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Constructing an "Appropriate" Education in Florida Special Education Due Process Final Orders

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by

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ABSTRACT

This study examined how Florida administrative law judges (ALJs) constructed an *appropriate* education for students with disabilities in their final orders. This study utilized the Johnstone Method as a heuristic in analyzing the data. It examined the construction of an *appropriate* education from the implementation of PL 94-142 up to the U.S. Supreme Court decision in *Board of Education v. Rowley* (1975-1978), after the Rowley decision (1983-1986), and after the reauthorization of the Individual with Disabilities Education Act in 2004 (2004-2007). Each time period was examined individually and then the results were compared. The data sources included six purposively sampled final orders obtained from the Florida Division of Administrative Hearings and the Florida Department of Education. Two final orders per time period have been examined. For each time period, one final order with the school district as the prevailing party and one with the parent as the prevailing party were selected. Immersive line-by-line coding, and grounding of claims in specific textual evidence have been utilized to establish trustworthiness. The results indicate that during the period pre-Rowley, ALJs constructed an "appropriate" education based on the needs of the child and the special education program proposed to meet those needs. Deference was not given to one party over the other and the ALJ used his or her judgment in helping to construct an appropriate education. After the U.S. Supreme Court decision in Board of Education v. Rowley (1982), experts were charged with constructing an appropriate education for students with disabilities. This decision established an epistemic hierarchy that gave deference to school districts over parents. Outcomes were not considered by ALJs in constructing an appropriate education post-Rowley. The purpose of special education as

outlined in IDEA (2004) had no impact on the construction of an appropriate education for a student with a disability; instead the Rowley decision impacted the time period post-IDEA (2004). Throughout the three time periods, the ALJs all emphasized that school districts are not required to provide the "best" education to students with disabilities.

CHAPTER 1—INTRODUCTION

The right to adjudicate the appropriateness of an education of a student with a disability is mandated by the Individuals with Disabilities Education Improvement Act (IDEA) of 2004, formerly PL 94-142. The IDEA affords students with disabilities both procedural and substantive due process rights. Both the parents of a student with a disability and the local education agency (LEA), charged with providing a Free and Appropriate Public Education (FAPE), can dispute what constitutes an appropriate education (IDEA, 2004). When these disputes cannot be resolved, IDEA grants the right to go to a due process hearing.

A due process hearing is akin to trial in court (Mueller, 2009). In due process, an arbitrator, known as an administrative law judge (ALJ), has to be persuaded based on merits of the case if a FAPE was provided (Florida Procedural Safeguards Act, 2006). The ALJ has the power to issue subpoenas, require witnesses to testify, weigh evidence, and to come to final written decision within 45 days of the filing for due process, unless waived (Florida Procedural Safeguards Act, 2006). The final order is the judge's written decision settling the dispute ("Florida IDEA", 2006). In 2008, there were approximately 2000 of these due process final orders written in the US (Zirkel & Scala, 2010).

Coming to a decision on the provision of a FAPE has been litigated at the administrative due process and federal level. In fact, in response to a lower court (federal and due process) challenge to the meaning of *appropriate*, the Supreme Court decided to define *appropriate*. In its landmark *Board of Education of Hendrick Hudson Central School District v. Rowley* (1982) decision, the Supreme Court ruled that PL 94-142 mandates no substantive educational standards

other than access to a FAPE. It ruled that an *appropriate* education is achieved when students with disabilities are given access to public school and the "basic floor" of educational opportunity. The court further ruled that this "basic floor" includes identification of a disability, access to special education and related services, evaluation, and progress monitoring. It established that the LEA is charged with monitoring grades, as well as annual grade level articulation or retention as the determinants in assessing the educational benefit of a FAPE.

The "basic floor" discourse of access and grade level articulation established in the Rowley decision differs from the discourse of the purpose of special education outlined in IDEA (2004). IDEA (2004) states that special education must prepare students for college, careers, and self-reliant citizenship. This emphasis on post-school outcomes is critical because as of 2012, only 31% of people with disabilities were employed (Annual Disability Compendium, 2013). The low employment rate of people with disabilities could lead researchers to question if students with disabilities are being adequately prepared for life after completing their k-12 education.

Examining final orders at the due process level is one way of understanding challenges to the appropriateness of an education for a student with a disability. It would be important to understand how an ALJ constructed an *appropriate* education and what factors he or she pointed to as the basis for this determination. It would also be useful to understand who prevailed and why. This information could help practitioners and policymakers in meeting the needs of students with disabilities. Critically analyzing the discourse in final orders helps in understanding the nature of an *appropriate* education through the lens of an adjudicator.

Discourse is both limited and perpetuated by a cyclical hegemony of previous discourse (Foucault, 1972; Johnstone, 2008). In the same way, the law and the rulings of other courts affect

new rulings of administrative law judges by limiting and perpetuating a particular legal discourse. By way of title, agency, and reliance on previous discourse such as the Rowley decision, an ALJ perpetuates power dynamics in his or her construction and adjudication of *appropriate*. Therefore, with the precedent set by the Rowley decision and the language of IDEA (2004), a critical analysis of discourse on how *appropriateness* is constructed in ALJ final orders pre-Rowley, post-Rowley, and post-reauthorization of IDEA is warranted.

Statement of the Problem

In 1975, PL 94-142 was introduced to provide students with disabilities a "free and appropriate public education," however, it did not specify what it meant by an appropriate education. Consequently, it fell upon ALJs to define an appropriate education on an individual basis. In 1982, in response to a challenge from a lower court and the decision of an ALJ, the U.S. Supreme Court, in its Rowley decision, defined an *appropriate* education. It defined an *appropriate* education as an education that provides the "basic floor of opportunity" and access to public education.

Then, in the 2004 reauthorization of IDEA, the purpose of special education was stated as an education that prepares students with disabilities for college, career, and independent citizenship. This led some scholars and researchers to believe that the Rowley standard of *appropriate* had been replaced by a more advanced standard set by IDEA (2004) (i.e., Bateman, 2010; Blau, 2007; Brizuela, 2011; Johnson, 2012; Kaufman & Blewett, 2012; Macfarlane, 2012; Valentino, 2006; Weber, 2012; Zirkel, 2008; Zirkel, 2013). In addition to some scholars and researchers, courts were also conflicted over whether Congress intended to increase the standard of an appropriate education set by the Supreme Court in Rowley (Brizuela, 2011; Brunt, & Bostic, 2012).

These judicial and legislative shifts have contributed to the scholarly debate on what constitutes an *appropriate* education for a student with a disability, and if the definition has been changed. This debate is particularly important because ambiguity can lead to parents exercising their rights to file for due process (Cope-Kasten, 2013). Since it is unclear what is meant by an *appropriate* education, practitioners and policymakers need to better understand how it is constructed.

Purpose of the Study

The purpose of this study is to investigate how Florida ALJs construct an *appropriate* education for students with disabilities. This qualitative critical discourse analysis (CDA) examined final orders across three time periods. Primarily, this study examined and compared the construction of an *appropriate* education prior to the Supreme Court decision in *Board of Education v. Rowley* (1975-1978), after the decision in Rowley (1983-1986), and after the reauthorization of the Individual with Disabilities Education Act in 2004 (2004-2007). This study provided an analysis of each time period and an evaluation of differences between them. Furthermore, it helps policymakers and practitioners understand how an appropriate education is constructed. This understanding helps to align policy and practice.

Importance of the Study

Due process cases have been studied, and the rulings have been analyzed based on the issues litigated, the gender and disability of the student, and who prevailed (Bateman, 2007a; Bateman 2007b; Bateman, 2008a; Bateman, 2008b; Bateman, 2009a; Bateman, 2009b; Bateman 2009c, Bateman, 2010; "Elementary & Secondary Education," 2013; Etscheidt, 2003 Kuriloff, 1985; McKinney & Schultz, 1996; Newcomer, Zirkel, & Tarola, 1998; Rickey, 2003; Schultz & McKinney, 2000). However, none of the studies critically examined ALJ decisions to determine

how an ALJ constructed an *appropriate* education for a student with a disability in his or her final order pre-Rowley, post-Rowley, and after the reauthorization of IDEA (2004), and the determinant factors in that construction. This is critical because those decisions could reveal rich information about the nature of the system, and the process of constructing and adjudicating an *appropriate* education by an ALJ.

There is a gap in the literature concerning how an ALJ constructs an appropriate education for students with disabilities before the Rowley decision, after the Rowley decision, and after the 2004 reauthorization of IDEA. Specifically, this study expands a pilot study conducted by this author on how *appropriate* was constructed by Florida ALJs' prior to Rowley, post-Rowley and post-reauthorization of IDEA (2004). The full study examined the discourse in the final orders line-by-line. It utilized the Johnstone Method as a heuristic to examine what the words of the ALJ are doing and what messages are they conveying. From a critical theorist epistemological perspective, this CDA exposed the imbalances of power in the special education due process hearing final orders analyzed. It also examined the propositions and corollary propositions embedded in the data. It also explored what else was interesting within the final order.

Finally, it concluded with policy implications and recommendations drawn from this discourse analysis. Research should influence policy, and in turn practice (Dunlap, Hemmeter, Kaiser, & Wolery, 2011). To that end, this discourse analysis attempts to fulfill a role and responsibility of informing policymakers and practitioners of how an *appropriate* education is constructed in final orders by ALJs. Knowing if the construction or interpretations of law are aligned with legislative intent can aid policymakers in policy development. For practitioners, it can help in the pedagogical understanding of a FAPE (Rock & Bateman, 2009).

Research Questions

This study is framed by the following four research questions:

1. How has an *appropriate* education been constructed by Florida administrative law judges in special education due process hearing final orders prior to the U.S. Supreme Court decision in *Board of Education v. Rowley* (1975-1978)?
2. How has an *appropriate* education been constructed by Florida administrative law judges in special education due process hearing final orders after the Supreme Court decision in *Board of Education v. Rowley* (1983-1986)?
3. How has an *appropriate* education been constructed by Florida administrative law judges in special education due process hearing final orders after the reauthorization of the Individuals with Disabilities Education Act in 2004 (2004-2007)?
4. To what extent, if any, has the construction of an *appropriate* education by Florida administrative law judges in special education final orders evolved from the implementation of PL 94-142 to the Rowley decision (1975-1978), after the Rowley decision (1983-1986), and after the reauthorization of the Individual with Disabilities Education Improvement Act in 2004 (2004-2007)?

Theoretical and Epistemological Perspective

This study is a qualitative CDA. Critical Discourse Analysis is a way of studying discourse and its ability to perpetuate power structures by influencing ways of thinking and believing through value-laden language that is grounded and contextualized in social systems of dominance and oppression (Fairclough, 1992; Fowler, 1981; Johnstone, 2008). CDA critically examines the author's decisions in word selection and semiosis through a critical theorist

epistemology (Fairclough, 1992; Johnston, 2008). It takes the stance that language has the power to influence ideology and, in turn, ontology (Johnstone, 2008). A major premise of CDA is to expose the hegemonic forces that are embedded in the text as a method of battling social inequality (Fairclough, 1992; Fairclough, 1996; Fowler, 1981; Johnstone, 2008). It does not usually begin with a theory; it looks at the data to determine imbalances of power (Fairclough, 1992; Fairclough, 1996; Fowler, 1981; Johnstone, 2008).

Method

The method utilized is a CDA using the Johnstone Method as a lens in examining the ALJ construction of an appropriate education. This micro-level analysis explored what the discourse says about the macro-level or the overall social system (Haspel & Tracy, 2007; Mehan, 1983). Immersive line-by-line coding and specific textual evidence have been used to establish trustworthiness.

Data Sources

The data selection process was purposive. Six final orders were selected that met the richness criteria on a researcher-created rubric. These final orders included only Florida cases. This decision was made because different circuits have the potential for different precedential interpretations of identical parts of the IDEA (Brizuela, 2011; Brunt, & Bostic, 2012). The focus on one judicial circuit helped to eliminate conflicting rulings among the judicial circuits. In other words, it only compared cases that operate under the same governing and interpretation rules. Like 41 other states, Florida uses a one-tier system that has the ALJ as the final arbitrator, unless appealed in court (Florida Procedural Safeguards, 2006; Zirkel & Scala, 2010). Only cases that have received a full ruling from an ALJ were selected for review. Cases settled in mediation and resolution meetings were not analyzed. This author has personal experience going

to special education due process hearings in Florida so familiarity was also a factor in selecting Florida.

Additionally, a pilot study was conducted on this topic so two of the six studies will come from the pilot study due to their rich descriptions and the unavailability of any other cases for the period prior to the 1982 United States Supreme Court case of the *Board of Education v. Rowley*. Two final orders for each time period have been selected. For each time period, one final order with the school district prevailing and one final order with the parent prevailing have been explored. The smaller amount of text was used in order to have a more in depth analysis (Johnstone, 2008).

Iterative Process

The Johnstone Heuristic (2008) was chosen over other methods because it provides a heuristic as a way of looking at the data. The Johnstone Heuristic recommends reading a document for discourse analysis first without criticism, and then again critiquing the problem. Johnstone asserts that you must *know* your documents in order to study them. Johnstone also suggests that researchers could explore the text using a heuristic to find out what stands out about a text without creating a list of what the researcher expects to find. No list of what is expected to be found was created, however since this study is guided by research questions, those questions are used as a guide in finding out if they are answerable through exploration of due process final orders. This study is contextualized based on dominance and oppression and on what was happening in the world during the time periods outlined in the research questions (Fairclough, 1992; Fowler, 1981; Johnstone, 2008).

The iterative process began with this researcher reading all due process final orders uncritically. In other words, the process begins with reading and becoming familiar with the

documents, without making judgments. Next, the researcher reread all of the documents critically while engaging in immersive line-by-line coding. The codes were all entered in Atlas.ti, a database that stores all cases for comparison by time period. Direct textual evidence was utilized to establish trustworthiness.

Delimitations and Conclusions

While examining six final orders is not generalizable, claims can be made about the nature of the system as well as policy recommendations from the findings (Fairclough, 1992; Fowler, 1981). The focus of this study is limited to how *appropriate* is constructed pre-Rowley, post-Rowley, and post-reauthorization of IDEA (2004) in Florida at the hearing officer level. Only cases that received a full ruling from an ALJ were selected for review. Cases settled in mediation and resolution meetings were not analyzed. Also, the researcher compared final orders that were written by different ALJs. Multiple ALJs were followed across time periods due to limitations in available data.

Additional noteworthy delimitations include the scope of children studied and what can be uncovered from the study. For example, IDEA does not cover gifted children unless they have a dual exceptionality. Also, this study only utilized final orders therefore the only information from the proceedings that is known is what the ALJs chose to include in their final orders. Finally, not all due process cases in all states are structured the same. For example, Florida uses a one-tier system that has the ALJ as the final arbitrator, unless appealed in court (Florida Procedural Safeguards, 2006). Additional delimitations have the possibility to be uncovered from data immersion.

Definition of Terms

In a qualitative discourse analysis, defining terms beforehand will constrict the type of information that is gathered (Johnstone, 2008). Therefore, this discourse analysis will use an immersive approach by using line-by-line coding to determine how the administrative law judge constructs an *appropriate* education. A few key operational definitions are: *special education due process hearing*: an arbitration process used to settle disputes regarding a free and appropriate education for a student with a disability. Hearing officer, arbitrator, and administrative law judge are used interchangeably. The opinion, the final order, and the decision are also used interchangeably. There are, however, specific definitions of terms that are utilized based on the exact definition based on IDEA. IDEA (2004) defines the following key terms:

- *Special education*: "means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including-- (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education. (2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section--(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards; (ii) Travel training; and (iii) Vocational education.
- *"At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program."
- *Free appropriate public education*: "The term `free appropriate public education' means special education and related services that have been provided at public expense, under

public supervision and direction, and without charge; meet the standards of the State educational agency include an appropriate preschool, elementary school, or secondary school education in the State involved; and provided in conformity with the individualized education program required under section 614(d)."

- "*Child with a disability: "*In general.--The term `child with a disability' means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as `emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and(ii) who, by reason thereof, needs special education and related services.(B) Child aged 3 through 9.--The term `child with a disability' for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child--(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and(ii) who, by reason thereof, needs special education and related services."
- *Administrative Law Judge or Hearing Officer*:

  "Must not be an employee of the SEA or the LEA that is involved in the education or care of the child; Must not be a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

  Must possess knowledge of, and the ability to understand, the provisions of the IDEA,

Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts; Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and Must possess the knowledge and ability to render and write decisions in special education and related services provided within public elementary schools and accordance with appropriate, standard legal practice.

[34 CFR 300.511(c)(1)] [20 U.S.C. 1415(f)(3)(A)]"

- *Educational service agency*: "The term `educational service agency'--(A) means a regional public multiservice agency--(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and(ii) recognized as an administrative agency for purposes of the provision of secondary schools of the State; and (B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school."
- *Individualized education program; IEP*: "The term `individualized education program' or `IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d). (15) Individualized family service plan.--The term `individualized family service plan' has the meaning given the term in section 636."
- *Parent*: "The term `parent' means--(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);(B) a guardian (but not the State if the child is a ward of the State);(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's

welfare; or(D) except as used in sections 615(b)(2) and 639(a)(5), an individual assigned under either of those sections to be a surrogate parent."

- *Local educational agency*: "In general.--The term `local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.
- *Related services*: "In general.--The term `related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. (B) Exception.--The term does not include a medical device that is surgically implanted, or the replacement of such device."
- *Due Process*: "A parent or a public agency may file a due process complaint on any of the matters described in Sec. 300.503(a)(1) and (2) (relating to the identification,

evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in Sec. 300.511(f) apply to the timeline in this section.(b) Information for parents. The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if--(1) The parent requests the information; or (2) The parent or the agency files a due process complaint under this section."

Overview of Chapters

The review of the literature in chapter 2 centers on parental voice in the IEP meeting, interpretations of an *appropriate* education, results of due process and federal level cases, and a methodological review of research. Chapter 2 also provides an overview of this researcher's pilot study. It also details the research methods and results, and the methodological use of document analysis to study legal cases. Chapter 3 describes this study's research methodology, the history of the methodology, and the adjustments made from the pilot study. Chapter 4 presents the results of the study. Finally, chapter 5 discusses and critically analyzes the results and chapter 6 provides recommendations for policy changes.

CHAPTER 2—LITERATURE REVIEW

This chapter reviews the literature related to legal and scholarly opinions on what constitutes an appropriate education for a student with a disability in light of the Rowley decision and the reauthorization of IDEA (2004). It explored the literature on parental perceptions of the IEP process, litigation and research on FAPE (due process, state, and federal levels), factors leading to success or failure in due process (with the supporting research and case law), and research methods that have been used to study final orders at all levels, with an emphasis of due process hearings. This review of the literature was conducted in order to understand the current state of FAPE-related special education litigation and research, and to establish a need for the current study. A pilot study by this author on the construction of an *appropriate* education by ALJs in Florida before and after the Rowley decision, and after reauthorization of IDEA (2004) is discussed in detail.

Evolution of an Appropriate Education

The courts and Congress have mandated education for all children. In particular, the U.S. Supreme Court's landmark decision in *Brown v. Topeka Board of Education* (1954) ordered the end of racial segregation in public schools. This decision was used as the impetus for other class-action lawsuits that challenged the exclusion and segregation of children with disabilities from public schools.

