (Yell & Crockett, 2011). Moreover, IDEA provides parents the right to seek mediation, a due process hearing, or even the ability to file a legal suit in state or district courts if dissent arises about a student’s evaluation, program of instruction, or educational placement (34 C.F.R. § 300.500-515).

**Litigation and FAPE**

While litigation served as a catalyst to help establish the special education rights decreed by IDEA, it has also been at the center of many legal proceedings since its inception. IDEA grants the courts power to rectify educational programming when a violation of IDEA occurs (20 U.S.C. § 1415 (i) (2) (B)). At the center of many IDEA infringements is debate on the operationalized definition of FAPE and how it is applied daily in the school setting.

**Board of Education of the Hendrick Hudson School District v. Rowley.** The first special education case heard by the U.S. Supreme Court was *Board of Education of the Hendrick Hudson School District v. Rowley* (hereafter *Rowley*) in 1982. This landmark case was the first in our country to address the meaning of FAPE. Amy Rowley met the IDEA disability criteria of a student with a Hearing Impairment. Prior to beginning her Kindergarten school year, it was determined by school personnel and her parents that Amy would attend a general education class all day. Amy was proficient at lip-reading and many school staff were trained in sign language to facilitate communication in the school setting. Amy’s school also installed a teletype machine in the main office to facilitate correspondence with her hearing-impaired parents. Additionally, a
sign language interpreter was provided in Amy’s class, and she finished her Kindergarten year
commensurate with her typically developing peers.

As Amy began her first-grade school year, an IEP was developed where Amy received
her core instruction in the general education classroom, allowed her the use of a hearing aid,
provided her with instruction from a deaf education tutor, and three hours a week of speech
therapy (Yell & Crockett, 2011). However, when Amy’s parents requested continued services of
the sign language interpreter, the school refused the request because it had been determined Amy
did not need the interpreter for her academic success. Amy’s parents exercised their right to a
due process hearing with an impartial hearing officer (IHO) on the basis that their daughter was
denied a FAPE because the school district failed to provide a sign language interpreter. The IHO
sided with the school district and affirmed a FAPE had been provided. In New York state, where
Amy was being educated, the IHO is the final arbitrator in special education disputes unless an
appeal is made to the State Review Office (SRO). An independent examiner agreed with the
school that an interpreter was unnecessary, a decision that was affirmed on appeal by the New
York commissioner of education at the SRO. Amy’s parents then appealed the case to the federal
district courts who determined that although Amy was performing academically stronger than
her typical peers, there existed a disparity between her potential and actual performance as a
result of her disabling condition (Yell & Crockett, 2011).

The Rowley’s then filed suit in naming the school district as defendant. The district court
judge found that, because Rowley lacked an interpreter, “she understands considerably less of
what goes on in class than she could if she were not deaf,” and she “is not learning as much, or
performing as well academically, as she would without her handicap.” (Board of Education of
The judge concluded that Rowley was not receiving a “free appropriate public education,” which he defined in her case as “an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.” (Board of Education of the Hendrick Hudson School District v. Rowley, 1982, p. 8) The Court of Appeals for the Second Circuit affirmed that judgment in July 1980. The school district then appealed to the Supreme Court, which heard oral arguments on March 23, 1982.

**The Rowley Standard.** In deciding the Rowley decision, the Supreme Court generated a two-part test to serve as a framework for courts to use in deciding if school districts have provided a FAPE. The criteria involved: First, has the [school] complied with the procedures of the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (Rowley, pp. 206-207). School districts that had met the requirements of the two-part test had provided a FAPE. In the years following Rowley, courts have ruled a denial of FAPE based on procedural violations which are represented by the first part of the Rowley test. In the ruling of Hall v. Vance County Board of Education (1985), for example, the courts concluded a FAPE was denied because the school district failed repeatedly to inform the parents of their rights as outlined in IDEA. The Henrico County Public Schools violated IDEA when it was determined the district changed a student’s educational placement before developing the IEP with collaboration of the parents in Spielberg v. Henrico County Public Schools (1988). The U.S. Court of Appeals also affirmed a FAPE violation in Tice v. Botetourt County School Board (1990) when the school district delayed evaluating a child for six months and failed to create an IEP.

The second part of the Rowley test was not as objective as determining procedural violations in comparison to the first principle (Yell & Crockett, 2011). In Polk v. Central
Susquehanna Intermediate Unit 16 (1988), the court criticized the lack of need to apply the substantive part in the Rowley decision because Amy was a bright student who excelled academically. Unlike in Polk (1988), the student in question was both cognitively and physically impaired, and the court had to decide if the school district provided a meaningful benefit based on the student’s IEP that involved more than procedural implications.

In contrast, the rulings immediately following the Rowley decision determined an IEP was acceptable if the school district could prove the IEP in question yielded some educational benefit. The cases of Karl v. Board of Education, Doe v. Lawson (1984), and Manual R. v. Ambach (1986) were decided allowing a proof of minimal educational benefit Yell & Crockett, 2011). However, more current cases have determined that a meaningful benefit of educational growth is needed to suffice for FAPE. The rulings attained in J.C. v. Central Regional School District (1996), Cypress-Fairbanks Independent School District v. Michael F. (1997), and Houston Independent School District v. Bobby R. (2000) affirmed the necessity of having a meaningful educational benefit to provide a FAPE.

**Endrew F. vs. Douglas County School District.** The Rowley standard would remain in place for 35 years until it was usurped by the Endrew F. vs. Douglas County School District (hereafter Endrew F.) decision in 2017. In contrast to Amy Rowley, Endrew F. was a student with an Autism Spectrum disorder who displayed severe developmental delays. Endrew was unable to be educated in a general education placement with typically developing peers. This resulted in his least restrictive educational environment to be a self-contained classroom with other students with developmental delays. While in attendance at the Douglas County School District, Endrew’s IEP included both academic and behavioral interventions to help him achieve annual progress. Although Endrew’s parents and team met to develop his IEP, his parents
became frustrated with the lack of advancement he made on his goals by the fourth grade. Endrew was promoted each year in school but was not acquiring any new skills.

Despite the Douglas County School District’s attempt to develop a new education program to address concerns expressed by Endrew’s parents, the plan continued to fail to yield any new skills presented by Endrew. Finally, Endrew’s parents enrolled him in a private school that was tailored for students with an Autism Spectrum Disorder. At the private school, Endrew acquired skills and made measurable progress on both his academic and behavioral goals.

Endrew’s parents returned to the school district with data on his progress and asked for another IEP which matched the services Endrew received at the private school. However, when the school district failed to produce an IEP which was similar to the educational plan Endrew received at his private school, his parents requested tuition reimbursement for the services he received at the school for students with Autism. The Douglas County School District refused to reimburse Endrew’s parents for his private school tuition which resulted in a law suit being filed against the school district.

As Endrew’s case moved throughout the court systems, the Rowley 1982 case was often referenced for precedence of FAPE. The courts often had to grapple with the ideas of appropriate vs. ideal when considering FAPE (Hammel, 2018). Ultimately the Supreme Court concluded: “that as advancement from grade to grade is expected for students in inclusion settings, a reasonable amount of progress should be expected for student in self-contained settings-even when they will not progress through the grades in a typical manner” (Hammel, 2018, p. 30). Despite a child’s disability, they deserve rigorous goals and ambitious educational objectives (Hammel, 2018). Thus, the standard for providing services under IDEA has been elevated with
the *Endrew F.* decision. In comparison to *Rowley* 1982, the magnitude of the impact of *Endrew F.* in the courts is still unfolding as it is a rather new precedent.

**Significance of Judicial Behavior**

As previously discussed, the courts play a vital role in the United States and ensuring that civil rights and liberties are upheld for all citizens. Therefore, understanding judicial behavior should not be limited to those trying to advance their political careers (Epstein, 2016). Epstein (2016) stated “the study of judicial behavior is a manifestation of the importance—perhaps growing importance—of judges world wide” and the increase of substantive topics addressed around the globe (p. 2039). In an address to the American people following the death of Justice Scalia, President Barack Obama (2016) commented on the importance of the role of a Supreme Court justice:

> The men and women who sit on the Supreme Court are the final arbiters of American law. They safeguard our rights. They ensure that our system is one of laws and not men. They’re charged with the essential task of applying principles put to paper more than two centuries ago to some of the most challenging questions of our time. (p. 141)

President Obama seemed to convey a message of urgency for citizens to understand the importance of the appointment of a new justice and what it would mean for our country. Appointed judges will serve as influential decision-makers for the remainder of their professional careers in a lifetime appointment (Carp, Manning, & Stidham, 2013), essentially providing each justice a potentially lengthy career to influence policy and legislation by their ideology. The behaviors of supreme court judges may also influence judges of lower courts as it serves as the model for all other courts to follow.
**Party-of-Appointing-President.** Judicial impartiality is essential in the decision-making abilities of a judge. Thus, judges are often considered to exist in a politically neutral manner. Yet, a familiar practice used to determine the ideology of a judge is through identifying the political party of the appointing president (Fischman & Law, 2009). Cohen, Klement, and Neeman (2018) reported that “selection effects imply that judges’ attitudes resemble those of their appointing body, be it the state’s governor, an appointment committee, or the public at large” (p. S136). Wasserman and Connolly (2015) reported that since the Brown decision, 89% of liberal votes cast by justices were appointed by Democratic presidents in comparison to 50% of justice votes who were appointed by Republican presidents. Although justices have been found to deviate in ideology from their appointing president following their 10th term, statistical analyses have confirmed the similarities in voting behaviors of a justice and the party ideals of their appointing president (Pinello, 1999; Sharma & Glennon, 2013).

