Special education and the least restrictive environment: United States federal appeals court outcomes and expert testimony

Linda A. Maass
*The University of Montana*

Follow this and additional works at: https://scholarworks.umt.edu/etd

Let us know how access to this document benefits you.

**Recommended Citation**
https://scholarworks.umt.edu/etd/9529

This Dissertation is brought to you for free and open access by the Graduate School at ScholarWorks at University of Montana. It has been accepted for inclusion in Graduate Student Theses, Dissertations, & Professional Papers by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.
Permission is granted by the author to reproduce this material in its entirety, provided that this material is used for scholarly purposes and is properly cited in published works and reports.

**Please check "Yes" or "No" and provide signature**

Yes, I grant permission  

No, I do not grant permission  

Author's Signature: Linda Maass

Date: 5-29-05

Any copying for commercial purposes or financial gain may be undertaken only with the author's explicit consent.
SPECIAL EDUCATION AND THE LEAST RESTRICTIVE ENVIRONMENT: U.S. FEDERAL APPEALS COURT OUTCOMES AND EXPERT TESTIMONY

By

Linda A. Maass

B.A., Rider University, 1970
M.A., Fairfield University, 1975

Presented in partial fulfillment of the requirements

For the degree of

Doctor of Education

The University of Montana

2005

Approved by:

[Signatures]

Co-Chair

Dean, Graduate School

5-31-05

Date
This mixed methodology study analyzed U.S. federal appellate court outcomes and expert testimony under the least restrictive environment provision of the Individuals with Disabilities Education Act (IDEA, 1997).

The population and sample consisted of 60 published federal appellate court cases in which least restrictive environment or placement was the germane issue of special education litigation from June 4, 1997 to December 31, 2004.

Quantitative results gathered via the Litigation Documentation Sheet were used to identify gender, disability classification, primary placement issue, educational methodology, and judicial outcomes. Descriptive data were presented in the form of frequencies and percentages. Judicial outcome results indicated school districts predominantly won 70 percent of the cases; parents prevailed in 25 percent of the cases; and 5 percent were split decisions. The most frequent disability classification for which the student was the subject of litigation was autism (33.3%); where educational methodology was most often a related issue. Disputes arose around boys at twice the rate of girls. Private school placement was the most frequent primary LRE issue litigated.

Qualitatively, the processes of open, axial, and selective coding resulted in the following conclusions:

1. Regardless of the LRE issue, the analytical framework employed by federal circuits was the Rowley (1982) FAPE standard.
2. The federal appellate courts are inconsistent with regard to the principles used to determine whether a disabled student has been educated with non-disabled peers to the maximum extent appropriate.
3. Regardless of whether an expert witness was testifying for the parent or the school district, judicial opinions expressly included the following noteworthy factors influencing decisions: expert’s demeanor, knowledge and expertise, and knowledge of the child.
4. These findings are directed toward school administrators, parents, and attorneys.
ACKNOWLEDGEMENTS

Completing a dissertation is, initially, like being cast adrift in the sea, slowly learning to use a compass to navigate toward a distant shore. The voyage requires adaptability, and change, but most importantly, support, and, upon reflection began many, many years ago. Thus, my acknowledgements are to those who contributed to this journey.

My gratitude and appreciation to my Co-Chairs, Dr. Roberta Evans and Dr. David Aronofsky; to Bobbie, William Arthur Ward once stated “...the great teacher inspires” here’s to you, sister, a great teacher! To my other committee members, Dr. George Camp, Dr. Jim Clark, and Dr. Don Robson, your unwavering support during the trials and tribulations of completing this study exemplifies the practice of educational leadership – my heartfelt thanks!

This dissertation is dedicated to my family- Beth Maass, Bobby Horowitz, and parents, Edmund and Elsa Maass. Beth, my journey began with your hours of consciousness-raising with dad; eternal thanks for convincing him that girls could go to college. You put my future before yours – the ultimate act of unconditional love. To my soul-mate, Bobby Horowitz, your belief in me kept me focused “on the ball.” For all of the dinners kept warm, for the tears and laughs we shared, you made it easier Bob. To my mother, Elsa Maass, who, alone, immigrated to this country at 18, and in so doing, taught her daughters that seemingly unimaginable goals are attainable. Last, but not least, to my father, who, if he were alive, would have proudly said, “Congratulations Dr. Maass.” To my family and Bobbie Evans, my deep bows for your support throughout my journey from 1966-2005.

Finally, during the latter part of my journey, I will be eternally grateful to Dr. Donald K. Wattam, for the hours of discourse and his unconditional support. As members of Cohort IV, we forged an everlasting bond that, I believe, illustrates the true meaning of cohort, a group united, helping each other toward a common goal. Many, many thanks, Dr. Don!
# TABLE OF CONTENTS

ABSTRACT ................................................................................................................................. ii

CHAPTER ONE: INTRODUCTION

Statement of the Problem ........................................................................................................ 2
Purpose of the Study .................................................................................................................. 4
Research Questions .................................................................................................................. 5
Role of the Researcher .............................................................................................................. 6
Definitions of Terms ................................................................................................................ 6
Limitations and Delimitations of the Study ........................................................................... 8
Significance of the Study ......................................................................................................... 9
Chapter Summary .................................................................................................................. 10

CHAPTER TWO: REVIEW OF RELATED LITERATURE

Sources of Law .......................................................................................................................... 12
The Federal Court System ..................................................................................................... 13
History of Special Education Practices ................................................................................. 14
History of Special Education Case Law ............................................................................... 15
Seminal Decisions .................................................................................................................. 17
Special Education Outcomes Litigation Analysis ............................................................... 27
Expert Testimony ................................................................................................................... 31
Summary of the Review of Related Literature ..................................................................... 32

CHAPTER THREE: METHODS AND PROCEDURES

Research Design ...................................................................................................................... 34
Population and Sample .......................................................................................................... 35
LIST OF TABLES

TABLE | PAGE
--- | ---
1. Composition of U.S. Circuit Courts | 13
3. Federal Appeals Court Cases by Study Number | 41
4. Cases Adjudicated from June 1997 – 2004 in Federal Appeals Court | 42
5. Distribution of LRE Placement Cases 1997-2004 | 43
6. Plaintiff Distribution | 43
7. Distribution of Students by Gender | 44
8. Distribution of Students by Disability Classification and Gender | 44
9. Distribution of Student by Placement | 45
10. Methodology and Disability Classification | 45
11. Distribution of Cases by Circuit Court Outcome | 46
12. Distribution of Cases by Outcome | 46
13. Properties and Dimensional Range of the Procedural Violations Category | 49
14. Properties and Dimensional Range of the Educational Benefit Category | 51
15. Properties and Dimensional Range of the Least Restrictive Environment Category | 54
16. Properties and Dimensional Range of the Private School Category | 57
17. Properties and Dimensional Range of the Due Weight Category | 60
18. Properties and Dimensional Range of the Credibility Category | 63
19. Properties and Dimensional Range of the School’s Expert Witness Category | 66
20. Properties and Dimensional Range of the Parent’s Experts Category | 68
21. Axial Coding Process ...............................................................................................71
22. Causal Condition and Phenomena .............................................................................72
23. The Phenomenon of Procedural Violations in Context ........................................72
24. The Phenomenon of Educational Benefit in Context ..............................................75
25. The Phenomenon of Least Restrictive Environment in Context ..........................77
26. The Phenomenon of Private School in Context .....................................................80
27. The Phenomenon of Due Weight in Context .........................................................83
28. The Phenomenon of Credibility in Context ..............................................................85
29. The Phenomenon of School’s Expert Witnesses in Context ..................................87
30. The Phenomenon of Parent’s Expert Witnesses in Context ................................90
<table>
<thead>
<tr>
<th>FIGURE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Procedural Violations (Rowley – 1st Prong)</td>
<td>123</td>
</tr>
<tr>
<td>2. Educational Benefit</td>
<td>123</td>
</tr>
<tr>
<td>3. Least Restrictive Environment</td>
<td>124</td>
</tr>
<tr>
<td>4. Private School</td>
<td>124</td>
</tr>
<tr>
<td>5. Expert Witness Testimony</td>
<td>125</td>
</tr>
</tbody>
</table>
CHAPTER ONE
INTRODUCTION

Amid the ebb and flow of education litigation facing America’s schools, one area in particular has continued to burgeon: special education. Throughout its historical evolution, special education practices have included a wide array of approaches, some of which were immersed in well-researched techniques. Sadly, in many circumstances, other approaches employed in special education were bereft of the types of sound practices emerging from research and were employed, instead, merely at the convenience of a school district. In these instances, devoid both of scientific findings and humanity, legal action against a school district was invaluable as a means of halting further harm befalling special education students across this country. Therefore, the context of these legal causes of action, along with their issues and inclusion of expert testimony, merit further investigation.

Taylor (2001) pointed out that in categorizing the ten major legal issues in education law; special education has ranked second in importance. Zirkel and D’Angelo (2002) found that in the federal courts, special education decisions dramatically increased from the 1970's to the 1990's, in contrast to an overall decline in the volume of education litigation during that same period. More specifically, Newcomer and Zirkel (1999) maintained that placement decisions have dominated special education litigation, arising from implementation of the Individuals with Disabilities Education Act (IDEA). In 63% of special education law cases, placement was the primary issue in IDEA litigation studied from 1982-1995. The authors cautioned that more recent trends in special education court decisions may differ from past trends and are a fertile ground for
As specified in IDEA, students identified with a disability must receive specially designed instruction (i.e. special education). This is intended to occur when school personnel and parents work together to develop and implement an individualized education program (IEP). Moreover, such services must be delivered, to the maximum extent appropriate, in settings with non-disabled students. This is also referred to as the IDEA least restrictive environment (LRE) requirement. When this is not possible, segregated or other forms of settings/placements may be provided (Snow 1993; Larose, 1996). This placement issue has been one of the major areas of special education legal dispute.

Statement of the Problem

Throughout the decades, despite the constancy of this LRE provision in statutory law, federal appeals court cases have reflected different placement decisions. An examination of recently published federal appellate court opinions on special education placements suggests that judicial outcomes have been mixed, depending upon the specific facts, testimony and evidence surrounding each case (Zirkel, 1996). Consequently, school districts have often used contradictory information to determine the placement of disabled students. School administrators must continually weigh the high costs of litigation - psychological and financial - in fulfilling their moral and professional responsibilities to make prudent decisions for their schools (Snow, 1993; Newcomer & Zirkel, 1999). To date, research has not examined federal appeals court outcomes and their relationship, if any, to expert testimony. Harvey (1999) explored the role of school psychologists in due process hearings as it related to their testimony and perceptions of
judicial outcomes. He found a greater than 50% probability that a school psychologist will participate in a due process hearing; that such involvement exacted a psychological cost; and that school psychologist’s perceptions were related to whether the school prevailed. Goldberg and Kuriloff (1991) evaluated how parents and school officials perceived the fairness of special education due process hearings, and also reported that experts widely disagree with regard to their testimony in special education hearings.

Another finding of this study regarded differences between parents and school officials in how they evaluated the subjective fairness of the hearings, and 95% of school officials had positive perceptions in contrast to only 51% of parents (Goldberg & Kuriloff, 1991).

The potential of parents to influence the hearing officer’s decision in special education due process procedures was also examined (Goldberg & Kuriloff, 1991). Parents won most frequently when they had more witnesses and exhibits, and when they questioned the school’s witnesses more often. Newcomer and Zirkel (1999) studied the degree of change between administrative and federal court level decisions, analyzing whether parents or school districts benefited from changes in the decisions. However, the researchers did not examine the factors, which contributed to those decisions. Zirkel (1996) found that judicial outcomes seem to vary according to each party’s evidence, arguments, and the effectiveness of each side’s advocacy. Moreover, research on special education case law, in terms of school districts winning or losing, has been limited in scope to narrow topics, such as judicial level, location, or time period (Lupini & Zirkel, 2003; Zirkel, 1996). Specifically, research on whether special education litigation outcomes are related to expert testimony has not been examined.
To date, apparently no research has examined federal appeals court opinions specific to the IDEA LRE issue and the relationship or trends, if any, between these appellate decisions and expert testimony. Freedman (2002) maintained that generally, when conflicting testimony is presented in special education case law, the courts support the school district, particularly after the school has demonstrated that the student’s program is appropriate and provides meaningful educational benefits. For example, in Heather S. v. State of Wisconsin (1997), the Seventh Circuit noted, with regard to expert testimony that,

...deference is to trained educators, not necessarily psychologists (Freedman, p.545)...there is no reason that teachers who work with students 180 days per year, should be treated as less expert that [sic] outsiders who may see the student once and never observe in school. Something is very wrong with this picture. (Freedman, 2002, p. 551)

Conversely, in Seattle S.D. v. B.S. (1996) the Ninth Circuit relied on expert testimony outside the educational system as a basis for its ruling. Therefore, a pertinent question for public schools is whether a relationship exists between federal appellate court LRE placement decisions under IDEA and expert testimony.

Purpose of the Study

The purpose of this study was to analyze federal appellate court placement decisions involving the IDEA LRE and the expert testimony corroborating those court opinions.
Research Questions

1. What are the judicial outcomes in federal appellate courts in relation to the LRE provision in the IDEA?

Sub-questions applicable to this question are:
   a. What LRE/placement issues have the federal appellate courts identified?
   b. Are educational methodology and LRE judicial outcomes related?
   c. Is disability classification a factor in federal appellate court decisions?
   d. How consistent are case outcomes, across judicial levels?

2. What are the primary reasons cited by the federal appeals courts in their placement decisions?

Sub-questions applicable to this question are:
   a. Were the analytical frameworks used by the federal appeals courts similar or consistent?
   b. What LRE tests were used in the federal appellate court placement decisions?

3. How has expert testimony potentially related to these federal appellate decisions, based on the court’s references to persuasive or non-persuasive expert testimony and the judicial outcome?

Sub-questions applicable to this question are:
   a. What LRE/placement issues have expert witnesses identified?
   b. Who are the expert witnesses cited by federal appellate courts in their decisions?
   c. What are the professional backgrounds of expert witnesses cited by courts as
most credible?

d. Are expert testimony and LRE/placement related?

The information garnered from this study will be invaluable to parents and educators in weighing the psychological, as well as financial, costs of potential litigation. School administrators aware of these findings will also be better equipped to fulfill their leadership roles in assessing and implementing best professional and legal practices in special education placement. However, most importantly, this research provides information to help ensure that students with disabilities and their parents can be better served in public schools.

Role of the Researcher

The author conducting this study is not an attorney. This study is an empirical analysis of special education litigation based partially on the investigator’s extensive experience in special education as a school psychologist and, more recently, as an administrator. Therefore, the information collected and analyzed will be based on an educational, rather than a legal, perspective.

Definitions of Terms

The following terms will be defined for the purposes of this study:

*Children with Disabilities.* Includes children, ages 3-21, with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities who, because of one or more disabilities, need special education and related services (20USC, Section 1401, (1)(A)(B).
**Expert witness.** An individual with special skills or knowledge representing mastery of a subject about which the witness is to testify and when such knowledge is not commonly held by an average person (Gifis, 1996; Freedman, 2002).

**Free appropriate public education (FAPE).** Defined by the IDEA as providing full educational opportunity to all disabled children, between the ages of 3 and 21, at public expense, including children with disabilities who have been expelled or suspended from school (20 USC, Section 1412(1)(A)).

**Full inclusion.** The provision of special education and related services solely in regular education classrooms (Huston, 1998; Julnes, 1994).

**Inclusion.** A term used synonymously with mainstreaming and refers to the extent to which a disabled child participates in regular education classes. There appears to be no consensus on the definition of inclusion, although it is generally considered a reference to special education students’ participation in general education classrooms (Yell, 1998).

**Individualized education program (IEP).** A written plan for each disabled child that is developed, reviewed, and revised by a team comprised of parents and school personnel, and in accordance with Section 1414 (d) of the IDEA.

The **Individuals with Disabilities Education Act (IDEA).** Originally enacted by Congress in 1975 as the Education for All Handicapped Children Act. It has been amended and reauthorized by Congress over the years (1978, 1986, 1990, 1997). IDEA mandates a free and appropriate public education (FAPE) for all children with disabilities, ages 3 through 21.
**Least restrictive environment (LRE).** A term employed in the IDEA (20 USC, Section 1412 (5)). It requires that disabled students, to the maximum extent appropriate, be educated with non-disabled children. Education in separate classes, separate schooling, or removal of disabled children 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 USC, Section 1412, (5)(A)). The term LRE is often used interchangeably with mainstreaming or inclusion (Zenick, 1999).

**Related services.** Supportive services such as speech-language pathology, audiology services, psychological services, physical and occupational therapy, recreation, social work services, counseling services, orientation and mobility services, and medical services (only for diagnostic and evaluation purposes) that are required for a disabled child to benefit from his/her special education program (20 USC, Section 1401(22)).

**Special education.** Specially designed instruction, at no cost to parents, to meet the unique needs of a disabled child, including instruction occurring in the classroom, home, hospital, institution or other settings. (20 USC, Section 1401 (25)(A)).

**Supplementary aids and services.** Aids, services and other types of support that are provided in school-related settings to disabled children in order to enable their education with non-disabled peers, to the maximum extent appropriate (20 USC, Section1401(29)).

**Limitations and Delimitations**

Readers of this study should note the following limitations and delimitations.

Expert testimony referenced in federal appellate court decisions likely differs when
compared to the actual transcripts of the federal district court or the administrative due process hearing (Zirkel, personal communication, March 11, 2004). However, for the purposes of this study, the focus is on the importance of what experts the federal appeals courts referenced and whether it had an impact on the outcome at this level. Therefore, the analysis of expert testimony is based on references contained within each federal appeals court decision, rather than on federal district court or administrative hearing transcripts. This study will be delimited to published federal appeals court cases. Published federal appellate court decisions establish binding legal precedent in their respective circuits, and they may be persuasive in other courts under the federal system (Osborne & Di Mattia, 1995; Zenick, 1999). Finally, this study will only examine those published federal appellate court opinions involving LRE/placement litigation subsequent to the 1997 reauthorization of the IDEA (Pub. L. No. 105-17), from June 1997 through December 2004.

Significance of the Study

Several researchers (McKinney & Schultz, 2000; Taylor, 2001; Newcomer & Zirkel, 1999) have maintained that litigation can have a significant impact on special needs students, their parents, and a school's organization and culture, adversely affecting all stakeholders. To minimize such negative impacts, school officials need to be fully informed of their legal responsibilities and duties regarding special needs students (Taylor, 2001). Dissemination of legal information falls to administrators, and remains an important area of responsibility for principals and superintendents in their leadership roles.
Therefore, it is crucial that school district leaders have sufficient knowledge about LRE case law as defined in the IDEA (1997). Moreover, Newcomer and Zirkel (1999) remind educators that fractured relationships between parents and schools obstruct effective team approaches in educating students with special needs. These crucial leadership roles, practically applied, suggest the need for educational leaders to prevent special education legal proceedings, whenever possible. Money spent on litigation becomes money unavailable to all students and other educational needs (Newcomer & Zirkel, 1999).

Perhaps most importantly, knowledge of special education placement cases and expert testimony can further promote effective leadership, best professional practices, and a school culture in which conflict is resolved through shared decision-making, rather than through the courts. In *Clyde K. v. Puyallup S.D.* (1994), the Ninth Circuit, succinctly summarized this:

> Though the doors to federal courts are always open, the slow and tedious workings of the judicial system make the courthouse a less than ideal forum in which to resolve disputes over a child’s education. This case offers a poignant reminder that everyone’s interests are better served when parents and school officials resolve their differences through cooperation and compromise rather than litigation. (35 F. 3d at 1396)

**Chapter Summary**

One area in education litigation has continued to proliferate: special education. Researchers have found that placement decisions have dominated special education litigation in the preceding decades. Special education services for students with
disabilities must be delivered, to the maximum extent appropriate, in settings with non-disabled peers; this is referred to as the IDEA least restrictive environment (LRE) requirement.

Throughout the decades, despite the constancy of this LRE statutory provision, federal appeals court cases have reflected different placement decisions. Federal appellate court opinions on special education placement suggests that judicial outcomes have been mixed. To date, no research has examined federal appeals court opinions specific to the IDEA LRE and the relationship, if any, to expert testimony. This study analyzed federal appellate court placement decisions involving the IDEA least restrictive environment and the expert testimony corroborating those court opinions.

Litigation can have a significant impact on all stakeholders – students, parents, and school officials. Additionally, adversarial relationships between parents and schools obstruct effective approaches in educating students with special needs. Effective leadership can be further promoted through conflict resolution, rather than through the courts.
CHAPTER TWO
Review of Related Literature

This review of related literature explored the relevant information in the following areas: (a) sources of law and judicial levels; (b) the history of special education practices; (c) the history of special education law; (d) summaries of historically significant LRE federal appellate court cases along with relevant expert testimony; (e) expert testimony; and (f) judicial outcomes analysis research in special education litigation. These aforementioned areas frame this study on federal appeals court outcomes and expert testimony under the LRE provision of the IDEA (1997).

Sources of Law

The IDEA (1997) evolved through three primary sources of law within the American legal system: constitutional law, statutory law, and case law (Zenick, 1999). Constitutional law refers to the U.S. Constitution, as well as the 50 state constitutions. Although the U.S. Constitution is silent about public education, in two principal ways the federal government has become involved in the educational arena. One is through federal funding of educational programs and the second is through the due process and equal protection clauses of the 5th and 14th amendments (Zenick, 1999). Statutory law allows state and federal legislators to enact laws, which do not violate their respective constitutions. The IDEA is an example of "statutory law with fairly extensive and highly specific regulations for compliance" (Zenick, p. 24). Case law, also known as common law, consists of standards based on judicial reason, common sense, and the changing needs of society rather than on fixed or absolute rules (Gifis, 1996). Case law has been reflected in one court's reliance on the judicial decision of a prior court addressing...
identical or substantially similar legal and factual issues. Case law has emerged from various judicial levels.

