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Education Law—IDEA Eligibility: Hindsight is 20/20—Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205 (5th Cir. 2019)

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**EDUCATION LAW—IDEA ELIGIBILITY:
HINDSIGHT IS 20/20—LISA M. EX REL. J.M. V.
LEANDER INDEP. SCH. DIST., 924 F.3D 205 (5TH
CIR. 2019)**

The Individuals with Disabilities Education Act (“IDEA”) was passed by Congress “to ensure that all children with disabilities have available to them a free appropriate public education.”¹ The IDEA provides special education services to children who need them.² To receive these services the child must: (1) have a qualifying disability and (2) need special education services to thrive due to said disability.³ If it is determined that a child has a qualified disability and is in need of special education services, the school district must construct an individualized education program (“IEP”) outlining how these services will be delivered.⁴ A parent who is dissatisfied with a school district’s evaluation or IEP may request a due

¹ See 20 U.S.C. § 1400(d)(1)(2010) (stating purpose of IDEA). The legislative purposes of the IDEA are:

- (A) 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;
- (B) to ensure that the rights of children with disabilities and parents of such children are _____ protected; _____ and
- (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

Id.; see also Antonis Katsiyannis et al., *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL & SPECIAL EDUC., 324, 324-25 (2001) (providing statistics regarding students with disabilities prior to IDEA). Before the IDEA was created, more than 1.75 million students were deprived of educational services due to their disabilities. Katsiyannis, *supra* note 1, at 324.

² See Katsiyannis, *supra* note 1, at 324 (noting IDEA “ensures all children with disabilities have access to a free appropriate public education.”)

³ See Lisa M. *ex rel.* J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 208 (5th Cir. 2019) (outlining two-pronged test used to determine special education eligibility); 20 U.S.C. § 1401(3) (defining the term “child with a disability”); 20 U.S.C. 1414(d)(2)(A) (requiring an individualized education program be in effect).

⁴ See 34 C.F.R. § 300.306(c)(1)(i) (2021) (stating “if a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child”); see also *Leander Indep. Sch. Dist.*, 924 F.3d at 209 (outlining specific IDEA evaluation procedures in J.M.’s case).

process hearing before an impartial hearing officer.⁵ Parties who wish to appeal the decision of the hearing officer may subsequently seek relief in the federal courts.⁶

District courts tasked with reviewing a hearing officer's decision will review the administrative record and reach an independent decision as to the child's IDEA eligibility.⁷ Circuit courts reviewing a district court's findings of fact apply a clear error standard of review, however.⁸ In applying this standard, a circuit court must determine whether it will consider events that occurred after the school district's initial determination ("hindsight review") or only the information available to the district at the time of its initial determination ("contemporaneous review").⁹ Due to a lack of statutory guidance, courts are currently split on the issue.¹⁰ In *Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*,¹¹ the Court of Appeals for the Fifth Circuit incorrectly utilized a contemporaneous framework of review, further solidifying a circuit split in this area of law.¹²

When J.M. was a second-grade student in the Leander Independent School District, he experienced challenges at school related to writing and classroom behavior.¹³ Later that year, J.M. was diagnosed with Attention Deficit Hyperactivity Disorder and Developmental Coordination Disorder.¹⁴ During the summer before J.M.'s fourth grade year, his parents requested the school evaluate him for special education services under the IDEA.¹⁵ The school district denied the parents' request for IDEA services, claiming that the services provided to J.M. via the Rehabilitation Act were

⁵ See 34 C.F.R. § 300.507(a) (2021) (describing process for filing due process complaint); 34 C.F.R. § 300.510(a) (2021) (explaining resolution process for due process hearing); see also *Leander Indep. Sch. Dist.*, 924 F.3d at 209 (outlining initial IDEA evaluation procedures).

⁶ See 34 C.F.R. § 300.516(a) (2021) (providing right to bring civil action in federal court); see also *Leander Indep. Sch. Dist.*, 924 F.3d at 209 (outlining secondary IDEA evaluation procedures).

⁷ See 20 U.S.C. § 1415(i)(2)(C) (listing requirements for district courts in evaluating civil action). The court "shall receive the records of the administrative proceedings" and "basing its decision on the preponderance of the evidence . . . grant such relief as the court determines is appropriate." *Id.*

⁸ See *Leander Indep. Sch. Dist.*, 924 F.3d at 213 (noting appellate court's standard of review).

