

National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions Under the IDEA: An Empirical Analysis

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I. INTRODUCTION

The outcome of a due process hearing between parents and a school district concerning a child's special education program rarely draws the attention of anyone beyond the parties to that dispute. The resulting decision of the hearing officer similarly impacts only the parties to the dispute, without extending to other parents and school districts seeking an adjudication to resolve their disagreements. When viewed collectively, however, both the frequency and outcomes of hearing officer decisions comprise a body of administrative law and offer a unique perspective on the legal obligations of schools in providing special education services.

The Individuals with Disabilities Education Act (IDEA)¹ established an array of special substantive and procedural rights for children with disabilities and their parents. The central substantive right is the entitlement to a free and appropriate public education (FAPE).² The corresponding core procedural safeguard is a specialized dispute resolution system centered on the right to a due process hearing.³ States may elect to have a one- or two-

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¹ 20 U.S.C. §§ 1400–1482 (2012). The corresponding regulations are at 34 C.F.R. Parts 300 and 303 (2012).

² 20 U.S.C. § 1401(9) (2012); 34 C.F.R. § 300.17 (2012). FAPE also has a significant procedural side, but its substantive component is an individualized education program that is "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). For infants and toddlers with a disability, the counterpart substantive component is an individualized family service plan. 20 U.S.C. § 1436 (2012); 34 C.F.R. §§ 303.340–346 (2012).

³ 20 U.S.C. § 1415(f) (2012); 34 C.F.R. § 300.511 (2012). In 2004, the reauthorization of IDEA included a mandatory resolution session where parents and school districts have the opportunity to discuss and resolve parent-filed complaints prior to a due process hearing. 20 U.S.C. § 1415(f)(1)(B) (2012).

tiered system for administrative adjudication.⁴ In states with a single tier, either the school district or the parent may appeal the decision of the hearing officer directly to state or federal court.⁵ In states with a two-tier system,⁶ the appeal is to a second administrative adjudication in the form of a review officer, with judicial review available after exhausting this second tier.⁷

In recent years, the decisions of IDEA hearing and review officers have become the subject of public and professional attention. Concerns have arisen about not only the purportedly rising frequency of such decisions,⁸ but also—even more notably in recent years—a school-favored skew in their decisions that seems to be at odds with the impartiality requirement of the IDEA.⁹ As a leading example, in a *Wall Street Journal* article, Daniel Golden reported a prevailing parental perception that the IDEA hearing and review officer system is biased in favor of school districts.¹⁰ In support of this accusation, he provided the 2005–2006 outcomes of hearings in five states—California, Connecticut, Florida, Massachusetts, and New Jersey—that together totaled as follows: "parent wins"—33 (15%); "district wins"—146 (66%), and "split decisions"—43 (19%).¹¹ However, his data were clearly

⁴ 20 U.S.C. § 1415(g) (2012); 34 C.F.R. § 300.514(b) (2012). For the variety of administrative systems among the states, see Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010) (including the trend downward from twenty-four two-tiered systems in 1991 to ten in 2010).

⁵ 20 U.S.C. § 1415(i)(2) (2012); 34 C.F.R. § 300.516(a) (2012). For the rather robust exhaustion requirement, see, for example, Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009).

⁶ See *supra* note 4 and accompanying text.

⁷ 20 U.S.C. § 1415(g), (i)(2) (2012); 34 C.F.R. § 300.514(b), (d) (2012). For exhaustion, see *supra* note 5.

⁸ See, e.g., Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (finding an increase in the frequency of hearing and review officer decisions between 1977 and 2000, particularly between 1992 and 2000).

⁹ For the broad IDEA standards of impartiality and the general judicial rejection of the various bias claims, see, for example, Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers Under the Individuals with Disabilities Act*, 83 N. DAKOTA L. REV. 109 (2007).

¹⁰ Daniel Golden, *Schools Beat Back Demands for Special-Ed Services*, WALL ST. J. (July 24, 2007, 11:59 PM), <http://online.wsj.com/news/articles/SB118524665215575918>.