The Federal Court System

The federal court system in the United States consists of district courts, courts of appeals, special federal courts, and the Supreme Court. District court decisions may be appealed to the federal courts of appeals; there are thirteen courts of appeals, eleven of which are numbered circuits, one for the District of Columbia, and one encompassing all federal circuits. The Supreme Court is the highest court in the land. Table 1 outlines the composition and number of each United States Circuit Courts of Appeal (Alexander & Alexander, 1998):

Table 1

Composition of U.S. Circuit Courts

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Composition</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>Maine, Massachusetts, New Hampshire</td>
</tr>
<tr>
<td></td>
<td>Puerto Rico, Rhode Island</td>
</tr>
<tr>
<td>Second</td>
<td>Connecticut, New York, Vermont</td>
</tr>
<tr>
<td>Third</td>
<td>Delaware, New Jersey, Pennsylvania, Virgin Islands</td>
</tr>
<tr>
<td>Fourth</td>
<td>Maryland, North Carolina, South Carolina, Virginia, West Virginia</td>
</tr>
<tr>
<td>Fifth</td>
<td>District of the Canal Zone, Louisiana, Texas, Mississippi</td>
</tr>
<tr>
<td>Sixth</td>
<td>Kentucky, Michigan, Ohio, Tennessee</td>
</tr>
<tr>
<td>Seventh</td>
<td>Illinois, Indiana, Wisconsin</td>
</tr>
<tr>
<td>Eighth</td>
<td>Arkansas, Arizona, Minnesota, Missouri, Nebraska, North Dakota, South Dakota</td>
</tr>
<tr>
<td>Ninth</td>
<td>Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon</td>
</tr>
<tr>
<td>Tenth</td>
<td>Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming</td>
</tr>
<tr>
<td>Eleventh</td>
<td>Alabama, Florida, Georgia</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>District of Columbia</td>
</tr>
</tbody>
</table>
The Court of Appeals for the Federal Circuit has no jurisdiction in special education and, therefore, is excluded.

History of Special Education Practices

Throughout human history, children with severe mental or physical disabilities were afforded little formal education. For example, in the Nineteenth Century mentally retarded individuals were generally placed in institutional settings and moreover, only received custodial care. Rebell and Hughes (1996) maintained that, underlying such practices, was the concern by social Darwinists that society needed to be segregated and protected from the genetic pool of the feeble-minded.

In the beginning years of special education in the United States, “there were virtually as many different approaches to educating students as there were school districts” (Rebell & Hughes, 1996, p. 530). Students with disabilities were often accommodated in separate buildings or classes. For example, one of the first special education classes for mentally retarded students was established in 1896, in Providence, Rhode Island. Segregation remained a key concern; that is, children who did not meet society’s conception of normality were removed from the regular education environment (Rebell & Hughes). This also coincided with the advent of compulsory education in the early twentieth century, as well as the influx of immigrant children.

After World War II, there was a dramatic increase in special education classes as public education attempted to accommodate diverse student populations. More specifically, in 1948, the number of students enrolled in public school special education programs was 442,000 and increased to 1,666,000 in 1963. Moreover, prior to the enactment of the Education for All Handicapped Children Act (1975), approximately 70
percent of children with disabilities were served in separate classrooms (Rebell & Hughes, 1966). Congress had determined that at least half of all children with disabilities were not receiving sufficient educational services; additionally, more than one million disabled children remained at home or in institutions, with inadequate educational opportunities. Consequently, in the early 1970's, legal challenges to educating children and adults with disabilities were initiated (Rebell & Hughes).

History of Special Education Case Law

Two primary lawsuits, *Pennsylvania Association of Retarded Citizens v. Pennsylvania* (PARC, 1977) and *Mills v. Board of Education* (1972) were prerequisites to Congress’ enactment of the Education for All Handicapped Children Act of 1975. In *PARC*, both the United States government and the Pennsylvania Association of Retarded Citizens initiated a class action lawsuit. They represented persons with mental retardation who resided at Pennhurst State School and Hospital, located in Spring City, Pennsylvania. At the time this lawsuit commenced, approximately 1,230 persons resided at Pennhurst. The average age was 36, with an average placement longevity of 21 years. Additionally, 43 percent of Pennhurst residents had no family contact within the last three years. Conditions for residents were appalling in that people slept in large overcrowded wards, and spent their days in large rooms, with few educational programs, let alone individually designed programs to increase skills or mainstream into the community.

*Mills v. Board of Education* (1972), like *PARC*, was a class action lawsuit brought by parents, on behalf of their children, against the District of Columbia public schools for; (a) failure to provide special education; and (b) excluding, expelling or transferring these children from regular education public school classes not affording them due process of
law. At the time of this litigation, it was estimated that, of the 22,000 children with disabilities in the District of Columbia public schools, as many as 18,000 were not receiving special education programs.

Congress originally enacted the Individuals with Disabilities Education Act (1997) in 1975 as the Education for All Handicapped Children Act (Pub. L. 94-142). It mandated that public schools provide a free and appropriate public education (FAPE) to all children with disabilities. This legislation ensured equal educational opportunities for all children with disabilities, akin to that available to non-disabled children (Alexander & Alexander, 1998). The original legislation has been amended over the years (1978, 1986, 1990, 1997). However, the LRE component has virtually remained unchanged over the years. The LRE has required public elementary and secondary schools to provide disabled students a continuum of service options, ranging from placement in the least restrictive to most restrictive environment (Champagne, 1997; Maloney, 1995):

To the maximum extent appropriate, children with disabilities... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in the regular education environment, with supplementary aids and services, cannot occur. (20 USC, Section 1412 (5)(A)

In the 1997 IDEA reauthorization, Congress reaffirmed its preference for educating disabled children in the LRE. This included regular education instruction, special education classes, special schools, home instruction, and instruction in hospitals and/or residential facilities (Champagne, 1997; Newcomer, 1995; Tarola, 1991).
However, the federal courts appear to have redefined the LRE requirements of the IDEA (Maloney, 1995). In an increasing number of cases federal courts have required schools to make regular education placements, attempting to provide costly supplementary aids and services, before concluding that a child cannot be appropriately served in the regular classroom (Maloney, 1995).

Seminal Decisions

Although the role courts should play in LRE litigation has not yet been directly addressed by the U.S. Supreme Court (Julnes, 1994), previous federal appellate court decisions have varied in their interpretation of this LRE requirement, along with the corroborated expert testimony. Historically, particular LRE federal appellate court rulings have been acknowledged as persuasive in contributing to current LRE case law (Yell & Drasgow, 1999; Yell, 1998; Osborne, 1998; Alexander & Alexander, 1998; Hicks, 1997; Larose, 1996; Julnes, 1994; Osborne & Dimattia, 1994). Yell and Drasgow (1999) have further maintained that these cases are important as controlling in their respective federal circuits. Osborne and Dimattia (1994) have also pointed out that such cases are also persuasive in other federal circuits. Additionally, these historic cases can provide educators with understanding and guidance in LRE decisions (Yell & Drasgow, 1999). The U.S. Supreme Court and Courts of Appeals have set standards that lower courts use to review LRE disputes; a summary of these landmark cases follows along with the substantiating expert testimony.

*Hendrick Hudson Board of Education v. Rowley*

One early special education dispute was a 1982 Supreme Court case, *Hendrick Hudson Board of Education v. Rowley*, which originated in the Second Circuit. The
Rowley suit was the first case in which the Supreme Court was called upon to interpret the Education of All Handicapped Children Act (Alexander & Alexander, 1998). This has also been referred to as the “beginning inquiry” for courts in determining LRE (Julnes, 1994).

Facts

Rowley involved a deaf student, Amy Rowley, who was receiving special education services in a kindergarten class with a hearing aid to amplify words spoken into a wireless receiver by the teacher or peers. She successfully completed kindergarten. During a two-week period in the classroom, an interpreter assisted Amy in her class, and testified that Amy did not need his services at that time. Amy’s parents, who were also deaf, requested that she be provided a sign-language interpreter in all of her first grade academic classes.

Decision

Both the federal district court and the Second Circuit held that although Amy communicated well with her peers as well as teachers, performed better than average, and was easily advancing, there still existed a disparity between her present achievement and potential because of her disability. The Supreme Court reversed both lower courts.

Reasoning

The U.S. Supreme Court reasoned that Congress did not intend, in requiring a FAPE for disabled children, for such services to maximize each child’s potential. Rather, it is sufficient that the disabled child’s Individualized Education Program (IEP) accords some educational benefits.

Consequently, the Supreme Court stated that courts must conduct a two-part
inquiry, subsequently known as “the Rowley Test.” They must determine first if the educational agency complied with IDEA procedural requirements; and second, whether the IEP has been calculated to enable the student to receive reasonable educational benefits.

In citing Dupre (1997), Crockett (1999) pointed out that the Rowley decision concerned the issue of an appropriate education, not placement or appropriate integration. However, Julnes (1994) has maintained that Rowley represents the initial question in determining LRE. Generally, the courts have viewed placement determinations as the prerogative of schools, when schools can prove that disabled students have received reasonable educational benefits (Larose, 1996; Newcomer, 1995). However, the following case exemplifies the difficulties school districts face in demonstrating reasonable educational benefits and placement in the least restrictive environment.

Roncker v. Walter

In 1983, the Sixth Circuit Roncker v. Walter decision established the original inclusion test (Julnes, 1994).

Facts

Neill Roncker, a nine year-old boy, with an IQ below 50, was recommended for placement by the Cincinnati School District in a county school for mentally retarded children. This effectively precluded contact with non-disabled children. Neill’s parents disagreed with the proposed placement, and sought a due process hearing. Pending the school district’s appeal of the hearing officer’s decision, Neill attended a class for severely mentally retarded students at an elementary school, with regular education inclusion during lunch, gym, and recess.
Decision

The hearing officer found for the parents determining that the school district had not met its burden of proving the proposed placement as the LRE. The district court reversed the hearing officer’s decision, and ruled in favor of the school district, citing testimony by school personnel that, at the elementary school, Neill achieved no significant educational progress. The Sixth Circuit reversed the lower court, holding that the district court had erred in not giving sufficient weight to the hearing officer. Thus, the district court had abused its power to review and overturn prior administrative rulings.

Reasoning

This case resulted in a “feasibility test” for determining LRE. The Sixth Circuit stated that in comparing the educational benefits for a particular placement, if the segregated setting is found superior, it must then be determined if those superior services could feasibly be delivered in a non-segregated setting. If so, then a segregated placement is inappropriate because it is not the LRE (Roncker v. Walter, 1983). Additional factors were addressed in this decision, including the degree to which the student disrupted the regular education class, and the cost of placement in a regular education setting (Hicks, 1997). Moreover, it is interesting to note that the dissenting opinion, written by Judge Kennedy, seems to exemplify one of the differing judicial viewpoints regarding interpretation of the LRE in IDEA. That is, how does a school district demonstrate that a child with disabilities is unable to make reasonable educational progress in a regular education setting?

Judge Kennedy argued in a dissenting opinion that the district court had accomplished what the 6th Circuit was again asking it to do. According to his opinion, the
district court already found that the school district had shown, even with supplementary aids and services, Neill was unable to make educational progress in this integrative setting. Therefore, Neill Roncker could not be educated satisfactorily in a regular education setting, despite the appropriate IEP. However, the Fifth Circuit in another seminal decision rejected this Sixth Circuit majority decision regarding placement or mainstreaming.


In *Daniel R.R. v. State Bd. of Ed.* (1989), the Fifth Circuit rejected the feasibility test adopted by the Sixth Circuit in *Roncker*, “as we are not comfortable...with the Sixth Circuit’s approach to the mainstreaming question” (*Daniel R.R.* p. 12). In *Daniel R. R.*, the 5th Circuit reasoned that although the factors in *Roncker* are important, the determination of where special education services can be provided to a student is a decision that school officials are more qualified to make than courts (Alexander & Alexander, 1998).

**Facts**

At the time this case arose, Daniel R.R., a six year-old boy with Down’s Syndrome, was enrolled in a regular education pre-school class for a half-day, and a special education early childhood program for the other half-day. During the school year, the El Paso School District proposed to change Daniel’s placement because, despite the school’s attempt to provide supplementary aids and services, the regular education preschool class was an inappropriate placement. Daniel’s pre-school teacher testified and documented assiduous attempts to modify the curriculum for Daniel.
Decision

The hearing officer in the due process administrative proceeding, and then the district court, held for the school district. Daniel’s parents appealed to the Fifth Circuit, which affirmed the lower court ruling, although the Fifth Circuit rejected the lower court’s analysis of the mainstreaming/inclusion issue (Daniel R.R., 1989, p.10).

Reasoning

The Fifth Circuit opposed the district court’s prerequisite “comparison standard” whereby the educational benefits of mainstreaming were determined by comparing whether they approximated the skill level of children without disabilities. The Fifth Circuit reasoned this would require regular education placements only for those disabled children who could function and learn at a level similar to their regular education peers. Thus, the district court placed too much emphasis on a disabled child’s ability to derive educational benefit in a regular education classroom. In effect, to deny a child regular education access solely because the child’s achievement was below that of classmates would violate IDEA. Rather, the Fifth Circuit reiterated that “states must tolerate educational differences; they need not perform the impossible: erase those differences by taking steps to equalize educational opportunities” (Daniel R.R., 1989, p.11).

The Fifth Circuit LRE analysis in Daniel R.R. evolved into a two-part test: (1) Can education in a regular class be satisfactorily achieved with the use of supplementary aids and services? and (2) If not, and the child is removed from regular education, has the child been included to the maximum extent appropriate? These questions were applied and utilized by the Ninth Circuit in a landmark case five years later.
Sacramento Unified School District v. Holland


Facts

The Sacramento Unified School District appealed a lower court’s judgment in favor of Rachel Holland, a cognitively delayed child (estimated IQ of 44), whose parents requested a full-time placement in a 2nd grade classroom. According to her parents, Rachel learned social and academic skills in this setting. The school district alleged Rachel was too severely disabled to receive educational benefits from a full-time placement and inclusion in regular education. Moreover, the district argued that the cost was prohibitive.

Decision

Both the hearing officer and the lower court found that: (a) the District had failed to show adequate effort to educate Rachel in a regular class; (b) Rachel was making educational progress in a regular class and learned through imitation, as well as modeling; and (c) the cost of a regular education placement was not prohibitive. The Ninth Circuit affirmed the lower court decision.

Reasoning

It is interesting to note that in this case, testimony was based on conflicting educational philosophies. The Ninth Circuit found the Holland expert witnesses more credible in their testimony that Rachel’s IEP goals and objectives could be achieved in a regular education classroom. The Court cited several reasons. First, the Holland witnesses had more background in evaluating disabled children in regular education classrooms,
and had observed Rachel over an extended period of time. Additionally, their philosophy regarding inclusion paralleled the intent of IDEA. In contrast, the Court cited the school’s testimony as too negative because it was “focused primarily on Rachel’s educational limitations” (Holland, 1994, p. 15). For example, the school’s evidence was largely presented by diagnostic center specialists, who had evaluated and observed Rachel in her regular education placement at the Shalom School. School witnesses testified that Rachel’s second grade placement was inappropriate because she was not receiving any educational benefit. The school experts believed that Rachel’s education should focus on functional skills such as handling money, and using public transportation; the setting most suited for these goals was a special education class. Conversely, the Holland family’s experts maintained that disabled children, regardless of the severity of their disabilities, were best educated in a regular education setting.

These conflicting philosophies, the ensuing testimony and subsequent impact of expert testimony on the Court, are best illustrated with the following example. During the November 1991 assessment of Rachel by witnesses representing both parties, Rachel was observed in Hebrew class where she was holding the book upside down. Another student helped her right the book and find her place. The school district expert concluded that Rachel derived no benefit from inclusion in the class, while in contrast, the Holland witness deduced that Rachel had positive peer interactions, an important factor in her future capacity to live in society. Therefore, because the experts differed in their philosophy, the testimony of Rachel’s second grade teacher was deemed more credible by the 9th Circuit as she was “experienced, skillful, and has no partisan involvement in the controversy” (Holland, 1994, p. 17).
Rachel’s teacher, Nina Crone, testified that she was progressing satisfactorily on her IEP goals and that, in many ways, Rachel was a typical second grader - she was eager and very motivated to participate in class. Moreover, Crone’s testimony paralleled that of Rachel’s kindergarten teacher and, taken together, these witnesses’ testimony appear to have been pivotal factors in this judicial decision. In summary, the Ninth Circuit found the Sacramento School District had failed to meet its burden of demonstrating that Rachel would receive equal or greater educational benefit in a segregated placement. The Ninth Circuit, in part, based its opinion on a previous decision by the Third Circuit.

_Oberti v. Board of Education of the Borough of Clementon School District_

In _Oberti v. Board of Education of the Borough of Clementon School District_ (3rd Circuit, 1993) the federal appeals court held that a public school may violate IDEA if it has not actually demonstrated adequate efforts to include a disabled child, whenever possible, in programs with nondisabled children. According to the Third Circuit, the school district clearly bears the burden of proof in this regard.

_Facts_

At the time, Rafael Oberti, an 8 year-old child with Down’s Syndrome, had been evaluated by the Clementon School District, and the school originally had proposed an out-of-district placement for Rafael in a segregated special education class. Rafael’s parents objected to this placement, resulting in a mutually agreeable placement for him in a developmental kindergarten class at Clementon Elementary School in the morning, along with an out-of-district special education class in the afternoon.

All of Rafael’s academic/readiness goals in his IEP were implemented in the
special education class. Goals in the morning kindergarten class mainly consisted of social exposure to peers. Although progress reports indicated that Rafael made social progress in kindergarten, he experienced numerous behavioral problems such as temper tantrums, hitting/spitting on peers, crawling and hiding under the furniture, and toileting accidents. Additionally, Rafael hit the teacher on several occasions. These problems frustrated the teacher, as well as disrupted the class.

Decision

The Third Circuit affirmed the decision of a New Jersey district court in finding that the LRE requirement prohibits a public school from placing a disabled child outside the regular classroom, if educating the child, with supplementary aids and services, can be satisfactorily achieved in the regular education class.

Reasoning

The Third Circuit rationale that the school district erred was based on several factors. First, Rafael’s IEP contained no behavior plan or goals which addressed his behavior problems. Although the kindergarten teacher had made some attempts to modify the curriculum (the teacher related that Rafael could follow approximately 25 percent of the curriculum), she also testified she received no consultation services from specialists (i.e. school psychologist, behavior specialist, special education teacher). The school district had provided a classroom aide, but the aide was ineffective in decreasing Rafael’s behavior problems. According to the teacher, occasionally - not frequently - she required assistance from another adult to remove Rafael from the developmental kindergarten class. Hence, the school district’s expert testimony did not support its contention that Rafael was a danger to others, and could receive no educational benefit from placement.
in a regular classroom. In contrast, the parent’s experts persuaded the court that, with effective supplementary aids and services, Rafael could be successfully integrated into a regular education class. As the Court expressly noted, “plaintiffs’ experts persuaded us that a similar multi-sensory approach... could be implemented successfully within the matrix of a regular classroom setting” (Oberti v. Clementon School District, 1992, p. 5).

These cases suggest some preliminary conclusions that expert testimony might be a significant factor in federal appellate court LRE decisions, although federal circuits have not adopted a constant or consistent standard for determining the LRE under the IDEA. The Fifth, Third and Eleventh Circuits have cited the Daniel R.R. (1989) case; while the Sixth, Fourth, and Eighth Circuits have applied the Roncker (1983) feasibility test, and the Ninth Circuit has employed factors used in both (Sacramento v. Holland, 1994; Alexander & Alexander, 1998). However, these individual cases do not provide an adequate sample for generalization purposes.

Outcomes analyses studies can provide researchers, as well as potential litigants, with a legal categorization of wins, losses, and inconclusive results regarding selected court decisions (Lupini, 2001; Schoenfeld & Zirkel, 1989). Nevertheless, research on special education outcomes litigation has not analyzed specific LRE placement issues.

Special Education Outcomes Litigation Analysis

In an examination of empirical trends in special education case law several pertinent findings have emerged from the research. Zirkel and D’Angelo (2002) found a dramatic increase in federal court decisions between the 1970's and 1990's. Interestingly, as the authors point out, the overall volume of education litigation in federal courts declined during this same time frame. Additionally, school districts prevailed in special

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
education litigation from 1989-2000, however with only a "slight edge in favor of school districts" (p.752). High volume regions for special education litigation were the First, Second, and Third federal appellate courts. More specifically, the highest frequency of judicial decisions for special education litigation were: (a) Second Circuit (15.8%); (b) First Circuit (11.6%); (c) Third Circuit (10.9%); (d) Sixth Circuit (8.7%); and (e) Ninth Circuit (8.5%). With regard to disability classification, approximately 27 percent of the cases involved students who were identified as learning disabled, 22 percent physically impaired, 14 percent as emotionally disturbed, and 20 percent as mentally retarded. It should be noted that the authors did not indicate whether this was an unduplicated count or if students with multiple disabilities were counted for each classification or more than once. Zirkel and D’Angelo (2002) also addressed outcomes data regarding particular special education issues and analyzed Office of Civil Rights (OCR) rulings in published Letters of Findings and found that parents prevailed in LRE issues 65 percent of the time.