⁹ See *id.* at 214 (discussing contemporaneous and hindsight frameworks).

¹⁰ See *id.* (noting circuit split).

¹¹ 924 F.3d 205 (5th Cir. 2019).

¹² See *id.* at 214 (establishing contemporaneous standard of review in challenges regarding special education qualifications). The contemporaneous standard of review assesses the needs of a child receiving IDEA services "at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight." *Id.*

¹³ See *Leander Indep. Sch. Dist.*, 924 F.3d at 208 (explaining J.M.'s difficulties in school).

¹⁴ See *id.* at 208 (identifying J.M.'s medical conditions and diagnoses).

¹⁵ See *id.* (noting J.M.'s parents' request that he be evaluated under IDEA).

sufficient.¹⁶ One month after the denial of IDEA services, a private neuropsychologist diagnosed J.M. with a Specific Learning Disability with particular impairment in written expression.¹⁷

In October of J.M.'s fourth-grade year, in order to determine if J.M. is eligible for special education services under the IDEA, the district scheduled a review of existing evaluation data ("REED") to establish whether J.M. qualified for a full and individual evaluation.¹⁸ The school district determined that J.M. qualified for a full and individual evaluation ("FIE"), and he subsequently received a drafted IEP, subject to change upon parental input.¹⁹ After reviewing J.M.'s drafted IEP, his mother requested an additional ten minutes of specialized writing instruction per day; however, ten days after this request, the district informed J.M.'s parents that they no longer believed J.M. was eligible for special education.²⁰ J.M.'s parents accused the school district administrators of pressuring teachers to down-play their concerns during a secret meeting held sometime between January 25th and February 23rd, and requested a due process hearing before a Special Education Hearing Officer (SEHO) to re-establish J.M.'s eligibility for special education.²¹ The SEHO ultimately found that

¹⁶ See *id.* (articulating school district's reasoning for denying services to J.M.); see also *Fry ex rel. E.F. v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 747 (2017) (noting differences between IDEA and Rehabilitation Act). While the "IDEA guarantees individually tailored education services . . . [the Rehabilitation Act] promise[s] nondiscriminatory access to public institutions" *Napoleon Cmty. Sch.*, 137 S. Ct. at 747. Despite the statutory differences between the IDEA and the Rehabilitation Act, there is some overlap in coverage. *Napoleon Cmty. Sch.*, 137 S. Ct. at 756; 29 U.S.C. § 794 (stating that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in . . . any program or activity receiving Federal financial assistance.")

¹⁷ See *Leander Indep. Sch. Dist.*, 924 F.3d at 208 (noting J.M.'s SLD diagnosis). Upon J.M.'s SLD diagnosis and recommendation by his neuropsychologist, the school agreed to evaluate him pursuant to the IDEA. *Id.*

¹⁸ See *id.* at 208-09 (describing J.M.'s initial evaluation and outlining IDEA evaluation procedures); see also 20 U.S.C. § 1414(a)(1)(C), (c)(1) (explaining process used to determine eligibility for special education services under IDEA).

¹⁹ See *Leander Indep. Sch. Dist.*, 924 F.3d at 209-10 (explaining school district's confirmation of J.M.'s positive qualification for special education). The school district held another REED meeting in November where teachers expressed growing concern for J.M.'s academic success and J.M.'s parents described his increased anxiety and distress due to his experiences at school. *Id.* at 210. The school district also updated the October REED to include the new evidence presented by J.M.'s teachers and parents in favor of his qualification for special education services. *Id.*; see also 20 U.S.C. § 1414(a)(1)(C), (c)(1) (describing process required to determine IDEA eligibility); 20 U.S.C. § 1414 (d)(1)(A)(i) (defining IEP). The IDEA defines an IEP as "a written statement for each child with a disability that is developed, reviewed, and revised" to ensure that their academic growth and development is promoted within that program. 20 U.S.C. § 1414 (d)(1)(A)(i).

²⁰ See *Leander Indep. Sch. Dist.*, 924 F.3d at 211 (noting school district's reversal of opinion).

²¹ See *id.* at 211-12 (outlining events leading up to legal dispute).