Specifically, *Brown v. Topeka Board of Education* (1954) was cited in the consent decree in *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* (1972). The State of Pennsylvania refused to allow students with intellectual

disabilities access to public schools. Pennsylvania agreed to a settlement that would require it to educate all of its school age children including children with intellectual disabilities. Stated in the consent decree, there has to be a "compelling" interest for the state to deny a "free public education" to any of its children.

Like PARC, *Mills v. D.C. Board of Education* (1972) is also a major class-action decision in favor of educating all children. In this case, seven African American students with learning and behavioral disabilities were barred from attending public school in the District of Columbia. The District of Columbia cited the high cost of educating students with disabilities as the reason for denying these children access to a free public education. The court rejected this argument and ruled that the financial cost of educating students with disabilities is not a legally valid reason for excluding them from a free public education.

Congress reacted to these legal challenges and developed a law that moved beyond just providing a free public education to providing a free and appropriate public education. In 1975, the Education for All Handicapped Children Act (PL 94-142) was enacted by President Gerald Ford to give children with disabilities all over the country the right to a free and appropriate public education (FAPE). This act specifically granted educational due process rights if the school district fails to provide a FAPE to a student with a disability. Due process is a fundamental right that is guaranteed under the fifth and fourteenth amendments of the United States Constitution. Although the eleventh amendment bars states from being sued federally, courts have found that Congress has granted the expressed right to sue for a FAPE both in administrative due process hearings and in federal appeals of special education due process decisions (FAPE, 1999). A rare challenge to the right of parents to sue school districts in federal court for a FAPE happened in the case of *Little Rock School District v. Mauney* (1999). Little

Rock School District contended that under the eleventh amendment states are immune from being sued in federal court. The ruling in this case clarified this issue. That is, states that accept IDEA funds are not immune from federal lawsuits that have been expressly permitted under IDEA ("FAPE", 1999).

Since the right to file for due process for a school district's failure to provide a FAPE has been established and settled, the extant literature has been reviewed to understand an *appropriate* education, the IEP process, due process and judicial ruling reviews, and factors leading to prevailing in due process.

Ambiguity in an Appropriate Education

IDEA (2004) established both procedural and substantive due process rights in order to litigate an appropriate education for a student with a disability. IDEA (2004) mandates that a court's ruling (due process or federal appellate level) for denial of FAPE must be based solely on substantive grounds, or serious procedural violations based on three criteria. Romberg (2011) states that the three procedural violations criteria outlined by IDEA (2004) for a denial of a FAPE are ambiguous. It states that a procedural denial of FAPE can only be awarded if the violation blocked parental involvement in some form, obstructed a FAPE, or prevented the student from receiving an educational benefit (see [34 CFR 300.513(a)(2)] [20 U.S.C. 1415(f)(3)(E)(ii)]).

The grounds for a procedural violation are not the only part of IDEA that scholars assert are unclear. For example, Blau (2007) argues that IDEA clearly defines terms such as "highly qualified" and" special education" (p.4). However, the term *appropriate* lacks clarity. Other researchers have also contested what constitutes an appropriate education for a student with a disability (Bateman, 2010; Etscheidt, 2003; McKinney & Schultz's, 1996; Newcomer, Zirkel, &

Tarola, 1998; Rickey, 2003).

The reauthorization of IDEA in 2004 included in its purposes that the "the purposes of *IDEA* include ensuring that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. [34 CFR 300.1(a)] [20 U.S.C. 1400(d)(1)(A)]". Many scholars and attorneys have argued for this standard of an appropriate education for a student with a disability set in the Rowley decision to be raised from the "basic floor" in light of the reauthorizations of IDEA, or the student achievement requirements of the No Child Left Behind Act (2001) (Blau, 2007; Brizuela, 2011; Johnson, 2012; Kaufman & Blewett, 2012; Macfarlane, 2012; Valentino, 2006; Weber, 2012; Zirkel, 2008; Zirkel, 2013). Unlike many scholars, Bates (1994) has asserted that this lack of definition benefits students with disabilities since each student with a disability has individual needs therefore appropriate should be defined individually. Nonetheless, with no clear definition of appropriate, courts have attempted to define an appropriate education for a student with a disability.

Rowley, Interpretations, and Judicial Conflicts

With unclear definitions of terms, courts began to act as lawmakers by creating new law and standards (Flaks, 2009; Palley, 2003). That is, the courts have attempted to define *appropriate*, in particularly, in the 1982 United States Supreme Court case of the *Board of Education v. Rowley*. The parents of Amy Rowley, a student with deafness who could read lips, challenged her right to a FAPE when the school district failed to provide her with a sign language interpreter. The Supreme Court ruled that a FAPE was provided since she had access to a public school. In the Rowley case, the United States Supreme Court attempted to clarify the

definition of appropriate by labeling it as the "basic floor of opportunity" (Daniel, 2008;Mead & Paige, 2008). The court established a two-tier test to determine appropriateness that looked at whether schools complied with IDEA (at the time of Rowley, IDEA was referred to as the Education of All Handicapped Children Act) and whether the Individualized Education Program (IEP) was designed to provide for *some* educational benefit (Mead & Paige, 2008). This test is the result of the statute's failure to define the term appropriate. It has led to what some describe as courts interpreting the law as providing an education that is much less than what Congress had intended (Blau, 2007;Valentino, 2006). For this reason, some posit that IDEA was reauthorized with amendments to help clarify the definition of appropriate (Blau, 2007; Johnson, 2003; Valentino, 2006). This would not be the first time scholars posited that the bar for a FAPE has been raised. Drasgow, Yell, and Robinson (2001) argue that the requirement of a FAPE was raised by the 1997 amendments to IDEA requiring IEP goals to be measurable.

Similar to the views about FAPE being raised by the language in the IDEA, Valentino (2006) argues that the decision in Rowley to provide *some* educational benefit to children with disabilities is now irrelevant because of the clarification of the definition of appropriate in the reauthorization of IDEA. The clarification of *appropriate* in IDEA is contrary to the decision in Rowley because IDEA (2004) states that its purpose is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" (Valentino, 2006). Scholars have argued that the lack of clear definitions can lead to inequity for students with disabilities (Hyatt, & Filler, 2011; McCarthy, 2008). Others have sided with the Supreme Court's dissent in the Rowley decision, by arguing that defining appropriate as the "basic floor" will provide an inequitable

education for students with disabilities (Goetz, Pust, & Reilly, 2011; Peterson, 2010).

Johnson (2012) contends that the " some educational" benefit of Rowley may lead to contention between parents and school districts. Several studies have questioned whether the standard outlined in *Board of Education v. Rowley* (1982) of the "basic floor of opportunity" being the basis for an appropriate education for a student with a disability has been raised in the 2004 reauthorization of the IDEA, formerly PL 94-142 (Blau, 2007; Daniel, 2008; Huefner, 2008; Valentino, 2006; Zirkel, 2008).

Some lower courts have agreed with scholars and attorneys in interpreting the purpose of IDEA (2004) as raising the Rowley standard; however, this has been reversed on appeal in the ninth circuit. An appellate court in the ninth circuit in the case of *J.L. v. Mercer* (2009) disagreed with an ALJ on this issue. The district court found that Rowley's definition of an appropriate education for a student with a disability has been raised from the "basic floor" by the Reauthorizations of IDEA. The appellate court reversed the lower court's decision because this elevation was not expressly "spelled-out" in the IDEA ("1997 amendments do not supersede Rowley FAPE standard, 2009; J.L. v. Mercer, 2009). In *J.L. v. Mercer* (2009) the ninth circuit unequivocally stated the following:

> because of the equivocal nature of the district court's order, it is also possible that the district court thought the Individuals with Disabilities Education Act "evolved" over time to eventually supersede Rowley in 1997. Neither plaintiffs nor the district court have pointed to authority supporting the proposition that we should consider the legislative 'evolution' of a statute when determining Congress' intent. Plain meaning interpretation is a 'cardinal canon' of statutory construction, and evolutionary arguments are by no means plain. See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146,

> 117 L.Ed.2d 391 (1992); Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." (internal quotation marks omitted)). Additionally, for legislation enacted pursuant to the Spending Clause, U.S. Const. art. I, § 8, cl. 1, such as the Individuals with Disabilities Education Act, it would seem that "evolutionary" theories by their very nature are foreclosed by the Supreme Court. See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006) (requiring Congress to set out federal funding conditions 'unambiguously' so that states can accept the funding 'voluntarily and knowingly').

In essence, the court ruled that if Congress had intended to raise the bar for an appropriate education, they would have made it abundantly clear in IDEA (2004).

Romberg (2011) argues that courts have conflicting interpretations because they are unsure of what is meant by substantive and procedural violations in the Rowley decision so they zealously focus on procedural violations as a denial of a FAPE. For example, in *Van Duyn v. Baker School District 5J* (2007), the Ninth Circuit ruled that a FAPE is denied solely by a "material" failure to fulfill the IEP. Reed (2008) argues in a review and analysis of this case that the court made a mistake with inequitable consequences when it misinterpreted the law in that ruling. Reed further states that the court should have ruled that not implementing even a single portion of the IEP constitutes a denial of FAPE.

Likewise, in *M.L V. Federal Way School District* (2004), the ninth circuit ruled that a failure to include a regular education teacher in the IEP team constituted an egregious procedural denial of FAPE by impeding parental participation. This case was also cited by the ALJ in

Florida as the basis for this author's victory in due process.

On the other hand, the Eighth Circuit differs in its interpretation of a FAPE. Remarkably, Goetz, Pust, and Reilly (2011) reviewed cases in the Eighth Circuit Court of Appeals that said, in principle, if the school district tried to educate a student with a disability, and that child received no benefit, FAPE was provided by way of an attempt. Their review found that this court has only found a denial of FAPE four times since the enactment of PL 94-142. They wrote that this interpretation is in contrast to Rowley standard of "some educational benefit" as well as the more advanced standard in the Third Circuit of "meaningful educational benefit" (p. 514).

Since the IDEA does not address the burden of persuasion, judicial conflicts among different circuits also existed on whose evidentiary burden it was to persuade an ALJ in special education due process hearing to rule in his or her favor. Conroy, Yell, and Katsiyannis (2008) analyzed the circuits' positions on this issue prior to the 2005 Supreme Court decision in Schaffer v. Weast. They found that the Second, Third, Seventh, Eighth, and Ninth Circuits assigned burden of proof to the party disputing the FAPE, while the remaining circuits placed the burden of persuasion on the school district regardless of who challenged the FAPE. This meant the school district had to persuade the court that it indeed provided a FAPE whenever a parent challenged a FAPE in the remaining circuits. Schaffer v. Weast (2005) settled this issue by stating that in special education cases (due process and at the federal appellate level), the burden to persuade is assigned only to the party suing.

Similarly, there is a lack of uniformity among states on their definition of a FAPE. Notably, Blau and Allbright (2006), in their analysis of FAPE in all 50 states and Washington D.C., found that all states have their own statutory definition of a FAPE and educational benefit for students with disabilities. Colorado §22-20-102 mentions an education to allow students with

disabilities an opportunity to "lead a fulfilling and productive lives". Hawaii statute § 302a-436 and Michigan § 380.1701 mention maximizing ability or potential. Likewise, North Carolina §115c-106 (a) adopts a "heightened" standard, however they specifically state that this is not advocating "Utopian" educational programs. None of the state statutes have adopted the purpose of special education outlined in IDEA (2004) that prepares students with disabilities for the post-school outcomes of college, career, and independent living. Florida § 1003.57 mandates that every three years, each district must provide its written procedures for special education and related services to the Florida Department of Education.

Individualized Education Program

In special education, an appropriate education for a student with a disability is often outlined in the IEP. The reauthorization of IDEA (2004) specifies the required components of an IEP that are designed to provide a FAPE. For example, Bates, Gartin, and Murdick (2005) outlined the requirements of the IEP in IDEA (2004) as eliminating the short term objectives section, requiring research-based practices, listing accommodations for standardized or alternative assessment, outlining minimum IEP members (regular education teacher, special education teacher, a person qualified in interpreting assessments, LEA, and possibly the child), detailing the "academic, developmental, and functional needs of the child (p. 330)", and offering a trial for 15 states to try three year IEPs. The specifics of the IEP must be created with parents, school district officials, and other stakeholders (IDEA, 2004). It acts as a written document or contract of how FAPE will be provided to a student with a disability. If a substantive or a serious procedural violation occurs in the IEP, parents have the right to sue under due process (IDEA, 2004). To illustrate this, Etscheidt (2003) conducted a retroactive study of 68 due process cases on the issue of IEPs of children with autism. It found that the required personnel must be present

at the IEP meeting, and services and goals must be aligned based on the student's need in order to arrive at an appropriate IEP. Understanding issues like this in the IEP that can lead to due process can help school districts with becoming proactive in avoiding due process.

The importance of a collaborative IEP cannot be underscored. Several research studies have investigated parental perception of the IEP process and have found that parents are dissatisfied with the IEP Process. Specifically, a focus group study of 27 families indicated that parents felt excluded and disenfranchised from the IEP process, and as if they had to battle for limited services (Hess, Molina, & Kozleski, 2006). Strengths of this study were that a pilot study was conducted beforehand, the focus group questions were designed to produce detailed responses, and it utilized repeated analyses. Limitations were that satisfaction is a broad topic and satisfaction was limited to the questions asked.

Likewise, in a seminal work on persuasion in the IEP process, Mehan (1983) analyzed videotapes, transcripts, and documents from IEP meetings. He found that psychological reports that were highly technical in nature were not challenged, while statements by non-experts were frequently questioned. He concluded that the IEP process appeared to be a predetermined ritual rather than a collaborative process in which all voices were given equal weight. This micro-level analysis of persuasion in IEPs helped illustrate the organizational structure of special education.

Additionally, Cho and Gannotti (2005) conducted interviews with 20 Korean-American mothers of children with developmental disabilities about their experiences with the IEP team. Cho and Ganotti found they felt they needed trained translators. Additionally, these parents felt disconnected from the IEP process and felt the school district was overly-exaggerating their child's disability (12 mothers of children with autism), and as if they were not equal partners. On the whole, however, they appreciated the special education resources. Advantages of this study

were that the questions were field tested by an outside party, member checks utilized, randomized selection of participants during the member checks, and audit trails. Potential limitations of the interview method are potential researcher affects on responses. Like Cho and Ganotti, Childre and Chambers (2005) found that parents were dissatisfied with the IEP process and also not seen as equal partners on the team in drafting the IEP.

Fish conducted two studies that produced differing results on perception of parental satisfaction in the IEP. For example, in a case study on the perceptions of the IEP process of seven parents of children with autism, the parents indicated that the IEP process was biased and contentious and school district officials were inconsistent in working on IEP goals (Fish, 2006).

Unlike Fish's 2006 work, Fish (2008) investigated the overall perceptions of 51 parents from middle to high socio-economic backgrounds of students receiving special education services. It found that 63% of parents have a positive opinion and a clear understanding of the IEP process. This study is relevant and useful in understanding perception of these parents, however clarification on the concept of understanding in the survey is needed. Understanding is a broad concept and parents were not tested to see if their perceived understanding or misunderstanding of the IEP process was valid.

Similar findings of parental satisfaction in the IEP process were noted by Miles-Bonart's (2002) study. In this study, surveys (n=207) and interviews (n=24) using grounded theory and single group descriptive analysis with parents of students receiving special education services in order to determine the parents' satisfaction with the IEP process (5% dissatisfied survey, 12% dissatisfied interview). Results indicated that the majority of parents were satisfied, overall, with the IEP process. Parental dissatisfaction arose when the appropriate personnel were missing from the IEP team. The study showed that open communication led to parental satisfaction. Parents of

students with physical or health impairments were more likely to be dissatisfied with the IEP process than parents of students with other disabilities. This method answered the research questions sufficiently. Information on the field-testing of the survey questions is needed.

When communication breaks down, Mueller (2009) suggests employing a neutral IEP facilitator. Mueller reports that facilitation tactics such as creating a plan, setting meeting norms, having each individual IEP team member develop goals, and placing issues to the side that are not immediately resolvable helps in quelling IEP conflict. By implementing these tactics the facilitator, parents, and the LEA can collaborate to avoid due process and develop a FAPE in the IEP. This article is relevant because it reveals contentious issues and perceptions that can lead to due process and how to avoid them.

Since parents have no obligations under IDEA to provide a FAPE, the school district in collaboration with parents, and other stakeholders must ensure that the IEP goals and objectives are designed to offer a FAPE. In essence, under IDEA (2004) the school district must provide a FAPE and pay for private school when due process is filed (child is allowed to remain in his or her current placement at public expense) under the stay-put provision of IDEA (2004) (Eisenberg, 2009). Practitioners and scholars can learn from research on understanding perceptions in the IEP that lead to filing for due process.

Final Order and Final Ruling Reviews

Under IDEA (1997), LEAs could file for due process if a parent failed to consent for special education services, however under IDEA (2004) the school district is forbidden from filing for due process if a parent refuses to consent for an initial special education placement, therefore the district is no longer mandated to provide a FAPE for that student with a potential disability (Hyatt, 2007). Even with that change in limiting due process, it still occurs. In fact, a

handful of states conduct more than half of all due process hearings and write the majority of all final orders. Specifically, Zirkel and Scala (2010) surveyed special education directors in all 50 states and DC. Results indicate that between 2008-2009 there were approximately 2000 due process adjudicated, DC had 880 cases, New York 550, while California, Pennsylvania, and New Jersey had roughly 100 cases, respectively. Likewise in studying all dispute resolution data, "IDEAdata.gov" (2012), found that in 2011-2012 California had 1039, District of Columbia had 34, Texas, Massachusetts, Pennsylvania 300, and Florida had 101 written complaints, mediation, and due process requests. These data also state that Florida had six due process hearings that issued a final order during the same time period. It is important to note that there are conflicting results. The Florida Department of Education states that it had 14 final orders rather than six issued for the same time period (Florida Department of Education, 2013).

Across jurisdictions, due process is contentious (Lanigan, Audette, Dreier, & Kobersy, 2001) and school district officials report that it is emotionally exhausting (Simon, 2000). Moreover, Goldberg and Kuriloff (1991) analyzed the experiences of parents and school district employees in 50 special education due process hearings (n=33 parents and 42 school employees) based on the categories of "objective and subjective" fairness. Both the school districts and the parents perceive due process as being unfair. Nonetheless, when a FAPE is not achieved or perceived as not achieved, whether it is in the IEP, assessment and evaluation, or on another substantive or egregious procedural ground it can lead to due process. The outcomes of these cases are written in an ALJ's final order. Creating a final order based on *appropriateness* may be challenging because the definition of appropriate is unclear (Blau, 2007; Dagley, 1995; Romberg, 2011).

Courts have specified their determinants in ruling on a FAPE. For example, in *Parent v.*

Osecola County School Board, a Florida parent went to due process because her son with a behavioral disability was placed in an alternative school for cutting another student. The court found the school district provided FAPE by using the following 3-part FAPE test: "1) the student's individualized education program is reasonably calculated to enable the child to receive educational benefits, (2) the student's placement allows the student to receive those benefits in the least restrictive environment, and (3) the state complied with the IDEA's procedures ("FAPE", 1999a p.674). Likewise, MacArdy (2009) reviewed the case of *Jamie S. v. Milwaukee Public Schools* where a district court found that Jamie S. was denied a FAPE because Milwaukee Public Schools failed to meet its child find obligations and identify this student as having a disability. Like many other cases, there was no specific methodology outlined or interrater reliability achieved, however, this review was unique because it went beyond summarizing the facts and posed critical questions and made critical statements based on supporting text about what the judge did and did not say, and what the words of the judge are doing. Macardy went further and recommended that 100% compliance with Child Find is inadequate. The compliance must be "substantial (p. 888)".