**Significance of Judges Ideology to Special Education.** Perhaps in an ideal world, legal precedent would be the only factor to impact a judge’s voting. Yet, over 50 years of research has shown there is an ideological component to how judges vote. Chief among the factors of how judges vote is captured by the attitudinal model. This theory contends that attitudes manifest themselves in ideological positions which express themselves in the decisions that judges make along a liberal and conservative continuum. There is a paucity of research examining the efficacy of the Attitudinal model and how it is applied in judicial decision-making regarding FAPE cases. The current study filled that gap.

To conclude, this literature review has provided a succinct history of the legal mandates that have provided civil protections and guaranteed rights to students with disabilities. The courts serve as the governing vehicle to ensure legislation is passed and rights are upheld to provide
specialized services to students with special needs. Current research has focused on studying judge ideology for the purposes of gathering knowledge for political science studies. Yet, as the courts are responsible for ruling in FAPE hearings, it is important to obtain more information on how the ideology of a presiding judge may impact how children with disabilities are serviced in public schools.
Chapter 3

Research Methodology

This chapter explains the design of this study and the statistical procedures used to analyze case outcomes in FAPE cases at the District Court level. Major sections this chapter include 1) Summary of Study, 2) Research Approach, 3) Database, 4) Data Verification, 5) Data Analysis, and 6) Summary.

Summary of Study

Using the Nexis Uni, the author created a data base comprised of United States District Court decisions resolving FAPE disputes between parents and local educational agencies. The cases selected were twofold: 1) FAPE cases decided prior to Andrew F. and 2) FAPE cases determined after Endrew F. These data were analyzed using logistic regression to determine whether Endrew F. resulted in changes in judicial voting after Endrew F. and whether judges’ ideology contributed significantly to how the judges voted in FAPE disputes.

Research Approach

The selection of logistic regression modeling was based on the dichotomous nature of the dependent measure, that is, whether judges voted in favor of the parents or the school district. The researcher set up two predictors: a legal precedent (decisions rendered before and after Endrew F. was decided) and judicial ideology. The judicial ideology variable was studied by considering the party affiliation of the president who appointed the judge, a more nuanced measure of judges’ ideology.

Database

The researcher created a database comprised of decisions in FAPE cases occurring two years prior and two years post the March 2017 Endrew F. decision at the United States District
Court level. Each case was retrieved from the Nexis Uni database and included students classified under one of the disability categories recognized under the IDEA. Cases were obtained using the following search criteria: “IDEA” and “FAPE.” From the list generated by the search criteria, every third case was selected to be used in the database.

In the United States District Courts, one judge is responsible for determining if a student with an identified disability has been denied a FAPE. District courts have original jurisdiction to decide FAPE conflicts after litigants have exhausted administrative remedies within the state where the district court is situated. This court evaluates whether the FAPE standard was applied correctly in state administrative due process hearings. Typically, the two parties involved in FAPE cases include the local school district and the parents or guardians of the student in question. In addition to establishing the implementation of FAPE, judges at this level may determine the type of relief, if any, a student is owed based on case law and guarantees contained in IDEA. Information entered into the database is the citation, case name, district, circuit, date decided, after or before Endrew F, judge’s name, judge’s gender, judge’s home state, appointing president, president’s party, child’s disability, winning party, type of violation, and holdings summary.

**Citation.** Each case was identified by a unique identifier comprised of letters and numbers that was consistent with the citation found in the Nexis Uni database. The variable CITATION was the name used in the current database.

**Case Name.** Each case was identified with a title that indicated the plaintiffs and the defendant appearing in its caption. The variable CASENAME was used in the current database.
**Case Decision Date.** The official ruling date a judge decided on a case was identified as DECISIONDATE. The dates were entered in the DD/MTH/YY format and sorted in ascending order, oldest to newest.

**After Endrew.** Cases were sorted into two groups: Those with a decision date prior to the Endrew F. ruling and those with a decision date after Endrew F. AFTERENDREW was the variable name used to capture this grouping.

**Judge’s Name.** While each judge’s full legal name is listed in the cases found on the Nexis Uni database, the Federal Judicial Center (FJC) website’s (http://www.fjc.gov/history/home.nsf/page/judges.html) was used to find additional biographical data of each judge. JUDGENAME was the identifier used to capture the name of the presiding judge.

**Judge’s Gender.** The gender of each judge was identified using the information obtained from the FJC website. JUDGESGEN was the variable name used in this database.

**Judge’s Home State.** As documented on the FJC website, each judge’s home state was established based on their professional location at the time of the appointment. This information was vital in determining the DW-Nominate score of each judge. The variable was recorded as JUSDGESHOMESTATE.

**Appointing President’s Name.** Using the Biographical Directory of Federal Judges located on the FJC website (http://www.fjc.gov/history/home.nsf/page/judges.html), the name of the president responsible for appointing each judge was listed in the database. The variable used to identify the appointing president was APPOINTPRES. As previously discussed, presidents often favor judges who have similar political ideology.
**President’s Party.** Each appointing president’s party was categorized as either Democrat or Republican. This variable was identified as PRESIDENTPARTY. This variable was coded using 0s and 1s in the database. Republicans were coded as “0” and Democrats were coded as “1.” The Party of Appointing President variable served to represent an alternative measure of ideology to judges’ DW-Nominate score.

**Disability.** Either the primary disability in question or the actual identifying disability of the student involved in the due process hearing was categorized by one of the 13 disability criteria outlined in IDEA. The variable was identified as DISABILITY. Disability represented either the suspected disability or the identified eligibility where a student qualified for to receive services under IDEA. While students may have qualified to receive services under IDEA with more than one eligibility classification, only the primary disability identified or suspected was used for this analysis as listed in the court case.

**Winning Party.** Typical FAPE cases are heard in court between two parties often identified as the parents and/or guardians and a local education agency (e.g. school district). The winning party variable was represented by WINPARTY. The party who judges ruled in favor of in the final decision was the winning party. In contrast, parties who the courts did not side with were the losing group. Where parents “win” a case, they may be granted relief by the judge. This includes such things as compensatory education, a new IEP, monetary relief for private school placement, or a remand with instructions to the school district to perform additional evaluations. Votes which found a FAPE violation or remanded for further administrative proceedings were coded as liberal votes. Votes which found no FAPE violation and ruled in favor of the school district were classified as conservative votes.
Type of Violation. Due to the centrality of FAPE to students with disabilities, the researcher recorded if judges determined the occurrence of a FAPE violation or not in each case. Type of violation was captured as VIOLATIONTYPE. FAPE violations are often categorized into procedural versus substantive. The FAPE variable represented the dependent measure of this study, which was critical to the data analysis.

Holdings. The holdings serve as a qualitative summary of facts and findings of each case. Depending on the case, some holdings were taken directly from the Nexis Uni database while others were summarized by the researcher. The researcher provided a summary of the facts pertaining to each case to serve as a reference while compiling the data base.

Data Verification

Data verification took place in the data entry review conducted by the primary researcher, assisting doctoral students, and supervising professors. Each data entry was inspected three times to certify for accuracy and fidelity. The use of descriptive statistics allowed for a review of the coding to assist in identifying errors and incomplete data.

Descriptive Analysis

The descriptive data were organized into three 2 x 2 cells. These tables contained the frequencies and percentages associated with voting outcomes from judges. This information provided empirical analyses on the effects the independent variables may have had on judges’ voting behaviors while utilizing inferential statistics. This set the stage for the inferential analyses.

Table 3.1 shows the frequency and percentage of liberal-pro-parent and conservative pro-district votes cast in United States District courts. The vote of each judge was disaggregated by the Party-of-Appointing President. The frequency distribution and associated percent of voting
among Republican and Democrat appointees’ voting in FAPE disputes. Table 2 depicts frequency and percentage of liberal-pro-parent and conservative pro-district votes cast in United States District courts in IDEA FAPE cases pre- and post- the United States Supreme Court’s Endrew F. decision.