In special education case law, the research on outcomes (i.e. winning or losing) has been limited typically by judicial level, topic or time period. Lupini (2001), in his doctoral dissertation on outcomes in education litigation, found an increase in special education litigation across two time periods, 1974 to 1976 and 1994 to 1996. He cautioned that because of the small sample size, statistical analyses was not conducted for subcategories and, consequently definitive generalizations were not possible. Moreover, Lupini did not investigate more specific special education issues such as placement. Newcomer (1995) compared the degree of change in outcomes between due process hearing officers and court decisions in special education under IDEA, from 1975 through 1995. His sample consisted of 200 published federal and state court decisions. The author
developed a Litigation Documentation Sheet, and recorded information such as student
gender, placement, primary issue, and adjudicated outcomes across judicial levels.
Newcomer found that learning disabled students were the most frequent disability group
involved in litigation and that, in approximately 62 percent of the cases examined,
placement was the primary issue.

Research has also examined judicial outcomes analysis of specific variables in
special education cases. Newcomer and Zirkel (1999) selected factors such as student
disability classification, gender, placement, time period, and court venue, to determine
whether the variables were statistically related to judicial outcomes. The authors
concluded that with regard to LRE, placement was the primary issue in 63 percent of the
selected cases. Additionally, of the cases in this study, federal courts decided 85 percent
and, of these, approximately 33 percent were at the federal appeals court level. Moreover,
at the federal appellate court level, school districts prevailed in 60 percent of the cases.
However, Newcomer and Zirkel (1999) noted that recent trends in special education court
decisions may differ and “are a fertile ground for additional research” (p. 479).
Similarly, Lupini (2001) also recommended that future research should focus on notable
subcategories such as federal court forums. Moreover, Zirkel (1996) maintained that
published LRE court decisions suggest mixed results on whether parents or school
districts prevail, and are dependent upon the individual circumstances surrounding each
case.

Several authors have addressed the limitations of outcomes research in education
recommended that such research should be “systematic, comprehensive, and longitudinal
in nature in order to remedy previous related studies” (p. 260). The authors further suggest that future analyses should explore more specific questions regarding categories, specific court venues, and court interactions. Finally, Lupini and Zirkel (2003) contended that subsequent research needs to address alternate explanations possibly based on methodological issues, such as the target population, the outcome scale or sampling decisions. In contrast, Lee (1991) has viewed outcomes analysis as a misnomer because it “does not analyze outcomes, but rather merely counts them” (p. 526). Although she acknowledged and concurred with the criticism of limitations in legal research, such as the focus on one or several cases and the consequent lack of representativeness, Lee (1991) questioned the assumption that outcomes research is useful to prospective plaintiffs because it does not analyze the reasons for these outcomes. According to Lee (1991) “there is much more behind a court decision than simply a negative or positive ruling” (p. 525). Moreover, research approaches that analyze the reasons for a court decision help a plaintiff and attorney compare factors in their case against those significant factors in prior related cases.

As a means of complimenting and/or compensating for the limitations of outcomes analysis research, Lee (1991) proposed “policy capturing” research which essentially has studied those factors contributing to plaintiff’s success or failure. More specifically, this procedure has entailed identifying elements noted in the court opinion along with the use of multivariate analysis to determine the predictability of those variables in case outcomes. The author cautioned however, that all components might not be identifiable in the court opinion because as she noted “the variables that influenced the judge may not be mentioned in the written opinion” (Lee, 1991, p. 525). Finally, Lee
(1991) recommended that education litigation research include narrative as well as statistical information, encompassing those factors and evidence necessary for plaintiffs to prevail. Expert testimony has appeared to be a significant factor in litigation and also a means of complimenting the quantitative nature of outcomes analysis.

Expert Testimony

Expert testimony has been generally regarded as a means to “bridge the gap” between common and specialized knowledge (Pipkin, 1991). Expert testimony has enabled a jury or court to understand and evaluate facts in order to form opinions as to how the issues of a case should be decided. However, the area of expert testimony has been marked by controversy.

The inherent adversarial characteristics of the judicial process have led to the problem of bias among expert witnesses (Pipkin, 1991). That is, an expert hired by a particular party can lead to bias in favor of the client, thus becoming more of an advocate rather than an objective individual who possesses specialized knowledge or expertise. This has resulted in increased scrutiny of expert witness testimony as well as complaints regarding deficiencies in such testimony. In turn, this has led researchers to further examine the influence and credibility of expert witnesses in litigation.

Factors that contribute to expert witness credibility have been investigated. Pipkin (1991) found that expertise, trustworthiness, and dynamism are generally agreed to be the primary components in determining the credibility of expert witnesses. While there is no single factor which appears to guarantee credibility, all three aforementioned factors appear to be important in this regard. On an applied level, Elias (1999) studied the role of school psychologists as expert witnesses and found the following factors to enhance
perception of expert witness credibility: (a) forthright speech; (b) use of the passive
voice; (c) use of words that connote power; and (d) emphasis on professional
background. Most importantly, the author cautioned that school psychologists who testify
as expert witnesses in court or an administrative hearing must understand the type of
evidence most useful to the court or administrative law judge as “school psychologists
dedicated to obtaining accurate and equitable results in legal and administrative hearings
perform an important public service and contribute to the development of the profession”
(Elias, 1999, p.56).

Chapter Summary

Until the 1970's, individuals with disabilities were generally not educated in
public schools, but rather at home or in institutions. Such segregated practices resulted in
unequal treatment and led to legal challenges. In 1975, the Education for All
Handicapped Children Act (PL 94-142), was enacted by Congress and mandated a FAPE
for all children with disabilities, ensuring that, to the maximum extent appropriate,
children with disabilities be educated with non-disabled peers; this has also been known
as the LRE provision. Parts of the original legislation have been amended over the years
under the IDEA (1997), however the LRE component has virtually remained unchanged
over the years. The LRE requires public elementary and secondary schools to provide
disabled students a continuum of special education services, ranging from placement in
the least restrictive to most restrictive environment, dependent upon each child’s
individual needs. When parents and school districts cannot agree, litigation is often
required to resolve these differences.

Although the U.S. Supreme Court has not yet addressed a LRE case under the
IDEA, the federal circuit courts have, although they have not adopted a consistent standard for determining the least restrictive environment. For example, the Fifth, Third and Eleventh Circuits have cited the Daniel R.R. (1989) case, while the Sixth, Fourth, and Eighth Circuits have applied the Roncker (1983) feasibility test. The Ninth Circuit has employed factors from both cases. Such discrepancies in case law have continued to leave educators and parents with unclear and inconsistent guidelines in determining the LRE for students with disabilities as well as the corroborating testimony and evidence utilized by courts.

The volume of special education case law has increased from the 1970's to the 1990's, while, interestingly, the overall volume of education litigation has declined. Information regarding the outcomes of special education litigation has provided researchers and potential litigants with a legal categorization and count of wins and losses. Empirical research trends suggest mixed results on whether parents or school districts prevail, and are dependent upon the facts and evidence surrounding each case. Expert testimony constitutes important evidence, however, to date, the relationship between expert testimony and litigation outcomes specific to published LRE federal court decisions under the IDEA, has not been investigated.
CHAPTER THREE
METHODS AND PROCEDURES

Research Design

This study used a mixed methodology design to examine federal appeals court outcomes, reasoning, and expert testimony in order to attain the advantages of collecting qualitative and quantitative data (Creswell, 1994; Denzin & Lincoln, 2000). More specifically, “both themes and statistical analysis are presented. Mixed methods have several purposes: triangulating or converging findings, elaborating on results, using one method to inform another, discovering paradox or contradiction, and extending the breadth of the inquiry” (Creswell, 1994, pp. 184-185).

Both the primary and secondary purposes of this study fall within the parameters cited by Creswell (1994) to support a mixed methodological design. Specifically, the initial part of the primary research question was framed within the descriptive research design and examined judicial LRE trends across all U.S. federal appeals courts. Sub­ questions sought to quantify: (a) the plaintiffs; (b) the gender and disability classification; (c) the primary LRE issue; (d) whether educational methodology was identified; (e) federal circuit court outcomes; and (f) consistency of outcomes across judicial levels (i.e. federal district courts and federal appellate courts).

In contrast, the second phase of this study expands the breadth of inquiry by simultaneously examining each court opinion’s analytical reasoning and expert testimony narratives to: (a) explore themes that drove the court decision; (b) describe the content and the context of each judicial decision relative to expert testimony; and (c) better understand the relationship between the credibility of expert witnesses and their testimony as perceived by the federal appellate courts. This phase of the study sought to develop a grounded theory of court reasoning specific to LRE/placement, expert witness testimony and the relationship, if any, to federal appellate court special education LRE decisions.
Sample

The population and sample consisted of all published federal appellate court cases, under the IDEA, in which LRE/placement was the pertinent issue of special education litigation, from June 4, 1997- December 31, 2004. June 4, 1997 was the date upon which the United States Congress reauthorized the IDEA. The specific breakdown of cases by federal appellate court is shown in Table 2:

Table 2

<table>
<thead>
<tr>
<th>Federal Circuit Court</th>
<th>Number of Cases Adjudicated</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>11</td>
<td>3</td>
</tr>
</tbody>
</table>

All 11 federal appellate courts will be included. The Court of Appeals for the Federal Circuit is excluded because it lacks jurisdiction over federal special education law cases. Federal circuit court decisions which contain claims under section 504 of the Rehabilitation Act of 1973 and Section 1983 of the Civil Rights Act (Title 42 U.S.C.A.) were excluded, if LRE/placement was not germane to the case.

Procedures

*Instrumentation for Legal Analysis*

Litigation Documentation Sheet

The Litigation Documentation Sheet (LDS) developed by Newcomer (1995) and Tarola (1991), and used by Newcomer and Zirkel (1999) in their research on analysis of judicial outcomes, was modified to include the variables in this study. The Litigation
Documentation Sheet is a coding system consisting of systematically recorded factors in each court case. Following is a description of each variable used on the LDS for this study, along with the source for these adaptations (See Appendix B).

Variables

*Case Name, Circuit, and Number.* This provides the name of the case, identifies the federal appellate court, and the federal citation.

*Plaintiffs and Defendants.* This item names each party. Plaintiff is the party who initiated the lawsuit. At the appellate court level, the term *appellant* is also used to denote the party who appeals a decision. Defendant is the party responding to the complaint and, at the appeals court level, the term *appellee* is the party who argues against setting aside the lower court’s judgment (Gifis, 1996).

*Disability Classification.* Refers to the disability categories specified in IDEA (1997), which assist child study teams in determining eligibility for special education. If more than one disability was contained in the court opinion, the recorded response was the one which had been most frequently stated by the court (Newcomer, 1995).

*Primary LRE Issue Identified by the Appeals Court.* Includes the continuum of LRE placement options from the least to most restrictive environment: (a) full inclusion in regular education with special education support; (b) regular education with resource room or itinerant support (i.e. supplementary aids & services); (c) full-time special education class; (d) other special education public school program; (e) homebound instruction; (f) private day school and whether the private school is sectarian; and (g) private residential school or residential mental health facility (Crockett, 1999; Newcomer, 1995; Tarola, 1991).

*Educational methodology.* This item refers to a particular program or curriculum that is referenced in the court opinion. A yes/no response was recorded for each case.

*Names and positions of expert witnesses.* This item identifies those expert witnesses cited for the plaintiffs and defendants in each case. If not noted by name and/or
position in the federal appellate court decision, the federal district court decision was reviewed for this information, even though this was not counted as an additional case in the study.

_Credibility of expert witnesses._ Each decision will be reviewed to determine if the court specifically referenced credibility of expert witnesses. A yes/no response was recorded.

_Judicial Outcomes._ Consists of a 5-point scale previously used by Newcomer (1995) and Newcomer and Zirkel (1999). Over the years, this outcome scale has been utilized and modified by other researchers (Lupini, 2001; Tarola, 1991; Rhen, 1989). The five outcomes included: (a) district complete win; (b) district win with modifications favoring the parent(s); (c) split decision; (d) parent win with modifications favoring the school district; and (e) parent complete win.

**Pilot Study**

Previous researchers who have utilized the Litigation Documentation Sheet (Lupini & Zirkel, 2003; Lupini, 2001; Newcomer & Zirkel, 1999; Newcomer, 1995; Tarola, 1991) have conducted a pilot phase in their studies to ensure reliability of the instrument. Inter-rater reliability was set at 80% for each variable on the LDS. In this study, a random sample of ten cases was selected, and analyzed by an experienced school attorney and the researcher. The level of agreement ranged from 80 percent to 100 percent for each of the variables on the LDS.

**Anticipated Treatment of the Data**

**Data Collection**

The databases IDELR (Individuals with Disabilities Education Law Reporter) and West’s Education Law Reporter were used to search all published federal appellate court cases, from June 1997- December 2004. IDELR was searched under the descriptors of LRE and placement. The West’s Education Law Reporter was searched using both topic (special education/LRE/placement) and key number as “key number alone is not
sufficient” (Moris, M.; Sales, B.; & Shuman, D., 1997, p.19). The following key numbers were used: 148.2 - 148.5; and 154.2 - 154.5 Finally, the original published federal appellate court case was obtained from West’s Federal Reporter.

Data Analysis Procedures

Cumulative frequency distributions and percentages were calculated for the following variables and exhibited in tables: the particular appeals court; plaintiffs (school district or parent); defendants (school district or parent); the student’s disability classification; the student’s gender; the primary LRE issue; and the judicial outcome across judicial levels.

Grounded Theory

Grounded theory qualitative research emerges from data that is systematically accumulated and analyzed. That is, a substantive theory is closely related to and derived from a particular subject, context or phenomenon, particularly in areas where there is a lack of research (Creswell, 1994), such as expert testimony and judicial analyses of outcomes. Moreover, the developed theory can be framed as a narrative, a visual picture or propositions (Creswell, 1998; Strauss & Corbin, 1998).

In this study, each case reasoning and references to expert testimony were recorded. This included direct quotes, the court’s evaluative summation of expert witness testimony, and any other court references regarding reasons and testimony (Prior, 2003). The reasoning behind each decision and expert testimony were examined incorporating qualitative analytic procedures of open, axial and selective coding (Prior, 2003; Strauss & Corbin, 1998; Maxwell, 1996). From this a narrative analysis emerged and formed the basis of the grounded theory (Maxwell, 1996; Strauss & Corbin, 1998).

In open coding, data were segmented into categories according to pertinent words, phrases, or concepts. That is, within each category “the investigator finds several properties or subcategories and looks for the data to dimensionalize, or show the extreme possibilities on a continuum of, [sic] the property” (Creswell, 1998, p.57). Consequently,
each court decision was reviewed. Words, phrases or concepts related to the court's reasoning were highlighted and then recorded on data sheets. Each data sheet contained the headings: (a) category; (b) property; (c) property descriptors; and (d) dimensionality. In the axial coding phase, the properties which emerged from open coding were further examined as phenomena; this allowed the investigator to assemble data in novel ways in order to identify and explore intervening conditions, actions/interactions, and consequences for each identified phenomenon. From this, selective coding emerged in which proposals that integrated the categories were presented (Creswell, 1998; Strauss & Corbin, 1998).

Summary

This study used a mixed methodology design to examine federal appeals court outcomes, reasoning, and expert testimony under the LRE provision of the IDEA, from 1997 to 2004. The initial part of the primary research question was framed within the descriptive research design and examined judicial LRE trends with regard to gender, disability classification, primary LRE issue, educational methodology, and court outcomes across the federal appellate and federal district court level. The second phase of this study simultaneously analyzed the court reasoning and expert testimony narratives. The qualitative methods of open, axial, and selective coding were employed.
CHAPTER FOUR

RESULTS

This study utilized a mixed methodology design to examine federal appeals court outcomes for LRE/placement issues in special education. Within the descriptive research design, the primary purpose of this study was to examine judicial LRE trends across all U.S. federal appeals courts. Secondary questions sought to quantify: (a) the plaintiffs, (b) the gender and disability classification, (c) the primary LRE issue, (d) whether educational methodology was identified, (e) federal circuit court outcomes, and (f) consistency of outcomes across judicial levels (i.e. federal district courts and federal appellate courts).

The population and sample for this research represented all published federal appellate court cases, under the IDEA, in which LRE/placement was a germane issue of special education litigation, from June 4, 1997 – December 31, 2004. June 4, 1997 was the date upon which the United States Congress reauthorized the IDEA.