J.M. was eligible for special education services and ordered the District to revise the existing IEP as originally planned.²²

In accordance with IDEA procedures, J.M.'s parents filed a complaint in federal district court to receive attorney fees and the district answered with a counterclaim challenging the SEHO's conclusions as to J.M.'s eligibility.²³ The district court granted judgment on the administrative record in favor of J.M.'s parents and the school district appealed, arguing against J.M.'s need for special education.²⁴ Ultimately, the Fifth Circuit held that the district court did not err in holding that J.M. met eligibility criteria for special education.²⁵

In 1975, Congress passed the IDEA to combat the discrimination faced by children with disabilities in the American public school system.²⁶ Under the IDEA, school districts are responsible for conducting an FIE before a student is granted special education services.²⁷ In order to establish IDEA eligibility under an FIE, it must be determined: "(1) whether the child has a qualifying disability, and (2) whether, by reason of that disability, that child needs IDEA services."²⁸ Although it is the school district's responsibility to conduct the FIE and a REED, the student's teachers, medical professionals, and parents present evidence of the student's academic success or failure so the school can make an informed decision.²⁹ After the FIE and REED are completed, a team of qualified professionals ("committee") will determine whether the student is granted or denied special educa-

²² See *id.* at 212 (explaining SEHO's decision). The SEHO "concluded that '[t]he evidence establishes a reasonable presumption that District personnel at some level intervened with [J.M.'s] teachers . . . either directing or training them to a finding of no eligibility . . .'" *Id.*

²³ See *id.* (describing complaint and counterclaim).

²⁴ See *id.* (noting district court's ruling and subsequent appeal).

²⁵ See *Leander Indep. Sch. Dist.*, 924 F.3d at 207-08 (stating the court's holding).

²⁶ See 20 U.S.C. § 1400(d)(1)(A) (articulating congressional intent of IDEA). The purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education." *Id.*; see also 34 C.F.R. § 300.306(c)(2) (2021) (establishing statutory right to free and appropriate education).

²⁷ See 20 U.S.C. § 1414(a)(1)(A)-(C) (explaining relationship between IDEA and FIE). A FIE is conducted by the school district to determine if a student has a qualifying disability under the IDEA and what the specific educational needs of that student are. *Id.* at (a)(1)(C).

²⁸ See 20 U.S.C. §§ 1401(3), 1414(d)(2)(A) (articulating two-pronged inquiry to determine IDEA eligibility). In order to fully and adequately assess a student's educational needs under the IDEA, school districts conduct a REED which includes "'evaluations and information provided by the parents . . . current classroom-based, local, or State assessments, and classroom-based observations [and] observations by teachers and related services providers.'" 20 U.S.C. § 1414(c)(1).

²⁹ See 20 U.S.C. § 1414(a)(1) (stating "a State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation"); 20 U.S.C. § 1414(c)(1) (noting data to be reviewed in evaluations).

tion services under the IDEA.³⁰ If this committee finds the student eligible for special education services, an IEP will be created to promote the student's academic success.³¹ If a parent is dissatisfied with the services their child receives, they may file a due process complaint and request an informal meeting with the school district to discuss their grievances; if the parents' dissatisfaction continues, they may pursue relief in an administrative due process hearing held before an impartial Special Education Hearing Officer (SEHO).³²

Once an IDEA case makes its way to federal district court, the review is "virtually *de novo*," meaning that the court gives due weight to the SEHO's determinations provided the hearing officer came to an independent conclusion based on the preponderance of the evidence.³³ The district court will grant summary judgment in favor of the school when there has been compliance with the procedures prescribed under the IDEA.³⁴ If the district court's decision is appealed, the appellate court will review the de-

³⁰ See 20 U.S.C. § 1414(b)(4) (noting determination of IDEA eligibility made by team of qualified professionals); see also 19 TEX. ADMIN. CODE § 89.1040(b) (2021) (clarifying specific eligibility procedures under IDEA in Texas). Texas refers to this "team of qualified professionals" as the admission, review, and dismissal (ARD) committee. 19 TEX. ADMIN. CODE § 89.1040(b) (2021).