On the other hand, Mazzi (2010) specified the methodology in the review of judicial, rulings. For example, Mazzi (2010) conducted a mixed methods discourse analysis of randomly selected Supreme Court rulings on the construction of judicial arguments through evaluative statements from the justices. The study found that justices utilized noun patterns in their evaluations. Mazzi's study presented an interesting discourse analysis of a case dealing with the Individuals with Disabilities Education Act and the use of the term 'rights' in the case. Mazzi's methodology of randomly selecting cases leaves open the possibility that the best examples of evaluation were not selected. In fact, Zirkel (2013b) made recommendations for ALJ decisions;

the decisions should be well written and descriptive, substantiated by evidence, decided by the ALJ, and painstakingly precise on the rationale for the decisions and award, if any. Nevertheless, given the vast number of Supreme Court cases, random selection could be considered a viable option for case selection.

Chaemsaithong (2010) also utilized legal discourse analysis to study the historical construction of experts and the evolution of the use of experts in the courtroom over time. This study suggested that the identity of an expert is a negotiated process that is constructed and performed. While this study provided an interesting discussion on the construction of experts in the courtroom that is grounded in evidence, Cheamsaithong's had a small sample. Regardless, this information is crucial because it shows how legal discourse can be examined and analyzed over time and that we can see how concepts and identities are constructed.

Defining and Constructing an Appropriate Education

Studies have been conducted that examined court rulings and the reauthorization of IDEA to determine how courts have defined/constructed appropriate. For example, Dougherty (2004) in a study using the legal research methodology on post-Rowley court decisions suggests that courts define appropriate on an individualized basis, and that the Eighth Circuit defines appropriate in complete accordance with Rowley, while other circuits have attempted to reinterpret the definition. This method is useful in understanding that court cases can be studied to examine how *appropriate* is defined by using evidence for the cases. This study did not examine the research through a particular epistemological perspective.

In contrast, in a meta-analysis of 93 post-Rowley appellate cases, Bates (1996) found that educational standards were not factored into determining an appropriate education in approximately 60% of the decisions. This lends itself to understanding that in these cases a

standards-based education is not a requirement for determining if a FAPE was provided. This study lends itself to understanding that parts court rulings can be compared and enumerated. Additionally, in a study on court rulings after the 1986 reauthorization of IDEA, Bridgewater (2003) conducted a dissertation that analyzed early childhood special education court cases after the 1986 reauthorization of PL 94-142 required services for children with disabilities ages 3-5.

This study reviewed 60 federal early childhood cases from 1986-2002 using Statsky and Wernet's 1995 brief case analysis to determine the name of the case, facts of the case, litigated issues, holdings, prevailing party, and the rational for judicial opinion. This method requires critical reading and framing an outline in the above fashion based on that reading. It is useful in understanding that cases can be analyzed using the above information, however it focuses on extrapolating key text features into an organizational pattern rather than analyzing the data.

Bateman Studies on Due Hearings

It is important to note that one of the predominant authors was in fact a former ALJ. David Bateman, a professor and former ALJ of more than 500 special education due process cases, has written several FAPE-related special education final orders (Bateman, 2007a; Bateman 2007b; Bateman, 2008a; Bateman, 2008b; Bateman, 2009a; Bateman, 2009b; Bateman 2009c). The cases were all different, however the format of these research articles was all the same. The articles all detailed the facts of the case, the issues related to a FAPE that were contested, the history of the issues, a narrative about the student, the law relating to the ruling such a Rowley, and the outcome of the special education case. Interestingly all cases were summaries. This research did not include methodological steps in conducting this research, a literature review, the purpose of the study, the research questions, significance, theories, limitations of the study, conclusions other than those reached by the ALJ, and policy

implications were not included. This author wanted to understand whom the author of the publication was in order to gain an additional understanding of his work that is not listed for the reader (i.e. epistemological, philosophical, legal). Given Bateman's ALJ status, if Bateman as a former ALJ is analyzing the cases that he himself adjudged, this summary criticism will be withdrawn. That has not been clarified for the reader of the articles therefore the criticism must be based solely on the article rather than an assumption until otherwise notified.

Since ALJs handle due process on a case-by-case basis, each case of Bateman's cases has qualitative value. For example, Bateman (2007a) summarized the case of Brian C., a dually exceptional student with giftedness and a learning disability that was denied a FAPE by the school district when it failed to provide him with his related special education services. This would constitute a substantive violation. Bateman (2007b) also summarized the case of Anna, a private school student, with a learning disability (LD) and processing and verbal language delays, who was denied a reimbursement for private school tuition since it was not established that the private school provided a FAPE despite the ALJ acknowledging that the school district's LD program did not offer a FAPE either. This case offered an interesting perspective by stating that due process can still be lost if the school district denied FAPE and the private school did not provide a FAPE.

Additionally, Bateman (2008b) detailed the story of Greg, a 13 year old with a behavioral disability that the school district wanted to place in a more restrictive placement. The hearing offer found that the student's behavior management plan was inappropriate and over-utilized time-outs as punishments for inappropriate behavior. This is useful to practitioners in understanding that consistently using punitive behavior management strategies can be a denial of FAPE. Another interesting case involved the failure to evaluate under Child Find in a timely

manner. Bateman (2009a) outlines the case of Chuck a ten-year-old with a learning disability that was denied a FAPE. In this case the ALJ determined that the school district failed to provide a FAPE and delayed the students evaluation under Child Find. The ALJ granted the parents request for compensatory education by requiring the school district to provide one year of compensatory special education. Not locating and evaluating a child with a disability was ruled as a denial of FAPE.

Finally, Bateman (2009b) reported on the due process hearing of Marnie, a student with a severe accident-related intellectual disability. She was scheduled to graduate from high school which the federal regulations specifies as a change in the students placement that mandates that the school district provide the parents with prior written notice. The decision to allow this student to graduate was found to be a denial of FAPE therefore she was allowed to stay in school until age 21. All of these FAPE-related due process summaries help the reader to understand how an ALJ ruled in regard to a FAPE.

Due Process Review Summary Format and Critique

Similar to the format in Bateman, a case review of *Horry County School District v. RE* analyzed a FAPE-related case. In this case, a South Carolina mother wanted her daughter placed in a room in her law firm with the help of a nearby private school instead of the school district's proposed residential placement ("FAPE", 1999b). The school district rejected the mother's suggestions, and the federal court sided with the school district ruling that it had no jurisdiction to decide a specific location of a placement and that the in-state residential placement provide a FAPE. Court decisions relating to elementary and secondary educational issues were reviewed, this work fell short of an in depth analysis of the content and discourse of the decisions ("Elementary & Secondary Education", 2013). It briefly summarized the decisions of the courts,

yet it helped us understand that court cannot order placements in specific locations.

Although utilized by scholars when conducting research on documents, Antaki, Billig, Edwards, and Potter (2003) argue that in order to qualify as an analysis, the work must go beyond summarizing and studying textual elements to also include analyzing the messages embedded in the text. There were many other articles in addition to the Bateman studies that utilized the same summary and textual elements format in reviewing court decisions that are criticized as not being an analysis (Journal of Law & Education, 2012; Journal of Law & Education, 2011; Recent decisions, 2013; "Supreme Court decisions", 2012;). Nevertheless, according to Rock and Bateman (2009) practitioners can learn from studying due process final orders. Specifically, Rock and Bateman (2009) offer a policy suggestion for practitioners to explore how a FAPE is constructed in final orders in order to become better IEP team members by learning to provide a FAPE that is perceived by all parties as being a FAPE.

Research on Prevailing Parties

Research on special education due process has focused primarily on the types of cases brought to hearing, student characteristics, and factors related to prevailing at hearing or failing to prevail. For example, Zirkel (2012) reviewed 65 Seventh Circuit due process appellate decisions in Illinois after the Rowley decision in 1982 through 2010. Results indicate that the school district prevailed the majority of the time and the appeal usually resulted in no change in the original ruling. Kuriloff (1985) conducted a content analysis that delved into the factors affecting ALJ decisions on who prevailed or failed to prevail. It examined the first four years of Pennsylvania implementing due process after the enactment of PL 94-142 (prior to Rowley). One of the findings suggested that in order to win the case, schools had to convince the ALJ that their educational programming decisions were based on good faith attempts to educate the student

with a disability. Prior to Rowley, experts and cross-examining witnesses was not necessary to win. On the other hand, during the same time, parents had to persist and insist on a placement and program or against a school's suggested placement and program. Parents were required to have more exhibits in order to win. Also notable, was parents who had a child already in special education were more likely to prevail than parents new to special education.

In addition, Rickey (2003) analyzed all Iowa due process law judge decisions spanning over ten years. The data suggest that issues regarding placement of special education students result in the highest level of hostility in litigated issues dealing with special education. It would be useful to understand what is meant by hostility and how it is measured for the purposes of the study. For elementary school students, the majority of litigated issues dealing with special education due process hearings arose from evaluation. Conversely, for middle school students, the majority of litigation arose from out of school disciplinary decisions, such as suspension. For high school students, conflict over placement gave rise to the majority of litigated issues. Boys formed the majority of students involved in the litigated decisions. Additionally, the school district prevailed 63% of the time. This long term study on ALJ due process decisions includes thick descriptions.

Since Rickey, utilized all cases in Iowa issues regarding sample selection are not in question. Jameson and Huefner (2006) utilized Lexis Nexis to identify and summarize federal court cases that dealt with the highly qualified teacher requirements after the reauthorization of IDEA (1997). Cases were divided into 2 categories based on who won, prevailing school district and parent, respectively. It found that deference was mainly given to the school district in these cases with federal judges wanting to avoid rating teacher qualifications. Explicitly excluded were ALJ decisions.

This trend of exploring who prevailed is evident in McKinney and Schultz's (1996) report on due process hearings. In an analysis of 189 due process cases from 1993-1995 (71 reached a final order), parents prevailed in 58% of cases reviewed. They examined the results by isolating individual issues and calculating win and losses.

Cope-Kasten (2013) conducted a mixed methods study on fairness in special education due process. This was carried out by interviewing ALJ's and by detailing who prevailed in the special education due process case. It found that a "failure to communicate" (p.1) was the reason for 210 due process in Minnesota and Wisconsin between 2000 and 2011. It also found that the school district was the prevailing party in the majority of these cases. This study purported that special education due process is unfair, and it called for an improved conflict resolution option. Additionally, Yocom (2010) conducted a Chi square statistical analysis on the prevailing parties in 480 special education dues process cases held between 2006-2008 in Texas. The school district prevailed in 82% of the cases.

Zirkel (2013a) offers an overall criticism on assessing fairness by enumerating who prevails, school district or parent, falls short of thorough analysis of due process. He goes further to suggest that there may be partial victories that get overlooked when looking at the totality of a case. This criticism supports Mckinney and Shultz (1996) methodology of disaggregating the issues and examining who prevails on a single issue at a time rather than the case level of analysis.

Autism-related Due Process Studies

At one point parents of children with autism dominated in victories in special education due process. For instance, Yell and Drasgow (2000) examined 45 FAPE-related special education due process final orders that were published between 1993-1998 involving students

with autism and the request for the Lovaas treatment (therapy for autism) to determine how an ALJ defined *appropriate*. Methods involved case review that categorized substantive and procedural violations, and factors contributing to prevailing. This case review examined who prevailed and the reasons for prevailing or failing to prevail. Results indicate that parents prevailed in 34 out of 45 cases and received reimbursement for Lovaas treatment 76% of the time. On occasion when school districts prevailed was when they made few procedural errors, used evidence-based procedures, experts, and implemented the IEP in a timely fashion. These factors contributed to their conclusions of how an ALJ "defines" *appropriate.* A more recent study had different findings, Hill and Kearley, (2013) reviewed 68 Autism related court cases on who prevailed. Results indicate that the school district prevailed 60% of the time, which indicates a possible shift from the prior parent prevalence dominance in autism-related cases. Bateman (2009c) reported on the special education due process hearing of William, a student with autism. His mother contested the appropriateness of his IEP and placement of her son in a private school for students with autism. The ALJ ruled in favor of the mother and ordered William to stay in the general education classroom since his academic performance was on par with students in general education. He was also ordered to receive a behavioral assessment.

Administrative Law Judges, Experts, and Attorneys

In order to succeed in a due process hearing one party must persuade the ALJ that a FAPE is or is not being provided. Whose duty it was to persuade was left up to the circuit courts until the Supreme Court settled this duty in *Schaffer v. Weast* (2005). The Supreme Court ruled that whoever is challenging the FAPE is responsible for proving his or her case. The burden to persuade requires an understanding of what is necessary to meet this burden. To illustrate this, Bateman (2010) conducted a case study on parents who wanted reimbursement for an

independent educational evaluation (IEE) or a second opinion evaluation by an outside party provided at public expense because the child with a disability (SLD and emotional disturbance) was not making progress in school. They also sought compensatory education (extra services for a school's failure to appropriately educate the child). The parents lost the case because they had to actually disagree with the school district evaluation in order to get the IEE paid for at public expense. No evidence was presented that the parents disagreed with any aspect of the school district's evaluation. This is a case study, albeit through summary rather than analysis, offered rich information on a due process case and failing to meet the burden to persuade.

The need for experts, advocates, and attorneys to present cases to ALJs in due process may be needed due to the increasing legal complexity of due process proceedings. In fact, Zirkel and Karanxha (2007) conducted an exploratory 145 special education due process final orders in Iowa to examine the legal complexity of hearings over time. They utilized a coding system and interrater reliability (.95) to determine if these cases are becoming more complex legally. Results were mixed, indicating that more legal citations are being utilized, less days were needed to issue a ruling—down from 169 days from 1978-1983 to 52 days in 2000-2005, more issues were being litigated per hearing, up from 1-2 to 3 from 2000-2005, and the hearing session time doubled, however Iowa is adjudicating cases within the allotted statutory time limits.

Administrative Law Judges

Since the ALJ ultimately settles the dispute at an administrative hearing; several studies have examined the qualifications and the potential bias of ALJs. For example, Schultz and McKinney (2000) investigated ALJ bias from 227 special education due process cases from 14 ALJs using discriminant function analysis. They found, seven ALJs were attorneys and seven were non-attorneys. Out of the 227 cases, 94 cases went to final order. Results indicate that

attorney ALJs (r=. 47) had cases settle prior to reaching the final order stage, and non-attorney ALJs conducted hearings that appeared to be less contentious. Additionally, Katsiyannis, and Klare (1991) conducted telephonic interviews with state administrators on due process (n= 51, 50 states and District of Columbia). Interrater reliability was achieved at 100%. Results indicate that 81% of ALJs are appointed by the state, 49% use lawyers as ALJs, and 18 states mandate that only a lawyer can be an ALJ. Zirkel and Scala (2010) found that most ALJs are attorneys. One study noted that Female ALJs ruled in favor of the parents more often than male ALJs (Mckinney & Shultz, 1996). In another study on due process decisions, Newcomer, Zirkel, and Tarola (1998) analyzed 347 special education due process and appellate cases over a 16-year period in Pennsylvania. Their findings suggested that the administrative law judge's outside occupation (i.e., attorney, teacher, or some other profession), the student's disability category (SLD, ADD etc.), and the nature of the litigation issues (placement, evaluation, least restrictive environment, etc.) impacted the decisions rendered in special education due process hearings. At the appellate level, the nature of the litigation issues also affected the decisions rendered. In addition, the gender of the involved student and district population density affected the administrative law judges' decisions. The Newcomer, Zirkel, and Tarola study examines the nature of the issues; however it does not make propositions about what the issues tell us about systems as a whole.

Experts and Advocates

Prevailing in due process hinges on the use of experts (Meyer, 2011; Zirkel, 2014). Experts can help a party meet his or her burden to persuade. Studies have suggested that judges give deference to school district personnel that may be seen as experts (Meyer, 2011; Zirkel, 2014). To qualify as an expert, ALJs look at qualifications, familiarity with the child, disability,

and knowledge of programming that offer a FAPE for that particular child (Mandlawitz, 2002; Yell &Drasgow, 2000). Experts have the power to sway ALJ's as cited by ALJs themselves in their own Final orders. For example, Bateman (2008a) summarized the case of Chris, a student that failed to qualify as having a learning disability by the school district evaluation. An independent educational evaluation/second opinion (IEE) disagreed with the school districts assertion that this child did not have a learning disability. The parent sought reimbursement for the (IEE) and an LD affirmation for special education and related services. The ALJ ruled that Chris was ineligible for special education services since the need was not established (the parent's own expert said it was not necessary) and no reimbursement for the parent's IEE will be granted. School districts often have experts on hand that are paid for with taxpayer funds. For instance, Havey (1999) surveyed 400 school psychologists on their role in special education due process hearings. They found that 38% had been called as expert witnesses in these hearings. Parent also must provide experts at their own expense in order to prevail.

Advocates are viewed as experts, however the court has ruled that they cannot be reimbursed for their services. For example, IDEA (2004) allows parents to bring advocates and people with specialized knowledge to due process hearings. When it comes to being reimbursed for advocacy fees if the parent prevails, the Supreme Court settled this by saying, in effect, attorney means attorney. In particular, in *Arlington Central School District Board of Education v. Murphy* (2006), the Supreme Court ruled that IDEA did not expressly give parents the right to recoup expert fees, which included the fees for advocate representation, even when they prevailed. This was ruled despite needing experts to prove that a FAPE was or was not provided in certain cases (Yell, Katsiyannis, Ryan, & McDuffie, 2008).

Attorneys' Fees

Where the law is silent, the court is forced to speak. This statement is historically accurate when it comes to prevailing parents recouping the fees and expenses accrued during, and in preparation for, special education due process hearings. The IDEA did not always have a written provision that dealt with the reimbursement of reasonable attorneys' fees. In fact, in *Smith v. Robinson* (1984), the Supreme Court ruled that under PL 94-142 attorneys' fees could not be awarded to prevailing parents since it was not expressly written into the law. Congress responded to this in 1986 and amended PL 94-142 to include an explicit provision for prevailing parents to recoup their reasonable attorneys' fees (attorneys' fees are addressed currently section 34 CFR 300.510 of IDEA (2004)). This amendment thereby voided the Supreme Court's ruling that prohibited reimbursement. Unlike with parents, the law has never allowed school districts to recoup their attorneys' fees in defending against denials of FAPE. That changed slightly in 2004. In its 2004 reauthorization, IDEA introduced a new provision that held parents liable for school district attorneys' fees only in cases where parents were found to have filed a completely meritless due process case that was vexatious in nature. IDEA cases involving the reimbursement of attorneys' fees due to a vexatious filing was notably absent from the search results.