Table 3.1 displays the frequency distribution and percentages of liberal and conservative votes. Liberal votes are those that were in favor of the student. Conservative votes are those that were in favor of the school district. The party ideology was derived from the party of the appointing president with Republican presidents considered conservative and Democratic president classified as liberal. Votes which found a FAPE violation or remanded for further administrative proceedings were coded as liberal votes. Votes which found no FAPE violation and ruled in favor of the school district were classified as conservative votes.

Table 3.1

<table>
<thead>
<tr>
<th>Voting</th>
<th>Liberal</th>
<th>Conservative</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party Ideology</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Republican</td>
<td>54 (42.5%)</td>
<td>73 (57.4%)</td>
<td>127 (100%)</td>
</tr>
<tr>
<td>Democrat</td>
<td>65 (43.6%)</td>
<td>84 (56.3%)</td>
<td>149 (100%)</td>
</tr>
<tr>
<td>Total</td>
<td>119 (43.1%)</td>
<td>157 (56.8%)</td>
<td>276 (Total)</td>
</tr>
</tbody>
</table>

Table 3.2 represents frequency distribution and percentages of liberal (pro-parent FAPE violations) and conservative (pro-district NO FAPE violations) votes. Liberal votes were those that were in favor of the student. Conservative votes were those that were in favor of the school
district. Votes were disaggregated between pre-Endrew F. ruling and post-Endrew F. Table 3 displays descriptive analysis of the effects of judges’ ideology as impacted by legal precedent.

Table 3.2

*Frequency and Percentage of Liberal-Pro-Parent and Conservative Pro-District Votes Cast in United States District Court Cases in IDEA FAPE Cases Pre- and Post- the United States Supreme Court’s Endrew F. Decision*

<table>
<thead>
<tr>
<th></th>
<th>Liberal</th>
<th>Voting</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Conservative</td>
<td></td>
</tr>
<tr>
<td>Post-Endrew F.</td>
<td>44 (33.0%)</td>
<td>89 (66.9%)</td>
<td>133 (100%)</td>
</tr>
<tr>
<td>Pre-Endrew F.</td>
<td>76 (53.1%)</td>
<td>67 (46.8%)</td>
<td>143 (100%)</td>
</tr>
<tr>
<td>Total</td>
<td>120 (43.4%)</td>
<td>156 (56.5%)</td>
<td>276 (Total)</td>
</tr>
</tbody>
</table>

Table 3.3 represents frequency distribution and percentages of liberal (pro-parent) and conservative (pro-district) votes rendered prior to the Endrew F. decision. Liberal votes were those that were in favor of the student. Conservative votes were those that were in favor of the school district. Votes were disaggregated by the primary disability eligibility of the student involved in each case. This allowed for comparisons to be made of votes received in cases involving student with an Autism Spectrum Disorder and those with another primary disability eligibility.

Table 3.3

*Frequency and Percentage of Liberal-Pro-Parent and Conservative Pro-District Votes Cast in United States District Court Cases in IDEA FAPE Cases Pre- - the United States Supreme Court’s Endrew F. Decision Disaggregated by Disability Eligibility*

<table>
<thead>
<tr>
<th></th>
<th>Liberal</th>
<th>Conservative</th>
<th>Overall Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Endrew F</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 3.4 represents frequency distribution and percentages of liberal (pro-parent) votes rendered after the Endrew F. decision by disability category as represented by Autism and Other. Liberal votes were those that were in favor of the student. Conservative votes were those that were in favor of the school district.

Table 3.4

*Frequency and Percentage of Pro-Parent and Votes Cast in United States District Court Cases in IDEA FAPE Cases Post- the United States Supreme Court’s Endrew F. Decision Disaggregated by Disability Eligibility*

<table>
<thead>
<tr>
<th></th>
<th>Post-Endrew F.</th>
<th>Liberal</th>
<th>Conservative</th>
<th>Overall Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autism</td>
<td></td>
<td>25 (44.6%)</td>
<td>31 (55.3%)</td>
<td>56 (100%)</td>
</tr>
<tr>
<td>Other Disability</td>
<td></td>
<td>49 (56.3%)</td>
<td>38 (43.6%)</td>
<td>87 (100%)</td>
</tr>
<tr>
<td>Overall Votes</td>
<td></td>
<td>74 (51.7%)</td>
<td>69 (48.2%)</td>
<td>143 (Total)</td>
</tr>
</tbody>
</table>

**Binary Logistic Regression.** The previous tables gave a descriptive analysis of the data set. Tables 5 and 6 display the results of the logistic regression modeling with the ideology (party-of-appointing president) and Endrew F on pro-parent or pro-district voting.

The data were analyzed using the logistic regression tool found in the Statistical Package for Social Sciences (SPSS) 24th version. Logistic rather than multiple regression techniques were
applied to analyze the data set since the dependent measure was dichotomous (Tabachnick & Fidell, 2007). The researcher sought to identify predictors that may help explain how judges vote in FAPE hearings.

**Inferential Analysis**

**Binary Logistic Regression.** The foundation for the inferential statistics to occur was laid in the previous section on descriptive analysis. Inferential statistics quantified the impact of the independent variables on judicial voting behaviors in terms of whether judges voted in favor of the parent (liberal) or the school district (conservative) in IDEA FAPE cases. Additional tables displaying the logit analyses are provided in Chapter 4.

Although Endrew F. set out standards which should be applied in all FAPE determinations, there remains an empirical question as to its effects on cases involving students with autism compared to students with other disabilities. Since Endrew F involved a student with autism, it is possible that judges may be applying its holding only to such students and not to students with other disabilities. Accordingly, the researcher posed this question as an exploratory one in an attempt to find an answer.

Chapter 4, entitled Results, includes a presentation of findings from the foregoing statistical analyses. Results are displayed in table formats that disaggregate the data for further synthesis to answer the target research questions. After the results are analyzed, they will be interpreted in Chapter 5 to gain further understanding of Endrew F.’s impact on judges’ voting in FAPE cases.
Chapter 4

Results

In this chapter, the author displays the results of the descriptive and inferential analyses performed on the data set described in Chapter 3. The principal objective of this study was to determine whether the Endrew F. SCOTUS decision impacted FAPE decision-making in United States District Court in cases alleging IDEA violations by local educational agencies. To determine Endrew F.’s effects I set up a logistic regression model wherein decisions made pre and post Endrew F.; party of the appointing president; judge’s gender; and type of disability (Autism or Other), served as independent variables. A dichotomous dependent measure judges’ votes on whether a FAPE violation occurred, served as the dependent measure. A total of 276 votes surrounding the Endrew F. decision were analyzed.

Descriptive Data

Descriptive data were organized in 2 x 2 cells containing frequencies and percentages associated with each of the variables described above. Table 4.1 reveals the frequency distribution and associated percentage of votes disaggregated into No FAPE violation and FAPE violation occurring before and after the Endrew F. decision.

Table 4.1

<table>
<thead>
<tr>
<th></th>
<th>No FAPE Violation</th>
<th>FAPE Violation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Endrew F. (0)</td>
<td>70 (48.9%)</td>
<td>73 (51.5%)</td>
<td>143 (100%)</td>
</tr>
<tr>
<td>After Endrew F. (1)</td>
<td>88 (66.1%)</td>
<td>45 (33.8%)</td>
<td>133 (100%)</td>
</tr>
<tr>
<td>Total</td>
<td>158 (57.2%)</td>
<td>118 (42.8%)</td>
<td>276 (Grand Total)</td>
</tr>
</tbody>
</table>
Table 4.2 shows that among the 276 total votes, 144 were cast prior to the Endrew F. decision and 134 followed Endrew F. Among the 144 votes cast prior to Endrew F., 48% of the decisions indicated no FAPE violation occurred while 52% of votes concluded a FAPE violation occurred. Following the Endrew F. ruling, a total of 134 votes were cast: 66% of the votes ruled in favor of the school district, finding no FAPE violation, and 34% indicated a FAPE violation arose. The analysis revealed there was a significant association between pre-Endrew and post-Endrew voting but in a direction different from what might have been expected: before Endrew F., 52% of the votes indicated a FAPE violation occurred whereas afterward only 34% of the decision so indicated.¹ Because Endrew F. set out a more rigorous standard than some circuit courts’ reading of Rowley these results demand an explanation.