³¹ See 34 C.F.R. § 300.306(c)(2) (2021) (stating "if a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child . . ."); 20 U.S.C. § 1414(d)(2)(A) (outlining general requirements for IEPs); see also 20 U.S.C.S. § 1412(a)(1) (stating "a free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . .") The IDEA utilizes IEPs as the vehicle to ensure that students with disabilities receive an education that is appropriate to their specific needs. 20 U.S.C.S. § 1412(a)(1).

³² See 34 C.F.R. § 300.507(a) (2021) (outlining process for filing due process complaint relating to "evaluation or educational placement of a child with a disability"); 34 C.F.R. §§ 300.510-12 (2021) (establishing process of and framework for review of IDEA complaints); 20 U.S.C. § 1415(i)(3)(B) (stating a court may award reasonable attorneys' fees for proceedings brought under § 1415). If the SEHO finds in favor of the parents, they are then permitted to file a complaint in federal district court to recover attorney's fees. 20 U.S.C. § 1415(i)(3)(B)(i)(II).

³³ See *Teague Indep. Sch. Dist. v. Mr. L ex rel. Todd L.*, 999 F.2d 127, 130-31 (5th Cir. 1993) (establishing *de novo* review of IDEA cases in Fifth Circuit); see also *Dallas Indep. Sch. Dist. v. Woody ex rel. K.W.*, 865 F.3d 303, 308-09 (5th Cir. 2017) (affirming *de novo* judicial review of IDEA cases in Fifth Circuit); 20 U.S.C. § 1415(i)(2)(C) (explaining procedural process of IDEA cases).

³⁴ See *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 967 (5th Cir. 2016) (explaining standard for summary judgment in IDEA cases). ". . . in IDEA proceedings, summary judgment 'is not directed to discerning whether there are disputed issues of fact, but rather, whether the administrative record, together with any additional evidence, establishes that there has been compliance with IDEA's processes and that the child's educational needs have been appropriately addressed.'" *Id.* (quoting *Wall ex rel. Wall v. Mattituck-Cutchogue Sch. Dist.*, 945 F. Supp. 501, 508 (E.D.N.Y. 1996)).

cision as a mixed question of law and fact.³⁵ Judicial review of IDEA complaints is unique and, because Congress generally defers to state and local school officials, the role of the judiciary is purposefully limited, leading to various conflicting interpretations.³⁶ Due to the legislative nature of the IDEA and the lack of clearly defined terms, circuit courts have developed two different standards of review for predominant questions of fact when assessing a child's eligibility for special education services under the IDEA.³⁷

Courts are split as to whether they should assess IDEA eligibility under a hindsight standard or under a contemporaneous standard.³⁸ Under the contemporaneous standard of review, courts only review the facts that were available to the committee at the time of the original eligibility decision, adhering to the *de novo* review used by the district courts.³⁹ Circuits

³⁵ See *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 808 (5th Cir. 2012) (explaining appellate standard of review for IDEA cases). “We review the district court’s findings of underlying fact . . . for clear error. Under a clear error standard, we will not reverse the district court unless we are ‘left with a definite and firm conviction that a mistake has been committed.’” *Id.* (quoting *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009)); see also *Orleans Par. Sch. Bd.*, 810 F.3d at 967 (articulating standard of review for appeal of district court’s determination in IDEA cases). If the appellate courts find that the question of fact is predominant to the question of law, then the case must be reviewed with clear error deference. *Orleans Par. Sch. Bd.*, 810 F.3d at 967. However, if the court finds that the question of law is predominant to the question of fact, the court reviews the case *de novo*. *Orleans Par. Sch. Bd.*, 810 F.3d at 967.

³⁶ See *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003) (quoting *Flour Bluff Indep. Sch. Dist. v. Lesa T. ex rel. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996)) (explaining tension between judiciary and legislature when establishing IDEA procedures); see also 34 C.F.R. § 300.8(a)(2)(i) (2021) (requiring need for special education to qualify for IDEA).

³⁷ See Dennis Fan, *No IDEA What the Future Holds: The Retrospective Evidence Dilemma* 114 COLUM. L. REV. 1503, 1522-32 (2014) (articulating differences between contemporaneous and hindsight review); Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1386-88 (2016) (discussing different standards of review held by circuits across the country); see also H.R. REP. NO. 108-77 at 84 (2003) (discussing need for IDEA eligibility reform).