Unlike with school district, there is literature on the parental recouping of fees from the school district. For example, "Attorneys' fees" (2002) reviewed several special education attorneys' fees reimbursement related written rulings including the *Sabatini v. Corning-Painted Post Area School District* decision. In this decision, the family of a child with depression, anxiety, and a learning disability settled with the school district and was awarded attorneys' fees and a private school placement at public expense. The school district thought that the attorney fees were excessive for the area and that since the parents did not prevail on the very first due

process case, the fees should be reduced. The court rejected both arguments citing that the succession of due process cases eventually led to the prevailing party settlement for the child. Also, since there were no attorneys with experience in special education law in Corning, the mandate in IDEA for reasonable fees for the area could not be applied, although the court did adjust the fees by 10,000 dollars, from 59,000 to 49,000. It also reviewed the case of *L.C. v. Waterbury Board of Education* (2002) that found that attorneys' fees were ordered for a child, L.C., with a behavioral disability that regressed behaviorally in the school district's placement. The school district was ordered to pay for the attorneys' fees but not ordered to pay for the attorney to attend IEP meetings that were not mandated by an ALJ (the reviewers found the same ruling in *E.C. v. Board of Education of South Brunswick Township*) and it also found that IDEA did not allow for attorneys' fees to be reimbursed to represent L.C. in juvenile court due to behavioral and legal issues. Attorneys' fees may have to be repaid if the decision is reversed on appeal. For instance, "Attorneys' fees" (2002) noted that the seventh circuit ruled that attorneys are required to reimburse payments of attorneys' fees based on reversal of rulings on appeal.

Attorneys can assist in settling cases prior to due process. In their above referenced study, McKinney and Schultz (1996) found Parties were more likely to settle prior to the hearing reaching the point of a final order if both parties were represented by an attorney. This quantitative analysis of due process hearings provides critical insight into understanding a role of an attorney because it illustrates that the presence of an attorney at due process hearings increases the likelihood of settlement.

Pro Se Representation in Due Process

The only place that IDEA (2004) mandates that no attorney be present is in the resolution meeting that must be convened 15 days after filing for due process. All other times, it is up to the

party. Without an attorney or an advocate, parents must represent themselves in due process. Self-representation in court is referred to as being *pro se*.

The Supreme Court clarified in *Winkelman v. Parma* (2007) that the right to parental *pro se* representation extends beyond due process to the federal appellate level. The utilization of *pro se* representation has alarmed some in the legal community. For example, legal scholars have argued that *pro se* parents could have damaging affects on the very right to a FAPE that they are fighting for to receive; their lack of legal knowledge and training could lead to them losing the case, and thus denying their own child a FAPE (Bathon, 2005; Flaks, 2009;Steiner, 2008). As noted earlier, attorney representation is a factor in increasing the likelihood to prevail in FAPE-related cases (Cope-Kasten, 2013;McKinney & Schultz, 1996; Sander, 2008). Nonetheless, this is a risk that parents will have to take since there are few special education attorneys (Rangel-Diaz, 2000).

Losing is not always the case; there have been case studies that reported on pro se parental victories. Specifically, Bateman and Jones (2010) summarized the due process case of DJ, a child with behavioral and learning disabilities. His mother, a woman without a post-high school education, represented her son pro-se. The mother won compensatory education for the student's denial of FAPE for his out of school placement that did not provide DJ with transportation. The district was ordered to provide the student with behavioral supports and a functional behavioral assessment. This, however, is not the norm. In fact, Sander (2008) investigated 194 final orders in Maryland, Virginia, West Virginia, North Carolina and South Carolina. Results indicate that parents are pro se 40% of the time and the school district is represented 99.5% of the time. School districts prevailed 75% of the time, while parents prevailed approximately 10% of the time.

Pilot Study on Constructing an Appropriate Education

Based on the review of existing literature, a pilot study was conducted by this researcher to explore the feasibility of using the Johnstone Method of discourse analysis to examine how ALJ's in Florida determined an appropriate education for a student with a disability as expressed in his or her final orders.

Purpose

Given the argument of whether or not Rowley is moot, a pilot study was conducted to determine to what extent, if any, has the manner in which *appropriate* is constructed in special education due process hearing final orders evolved or remained static over the time periods prior to the Supreme Court decision in Board of Education v. Rowley (1975-1982), after the decision in Rowley (1983-2004), and after the reauthorization of the Individual with Disabilities Act in 2004(2004-2010)? Additionally, it investigated if CDA could be used to explore the way *appropriate* has been interpreted by special education ALJs in their final orders across the specified time periods.

Perspectives or Theoretical Framework from the Pilot Study

This researcher chose CDA as a way of studying discourse and its ability to perpetuate power structures by influencing ways of thinking and believing through value-laden language that is grounded and contextualized in social systems of dominance and oppression (Fairclough, 1992; Fowler, 1981; Johnstone, 2008). CDA critically examines the author's decisions in word selection and semiosis through a critical theorist epistemology. It takes the stance that language has the power to influence ideology and, in turn, ontology. A major agenda of CDA is to expose the hegemonic forces that are embedded in the text as a method of battling social inequality. It

does not usually begin with a theory; it looks at the data to determine imbalances of power. (Johnstone, 2008)

Pilot Study Method

Prior to exploring any final orders, this researcher examined the researchers own ideology and beliefs about special education due process hearings. This researcher participated in a special education due process hearing in Florida. At this hearing, the student prevailed because the administrative law judge told the school district's attorneys that the law was clear and they had no chance of winning. The case resulted in a settlement and a dismissal. This experience has led this researcher to believe that the process is primarily fair and unbiased. This researcher did not subscribe to an ideology of hegemony in special education due process hearings; however this researcher does believe that school districts are more likely to prevail because they have more funds to hire good attorneys. This is why two cases per time period, one case with the parent as the prevailing party and the other with the school district as the prevailing party were chosen.

Data Sources

The data selection process was purposive. Only Florida special education due process final orders occurring during the research time periods were selected. Documents were obtained from the Florida Division of Administrative Hearings and the State of Florida's online public portal. The selection criteria for the pilot study was that the ALJ had to have a detailed rationale for his or her decisions and that the cases had to be FAPE-related. There were 4 available final orders from 1975-1978, 111 final orders written for the time period after the implementation of IDEA (2004) to 2010, and the researcher only reviewed 50 final orders from1983-2004. The researcher read through the final orders to determine who prevailed and if there was a detailed

rationale for the ALJs decisions. Then, the researcher selected the two final orders per time period with the thickest descriptions. For each time period, one final order was selected with the school district as the prevailing party and one with the parent as the prevailing party.

Iterative Process

Next, the iterative process suggested by Johnstone (2008) began. Johnstone (2008) recommends reading a document for discourse analysis first without criticism, and then again critiquing the problem. She believes that you must *know* your documents in order to study them. Johnstone (2008) also suggests that researchers could explore the text using a heuristic to find out what is interesting about a text without creating a list of what the researcher expects to find. No list was created of what was expected to be found, however since the research is guided by research questions, the researcher chose to use those questions as a guide in finding out if they could be answered by exploring due process final orders. The study was contextualized within the time periods. For example, in 1975 the Vietnam War was ending and a major legislation (EAHCA) was enacted to give all children with disabilities the right to a free and appropriate public education. Also, in 1982 the Supreme Court attempted to add clarity to the term appropriate, and finally in 2004 IDEA was reauthorized with possible new definitions of appropriate.

The iterative process began with the researcher read all due process final orders uncritically. Then, the researcher rereads all of them critically while engaging in line-by-line coding. The codes were all entered in a database that stored all case numbers for comparison by time period. Johnstone states that most discourse analysts do not use interrater reliability because decisions such as whether something occurs in the "passive or active voice is not subject to interpretation" (B. Johnstone personal communication, April 4, 2010). In a sense *appropriate*

may not be subject to interpretation when the administrative law judge says that something is appropriate or inappropriate, however imbalances of power such as deference may be subject to interpretation. For that reason, this analysis utilized interrater reliability. The interrater followed the iterative process of the researcher. The interrater coded 20% of the randomly selected final orders independently. Then, the researcher and the interrater compared the coded texts. Interrater reliability was achieved at (.8).

Results and Discussion

The results indicate that *appropriate* has been an arbitrary and capricious term since its inception in the Education of All Handicapped Children's Act in 1975. The cases studied from 1976 and 1978 suggest that the administrative law judges utilized the term appropriate, however they did not explain what appropriate was or their legal standard for citing that an education was either appropriate or inappropriate. Instead, they cited reasons for their decision such as it would be inappropriate to place a child with *normal* intelligence in a school with just students with disabilities. Or, "the learning disabilities program in the Dade County Public Schools is adequate for most children and Respondent refers children to private schools only in extreme cases involving children who cannot be properly handled in the public school system for unusual reasons." This led me to ask: What children could not be handled properly in public schools and What are those unusual reasons?

During the periods after the decision in Rowley, there were no notable differences between the cases. Appropriate was defined as "A free appropriate public education means that the educational program is reasonably calculated to provide Respondent with educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982)." In *J.S.K. v. Hendry County School Board* (1991), the court stated: "We . . . define

'appropriate education' as making measurable and adequate gains in the classroom." Other than the definition given by the 11th circuit (which includes the state of Florida) that only applies to courts in the 11th circuit, the years of the cases could have been substituted and an analyst would not know the difference with the one exception. In fact, these cases are all very similar, however after the decision in Rowley the administrative law judges began to defer to the judgment of teachers and other experts. One administrative law judge cited that "Indeed, nothing was presented at hearing beyond the parents' subjective belief that *** can perform in the current placement." This could be an example of the administrative law judge deferring to the judgment of the teachers. This researcher wondered what the ramifications are for suggesting that parents view is 'subjective'. This statement implies that teachers are objective or that their beliefs about the students are more credible than that of the parents.

Also, regardless of the prevailing party, the administrative law judges all cited experts' opinions as their reasons behind their decision. They would defer to those with more 'expertise'. In one case, an administrative law judge stated, "had Petitioner's case been presented by a skillful attorney, the undersigned cannot make decisions based upon what he imagines such a case might have looked like; rather, he is constrained to do the best with what he has been given." Another example of this occurred in 2004, the administrative law judge cited expertise and lack of expertise as the rationale for deciding that the public school could not educate that child appropriately.

The due process final orders after the Supreme Court decision in Rowley referenced Rowley as a basis for their ruling; however after a critical examination of the due process final orders, this researcher noticed that there was more than that decision that went into these decisions. Clearly, CDA could be used as a methodology for exploring the possible evolution of

the term appropriate in special education due process final orders. Also, like Johnstone (2008) states, what a person says means as much or more as what they leave unsaid. The words of administrative law judges are powerful. Appropriate only goes as far as the administrative law judge who is deciding the case. The "basic floor" of services appears to have the potential to be raised or lowered depending on how well the challenging party can put on a case to persuade the administrative law judge. Administrative law judges used words like persuade and convince to signify the person that would be given deference in their final orders.

Limitations

The potential limitations of this study are that the results from this analysis are only generalizable to the findings in the current study because of the limited number of studies examined. The study excludes students with giftedness as their primary identification. Split decisions in terms of issues are also excluded.

Significance

Discourse analysis can be used as a methodology for studying how ALJs determined an appropriate education. Currently, the definition of appropriate appears to be similar to the Supreme Court's definition of pornography. The administrative law judge knows it when he or she sees it. This has implications for future policy in helping to clarify this term. It is also significant because the voices of parents in determining appropriate appear to be inaudible to the ears of administrative law judges.

Summary and Conclusions

In conclusion, even if the ninth circuit is correct, and IDEA has not raised the standard of a FAPE, and *appropriate* is still the "basic Floor" outlined in Rowley, how an ALJ determines FAPE needs to be examined in the cases available. This study is needed for both practical and

theoretical reasons such as understanding how *appropriate* is constructed and theoretical reasons such as critically examining the power dynamics in final orders. Several of the above studies examined the contents of the ALJ decisions, and perceptions of parents in the IEP process. Studies are conflicted over perceived parental satisfaction in the IEP. Some studies indicate that parents are generally satisfied with the IEP process (Cho & Gannotti, 2005; Fish, 2008; Miles-Bonart's, 2002), while other studies indicate that parents are dissatisfied with the IEP and are not treated as equal partners (Childre, &Chambers, 2005; Fish, 2006; Hess, Molina, and Kozleski's, 2006; Mehan, 1983). Studies also indicated that attorneys and experts were more likely to increase the likelihood to prevail.

Many studies reviewed legal cases. The primary methods of reviewing final orders and other legal rulings are the summary, enumeration, and/or extrapolation of key factors such as who prevailed. These methods are advantageous is making legal rulings and final orders easily accessible to non-lawyers. Some of the limitations are that these methods often do not outline a specific research method, an epistemological perspective, nor does it analyze the data. No studies examined the discourse in administrative law judge final orders to uncover the embedded messages in the text. From the pilot study, it was learned that exploring due process final orders could help in understanding how an ALJ constructs appropriate.

All in all, the existing literature suggests that parents are generally satisfied with the IEP process; however, there is some contention over what constitutes an appropriate education for a student with a disability. Sometimes this can lead to a parent filing for due process. Due process cases have been studied, and the rulings have been analyzed based on the types of issues litigated, the gender and disability of the student, and who won or lost the case. None of the studies examined administrative law judge decisions to determine how the administrative law

judge constructed an "appropriate" education for a student with a disability in the final order. This would be important to know because these decisions could reveal information about the nature of the system and the process of constructing appropriate by the administrative law judge. Also, studies on voice and perception in the IEP process indicated that a breakdown in communication between the parents and the school district could occur. A select number of studies utilized discourse analysis to examine the legal system and illustrated that this methodology provides an effective tool for the analysis of court documents.

Given the current state of the research in special education due process, the gaps in the existing literature, and the vagueness of an *appropriate* special education, a CDA on the construction of *appropriate* in administrative law judges' final orders is needed to shed light on what is meant by an appropriate education. This CDA illuminates the evolution of an appropriate education pre and post Rowley and post-reauthorization of IDEA (2004). This study answers the critical question of: to what extent, if any, has the manner in which *appropriate* is constructed in special education due process hearing final orders in Florida evolved or remained static over the time periods prior to the Supreme Court decision in Board of Education v. Rowley (1975-1978), after the decision in Rowley (1983-1986), and after the reauthorization of the Individual with Disabilities Act in 2004(2004-2007)?

CHAPTER 3—METHODOLOGY

Johnstone Discourse Analysis Methodology

The following sections are based solely on the Johnstone Methodology as outlined by Johnstone (2008). It outlines qualitative discourse analysis, its history, the Johnstone Method, data analysis process, critiques of the method, and frequently cited experts in order to frame the methodological process of this research.

Qualitative discourse analysis comprises a multitude of systematic and rigorous methodologies that involve the subjective and interpretive study of communication and 'its effects' (Johnstone, 2008, p. 2). In discourse analysis, communication extends far beyond the traditional study of written, verbal, or manual language; however, it is primarily regarded as being a study of language. Some examples of non-traditional forms of communication in discourse analysis are employment positions, clothing style, facial expressions, gestures, or even dance.

Like language, messages and meaning are also communicated through these means. The uncovering of meaning in discourse analysis is a complex process that is rooted in perspectivism and open to the possibility of multiple meanings. Thus, the results of discourse analysis could possibly yield more questions than answers and leave the research question unanswered. It also has the possibility to answer the research question and/or to create a new research question after one immerses himself or herself in the data. Discourse analysis should not be conducted in a vacuum because many factors such as the relationship of text to prior text, experience, and context must be considered when interpreting meaning.

Discourse analysis attempts to interpret meaning by decoding meaning in the communicative process. This process of decoding communication to make meaning is commonly referred to as semiosis in this field. Studying discourse and making meaning is both a rigid and fluid process. It can be fluid because people draw inferences, set rules of discourse, and make generalizations based on their experience with discourse. On the other hand, it lends itself to fluidity because people utilize their prior knowledge about the rules and conventions of discourse to formulate new discourse. Additionally, as a part of fluidity, discourse analysis can be studied in several different ways depending on the stance of the scholar and the discipline or field. This study can yield criticism or description or both; however it usually results in description of the text (Johnstone, 2008).

Finally, another branch of discourse analysis worth mentioning is entitled CDA (CDA). CDA is a way of studying discourse and its ability to perpetuate power structures by influencing ways of thinking and believing through value-laden language that is grounded and contextualized in social systems of dominance and oppression (Fairclough, 1992; Fowler, 1981; Johnstone, 2008). CDA critically examines the author's decisions in word selection and semiosis through a critical theorist epistemology. It takes the stance that language has the power to influence ideology and, in turn, ontology. A major agenda of CDA is to expose the hegemonic forces that are embedded in the text as a method of battling social inequality (Johnstone, 2008).

Historical Overview of Discourse Analysis

The history of discourse analysis is often thought to have roots in anthropology, sociology, philosophy, and hermeneutics. However Harris (1952) first coined the term "discourse analysis". The history of this methodology is important because descriptive linguists helped in documenting and standardizing grammar and conventions in discourse in order to help analyze

language, and rhetoricians helped to explore the meaning behind language. Discourse analysis can be viewed through many epistemological lenses but relies heavily on an interpretist epistemology. CDA is thought to have historical roots in Marxism and within Gramsi's and Habermas' critical theory. This is one reason why this method explores imbalances in power in social systems (Johnstone, 2008).

Rationale for Discourse Analysis

The reasons for using discourse analysis can be vast. Johnstone (2008) asserts that a major reason to use discourse analysis is to explore the meaning and effects of communication. Discourse analysts can examine data from a multitude of angles, styles, and perspectives to make qualitative claims rather than to make generalizations about the population of the data. If someone wanted to make quantitative claims in discourse analysis, they could, however there would need to be a large enough sample size to generate statistical power in the data in order to generalize about the population of data. Another reason for using discourse analysis is to examine the relationship of a text to other texts, or to society (Johnstone, 2008). Johnstone argues that this method of questioning and analyzing the data is one of the most critical reasons for selecting discourse analysis as a research methodology.

Methodology

Research Questions

The research questions that discourse analysis can answer are similar to research questions in other methodologies (Johnstone, 2008). For example, discourse analysis can answer questions related to semiosis in communication, hegemony, society, self, text, context, purpose, experience, as well as a multitude of other questions that are asked by other fields. It can also attempt to answer the how and why research questions that are often asked in qualitative

research, or it can help to generate more questions for possible research exploration. In essence, the research questions asked in discourse analysis do not differ greatly from the research questions asked in other qualitative methodologies. The difference maker is the methodology or methodologies it uses for analyzing text to uncover meaning (Johnstone, 2008).

Sampling

Usually, discourse analysis requires a minute sample size to begin the analysis. The participants in discourse analysis are unique to this methodology. The participants are often the messengers such as the authors of a text or the people who are engaging in conversation and other forms of oral discourse. The discourse analyst is also a participant and an instrument because he or she is attempting to interpret the message that the messenger is sending. The messenger is a critical participant because he or she makes decisions on the message sent, the intent of the message, and the expected interpretation of the message. Who gets to interpret meaning depends on many factors including culture, position, and field of study. At times, the messenger, and the messenger alone, is the only person who gets to declare the true meaning of their words, and at other times that task of discerning truth is left to the receiver of the message (Johnstone, 2008).

Additionally, data are sampled based on the data that best meets the purpose of the study. Data can be found in anything that communicates a message. Usually in discourse analysis, a text is examined without a set of hard rules or criteria about what one expects to find in the data. If there is a preset criterion for the sample, discourse analysts must be open to eliminating this criterion after they examine the text, and accepting what emerges through critical examination (Johnstone, 2008).

Data Collection

The data collection for discourse analysis can include a host of texts such as books, poems, newspaper articles, websites, documents, and transcripts. It can also include both audio and videotapes, and song. For the purposes of discourse analysis, just one datum is enough as opposed to collective data. In discourse analysis the researcher based on purposive needs sets the inclusion and exclusion criteria for data. The researcher makes critical decisions about what data to include or exclude based on his or her need.