This study identified a sample of 60 cases for the described period. The specific break-down of cases by federal appellate court is shown in Table 3.
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Circuit Court</th>
<th>Federal Citation</th>
<th>Plaintiffs</th>
<th>Defendants</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>4</td>
<td>324 F.3d240</td>
<td>G</td>
<td>Ft. Bragg</td>
<td>2003</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>335 F.3d297</td>
<td>Wagner</td>
<td>Mont. City</td>
<td>2003</td>
</tr>
<tr>
<td>3</td>
<td>6</td>
<td>348 F.3d513</td>
<td>Berger</td>
<td>Medina</td>
<td>2003</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
<td>118 F.3d245</td>
<td>Cypr.Fb.</td>
<td>Michael F.</td>
<td>1997</td>
</tr>
<tr>
<td>5</td>
<td>9</td>
<td>341 F.3d1052</td>
<td>M.L.</td>
<td>Federal Way</td>
<td>2003</td>
</tr>
<tr>
<td>6</td>
<td>8</td>
<td>315 F.3d1022</td>
<td>Nezahbo</td>
<td>K. Clark</td>
<td>2003</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>336 F.3d260</td>
<td>S.H.</td>
<td>Newark</td>
<td>2003</td>
</tr>
<tr>
<td>8</td>
<td>10</td>
<td>144 F.3d692</td>
<td>O'Toole</td>
<td>Olathe</td>
<td>1998</td>
</tr>
<tr>
<td>9</td>
<td>7</td>
<td>282 F.3d493</td>
<td>Beth B.</td>
<td>Van Clay</td>
<td>1998</td>
</tr>
<tr>
<td>10</td>
<td>11</td>
<td>285 F.3d977</td>
<td>Collier</td>
<td>K.C.</td>
<td>2002</td>
</tr>
<tr>
<td>11</td>
<td>2</td>
<td>346 F.3d377</td>
<td>Grim</td>
<td>Rhinebeck</td>
<td>2003</td>
</tr>
<tr>
<td>12</td>
<td>1</td>
<td>315 F.3d21</td>
<td>Rafferty</td>
<td>Cranston</td>
<td>2002</td>
</tr>
<tr>
<td>13</td>
<td>8</td>
<td>217 F.3d1027</td>
<td>Gill</td>
<td>Columbia</td>
<td>2000</td>
</tr>
<tr>
<td>14</td>
<td>7</td>
<td>200 F.3d504</td>
<td>Linda W</td>
<td>Indiana</td>
<td>1999</td>
</tr>
<tr>
<td>15</td>
<td>1</td>
<td>321 F.3d49</td>
<td>Maine35</td>
<td>Mr.Mrs.R.</td>
<td>2003</td>
</tr>
<tr>
<td>16</td>
<td>2</td>
<td>334 F.3d217</td>
<td>Mr.Mrs.D.</td>
<td>Southington</td>
<td>2003</td>
</tr>
<tr>
<td>17</td>
<td>2</td>
<td>226 F.3d69</td>
<td>MC</td>
<td>Voluntown</td>
<td>2000</td>
</tr>
<tr>
<td>18</td>
<td>2</td>
<td>240 F.3d163</td>
<td>St John</td>
<td>D.H.</td>
<td>2001</td>
</tr>
<tr>
<td>19</td>
<td>1</td>
<td>130 F.3d481</td>
<td>Kevin G.</td>
<td>Cranston</td>
<td>1997</td>
</tr>
<tr>
<td>20</td>
<td>6</td>
<td>238 F.3d755</td>
<td>Knable</td>
<td>Bexley</td>
<td>2001</td>
</tr>
<tr>
<td>21</td>
<td>5</td>
<td>328 F.3d804</td>
<td>Adam J.</td>
<td>Keller</td>
<td>2003</td>
</tr>
<tr>
<td>22</td>
<td>5</td>
<td>343 F.3d373</td>
<td>White</td>
<td>Ascension</td>
<td>2003</td>
</tr>
<tr>
<td>23</td>
<td>1</td>
<td>306 F.3d1</td>
<td>Manches</td>
<td>Crissman</td>
<td>2002</td>
</tr>
<tr>
<td>24</td>
<td>3</td>
<td>190 F.3d80</td>
<td>Warren G.</td>
<td>Cumber.Cty.</td>
<td>1999</td>
</tr>
<tr>
<td>26</td>
<td>2</td>
<td>142 F.3d119</td>
<td>Walczak</td>
<td>Florida</td>
<td>1998</td>
</tr>
<tr>
<td>27</td>
<td>2</td>
<td>231 F.3d96</td>
<td>M.S.</td>
<td>City Yonkers</td>
<td>2000</td>
</tr>
<tr>
<td>28</td>
<td>3</td>
<td>172 F.3d338</td>
<td>Ridgewd</td>
<td>N.E.</td>
<td>1999</td>
</tr>
<tr>
<td>29</td>
<td>4</td>
<td>118 F.3d996</td>
<td>Hartmann</td>
<td>Loudon Cty.</td>
<td>1997</td>
</tr>
<tr>
<td>30</td>
<td>6</td>
<td>320 F.3d663</td>
<td>McLaugh</td>
<td>Holt</td>
<td>2003</td>
</tr>
<tr>
<td>31</td>
<td>1</td>
<td>154 F.3d8</td>
<td>Kahlil.H.</td>
<td>MA.Dep.Ed.</td>
<td>1998</td>
</tr>
<tr>
<td>32</td>
<td>11</td>
<td>314 F.3d545</td>
<td>Georgia</td>
<td>Derrick C.</td>
<td>2002</td>
</tr>
<tr>
<td>33</td>
<td>9</td>
<td>317 F.3d1072</td>
<td>Shapiro</td>
<td>Paradise</td>
<td>2003</td>
</tr>
<tr>
<td>34</td>
<td>6</td>
<td>208 F.3d560</td>
<td>Burilovich</td>
<td>Bd.Ed.</td>
<td>2000</td>
</tr>
<tr>
<td>35</td>
<td>7</td>
<td>237 F.3d113</td>
<td>Dale M.</td>
<td>Bradley</td>
<td>2001</td>
</tr>
<tr>
<td>36</td>
<td>6</td>
<td>325 F.3d724</td>
<td>Kings</td>
<td>Zelazny</td>
<td>2003</td>
</tr>
<tr>
<td>37</td>
<td>8</td>
<td>198 F.3d648</td>
<td>Blackmon</td>
<td>Springfield</td>
<td>1999</td>
</tr>
<tr>
<td>38</td>
<td>8</td>
<td>119 F.3d607</td>
<td>Ft.Zum.</td>
<td>Clynes</td>
<td>1997</td>
</tr>
<tr>
<td>39</td>
<td>6</td>
<td>136 F.3d495</td>
<td>Tucker</td>
<td>Calloway</td>
<td>1998</td>
</tr>
<tr>
<td>40</td>
<td>6</td>
<td>197 F.3d759</td>
<td>Dong</td>
<td>Rochester</td>
<td>1999</td>
</tr>
<tr>
<td>41</td>
<td>6</td>
<td>185 F.3d635</td>
<td>Remner</td>
<td>Bd. Ed.</td>
<td>1999</td>
</tr>
<tr>
<td>42</td>
<td>7</td>
<td>295 F.3d671</td>
<td>Wis.Dells</td>
<td>Littlegeorge</td>
<td>2002</td>
</tr>
<tr>
<td>43</td>
<td>8</td>
<td>323 F.3d630</td>
<td>CJN</td>
<td>Minneapolis</td>
<td>2003</td>
</tr>
<tr>
<td>44</td>
<td>5</td>
<td>325 F.3d609</td>
<td>Pace</td>
<td>Bogalusa</td>
<td>2003</td>
</tr>
<tr>
<td>45</td>
<td>9</td>
<td>307 F.3d1064</td>
<td>Porter</td>
<td>Manhattan</td>
<td>2002</td>
</tr>
<tr>
<td>46</td>
<td>7</td>
<td>349 F.3d469</td>
<td>T.D.</td>
<td>Lagrange</td>
<td>2003</td>
</tr>
<tr>
<td>47</td>
<td>1</td>
<td>361 F.3d80</td>
<td>LT,TB,EB</td>
<td>Warwick</td>
<td>2004</td>
</tr>
<tr>
<td>48</td>
<td>1</td>
<td>254 F.3d350</td>
<td>Gonzalez</td>
<td>Puerto Rico</td>
<td>2001</td>
</tr>
<tr>
<td>49</td>
<td>6</td>
<td>228 F.3d764</td>
<td>James</td>
<td>Upper Abling.</td>
<td>2000</td>
</tr>
<tr>
<td>50</td>
<td>5</td>
<td>200 F.3d341</td>
<td>Houston</td>
<td>Bobby R</td>
<td>2000</td>
</tr>
<tr>
<td>51</td>
<td>11</td>
<td>349 F.3d1309</td>
<td>Loren F.</td>
<td>Atlanta</td>
<td>2003</td>
</tr>
<tr>
<td>52</td>
<td>1</td>
<td>358 F.3d150</td>
<td>Greenl.</td>
<td>Amy N.</td>
<td>2004</td>
</tr>
<tr>
<td>53</td>
<td>7</td>
<td>203 F.3d462</td>
<td>Patricia P.</td>
<td>Oak Park</td>
<td>2000</td>
</tr>
<tr>
<td>54</td>
<td>4</td>
<td>354 F.3d315</td>
<td>A.B.</td>
<td>Lawson</td>
<td>2004</td>
</tr>
<tr>
<td>55</td>
<td>9</td>
<td>337 F.3d1115</td>
<td>MS.</td>
<td>Vashon Is.</td>
<td>2003</td>
</tr>
<tr>
<td>56</td>
<td>4</td>
<td>372 F.3d674</td>
<td>AW</td>
<td>Fairfax</td>
<td>2004</td>
</tr>
<tr>
<td>57</td>
<td>10</td>
<td>379 F.3d966</td>
<td>LT,JB,KB</td>
<td>Nebo</td>
<td>2003</td>
</tr>
<tr>
<td>58</td>
<td>7</td>
<td>375 F.3d603</td>
<td>Alex R.</td>
<td>Forrestville</td>
<td>2004</td>
</tr>
<tr>
<td>59</td>
<td>6</td>
<td>193 F.3d457</td>
<td>Metropol.</td>
<td>Guest</td>
<td>1999</td>
</tr>
<tr>
<td>60</td>
<td>6</td>
<td>392 F.3d840</td>
<td>Deal</td>
<td>Hamilton</td>
<td>2004</td>
</tr>
</tbody>
</table>
The number of LRE cases adjudicated by federal appellate courts is shown in Table 4.

Table 4

<table>
<thead>
<tr>
<th>Federal Circuit Court</th>
<th>Number of Cases Adjudicated</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>0</td>
</tr>
</tbody>
</table>

The Court of Appeals for the Federal Circuit is excluded because it lacks jurisdiction over federal special education cases. Federal circuit court decisions which contained claims under section 504 of the Rehabilitation Act of 1973, and Section 1983 of the Civil Rights Act (Title 42 U.S.C.A.) were excluded, if LRE/placement was not germane to the case.

Presentation of Data

The first examination of the data reveals the number of LRE federal appellate court cases litigated by each circuit court. Table 5 presents the number of LRE federal appellate court cases litigated, by Circuit, from June 1997 to December 2004.
Table 5

Distribution of LRE/placement cases 1997-2004

<table>
<thead>
<tr>
<th>Circuit Court</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>2nd</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>3rd</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>4th</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>5th</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>6th</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>7th</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>8th</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>9th</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>10th</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>11th</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>DC</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

As is shown in Table 5, in 2003 the total number of cases litigated (20) represented more than three times the rate than the previous year and decreased to less than half by 2004.

With regard to determining which party sought remedy before the federal appellate courts, parent(s) or the public school district, this Plaintiff distribution is displayed in Table 6.

Table 6

<table>
<thead>
<tr>
<th>Plaintiff</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent</td>
<td>46</td>
<td>77</td>
</tr>
<tr>
<td>School District</td>
<td>14</td>
<td>23</td>
</tr>
</tbody>
</table>

Parents were the Plaintiffs more than three times as often as school districts.

Characteristics of the disabled students who were the subject of litigation, by gender and disability classification are displayed in Table 7 and Table 8. The gender distribution is shown in Table 7.
Table 7

Distribution of Students by Gender

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Males</td>
<td>44</td>
<td>73</td>
</tr>
<tr>
<td>Females</td>
<td>16</td>
<td>27</td>
</tr>
</tbody>
</table>

With regard to gender, males were the subject of litigation at more than twice the rate of females.

Table 8 enumerates disability classification and gender.

Table 8

Distribution of Students by Disability Classification and Gender

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autism</td>
<td>17</td>
<td>3</td>
<td>20</td>
</tr>
<tr>
<td>Child with Disability</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Cognitive Delay</td>
<td>2</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Deaf-Blindness</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Deafness</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Emotional Disturbance</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Visual Impairment</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hearing Impairment</td>
<td>2</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Orthopedic Impairment</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Other Health Impairment</td>
<td>7</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Specific Learning Disability</td>
<td>9</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Speech Language Impairment</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Traumatic Brain Injury</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

The most frequent disability classification, which was the subject of litigation, was students with Autism, representing 33.3 percent of the cases. Specific Learning Disability and Other Health Impairment corresponded to 20 percent and 15 percent of the cases respectively.

Table 9 presents the frequencies of the disputed educational placements as identified in the federal appeals court decisions. In this table categories are listed from the least to most restrictive, and as outlined on the Litigation Documentation Sheet.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Table 9

Distribution of Students by Placement

<table>
<thead>
<tr>
<th>Placement</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full inclusion in regular education with SPED support</td>
<td>6</td>
<td>10.0%</td>
</tr>
<tr>
<td>Regular Education with resource room or itinerant support</td>
<td>5</td>
<td>8.3%</td>
</tr>
<tr>
<td>Full-time SPED public school program</td>
<td>4</td>
<td>6.7%</td>
</tr>
<tr>
<td>Other SPED public school program</td>
<td>7</td>
<td>11.7%</td>
</tr>
<tr>
<td>Homebound</td>
<td>4</td>
<td>6.7%</td>
</tr>
<tr>
<td>Private Day School</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sectarian</td>
<td>3</td>
<td>5.0%</td>
</tr>
<tr>
<td>Non-Sectarian</td>
<td>25</td>
<td>41.7%</td>
</tr>
<tr>
<td>Private Residential School/Mental Health Facility</td>
<td>6</td>
<td>10.0%</td>
</tr>
</tbody>
</table>

Private Day School constituted slightly less than half of the placement issues.

More specifically, Non-Sectarian Private Day School’s encompassed most of the cases in this category. Moreover, when combined with Private Residential School/Mental Health Facility, these two most restrictive placement categories represented more than half of the litigated cases in this study.

Table 10 displays the number of cases in which educational methodology was an issue as well as the disability classification.

Table 10

Methodology and Disability Classification

<table>
<thead>
<tr>
<th>Classification</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autism</td>
<td>10</td>
<td>50.0%</td>
</tr>
<tr>
<td>Hearing Impaired</td>
<td>1</td>
<td>20.0%</td>
</tr>
<tr>
<td>Learning Disability</td>
<td>2</td>
<td>16.7%</td>
</tr>
</tbody>
</table>

In those cases in which educational methodology was an issue, half of the cases involved students with Autism.
Table 11 represents the distribution of federal circuit court cases by each of the five outcomes as listed on the LDS (see Appendix B).

Table 11

Distribution of Circuit Court Cases by Outcome

<table>
<thead>
<tr>
<th>Outcome</th>
<th>1&lt;sup&gt;st&lt;/sup&gt;</th>
<th>2&lt;sup&gt;nd&lt;/sup&gt;</th>
<th>3&lt;sup&gt;rd&lt;/sup&gt;</th>
<th>4&lt;sup&gt;th&lt;/sup&gt;</th>
<th>5&lt;sup&gt;th&lt;/sup&gt;</th>
<th>6&lt;sup&gt;th&lt;/sup&gt;</th>
<th>7&lt;sup&gt;th&lt;/sup&gt;</th>
<th>8&lt;sup&gt;th&lt;/sup&gt;</th>
<th>9&lt;sup&gt;th&lt;/sup&gt;</th>
<th>10&lt;sup&gt;th&lt;/sup&gt;</th>
<th>11&lt;sup&gt;th&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Complete Win</td>
<td>6</td>
<td>4</td>
<td>0</td>
<td>4</td>
<td>4</td>
<td>7</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>District Win with Modification in Favor of Parent</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Split Decision</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Parent Win with Modification in favor of School District</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Parent Complete Win</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

The Sixth, First, Fifth, and Seventh Circuits, respectively, found for the school district most often. Moreover, the Seventh and Fifth Circuits did not favor parents in any of their LRE/placement decisions.

The frequencies of outcomes on the federal circuit court and federal district court are shown in Table 12.

Table 12

Distribution of Federal Court Cases by Outcome

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Circuit Court</th>
<th>Federal District Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Frequency</td>
<td>Percent</td>
</tr>
<tr>
<td>District Complete Win</td>
<td>39</td>
<td>65.0%</td>
</tr>
<tr>
<td>District Win with Modification in Favor of Parent</td>
<td>3</td>
<td>5.0%</td>
</tr>
<tr>
<td>Split Decision</td>
<td>3</td>
<td>5.0%</td>
</tr>
<tr>
<td>Parent Win with Modification in favor of School District</td>
<td>7</td>
<td>11.7%</td>
</tr>
<tr>
<td>Parent Complete Win</td>
<td>8</td>
<td>13.3%</td>
</tr>
</tbody>
</table>
School districts’ prevailed completely or predominantly 70 percent of the time versus Parents prevailing completely or predominantly 25 percent of the time, and 5 percent split decision.

Findings from the Qualitative Inquiry

This study was guided by the general research questions: (a) what primary reasons are cited by the federal appeals courts in their decisions? and (b) is expert testimony related to the case outcome? Data collected pertaining to these questions and subsequent analyses are reported in this section. Table 3 provides the demographic data for each core category; the case names, case number assigned in this study; the federal citation, federal appeals court, and date of the decision.

For the purposes of this study, descriptive data were reported in narrative form and extracted using verbatim language from each court opinion. Each case was transcribed and connected to the source by its assigned case study number.

The analyses of data for this study followed the format recommended by Strauss and Corbin (1998) and utilized the processes of open coding, axial coding, and selective coding. The Coding process separates data, analyzes relationships, and, subsequently, recontextualizes the data. In turn, this constitutes the basis from which the narrative was written. The initial stage used to examine the data was open coding.

Open Coding

Open coding involved making comparisons and asking questions (Strauss & Corbin, 1998). Utilizing this methodology, data were initially broken down into separate parts and examined for relationships. For the purposes of this study, questions were: (a) What were the main reasons the appeals courts cited in the judicial decision, and (b) how was expert testimony referenced in the decision?
Court decisions yielded two core categories to identify common relationships and phenomena, Court Reasoning and Expert Testimony. Within the core category of Court Reasoning, five subcategories emerged: (a) procedural violations; (b) educational benefit; (c) LRE; (d) private school reimbursement; and (e) due weight. Three subcategories evolved from the Expert Testimony core category: (a) credibility; (b) school district’s experts; and (c) parent’s experts. These eight categories were then examined for their properties and dimensional range. Strauss and Corbin (1998) define properties within the open coding process as “characteristics of a category, the delineation of which defines and gives it meaning” (p. 101). In turn, properties were then analyzed to determine their dimensional range or degrees of variation. Strauss and Corbin (1998) maintained that dimensions further specify and provide scope to a category. This stage of the open coding process begins with the property of Procedural Violations and refers to Table 13.

**Procedural Violations**

Table 13 presents the category of Procedural Violations and the dimensional range of the properties related to this category. The property and dimensionality of the category procedural violations was supported with descriptive narratives derived from the property descriptors, and collected from cases in which procedural violations were referred to as a major reason for the respective circuit court decision. This category contained two properties, substantive and minor violations.
Table 13
Properties and Dimensional Range of the Procedural Violations Category

<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural Violations</td>
<td>substantive</td>
<td>procedural violations are substantive (Cases 5, 8, 20, 21, 22, 33, 34, 36, 37, 40, 45, 49, 59, 60)</td>
<td>no denial ➔ denial of FAPE</td>
</tr>
<tr>
<td>For Names of Specific</td>
<td>minor</td>
<td>technical violations by a school not a denial of FAPE (Cases 10, 37, 43, 44, 47, 55)</td>
<td></td>
</tr>
<tr>
<td>Cases See Table 3</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Substantive: Qualitative data revealed that, with regard to Procedural Violations, 14 of 19 decisions were predicated on the U.S. Supreme Court, in *Hendrick Hudson Bd. Of Ed. v. Rowley* (1982). The Supreme Court set forth a two-part inquiry for lower courts to determine whether a public school had provided a disabled student with a free and appropriate public education (FAPE). First, has the public education agency complied with the procedural requirements under IDEA? Second, is the disabled child's individualized education program (IEP) reasonably calculated to enable the child to receive educational benefits? In this study, many federal circuit courts began their reasoning and analysis of LRE cases with the *Rowley* (1982) standard. Consequently, judicial outcomes in some cases were based on whether a public school district's procedural violations are substantive. In turn, this then leads to a conclusion of whether the school has denied FAPE. In contrast, minor or technical procedural violations have not been held to be a denial of FAPE. For example, in *MS v. Vashon Island* (2003), the Ninth Circuit held that technical procedural errors did not deny FAPE. More specifically, the school district's interim placement was not considered a predetermined placement. If a public school has met the procedural requirements under IDEA, then the federal appeals courts next turn to the question of whether a disabled student's IEP has been reasonably calculated to enable the child to receive educational benefits. As the Supreme Court acknowledged in *Rowley* (1982) this "presents a more difficult problem" (p. 187).

Assessing Educational Benefit

Table 14 presents the category of Educational Benefit and the dimensional range of the properties related to this category. The category of Educational Benefit comprised three properties: (a) as assessed by an IEP; (b) as assessed by IEP progress; and (c) as assessed by methodology. Of the 26 cases in this category, 19 pertained to assessment by IEP; 9 to assessment by IEP progress; and 4 related to assessment by methodology.
<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educational benefit</td>
<td>as assessed by IEP</td>
<td>IEP is reasonably calculated to provide educational benefit (Cases 3, 4, 10, 13, 15, 21, 26, 27, 28, 34, 36, 37, 38, 40, 44, 47, 48, 50, 54, 60)</td>
<td>trivial → not maximize potential</td>
</tr>
<tr>
<td></td>
<td>as assessed by IEP progress</td>
<td>includes both academic and non-academic progress (Cases 6, 15, 21, 27, 38, 40, 42, 43, 58)</td>
<td>social → behavioral → academic</td>
</tr>
<tr>
<td></td>
<td>as assessed by methodology</td>
<td>if educational benefit then defer to educators (Cases 1, 13, 39, 60)</td>
<td>defer → not defer</td>
</tr>
</tbody>
</table>

For Name of Specific Cases
See Table 3
As Assessed by IEP. Whether a disabled student’s IEP confers educational benefits has been considered the touchstone of IDEA. In this study - regardless of the particular LRE issue - the majority of cases hinged on this inquiry. Federal appeals court rationales have ranged from whether an IEP provides more than trivial educational benefits, to holding that an IEP does not have to maximize a child’s potential. In several cases, the federal appeals courts reasoned that the standard should be gauged against each disabled child’s individual potential. Two cases illustrate the diverse range of reasoning by the federal circuit courts. In Walczak v. Florida (1998), the Second Circuit held that meaningful educational benefit did not guarantee totally successful results. In contrast, in Ridgewood v. N.E. (1999), the Third Circuit ruled that educational benefits must be significant and gauged in relation to the child’s potential.

As Assessed by IEP Progress. The federal circuit courts considered how educational benefits were defined according to the student’s progress on their IEP goals/objectives, as well as their progress in the general education curriculum, if such a placement were applicable. Federal appeals courts reasoned similarly in that both academic and non-academic progress were considered, with non-academic progress including social, behavioral and emotional areas. In CJN v. Minneapolis (2003), the Eighth Circuit ruled that a student’s behavior problems were sufficiently controlled by school personnel to enable the student to receive educational benefit. Similarly, in Alex R. v. Forrestville (2004), the Seventh Circuit determined that, in considering educational benefits, the school district was correct to take into account the student’s disruptive behavior.
As assessed by Methodology. If a judicial review determined that a public school had provided a disabled student with an IEP that conferred more than trivial educational benefits, then most circuit courts reasoned that the question of methodology was left for educators to decide; with dimensionality ranging from deferring to not deferring to educators. Two cases illustrate circuit court reasoning regarding methodology. In *G. v. Fort Bragg* (2003), the Fourth Circuit ruled that the proper standard regarding methodology is educational benefit, not whether a student’s IEP would replicate a particular methodology. In *Tucker v. Calloway* (1998), the Sixth Circuit held that parents cannot compel a school district to use a particular methodology. According to the Sixth Circuit, case law is clear – parents are entitled to present their views but cannot make unilateral decisions about specific programs paid for with public funds.

**Least Restrictive Environment (LRE)**

Further analyses of the data indicated that LRE transcended all of the cases in this study and were threaded among the other reasoning categories. Table 15 introduces the category of the Least Restrictive Environment as well as the dimensional range contained within each property. For the purposes of this study, three primary LRE concepts emerged: (a) education placement defined; (b) mainstream conditions defined; and (c) LRE tests.
<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Least Restrictive Environment</td>
<td>education placement</td>
<td>inconsistent use of term</td>
<td>physical location →</td>
</tr>
<tr>
<td></td>
<td>defined</td>
<td>(Cases 15, 23, 56, 57)</td>
<td>abstract</td>
</tr>
<tr>
<td></td>
<td>mainstream conditions</td>
<td>as close as feasible to regular education</td>
<td>full inclusion → full</td>
</tr>
<tr>
<td></td>
<td>defined</td>
<td>(Cases 6, 8, 13, 14, 19, 20, 22, 24, 26, 28, 29, 30, 55, 60)</td>
<td>residential</td>
</tr>
<tr>
<td>For Names of Specific Cases</td>
<td>LRE tests</td>
<td>circuit courts vary</td>
<td>1st Circuit → 11th Circuit</td>
</tr>
<tr>
<td>See Table 3</td>
<td></td>
<td>(Cases 5, 7, 8, 9, 41, 57)</td>
<td></td>
</tr>
</tbody>
</table>
*Education Placement Defined.* Four of 22 cases were associated with this concept. This term has been inconsistently used among the federal appeals courts. Court reasoning ranged from education placement being defined as the physical location of a particular school or setting to abstract goals in a disabled student’s IEP.