³⁸ See Fan, *supra* note 37, at 1522-32 (highlighting current circuit split regarding IDEA eligibility determinations); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 83-84 (2009) (detailing lack of guidelines and circuit splits regarding IDEA eligibility).

³⁹ See *Hudson ex rel. L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175 (9th Cir. 2016) (citing *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)) (refusing to consider hindsight evidence). “The appropriateness of a student’s eligibility should be assessed in terms of its appropriateness at the time of the child’s evaluation and not from the perspective of a later time with the benefit of hindsight.” *Id.*; *R.E. ex rel. J.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 187 (2d Cir. 2012) (refusing to consider hindsight evidence). “In determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision.” *New York City Dep’t of Educ.*, 694 F.3d at 187; *D.L. ex rel. J.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App’x 733, 738 (5th Cir. 2017) (establishing contemporaneous review for IDEA qualification); see also Fan, *supra* note 37, at 1516 (acknowledging some courts “enforce an intermediate

using the hindsight standard of review allow the admission of additional evidence to make an independent and current assessment of the child's need for special education services.⁴⁰

In *Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*, the court utilized a contemporaneous standard of review when evaluating J.M.'s eligibility for IDEA special education services.⁴¹ In its reasoning, the Fifth Circuit relied on precedent it established in *D.L. ex rel. J.L. v. Clear Creek Indep. Sch. Dist.*, where it ruled that it would “not judge a school district’s determination in hindsight,” but rather “consider whether there was a present need for special education services.”⁴² The court acknowledged that, while the judiciary unavoidably views in retrospect, IDEA eligibility must be determined based on the information available to the ARD committee at the time of its decision because:

An erroneous conclusion that a student is ineligible for special education does not somehow become acceptable because a student subsequently succeeds. Nor does a proper finding that a student is ineligible become erroneous because the student later struggles. Subsequent events do not determine ex ante reasonableness in the eligibility context.⁴³

standard of review between substantial deference and de novo.”); Wittlin, *supra* note 37, at 1386-88 (identifying circuits utilizing contemporaneous decision review).

⁴⁰ See *Simchick ex rel. M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (noting “in some situations, evidence of *actual progress* may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some education benefit.”); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 590 (5th Cir. 2009) (explaining “[p]assing grades and advancement from year to year are factors that indicate a child is receiving a meaningful educational benefit.”); see also *Fan, supra* note 37, at 1533-40 (detailing varying levels of hindsight evidence allowed in circuit courts); Wittlin, *supra* note 37, at 1386-88 (identifying circuit stances on hindsight evidence).

⁴¹ See *Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 214 (5th Cir. 2019) (noting court must “assess eligibility with the information available to the ARD committee at the time of its decision.”)

⁴² See *Clear Creek Indep. Sch. Dist.*, 695 F. App’x at 738 (establishing contemporaneous review for IDEA qualification); *Leander Indep. Sch. Dist.*, 924 F.3d at 215 (assessing J.M.’s IDEA qualification under contemporaneous review).

⁴³ *Leander Indep. Sch. Dist.*, 924 F.3d at 214 (explaining rationale behind exclusion of hindsight evidence). The contemporaneous standard approach decreases the court’s role in establishing a student’s eligibility for special education services under the IDEA and gives great deference to the ARD committee’s decision. *Id.* at 218.

Under the contemporaneous standard of review, the court held that J.M. was eligible for services under the IDEA based upon the evidence presented to the ARD committee.⁴⁴

By applying a contemporaneous standard of review for IEP eligibility, the court in *Leander Indep. Sch. Dist.* adopted precedent that further complicated subsequent judicial review of IDEA challenges.⁴⁵ The contemporaneous standard of review prevents appellate courts from hearing new or additional evidence not originally available to the ARD Committee, adversely affecting a student's ability to qualify for services under the IDEA.⁴⁶ Preventing the admission of new evidence increases the likelihood of an erroneous special education eligibility determination because a significant amount of time elapses between the committee's hearing and the appellate court's review.⁴⁷ The severity of a student's disability and individualized educational needs can progress over time, and an appellate court is unable to render an accurate determination of a student's IDEA eligibility without current and up-to-date evidence.⁴⁸

⁴⁴ See *id.* at 217 (holding J.M. met eligibility criteria for special education provided by IDEA). The court based its decision on the evidence presented to the ARD committee which included documentation of J.M.'s difficulty in the general education environment, teacher observations, clinical observations, progress reports, parent observation, and a student self-evaluation. *Id.* at 216-17.