Frequency

Frequency in qualitative discourse analysis is measured by how many times a phrase or word appears in a text, and by examining its contextualized meaning. Also, for evolving documents such as websites or social networking pages that change frequently, frequency can mean that periodic or routine examining of those sites (Johnstone, 2008).

Logistics

Discourse analysis does not usually have the traditional logistical dilemmas that are often found in other types of research. Usually data for discourse analysis has already been captured in a text, or on an audio or videotape. The relationship between the participant or data and the researcher is both distant and close. It is distant because the data are not usually analyzed in the moment of occurrence as in the case of a text. However, that relationship is close because a discourse analyst will study the discourse intensively in order to make meaning. They may also study a text to create rich descriptions or to critically analyze the text within its social and/or political context. Situating a text within a context is logistical and helps to establish coherence, which is a sense of connectedness from one piece of text to the next. The location for analysis depends on what discourse analysis is about or related to because this is how one would truly

understand meaning. Text that does not appear to be located in something that someone can reference can be considered nonsensical (Johnstone, 2008).

Data Analysis

Analyzing data in discourse analysis is a complex and iterative process. Some factors that could be considered in the process are the interrelations between self, context, subtext, text, perspective, and experience.

To begin, the self reflects who you are, and what you know and believe. Knowing the self may add clarity in understanding the rationale behind the decisions a researcher makes in revealing the possibility of meaning. Like the self, the context is intimately involved in the meaning making process. The context helps the researcher to see how the text is situated, what the circumstances surrounding the text are, and the framework for viewing the text. The context, whether it is sociological and/or situated in the moment of communication, adds to coherence of the text by allowing the researcher to see that the text is connected to factors outside the text. It also allows the researcher to interpret meaning in relation to its context. This is important because the meanings of the same phrases could take on distinctly different meanings when examined in context. Another factor that may need to be examined is the subtext. The subtext examines the possible implications in the text.

In discourse analysis, what is implied may be even more important than what is overt because it aids in helping to reveal meaning. The subtext could possibly be examined in relation to your knowledge of its context. An example of a bridge between subtext and context is intonation. Intonation has to do with both inflection and tone. This can be detected based on hard rules or our experience with discourse. Intonation can be real or imagined because the hearer may misinterpret the intonation of the speaker and it can change the meaning of the discourse. In

order to reduce misinterpretation of meaning intonation must be taken in context. For example, if a speaker says, get out of here in response to a joke. A possible meaning of the phrase "get out of here" could mean leave if said an angry tone, or that a joke is unbelievable if said in a happy tone (Johnstone, 2008).

Johnstone (2008) asserts, as with subtext and context, that a text never stands alone. It must be examined through other factors outside the text. Current and prior texts allow the researcher to compare one text to other texts within the genre to help uncover meaning. The perspective, the angle and lens in which we view the text, must be known in order to understand the researcher's rationale for making decisions about the possibility of meaning. This could include epistemology as well as the rationales as to why the researcher asked specific questions of the text, and their possible interpretations of the meaning in the text.

Finally, Johnstone argues that experience plays a major role in the discourse analysis process. Experience affects the manner in which a text is viewed and interpreted of the text. For example, our experience with hedging can help us understand meaning. It can signify being noncommittal, deference, or that something is an option. For example, when a parent is speaking about their child and they say that they *may* take them to the movies on Saturday. Our experience with hedging may tell us that the parent is not trying to disappoint the child in case the plans to attend the movies fall through. The parent is indicating that this is only a possibility. On the other hand, if a patient is speaking to a doctor, he or she may want to use a hedge when describing his or her condition in order to show deference to the doctor's judgment.

These factors, to name a few, are interrelated in the meaning making process in discourse analysis. Since these factors are all interrelated in communication and interpretation, they must be considered when analyzing discourse. This helps discourse analysts as they attempt to

decipher the messages that were sent, the sender's intent, the messages that were received and perceived, and the manner in which they were received and perceived. One keynote to make is that we cannot see perceptions (they are invisible and psychological) unless they are specifically referred to in discourse. It takes the stance that communication is not an objective and agenda-less process. It is, in fact, a deliberative process that has a purpose whether realized or unrealized. Because of this, the function of the researcher is to analyze that process (Johnstone, 2008).

Having a method for exploring text has the potential to help the researcher with looking for what is actually in the text rather than what the researcher expects to find in the text. This method of exploration is defined as a heuristic, and a major purpose of a heuristic in discourse analysis is to provide the researcher with a tool for exploring what is in the text. Johnstone uses the following explicit six part heuristic as a possible:

> Discourse is shaped by the world, and discourse shapes the world. Discourse is shaped by language, and discourse shapes language. Discourse is shaped by participants, and discourse shapes participants. Discourse is shaped by prior discourse, and discourse shapes possibilities for future discourse. Discourse is shaped by its medium, and discourse shapes possibilities of its medium. Discourse is shaped by purpose, and discourse shapes possible purposes. (2008, p.10)

In essence, Johnstone states that:

> discourse and the inferences we draw from discourse are influenced by society, and it influences society; Text and communication are defined by relationships, and it aids in defining relationships; Discourse is influenced by the freedom and constraints of language, and it influences language; Discourse is shaped by expectations created by

> familiar discourse, and new instances of discourse help to shape our expectations about what future discourse will be like and how it should be interpreted; Discourse is shaped by the limitations and possibilities of its media, and the possibilities of communications media are shaped by their uses in discourse; Discourse influences our objectives and agendas, and it influences our potential objectives and agendas. (2008, pp. 9-18)

Johnstone's first heuristic implies that discourse and the inferences we draw from discourse are influenced by society, and it influences society. Take a moment to think of an image that comes to mind when you hear the following: a man, a real man, and half a man. What does it mean in society when someone uses the term *a man*? It could mean someone who is male, someone who is manly, someone who is over the age of 18 and male or a host of other possibilities. In discourse analysis one could analyze what it means to be a man, a Mexican man, an American man, as well as what it means to not be a man. Some of the assumptions being made are that manhood is knowable, and that there are shared characteristics in manhood, that culture influences manhood, and that manhood is different from womanhood. If we looked at the term a real man, possible meanings are masculine, supportive, strong, authentic in manhood, more than just being male, or compared to other males this person is better. Implications of the term real man are: there are imposters or men that are not really men, there is a definition of manhood, and there is an authentic man that is recognizable. Half a man would also conjure up possible meanings. If someone does not fit into societies view of manhood, they could be considered effeminate, a child, a wimp, or someone who is not a provider. A researcher could explore how the discourse or discourses on manhood influence society and are influenced by society. This process would be repeated for the remaining five heuristics.

Overall, you must first read the text without critique or analysis. This is referred to as the

uncritical read. Then, read it a second time for possible themes that are contained within the text using a heuristic. Utilize a line-by-line system for coding, memo the text and list the possible questions, or answers to questions that appear in your analysis of the data. Explore the possibilities of meanings using all relevant factors which include the context, relationship to other texts in its genre, pretext etc. Finally, be open to the possibility that there are several right answers, no right answers, or just questions (Johnstone, 2008).

Rigor

The quality indicators suggested for discourse analysis requires a rich description of purposive documents, ethical treatment of private documents, and the secure archival of documents; member checks or interrater reliability could be also be a quality indicator depending on the interpretive nature of the study **(**Brantlinger, Jimenez, Klingner, Pugach, & Richardson**,** 2005).

Controversies and Critiques

The major criticism of discourse analysis is that it allows for the possibility of many answers to research questions as well as no answer to the research question. This method also allows for multiple questions that arise from being immersed in the data. It is also not guided by preset theories but by an exploration of the data. Essentially, this method is criticized because it does not follow the traditional research question and answer model (Johnstone, 2008).

Frequently Cited Experts

Barbara Johnstone, a professor of linguistics and rhetoric at Carnegie Melon University, is a frequently cited expert on discourse analysis

. Norman Fairclough, a retired professor in the United Kingdom, is a frequently cited expert on CDA. Teun Van Dijk and James Paul Gee are also other frequently citied experts on discourse

analysis (Johnstone, 2008).

Examples and Exemplars

Davies (2003) provides an example of discourse analysis through its examination of the functions of discourse situated in context. Askildson's "Discoursal & Generic Features of U.S. Army Obituaries: A Mini-Corpus Analysis of Contemporary Military Death Announcements" (2007) also conducts discourse analysis in its study of army obituaries through the application of Johnstone's Heuristic. Both these articles, regardless of methodology, are examples of discourse analysis because they examine the text in order to uncover a multitude of meaning. Finally, Johnstone's (2013) article entitled "100% Authentic Pittsburgh": Sociolinguistic authenticity and the linguistics of particularity is an exemplar because it is a discourse analysis using the Becker inspired Johnstone Heuristic. This analysis is the format from which this dissertation is derived.

Adjustments from Pilot Study

After presenting the initial pilot study above at a research symposium, reflecting on the process, and getting feedback from doctoral level peers assigned to review the pilot study for the symposium, as well as a dissertation committee, a professor in language studies with a decade worth of experience and contacting Barbara Johnstone, several adjustments to the present study were made. These adjustments included modifying the research question and removing the inter-rater in favor of using specific textual evidence to support claims and arguments. Also, using inter-raters is not a standard practice in discourse analysis (Johnstone, 2008). Additionally, the research question was revised.

Current Research Question

In the pilot study, the research question dealt with how *appropriate* was interpreted. Using the word *interpreted* presupposes an already established construction of appropriate. The

more fitting process would look at how *appropriate* is constructed. The new research questions are:

Research Questions

1. How has an *appropriate* education been constructed by Florida administrative law judges in special education due process hearing final orders prior to the Supreme Court decision in *Board of Education v. Rowley* (1975-1978)?
2. How has an *appropriate* education been constructed by Florida administrative law judges in special education due process hearing final orders after the Supreme Court decision in *Board of Education v. Rowley* (1983-1986)?
3. How has an *appropriate* education been constructed by Florida administrative law judges in special education due process hearing final orders after the reauthorization of the Individuals with Disabilities Education Act in 2004 (2004-2007)?
4. To what extent, if any, has the construction of an *appropriate* education by Florida administrative law judges in special education final orders evolved from the implementation of PL 94-142 to the Rowley decision (1975-1978), after the Rowley decision (1983-1986), and after the reauthorization of the Individual with Disabilities Education Improvement Act in 2004 (2004-2007)?

Purpose

The purpose of this study is to investigate how Florida ALJs construct an *appropriate* education for students with disabilities. It examined and compared the construction of an *appropriate* education prior to the Supreme Court decision in *Board of Education v. Rowley* (1975-1978), after the decision in Rowley (1983-1986), and after the reauthorization of the

Individual with Disabilities Education Act in 2004 (2004-2007). Then, it provided an analysis of each time period and an evaluation of differences between them. It exposed the power imbalances in this construction. It recommended policy changes to help align policy and practice. This analysis on the micro-level was utilized to see what the discourse says about the macro-level or the overall social system (Haspel & Tracy, 2007; Mehan, 1983; Johnstone, 2008).

Data Sources

The data sources included six final orders out of 127 that met the inclusion/exclusion criteria. From those cases, only cases that were rated as a level three on a researcher created thickness rubric were selected. Two final orders per time period have been examined; one final order has been selected where the parent prevailed and one where the school district prevailed. The smaller amount of text was used in order to have a more in depth analysis (Johnstone, 2008). Also, having two different prevailing parties controlled for researcher bias and allowed the researcher to explore the construction of an appropriate education regardless of who prevailed.

These final orders were obtained from the Florida Division of Administrative Hearings (DOAH) and the Florida Department of Education (FLDOE). This process involved requesting the final orders through the Freedom of Information Act (FOIA) since all final orders previously available through the online portals at DOAH were removed. In response to the FOIA request, the State of Florida stated that there were no cases from 1975 to 1978. Nonetheless, the researcher was in possession of final orders from this time period since they were collected when the online portal was open to the public. The State suggested that it was probably a coding error why they were unable to locate these final orders. The researcher had to speak with State of Florida's attorney and requested, that like other current cases that are available online through FLDOE, that the names and titles of public employees not be redacted. Initially, the State of

Florida said they had to do this to protect student information under "FERPA". The researcher then made promises to help get these documents released.

This study also focused only on Florida because various circuits have different precedential interpretations and governing rules of IDEA (Brizuela, 2011; Brunt, & Bostic, 2012). The focus on only one circuit helped to eliminate conflicting rulings and systems among the judicial circuits. Specifically, Florida uses a one-tier system that has the ALJ as the final arbitrator unless the ruling is appealed within 30 days (Florida Procedural Safeguards, 2006).

Only FAPE-related cases that have received a full ruling from an ALJ were selected for review. Cases settled in mediation and resolution meetings were not analyzed. Also, this author has personal experience going to special education due process hearings in Florida so experience was a factor in state selection.

Additionally, a pilot study was conducted on this topic so two of the six studies will come from the pilot study. These cases were selected due to their rich descriptions and the unavailability of any other cases for the period prior to the 1982 United States Supreme Court case of the *Board of Education v. Rowley*.

All of the final orders were purposively sampled due to rich descriptions and having detailed rationale for rulings (Zirkel, 2013b). A rubric was created to assess the richness of the final orders and to determine the inclusion and exclusion criteria. The final order summaries were reviewed first to determine which cases best fits the inclusion criteria. Then, an unpublished database on Florida special education due process final orders created by Karanxha was reviewed to determine any cases could be excluded based on the rubric. Then, the researcher read and rated all cases that were not excluded.

Inclusion/Exclusion Criteria

In order to be included in the study, the disputed issues in the final order had to address issues related to the appropriateness of a student with a disability's education. It had to be held in Florida during the selected time periods. It had to be a clear victory for either side; therefore partial victories on the issue of a FAPE were excluded. There had to be a detailed rationale for the rulings and the case had to start during the time periods selected (Zirkel, 2013b). To be included in this study, the final order had to be rated as a three on the researcher-created thickness scale. The scale is as follows: **Inclusion/ Exclusion Criteria Rubric**

1. **Richly Descriptive—3** FAPE related. One side clearly prevailed on the issue of FAPE. The ALJ clearly explained reasons for final decision, describes in detail the rationale for how the evidence supports final decision.
2. **Descriptive—2** FAPE related. One side clearly prevailed on the issue of FAPE. Includes explanations for decisions. Has some rationale for how the evidence supports final decision.
3. **Minimally Descriptive—1** FAPE related. One side clearly prevailed on the issue of FAPE. Limited explanations for decisions. Little or no rationale of how evidence supports final decision.
4. **Excluded—0** Split decision on the issue of FAPE. Not Florida. Dismissed. Not Disability related. No explanations and rationale for decisions. Written outside the three year time period or did not begin within the three year time period.

Sample

After consulting with an expert in discourse analysis who is a professor in language studies, has published many articles on discourse analysis, and has approximately 10 years experience in

discourse analysis, the suggestion was made that the sample size needs to be smaller in order to have a deep analysis. The expert's views on a smaller sample size were in line with Johnstone (2008). This study used a purposive sample of six special education due process final orders in Florida.

For the first time period, only two final orders were available that met the criteria. For the period of 1983-1986, there were 35 cases and only 10 met the criteria of scoring a three on the rubric. For the period from December of 2004-2007, there were 90 available cases but only 23 met the criteria of scoring a level three on the thickness rubric. Out of those 23, the cases with the most rationale for decisions were selected. If there were equally rich final orders available, the researcher attempted to match disability, grade level, and issues disputed.

The selected cases included two 12 page final orders from 1976 and 1978 (six single-spaced typewriter pages). It also included a 32 page final order from 1986 where the parent prevailed and a 20 page final order from 1986 where the school district prevailed (typewriter-set pages). The final cases selected included a 37 page final order from 2006 where the parent prevailed and a 95 page final order from 2007 where the school district prevailed.

Epistemology

The researcher did not go into the study assuming that there would be an imbalance of power between the parents and the school district that would automatically result in a win for the school district. The researcher understands that monetary and school resources may present an advantage to the school district. This is one reason why the researcher sought a balanced purposive sample that had both parental and school district victories. After reflecting and consulting with an expert, the epistemological perspective selected is discursive and critical in that by doing a microanalysis it illuminates social practice (Haspel & Tracy, 2007; Mehan, 1983;

Johnstone, 2008). The researcher will analyze discourse through a critical lens. If the data reflect a power imbalance, the researcher will make those claims if supported by textual evidence. The researcher makes policy recommendations, corrects misconceptions, discussed how text the functions (move from the micro to the macro level), and advocates through social action by conducting a discourse analysis in a critical manner (Haspel & Tracy, 2007; Mehan,1983). This epistemology is connected throughout the methodology.

Significance

In addition to the significance outlined in the pilot study, this study filled a gap in the literature. It moved beyond studying who prevailed to determining how appropriate is constructed. Then, it exposed the hegemony in the construction. Understanding the construction of an appropriate education is useful to parents, practitioners, and policymakers. This study illuminated practice and explored the changes in the construction of a*ppropriate* over time. It made public policy recommendations to rectify inequalities.

Contextualization

In addition to contextualizing this study in dominance and oppression (Fairclough, 1992; Fowler, 1981; Johnstone, 2008), this study is also contextualized in the Vietnam War, the Education for All Handicapped Children Act, the Supreme Court decision in Rowley, the 2004 reauthorization of IDEA, and the disability rights movement because Johnstone (2008) suggests that discourse influences and is influenced by societal events.

Assumptions

Before analyzing any final orders using CDA, the researcher explored her own ideology and presuppositions in regard to special education due process hearings. The researcher has participated in and been successful in a special education due process hearing where the student

prevailed. The student prevailed because the ALJ told the school district's attorneys that the law was clear and that the school district was going to be unsuccessful. This was done through questioning and stating the law. For example, one question to the school district attorneys was: What would prevent me from ruling in the student's favor? The response by the school district attorneys was: nothing. The researcher appreciated the expertise of the ALJ in realizing that the school district is not prohibited from paying for an independent educational evaluation (IEE) if a doctor has not been fingerprinted under the Jessica Lunsford Act. The ALJ also stated that *M.L. v. Federal Way* says that not including a regular education teacher in an IEP meeting is grounds for a denial of FAPE. This case resulted in a full settlement in excess of what was requested and a dismissal. This experience has led the researcher to believe that due process is generally fair and unbiased. However, the researcher believes that school districts are more likely to prevail because they have more money to hire experienced special education attorneys.

Iterative Process

The steps in the iterative process are as follows. First, the researcher read the final orders uncritically. Then, the researcher reread the final orders critically looking for any themes to be coded. The researcher then applied the Johnstone Heuristic as a guide in determining what was interesting about the final orders. Then, the researcher employed Atlas ti as a tool to engage in line-by-line coding. All final orders in Atlas ti were stored by time period. Through this process, the researcher operationally defined any uncommon coded constructs. The researcher then compared coded text by time period. In the next steps, the researcher examined and compared the embedded messages from coded lines by time period. Then the researcher determined questions that could be asked and claims that can be made of the text. Then, the researcher contextualized the study based on the time periods and determined any propositions and

corollary propositions from the data. Lastly, this CDA was submitted to a doctoral committee for review.