*Mainstream Conditions Defined.* The term “mainstreaming” is not contained in the IDEA, but is commonly used interchangeably among the federal circuit courts with the term LRE. In the IDEA, this provision mandates that disabled children be educated in the least restrictive appropriate environment. Federal circuit courts have generally reasoned that mainstreaming conditions be as close as feasible to the regular education setting, although a continuum of placement options be available, from full inclusion in the regular education classroom to 24 hour residential placement. For example, in *O'Toole v. Olathe* (1998), the Tenth Circuit reasoned that LRE does not require a school district to provide a particular level of special education services. Rather, LRE is an obligation to balance FAPE and placement in a setting closest to regular education.

*LRE Tests.* The U.S. Supreme Court has not decided a special education case specific to what constitutes the LRE. Consequently, federal circuit courts have varied in determining if a disabled child has been provided a free and appropriate education in the LRE. The Fifth Circuit, in *Cypress Fairbanks v. Michael F.* (1997), included LRE as one of four factors in an educational benefits test. In contrast, the Tenth Circuit in *LT, JB, KB v. Nebo* (2003), addressed four factors pertaining to LRE: (a) whether the mainstream class provided appropriate role models; (b) the class gender ratio; (c) whether the child’s placement met his/her behavioral and social needs; and (d) whether the student’s behavior disrupted the regular education class. As stated previously, although all of the
cases in this study involved a primary LRE issue, circuit courts did not always address this issue. Rather, the courts' justifications pertinent to the case outcome involved one or more of the other four categories that emerged during the open coding process, such as the category of Private School.

*Private School*

Private school placements constituted the most frequent LRE issue and represented 30 cases in this category. Additionally, federal circuit court reasoning among these cases was the most consistent. Table 16 delineates the category of Private School and the dimensional range. Three primary concepts were associated with Private School: (a) reimbursement by school district, (b) FAPE responsibility, and (c) no reimbursement.
Table 16

Properties and Dimensional Range of the Private School Category

<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private School</td>
<td>reimbursement by school district</td>
<td>only if public school violated IDEA and private school placement appropriate (Cases 20, 24, 25, 32, 33, 36)</td>
<td>unilateral parent placement → school district placement</td>
</tr>
<tr>
<td></td>
<td>FAPE responsibility</td>
<td>public agency responsibility (Case 18)</td>
<td>private → public school</td>
</tr>
<tr>
<td></td>
<td>no reimbursement</td>
<td>if public school offered FAPE (Cases 3, 4, 12, 14, 17, 21, 26</td>
<td>FAPE → denial of FAPE</td>
</tr>
</tbody>
</table>

For Names of Specific Cases
See Table 3

|                                      | 27, 28, 31, 35, 36, 38, 39, 43, 46, 47, 48, 49, 50, 51, 52, 53 |
Reimbursement by School District. Private school placements are considered to fall on the more restrictive end of the LRE continuum. Federal appeals court reasoning in the private school category was the most consistent by requiring public school districts to reimburse parents only if a judicial review found that the public school had not provided a disabled student with a FAPE, and if the private school placement was appropriate. For example, in Warren G. v. Cumberland Cty. (1999), the Third Circuit held that the test for parents’ private school placement is that it is appropriate, not perfect. The dimensionality of this property ranged from parents who unilaterally placed their disabled child in a private school to public schools who had placed a disabled child in a private school. If federal circuit courts held that the public school had violated IDEA, the appropriateness of the private school placement was next addressed. If the private placement was found appropriate, then the public school was required to reimburse the parents. However, in some cases, courts found that the private school placement was not appropriate because the placement was either too restrictive or the private school could not meet the individual needs of the disabled child.

FAPE Responsibility. Although only one case outcome was based on this private school property, the significance of this case pertains to the circuit court reasoning that a FAPE, by definition, is the responsibility of the public agency, despite whether a disabled student has been placed in a private school by their parent or the public school. In St. Johnsbury v. D.H. (2001), the Second Circuit opined that the public school remains responsible for ensuring FAPE regardless of the private schools’ policies or unwillingness to provide special education services.
No Reimbursement. In the majority of private school cases in this study, the federal appeals courts ruled that the public school had provided a FAPE to the disabled child. More specifically, these cases determined that a public school had not committed substantive procedural violations and that the disabled student's IEP was calculated to reasonably confer educational benefits. Therefore, there was no need to address whether the private school placement was appropriate because the public school had met its obligations under IDEA.

Due Weight

Although fewer federal appellate court decisions were based on the concept of Due Weight, one term consistently appeared in these court decisions: erroneous subjective judgment. Table 17 presents the category of Due Weight.
Table 17

Properties and Dimensional Range of the Due Weight Category

<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Due Weight</td>
<td>erroneously used subjective</td>
<td>District court or hearing officer substituted their own judgment for that of school officials</td>
<td>Subjective judgment → excessive remedy</td>
</tr>
<tr>
<td></td>
<td>judgment</td>
<td>(Cases 11, 37, 42, 54, 58, 59)</td>
<td></td>
</tr>
<tr>
<td>For Names of Specific Cases</td>
<td></td>
<td>See Table 3</td>
<td></td>
</tr>
</tbody>
</table>
Erroneous Subjective Judgment. Federal courts, when reviewing lower judicial decisions, must accord “due weight” to the administrative proceedings and decisions of the administrative law judge or hearing officer. The U.S. Supreme Court, in *Hendrick Huson Bd. of Ed. v. Rowley* (1982), cautioned that federal courts “lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy” (p.189). Thus, the standard of judicial review under the IDEA and *Rowley* is that courts not impose their views about controversial issues of educational policy. Rather, the courts must conduct an independent review by examining and making decisions based on the specific facts and objective evidence in each case. When this is not done, federal appeals courts have generally held that lower courts have not applied due weight to the judicial proceedings and consequently, have reached an invalid decision.

In all of the cases in the due weight category, the hearing officer or district court erroneously used subjective judgment. More specifically, the federal appellate courts held that the district court or hearing officer substituted his or her own views for that of school officials and, in so doing, impermissibly chose between experts. In one case, the appeals court noted that the hearing officer’s remedies exceeded the facts and situation of the case because she required the entire school to undergo disability sensitivity training. The dimensionality of these cases ranged from subjective judgment to excessive remedy. Those cases in which a district court or hearing officer erroneously substituted his or her judgment with regard to expert witness credibility, led to interesting insight into how credibility was addressed by the circuit courts. In *A.B. v. Lawson* (2004), and *Hartmann v. Loudon Cty.* (1997), the Fourth Circuit admonished both the hearing officer and the district court for substituting their own opinions for that of school officials.
The open coding process revealed three general categories under Expert
Testimony: (a) credibility determination; (b) school district experts; and (c) parents’
experts.

*Credibility Determination*

With regard to Credibility Determination, 14 cases enumerated three areas: (a)
demeanor; (b) expert witness expertise; and (c) appropriate credibility determination.

Table 18 portrays the category of Credibility Determination.
### Table 18

Properties and Dimensional Range of the Credibility Category

<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credibility Determination</td>
<td>demeanor</td>
<td>law judge who view witnesses as they testify accorded deference (Cases 8, 28, 29, 43, 44, 47, 55)</td>
<td>live testimony → written transcript</td>
</tr>
<tr>
<td></td>
<td>expert witness</td>
<td>conflicting testimony (Cases 26, 29, 30, 37, 42, 44, 48, 54, 60)</td>
<td>credible → not credible</td>
</tr>
<tr>
<td></td>
<td>expertise</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Names of Specific Cases</td>
<td>appropriate</td>
<td>District court judge cannot substitute their judgment</td>
<td>appropriate determination → inappropriate</td>
</tr>
<tr>
<td>See Table 3</td>
<td>credibility determination</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Demeanor. Seeing a witness testify live assists the fact finder or law judge in assessing the witness’s credibility. Live testimony provides the law judge with the ability to determine the witness’s demeanor – their physical reactions to questions, their tone of voice. One case illustrated the importance of demeanor. In *MS v. Vashon Island* (2003) the Ninth Circuit further explained that a witness’ physical reaction to questions and their tone of voice are crucial to credibility determinations. Matters such as these cannot be construed from a written transcript. Generally, for cases in this study in which the credibility of expert witnesses was an issue, federal appeals courts have accorded deference to the law judge who viewed live witness testimony. Conversely, either where credibility of expert witnesses was not an issue or where the law judge was further removed from live testimony, the less deference was accorded to that decision.

Expert Witness Expertise. It stands to reason that expert witness testimony presented by Plaintiff’s will conflict with that of the Defendant’s. In all of the cases in this study that referenced or cited expert witness testimony, either parents or the public school district presented conflicting testimony. This then led to a determination of whether individual expert witnesses are credible and the reasons put forth by the courts. Whether or not an expert witness was credible often hinged on the experience/expertise of the witness. Cases contained within this property also included conflicting testimony among the experts testifying on behalf of the same party. For example, school personnel or parents’ experts who gave varying testimony about a particular issue were then sometimes deemed not credible. One particular case portrays the complexity involved in expert witness expertise. In *Wisconsin Dells v. Littlegeorge* (2002), the Seventh Circuit commented, “Autism experts have a variety of opinions about which type of program is
best. Federal courts must defer to the judgment of educational experts who craft and review a child's IEP” (p. 676).

*Appropriate Credibility Determination.* In expert witness testimony, federal circuit courts were often faced with determining whether a lower court or administrative review officer had made appropriate credibility determinations. In other words, did the presiding court officer base their credibility determination of expert witnesses on their testimony and whether the other evidence in the case supported that individual’s testimony? When a court officer substitutes their personal judgment for that of the expert witness, the circuit courts have ruled that this is inappropriate.

*School’s Expert Witnesses*

In an examination of the 22 cases in which expert witnesses testified on behalf of school districts, it was revealed that schools had generally identified experts who were employees with personal knowledge of the child, and had specialized educational training. Table 19 represents the category School’s Expert Witnesses and the dimensional range. In this study, the category of School’s Expert Witnesses contained three properties: (1) employees; (2) personal knowledge; and (3) specialized knowledge.
Table 19

Properties and Dimensionality Range of the School’s Expert Witness Category

<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>School’s Expert Witnesses</td>
<td>employees</td>
<td>testimony by public school employees (cases 26,29,38,39,60)</td>
<td>administrators → teachers → specialists</td>
</tr>
<tr>
<td></td>
<td>personal knowledge</td>
<td>personal knowledge of child (cases 3,4,6,21,26,27,29,30,38,39,43,47,52,54,57,58,60)</td>
<td>positive → negative</td>
</tr>
<tr>
<td>For Names of Specific Cases</td>
<td>specialized knowledge</td>
<td>specialized knowledge and experience (cases, 5,10,39,44,47,48,57,59,60)</td>
<td>employees → non-employees</td>
</tr>
</tbody>
</table>

See Table 3
Employees. School employees who were expert witnesses included administrators (special education directors, principals, supervisors), regular and special education teachers, and specialists (special education related service providers such as school psychologists, speech/language clinicians). This property also included outside consultants who were not permanent employees of the school district such as autism experts, psychologists, and experts on special education practices. In most of the cases, permanent school district employees who were expert witnesses included administrators, special education teachers, regular education teachers, and school psychologists.

Personal Knowledge. In the majority of these cases, the expert’s personal knowledge of the child was frequently referenced in the federal circuit court opinions. More specifically, the degree to which the expert had observed the child or had contact with the child was related to their credibility and, whether the courts viewed this negatively or positively. In Cypress Fairbanks v. Michael F. (1997), the Fifth Circuit concluded that the testimony of expert witnesses who had direct and frequent contact with Michael provided substantial support for determining that his IEP provided meaningful educational benefit.

Specialized Knowledge. This property relates to the expert witness’s knowledge regarding programs, special education practices or methodology. This included both permanent employees of a public school district as well as outside consultants.

Parents’ Expert Witnesses

Although Parents’ Expert Witnesses also had personal knowledge of the child or specialized knowledge in a particular area, in 14 of 21 cases in this category the most frequent expert witnesses consisted of psychologists and/or medical doctors. Testimony pertained to either the appropriateness of the child’s IEP or placement. Table 20 outlines the category Parents’ Expert Witnesses and the dimensional range of the related properties.
<table>
<thead>
<tr>
<th>Category</th>
<th>Property</th>
<th>Property Descriptors/Data</th>
<th>Dimensionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent's Experts</td>
<td>psychologists</td>
<td>testimony regarding appropriateness inadequate → minimal of IEP, of placement, or of school district methodology (Cases 4, 6, 26, 27, 28, 29, 30, 31, 37, 39, 40, 43, 47, 50, 52, 54, 56, 57, 58, 59, 60)</td>
<td>educational benefit → not maximizing child’s potential</td>
</tr>
<tr>
<td></td>
<td>private institute</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>private teacher/Tutor</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

For Names of Specific Cases
See Table 3
In this study, the category Parents’ Expert Witnesses included four properties. Those properties were: (a) psychologists/medical doctor; (b) private agency; (c) private teacher/tutor; and (d) specialists. Although this category revealed different properties or professional groups, the issues for which all parent’s experts testified pertained to the appropriateness of the child’s IEP, the child’s placement or school district’s methodology. The dimensionality ranged from testimony regarding inadequate educational programs, placement or methodology, to acknowledging that a disabled child was receiving some educational benefit at the public school, to the IEP not maximizing the child’s potential. In *LT, TB, EB v. Warwick* (1st Circuit, 2004), the psychologist testified that the school district’s IEP was inadequate. In *Ridgewood v. N.E.* (3rd Circuit, 1999) the psychologist criticized the IEP, maintaining it would not result in an adequate education. Interestingly, no parent expert witnesses testified about school district procedural violations.

**Psychologists/Medical Doctor.** Psychologists were the most frequent expert witness testifying on behalf of the parents and child. In a few cases, a medical doctor testified as an expert witness.

**Private Agency.** In many cases, individuals associated with private schools testified as parent expert witnesses. Private agency testimony also included medical or developmental centers.

**Specialists.** Included in this property are private school teachers or individual tutors hired by the parents of a disabled child and speech/language clinicians. However, few cases in this study cited these individuals as parent’s expert witnesses.
Axial Coding

The previous section of the open coding process resulted in the identification of eight categories. In this section, employing the process of axial coding, data were de-contextualized into parts, subsequently analyzed, and re-contextualized in a different manner (Strauss & Corbin, 1998).

An analysis of the re-contextualized data indicated phenomena that related to the causal condition as well as the properties associated with that phenomenon. These relationships and properties which evolved from the axial coding process are referred to as: “Causal Condition,” “Phenomenon,” “Context,” “Intervening Condition,” “Action/Interaction,” and “Consequence.” Following is a brief explanation of these terms, however for a more detailed description of these terms and features see Strauss and Corbin (1998).

Phenomenon. Phenomenon is a central idea or event, which looks for repeated happenings that represent what people do or say. In the coding process, phenomena are akin to categories (Strauss & Corbin, 1998). Phenomenon in this study is represented by each category that evolved from the open coding. Thus, eight phenomena emerged under the core category of Court Reasoning: (a) procedural violations; (b) educational benefit; (c) least restrictive environment; (d) private school reimbursement; and (e) due weight. Three phenomena evolved from the Expert Testimony core category: (a) credibility; (b) parent’s experts; and (3) school district’s experts.

Conditions. Conditions stand for events that influence or create phenomenon. Conditions potentially arise out of time, place, beliefs, rules or regulations. Labels assigned to conditions such as causal, intervening, and contextual are a means of sorting complex relationships among conditions (Strauss & Corbin, 1998).
Causal Conditions. The causal conditions for each category in this study are comprised of the federal appellate court decision.

Intervening Conditions. Intervening conditions are those that alter or influence causal conditions on phenomena. In this study, intervening conditions are the reasons cited in the nine phenomenon or categories.

Actions/Interactions. This refers to discussions or interactions that evolve over time and provide meanings to situations.

Consequences. Actions taken in response to an issue results in ranges of consequences. “Delineating these consequences, as well as explaining how they alter the situation and affect the phenomenon in question, provides for more complete explanations” (Strauss & Corbin, 1998, p. 134). In this study, the consequences are related to the judicial outcomes associated with each case.

Table 21 conveys the components of the axial coding paradigm and the relationship between each component in this analytical process.

Table 21

<table>
<thead>
<tr>
<th>Axial Coding Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>causal condition &gt; phenomenon &gt; context &gt;</td>
</tr>
<tr>
<td>intervening condition &gt; action/interaction &gt; consequences</td>
</tr>
</tbody>
</table>

The analytical relationship in the axial coding process begins with connecting a causal condition to a phenomenon. Table 22 presents the causal condition for this study and the associated phenomena in the axial coding process.
Table 22

<table>
<thead>
<tr>
<th>Causal Condition</th>
<th>Phenomena</th>
</tr>
</thead>
</table>
| Federal appellate court reasoning | procedural violations  
educational benefit  
least restrictive environment  
private school reimbursement  
due weight  
credibility determination  
school’s expert witnesses  
parent’s expert witnesses |

In order to further understand the application of the axial coding process in this study, the context of each phenomenon in this study are presented in Table format, followed by the features of each context: “Intervening Condition,” “Action/Interaction,” and “Consequences.” Table 23 outlines the phenomenon of Procedural Violations.

Table 23

<table>
<thead>
<tr>
<th>Phenomenon</th>
<th>Context</th>
</tr>
</thead>
<tbody>
<tr>
<td>When do procedural violations deny FAPE?</td>
<td>#1. Substantive violations are those that lead to loss of educational opportunity or prevent parents participation in IEP process.</td>
</tr>
<tr>
<td></td>
<td>#2. Parents right to participate is not equivalent to agreeing with parents desired outcome.</td>
</tr>
<tr>
<td></td>
<td>#3. A school district can commit minor procedural violations that do not result in denial of FAPE.</td>
</tr>
</tbody>
</table>

Procedural Violations Context # 1 from Table 23:

Substantive procedural violations are those that lead to loss of educational opportunity for the disabled child or prevent parents participation in the IEP process.

Intervening Condition

Whether procedural violations are substantive.
Action/Interaction

1. Procedural violations that cause substantive harm.

2. Loss of educational opportunity includes failure to convene and implement an IEP meeting, failure to include a regular education teacher in an IEP meeting, pre-written IEP or pre-determined placement, pre-determined methodology, and failure to keep sufficient data on a student.

Consequences (Cases 5, 8, 20, 21, 22, 33, 34, 36, 37, 40, 45, 49, 59, 60)

1. A public school district’s violations of IDEA procedural requirements may alone warrant a finding that the public school has denied FAPE.

2. In analyzing whether a school district has provided FAPE, federal appeals courts have held that substantive violations alone can result in denial of FAPE. If so, it is unnecessary to address whether the student’s IEP was reasonably calculated to provide educational benefit.

3. A public school district’s unofficial policy or refusal to discuss a particular program or methodology can be considered pre-determination and, thus, a substantive procedural violation.

Procedural Violations Context # 2 from Table 23:

Parents right to participate in the IEP process is not equivalent to agreeing with parents desired outcome.

Intervening Condition

Participation in the IEP process.

Action/Interaction

1. Parents right to participation does not equate to site selection of special special education services or to their desired program.
2. Parents right to participation does not prevent school personnel from informal conversations outside of the IEP process, from developing a draft IEP or making tentative IEP recommendations.

3. When parents refuse to participate in the IEP process, a school district cannot be faulted for failure to engage parents in discussion.

Consequence (Cases 21, 22, 33, 34, 36, 37, 60)

If a school has not afforded parents the opportunity to participate (i.e. consider and discuss the parents viewpoints), it is a substantive procedural violation, resulting in denial of FAPE.

**Procedural Violations Context # 3 from Table 23:**

**Minor procedural violations alone are not a denial of FAPE.**

Intervening Condition

School district commits technical violations.

Actions/Interactions

1. It is not a substantive violation to increase a student’s special education services and not evaluate.

2. Experts who are knowledgeable about a particular methodology are not required to attend an IEP meeting.

3. A school district does not need complete student records or have to meet with a student prior to developing an interim IEP.

4. Teacher made tests, observations, report cards, and student work samples are sufficient to meet procedural requirements that the IEP list evaluation procedures.

5. Draft IEP is not a procedural violation.
6. Alleged procedural violations must be raised in administrative proceedings.

Consequence (Cases 8, 37, 40, 43, 44, 55)

Minor procedural violations alone are not a denial of FAPE.

Table 24

<table>
<thead>
<tr>
<th>The Phenomenon of Educational Benefit in Context</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phenomenon</td>
</tr>
<tr>
<td>Whether an IEP provides meaningful educational benefit?</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

Listed below are the three contexts for the phenomenon of educational benefit and the features associated with each context.

**Educational Benefit Context # 1 from Table 24:**

Educational benefit is the touchstone of IDEA. A disabled student’s IEP must confer some educational benefit that is more than trivial but does not need to maximize the child’s potential.

Intervening Condition

Appropriateness of an IEP.

Action/Interaction

1. IEP does not have to be the best or most appropriate program/placement.

2. Must provide significant learning.

3. Fifth Circuit has outlined a four-factor test.
4. IEP cannot be judged in hindsight, but rather from perspective of when written.

5. Educational benefit does not have to guarantee totally successful results.

Consequence (Cases 3, 4, 10, 13, 15, 21, 26, 27, 28, 34, 36, 37, 38, 40, 44, 47, 48, 50, 54, 60)

If a judicial review determines that a student’s IEP has not provided educational benefit, then the school district has not provided FAPE.