Table 4.2 shows the frequency distribution of votes cast by District Court judges based on their gender. There was a total of 191 male 87 female judges who rendered decisions in these cases. A total of 155 votes were decided as No FAPE violation, 56% of those votes were cast by male judges with 55% determined by female judges. The FAPE violation findings totaled 123 with 44% of these rulings were decided by a male judge and 45% decided by a female judge. This indicates the gender of a judge appears to have no impact on how they voted regarding FAPE controversies.²

Table 4.2

<table>
<thead>
<tr>
<th>Frequency Distribution of Judicial Findings of FAPE Violations Based on the Judges’ Gender</th>
</tr>
</thead>
</table>

¹There was a relationship between decisions rendered before Endrew F. and thereafter and whether the court found a FAPE violation ($X^2 = 8.3433, df = 1, p = .004$ (rounded)).

²There was no relationship between decisions rendered by male judges compared to those made by female judges ($X^2 = 0.004, df = 1, p = .9525$).
Table 4.3 shows the frequency distribution difference based on the Party of the Appointing President who nominated each judge. The two parties were identified as either Republican or Democrat. The percentage distributions of No FAPE and FAPE violations were essentially the same between Republicans and Democrats with 43% of each group finding a FAPE violation.³

Table 4.3

<table>
<thead>
<tr>
<th></th>
<th>No FAPE Violation</th>
<th>FAPE Violation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>105 (55.5%)</td>
<td>84 (44.4%)</td>
<td>189 (100%)</td>
</tr>
<tr>
<td>Female</td>
<td>48 (55.1%)</td>
<td>39 (44.8%)</td>
<td>87 (100%)</td>
</tr>
<tr>
<td>Total</td>
<td>153 (55.4%)</td>
<td>123 (44.5%)</td>
<td>276 (Grand Total)</td>
</tr>
</tbody>
</table>

Table 4.4 shows the frequency distribution of judicial findings of FAPE violations involving students identified with an Autism Spectrum Disorder compared to students not identified with an Autism Spectrum Disorder for all 276 cases included in the study. Judges found FAPE violations in 41% of the autism cases and 44% of the cases involving students with

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³ There was no relationship between decisions rendered by Republican verses Democratic appointees in their FAPE voting ($X^2 = 0.00186, df=1, p = .8915$).
other disabilities. This minor difference did not attain significance when a chi square statistic was calculated.\(^4\)

Table 4.4

*Frequency Distribution of Judicial Findings of FAPE Violations Involving Students Identified with an Autism Spectrum Disorder Compared to Students Identified with Another Disability Identified by IDEA.*

<table>
<thead>
<tr>
<th></th>
<th>No FAPE Violation</th>
<th>FAPE Violation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autism</td>
<td>68 (59%)</td>
<td>48 (41%)</td>
<td>116 (100%)</td>
</tr>
<tr>
<td>Other</td>
<td>89 (56%)</td>
<td>71 (44%)</td>
<td>160 (100%)</td>
</tr>
<tr>
<td>Total</td>
<td>157 (57%)</td>
<td>119 (43%)</td>
<td>276 (Grand Total)</td>
</tr>
</tbody>
</table>

Table 4.5 contains the frequency distribution for FAPE violations found in high FAPE standard circuits compared to circuits denominated as lower FAPE standard circuits for all 276 cases in the data base. A 2 x 2 chi square analysis indicated no significant differences between the high standard and lower standard circuits in their finding FAPE violations.\(^5\)

Table 4.5

*Frequency Distribution of Judicial Findings of FAPE Violations by High and Lower FAPE Standard Circuits for all 276 Decisions in the Database*

<table>
<thead>
<tr>
<th>Circuit</th>
<th>No FAPE Violation</th>
<th>FAPE Violation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>High FAPE standard</td>
<td>91 (59.8%)</td>
<td>61 (40.1%)</td>
<td>152 (100%)</td>
</tr>
</tbody>
</table>

Pre-Endrew F.

\(^4\) There was no relationship revealed between FAPE decisions rendered in autism verses other disability cases \(\chi^2 = 0.2461, df=1, p = .619866\).

\(^5\) There was no overall relationship revealed between FAPE decisions rendered in high verses lower standard circuits \(\chi^2 = 0.7074, df=1, p = .400302\).
Table 4.5 shows the frequency of FAPE violations found by the high and lower standard circuits before the Endrew F. decision was rendered. The results indicate that the high standard circuits found FAPE violations 43.3% of the time while the lower standard circuits found FAPE violations 64.8% of the time. The association between pre-Endrew FAPE standards and finding FAPE violations during the pre-Endrew period was statistically significant. This result seems anomalous in that one might expect to find a higher percentage of FAPE violations in circuits which set a more demanding standard for satisfying IDEA’s FAPE requirements. This suggests that the characterization of commentators as to the standards applied in the various circuits regarding high v. lower FAPE standards did not translate into how FAPE decisions were made, at least in terms of how judges voted. This suggests that the various applications of “reasonably calculated to enable the child to receive educational benefits,” applied by the high and lower FAPE standard circuits were sufficiently ambiguous to deny real meaning to Rowley during the pre-Endrew period.

Table 4.6

Pre-Endrew F. Frequency Distribution of Judicial Findings of FAPE Violations by Federal Circuit.

---

6 A significant relationship between high and lower FAPE standard circuits was revealed for the pre-Endrew period ($X^2 = 5.9327, df=1, p = .014862$).

7 Board of Education v. Rowley, 458 U.S. at 207
<table>
<thead>
<tr>
<th>Circuit</th>
<th>No FAPE Violation</th>
<th>FAPE Violation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>High FAPE standard</td>
<td>50 (56.2%)</td>
<td>39 (43.8%)</td>
<td>89</td>
</tr>
<tr>
<td>Pre-Endrew F.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lower FAPE</td>
<td>19 (35.2%)</td>
<td>35 (64.8%)</td>
<td>54</td>
</tr>
<tr>
<td>standard Pre-Endrew F</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>69 (48.3%)</td>
<td>74 (51.7%)</td>
<td>143 (Grand Total)</td>
</tr>
</tbody>
</table>

Table 4.6 displays the frequency distribution for voting on FAPE violations by comparing how judges from high and lower standard pre-Endrew circuits voted after the Endrew F. decision was rendered. The results indicated that there was no significant difference between the two circuit groups in voting after the Endrew F. decision was made. This null finding might be expected if during the post-Endrew period the high and less demanding circuits applied a common unambiguous standard following issuance of Endrew F. This suggests that the phrases such as “appropriately ambitious” and “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” may have real practical meaning despite the Court’s refusal to establish a bright line rule for what appropriate progress would look like in each individual case. Unfortunately, the Court’s direction in Endrew F that lower courts should

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8 There was no overall relationship revealed between FAPE decisions rendered in the pre-Endrew F. high verses lower standard circuits for votes rendered post-Endrew F. ($X^2 = 0.326$, $df = 1$, $p = .856722$).

9 Endrew F. v. Douglas County School District RE_1, 137 S.Ct. 988, 1000-01 (2017)
defer to the judgment of school makes less certain whether the absence of differences between the more and less demanding FAPE standard pre-Endrew circuits, post-Endrew, is simply a function of deference to state agency decisions as directed under the Endrew F. decision or the application of the more demanding Endrew F. standard.

The analysis revealed the percent of FAPE violations in the pre-Endrew high standard FAPE circuits dropped from 43.8% pre-Endrew F (Table 4.6) to 33.9% post-Endrew F. (Table 4.7) and in the lower standard pre-Endrew FAPE circuits from 64.8 % pre-Endrew F (Table 4.6) to 32.4 % post-Endrew F. (Table 4.7). Thus, the direction for district courts finding FAPE violations between the two periods under study is the opposite from what might occur if a higher standard were applied post-Endrew (Weber, 2019). This is particularly true because nearly all of the decisions reviewed post-Endrew involved review of administrative decisions rendered under the pre-Endrew Rowley standard. This suggests that Endrew F’s direction on deference may have had a greater impact on outcomes than the new higher FAPE standard it set in Endrew F. Perhaps what the Court gave with one hand on the FAPE standard, it took away with the other by it reference to judicial deference?

Next, we subjected the judges’ voting to an inferential analysis which included the all the predictor variables under study: party of the appointing president, judges’ gender, high v. lower standard circuit, and students’ disability, autism and other. The researcher was particularly interested in determining how the initial observations reported above would be align with the outcomes under a full model logit calculation. The results of those calculations appear in the next section.

Table 4.7

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10 Id. at 1001.
Inferential Analysis

Binary logistic regression.

A logistic regression model was run with and without an interaction effect between the legal precedent and circuit variables.

Without interaction.