In summary, after engaging in line-by-line coding of the final orders supported by direct textual evidence, this researcher examined what messages were embedded in the coded text, what questions could be asked, and what claims about the system as a whole (i.e. construction of appropriate, social order, nature of disability, nature of knowledge etc.) could be made from this micro-analysis. Morse and colleagues (2002) posits that substantiating codes through reliability measures is a quality indicator in qualitative research. This study utilized direct textual evidence for transparency and to substantiate its analysis**.**

Sample Analysis

This is an example of a further analysis of discourse from the pilot study for a statement that was coded as deference using Atlas ti. The following statement was taken from the 2009 special education final order:

One administrative law judge said, "Indeed, nothing was presented at hearing beyond the parents' subjective belief that *** can perform in the current placement."

What is stated and embedded in this claim? What questions can be asked from this statement?

1. Parents are subjective
2. There are people who are objective in regard to the child
3. Parents lack the knowledge or expertise to determine an appropriate placement for their child
4. Others can determine an appropriate placement for the child
5. The parents' beliefs are insufficient
6. Their belief is not the truth
7. Something more should have been presented

8. (Lack of an agent here, No first person language such as I) administrative law judge is speaking the truth
9. Administrative law judge has the power to assign value to who is subjective and who is objective
10. Administrative law judge cannot give deference based on the parent's beliefs
11. What is this saying about the nature of beliefs? Beliefs are not valued, you cannot have an objective belief; you must have objective fact.
12. What is it saying about the value of experiential versus expert knowledge (Mehan in his work on learning disabilities suggests that expert knowledge is preferential to experiential knowledge)?
13. What is it saying about who gets to be an expert (time with child, education?)?
14. What does this say about the nature of disability? Constructed? Other people speak for those with disabilities. Competency must be proven. Adjudication is defining disability.
15. Nature of hearings? Governed by fact not belief. Why is one statement considered belief and another fact?
16. What is it saying about the nature of parents in special education due process?
17. Epistemic rights, who has the rights to this knowledge? Who can construct appropriate?
18. What does the construction of appropriate do?
19. What propositions can be made from the data?
20. What does this say about social order? Who gets versus who does not.

For understanding common flaws in discourse analysis the following article by Antaki may prove useful: http://extra.shu.ac.uk/daol/articles/v1/n1/a1/antaki2002002-paper.html, although these flaws are not present in this sample analysis.

Delimitations and Conclusions

Again, generalizability is limited because only six cases were used. Only special educations due process final orders in Florida are utilized. Delving deeply into the text allows the researcher to make claims about the nature of the system as well as potential policy recommendations from the findings (Johnstone, 2008). This study is limited to how *appropriate* is constructed pre-Rowley, post-Rowley, and post-reauthorization of IDEA (2004).

Several noteworthy delimitations are that IDEA does not cover gifted children unless they have a dual exceptionality. Also, it only used final orders so the only information from the proceedings in the final order is what the ALJ decided to include, and his or her rationales for decision-making. Also, not all due process cases in all states are structured the same nor do all circuit interpret a FAPE and Rowley the same way. Florida uses a one-tier system that has the ALJ as the final arbitrator, unless appealed in court (Florida Procedural Safeguards, 2006). Cases settled or withdrawn due to mediation and resolution are excluded. Finally, this study is unable to follow the same ALJ across the three time periods so there is the potential that different ALJs may have written final orders differently.

It must also be noted that traditional methods of validity are not employed in a qualitative discourse analysis. Methods of trustworthiness such as only making claims that can be supported by the data are included (Guba, 1981). This CDA will avoid making claims that are not stated in the data such as how someone feels, thinks, perceives, etc., (unless discussed in the data). Work not supported by the data that is cognitive is reserved for people such as psychiatrists, psychologists, and psychics (M. Bartesaghi, personal communication, November 30, 2008). In essence, this is discourse work that cannot or should not be done because it lacks credibility; it cannot be seen, thus it cannot be claimed and interpreted as such. Credibility must be established

in discourse analysis by making connections to the data. Not everything can be seen in the data, however this study made claims based on what can be seen and uncovered by using direct textual evidence. From a microanalysis, the researcher examines what the discourse tells us about systems (macro-level) (Haspel & Tracy, 2007; Mehan, 1983; Johnstone, 2008).

Ethical Considerations

Only public records available through the Florida Division of Administrative Hearings and the Florida Department of Education have been utilized. Names of students have been omitted or changed entirely. The names of public employees such as teachers and psychologists have been changed or referred to by initial or title. Finally, specific case numbers and page numbers have been omitted. The University of South Florida Institutional Review Board (IRB) has certified that this CDA using only public due process cases is hereby exempt from the IRB requirements.

CHAPTER 4—RESULTS

This chapter details the results of this CDA that has been conducted to examine how ALJs construct an appropriate education for students with disabilities across three critical time periods. Specifically, the results of this CDA analyzed the construction of an appropriate education before the U.S. Supreme Court decision in *Board of Education v. Rowley* (1975-1978), after the decision in *Board of Education v. Rowley* (1983-1986), and after the reauthorization of the Individuals with Disabilities Education Act in 2004 (2004-2007). Then, it analyzed the evolution of the construction of an appropriate education among these time periods. For each of the three time periods, two Florida special education due process final orders were selected for critical analysis. For each time period, these FAPE-related final orders included one case where the school district prevailed and the one where the parent prevailed. The documents were obtained with a researcher promise to the State of Florida not to reference specific page or case numbers and to be careful not to disclose information that would identify the student. Therefore, all reference to what the ALJ stated is used in block or direct quotation format without reference to the documents that have yet to be re-published (all of these documents were available in 2010 prior to removal) by the State of Florida. The results from all three periods are supported using direct textual evidence to substantiate this analysis are as follows:

Construction of Appropriate Prior to the Rowley Decision

Summary of the Issues

In a 1976 final order where the parents were the prevailing party, a first grader named FC qualified as student with a disability due to his cystic fibrosis. The school district offered the

parents a choice of two programs—one for students with physical disabilities or one for students with learning disabilities. The parents refused to place FC in either program alleging that the schools district's only available programs were inappropriate for FC and therefore constituted a denial of FAPE. The parents asked the ALJ to render a ruling on FC's eligibility for special education services, the appropriateness of the school district's two available programs, and the necessity for the school district to pay for FC's private education at public expense.

Construction Based on Disability and Needs

To adjudicate the disputed issues and construct an appropriate education for FC, the ALJ begins to describe the student's disability in detail. The ALJ states,

> The Petitioner suffers from a genetic disease called cystic fibrosis. Cystic fibrosis is manifested in young children by abnormalities in the exocrine gland system. Any infectious illnesses that tend to produce pulmonary disease are a grave hazard to persons who suffer from the disease. The disease is likely to become disabling if the victim contracts a pulmonary illness. The Petitioner is thus susceptible to contracting various childhood illnesses which can disproportionately advance chronic lung ailments.

Using the information about the student's disability, the ALJ constructs an appropriate education based on the needs of the child. The ALJ details what the child needs and rationalizes what an appropriate education would look like. The ALJ states, "It is necessary that the Petitioner's environment be watched very closely. It is imperative that the Petitioner's exposure to acute infectious illnesses be minimized." The ALJ also states,

> In order to counteract the possibilities of the Petitioner contracting an infectious illness, it is necessary that he be placed in an air-conditioned classroom with a maximum of 15 other students. In order that the Petitioner not suffer an exacerbation of emotional

problems it is important that the Petitioner be placed in a normal classroom environment where he can obtain the benefits of a normal peer group.

By first stating what the child's disability is, and then prescribing a plan for the student using words like "imperative" and "necessary" the ALJ is constructing what an appropriate education would look like for FC.

Witnesses at Hearing

The witnesses at the hearing possibly helped the ALJ in constructing an appropriate education, however this is not directly stated. The ALJ briefly discusses the witnesses called and the evidence presented. For example, the ALJ stated, FC's parents presented a pediatrician that is qualified as an expert and a psychologist familiar with cystic fibrosis. The school district called the director of exceptional child education and the coordinator for students with physical disabilities. When comparing the witnesses, the ALJ wrote that the parent called one person that qualified as an "expert." It is evident that the parent's witness had the more impressive credentials for discussing the student's needs. Nonetheless, the only time the witnesses were discussed was in this section that notified the reader of the identity of the witnesses called. The ALJ did not weigh the credibility of the witnesses or assign deference to any party as evidenced by it being omitted from the final order.

Constructing Appropriate by Revealing Inappropriate

The ALJ details why the proposed school district programs are inappropriate. An illustration of this is when the ALJ stated, "The Petitioner could be enrolled in the learning disability program at Gilbert Elementary School without being tested, and without suffering from any learning disability. This program is inappropriate for the Petitioner because it does not appear that he suffers from any learning disability." The ALJ wrote that FC needs a "normal"

class with typically developing peers. This proposed placement would increase FC's chance of contracting a communicable disease due to the large class size.

The ALJ placed an emphasis on the placement being as normal as possible. The ALJ did this by stating,

> Children with cystic fibrosis tend to suffer from an exacerbation of normal sorts or emotional problems associated with growing up. It is emotionally, psychologically, and educationally important that the child be placed in the most normal possible environment. The Petitioner from all outward appearances is a normal child.

Next, the ALJ used his judgment to render the school district's potential placements inappropriate. To support this argument, the ALJ writes,

> He is not physically handicapped except for his susceptibility to infectious illnesses. It does not appear that the Petitioner suffers from any learning disabilities. It appears that the Petitioner is fully intellectually capable of functioning in a normal manner in a normal classroom environment." The ALJ also states, "The second alternative offered by the Respondent is in a learning disability class at Gilbert Elementary School. Learning disability classes at other elementary schools might also be available to the Petitioner, but only if he were tested and found to suffer from a learning disability.

In making the ruling, the ALJ reemphasizes the needs of the child and what the ALJ determines to be appropriate. The ALJ writes,

> The normal public school environment provides a potentially grave hazard to the Petitioner. Petitioner, due to his suffering from cystic fibrosis, tends to contract heat exhaustion. It is thus important that he be placed in an air-conditioned classroom. Due to his susceptibility to infectious diseases it is important that the Petitioner be placed in an

environment which minimizes the risks of exposure.

Suitable and Appropriate Ruling in Favor of Parents

Finally, the ALJ orders the school district to find something "suitable". This is not a mandate for the best program, only a program that can meet the needs of FC. The ruling is as follows:

> The programs offered by the Respondent do not provide the Petitioner with the special facilities that he requires. The programs which the Respondent has available for the Petitioner are not suited to the Petitioner's special educational needs. The Respondent should thus assist in making a contractual arrangement with a private school facility which would offer air-conditioned classrooms with no more than 15 students in the class, and a normal educational program.

This is evidence that appropriate is constructed based on the needs of the student and the ability of the school districts program to meet those needs.

School District as the Prevailing Party 1978

In a 1978 due process final order where the school district prevailed, an ALJ details the case of BR. BR's mother filed for due process to determine if the school district's program for students with learning disabilities was appropriate for BR. BR's mother, Mrs. Roman, asserts that since the school district has a large class for students with learning disabilities, and the school district did not put BR on the school bus as agreed, which resulted in BR being found 24 blocks away from school, the school district is incapable of providing BR with a FAPE. BR's mother is requesting van service and private school tuition reimbursement since BR suffered serious "emotional trauma" that he has not recovered from the bus incident.

The ALJ writes that the dispute is that the parent "claims" that the school district "cannot

provide maximum educational benefits" while the school district "maintains" that it can educate BR appropriately. Both parties are making claims, however the ALJ uses two different terms to describe the dispute. This is not, in of itself, direct evidence of deference, however it is possible that the ALJ is alluding to the fact that the school district does not share the belief of the parent on educating BR. This is an example of: one claims something was not done, while another insists that it was. This ALJ also highlights the issue of "maximum" versus "appropriate" educational benefits.

Normalcy in School Procedure

The process for BR being placed in the program for students with learning disabilities was not "normal". The ALJ informs, "The normal procedure followed … for placement of a child in a learning disabilities program is for the student's teacher to bring the matter to the attention of the local school authorities who refer the case to a school team." Additionally the ALJ says, "Normally, the local schools are reluctant to test a small child early in the year until school personnel have worked with the child for a reasonable period of time." Nevertheless, the school district tested BR and found him eligible as a student with a learning disability. This deviation in procedure suggests that the ALJ is asserting that BR has received more than what is typical for other students suspected of having a learning disability.

The Best is Not a Requirement

Like highlighting was is "normal", the construction of an appropriate education also suggests that students with disabilities are not entitled to the best educational program. Since BR's mother is asserting that the school district has failed to keep BR safe and adequately monitor him, it is appropriate for him to be in a smaller class. As a counter-argument, the ALJ uses the word "ideal" to rationalize what is best, yet not necessary. An example of this is when

the ALJ writes,

> Although ideally he should be in a class with a low teacher/child ratio of ten or less children, this ratio may be higher [in] institutions where an aide is present to assist the teacher. BR's teacher at Eli Rich found that he seemed no different than any other child in her class and when he returned to school on November 4 after the unfortunate bus incident, he did not appear to be upset or pose any difficulty.

The ALJ included, "The learning disabilities program in the Public School is adequate for most children and Respondent refers children to private schools only in extreme cases involving children who cannot be properly handled in the public school system for unusual reasons." Using terms like "adequate" to describe the school district's program, and "extreme" and "unusual" to describe the school district paying private tuition at public expense, the ALJ is taking a stance that private school tuition is something that very few students with disabilities are entitled to receive.

No Deference Given to Either Party

After the bus incident, Mrs. Roman, withdrew BR from public school and enrolled him in private school with a request for it to be paid at public expense. The school district contended that Mrs. Roman was equally responsible for BR missing the school bus and wandering off because she dropped him to school that day. The ALJ noted, "This was not done because the school bus transportation office had not received a formal written request for such special treatment." This conflict further supports the argument that "special treatment" that is over and above what is usual is not a right. The ALJ acknowledged what each party said without question or deference.

Like with the school district, the ALJ acknowledged it as truth when Mrs. Roman spoke.

For example, Mrs. Roman said that BR had nightmares after getting lost and missing the school bus. The ALJ did not question her assertion. The ALJ writes, "The next day Mrs. Roman took him back to school, although he had had nightmares and did not want to return."

Examining the Needs of the Child and the Program Offered

The ALJ included the needs of the child and looked at placement in the construction of an appropriate education. The ALJ stated, "that the child's primary educational needs were activities to remediate visual motor deficits, visual closure activities, visual association, and visual sequential memory activities, and a program for gross motor development."

The ALJ went on to include information from testimony about the programming provided at Eli Rich for BR. The ALJ details, a "certified" teacher that provides "individual attention" to "deficits" despite having a large class teaches the school district's program.

Ruling

After detailing the needs of the child and the program, the ALJ said this is an issue of reimbursement. The ALJ found that despite the "unfortunate" bus incident, "insufficient evidence" was presented to show "negligence" and that BR was "traumatized" to an extent that made him unable to go to public school. Thus, the ALJ denied Mrs. Roman's request for reimbursement of her $350 per month private school and van service.

Summary of Results Prior to the Rowley Decision

Prior to the U.S. Supreme Court decision in Board of Education v. Rowley, ALJs heard testimony and reviewed evidence without assigning deference to any party. The ALJ constructed an appropriate education based on the needs of the child and the educational program offered. Each case reviewed shows that the ALJ was careful not to award the best possible services for

the child. Instead, the ALJ focused on what was “adequate”, “appropriate”, “normal”, and “suitable”.

Rowley Period

In this case that occurred after the U.S. Supreme Court decision in *Board of Education v. Rowley*, the father of EH, a child with a severe emotional and behavioral disability, and a language impairment requested that his son remain in a private school for students with disabilities at public expense. The school district funded the private school from 1977-1986 because it did not have an appropriate educational program to meet EH’s needs. EH made progress in the private school as evidenced by the ALJ writing that EH “progressed in an exceedingly successful fashion earning primarily A's and B's.” The father was concerned that EH would become disconnected, “fearful”, and “suicidal” if removed from his current placement and put in a general education classroom. In 1983, the school board developed a general education program with supports that, in their opinion, could meet EH’s needs. Nevertheless, the school board permitted EH to stay at the private school at public expense until 1986. With the impending removal from private school at public expense, EH’s father filed for due process to block EH’s change of placement. EH’s father asserted that the school district’s program would not provide a FAPE.

Assigning Deference to Educators and Experts

In this case, an appropriate education was constructed through a discourse of expertise and deference. For example, a school district evaluator said, "Based on evaluation…a normal classroom" is the correct placement for EH. On the other hand, the ALJ stated that EH’s father has a "sincere belief” that EH would commit suicide if compelled to attend a general education classroom. The contrast between the father and the evaluator is remarkable. The ALJ is

transparent in assigning deference. Asserting that the school district's expert is basing her view on "evaluation", while the father is basing his view on "sincerity" accomplishes the task of assigning deference, power, and expertise. The ALJ went further in his construction of an appropriate education through deference, power, and expertise by stating that: "For the 1986-1987 school year, however, the Board decided that its programs were now sufficiently developed and matured to successfully provide an appropriate program for EH in the mainstream public school system, and that a program existed that would provide sufficient and adequate support for EH's problem. Before arriving at this conclusion, however, the Board conducted a thorough and comprehensive re-evaluation of EH's situation." The discourse of expertise continued at the ALJ specifically referenced the school district expert as having, "24 years experience dealing with students with special needs." When EH's father contests an evaluation, the ALJ challenged this by referring to the experience of the psychologist. The ALJ writes, that the school district psychologist has "accomplished over 200 evaluations of this nature over her term with the Board". The ALJ goes further to state:

> She believed that it was done correctly here and is accurate and she stands by it. EH's father refuses to concede that those individuals who have worked with these statutes and their implementation for many years might have an opinion as to what they mean at least as valid as his. That Mr. H cannot do this is unfortunate.

Although the ALJ alludes to Mr. H having a "valid" opinion, he still defers to the expert by saying the evaluation was accurate.

Deference to experts is also included in the ALJ stating, "Mr. H did not produce, however, any firm, independent evidence other than his own testimony, which at times was questionable because of his obvious emotional involvement in this case." On the other hand, the

ALJ asserted that the general education evaluator "does several hundred of these evaluations per year and knows of what he speaks". This again suggests a discourse of experts knowing and parents emoting, therefore the person who knows must be heard and the person that is ignorant must be ignored. Deference to school district officials is not just a discursive action it is a legal mandate that is perpetuated by ALJs as they weigh credibility.

The Ruling that Appropriate is Based on Deference not Outcomes

The ruling determining appropriate further emphasized a construction of expertise. This is evidenced by the ALJ stating, "Mr. M is convinced, as are all other specialists who testified for the Board, that there are adequate resources within the county school system to provide a sufficient, adequate and appropriate individual education program for EH with the least possible restriction and that there is nothing available at that is in any way superior to that which is available now within the public school system. It is so found."

In contrast, in rationalizing this ruling, the ALJ states, Mr. H. " relies upon hearsay testimony", did not "present any credible evidence of any magnitude other than his own interpretation of his son's action", and Mr. H " has produced no independent evidence to support his conclusions" while the school board provided "ample evidence". Again, the parent's interpretations are not considered valid.