Educational Benefit Context # 3 from Table 24:

School districts are not compelled to use a specific methodology or program in developing/implementing an IEP if judicially sanctioned.

Intervening Condition

Parents want school to utilize a particular methodology or program.

Action/Interaction

If a school district can demonstrate that a disabled student has received more than trivial educational benefit from their IEP, then courts defer to educators.

Consequences (Cases 1, 13, 39, 60)

1. Decisions about methodology and programs should be left to educators, if a student’s IEP is appropriate.

2. Parents are entitled to discuss their views regarding their preferred methodology or program.

3. Parents are not entitled to make unilateral decisions about programs paid for with public funds.
Table 25

The Phenomenon of Least Restrictive Environment in Context

<table>
<thead>
<tr>
<th>Phenomenon</th>
<th>Context</th>
</tr>
</thead>
<tbody>
<tr>
<td>What does least restrictive environment mean?</td>
<td>#1. Case law does not provide significant clarification of the term educational placement.</td>
</tr>
<tr>
<td></td>
<td>#2. Administrative proceedings and courts have confused FAPE with LRE.</td>
</tr>
<tr>
<td></td>
<td>#3. Federal appeals courts have adopted different LRE tests.</td>
</tr>
</tbody>
</table>

Least Restrictive Environment Context # 1 from Table 25:

Case law does not provide significant clarification of the term educational Placement.

Intervening Condition

U.S. Federal Appeals Courts interpretation of educational placement.

Action/Interaction

1. “Placement” ranges from a physical location to abstract goals in an IEP
2. Disabled child’s placement should be as closely aligned to those of non-disabled peers, and in which the child receives both academic and non-academic benefits.
3. Placement is not a right to attend a particular classroom or location. Rather, it refers to an educational setting.
4. LRE involves the degree to which a child is mainstreamed in regular education settings, not which special education placement is appropriate.
5. Disability classification does not drive a disabled child’s education placement.
6. LRE is not a question of methodology.

Consequences (Cases 6, 8, 13, 14, 15, 19, 20, 22, 23, 24, 26, 28, 29, 30, 56, 57, 60)
1. The degree to which a child is mainstreamed is the degree for which they can receive educational benefit in regular education.

2. Schools must offer a continuum of placement options ranging from least (full inclusion in regular education) to most restrictive (full-time residential).

3. IDEA’s least restrictive environment provision establishes a presumption that disabled students will be educated with non-disabled peers to the maximum extent appropriate. It is not an inflexible mandate.

**Least Restrictive Environment Context # 2 from Table 25:**

**Administrative proceedings and the courts have confused FAPE with LRE.**

**Intervening Condition**

U.S. Supreme Court *Rowley* (1982) FAPE standard and LRE statutory requirement that disabled students be educated with their peers to the maximum extent appropriate.

**Action/Interaction**

1. FAPE determination is at the threshold of the LRE inquiry.

2. LRE involves the public school’s obligation to balance FAPE and placement in an educational setting closest to regular education.

3. Regular education teacher’s attendance at IEP meeting is closely related to LRE mandate.

4. In determining LRE, both academic and non-academic educational benefits should be considered.

**Consequences (Cases 5, 8, 9, 20, 24, 26, 41, 58, 60)**

1. A disabled student may be removed from the regular education environment if not receiving more than trivial educational benefits.
2. LRE is one factor in determining educational benefit.

3. Even where mainstreaming in regular education is not feasible, the statutory preference for LRE applies.

4. When determining whether a private school placement is appropriate, LRE applies.

5. A regular education teacher’s attendance at an IEP meeting is crucial in deciding the extent to which a student is integrated with non-disabled peers, and how their individual needs can be met in a regular education classroom.

6. It would cause extreme restrictions on the school’s authority to place in separate special education environments if a disabled student could not be removed from regular education because they received “any” or trivial educational benefit.

Least Restrictive Environment Context # 3 from Table 25:

Federal circuit courts have adopted different LRE tests.

Intervening Condition
   1. Particular federal circuit court.
   2. Facts of each case.
   3. Continuum of placement options.

Action/Interaction
   1. To date, the U.S. Supreme Court has not ruled on an LRE case.
   2. Even if the restrictive placement was superior, it would violate the least restrictive environment requirement, if a disabled child were placed in a more restrictive setting if that child was making educational progress in the less restrictive placement.
3. If mainstreaming in a regular education environment is not a feasible alternative, the statutory preference for LRE still applies.

4. Schools are not required to offer a continuum of placement options at each school in the district.

Consequences (Cases 5, 7, 8, 9, 41, 57)

1. Circuit courts have developed variations of an LRE test in determining whether the IDEA mandate has been violated.

2. Educating students in the least restrictive appropriate environment is one of the IDEA’s most substantive requirements.

3. Federal circuit court LRE tests are not uniform.

4. A disabled child’s educational placement in the least restrictive environment is a significant factor in determining whether an IEP provides academic and non-academic educational benefits.

Table 26

The Phenomenon of Private School in Context

<table>
<thead>
<tr>
<th>Private School Context</th>
<th>Whether public school must reimburse?</th>
<th>#1. Reimbursement only available to parents if judicial review determines public school failed to provide FAPE and private school placement appropriate.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#2. It is the public school’s responsibility to provide and ensure FAPE, not the private school.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>#3. No reimbursement if procedural violations were not substantive and IEP provided educational benefit.</td>
<td></td>
</tr>
</tbody>
</table>

Private School Context # 1 from Table 26:

Private School reimbursement is only available to parents if a judicial review determines that the public school failed to provide FAPE and the private school placement is appropriate.
Intervening Conditions

1. Parents remove their disabled child from public school, unilaterally place child in private school, and seek reimbursement from the public school.

2. Public school did or did not offer FAPE.

Action/Interaction

1. Private school placement must be for educational reasons/services.

2. Parents must notify the public school prior to removing disabled child.

3. Parents must give the public school the opportunity to develop an IEP before seeking private school reimbursement.

4. Private school reimbursement is only available if student has previously received special education services in a public school.

Consequences (Cases 20, 24, 25, 32, 33, 36)

1. Parents who unilaterally enroll their disabled child in a private school risk denial of reimbursement for private school costs.

2. Private school reimbursement only if a court concludes that the public school violated FAPE and the private school placement is appropriate.

3. If public school provided FAPE, then inquiry ends and courts need not consider if private school placement is appropriate.

4. LRE is one factor in determining appropriateness of private school placement.

5. Whether private school placement is appropriate hinges on whether educational benefits can be provided at private school.

Private School Context # 2 from Table 26:

It is the public school’s responsibility to provide and ensure FAPE, not the private school.
Intervening Condition

Local or state education agencies are, by definition, public agencies.

Action/Interaction

1. A private school is not subject to IDEA statutory requirements.

2. Even if public school places a disabled student in a private school, it is the public school’s responsibility for ensuring FAPE.

Consequence (Case 18)

A private school cannot be held responsible for IDEA violations or FAPE.

Private School Context # 3 from Table 26:

A public school is not responsible for reimbursement of private school, if procedural violations were not substantive and IEP provided educational benefits.

Intervening Conditions

1. Whether the public schools follow procedural requirements of IDEA.

2. Whether the public schools provide the disabled student with an IEP that was reasonably calculated to provide educational benefits.

Action/Interaction

1. Public school committed no substantive procedural violations.

2. IEP offered by the public school provided educational benefit.

3. IEP placement was offered in the least restrictive appropriate environment.

Consequence (Cases 3, 4, 12, 14, 17, 21, 26, 27, 28, 31, 35, 36, 38, 39, 43, 46, 47, 48, 49, 50, 51, 52, 53)

No reimbursement to parents for private school placement.
Table 27

The Phenomenon of Due Weight in Context

<table>
<thead>
<tr>
<th>Phenomenon</th>
<th>Due Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whether judicial review is</td>
<td>#1. The U.S. Supreme Court strictly limited</td>
</tr>
<tr>
<td>appropriate?</td>
<td>judicial reviews under the IDEA.</td>
</tr>
<tr>
<td></td>
<td>#2. Federal appeals courts have set parameters.</td>
</tr>
<tr>
<td></td>
<td>#3. Judicial outcomes are related to these parameters.</td>
</tr>
</tbody>
</table>

**Due Weight Context # 1 from Table 27:**

*Under IDEA, the Supreme Court strictly limited judicial review of state administrative decisions. Courts must afford them due weight based on preponderance of the evidence.*

**Intervening Condition**

Facts of each case.

**Action/Interaction**

Preponderance of the evidence is based on the record from the administrative proceedings and any new evidence before the district court.

**Consequence (Cases 11, 37, 42, 54, 58)**

When new and significant evidence is submitted to the district court, then judicial reviews may expand to include the new evidence which the administrative proceedings did not have.

**Due Weight Context # 2 from Table 27:**

*Federal appeals courts have set forth due weight parameters for judicial review of state administrative decisions.*
Intervening Conditions

1. Review of state administrative due process proceedings.
2. Consideration of new evidence before the district court.

Action/Interaction

1. District court is limited to review record of administrative proceedings if no new evidence is presented.
2. IDEA authorized district court’s to recognize and consider new evidence not presented at the administrative proceedings.

Consequences (Cases 11, 37, 42, 54, 58)

1. District court may reverse the administrative decision, if contrary to preponderance of the evidence from the administrative record.
2. If no new evidence or additional testimony, then the judicial review is limited to the administrative record.
3. District court owes considerable deference to the administrative officer.

**Due Weight Context # 3 from Table 27:**

*Judicial outcomes are related to whether these parameters have been followed or violated.*

Intervening Condition

1. Courts cannot substitute their own judgment.
2. If courts disagree with the administrative findings, they are required to explain why.

Action/Interaction

   Erroneously used subjective judgment.

Consequences (Cases 11, 37, 42, 54, 58)
1. Administrative decision reversed by the circuit court because ALJ or district court substituted their own judgment.

2. Circuit court remanded and ordered district court to explain why it did not agree with the administrative findings.

3. Circuit court affirmed the district court decision.

Table 28

<table>
<thead>
<tr>
<th>The Phenomenon of Credibility in Context</th>
<th>Context</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#2. Credibility of conflicting testimony should be considered within preponderance of the evidence.</td>
</tr>
<tr>
<td></td>
<td>#3. Credibility cannot be determined from a written transcript and credibility findings of judicial officer closest to live testimony entitled to deference.</td>
</tr>
</tbody>
</table>

Credibility Context # 1 from Table 28:

**Credibility determination factors.**

Intervening Condition

Whether expert witness is judged credible.

Action/Interaction

1. Expert witness’s tone of voice, physical gestures, and emotional response to questions.

2. Expert witnesses expertise and knowledge.

Consequences (Cases 8, 28, 29, 43, 44, 47, 55)

1. Court determination on whether the expert witness is credible.

2. Significant factor in determining court outcomes.

3. Expert witnesses whose testimony is not aligned with other evidence.
risk court or hearing officer determination of not credible.

**Credibility Context # 2 from Table 28:**

**Credibility of conflicting testimony should be considered within preponderance of the evidence.**

Intervening Condition

Non-testimonial evidence and conflicting testimony of expert witnesses.

Action/Interaction

1. Expert witnesses for each party give conflicting testimony.
2. Expert witnesses for the same party give conflicting testimony.
3. Preponderance of other non-testimonial evidence.

Consequences (Cases 26, 29, 30, 37, 42, 44, 48, 54, 60)

1. Reviewing officer determines expert witness credibility along with non-testimonial evidence.
2. Significant factor in the case outcome.

**Credibility Context # 3 from Table 28:**

**Credibility cannot be determined from a written transcript and credibility findings of judicial officer closest to live testimony is entitled to deference.**

Intervening Condition

Degree of deference to judicial officer closest to live testimony.

Action/Interaction

Reviewing officer substitutes his or her personal judgment for that of expert witnesses.

Consequence (Cases 54, 55)

Judicial outcome is overturned and reversed or remanded.
Table 29

The Phenomenon of School’s Expert Witnesses in Context

<table>
<thead>
<tr>
<th>Phenomenon</th>
<th>Context</th>
</tr>
</thead>
<tbody>
<tr>
<td>What factors describe school’s experts?</td>
<td>#1. Testimony by school personnel related to personal knowledge of the child.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>#2. Testimony by school personnel related to knowledge of programs/placement.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>#3. Testimony by school personnel related to their specific expertise and experience.</td>
</tr>
</tbody>
</table>

School’s Expert Witnesses Context # 1 from Table 29:

**Testimony by school personnel related to personal knowledge of the child.**

Intervening Condition

Testimony of school personnel as a reflection of their personal knowledge of the individual child.

Action/Interaction

1. The degree to which school personnel can articulate their knowledge of the disabled child.
2. The degree to which expert witnesses had direct and frequent contact with the child.
3. The documented child data to support testimony.

Consequences (Cases 3, 4, 6, 21, 26, 27, 29, 30, 38, 39, 43, 47, 52, 54, 57, 58, 60)

1. School personnel who articulate and convey their personal knowledge of the child are influential in determining the administrative or judicial outcome of a case.
2. Lack of supporting data on a child can result in a negative court outcome.
School’s Expert Witnesses Context # 2 from Table 29:

Testimony by school personnel related to knowledge of programs/placement

Intervening Condition

Knowledge of programs/placement and its’ relationship to the individual needs of the child.

Action/Interaction

1. Knowledge of special education program/placement in relation to disabled child’s individual needs.

2. Knowledge of program or placement as defined by specific disability.

Consequences (Cases 5, 10, 39, 44, 47, 48, 57, 59, 60)

1. School expert witnesses do or do not provide substantial and credible support that the individual child’s program or placement provides academic and non-academic educational benefits.

2. School expert witnesses do not connect program or methodology to individual needs of the child.

3. School expert witness testimony “one size fits all” can result in negative outcome.

School’s Expert Witnesses Context # 3 from Table 29:

Testimony by school personnel related to their specific expertise and experience.

Intervening Condition

Experience and expertise of expert witnesses.

Action/Interaction
1. Consultants hired by a school district articulate their expertise and experience regarding child’s disability.

2. School employees articulate their expertise and experience with individual child.

3. Consultants hired by a school district articulate their expertise and experience in special education practices.

Consequence Cases 3, 4, 5, 6, 10, 21, 26, 27, 29, 30, 38, 39, 43, 44, 47, 48, 57, 58, 59, 60

Administrative and judicial reviews determine credibility of school’s expert witnesses along with preponderance of evidence.

Table 30

<table>
<thead>
<tr>
<th>Parents' Experts</th>
<th>Context</th>
</tr>
</thead>
<tbody>
<tr>
<td>What factors describe parents expert’s?</td>
<td>#1. The most frequently used expert witness by parent’s were psychologists.</td>
</tr>
<tr>
<td></td>
<td>#2. Testimony centered on the inadequacy of an IEP or public school placement.</td>
</tr>
<tr>
<td></td>
<td>#3. Expert witness testimony regarding methodology most frequently pertained to autism.</td>
</tr>
</tbody>
</table>

Parents' Expert Witnesses Context # 1 from Table 30:

**The most frequent expert witnesses to testify for parents were psychologists.**

Intervening Condition

Psychologist’s expert testimony.

Action/Interaction

1. Psychologists testified for parents more than any other professional group.
2. Parents’ expert witnesses do or do not provide substantial and credible support that the individual child’s program or placement provides academic and non-academic educational benefits.

3. Psychologist’s testimony does not connect program or methodology to the individual needs of the child.

Consequence (Cases 4, 20, 27, 28, 39, 40, 43, 47, 52, 54, 56, 60)

Reviewing officer determined credibility.

Parents’ Expert Witnesses Context # 2 from Table 30:

Testimony centered on the inadequacy of an IEP or public school placement.

Intervening Condition

1. Adequacy of disabled child’s IEP.
2. Disabled child’s placement in the least restrictive environment.

Action/Interaction

1. Conflicting testimony by parents’ experts about child data, goals and objectives in IEP, number of instructional hours.
2. Conflicting testimony by parents’ experts regarding the appropriate placement for child, ranging from lesser restrictive to more restrictive placement.
3. Conflicting testimony by parents’ experts whether school district’s IEP and/or placement provided child with reasonable educational benefits.

Consequence (Cases 26, 27, 28, 29, 30, 31, 37, 39, 40, 47, 50, 52, 54, 56, 57, 58, 59, 60)

1. Conflicting testimony is compared to preponderance of the evidence and court or hearing officer determines credibility of expert witnesses.
2. Credibility determination related to judicial outcome.
Parents' Expert Witnesses Context # 3 from Table 30:

**Expert witness testimony regarding methodology**

*most frequently pertained to autism.*

Intervening Condition

The disabled child’s IEP, placement, or program.

Action/Interaction

1. Parents’ experts criticized methodology employed by school districts.
2. Parents’ experts advocated either inclusive, homebound or private school placements.
3. Parents’ experts criticized the child’s IEP for not providing meaningful educational benefits.

Consequences (Cases 1, 2, 13, 29, 34, 36, 39, 40, 41, 47, 60)

1. Reviewing officers may consider methodology in their decisions, if the child’s IEP did not confer reasonable educational benefits.
2. Courts vary in whether they consider methodology, ranging from deference to educators, to determining appropriateness of methodology.

*Selective Coding*

Strauss and Corbin (1998) define selective coding as “the process of integrating and refining the theory” (p. 143). More specifically, the data which emerged during the open and axial coding process is integrated into a larger picture. In turn, this macro analysis results in the development of larger theoretical themes. This section of the study incorporates the analyzed data and the interrelationships that exist among the data.

Findings based on analyses of the data and their interrelationships are presented through a story line (Strauss & Corbin, 1998). The story line has emerged from the
analyses during the axial coding process and focuses on the eight phenomena. Describing the story line in this fashion allows for a rich narrative description and the formulation of a grounded theory (McCaw, 1999).

The following story line contains the context of each phenomenon. In order to assist the reader, concepts related to each phenomenon, and which evolved from the axial coding process, are presented in boldface type.

Regardless of the particular least restrictive environment (LRE) issue federal appellate courts have before them, the threshold of their analysis is the Rowley (1982) FAPE standard established by the United States Supreme Court in Hendrick Hudson Bd. of Ed. v. Rowley (1982). In that decision, the Supreme Court promulgated a two-part inquiry as to whether a public school has provided a disabled child with a free and appropriate public education (FAPE). First, has the public school complied with the procedural requirements mandated under the Individuals with Disabilities Education Act (IDEA, 1997). Second, has the disabled child’s Individualized Education Program (IEP) been reasonably calculated to provide educational benefit? If so, then the public school district has met the IDEA requirements for FAPE. In their reasoning analyses, most federal appeals courts have approached least restrictive environment (LRE) issues within the context of the Rowley standard. For example, of the 60 cases in this study, 67% began their analyses with the two-part Rowley inquiry, regardless of the LRE placement issue.

A public school’s failure to follow the IDEA procedural requirements may alone warrant a finding that the public school has denied FAPE. The majority of federal circuit courts in this study began their examination by initially addressing the question of whether the school has complied with the IDEA procedural mandates. Federal appeals courts generally follow a framework in which procedural violations are
gauged according to whether they are substantive or minor. Most federal appeals courts agree that substantive violations are those that lead to loss of educational opportunity for the disabled child or prevent parent participation in the IEP process. Based on analyses of cases in this study, loss of educational opportunity includes failure to include a regular education teacher in an IEP meeting, pre-written IEP's, predetermined placement decisions or methodology, and failure to keep sufficient data on a disabled child's progress.

The Ninth Circuit's reasoning in *M.L. v. Federal Way* (2003) reflected the significance that the courts attribute to a regular education teacher's participation in an IEP meeting. In this case, the Ninth Circuit initially held that the absence of the child's regular education teacher in an IEP meeting was not a substantive procedural violation. In a later decision, *M.L. v. Federal Way* (2004), the Ninth Circuit reversed its previous decision reasoning that a regular education teacher's attendance at an IEP meeting is crucial in deciding the extent to which a disabled student is integrated with non-disabled peers and how the student's special needs can be met in a regular education classroom. The Ninth Circuit remanded this case to the district court to decide whether this was a substantive violation.

Parents' right to participate in the IEP process is the other significant factor federal appeals courts have reasoned is a substantive violation, although parents' right to participate is not equivalent to agreeing with their desired outcome. LRE issues are intertwined with substantive procedural violations as federal appellate courts have reasoned that parental rights to participation do not equate to site selection of special education services or programs. In *White v. Ascension Parish* (2003), the Fifth Circuit reversed a hearing officer and lower court's decision. Parents of a hearing impaired child

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
wanted their child to attend their neighborhood school rather than a centralized school.
The question before the circuit court was whether the school district violated the IDEA in
placing the student in a centralized school rather than his neighborhood school. Parents
maintained that their right to participate entitled them to a choice of which school within
the school district their hearing impaired child would attend. The Sixth Circuit, in
Burilovich v. Bd. Of Ed. of Lincoln Consolidated Schools (2000), and also in Kings v.
Zelazny (2003) held that parental participation in the IEP process does not preclude
school personnel from engaging in informal conversations about a child’s IEP or
placement, outside of an IEP meeting, or making tentative IEP recommendations.
These minor procedural violations alone are not a denial of FAPE.

In sum, federal circuit courts have defined what constitutes substantive
procedural violations and these alone can result in a denial of FAPE. If so
determined, many circuit courts have rationalized that it is unnecessary to address the
second Rowley (1982) standard – whether the student’s IEP was reasonably calculated to
provide educational benefit?