⁴⁵ See *Clear Creek Indep. Sch. Dist.*, 695 F. App'x at 738 (applying contemporaneous review of IDEA eligibility); *Leander Indep. Sch. Dist.*, 924 F.3d at 214 (utilizing contemporaneous review of IDEA eligibility set by *Clear Creek*); see also Weber, *supra* note 38, at 83-84 (detailing lack of guidelines and circuit splits regarding IDEA eligibility).

⁴⁶ See *Clear Creek Indep. Sch. Dist.*, 695 F. App'x at 737-38 (detailing court's process when reviewing IDEA eligibility under contemporaneous standard); *Leander Indep. Sch. Dist.*, 924 F.3d at 215 (declaring contemporaneous review prevents "Monday morning quarterbacking"); see also Hudson *ex rel.* L.J. v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017) (applying contemporaneous review). IDEA eligibility is decided by the ARD committee based on the student's need for special education services at a particular moment in time. 19 TEX. ADMIN. CODE § 89.1040(b) (2021).

⁴⁷ See *Leander Indep. Sch. Dist.*, 924 F.3d at 207-13 (showing three years and nine months between request for services and final decision); *Clear Creek Indep. Sch. Dist.*, 695 F. App'x at 735-36 (describing fifty months passed between request for services and final court decision); *Simchick ex rel. M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 320-23 (4th Cir. 2009) (describing forty months passed between request for services and final decision); see also Wittlin, *supra* note 37, at 1393 (explaining how using hindsight evidence increases accuracy of court adjudication).

⁴⁸ See 20 U.S.C. § 1414 (d)(4)(Aa)(i) (establishing that IEP appropriateness must be reviewed annually); 20 U.S.C. § 1414 (d)(5)(A)(i) (asserting students' IDEA eligibility must be re-evaluated every three years); Wittlin, *supra* note 37, at 1387-88 (articulating increased judicial accuracy when utilizing hindsight standard due to inclusion of most recent evidence). Once a school district deems a student eligible for IDEA services, the district reviews the student's IEP on an annual basis to ensure that the student's plan is still appropriate. 20 U.S.C. § 1414 (d)(4)(A)(i). In addition, the district reviews the student's IEP at least once every three years. 20 U.S.C. § 1414 (d)(5)(A)(i). Conversely, when a school district wrongly denies a student IDEA services, the student is expected to succeed academically in the general education setting while

It should be noted that most courts, including the Fifth Circuit, evaluate other aspects of the IDEA, such as IEP appropriateness and implementation, with the benefit of hindsight evidence.⁴⁹ The court in *Leander Indep. Sch. Dist.* refused to consider hindsight evidence in IDEA eligibility cases, explaining that “[a]n erroneous conclusion that a student is ineligible for special education does not somehow become acceptable because a student subsequently succeeds; nor does a proper finding that a student is ineligible become erroneous because the student later struggles.”⁵⁰ By this reasoning, an erroneous committee decision could be affirmed by the court, leaving a child to suffer.⁵¹

When a student is denied IDEA services based on inadequate or incomplete evidence provided to the committee, the student is denied their statutory right to a free appropriate public education until this mistake is

they wait for their case to reach the appellate level, because the district courts are not permitted to review evidence of eligibility. *Leander Indep. Sch. Dist.*, 924 F.3d at 212.

⁴⁹ See *Houston Indep. Sch. Dist. v. Juan P. ex rel. V.P.*, 582 F.3d 576, 588 (5th Cir. 2009) (categorizing certain hindsight evidence as “critical factor” when determining whether student received free appropriate public education); *Fairfax Cnty. Sch. Bd.*, 553 F.3d at 326-27 (concluding hindsight evidence of student progress relevant in determining IEP appropriateness); see also Fan, *supra* note 37, at 1522-39 (describing various circuit positions regarding hindsight evidence in IDEA cases). The Second, Seventh, Ninth, and Eleventh Circuits exclude all retrospective evidence in all IDEA cases involving a student’s denial of a free appropriate public education. Fan, *supra* note 37, at 1526. The Third, Fourth, Fifth, and Tenth Circuits will, however, allow hindsight evidence in varying circumstances and degrees. Fan, *supra* note 37, at 1533. The Third Circuit is the most liberal in their approach, allowing hindsight evidence to be considered in IEP appropriateness when it is helpful and relevant to the issue being adjudicated. Fan, *supra* note 37, at 1534-35. Grounding its liberal approach in the statutory purpose of the IDEA, the Third Circuit has intentionally set precedent with broad language, resulting in more equitable appellate decisions. Fan, *supra* note 37, at 1534-35.