A total of 276 votes were analyzed, and the full non-interaction model significantly predicted judges’ FAPE verses no-FAPE violation decisions (omnibus chi-square =17.823, df = 6, p < .05). The model accounted for between 6.2% and 8.3% of the variance in judge voting behaviors (analogous to the $R$ squared statistic in multiple regression), as derived from Cox-Snell and Nagelkerke $R$ Square estimate measures. Overall, 63.3% of predictions were accurate.

This model, as shown in Table 4.8, (below) indicates that the likelihood of a “1” vote (finding a FAPE violation) went down after the Endrew F. decision, and no circuit effect was revealed. Neither judges’ gender, disability classification attained significance.

Table 4.8
Logit Analysis of the Odds of a FAPE violation determination as a function of the Endrew F. decision, students’ disability, judges’ party affiliation and gender.

<table>
<thead>
<tr>
<th></th>
<th>B</th>
<th>S.E.</th>
<th>Wald</th>
<th>df</th>
<th>Sig</th>
<th>Exp (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>After Endrew</td>
<td>-.740</td>
<td>.250</td>
<td>8.761</td>
<td>1</td>
<td>.003</td>
<td>.477</td>
</tr>
<tr>
<td>PresidentParty</td>
<td>.159</td>
<td>.261</td>
<td>.369</td>
<td>1</td>
<td>.543</td>
<td>1.172</td>
</tr>
<tr>
<td>Judges’_Gender</td>
<td>-.106</td>
<td>.271</td>
<td>.153</td>
<td>1</td>
<td>.695</td>
<td>.899</td>
</tr>
<tr>
<td>Autism_or_Other</td>
<td>-.232</td>
<td>.258</td>
<td>.811</td>
<td>1</td>
<td>.368</td>
<td>.793</td>
</tr>
<tr>
<td>Constant</td>
<td>.085</td>
<td>.240</td>
<td>.125</td>
<td>1</td>
<td>.724</td>
<td>1.088</td>
</tr>
</tbody>
</table>

**The Interaction Model.**

Table 4.9 shows the results of the logit analysis performed on the data set with the interaction between the legal precedent and circuit variable included.

Table 4.9

*Logit Analysis of the Odds of a FAPE Violation as a Function of the Legal Precedent, Judges’ Party Affiliation, Judges’ Gender, Students’ Disability, and Circuit Variables with (Precedent x Circuit Variable) Interaction.*

<table>
<thead>
<tr>
<th></th>
<th>B</th>
<th>S.E.</th>
<th>Wald</th>
<th>df</th>
<th>Sig</th>
<th>Exp (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Precedent</td>
<td>-.347</td>
<td>.340</td>
<td>1.040</td>
<td>1</td>
<td>.308</td>
<td>.707</td>
</tr>
<tr>
<td>PresidentParty</td>
<td>.158</td>
<td>.264</td>
<td>.360</td>
<td>1</td>
<td>.548</td>
<td>1.172</td>
</tr>
<tr>
<td>Judges’_Gender</td>
<td>-.145</td>
<td>.277</td>
<td>.274</td>
<td>1</td>
<td>.601</td>
<td>.865</td>
</tr>
<tr>
<td>Autism/Other</td>
<td>-.128</td>
<td>.265</td>
<td>.235</td>
<td>1</td>
<td>.628</td>
<td>.879</td>
</tr>
<tr>
<td>Circuit</td>
<td>909</td>
<td>.364</td>
<td>6.229</td>
<td>1</td>
<td>.013</td>
<td>2.482</td>
</tr>
<tr>
<td>Int: Prec x Cir.</td>
<td>1.106</td>
<td>526</td>
<td>4.416</td>
<td>1</td>
<td>.036</td>
<td>.331</td>
</tr>
<tr>
<td>Constant</td>
<td>1.242</td>
<td>.282</td>
<td>.736</td>
<td>1</td>
<td>1.391</td>
<td>.785</td>
</tr>
</tbody>
</table>
Table 4.9 gives the coefficients, Wald statistic, associated degrees of freedom, and probability values for each of the predictor variables with interaction included. The main effect for the pre-versus post-Endrew period as revealed in Table 4.8 disappeared when the interaction between the legal precedent and circuit variable was included.

Table 4.9 shows that only main effects for the circuit variable in the interaction model were statistically significant at the .05 alpha level ($B=0.909; \text{Exp}(B)=2.484); p = .013$). The less rigorous pre-Endrew F. circuits (coded “1”) (District of Columbia, Fourth, Seventh, Eighth, Ninth, 10th and 11th Circuits) compared to the more rigorous ones (coded “0”) (the First, Second, Third, Fifth and Sixth Circuits) found significantly more FAPE violations than did the rigorous circuits when both the pre- and post-Endrew F cases were included in the analysis and all other variables were controlled. In other words, when the pre- and post Endrew decisions were combined ($n = 276$), as the pre-Endrew circuit standards decreased (coded as going from 0 to 1), significantly more FAPE violations were observed (1= FAPE violation, 0=no FAPE violation, Wald = 6.229, $p=.013$, df. =1) $^{11}$ For each unit increase from the more (coded “0”) to the less rigorous FAPE circuit (coded “1”), the odds of a finding of a FAPE violation increased by a factor of 2.482. This result is qualified by the fact the analysis revealed a significant interaction effect between the pre- post- Endrew F predictor and the high FAPE standard- lesser FAPE standard circuits.

$^{11}$ Recall that the when the Chi Square statistic was computed for before and after Endrew F the analysis revealed there was a significant association between pre-Endrew and post-Endrew voting but in a direction different from what might have been expected: before Endrew F. Fifty-two percent of the votes indicated a FAPE violation occurred whereas afterward only 34% of the decision so indicated. Thus, in this respect the logit results are consistent with the descriptive analysis discussed above about the Table 4.1 results.
The interaction suggests that the effect really pertains to the courts where the circuit variable was coded as “1” [the lower standard pre-Endrew FAPE circuits]. The lower standard pre-Endrew courts were less likely to find a FAPE violation following Endrew F. Wald = 4.416, \( B = 1.106, p = 0.036, \text{Ex (B)} = .331 \) By contrast, voting by circuits coded as “1” [higher standard pre-Endrew circuits] did not change after Endrew F. issued.

The absence of a precedential effect in the high FAPE standard circuits in pre- and post-Endrew voting makes sense in that the higher pre-Endrew standards align closely with the post-Endrew standards, and therefore it might be expected that little change would occur after Endrew F. was decided. The fact that the lower standard pre-Endrew courts were less likely to find a FAPE violation following Endrew F. was surprising. It might have been expected that these courts would have found significantly more violations because nearly all of the cases under study involved “appeals” from state educational agency (SEA) determinations made under the weaker pre-Endrew standards. This enabled a comparison between cases initiated and decided pre-Endrew with those initiated pre-Endrew and yet to be decided post-Endrew. This suggests that factors other than the new legal standard set by Endrew F. may be operating to produce this result in the circuits with weaker pre-Endrew circuits. I consider possible reasons for this outcome in the next chapter.
Chapter 5

Discussion

This chapter analyzes and discusses the results reported in the previous chapter.

Endrew F. declared that a school district “must offer an IEP reasonably calculated to enable a child to make progress” (Endrew F. V. Douglas Cnty.Sch. Dist., 2017). This meant that “whether a child is fully integrated or not, each student must be offered an educational program that is “appropriately ambitious in light of [the child’s] circumstances … [E]very child should have the chance to meet challenging objectives ” (Endrew F. V. Douglas Cnty.Sch. Dist., 2017, p.1). The Court held that this standard for appropriate education is “markedly more demanding than the ‘merely more than de minimis test applied by the Tenth Circuit” (Endrew F. V. Douglas Cnty.Sch. Dist., 2017, p. 1). Because the Tenth Circuit applied the wrong standard the case was remanded to the district court which had decided the case in favor of the parents12 for consideration under the correct FAPE standard.

The Endrew F. Court also reaffirmed Rowley’s rejection of the claim that IDEA requires all children to be offered an opportunity to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to children without disabilities.13 This study examined how parents fared in United States District Courts when challenging the adequacy of the education offered to their children under the Individuals with Disabilities Education Act (IDEA) under the pre-Endrew F and post-Endrew F. standards.

The data base was comprised of United States District Court decisions resolving FAPE disputes between parents and local educational agencies. District court cases decided two years

13 Id. at 1001-02.
prior and two years following the March 22, 2017 Endrew F. SCOTUS decision were considered. This data was analyzed using logistic regression to determine whether Endrew F. resulted in changes in judicial voting after Endrew F.

The discussion in this chapter parallels the findings reported in Chapter 4 respecting the four variables used in the analyses. These included a dichotomous precedent variable indicated by whether the decision was dated before or after Endrew F.; the party-of-the-president appointing the judge (Democrat-Republican); judges’ gender, and the child’s disability (autism or other).