Educational benefit is the touchstone under the IDEA. In this study, the
federal circuit courts have held that a student’s IEP must confer more than trivial
educational benefit but need not maximize the child’s potential. That is, a disabled
student’s IEP must confer significant learning, but does not have to be the best or most
appropriate IEP or placement. Educational benefits include academic as well as
social, emotional, and behavioral areas. Additionally, LRE is one factor in
determining educational benefit.

The question of how much educational benefit an IEP must confer presents a
more difficult problem for the courts to discern. Federal appeals courts have varied in
their reasoning regarding this issue. A disabled student’s academic and non-academic progress as assessed by their IEP is a major factor in this determination. Clearly, the courts have consistently explained that a disabled child’s educational progress cannot be measured in relation to non-disabled students. Additionally, IEP’s cannot be judged in hindsight but rather from the perspective of when it was written. In this study, in cases in which educational benefits were the major issue, the following factors were indications of whether a student’s IEP conferred reasonable educational benefits: (a) individual test scores; (b) grade level functioning; (c) progress on IEP goals and objectives; (d) the degree or severity of a student’s disruptive behavior; and (e) passing grades. However, none of these factors alone are necessarily considered indicators of significant learning or educational benefit.

Two Circuit Courts have indicated that educational benefits need to be gauged in relation to each child’s potential. In *Ridgewood Board of Education v. N.E.* (1999), the Third Circuit, reversed and remanded the district court’s decision. Parents of a learning disabled child, whose IQ was at the 95th percentile, sought private school reimbursement because the school district’s IEP and placement did not confer meaningful educational benefits. The Third Circuit reasoned “the District Court may not have given adequate consideration to M.E.’s intellectual potential (p.248). Educational benefit… must be gauged in relation to the child’s potential” (p. 247). In a more recent decision, *Deal v. Hamilton County Board of Education* (2004), the Sixth Circuit held that, “only by considering an individual child’s capabilities and potentialities may a court determine whether an education benefit provided to that child allows for meaningful advancement” (p.852). In this case, parents were seeking private school reimbursement as well as costs for a 40 hour per week in-home Lovaas program.
The Fifth Circuit adopted a **four-factor test in determining whether an IEP provides educational benefits.** In *Cypress-Fairbanks Independent School District v. Michael F.* (1997), the following four factors were used as a rational for determining educational benefits: (a) is the IEP individualized based on student assessment and performance?, (b) is the child’s placement in the least restrictive environment?, (c) are the special education services delivered in a coordinated manner?, and (4) are academic and non-academic benefits demonstrated?

A further concept associated with educational benefit is the particular **methodology** or program a public school district employs. This issue is particularly prevalent among the autism cases in this study. Although the federal appellate courts have generally held that public school districts are not compelled to use a specific program or methodology, if a disabled student’s IEP reasonably confers educational benefits. However, there are significant “if-then” qualifications associated with this issue.

If a public school district can demonstrate that a disabled student has received educational benefits from their IEP, then the courts have generally deferred to educators. Although parents are entitled to discuss their views regarding a particular methodology or program, parents are not empowered to make unilateral decisions about programs paid for with public funds. Conversely, educators must engage in a meaningful discussion with parents. In *Gill v. Columbia 93 School District* (2000), the Eighth Circuit’s reasoning on methodology in an autism case succinctly represents most other circuits in holding that the appropriate standard is not whether an IEP would replicate the parents preferred methodology, but whether the school district’s IEP is reasonably calculated to provide educational benefits: “Federal
courts must defer to the judgment of education experts who craft and review a child’s IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible” (p. 1042). A more recent case however, exemplifies the complexities surrounding whether methodology is a determining factor in a judicial review. In Deal v Hamilton County Board of Education (2004), in considering the merits of the Lovaas methodology for an autistic child, the Sixth Circuit acknowledged that although

This Court and others...have decided that school systems are not required to provide autistic children with the sort of intensive (and expensive) educational program pioneered by Dr. Lovaas....At some point, however this facile answer becomes insufficient....there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of FAPE. (p.860)

LRE transcends all of the phenomena which emerged in this study. That is, LRE issues are threaded among each of the eight categories/phenomena which emerged from analyses of the data. For example, the 5th Circuit’s four-factor educational benefits test includes LRE as one factor. Adding to the complexity of the LRE issue is that case law does not provide significant clarification of the term educational placement. Federal Appeals Courts’ interpretation of the term ranges from a physical location to abstract goals in an IEP. Within this wide continuum of definitions, federal appeals courts have set forth mainstream conditions. A disabled child’s placement should be as closely aligned to those of non-disabled peers, to the maximum extent appropriate.

Additionally, placement is not a right to attend a particular classroom or location,
but rather the degree to which a child can be mainstreamed, yet still receive more than trivial educational benefits. Lastly, LRE is not a question of methodology.

Administrative proceedings and courts have confused LRE with FAPE. More specifically, the determination of FAPE is at the threshold of the LRE inquiry. Judicial analyses regarding LRE placement issues begin within the framework of determining whether a public school district has met the substantive procedural requirements of IDEA and whether a disabled student's IEP provides reasonable educational benefits. Thus, LRE involves the public school's obligation to balance a child's right to FAPE and placement in a setting that is, given the child's needs, closest to regular education.

Finally, federal circuit courts have utilized different LRE tests. Although the seminal LRE cases pre-date the time span of this study, they continue to be cited in decisions. Moreover, to date, the U.S. Supreme Court has not adjudicated a LRE standard for lower courts as they have done with defining FAPE in Rowley (1982).

The Tenth Circuit adopted the *Daniel R.R.* LRE test, but without the cost factors.

Of the continuum of LRE placements as outlined on the Litigation Documentation Sheet in this study, private school placements (including both private day school and residential school) were the most frequent LRE placement issue. Moreover, circuit court reasoning or analysis in this category demonstrated the most consistency among the federal circuit courts.

The major issue in these cases was whether the public school must reimburse parents for the private school placement of a disabled child. **Parents who unilaterally enroll their disabled child in a private school risk denial of reimbursement for private school costs.** Private school reimbursement is available only if a court concludes that the public school violated FAPE and the private school placement is appropriate. Whether or not a public school provided FAPE was addressed using the two-prong inquiry in *Hendrick Hudson Bd. v. Rowley* (1982). Additionally, private school reimbursement is only available if a disabled student has previously received special education services in a public school. In other words, when dissatisfied with their child’s public school special education services, **parents must notify the public school prior to removing their disabled child.** Parents must give the public school the opportunity to develop an appropriate IEP before seeking private school reimbursement. Although the public school responsibility for FAPE seems implicitly clear, it is not necessarily so when a public school places a disabled child in a private school. One case in this study illustrates this situation. In *St. Johnsbury v. D.H.* (2001), the local school district did not have a public high school and all students had several options for attending high school, one of which was to attend a local private academy, St.
Johnsbury Academy. St Johnsbury had a policy that disabled students whose reading level was below fifth grade could not be mainstreamed in academic classes, but rather were placed in the resource room program. The parents of a learning disabled and cerebral palsy student wanted their son to attend regular education classes and initiated litigation maintaining that such a policy was in violation of the IDEA preference for mainstreaming in the LRE. The federal district court ruled in favor of the parents. The Second Circuit reversed the lower court ruling reasoning that a private school cannot be held responsible for IDEA violations or providing FAPE because, by definition, local or state education agencies are public agencies. Thus, a private school is not subject to IDEA statutes and, even if a public school places a disabled child in a private school, it remains the public school’s responsibility for ensuring a FAPE.

In this study, the majority of federal appeals courts did not grant parents’ private school reimbursement in that the courts reasoned the public school had not committed any substantive procedural violations and/or the disabled student’s IEP provided reasonable educational benefits. If the public school provided FAPE, then the courts did not consider if the private school placement was appropriate because the public school had met its’ obligations under the IDEA.

Expert Witness Testimony

In 34 out of 60 cases in this study, expert witness credibility, school districts’ experts, and parents’ experts, were cited or referenced in federal appellate court decisions.

Based on data analyses in this study, several factors were associated with expert witness credibility: (1) credibility determination factors; (2) consideration of conflicting expert witness testimony as compared to the preponderance of evidence
in each case; and (3) deference given to the judicial officer who is closest to the live testimony. The Ninth Circuit, in *MS. S. ex rel G. v. Vashon Island School District* (2003), succinctly addressed these credibility determination factors:

Live testimony enables the finder of fact to see the witness’s physical reactions to questions, to assess the witness’s demeanor, and to hear the tone of the witness’s voice – matters that cannot be gleaned from a written transcript (p. 1128). In response to a question a witness may fidget, or blush, or sweat, or frown, or grin, or shift his eyes nervously about, or…. look for assistance to his counsel or to a friend in the audience. (p.1127)

Generally, the presiding judicial officer who is closest to live testimony is in the best position to determine issues of credibility. For example, in *O’Toole v. Olathe Unified School Dist. No. 233* (1998), the Tenth Circuit noted that, when the judicial reviewing officer’s findings are based on credibility judgments, deference to that officer’s conclusions is warranted, unless non-testimonial evidence justifies a contrary conclusion.

Contrary conclusions across judicial levels have generally occurred when the hearing officer and district court disagree. In *A.B. v. Lawson* (2004), the Fourth Circuit ruled that the district court had disregarded the administrative law judge’s (ALJ) findings of fact with regard to the ALJ’s resolution of conflicting testimony. The district court found the school district’s expert witnesses “externally and internally inconsistent, generally garbled and aimed primarily at self-justification…and wholly incompetent” while in contrast, the parent’s experts were found to be “wholly competent” (p. 327). In this case, the ALJ found the parent’s experts, two psychologists, unconvincing while crediting the contrary views of the school district’s experts.
Of course, when experts from the school and parents testify, it stands to reason that conflicting testimony will be presented, however of particular note are cases in which **expert testimony is in antithesis to the preponderance of the evidence or when experts for either the school or parent are inconsistent.** This can result in an unfavorable ruling by the circuit courts, for either the parent or school district because experts gave inconsistent testimony or their testimony was in antithesis to the preponderance of the evidence. *Walczak v. Florida Union Free School District (1998)* illustrates this final point. The Second Circuit reversed the district court’s ruling, holding that a preponderance of the evidence supported the adequacy the school’s placement of an autistic child in a self-contained special education program. The parent’s experts, a psychologist and psychotherapist, both recommended that the student could only achieve the social goals in her IEP in a residential facility. However, the psychotherapist acknowledged that, although she favored a residential placement, the child’s social and academic needs could be met in the public school program. In ruling for the school district, the Second Circuit explained:

> Ms. Priestner-Werte’s testimony is particularly relevant. Although she viewed Maplebrook as a superior facility, she stated that the BOCES program...was sufficiently structured and supportive to meet B.W.’s academic and social needs.

It was entirely appropriate for the hearing officer to rely on this testimony. (p.133)

In summary, expert witness testimony, along with non-testimonial evidence, was related to judicial outcomes. **The demeanor of expert witnesses, their articulated knowledge and expertise, as well as knowledge of the individual child – regardless of the conflicting testimony between parties** – were crucial factors in the court’s assessment of an expert’s reliability, credibility and, ultimately, the outcome of a case.
Summary

This study used a mixed methodology design to examine LRE federal appeals court outcomes, the reasoning upon which the outcome was based, and expert testimony. With regard to the descriptive research design, federal appeals court outcomes favored the school district, with 70 percent predominant or complete wins, 25 percent predominant or complete wins for the parent, and 5 percent split decision. Private School placement was the most frequent placement issue litigated; student with autism spectrum disorder were most often the subject of litigation.

Qualitative treatment methods of open, axial, and selective coding were employed. Open coding involved making comparisons and, from this, formulating categories. In axial coding, categories were further analyzed to determine causal conditions, context, and consequences. Finally in selective coding, the data that emerged during the axial coding process was integrated to develop larger theoretical themes.

Qualitative findings indicated that reasoning related to LRE circuit court cases were intertwined with FAPE standards set forth by the U.S. Supreme Court in *Rowley* (1982). With regard to expert witness testimony, the demeanor of expert witnesses, their articulated knowledge and expertise, and their knowledge of the child, were crucial factors in the federal appeals courts’ assessment of an expert’s reliability, credibility, and case outcome.
CHAPTER FIVE

Findings, Conclusions and Recommendations

This Chapter begins with a summary of the Findings, the Conclusions which emerged from the data, and recommendations for practitioners as well as recommendations for further research. This study utilized a mixed methodology design to examine federal appeals court outcomes for LRE/placement issues in special education. Within the descriptive research design, the primary purpose of this study was to examine judicial least restrictive environment (LRE) outcomes across all U.S. federal appeals courts over a seven year period. Secondary questions sought to identify: (a) the plaintiffs; (b) the gender and disability classification of the disabled students who were the subject of litigation; (c) the primary LRE issue; (d) whether educational methodology was an issue in litigation; (e) federal circuit court outcomes; and (f) the consistency of outcomes across judicial levels (i.e. federal district courts and federal appellate courts).

The population and sample consisted of 60 published federal appellate court cases under the IDEA (1997), in which LRE/placement was a germane issue of special education litigation, from June 4, 1997 to December 31, 2004. Cases were selected from the IDELR (Individuals with Disabilities Education Law Reporter) database and West’s Education Law Reporter.

The Litigation Documentation Sheet (LDS) developed by Newcomer (1995) was modified and used by the researcher to record and code the following from each case: plaintiffs, defendants, gender, student’s disability classification, primary LRE placement issue, educational methodology, expert witnesses, and judicial outcomes at the federal district and circuit court levels.
Findings

Parents were represented as appellants at more than three times the rate than school districts. That is, parents initiated an appeal in 77 percent of the cases, whereas school districts did so in 23 percent of the cases. With regard to gender, males were the subject of litigation at more than twice the rate of females, although this coincides nationally with special education populations represented by more males than females at a ratio of 3:1. Students with autism were the most frequent subject of litigation in this study and constituted approximately 33 percent of the cases. Although these results coincide with the reported increase in students diagnosed on the autism spectrum, past research has identified students with learning disabilities as the most frequent subjects of litigation.

Judicial outcomes analyses indicated that school districts predominantly or completely prevailed in federal circuit courts 70 percent, while parents predominantly prevailed 25 percent, and 5 percent were split decisions. The most frequently litigated LRE issues, in descending order were: (a) private school placement (46.7%); (b) other special education program (11.7%); (c) full inclusion in regular education with special education support (10%); (d) private residential school/mental health facility (10%); (e) regular education with resource room support (8.3%); (f) full time special education (6.7%); and (g) homebound (6.7%).

Qualitative data examining the “Least Restrictive Environment: U.S. Federal Appeals Court Outcomes and Expert Testimony,” were subjected to procedures of open, axial, and selective coding suggested by Strauss and Corbin (1998). The eight categories, which emerged from the axial coding process, form the basis of the grounded theory for
this study. Initially, two encompassing core categories evolved, Court Reasoning and Expert Testimony. In turn, from these two core categories, five subcategories evolved and integrated with the Court Reasoning core category: (a) procedural violations; (b) educational benefits; (c) least restrictive environment; (d) private school; and (e) due weight. From the core category of Expert Testimony, three subcategories were connected and emerged: (a) credibility; (b) school's expert witnesses; and (c) parents' expert witnesses.

Conclusions

Exploration of the Grand Tour and Sub-questions

In depth analyses of these categorical interrelationships and their components indicated different perspectives on the grand tour research questions that framed this qualitative research design. The research questions sought to: (a) identify the primary reasons cited by the federal appeals courts in their decisions; and (b) whether expert testimony is related to the case outcome, based on the expert testimony referenced in the federal appellate court opinions?

For the purposes of this study, each subcategory was linked to one of the sub-questions originally proposed in this study. The subcategories were derived from the qualitative processes of open, axial, and selective coding and are coupled as well as discussed under the applicable sub-question. From this approach, a picture emerges which presents federal appeals courts reasoning in special education placement issues and the related expert testimony. The initial sub-question addresses the analytical frameworks utilized by the federal circuits in special education LRE placement decisions.
Are similar or consistent analytical frameworks used by the federal circuit courts in their LRE placement decisions? In the majority of cases in this study - regardless of the LRE issue – the analytic framework employed by federal circuit courts was the Rowley (1982) FAPE standard. This standard first addresses whether the public school has met the procedural mandates of the IDEA and, second, asks if the disabled student’s IEP has been reasonably calculated to provide educational benefits?

Are Procedural Violations substantive?

A public school’s failure to follow the IDEA procedural requirements may alone warrant a finding that the public school has denied FAPE. The majority of federal circuit courts in this study began their examination by initially addressing the question of whether the school has complied with the IDEA procedural mandates. Federal appeals courts generally follow a framework in which procedural violations are gauged according to whether they are substantive or minor. Most federal appeals courts agree that substantive violations are those that lead to loss of educational opportunity for the disabled child or prevent parent participation in the IEP process. Based on an analysis of cases in this study loss of educational opportunity includes failure to include a regular education teacher in an IEP meeting, pre-written IEP’s, pre-determined placement decisions or methodology, and failure to keep sufficient data on a disabled child’s progress.

The Ninth Circuit’s reasoning in M.L. v. Federal Way (2003) reflected the significance that the courts attribute to a regular education teacher’s participation in an IEP meeting. In this case, the Ninth Circuit initially held that the absence of the child’s regular education teacher in an IEP meeting was not a substantive procedural violation. In
a later decision, *M.L. v. Federal Way* (2004), the Ninth Circuit reversed its previous decision reasoning that a regular education teacher’s attendance at an IEP meeting is crucial in deciding the extent to which a disabled student is integrated with non-disabled peers and how the student’s special needs can be met in a regular education classroom. The Ninth Circuit remanded this case to the district court to decide whether this was a substantive violation.

Parents’ right to participate in the IEP process is the other significant factor federal appeals courts have reasoned is a substantive violation, although parents’ right to participate is not equivalent to agreeing with their desired outcome. LRE issues are intertwined with substantive procedural violations as federal appellate courts have reasoned that parental rights to participation do not equate to site selection of special education services or programs. In *White v. Ascension Parish* (2003), the Fifth Circuit reversed a hearing officer and lower court’s decision. Parents of a hearing impaired child wanted their child to attend their neighborhood school rather than a centralized school. The question before the circuit court was whether the school district violated the IDEA in placing the student in a centralized school rather than his neighborhood school. Parents maintained that their right to participate entitled them to a choice of which school within the school district their hearing impaired child would attend. The Sixth Circuit, in *Burilovich v. Bd. Of Ed. of Lincoln Consolidated Schools* (2000), and also in *Kings v. Zelazny* (2003) held that parental participation in the IEP process does not preclude school personnel from engaging in informal conversations about a child’s IEP or placement, outside of an IEP meeting, or making tentative IEP recommendations. These minor procedural violations alone are not a denial of FAPE. In sum, federal circuit courts
have defined what constitutes substantive procedural violations and these alone can result in a denial of FAPE. If so determined, many circuit courts have rationalized that it is unnecessary to address the second *Rowley* (1982) standard – whether the student’s IEP was reasonably calculated to provide educational benefit?

*Did the student’s IEP provide reasonable educational benefits?*

This second prong of the *Rowley* (1982) standard has consistently been considered the touchstone of the IDEA in federal appellate court cases analyzed in this study. In *Rowley* (1982), the U.S. Supreme Court established that a disabled student’s IEP does not have to maximize his or her potential. Consequently, federal appeals courts varied considerably in their reasoning regarding this issue.

At one end of the educational benefits continuum, and commonly reasoned among the courts, is that a disabled student’s IEP must confer more than trivial or some educational benefits. Thus, as illustrated by the Seventh Circuit in *Beth B. v. Van Clay* (2002), the parent’s contention that the school district could not remove Beth from the regular education placement to a more restrictive special education setting so long as she received “some educational benefit” confused the *Rowley* test with the LRE provision. “Beth’s parents rely on misplaced language from *Rowley* to argue that so long as she was receiving any benefit...her removal would violate the LRE requirement...Beth’s parents turn the “some educational benefit” on its head” (p. 498).

Educational benefit is the touchstone under the IDEA. Educational benefits include academic as well as social, emotional, and behavioral areas. Additionally, LRE is one factor in determining educational benefit. The question of how much educational benefit an IEP must confer presents a more difficult problem for the courts to discern.
Federal appeals courts have varied in their reasoning regarding this issue. A disabled student’s academic and non-academic progress as assessed by their IEP is a major factor in this determination. Clearly, the courts have consistently explained that a disabled child’s educational progress cannot be measured in relation to non-disabled students. Additionally, IEP’s cannot be judged in hindsight but rather from the perspective of when it was written. In this study, in cases in which educational benefits were the major issue, the following factors were indications of whether a student’s IEP conferred reasonable educational benefits: (a) individual test scores; (b) grade level functioning; (c) progress on IEP goals and objectives; (d) the degree or severity of a student’s disruptive behavior; and (e) passing grades. However, none of these factors alone are necessarily considered indicators of significant learning or educational benefit.

Two Circuit Courts have indicated that educational benefits need to be gauged in relation to each child’s potential. In *Ridgewood Board of Education v. N.E.* (1999), the Third Circuit reversed and remanded the district court’s decision. Parents of a learning disabled child, whose IQ was at the 95th percentile, sought private school reimbursement because the school district’s IEP and placement did not confer meaningful educational benefits. The Third Circuit reasoned “the District Court may not have given adequate consideration to M.E.’s intellectual potential (p.248). Educational benefit…must be gauged in relation to the child’s potential” (p. 247). In a more recent decision, *Deal v. Hamilton County Board of Education* (2004), the Sixth Circuit held that, “only by considering an individual child’s capabilities and potentialities may a court determine whether an education benefit provided to that child allows for meaningful advancement”
(p.855). In this case, parents were seeking private school reimbursement as well as costs for a 40 hour per week in-home Lovaas program.