¹¹ *Id.*

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questionable for several reasons. First, he used a sample selected for convenience rather than a random sample, and it was limited to a one-year period, 2005–2006, rather than being longitudinal.¹² Second, he categorized the decisions into an overly simplistic scale of wins and losses, with an undefined extra category of "split decisions" and without providing or analyzing the basis for this outcome scale.¹³ Third, although the text of his article focused on the review officer decisions in New York and Pennsylvania, his data were limited to one-tier states, thus exclusively outcomes at the hearing officer level.¹⁴

Informed public policy requires more objective and precise data about IDEA hearing and review officer decisions, particularly in terms of the metric for classifying the outcomes of these adjudicated cases.¹⁵ More specifically, this metric needs to provide more careful consideration for cases with more than one issue and for those outcomes that are not complete wins or losses. Moreover, the sample needs to be representatively national.

II. RESEARCH FRAMEWORK

Sources abound in literature addressing the special education administrative process that point out many of the problems in the current system of due process hearings. These sources have focused on a number of negative aspects of this specialized litigation, such as the expense to the

¹² The states in this sample are not systematically representative of either the nation or the dominant states of special education litigation. *See, e.g., infra* notes 26–31, 35 and accompanying text. Moreover, the article did not recognize the non-uniform problems of state data collection, including their varying definitions of adjudicated decisions and yearly period. *See, e.g.,* Perry A. Zirkel & Karen Gischar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 21, 28 (2008).

¹³ Cryptically citing his sources as "the states," he presumably obtained the data from the state education agency websites for the five selected states, without acknowledging the lack of a uniform basis for these results. Golden, *supra* note 10. For example, how did each state determine the classification of cases that decided more than one issue and/or decided an issue largely but not completely in one side's favor?

¹⁴ For a more complete critique, see Perry A. Zirkel, *Balance and Bias in Special Education Hearings*, 22 J. DISABILITY POL'Y STUD. 67 (2013).

¹⁵ *See, e.g.,* Perry A. Zirkel, *Blaming the Referee*, 37 COMMUNIQUÉ 11 (2008) (explaining how IDEA hearing and review officers become scapegoats for parties' perceptions about outcome percentages that are not evenly split or in their favor within the limited two-category conception).

parties,¹⁶ damage to their relationship,¹⁷ and overall legal complexity and lengthy delays.¹⁸ The proposed alternative dispute resolution mechanisms include binding arbitration¹⁹ and mandatory individualized education program (IEP) facilitation with an optional special education consultant process.²⁰

The empirical segment of the literature is less extensive, particularly for the primary source of adjudications: impartial hearing officer decisions and, in the limited, dwindling number of states with a second tier,²¹ review officer decisions.²² The empirical research on the overall trends in special education litigation has focused primarily on two key dimensions—frequency and outcomes. "Frequency" in this context refers to the volume, or total number, of either filings, hearings, or—corresponding most closely with outcomes—"adjudicated" cases, i.e., those resulting in a written decision after the IDEA's required proceedings. In turn, "outcomes" refers to whether the decisions in these adjudicated cases are in favor of parents, school districts, or—with a sufficiently systematic scale—intermediate differentiations between these two polar positions. Yet, the relevant research to date has been less than sufficient in terms of (1) providing national and longitudinal data; (2) focusing on hearing officer, rather than judicial, decisions; and (3) engaging in a carefully systematic analysis, such as the use of analogous issue categories and differentiated outcome scales.

¹⁶ See, e.g., Elisa Hyman, Dean Hill Rivkin, & Stephen A. Rosenbaum, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 10 J. GENDER, SOC. POL'Y & L. 107, 111–14 (2011).

¹⁷ See, e.g., AM. ASS'N OF SCH. ADM'RS, *RETHINKING SPECIAL EDUCATION DUE PROCESS* 8–9 (2013), available at <http://www.aasa.org/rethinkingdueprocess.aspx>.

¹⁸ See, e.g., Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONTANA L. REV. 403 (1994).

¹⁹ See, e.g., S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 544 (2012) (providing for an additional dispute resolution option for binding arbitration by a panel consisting of an expert in the child's disability, a special education administrator with experience in the child's disability, and an attorney familiar with special education law).