**Empirical Findings**

**Before and After Endrew F.**

Until Endrew F. was decided the Supreme Court had not issued an opinion defining the FAPE standard since its 1982 opinion in Board of Education v. Rowley. Although Congress took no action regarding the FAPE standard since Rowley issued it passed three major education laws aimed at improving education. These were: the 1997 Amendments to IDEA, the 2004 re-authorization of the IDEA (which followed the No Child Left Behind Act), and Every Student Succeeds Act of 2015 (Cowin, 2018). The 1997 Amendments reinforced the concept of “Least Restrictive Environment (LRE)” by reiterating that students with disabilities must be educated with their typically developing peers. Students requiring specialized supports should be instructed in the LRE to the “maximum extent appropriate”. Additionally, the 1997 Amendments clarified the importance and responsibility of general education teachers to actively participate in the process of educating students with disabilities. Children who qualify for services under IDEA are presumed to be general education students. Under the presidency of George W. Bush, the IDEA reauthorization of 2004 established a requirement for Highly Qualified Teachers in the public-school setting. These highly qualified teachers were to be provided with regular
professional development to work with students with special needs. Lastly, the 2004 re-authorization made it mandatory for all state education agencies to include students with disabilities in their annual standardized assessments. In 2015, the Obama administration’s Every Student Succeeds Act complemented the previous educational laws by requiring states to provide alternate standardized assessments for student with severe disabling conditions. This Act also mandated local education agencies to align every Individualized Education Plan (IEP) with general education content standards (ex. Texas Essential Knowledge and Skills (TEKS)).

Although, the Endrew F. ruling has “heightened” what qualifies as FAPE, the new precedent failed to provide a concrete blue print as to how schools should interpret the standard in practice or a rubric for the courts to make decisions in FAPE disputes. As with Rowley, “the court declined to establish a bright-line rule that elaborated on what appropriate progress would actually entail, stressing that courts should instead defer to the judgement of school authorities on that particular question” (Cowin, 2018, p. 15). (emphasis supplied).

Because Endrew F. tightened the reins of FAPE standards it might have been expected that a substantial number of reversals of pre-Endrew agency decisions might have occurred on review in the federal district courts. Zirkel’s work indicates this is not the case. Zirkel (2018) compared the outcomes in cases initially decided by the state agency under Rowley and then reviewed in the federal district courts under Endrew F. In the 49 cases reviewed, he found that 90% of the outcomes remained unchanged (43 out of 49). Only 6% ($n=3$) were reversed by the district courts with 4% ($n=2$) were remanded\(^\text{14}\).

\(^{14}\) One of the three reversals was found in favor of the school district. The other two reversals went in favor of the parents.
Unfortunately, it’s a bit early to make conclusions about Endrew’s long-term effects. The proximity to the Endrew F. decision may have allowed insufficient time for an agreed upon standard to have developed and guide the lower courts in the FAPE determinations.

**Party-of-Appointing-President**

Although party affiliation has been shown to influence judicial voting on significant issues the results have not been uniform. It appears that FAPE standards may not possess enough ideological issue salience to bring about divergence in how Republican and Democratic appointees vote.

**Judges’ Gender**

As with judicial ideology, the effects of gender on judicial voting has not been uniform. In one of the more prominent studies Peresie found that female judges mattered to outcomes in Title VII sexual harassment and sex discrimination cases. Her results showed although plaintiffs lost in most cases they were significantly more likely to win when a female judge was on the bench. This effect was independent of judicial ideology - the presence of both liberal and conservative female judges increased the probability that plaintiffs prevailed on panels of varying ideological composition.

Because the data showed significant gender disparities after controlling for other factors affecting judges' decisions - most significantly ideology, Peresie concluded - “that direct and indirect effects of gender exist beyond the data set, at least in Title VII sexual harassment and sex discrimination cases. Whether the findings are applicable to other areas is less certain, but this is a rich area for future research.”15

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Boyd and Nelson (2017) on the other hand found that no overall statistical difference was observed in how male and female judges determine sentences for defendants. However, Boyd and Nelson did observe an interaction effect. Female judges are more lenient on sentences doled out to female defendants when compared to male judge counterparts. Because of finding such as these I included judges’ gender as a control variable. As indicated in the previous chapter gender did not impact judges’ decision making on FAPE determinations.

**Autism and Other**

Although the FAPE standard announced in Endrew F. purported to set a uniform standard across disability categories I thought it prudent to include a predictor which distinguished between children with autism and those with other disabilities. Because of the severity of violations in Endrew F. and the extremely inadequate programming for that child, it might have been the case may be that the standard set forth in Endrew F. could be interpreted by judges as requiring glaring violations to overcome the deference afforded to state agencies under Endrew F. I found no difference in the dependent measure between the autism group and students with other disabilities.

**Analysis of Results**

It will be recalled that when the interaction model was run that the only main effects for the circuit variable were statistically significant at the .05 alpha level. The less rigorous pre-Endrew F. circuits (District of Columbia, Fourth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits) compared to the more rigorous ones (the First, Second, Third, Fifth and Sixth Circuits) found significantly more FAPE violations than did the rigorous circuits when both the pre- and post-Endrew F cases were included in the analysis and all other variables were controlled. In other words when the pre- and post Endrew decisions were combined ($n=276$), as the pre-Endrew circuit standards decreased (coded as going from 0 to 1) significantly more FAPE
violations were observed. This result was qualified by the fact the analysis revealed a significant interaction effect between the pre- post- Endrew F predictor and the high FAPE standard versus the- lesser FAPE standard circuits.

The interaction suggested that the main effect really pertains to the courts where the circuit variable is coded as “1” [the lower standard pre-Endrew FAPE circuits]. The lower standard pre-Endrew courts were less likely to find a FAPE violation following Endrew F. Wald = 4.416, B=1.106, p= 036, Ex (B)=.331) By contrast, voting by circuits coded as “1” [higher standard pre-Endrew circuits] did not change after Endrew F. issued.

The absence of a precedential effect in the high FAPE standard circuits in pre- and post-Endrew voting makes sense in that the higher pre-Endrew standards align closely with the post-Endrew standards and therefore it might be expected that little change would occur after Endrew F. was decided.

The fact that the lower standard pre-Endrew courts were less likely to find a FAPE violation following Endrew F. was surprising. It might have been expected these courts would have found significantly more violations because nearly all of the cases under study involved “appeals” from state educational agency (SEA”) determinations made under the weaker pre-Endrew standards.16 This enabled a comparison between cases initiated and decided pre-Endrew with those initiated pre-Endrew and but decided post-Endrew. This unanticipated result suggests that factors other than the new legal standard set by Endrew F. may be operating to produce this result in the circuits with weaker pre-Endrew circuits. Our data shows that substantial inertia

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16 Courts categorized as less likely to find a FAPE violation should, in theory identify more FAPE violations post Endrew F. Yet, courts identified in the low standard category were found to identify the same or less number of FAPE disputes despite the raised standard precedent set by the Endrew F. ruling.
exists in the, D.C., Fourth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits in that those jurisdictions appeared to have doubled down on their pre-Endrew F. interpretation of IDEA’s FAPE requirements, at least as measured by their willingness to find FAPE violations. Indeed, the interaction revealed pre- and post-Endrew F. voting and the circuit variable indicates these circuits have found significantly fewer FAPE violations despite the Court’s rejection of the less rigorous standards applied in these circuits pre-Endrew F.

Several explanations for these seemingly anomalous results are possible. These include:

1. The less rigorous pre-Endrew FAPE circuits interpret their pre-Endrew FAPE standards as consistent with Endrew F. FAPE criteria even though they may not be.¹⁷

2. The multiple-faceted FAPE criteria contained in Endrew F. offer an opportunity for these courts to exercise their discretion by picking and choosing which of these criteria to emphasize.¹⁸ This choice may lead to outcomes which are more consistent with pre-Endrew results rather than the more demanding Endrew F. standards, but nevertheless provide “lip service” for fitting the decision into Endrew F. standards.¹⁹

¹⁷ See, e.g. Mark C. Weber, Endrew F. Clairvoyance, 35 Touro Law Review 591, 595 (2019) (criticizing Second Circuit’s contention that its prior decisions are consistent with Endrew F. when in fact some of its decisions are clearly not consistent with Endrew F. FAPE standards; Perry A. Zirkel, The Aftermath of Endrew F.: An Outcomes Analysis Eighteen Months Later, 361 West’s Education Law Reporter 448-497 (2019)(comparing pre- and post-Endrew F decisions in the circuits and finding some circuits claiming consistency between the pre- and post-Endrew F. eras, especially in the Ninth and Second circuits, may not be accurate.).