⁵⁰ See *Leander Indep. Sch. Dist.*, 924 F.3d at 214 (articulating concerns regarding hindsight evidence when determining IDEA eligibility); *Clear Creek Indep. Sch. Dist.*, 695 F. App’x at 738 (stating court need only determine if student had “a present need for special education services”); see also Fan, *supra* note 37, at 1518-19 (explaining consequences of judiciary’s reluctance to overturn decisions made in due process hearings). The judiciary is well aware of the limitation on its power regarding IEP appropriateness review. Fan, *supra* note 37, at 1516-17. This limitation, although well-intentioned, hinders student and educator success because it creates challenges for both parties when the IEP is not applied and implemented as intended. Fan, *supra* note 37, at 1520-21. By giving unchecked deference to evidence presented during the due process hearing, it is difficult for the court to find in favor of the complaining party, thereby forcing the school district, the student, and the parents to start the entire process over again after being tied up in the legal system for what is often years. Fan, *supra* note 37, at 1521.

⁵¹ See Fan, *supra* note 37, at 1513 (inferring inadequate IEP constitutes denial of free appropriate public education); Weber, *supra* note 38, at 152 (proposing to look at issues once child is IDEA eligible, not in IDEA eligibility itself). Logically, if a student who qualifies for and receives IDEA services can be denied a free appropriate public education due to an inadequate IEP, a student who should have qualified for and never received IDEA services can also be denied a free appropriate public education. Fan, *supra* note 37, at 1531 n.163.

corrected.⁵² The school district also wastes valuable resources due to increased staffing and funding needed to support IEP students until the mistake is corrected by either the SEHO or judiciary.⁵³ When the court fails to hear additional evidence regarding a student's IDEA eligibility, the likelihood of correcting an inappropriate ruling by the committee or SEHO significantly decreases.⁵⁴

The court in *Leander Indep. Sch. Dist.* further entrenched the circuit split that exists regarding appellate review of IDEA eligibility by adopting a contemporaneous standard for reviewing committee determinations. When a student's IDEA eligibility is incorrectly decided, school districts waste valuable resources and students are denied their statutory right to a free appropriate public education. The Fifth Circuit in this case should not have established precedent that prohibits the admission of hindsight evidence that could help ensure IDEA eligibility findings are accurate and protect a student's right to receive a free appropriate public education.

Sydney Doneen

⁵² See 7 C.F.R. § 15b.22 (establishing statutory right to free appropriate public education); see also 20 U.S.C. § 1414 (establishing evaluation procedures under IDEA). The legislative purpose of the IDEA was to provide every child with a FAPE. 7 C.F.R. § 15b.22; 20 U.S.C. § 1414. The denial of a free appropriate public education is a violation of a child's inherent right to education, however, without the ability to review relevant hindsight evidence, courts are bound, more often than not, to deny a student petitioner this right because the evidence is either outdated, incomplete, or inaccurate. Fan, *supra* note 37, at 1546 (explaining incomplete information promotes needless litigation); Wittlin, *supra* note 37, at 1393 (discussing accuracy of hindsight evidence in litigation); Weber, *supra* note 38 at 152 (proposing reforming caselaw on eligibility for IDEA).

⁵³ See H.R. REP. NO. 108-77 at 84 (2003) (stating “[o]veridentification of children as disabled and placing them in special education where they do not belong hinders the academic development of these students . . . [and] takes valuable resources away from students who truly are disabled.” *Id.* Additionally, it is important to recognize that students who are wrongfully deemed eligible suffer academically in a way that is comparable to those who are wrongfully denied eligibility. *Id.*

⁵⁴ See Wittlin, *supra* note 37, at 1393 (explaining increased accuracy and consistency of decisions made by courts decisions that allow hindsight evidence).