²⁰ See, e.g., AM. ASS'N OF SCH. ADM'RS, *supra* note 17, at 17–23 (proposing to replace due process hearings with a two-tiered system to include a mandatory facilitated IEP meeting and, if that is unsuccessful, an optional special education consultant process to develop an IEP that the parties are required to attempt before having the ability to file an action in court).

²¹ See Zirkel & Scala, *supra* note 4, at 6.

²² See *supra* note 4 and accompanying text.

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A. Frequency Studies

Relatively few studies have examined the frequency of special education litigation across the country in recent decades. Moreover, several of those national studies examined the judicial, rather than the hearing/review officer, level. For example, early analyses found that from the 1970s to the 1990s the overall volume of reported education litigation in state and federal courts remained relatively level, but the segment of special education litigation rose dramatically.²³ Similarly limiting their analysis to court decisions, Zirkel and Johnson's update found that the trend in special education litigation continued to increase in the most recent decade.²⁴

The corresponding national studies on the frequency of hearing and review officer decisions, which comprise a substantial segment of the special education case law, provide a patchwork picture based on varying data sources. First, Zirkel and D'Angelo's early analysis was based on hearing and review officer decisions published in the INDIVIDUALS WITH DISABILITIES LAW REPORT (IDELR) database from 1977 to 2000, revealing a generally but not uniformly upward trend.²⁵

More recently, Zirkel and Gischlar based their frequency analysis on the total population of adjudicated cases at the hearing officer level under the IDEA from 1991 to 2005, without attention to the review officer level.²⁶ They found a steady increase in the volume of decisions during the period 1991 to 1996, followed by a "relatively high, albeit uneven, plateau"²⁷ from

²³ See Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 114 (1997); Perry A. Zirkel & Sharon N. Richardson, *The "Explosion" in Education Litigation*, 53 EDUC. L. REP. 767 (1989). Early research that focused on litigation specific to special education provided largely confirmatory evidence. See, e.g., Zirkel & D'Angelo, *supra* note 8 (finding an upward trend from 1977 to 1997 but, using three-year increments, a slight decline in 1998–2000); Perry A. Zirkel & James Newcomer, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999) (finding a marked increase from 1975 and 1995).

²⁴ Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011).

²⁵ Using three-year segments within the overall period, they found the frequency to increase moderately from 1977 to 1982, remain relatively stable from 1983 to 1994, and increase substantially from 1995 to 2000. Zirkel & D'Angelo, *supra* note 8, at 738–40.

²⁶ Zirkel & Gischlar, *supra* note 12.

²⁷ *Id.* at 27. From 1997–2005 the volume of decisions slightly fluctuated from year to year; however, the overall volume for this period remained higher than for the period 1991–1996. *Id.*

1997 to 2005. Acknowledging the limitation of nonuniformity in the state reports,²⁸ they determined the top five states in overall frequency during that time period were New York (43% of the total), New Jersey (13%), Pennsylvania (7%), California (5%), and Maryland (4%).²⁹ In a subsequent study that extended to the District of Columbia (D.C.),³⁰ Zirkel and Scala reported that the top five jurisdictions for adjudicated hearing officer decisions in 2008–2009 were D.C. (43%), New York (27%), California (6%), and New Jersey and Pennsylvania (4%).³¹

Finally, the federally funded National Center on Dispute Resolution in Special Education (CADRE) recently released a six year summary of special education dispute resolution data from 2004 to 2010, reporting that the total number of hearing officer decisions declined steadily and significantly from the 2004–2005 school year (n=7,349) to the end of the 2009–2010 school year (n=2,329).³² Based on the same governmental data source, these data

²⁸ Their survey and the annual NASDSE surveys were the sources of the data. *Id.* at 24.

²⁹ *Id.* at 25. They also analyzed the frequencies on a per capita basis in relation to each state's special education enrollments, finding some ranks remaining the same (e.g., New York and New Jersey) and others changing dramatically (e.g., Hawaii and some of the states in the northeast moving into the top group). *Id.* Their tabulation effectively subsumed the GAO report, which was based on the same NASDSE survey data for the earlier segment of years. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 13 (2003), available at <http://www.gao.gov/new.items/d03897.pdf> (reporting that the top five states in frequency of due process hearings held between 1996 and 2000—accounting for 80% of the 16,418 hearings held—were California, Maryland, New Jersey, New York, and Pennsylvania). None of these tabulations included data from the review officer level.