¹⁹ Professor Zirkel has observed a superficiality in the analysis rendered under Rowley and Endrew F. standards, describing them as “less than nuanced.” Perry A. Zirkel, The Aftermath of
3. The typically voluminous records emanating from the state administrative record lead to a natural tendency to affirm the agency decisions absent glaring IEP violations.²⁰

4. General federal court congestion may cause to a time problem in case processing leading to a tendency to affirm administrative decisions even when a reversal may be appropriate.²²

5. The fuzziness between “meaningful” and “some” progress formulations and “appropriately ambitious” programming as required by Endrew F. necessarily leads to inconsistency in outcomes among the circuits.²³

6. The enormous range in severity among disabled children would seem to imply an almost endless variety of appropriate IEPs each corresponding to the special needs of the individual child. Because Endrew F. did not overrule Rowley judges are free to use those cases to reinforce their pre-existing voting tendencies, at least those emanating from the circuit of which they are a part.


²² Id.

²³ See, e.g., Maureen A. MacFarlane, In Search of the Meaning of an “Appropriate Education”: Ponderings on the Fry and Endrew Decisions, 46 J.L. & EDUC. 539 (2017) (questioning whether Endrew F. has added clarity to the substantive meaning of FAPE)
**Policy Implications**

The six factors I have listed above are readily drawn upon by judges using the power of deference to rule in a way which creates an obstacle to attaining the salutary results Endrew F. was intended to achieve. Rather than relying on amorphous verbalisms I have proposed an approach which may be able to overcome the niceties of language and narrow the discretion exercised by the district court judges.

The discretion of the judges needs to be limited by requiring them to anchor their decisions about IEP efficacy to measurable set of skills in the general curriculum. In each skill area impacted by the child’s disability a baseline performance levels defined by the general curriculum must be articulated in operational terms. In the same vein each annual goal must be anchored to that present performance level and stated in operational terms defined by specific advances in the general curriculum, regardless of the student’s IDEA classification and potential (Cowin 2018).

Table 5.1 serves as an illustration of the type of guide which may assist educators in establishing a FAPE and judges in determining if a FAPE has been provided. Establishing an objective and measurable set of goals for students alleviates historical concerns of ambiguity and may bring about results more consistent with Endrew F.’s standards. Using such a roadmap will not eliminate conflict concerning whether the goals set are appropriately ambitious under Endrew F but will enable the disputants to narrow the discussion about what to do based on a common set of agreed-to facts.

Table 5.1

*Sample template for establishing IEP specificity with measurable current performance levels and outcomes.*
<table>
<thead>
<tr>
<th>Content Area</th>
<th>Skill Deficit</th>
<th>Baseline Data</th>
<th>Goals and Objectives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reading Decoding</td>
<td>First grade student continues to read at a pre-primer level.</td>
<td>Student can identify 5 out of the 100 sight words required for mastery in the first grade.</td>
<td>Given the <strong>basic sight words</strong>, <strong>STUDENT</strong> will read 100 sight words with 100% accuracy on 5 consecutive trials.</td>
</tr>
<tr>
<td>Reading Comprehension</td>
<td>Typically, students receive orally or read passages after which they are asked a series of questions about the content to which they have been exposed.</td>
<td>Student is answering 1 out of 5 comprehension questions in a passage on grade level.</td>
<td>When asked, <strong>STUDENT</strong> will read a 100-word story at instructional level making no more than 8 <strong>oral reading</strong> errors and will answer 3 of 5 <strong>comprehension questions</strong> correctly 3 consecutive days.</td>
</tr>
<tr>
<td>Math Calculation</td>
<td>Student is only able to calculate one-digit addition problems with accuracy</td>
<td>Student solves 0 out of 10 two-digit addition problems</td>
<td>Given a set of numbers, <strong>STUDENT</strong> will solve <strong>two-digit addition</strong> problems <strong>without regrouping</strong> with 80% accuracy in 4/5 trials.</td>
</tr>
<tr>
<td><strong>Math Reasoning (word problems)</strong></td>
<td><strong>Student is only able to read time on a digital clock</strong></td>
<td><strong>Student can identify time on a clock with hands only at the top and bottom of the hour.</strong></td>
<td><strong>Given a clock, STUDENT will measure time to the nearest quarter hour and five minutes with 80% accuracy 4/5 trials.</strong></td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Written Expression</strong></td>
<td><strong>Student writes sentences in all capital letters</strong></td>
<td><strong>Student produced a paragraph using all capital letters.</strong></td>
<td><strong>When asked by the teacher, STUDENT will write upper- and lower-case letters with 100% accuracy in 4/5 trials.</strong></td>
</tr>
<tr>
<td><strong>Spelling</strong></td>
<td><strong>Student is having difficulty producing grammatically correct sentences independently</strong></td>
<td><strong>Student produced a paragraph in all capital letters with no use of periods, question marks, or commas.</strong></td>
<td><strong>When orally presented 5 dictated sentences, STUDENT will correctly write them (spelling, punctuation, capitalization) with 90% accuracy in 2 of 3 trials.</strong></td>
</tr>
<tr>
<td><strong>Expressive Communication</strong></td>
<td><strong>Student is identifying object names incorrectly throughout picture books</strong></td>
<td><strong>Student identifies 2 out of 10 items in a picture book correctly.</strong></td>
<td><strong>When shown 10 pictures/objects, STUDENT will verbally label the item with 80% accuracy for 4 out of 5 sessions.</strong></td>
</tr>
<tr>
<td>Receptive Communication</td>
<td>Student is having trouble on reading comprehension activities in the classroom.</td>
<td>Student correctly describes 1 out of 10 idioms.</td>
<td>When verbally given 10 idioms with a visual cue, STUDENT will describe the meanings correctly with 80% accuracy 4/5 sessions.</td>
</tr>
<tr>
<td>-------------------------</td>
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<tr>
<td>Pragmatic Language</td>
<td>Student identified with an Autism Spectrum Disorder is not making friends but is interested in meeting new people.</td>
<td>3 out of 3 times student entered a room and did not initiate a greeting with peers or adults.</td>
<td>STUDENT will introduce HIMSELF to 5 people without cues using appropriate volume, eye contact, etc. 8/10 times over 5 sessions.</td>
</tr>
<tr>
<td>Behavior</td>
<td>A third-grade student is unable to remain in his seat during independent work</td>
<td>Student left his seat without permission 15 times during a 10-minute interval</td>
<td>Student will demonstrate on task-behavior in the general education setting 75% of intervals during a 10-minute period, with the use of an appropriate fidget and one adult reminder in 4/5 trials, as measured by observation and data.</td>
</tr>
<tr>
<td>Social Emotional</td>
<td>Student will hit peers and throw objects when he is engaged in a one-hour class.</td>
<td>Student threw an object of attempted to hit a peer 5 x in a one-hour class.</td>
<td>Student will refrain from physical aggression (i.e. kicking, hitting,</td>
</tr>
</tbody>
</table>
Note. The skill deficit, baseline data, and goals and objectives must be uniformly derived from state and local curriculum. In this way, IDEA enables reliable measurement of baseline skill sets and enhancement of those skills through educational programming. All goals and objectives should be measured using a reliable method implemented with fidelity.

Table 5.1 provides a factual temperature check on the IEP. If the student has been integrated into the general education program then the goals should be reviewed to determine if they have been established to enable the child to achieve passing grades and advance to the next grade based on stipulated facts. However, some students receiving specialized services are so delayed that they are unable to be integrated into the general education classroom. Educators must still determine if the IEP is appropriately ambitious so that it presents challenging objectives for that part of the IEP which is implemented in restrictive settings. Adhering to this approach, should reduce the amount of vagueness which burdens the review process and enables judges to more effectively review the justifications for the IEP developed by the school.

Although judges cannot be excused from reviewing the records nevertheless, by judges emphasizing in their review the items referenced in the template above should engender a certain efficiency and cogency in the process. The language in Endrew F. states a student with an IEP should be making “appropriate progress”. When the legal arguments on both sides appear to be of equal force the presumption in favor of the school district will come to the fore. Right now, it
seems that very often deference is applied without scrutiny of the kind I advocate for here. The Rowley and Endrew F. cases can only help judges so much due to the varying degrees of impairment presented by each student in the cases.

Lastly, Congress could modify the IDEA to make consistent FAPE standards by clarifying Endrew F. further and thereby reduce the debilitating effects of ambiguity among local school districts and within the courts.

Despite these issues one commentator has suggested that Endrew F.’s may in some cases prove persuasive to schools or the courts based on its symbolic value (Waterstone 2017). However, such optimism as a result of Endrew F. must have been dampened considering the results which have ensued.