Expertise and Access Not Outcomes

The discourse in this final order relies heavily on expertise. It also states that an appropriate education is not based on "outcome". To support this argument, the ALJ states, "it is recognized that there is no guarantee available that any emotionally handicapped child will be successful even in a specifically designed class because of the variables inherent in the child and the situation." The lack of an agent in this statement suggests that an overall truth is being

spoken because “it is recognized”. The truth is that the Rowley decision made that statement “recognized”.

To further support this argument, in the appendix of this final order, the ALJ writes:

> Indeed, "the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." The ALJ states, based on the Rowley decision, that “It cannot be said that the framers of the legislation intended to guarantee any particular level of education. Rowley at 3043. Instead, implicitly, a free appropriate public education must only include access "sufficient to confer some educational benefit upon the handicapped child." He then went on to provide additional evidence to advance this argument by stating, “It would be indeed a wonderful world if the heartfelt desires of each parent could be fulfilled at public expense regardless of a legal requirement to do so. Unfortunately utopia has not arrived.

Again, parents are viewed as being “sincere” and having “heartfelt desires” rather than having any knowledge or expertise of their child. It also suggests that the goal of an appropriate education is the “basic floor” and not an elevated educational standard.

Parental Victory in the Era of Rowley

In this final order, a parent of AD initiated a due process hearing that challenged the school district’s provision of a FAPE, and examined the extent that the decision in *Hendry County School Board v. Kujawski* (1986) applies in awarding tuition reimbursement. AD has a cleft palate, a harelip, a “brain dysfunction”, and depression. He has average intelligence, however he has a learning disability. He attended a private school for students with learning disabilities since the first grade, however when his family relocated, he was placed in a self-contained classroom for students with emotional and behavioral disabilities

In the seventh grade, the school district decreased AD's weekly special education hours to 15 hours per week. Then, the following year when AD entered eighth grade it was reduced to 10 hours. AD's academics were rapidly declining and he was failing his special education classes His mathematical achievement level dropped from a fourth grade level to a second grade level.

Additionally, AD began to engage in violent behavior, to aggress against other students, and to destroy school property. Ultimately, he was suspended. As a result, his adoptive parents met with the school district to review the findings of his physician and to discuss appropriate educational programming. When no appropriate programming was found, AD's parents proceeded to file for due process.

Constructing an Appropriate Education in a Post-Rowley Era

As in the above post-Rowley case, the ALJ deferred to the school district in constructing an appropriate education. The school board conceded at the due process hearing that it did not have an appropriate program for AD. The ALJ wrote, "Respondent did not contend at hearing that this placement was appropriate." Then, the ALJ wrote, "Nobody seemed to know the solution". The ALJ then went on to support the discourse on constructing an appropriate education by detailing that the school psychologist had 26 years experience and "offered to teach AD at home, but [sic] decided that AD did not qualify for home-bound".

The school district suggested several inappropriate options that Mrs. D visited. At one placement she caught a glimpse of a student with a profound intellectual disability openly engaging in explicit behavior. There was another program that Mrs. D visited, however it too was found to be inappropriate since it denied him admission for not having a severe emotional and behavioral disorder. At yet another program that Mrs. D applied to, admission for AD was denied. The ALJ cited, "they did not feel that they have the appropriate program for him. AD

needs a program with more support and back-up services than we can offer…I do not have a school to recommend in Florida." The ALJ included testimony that the school board's own expert, "a certificated learning disabilities teacher in respondent's employ during the school year, testified at hearing that she had told them they "ought to investigate a residential school for AD somewhere."

The school district and the attorneys of both parties determined that a "disinterested third party" should conduct an evaluation and select a special education program for AD from the school districts available options. The school board selected a college program for adults who have not mastered reading. The ALJ cited Mrs. D talked to a college employee that said, "I cannot say this an appropriate program for AD". The ALJ accepted this "hearsay" because it was substantiated by the testimony of an expert. The ALJ states, "This hearsay corroborates that the program was inappropriate, testimony which has been credited."

Finally, the school board found a placement for AD for students with behavioral disabilities. The ALJ titles this section of the final order as "An Afterthought". The ALJ stated, "Neither of the two witnesses who testified that the school was appropriate had ever met AD… testimony that AD was "not atypical" (T. II.l44) contradicted the testimony of all the other experts, including that of the other expert the School Board called."

Ruling

The ALJ ultimately ruled in favor of the parent, that AD needs a residential placement at public expense and nothing in the recent *Hendry County School Board v. Kujawski* (1986) prohibits awarding reimbursement. The ALJ discredited the experts that said that AD does not need a residential placement. Evidence of this is the ALJ stated:

> the two experts called by the School Board (although not the two school board employees who testified on AD's behalf) testified that residential placement was unnecessary because instruction at the [school for students with behavioral disabilities] together with support from parents and a social worker would suffice, and would be less restrictive than residential placement. One of the experts, added: "I think the best teacher of life is life itself." (T.II.l36) But the evidence established that respondent needs the constant repetition and practice, the coordinated team approach and the highly structured atmosphere of a residential setting." The residential placement's "ultimate objective is vocational education to prepare AD for useful work.

Summary

Like the above post-Rowley final order, this final order where the parent prevailed also utilized a discourse of deference, expertise, and minimized benefit in constructing an appropriate education for a student with a disability.

Post-Individuals with Disabilities Education Act 2004

AC is an English language learner. Her parents were employed as a pediatrician and a dentist in Chile. Shortly before AC's second birthday, she was diagnosed with Autism and received early intervention services. At the age three, the school district evaluated AC and determined that she meets the eligibility criteria for language impairment and Autism. AC began attending a full day self-contained class for student's with Autism at her local public school. The ALJ stated, "Mrs. C requested a class with typically development peers rather than the self-contained classroom, and "School Board personnel acceded to Mrs. C's request." The school board placed AC in the Learning Experiences: An Alternative Program for Preschoolers and Parents (LEAP) classroom that included typical peers for AC. The ALJ wrote:

Leap is a researched-supported, federal-grant receiving, cost-effective instructional program developed specifically for young children with autism. It features peer-mediated learning activities in classroom settings having no more than four autistic children grouped with six to eight typically developing children who model skills and behavior for their autistic peers." The ALJ goes on to state that AC's IEP was "reasonably calculated" with "objectively measurable" goals that provide AC with "meaningful educational benefit.

Experts

The ALJ credited the following School Board employees as experts, this is evidenced by the ALJ writing that "AC's classroom teacher was Ms. M, a well-qualified and experienced ESE teacher, who has been teaching children with autism for 17 years, the last three in a LEAP classroom." The ALJ also stated, "Among the various teaching strategies and techniques she used were those based on ABA principles." This process continued with the ALJ writing, "AC's speech/language pathologist was Ms. S, who has a master's degree in speech pathology and approximately 23 years of experience working with children with autism."

By contrast, deference is declined by not having certification. This is evidenced by the ALJ stating, "The "tech" providing this "one-on-one" therapy "does not have to be board-certified." He or she must simply "pass [BAI's] training program which is competency based. A teaching license is not required." By stating that the process to become qualified was a simple one, the ALJ is implying that this witness does not have the credentials to be heard.

Likewise, the parents of AC are politely discredited by this ALJ through terminology that signifies care and not expertise. The ALJ does this by stating, "Mr. C and Mrs. C are loving and caring parents who want the best for AC. Although grateful for "everything that [the School

Board] had offered" AC, they were dissatisfied with the pace of AC's progress in school." The ALJ also does this by pointing out their lack of knowledge and expertise. This is accomplished by the ALJ stating, "The Parents did not attend any of the "positive parenting practices" training sessions offered by the School Board during the 2006-2007 school year, although they had each attended four or five sessions the previous school year."

Successful Outcomes are Not a Requirement of an Appropriate Education

The law is clear that the adjudication of an appropriate education is not dependent on any particular outcome other than it being designed so that the student with a disability would receive some benefit regardless of if that benefit was actually achieved. The ALJ cites that the law requires " sufficient" support, a "serviceable Chevrolet", "some benefit", and "no requirement to meet every need" or "cure" a student's disability. To illustrate this point, the ALJ went into great detail to cite the following cases:

> To meet its obligation under Sections 1001.42(4)(l) and 1003.57, Florida Statutes, to provide an "appropriate" public education to each of its "exceptional students," a district school board must provide "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982)."Doe v. Board of Education, 9 F.3d 455, 459-460 (6th Cir. 1993)("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. "See also M. H. v. Nassau County School Board, 918 So. 2d 316, 318 (Fla. 1st DCA 2005)("A free appropriate public education

'provided under the Act does not require the states to satisfy all the particular needs of each handicapped child,' but must be designed to afford the child a meaningful opportunity to learn.")(citation omitted); C. P. v. Leon County School Board, 483 F.3d 1151, 1153 (11th Cir. 2007)("This standard, that the local school system must provide the child 'some educational benefit,' Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, has become known as the Rowley 'basic floor of opportunity' standard."11); M. M. v. School Board of Miami-Dade County, 437 F.3d 1085, 1102 (11th Cir. 2006)("[U]nder the IDEA there is no entitlement to the 'best' program.")". "The [law] does not demand that [a district school board] cure the disabilities which impair a child's ability to learn, but [merely] requires a program of remediation which would allow the child to learn notwithstanding [the child's] disability." Independent School District No. 283, St. Louis Park, Minn. V. S. D. By and Through J. D., 948 F. Supp. 860, 885 (D. Minn. 1995).; see also Coale v. State Department of Education, 162 F. Supp. 2d 316, 331 n.17 (D. Del. 2001)("If the IDEA required the State to 'cure' Alex's disability or to produce 'meaningful' progress in each and every weakness demonstrated by a student. (ALJ name withheld, post-2004)

With that being said, the ALJ also stresses that the best education is not a requirement. This ALJ briefly writes, "'appropriate' does not mean the best possible education that a school could provide if given access to unlimited funds."

Burden of Proof

The ALJ cited case law to determine whose legal duty it is to persuade the court to rule in their favor. For example, the ALJ stated, "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 62 (2005); see also Brown v. Bartholomew Consolidated School Corp., 442 F.3d 588, 594

(7th Cir. 2006)."

Outcomes are Not Promised Even in Hindsight

In constructing an appropriate education for students with disabilities, this ALJ, stressed that outcomes are not required to construct a FAPE. This ALJ extensively cited case law to support the prohibition of looking at the IEP in "retrospectively". To support this argument, the ALJ wrote:

> The appropriateness of an IEP must be judged prospectively, taking into consideration the circumstances that existed at the time of the IEP's development. See Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999)("We do not judge an [IEP] in hindsight; rather, we look to the [IEP]'s goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer Lucas with a meaningful benefit."); Walczak v. Florida Union Free School District, 142 F.3d 119, 133 (2d Cir. 1998)("IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results." Citing "J. R. ex rel. S. R. v. Board of Education of the City of Rye School District, 345 F. Supp. 2d 386, 395 (D. N. Y. 2004)", the ALJ stressed that ALJ's are prohibited in "Monday Morning quarterbacking" an IEP because of the fact that they became aware that the student made progress at another school.

The following excerpts further support this claim:

- "Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1st Cir. 1990)("[A]ctions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was

taken, that is, at the time the IEP was promulgated."

- “A. M. v. Fairbanks North Star Borough School District, No. 3:05-cv-179 TMB, 2006 U.S. Dist. LEXIS 71724 *19 (D. Alaska September 29, 2006)("Turning to the question of whether the IEP was reasonably calculated to enable A.M. to receive educational benefits, the Court agrees with FSD that the pertinent inquiry is whether the program is appropriate when developed, not in hindsight.”
- “Although a [district school board] can meet its statutory obligation even though its IEP proves ultimately unsuccessful, the fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP. Otherwise, the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed." Board of Education of the County of Knawha v. Michael M., 95 F. Supp. 2d 600, 609 n.8 (D. W. Va. 2000).”
- “D. B. v. Ocean Township Board of Education, 985 F. Supp. 457, 525 (D. N. J. 1997)("However, the fact of failing to make adequate educational progress in the past, even if that occurred, generally has not been held sufficient to warrant residential placement. This is because, as our courts have held, the appropriateness of a proposed IEP program must be viewed prospectively.").”
- “Although a [district school board] can meet its statutory obligation even though its IEP proves ultimately unsuccessful, the fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP. Otherwise, the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed." Board of Education of the County of Knawha v. Michael M., 95 F. Supp. 2d 600, 609 n.8 (D. W. Va. 2000).”

Deference

An appropriate education for a student with a disability is constructed by deference to educators and experts. This requirement of giving deference to educators and experts is consistently cited using relevant case law. This arguments is supported by stating that ALJs are mandated to not "second guess" experts, "substitute" their judgment with that of experts, or set aside the "unrebutted" opinions of experts." The ALJ support this argument of deference with the following:

> In making a determination as to the appropriateness of an IEP, the administrative law judge should give deference to the reasonable opinions of those witnesses who have expertise in education and related fields. See MM ex rel. DM v. School District of Greenville County, 303 F.3d 523, 532-33 (4th Cir. 2002)("We have always been, and we should continue to be, reluctant to second-guess professional educators. . . . In refusing to credit such evidence, and in conducting its own assessment of MM's IEP, the court elevated its judgment over that of the educators designated by the IDEA to implement its mandate. The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators." "As we have repeatedly recognized, 'the task of education belongs to the educators who have been charged by society with that critical task . . . .'"); School District of Wisconsin Dells v. Z. S. ex rel. Littlegeorge, 295 F.3d 671, 676-77 (7th Cir. 2002) ("Administrative law judges . . . are not required to accept supinely whatever school officials testify to. But they have to give that testimony due weight. . . . The administrative law judge substituted his own opinion for that of the school administrators. He thought them mistaken, and they may have been; but they were not unreasonable.");

Devine, 249 F.3d at 1292." "ElectricJohnson v. Metro Davidson School System, 108 F. Supp. 2d 906, 915 (M. D. Tenn. 2000)("[I]f the district court is to give deference to the local school authorities on educational policy issues when it reviews the decision from an impartial due process hearing, it can only be that the ALJ presiding over such a [due process] hearing must give due weight to such policy decisions. For it to be otherwise, would be illogical; to prevent an ALJ from giving proper deference to the educational expertise of the local school authorities and then require such deference by the district court would be inefficient and thus counter to sound jurisprudence.")." "If the expert's opinion testimony is unrebutted, it may not be rejected by the administrative law judge unless there is an reasonable explanation given for doing so. See Heritage Health Care Center (Beverly Enterprises-Florida, Inc., d/b/a Beverly Gulf Coast-Florida, Inc.) v. Agency for Health Care Administration, 746 So. 2d 573, 573-74 (Fla. 1st DCA 1999); Weiderhold v. Weiderhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997); Fuentes v. Caribbean , 596 So. 2d 1228, 1229 (Fla. 1st DCA 1992); and Brooks v. St. Tammany School Board, 510 So. 2d 51, 55 (La. App. 1987). (ALJ unnamed, post-2004, conclusions of law).

Administrative Law Judge Must Defer to Experts and Not Judge the IEP

Case law is utilized as the basis for an ALJ deferring to experts. To illustrate this point, this ALJ cited the following:

It is not the function of the administrative law judge, in passing upon the appropriateness of an IEP, to determine the "best methodology for educating [the] child. That is precisely the kind of issue which is properly resolved by local educators and experts" and is not subject to review in a due process hearing. O'Toole By and Through O'Toole v. Olathe

District Schools Unified School District No. 233, 144 F.3d 692, 709 (10th Cir. 1998); see also M. M., 437 F.3d at 1102, quoting Lachman v. Illinois Board of Education, 852 F.2d 290, 297 (7th Cir. 1988). (ALJ unnamed, appropriate)

Burden of Proof Met Through Expertise

The "expert" testimony of the parent's witnesses Mr. G was challenged by the ALJ for not being knowledgeable about the program offered by the school district. The ALJ wrote, "Mr. G is a board-certified behavioral analyst. He is not a teacher. He was offered by the parents as an expert in ABA and the "treatment of autism." During his testimony, he conceded that he did not have a detailed understanding of the LEAP model, that he was "not familiar at all with the curricula . . . used in [AC's LEAP] classroom", and that he could not "comment on what [was] going on in [that classroom] setting."

On the other hand, the ALJ sided with experts of the school district that had more knowledge on the program. This is evidenced by the ALJ writing:

> The School Board countered the Parents' evidentiary presentation with documentary evidence of its own, as well as the testimony of five School Board employees -- the supervisor of the School Board's Prekindergarten Program for Children with Disabilities; AC's classroom teacher and speech/language pathologist; the autism support teacher assisting his classroom teacher; and the School Board's "psychologist for autism spectrum disorders" -- who, collectively, were far more familiar than Mr. G with the "programming" the School Board offered and were able to shed light on what AC's LEAP classroom placement entailed, the nature and extent of services AC received, and how those services met AC's unique needs.

Ruling

This ruling that the school district provided a FAPE further supports the argument of using experts to construct a FAPE. The ALJ ruled, “Through the credible and persuasive testimony of these witnesses, together with its accepted exhibits, the School Board affirmatively established (although it was not its burden to do so) that the 2006-2007 IEPs were not substantially deficient in any of the ways alleged by the Parents, but rather were reasonably calculated to, and upon their implementation did in fact, address AC's educational and behavioral needs and provide AC with meaningful educational benefit and therefore a "free appropriate public education."

Standard Diploma to Special Diploma

Similar findings on the construction of an appropriate education in the final orders by ALJs were evident in another post-IDEA (2004) case of SH. The primary issue in this case is if the school district denied SH a FAPE in the least restrictive environment (LRE) by not considering an Independent Educational Evaluation (IEE), and removing SH from the standard diploma track to a certificate of completion track. SH is a 17-year-old student with autism and a language impairment. The school district requested an IEP but SH’s mother became concerned because the request for an IEP did not address whether “transitional and vocational rehabilitative services” would be considered at his meeting. She also noticed that the school district requested no one from “transitional or vocational rehabilitative services” to be in attendance at the IEP meeting. Mrs. H filed due process and that IEP meeting was not held. The parties went to a resolution meeting and the parties agreed that Mrs. H would have SH reevaluated at public expense. Mrs. H noticed that the school district’s psychologist that conducted the original re-evaluation was not invited to the IEP meeting. She later discovered that the psychologist was no

longer a school district employee. At the new IEP meeting there was a request for "transitional and vocational rehabilitative services" to be in attendance. At the new meeting, it was determined that SH would be in a self-contained classroom for the majority of the day. SH would also no longer be eligible to complete the standard diploma in favor of a special diploma that signifies that he has completed high school. The mother objected and requested that the school district adjourn the IEP meeting until which time that the IEE could be complete. The school district rejected the request and moved to place SH on the special diploma track.

Experts

Using experts to construct an appropriate education is supported by substantial evidence in the final order. The parent's expert, Dr. G, was found by the ALJ to be "credible." The ALJ emphasized that Dr. G has suggested, "Research-based accommodations and intense remediation for SH's dyslexia and learning". Dr. G issued a grave warning on the inappropriateness of placing SH in special education. Dr. warned, SH will stay "illiterate" if the placement for SH is changed from general education to special education.

Experts are rebutted at due process by like experts. For example, the ALJ wrote:" SH's geometry teacher testified that SH has problems with geometry. She further testified that she did not believe that SH could pass geometry because the way that geometry is taught, a student must apply algebra and SH could not apply algebra." Additionally the ALJ wrote:

> At hearing, the School Board presented evidence of accommodations and remediation being provided to SH. No evidence was presented that the accommodations and remediation provided by the School Board were provided to assist SH with SH's dyslexia, as well as autism and language impairment.