³⁰ As had Zirkel and Gischlar, *supra* note 12, at 24, Zirkel and Scala sent a survey to the special education director of every state and the District of Columbia. Unlike Zirkel and Gischlar, however, Zirkel and Scala obtained sufficient data from the District of Columbia to include it in their results. Zirkel & Scala, *supra* note 4, at 4–5.

³¹ Zirkel & Scala, *supra* note 4, at 5.

³² Dick Zeller, *Six Year State and National Summaries of Dispute Resolution Data*, CADRE, 1, 25–30, <http://www.directionservice.org/cadre/pdf/National%20Part%20B%20Tables%2004-05%20thru%2009-10%20Summary%2021March%202012.pdf> (last updated Feb. 12, 2012). This report also included figures for "hearings pending" without elaboration on whether and how those numbers were included in the numbers of hearings held. CADRE more recently provided more detailed data updated through 2011–2012. See Richard Zeller & Amy Whitehome, *Dispute Resolution National Trends: 8 Years of APR/Section 618 Data*, CADRE (Feb. 13, 2014),

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were based on reports from the U.S. Department of Education's Office of Special Education Programs (OSEP), which had notably resolved much of the nonuniformity.³³ Significantly, as OSEP's data notes acknowledged, the varied ways different states collect and report this data limited the accuracy of the figures.³⁴ Based on this same, improved governmental data source, Zirkel's recent analysis concluded that six jurisdictions—Puerto Rico, the District of Columbia, New York, California, Pennsylvania, and New Jersey—accounted for 90% of the first-tier filings and adjudications.³⁵

Overall, the limitations of these successive frequency analyses included the lack of a uniform data source for an extended period of time and for the two-tier scope of these administrative adjudications. The other major limitation was the lack of a more precise, differentiated unit of analysis beyond the case. More specifically, these previous studies did not examine the frequency of issues or at least categories of issues, such as eligibility and FAPE, and the ratio of these issue categories per case.

B. Outcome Studies

Empirical studies of outcomes at the judicial and administrative levels of special education adjudication have also been more limited, particularly in terms of the specificity of the unit of analysis and the precision of the outcome scale. The outcome studies under the IDEA with a national scope have been largely limited to those focused on court decisions. For the most direct of the national studies, Zirkel and D'Angelo's results yielded the following overall outcomes distribution for IDELR-published court decisions

http://www.directionservice.org/cadre/pdf/DR_Data_Trends_Webinar_13FEB14.pdf (last visited Apr. 30, 2014).

³³ For the data tables for Part B Dispute Resolution and the accompanying Part B Data notes reflecting data from not only the fifty states but also, the District of Columbia, Puerto Rico, and other U.S. jurisdictions, see *Historical State-level IDEA Data Notes Files*, TA&D NETWORK, <http://tadnet.public.tadnet.org/pages/712> (last visited Mar. 11, 2014).

³⁴ See *id.*

³⁵ Perry A. Zirkel, *Longitudinal Trends of Impartial Hearings under the IDEA*, 302 EDUC. L. REP. 1 (2014) (containing data on an overall basis for the six years from 2006–2007 through 2011–2012 without adjustment for special education enrollments and finding that the ranking differed among these six jurisdictions depending on the unit of analysis—filings or adjudications.). For a subsequent reanalysis on a per capita basis in relation to special education enrollments, see Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Follow-Up Analysis*, 303 EDUC. L. REP. 1 (2014).

for the period 1989–2000: school districts—56%, mixed—9%, and parents—35%.³⁶ This broad three-category outcomes scale failed to differentiate cases from issues, leaving "mixed" as an ambiguous middle ground.³⁷

The other national studies of the outcomes of court decisions were less direct, focusing instead on the relationship of the outcomes between or among adjudicative levels. First, in their aforementioned³⁸ early study, Zirkel and Newcomer focused on the changes upon judicial review, reporting the outcomes of court decisions published in IDELR for the period 1975–95 according to the following five-category scale: complete district wins—40%, modified district wins—10%, split decisions—11%, modified parent wins—12%, and complete parent wins—29%.³⁹ Second and more recently Zirkel and Machin compared the outcomes of published and unpublished judicial decisions using a seven-category scale for issue categories, such as eligibility, FAPE-procedural, and FAPE-substantive.⁴⁰ They concluded from

³⁶ See Zirkel & D'Angelo, *supra* note 8, at 740, 746 (using this three-category outcomes scale, they reported the distributions for successive three-year intervals. By combining these percentages with the frequencies that they separately reported for the same intervals we are able to calculate this overall distribution).