It is interesting to note that the Third and Sixth Circuits seem to have created an educational benefit standard that might be in opposition or go beyond the reasoning set forth by the U.S. Supreme Court — that a disabled student’s IEP does not have to maximize a child’s potential. For example, in the practice of school psychology, it is commonly accepted that behaviors associated with certain disabilities can impede a child’s assessment performance. Behaviors such as distractibility or impulsivity make it difficult to arrive at a valid estimate of a child’s potential. Consequently, utilizing a potential or capability standard to gauge whether a disabled child has received reasonable educational benefits seems problematic. Moreover, it might well infringe upon the admonishment set forth by the U.S. Supreme Court in *Rowley* (1982) — that courts “must be careful to avoid imposing their view of preferable educational methods upon the States” (p. 189).

The Fifth Circuit adopted a four-factor test in determining whether an IEP provides educational benefits. In *Cypress-Fairbanks Independent School District v. Michael F.* (1997), the following four factors were used as a rationale for determining educational benefits: (a) whether the IEP individualized is based on student assessment and performance; (b) whether the child’s placement is in the least restrictive environment; (c) whether the special education services are delivered in a coordinated manner; and (4) whether academic and non-academic benefits are demonstrated.

A further concept associated with educational benefit is the particular methodology or program a public school district employs. This issue is particularly
prevalent among the autism cases in this study. Although the federal appellate courts have generally held that public school districts are not compelled to use a specific program or methodology, if a disabled student’s IEP reasonably confers educational benefits. However, there are significant “if-then” qualifications associated with this issue.

If a public school district can demonstrate that a disabled student has received educational benefits from their IEP, then the courts have generally deferred to educators. Although parents are entitled to discuss their views regarding a particular methodology or program, parents are not empowered to make unilateral decisions about programs paid for with public funds. Conversely, educators must engage in a meaningful discussion with parents. In *Gill v. Columbia 93 School District* (2000), the Eighth Circuit’s reasoning on methodology in an autism case succinctly represents most other circuits in holding that the appropriate standard is not whether an IEP would replicate the parents preferred methodology, but whether the school district’s IEP is reasonably calculated to provide educational benefits: “Federal courts must defer to the judgment of education experts who craft and review a child’s IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible” (p. 1042). A more recent case however, exemplifies the complexities surrounding whether methodology is a determining factor in a judicial review. In *Deal v Hamilton County Board of Education* (2004), in considering the merits of the Lovaas methodology for an autistic child, the Sixth Circuit acknowledged that although

This Court and others...have decided that school systems are not required to provide autistic children with the sort of intensive (and expensive) educational program pioneered by Dr. Lovaas....At some point, however this facile answer
becomes insufficient...there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of FAPE. (392 F.3d at 853).

What LRE tests did the federal circuit courts utilize?

LRE transcends all of the phenomena which emerged in this study. That is, LRE issues are threaded among each of the eight categories/phenomena that emerged from analyses of the data. For example, the Fifth Circuit’s four-factor educational benefits test includes LRE as one factor. Adding to the complexity of the LRE issue is that case law does not provide significant clarification of the term educational placement. Federal appeals courts’ interpretation of the term ranges from a physical location to abstract goals in an IEP. Within this wide continuum of definitions, federal appeals courts have set forth mainstream conditions. A disabled child’s placement should be as closely aligned to those of non-disabled peers, to the maximum extent appropriate. Additionally, placement is not a right to attend a particular classroom or location, but rather the degree to which a child can be mainstreamed, yet still receive more than trivial educational benefits. Lastly, LRE is not a question of methodology.

Administrative proceedings and courts have confused LRE with FAPE. More specifically, the determination of FAPE is at the threshold of the LRE inquiry. Judicial analyses regarding LRE placement issues begin within the framework of determining whether a public school district has met the substantive procedural requirements of IDEA and whether a disabled student’s IEP provides reasonable educational benefits. Thus, LRE involves the public school’s obligation to balance a child’s right to FAPE and placement in a setting that is, given the child’s needs, closest to regular education.
Finally, federal circuit courts have utilized different LRE tests. Although the seminal LRE cases pre-date the time span of this study, they continue to be cited in decisions. Yet, in the majority of cases in this study, LRE was not the analytical framework employed by federal circuit courts. Moreover, to date, the U.S. Supreme Court has not adjudicated a LRE standard for lower courts as they have done with defining FAPE in *Rowley* (1982). The Tenth Circuit, in *L.B. v. Nebo School District* (2004), illustrated this inconsistency among the federal circuits. For example, the Third and Fifth Circuits adopted *Daniel R.R. v. State Bd. Of Ed.* (1989), the Ninth Circuit adopted a varied version in *Sacramento City Unified Sch. Dist. V. Holland* (1994), the Seventh Circuit on its decision in *Roncker v. Walter* (1983), and the Eleventh Circuit considers costs in addition to *Hendrick Hudson Bd. Of Ed. v. Rowley* (1982). The Fourth, Sixth, and Eighth Circuits generally utilize the *Roncker* test. In summarizing its sister circuits proclivity with regard to LRE placement issues, the Tenth Circuit adopted still another LRE test in *L.B. ex rel. K.B. v. Nebo School Dist.* (2004).

In this case, parents of an autistic student sought reimbursement for a private inclusive pre-school program; the school district offered a pre-school placement that included “thirty to fifty percent typically developing children” (p. 968). The Tenth Circuit adopted the *Daniel R.R.* LRE test, but without the cost factors.

Some day the United States Supreme Court will address LRE. It will be asked to set forth a uniform national LRE test applicable in all circuits. It may select from among one of the announced circuit court tests or it may announce a totally different test. (Julnes, 1994, p. 803)
**Private Schools.**

Of the continuum of LRE placements as outlined on the Litigation Documentation Sheet in this study, private school placements (including both private day school and residential school) were the most frequent LRE placement issue. Moreover, circuit court reasoning or analysis in this category demonstrated the most consistency among the federal circuit courts.

The major issue in these cases was whether the public school must reimburse parents for the private school placement of a disabled child. Parents who unilaterally enroll their disabled child in a private school risk denial of reimbursement for private school costs. Private school reimbursement is available only if a court concludes that the public school violated FAPE and the private school placement is appropriate. Whether or not a public school provided FAPE was addressed using the two-prong inquiry in *Hendrick Hudson Bd. V. Rowley* (1982). Additionally, private school reimbursement is only available if a disabled student has previously received special education services in a public school. In other words, when dissatisfied with their child’s public school special education services, parents must notify the public school prior to removing their disabled child. Parents must give the public school the opportunity to provide an appropriate IEP before seeking private school reimbursement. Although the public school responsibility for FAPE seems implicitly clear, it is not necessarily so when a public school places a disabled child in a private school. One case in this study illustrates this situation.

In *St. Johnsbury v. D.H.* (2001), the local school district did not have a public high school and all students had several options for attending high school, one of which was to attend a local private academy, St. Johnsbury Academy. St Johnsbury had a policy
that disabled students whose reading level was below fifth grade could not be mainstreamed in academic classes, but rather were placed in the resource room program. The parents of a learning disabled and cerebral palsy student wanted their son to attend regular education classes and initiated litigation maintaining that such a policy was in violation of the IDEA preference for mainstreaming in the LRE. The federal district court ruled in favor of the parents. The Second Circuit reversed the lower court ruling reasoning that a private school cannot be held responsible for IDEA violations or providing FAPE because, by definition, local or state education agencies are public agencies. Thus, a private school is not subject to IDEA statutes and, even if a public school places a disabled child in a private school, it remains the public school’s responsibility for ensuring a FAPE.

In this study, the majority of federal appeals courts did not grant parents’ private school reimbursement in that the courts reasoned the public school had not committed any substantive procedural violations and/or the disabled student’s IEP provided reasonable educational benefits. If the public school provided FAPE, then the courts did not consider if the private school placement was appropriate because the public school had met its obligations under the IDEA.

*Expert Witness Testimony*

*Grand Tour and sub-questions.* Is expert testimony related to the case outcome, based on the expert testimony referenced in the federal appellate court opinions?

Expert witness testimony was included in 34 out of 60 cases in this study. Data analyses suggest that, based on these federal appellate court opinions, expert testimony is a significant factor in the judicial decision. Regardless of whether the expert was
testifying for the parent or the school district, the demeanor of the expert witnesses, their
articulated knowledge and expertise, as well as their knowledge of the child were
noteworthy factors contributing to judicial outcomes.

Based on data analyses in this study, several factors were associated with expert
witness credibility: (a) credibility determination factors; (b) consideration of conflicting
expert witness testimony as compared to the preponderance of evidence in each case; and
(c) deference given to the judicial officer who is closest to the live testimony. The Ninth
Circuit, in *MS. S. ex rel G. v. Vashon Island School District* (2003), succinctly addressed
these credibility determination factors:

Live testimony enables the finder of fact to see the witness’s physical
reactions to questions, to assess the witness’s demeanor, and to hear the
tone of the witness’s voice – matters that cannot be gleaned from a
written transcript … In response to a question a witness may fidget,
or blush, or sweat, or frown, or grin, or shift his eyes nervously
about, or …. look for assistance to his counsel or to a friend in the
audience. (337 F.3d at 1028)

Generally, the presiding judicial officer who is closest to live testimony is in the
best position to determine issues of credibility. For example, in *O’Toole v. Olathe Unified
School Dist. No. 233* (1998), the Tenth Circuit noted that, when the judicial reviewing
officer’s findings are based on credibility judgments, deference to that officer’s
conclusions is warranted, unless non-testimonial evidence justifies a contrary conclusion.

Contrary conclusions across judicial levels have generally occurred when the
hearing officer and district court disagree. In *A.B. v. Lawson* (2004), the Fourth Circuit
ruled that the district court had disregarded the administrative law judge’s (ALJ) findings of fact with regard to the ALJ’s resolution of conflicting testimony. The district court found the school district’s expert witnesses “externally and internally inconsistent, generally garbled and aimed primarily at self-justification...and wholly incompetent” while in contrast, the parent’s experts were found to be “wholly competent” (p. 327). In this case, the ALJ found the parent’s experts, two psychologists, unconvincing while crediting the contrary views of the school district’s experts.

Of course, when experts from the school and parents testify, it stands to reason that conflicting testimony will be presented, however of particular note are cases in which expert testimony is in antithesis to the preponderance of the evidence or when experts for either the school or parent are inconsistent. This can result in an unfavorable ruling by the circuit courts, for either the parent or school district because experts gave inconsistent testimony or their testimony was in antithesis to the preponderance of the evidence. *Walczak v. Florida Union Free School District (1998)* illustrates this final point. The Second Circuit reversed the district court’s ruling, holding that a preponderance of the evidence supported the school’s placement of an autistic child in a self-contained special education program. The parent’s experts, a psychologist and psychotherapist, both recommended that the student could only achieve the social goals in her IEP in a residential facility. However, the psychotherapist acknowledged that, although she favored a residential placement, the child’s social and academic needs could be met in the public school program. In ruling for the school district, the Second Circuit explained:

Ms. Priestner-Werte’s testimony is particularly relevant. Although she viewed Maplebrook as a superior facility, she stated that the BOCES program...was
sufficiently structured and supportive to meet B.W.'s academic and social needs.

It was entirely appropriate for the hearing officer to rely on this testimony. (142 F. 3d at 133)

In summary, expert witness testimony, along with non-testimonial evidence, was related to judicial outcomes. The demeanor of expert witnesses, their articulated knowledge and expertise, as well as knowledge of the individual child – regardless of the conflicting testimony between parties – were crucial factors in the court’s assessment of an expert’s reliability, credibility and, ultimately, the outcome of a case.

The IDEA (1997) ranks as the primary federal law for public school districts, in collaboration with parents, to provide a FAPE to students with disabilities in least restrictive settings. The failure of parents and school districts to reach consensus on appropriate placement or programs has been the underlying focus of this study. Circuit court judicial outcomes relative to the LRE are similar to those previously obtained by other researchers in regard to outcomes and placement.

Analyses Related to the Literature

In this study, school district complete or predominant wins comprised 70 percent of the judicial outcomes compared to 15 percent complete or predominant wins for parents. Comparable results were obtained by other researchers (Newcomer, 1995; Newcomer & Zirkel, 1999; and Zorn, 1999) with complete or predominant wins for school districts ranging from 52 percent to 64 percent. The variation in results might well be due to the different court venues and time periods in which the cases were heard. Moreover, and similar to Newcomer’s (1995) findings, private school placement was the predominant LRE issue, accounting for 46.7 percent of the cases in this study, whereas
Newcomer (1995) indicated that 40.5 percent of the cases he reviewed comprised private school placement issues. Although the analytical framework utilized by the federal circuit courts for private school placement was consistent, other LRE placement tests varied considerably. This finding is not surprising in light of other related literature.

Julnes (1994) maintained that the variation among federal appeals court in their application of LRE tests is partly because the U.S. Supreme Court's lack of adjudication. "Some day the United States Supreme Court will address LRE. It will be asked to set forth a uniform national LRE test applicable in all circuits" (p. 803). Julnes (1994) further stated that the selection of what LRE test is applied is central to the final determination of LRE within the IDEA, as well as the future role of the courts in LRE placement decisions. Further complicating this issue, and as demonstrated in this study, FAPE and LRE are so intertwined that it is difficult to distinguish between them. Despite numerous court decisions it is still unclear what role placement plays in the determination of a FAPE for a disabled child (Julnes, 1994; Zirkel, 2001; Hazelkorn, 2003). As Julnes (1994) succinctly summarized, "...there remains miles to walk. As yet, the LRE issue has not yet gone the distance" (p. 808).

Finally, a surprising finding of this study was that the disability classification of autism accounted for 33.3 percent of the cases. Past research (Zirkel, 2001; Newcomer, 1995) has shown that students with learning disabilities were the most frequent subjects of litigation whereas, in this study 20 percent of the cases involved students with learning disabilities. The high percentage of autistic students involved in federal appeals courts litigation coincides with the increase in the identification of students on the autism spectrum nationally.
General Implications of the Findings

Recommendations for Future Research

Recommendations derived from these findings and conclusions include the following:

1. Further research should explore the perceptions of school district and parent expert witnesses in special education litigation.

2. Further research should expand the years of this study to determine if judicial outcome trends in LRE cases vary from the results of this study.

3. Further research should examine judicial outcomes and reasoning specific to autism and associated methodology issues.

4. If possible, further research should compare the transcripts of expert witness testimony across judicial levels (Zirkel, personal communication, March 11, 2004).

Recommendations for Practitioners

General recommendations for practitioners are provided along with flow charts. These flowcharts delineate further guidelines for practitioners derived from the findings.

1. Administrators need to ensure that the delivery of special education services for disabled students is done so in a coordinated and collaborative manner. School administrators need to establish this standard in order to provide meaningful educational benefits to disabled students, particularly for those who require related services or multiple personnel. Ownership of educating an individual child should be shared among the key service providers.
2. Administrators also need to recognize the crucial importance of professional development and training for both regular and special education personnel. Lack of training is an unacceptable professional practice and increases a school district’s liability for failure to provide FAPE. More specifically, based on this study, personnel need training in: (a) specific disabilities and professionally accepted methodologies, especially to understand and know pedagogies for those disabilities that the students with whom they are working are trying to cope; (b) substantive procedural violation guidelines; (c) professional conduct at IEP meetings; (d) conflict resolution training; and (e) articulating individual knowledge of the child and accepted research practices.

3. The regular education teacher’s presence at IEP meetings is crucial to successful integration of students with disabilities in the regular education setting. Moreover, regular education teachers need to be recognized and more valued as an active participant in IEP meetings rather than a silent bystander.

4. Attorneys need to provide school personnel and expert witnesses with the necessary preparation to testify as credible witnesses.

5. Finally, all major players or stakeholders working with disabled students need to recognize that adversarial relationships with parents create “us versus them” mentalities and increases conflict. Although this is often the perspective in litigation, there are no winners in the human arena. Perhaps most importantly, the special needs child stands to lose the most.
Figure 1

Procedural Violations (Rowley – 1st Prong)

Procedural Violations

<table>
<thead>
<tr>
<th>Substantive</th>
<th>Minor</th>
</tr>
</thead>
</table>

1. Did violation result in loss of educational opportunity for student?

2. Did violation impede parents opportunity to participate in IEP process.

Figure 2

Educational Benefit

Was the student’s IEP reasonably calculated to provide educational benefit?

**YES**
No denial of FAPE

**NO**
Denial of FAPE

1. Was IEP based on individual performance and assessment.
2. Implemented in LRE.
3. Services implemented in a coordinated and collaborative manner.
4. Educational benefits demonstrated (academic and non-academic)
   a. progress reports
   b. test scores
   c. teacher reports
   d. academic and non-academic advancement demonstrated
Figure 3

Least Restrictive Environment

| YES | NO |

Rowley educational benefits test

Proposed placement to maximum extent appropriate with non-disabled peers.

Have lesser restrictive environments been attempted?
  a. What is the documentation?

What documentation does the regular education teacher have?
  a. Extent to which child can participate non-disabled peers both academically and non-academically.
  b. What accommodations are needed

Did regular education teacher participate in IEP meeting?

Figure 4

Private School

No Reimbursement

No substantive procedural violations. IEP provided educational benefits.

Reimbursement

Substantive procedural violations. IEP did not provide educational benefits.

AND

Court Inquiry Ends

Public school has met FAPE obligation.

Court determines private school placement is appropriate.

| In LRE | Can meet individual child’s special needs. |
Figure 5

**Expert Witness Testimony**

<table>
<thead>
<tr>
<th>Credibility</th>
<th>Knowledge of Child</th>
<th>Experience and Expertise</th>
</tr>
</thead>
<tbody>
<tr>
<td>Demeanor</td>
<td>Degree of contact with Child</td>
<td>Professional Training</td>
</tr>
<tr>
<td></td>
<td>Breadth of experience</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Credentials</td>
<td></td>
</tr>
</tbody>
</table>

**Endnote**

In sum, this research has revealed insight into federal appeals court decisions, yet the U.S. Supreme Court remains a wild card. Ultimately, educators may concur with the prophetic words of Ralph Julnes, University of Washington Professor of Law: “There are reasons to believe LRE might receive a different treatment before the United States Supreme Court” (Julnes, 1994, p.809). Since that time, eleven years have passed and the Supreme Court has yet to adjudicate a LRE case.

Certiorari Denied by the U. S. Supreme Court in the following cases:


APPENDIX A

TABLE OF CASES
FEDERAL APPEALS COURT CASES

1st Circuit


2nd Circuit


M.S. ex rel. S.S. v. Board of Educ. of the City Scho. Dist. of the City of Yonkers, 231 F.
  3d 96 (2000).


3rd Circuit


4th Circuit

AW v. Fairfax County School Board, 372 F. 3d 674 (2004).


Hartmann by Hartmann v. Loudon County Bd. of Educ., 118 F. 3d 996 (1997).

5th Circuit


6th Circuit


Renner v. Bd. of Ed. of City of Ann Arbor, 185 F. 3d 635 (1999).

7th Circuit

Alex R. v. Forrestville Valley Community Unit Sch. Dist., 375 F. 3d 603 (2004).

8th Circuit

9th Circuit


10th Circuit


11th Circuit


APPENDIX B

LITIGATION DOCUMENTATION SHEET
<table>
<thead>
<tr>
<th>Classification</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autism</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Child with Disability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cognitive Delay</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deaf-Blindness</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deafness</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emotional Disturbance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Visual Impairment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearing Impairment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Orthopedic Impairment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Health Impairment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Specific Learning Disability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Speech Language Impairment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Traumatic Brain Injury</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Primary LRE Issue:
- Full inclusion in regular education with special education support
- Regular education with resource room or itinerant support
- Full-time special education class
- Other special education public school program
- Homebound
- Private Day School
- Sectarian
- Non-sectarian
- Private Residential School/Mental Health Facility

Is educational methodology an issue in this case?  Yes  No

Verbatim court language:

[Blank lines for text]
Names and positions/professional background of expert witnesses:

### Plaintiffs:
<table>
<thead>
<tr>
<th>Name</th>
<th>Position/Professional Background</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Defendants:
<table>
<thead>
<tr>
<th>Name</th>
<th>Position/Professional Background</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Did the court cite credibility of expert witness?  ____Yes  ____No
Did the court cite other expert factors?  ____Yes  ____No

Verbatim court language:

Judicial Outcome:

- Federal Appellate/Circuit Court
  - District Complete Win
  - District Win with Modification in Favor of Parent
  - Split Decision
  - Parent Win with Modification in Favor of School District
  - Parent Complete Win
- Federal District Court
  -
  -
  -
  -
  -
APPENDIX C

LITIGATION DOCUMENTATION SHEET APPROVAL
December 3, 2003

Dr. Roberta Evans  
School of Education  
University of Montana  
Missoula, MT 59812

Dear Dr. Evans:

Linda Maass has our permission to use the Litigation Documentation Sheet, which I authored as part of my dissertation work and subsequent journal articles. I was the principal author. Dr. Perry Zirkel, my mentor and advisor, joins me in granting this permission.

We were impressed with Linda and her work when we met this past summer at Lehigh University, and we are looking forward to her future publications.

Sincerely,

James R. Newcomer, Ed.D.
Assistant Superintendent for  
Pupil Services/Secondary Education
REFERENCES


*Sacramento City Unified School District, Board of Education v. Rachel II,* 1398 F. 3d (9th Circuit, 1994).


*Seattle S.D. v. B.S.,* 82 F.3d 1493 (7th Circuit, 1996).