**Limitations of the Study**

This study is inaugural in nature as it is the first of its kind to investigate the impact of the Endrew F. ruling and how it impacts the lower courts and educational decisions made by local school districts for students with special needs. Additionally, this study extends the breadth of empirical research on ideology (measured by party-of–the-appointing-president) and judicial voting behavior.

One limitation of this study is that our data analysis was not based on the entire population of district court cases but rather a randomized selection of the cases. As with any other sampling, it is subject to error. Although the coding of the circuits was done in a relatively standardized fashion, based on language employed by the circuits in establishing their FAPE standards. The fact remains there are many moving parts in FAPE determinations and the two categories selected for this study might have been more nuanced which could result in a different empirical outcome.
Lastly, because Endrew F. was decided in March 2017 its impact has only been felt for a little over two years. Therefore, predictions as to the direction the courts will go in respect to FAPE law must be made with caution. Thus, future studies should be conducted to monitor the trends in the circuits regarding FAPE disputes. Differences in the application of Endrew F. in the circuits may disappear over time. It remains imperative that a prototypical approach to creating, implementing and determining a FAPE is continuously addressed to uphold the rights of students with disabilities under the IDEA.

**Further Reflections**

The inherent friction between the higher FAPE standard announced in Endrew F. and Endrew F.’s recognition of judicial deference to state agency determinations creates an environment where judges may exercise broad discretion in determining whether a FAPE violation has occurred.\(^{24}\) As stated above, no blueprint has been provided in either the Rowley or the Endrew F. SCOUTUS decisions regarding how FAPE should be provided in the school setting or a legal template for lower courts to utilize in determining FAPE disagreements. While both the Rowley and Endrew F. decisions state that courts should defer to school-based practitioners and educators on matters of pedagogy and educational methodology, the ambiguity exists as to how much or how little deference the courts should extend to school-based personnel. The supreme court has said there is a certain amount of deference that must be given to the state agency. Yet, deference is not subjugation. District court judges do not have a firm standard as to how much deference should be given. This produces “different outcomes across jurisdictions

Despite similar facts being presented in any given case” (Cowin, 2018, p. 17). Results of this current study may reflect too much deference given to the local state education agencies which negates the positive effects of Endrew F.

The long-term impact of Endrew F. is still to be determined. Clearly, the current research should be expanded to include more cases. Once a sufficient data base accrues the scope of this study should be expanded to appellate jurisdictions. Future studies should include examination of the impact of the following variables how District Courts in the varying circuits interpret the FAPE requirement whether ideology as measured by the Party-of-Appointing-President distinguishes how judges vote in FAPE and other IDEA controversies. Whether courts apply more stringently FAPE requirements for children falling on the Autism Spectrum then they do for other disabilities. Whether IEP teams and parents will have fewer conflicts about IEP development due to school officials’ awareness of the more rigorous FAPE standards set by Endrew F.

Finally, there is an emerging appearance that the anticipated positive effects for children which resulted in the Endrew F. decision have not yet been realized. Hopefully, some of the suggestions I have made will enhance the likelihood of that salutary goals of IDEA being fully realized.
References


Peter MILLS et al., Plaintiffs, v. BOARD OF EDUCATION OF the DISTRICT OF COLUMBIA et al., Defendants, 348 F. Supp. 866, 1972 U.S. Dist. LEXIS 12499 (United


Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, 1896 U.S. LEXIS 3390 (U.S. May 18, 1896)


Appendix A

FAPE decisions in the Court of Appeals regarding FAPE violations referencing the Endrew F. ruling

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Date Decided</th>
<th>1=FAPE Violation, 0-No FAPE Violation</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Renee J. v. Houston Indep. Sch. Dist., 913 F.3d 523</td>
<td>01/16/2019</td>
<td>0</td>
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<tr>
<td>Number</td>
<td>Case Name</td>
<td>Citation</td>
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<tr>
<td>11</td>
<td>Somberg v. Utica Cmty. Schs, 908 F.3d 162</td>
<td>11/05/2018</td>
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<tr>
<td>13</td>
<td>Johnson v. Boston Pub. Schs, 906 F.3d 182</td>
<td>10/12/2018</td>
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<tr>
<td>14</td>
<td>J.R. v. N.Y. City Dep't of Educ., 748 Fed. Appx. 382</td>
<td>09/27/2018</td>
</tr>
<tr>
<td>15</td>
<td>Dunn v. Downingtown Area Sch. Dist. (In re K.D.), 904 F.3d 248</td>
<td>09/18/2018</td>
</tr>
<tr>
<td>16</td>
<td>Lauren C. v. Lewisville Indep. Sch. Dist., 904 F.3d 363</td>
<td>09/14/2018</td>
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<tr>
<td>18</td>
<td>L.H. v. Hamilton Cty. Dep't of Educ., 900 F.3d 779</td>
<td>08/20/2018</td>
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<tr>
<td>19</td>
<td>A.L. v. Walt Disney Parks &amp; Resorts US, Inc., 900 F.3d 1270</td>
<td>08/17/2018</td>
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<tr>
<td>20</td>
<td>T.B. v. Prince George's Cty. Bd. of Educ., 897 F.3d 566</td>
<td>07/26/2018</td>
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<tr>
<td>21</td>
<td>Sophie G. v. Wilson Cty. Schs, 742 Fed. Appx. 73</td>
<td>07/12/2018</td>
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<td>Case</td>
<td>Citation</td>
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<tr>
<td>23</td>
<td>Z. B. v. D.C.</td>
<td>888 F.3d 515</td>
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<tr>
<td>24</td>
<td>Durbrow v. Cobb Cty. Sch. Dist.</td>
<td>887 F.3d 1182</td>
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<tr>
<td>26</td>
<td>Pollack v. Reg'l Sch. Unit 75</td>
<td>886 F.3d 75</td>
</tr>
<tr>
<td>27</td>
<td>P. v. West Hartford Bd. of Educ.</td>
<td>885 F.3d 735</td>
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<tr>
<td>29</td>
<td>E.F. v. Newport Mesa Unified Sch. Dist.</td>
<td>726 Fed. Appx. 535</td>
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<tr>
<td>30</td>
<td>J.P. v. City of New York Dep't of Educ.</td>
<td>717 Fed. Appx. 30</td>
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<tr>
<td>31</td>
<td>N.P. v. Maxwell</td>
<td>711 Fed. Appx. 713</td>
</tr>
<tr>
<td>32</td>
<td>ON.B. ex rel. H.B. v. N.Y. City Dep't of Educ.</td>
<td>711 Fed. Appx. 29</td>
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<tr>
<td>33</td>
<td>Rachel H. v. Dep't of Educ.</td>
<td>868 F.3d 1085</td>
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<tr>
<td>34</td>
<td>M. L. v. Smith</td>
<td>867 F.3d 487</td>
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Post Hoc Analyses of FAPE decisions in the Court of Appeals

Since the results in our data base appeared anomalous a rudimentary Post Hoc analysis was examined in the United States Court of Appeals regarding FAPE violations. Appendix B displays the frequency distributions of court cases decided in the higher court following the Endrew F. ruling randomly selected by the Nexis database. Of the identified 40 cases, only 7 of those cases resulted in a FAPE violation highlighting the phenomenon of local school agencies emerging as victors in cases questioning the provision of FAPE for students served under IDEA. This brings forth the question What does the result of the Endrew F. ruling mean for student rights? There has always been a legal distinction between the procedural (i.e. IDEA process requirements were not followed) and substantial (i.e. educational support services were not provided) violations categorized under IDEA. Two cases involving procedural FAPE disputes
was the *School Board of City of Norfolk v. Brown* (2010) and *L.G. ex rel. E.G. v. Fair Lawn Board of Education* (2012). In the first case, the school district was found to have failed to identify a student with a disability once they received notification of the student’s delays. While in the second case the district was found to have failed to hold an IEP team meeting without properly notifying the parents. In contrast, two cases involving substantial FAPE disputes is the *D.S. v. Bayonne Board of Education* (2010) and *L.R. v. Manheim Township School District* (2008). The first substantial dispute was brought to hearing as parents argued the school district did not provide the appropriate accommodations and modifications as outlined in their child’s IEP. Similar to the previous case, the second substantial case involved parents who claimed their child did not receive adequate speech therapy services or was provided a one-on-one aid.

Often, school districts emerge victorious in FAPE hearings as a result of legal technicalities. Regardless of the legal decision, a judge determines a child with disabilities may still have been victim to a loss of therapy or academic support services if evaluations are not completed, Individual Education Plan meetings not held, or special education documents are not done in a timely fashion, it may delay the amount and intensity of support a student with disabilities may receive in a school year.