The ALJ wrote, "The School Board did not present the testimony of an expert in opposition to

the testimony presented by Dr. G." In fact, the ALJ stated, "No evidence was presented by the School Board to contradict the evidence that SH suffers from dyslexia."

The ALJ concludes by stating, "A finding of fact is made that SH suffers from dyslexia. Further, a finding of fact is made that the IEE is appropriate." The ALJ stated that in order to prove that an evaluation by an expert was considered, an expert on that topic should be in attendance at IEP the meeting. This is evidenced by the ALJ stating:

> Discussing a suggested new and significant factor in SH's learning ability, which was suggested by an expert, and having someone at the IEP meeting with expertise in dyslexia to provide input on the accommodations and remediation recommended by the IEE would demonstrate that the IEE was considered at the IEP meeting.
>
> The ALJ ruled:
>
> The School Board's position, as to credits, is that is unable to earn the required credits to receive a standard diploma, and, as a result, the diploma track should be changed from standard to special. As previously found, the School Board should have considered SH's dyslexia and the accommodations and remediation recommended by the IEE in determining whether to change the diploma track, but the School Board failed to do so.

The ALJ ruled, "The evidence presented demonstrates that the IEE was not considered at the IEP meeting held on December 15, 2006." The ALJ ruled that FAPE was denied and new IEP must be drafted.

Burden of Proof

The ALJ considers burden of proof in constructing an appropriate education. The ALJ stated:

> The parent of SH has the burden of proof in these proceedings. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528,163 L. Ed. 2d 387 (2005). The standard of proof is a preponderance of the evidence. DeVine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001).

Less than Optimal

As in the previous case, the ALJ cited that students with disabilities are not entitled to the "maximum" education benefit. The ALJ writes, "A state is not required to maximize the potential of a disabled child commensurate with the opportunity provided to a non-disabled child. Rather, the IEP developed for a disabled child must be reasonably calculated to enable the child to receive some educational benefit." Additionally, the ALJ writes, "The disabled child must be making measurable and adequate gains in the classroom, but more than de minimus gains J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991)."

Deference

Like the previous case, this ALJ cites deference to school district officials as a legal basis in constructing an appropriate education. For example, the ALJ writes, "In examining an IEP, great deference is given to the educators who develop the IEP. Todd, at 1581." The ALJ only uses this case as the legal basis in supporting this argument.

CHAPTER 5—DISCUSSION

The literature suggests that the definition of an appropriate education is ambiguous (Blau, 2007; Dagley, 1995; Romberg, 2011). This has led many scholars to conclude that students with disabilities are not getting the appropriate education that Congress intended (Blau, 2007;Valentino, 2006). Through a critical theorist epistemological perspective, this CDA analyzed and compared the construction of an *appropriate* education prior to the U.S. Supreme Court decision in *Board of Education v. Rowley* (1975-1978), after the decision in Rowley (1983-1986), and after the reauthorization of the Individual with Disabilities Education Act in 2004 (2004-2007). It also sought to uncover any imbalances of power that are present in this construction. It examined the propositions and corollary propositions that are embedded in the final orders using the Johnstone Heuristic as a method of data exploration through immersion.

In both final orders analyzed prior to the U.S. Supreme Court decision in *Board of Education v. Rowley*, the ALJ utilized his or her own judgment in constructing an appropriate education. The testimony of the parents and the school district were given equal weight. Neither final order suggested that the child should have anything above what the ALJ suggested was adequate given the child's disability. Each final order avoided discussing in detail the law, the weighing of credibility, deference, or burden of proof. The ALJs made the decision to rule in favor of either party by using his or her own judgment. Overall, in constructing an appropriate education pre-Rowley, the ALJ looks at if the program can meet the needs of the child. These pre-Rowley findings are consistent with the study on due process final orders conducted by Kuriloff (1985), however this CDA did not find that parental insistence on a particular program

had any impact on prevailing as in the case of BR.

Although each child is different, the construction of an appropriate education post-Rowley and Post-IDEA (2004) follows a pattern. This pattern is consistent with what Foucault (1972) describes as being prescribed discourse with epistemic rights being assigned to the privileged. The results of this study indicate that an appropriate education is constructed post-*Board of Education v. Rowley* (1982) by ALJs in their final orders through an epistemic hierarchy. This epistemic hierarchy is established by ALJs giving deference to school districts. The ALJs also emphasize access to special education rather than successful outcomes.

Constructed by Deferring to School District Officials and Experts

In this construction, the parent is not an expert on their child and deference is given to school district officials. These findings are consistent with the work of Yell and Drasgow (2000) that suggested that experts are necessary in *defining* an appropriate education for students with disabilities, however no definition of an appropriate education was apparent from the six final orders analyzed in this study. Experts were, however, used to construct an appropriate education for students with disabilities. There had to be a persuasive expert to rebut the experts of the school district. This is illustrated in research studies that suggest that judges give deference to experts (i.e. Meyer, 2011; Zirkel, 2014). To qualify as an expert, ALJs looked at education, length of practice, familiarity with the child, disability, and knowledge of appropriate programming for the student with a disability (Mandlawitz, 2002; Yell &Drasgow, 2000).

As a result of the Rowley decision (1982), ALJs could no longer 'substitute' their judgment, even when they believed the expert was incorrect, in constructing an appropriate education on substantive grounds. In essence, an expert had to be rebutted by a more persuasive expert. The results of this CDA are also consistent with the findings of researchers that found

that experts are necessary to prevail (Meyer, 2011; Yell, Katsiyannis, Ryan, & McDuffie, 2008; Zirkel, 2014).

Furthermore, the (2010) pilot study conducted by this researcher on the construction of an appropriate education suggested that deference to educators could be occurring. After the complete analysis, and the acknowledgement by post-Rowley and post-IDEA (2004) ALJs that this is occurring, this is no longer a theory but a truth. The nature of due process post-Rowley helped to expose the power and value dynamics embedded in special education. The propositions that school districts are experts and parents are emotive suggest that there is a hierarchy in special education. This epistemic hierarchy gives deference and epistemic rights to experts and educators. This knowledge of deference is consistent with the findings of Mehan (1983) that examined the role of expert in the IEP meeting. It extends that work by examining this phenomenon at special education due process hearings through the lens of the ALJ.

The reauthorization of IDEA (2004) is considered by some scholars as an attempt to raise the standard of the basic floor set in *Board of Education v. Rowley* (Blau, 2007; Brizuela, 2011; Johnson, 2012; Kaufman & Blewett, 2012; Macfarlane, 2012; Valentino, 2006; Weber, 2012; Zirkel, 2008; Zirkel, 2013). The reauthorization of IDEA (2004) that stated the purpose of special education is to prepare students for college, careers, and independent citizenship. This purpose of special education had no impact on the construction of an appropriate education for students with a disabilities in due process final orders. In fact, the prevailing law is still *Board of Education v. Rowley*. The findings on the construction of an appropriate education post-IDEA (2004) are identical to the construction of an appropriate education post-Rowley with the exception of more legal citations for rulings from 2004-2007 and the assigning of the burden of proof to the party that filed due process.

Throughout all three time periods, ALJs use discourse to emphasize that students with disabilities are not entitled to the "best" possible education. All of the ALJs constructed an *appropriate* education using words like "appropriate", "sufficient", "necessary", and "adequate". All of the final orders suggest that ALJs understood the IDEA to provide students with disabilities with a standard of education that is less than optimal. Words like "special treatment", "ideal", "utopia", and "Cadillac" were also emphasized to illustrate this claim.

Additionally, the complexity of the final orders increased with each time period with little to no law cited and little to no weighing of the credibility of the witnesses during the period from 1975-1978 to the cursory weighing of the credibility witnesses in the period from 1983-1986 to the weighing of the credibility of every witness, and the citing of significant amounts of supporting case law in the period from 2004-2007. These findings from all Florida due process final orders analyzed support the research findings of Zirkel and Karanxha (2007) that due process hearings have increased in legal complexity.

Similar to the meta-analysis of 93 post-Rowley appellate cases of Bates (1996) educational standards were not major factors in determining an appropriate education post-Rowley and Post-IDEA (2004). In fact, the way appropriate is constructed by the ALJs post-*Board of Education v. Rowley* suggests that outcomes do not matter when it comes to educating students with disabilities. The language about the purpose of special education preparing students for college, careers, and independent citizenship in IDEA (2004) is not a mandate as evidenced by the final orders.

Analysis through the Johnstone Heuristic.

This analysis is viewed through a critical lens using the following six-part heuristic:

Discourse is shaped by the world, and discourse shapes the world. Discourse is shaped by

language, and discourse shapes language. Discourse is shaped by participants, and discourse shapes participants. Discourse is shaped by prior discourse, and discourse shapes possibilities for future discourse. Discourse is shaped by its medium, and discourse shapes possibilities of its medium. Discourse is shaped by purpose, and discourse shapes possible purposes. (Johnstone, 2008, p.10)

"Discourse is shaped by the world, and discourse shapes the world."

- The Vietnam War and the casualties associated with the war, the disability rights movement, the EAHCA giving all children with disabilities the right to a FAPE, the 1982 U.S. Supreme Court Rowley decision attempting to add clarity to the term appropriate, and Congress reauthorizing the IDEA in 2004 aided in exploring the data. Understanding that wounded soldiers were returning home from war and people with disabilities were fighting to be included helped to illuminate and perpetuate the discourse of equal access. In fact, it guided the U.S. Supreme Court in the 1982 Rowley decision by the court interpreting that the EAHCA is a law that provides 'access' to education. The passing of IDEA (2004) did not impact the discourse of access because the U.S. Supreme Court's Rowley decision was accepted by ALJs as the standard of an *appropriate* education.

"Discourse is shaped by language, and discourse shapes language."

- The language used in prior court rulings that help to define an education for students with disabilities shape the language of an *appropriate* education in current rulings. After the Rowley decision, there has been an increase in grounding decisions on an *appropriate* education in supporting case law, therefore the language used in prior rulings on an appropriate education dictate the language in future rulings. The language used in the Rowley decision that requires deference to experts, the "basic floor" of educational

services, and language that parents are not experts, is perpetuated in every post-Rowley FAPE-related final order.

"Discourse is shaped by participants, and discourse shapes participants."

- Participants, experts, administrative law judges, and non-experts are shaped by how appropriate is constructed. How *appropriate* is constructed is shaped by participants--experts, administrative law judges, and non-experts. For example, as in the pilot study conducted by this author in another post-Rowley (2009) final order, an ALJ wrote, "Indeed, nothing was presented at hearing beyond the parents' subjective belief that [this child] can perform in the current placement." From the pilot study this author wrote that this could be an example of the administrative law judge deferring to the judgment of the teachers. In fact, it is an example of deference. As in all post-Rowley final orders analyzed, the ALJ is required by law to give deference to the school district officials. The discourse of parents, as it carries no expertise, shapes parents as being "subjective" interested parties that have a stake in the outcome of the case. By way of due deference being given to the school district, it shapes the school district officials as being objective and having the necessary skills, knowledge, and expertise to be heard and acknowledged when determining an education. The ALJ rules based on the expertise of the participants and deference assumes more knowledge by one party, therefore deference assigns epistemic rights concerning the child with a disability to experts rather than parents.

"Discourse is shaped by prior discourse, and discourse shapes possibilities for future discourse."

- Prior court rulings dictate what can and cannot be said in special education due process, and those rulings dictate what will be said in future rulings. This works to perpetuate a

discourse on an *appropriate* education that is constructed by the testimony of experts and prior case law that directs current and future legal discourse.

"Discourse is shaped by its medium, and discourse shapes possibilities of its medium."

- All of these final orders reviewed the issues disputed, mentioned participants, detailed the child's disability, and rendered a decision on the disputed issues. The discourse in one final order helps to dictate the discourse in other final orders.

"Discourse is shaped by purpose, and discourse shapes possible purposes."

- The purpose of an ALJ's final order is to adjudicate special education disputes. This purpose can extend beyond adjudicating and constructing an *appropriate* education for students with disabilities. The discourse in these final orders can shape how parents and school districts present their cases and how school districts provide an *appropriate* education. It can also serve a purpose to shape how policymakers develop special education law.

Strengths and Limitations

In this qualitative CDA, an emphasis was placed not on how often the ALJ used the word appropriate or other words that signified appropriate such as adequate, instead it looked at how appropriate was used and the power dynamics associated with its construction. Although useful and necessary in advancing the understanding of discourse, this CDA did not just quote the ALJ, highlight features of the final order, and summarize the final order. This CDA analyzed the messages being conveyed. Analyzing the messages in the text is critical in discourse analysis according to Antaki, Billig, Edwards, and Potter (2003). This was accomplished with textual evidence by summarizing, highlighting, quoting, providing robust descriptions of the data, and doing the critical analytical work of exposing the embedded messages of inequality inherent in

the final orders. Reviewing these final orders helps to expose the hegemonic forces at play in the construction of an appropriate education.

The limitations of this CDA are that although there is uniformity in the law, there is potential that there is variability in how different ALJs will rule based on a variety of factors such as occupation and gender (Mckinney& Shultz, 1996; Newcomer, Zirkel, & Tarola, 1998). There is also no understanding of how the other participants at the hearing viewed the information being presented. The only evidence that available to understand this process is the information that the ALJ chose to include and exclude. This gives the power of voice to the ALJ. It is equally important to note that the researcher also has the power of what to include and exclude by reducing an approximately 100 page final order to several pages. In other words, the reduction makes these data manageable, yet there is still the potential to silence the voice of a participant and the ALJ.

Implications for Future Research

If data exist, a CDA that followed how a single ALJ constructed an appropriate education for a student with a disability across the three time periods would be useful. Also, the triangulation of what the ALJ included in the final order with textual evidence, speaking to parties involved could prove useful in understanding the importance of what is included and excluded by the ALJ. Zirkel (2012) reviewed 65 Seventh Circuit due process appellate decisions in Illinois after the Rowley decision, and the results indicated that the results of appeal was often the same result as at due process. It would be useful to see if there are any differences in the way the appellate court constructs an appropriate education in cases where the ruling of the ALJ has been reversed.

Additionally, for a qualitative CDA the quantification of how many times an ALJ

referenced a particular phrase is not, in it self useful, however knowing this information could shed light on what words are frequently emphasized by the ALJ as well as textual evidence to support how it is used to determine if there are any patterns. Since the purpose of special education as outlined by Congress in the reauthorization of IDEA (2004) was not a factor in raising the "basic floor" educational standard set by Board of Education v. Rowley, research on the impact of any key legislation in the construction of an appropriate education could aid in advancing the field.

Summary and Conclusions

CDA is a way to expose the power dynamics embedded in the discourse and advocate for change (Fairclough, 1992). This CDA attempts to act by exposing the power imbalances, advancing understanding, and advocating for change in the construction of an appropriate education for students with disabilities.

The construction of an appropriate education for students with disabilities perpetuates an imbalance of power between the parent of a student with a disability and the school district through an epistemic hierarchy. In the CDA pre-Rowley, an appropriate education was constructed by an ALJ examining the needs of the child and the programming available to meet those needs. The discourse in the final order is constrained by the ruling in *Board of Education v. Rowley* that set parameters on how an appropriate education can be constructed. Appropriate is constructed by way of experts. This construction gives deference to the school district and experts. The discourse of deference, the "basic floor" of opportunity, and experts play a pivotal role in how an appropriate education is constructed by ALJs.

Understanding the assigning of deference is critically important because embedded in that hierarchy are the propositions that experts are equipped to construct an appropriate

education for a student with a disability, therefore they must be heard without skepticism. Parents are not experts, and therefore they should not be heard. There opinions have no legal persuasion when contesting an opinion of a school district expert. Parents have no epistemic rights in determining an appropriate education. Knowledge of the child through experience alone is not enough to give parents a voice. This knowledge is discredited by ALJs post-Rowley as being of no value. This construction works to perpetuate an epistemic hierarchy of school district dominance and parental submission.

The law empowers and disempowers ALJs. They are empowered by being the final adjudicator in deciding if an *appropriate* education has been provided. At the same time, they are disempowered because they are limited by what the law has said and left unsaid. Conducting this CDA on a micro-level helps practitioners, parents, and policymakers to understand special education on a macro-level (Haspel & Tracy, 2007; Mehan, 1983; Johnstone, 2008). With the ambiguity in IDEA (2004) on an appropriate education for students with disabilities, and the United States Supreme Court decision in *Board of Education v. Rowley*, the power of an ALJ to construct an appropriate education is constrained by the discourse in the Rowley decision and the lack of an outcomes-based construction of an appropriate education for students with disabilities.

The purpose of special education as outlined in IDEA (2004) to prepare students with disabilities for college, career, or independent citizenship was not addressed by the ALJs in the final orders analyzed. This lack of accountability marginalizes students with disabilities and could fall short of what Congress intended (Blau, 2007;Valentino, 2006. Discerning the intentions of Congress is difficult. IDEA (2004) explicitly states that parents are equal partners in the IEP process, yet when there is a challenge to the IEP at due process that equal partnership is dissolved and due deference is given to the school district officials. It is imperative that Congress

acts to improve the fairness of the construction of an appropriate education for students with disabilities.

CHAPTER 6—RECOMMENDATIONS

The "basic floor" discourse of access and grade level articulation established in the Rowley decision is in direct conflict with the discourse of IDEA (2004) that states that the purpose of special education is to prepare students with disabilities for college, careers, and independent citizenship. Based on the Rowley decision and other court rulings that perpetuate a discourse of deference to educators and experts, parents are disempowered at due process (Lachman v. Illinois Board of Education, 1988; O'Toole v. Olathe District Schools Unified, 1998). Congress has to make a decision in the reauthorization of IDEA (2004) if it intended to only provide students with disabilities access to a public education rather than an outcomes-based education.

There is a critical need to be able to recover expert witness fees. Without this, even when parents prevail at due process, the education will still have not been free due to the cost of litigation and providing the necessary experts and rebuttal experts. Even if parents prevail on substantive issues, they still fall short of receiving a free education for their child with a disability. The education is not free because the right to recover expert witness fees has not been expressly written into the IDEA (Arlington Central School District Board of Education v. Murphy, 2006). The IDEA (2004) expressly states that parents are equal partners on the IEP team. This partnership must not dissolve at due process. To level this playing field, Congress must pass the IDEA Fairness and Restoration Act (2014) (formerly H.R. 2740) that places the burden of persuasion on the school district and gives parents the explicit right to recover their

expert witness fees when they prevail at a special education due process hearing. If it is not passed, these issues must be addressed in the reauthorization of IDEA (2004). It is recommended that Congress also make fees of lay advocates recoverable.

Additionally, because some courts have interpreted that an IEP that provides a student with a disability with no educational benefit can still be constituted as the school district meeting its statutory obligation to provide a FAPE, any subsequent reauthorization of IDEA must include an accountability measure that allows parents to argue that a FAPE was not provided.

Finally, if Congress fails to expressly state that equal weight must be given to the parents at due process, parents must be informed of their true standing. It is recommended that the procedural safeguards inform parents that at due process appropriate in constructed by the use of experts and that deference is given to the school district. This can save parents the hassle of going to due process and losing on substantive grounds because they were not informed that by law their testimony on an appropriate education is not viewed as persuasive. A passionate argument that is correct will not be accepted over the testimony of an expert. This will alert them, if they cannot afford experts, that they have no recourse for an inappropriate educational program.

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