³⁷ *Id.* at 738 (relying on the IDELR editors' outcome designations, which used "partial" as the middle category, Zirkel and D'Angelo used instead the replacement term "mixed" for what appeared to be an imprecise catch-all that included inconclusive, split, and other less than one-sided rulings for both single- and multi-issue cases).

³⁸ See Zirkel & Newcomer, *supra* note 23 and accompanying text.

³⁹ Newcomer & Zirkel, *supra* note 23, at 473 (explaining that—because the purpose of their study was to determine the relationship between hearing/review officer and court decisions—their "modified" categories were attributable to the focus of decision at each successive level of appeal). Their instrument described successive foci as "win on major issue," presumably for the hearing officer level, or "modified in favor of [the party]" for the second tier, if any, and each court level of adjudication.). *Id.* at 473, 475. Using a back-mapping approach, i.e., determining the hearing and, if any, review officer, decision as reported in their random sample of court decisions, they reported the following distribution of outcomes for these same cases at the administrative (i.e., hearing/review officer) level: complete district wins—49%, modified district wins—11%, split decisions—9%, modified parent wins—4%, and complete parent wins—28%. *Id.* at 475. Due to their focus and approach, they did not include in their back-mapping those hearing or review officer decisions that did not result in an IDELR-published judicial appeal, thus providing a severely skewed sample of the administrative adjudications.

⁴⁰ Perry A. Zirkel & Amanda C. Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483, 503 (2012) (including a pair of the seven categories—inconclusive in favor of parents and inconclusive in favor of districts—that were attributable to the high proportion of summary judgment rulings at the court levels, i.e., upon judicial review under the IDEA).

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the resulting small sample that the published and unpublished decisions were similarly skewed toward districts in their issue category rulings as well as global case outcomes.⁴¹

One other recent outcomes study at the judicial level was limited to a single state but similarly moved to the more precise unit of analysis of issue category rulings. More specifically, this study focuses on the relationship between the outcomes at the judicial levels and those at the hearing and review officer levels in Illinois, using a back-mapping approach rather than obtaining a random sample at each level. Within these limitations, this analysis found a similar pro-district propensity in issue category rulings at the various adjudicative levels.⁴²

By contrast, the outcome analyses specific to hearing/review officer decisions have been largely limited to single states and to less precise outcomes measures.⁴³ For example, incidental to their focus on the relationship between the characteristics of hearing and review officers in Pennsylvania and their decisions at the hearing and review officer levels for the period 1973–89, Newcomer, Zirkel, and Tarola tabulated the outcomes of hearing and review officer decisions in terms of two respective outcome scales, which did not provide any clear differentiation for issues or issue category rulings within each case.⁴⁴ More specifically, they reported the

⁴¹ *Id.* at 495 n.58.

⁴² Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions under the IDEA: An Empirical Analysis*, 78 *EXCEPTIONAL CHILD* 375, 378 (2012) (Their sample was too small to compare the distributions within the issue categories rather than conflated clusters of these categories. Moreover, their primary purpose was not focused on such precision.).

⁴³ For a pair of overlapping studies for one unidentified midwestern state that did not provide sufficient information about outcomes due to their focus on other variables and their non-specific methodological section, see Joseph McKinney & George F. Schultz, *Hearing Officers, Case Characteristics, and Due Process Hearings*, 111 *EDUC. L. REP.* 1069, 1073 (1996) (reporting that "parent prevailed on 58% of the issues" in seventy-one decisions from 1993–1995, without clarifying the relationship of the issues to the cases); George F. Schultz & Joseph R. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decision Outcomes*, *BYU EDUC. & L.J.* 17, 26 (2000) (reporting that 45% of the 2000 "rulings" in ninety-four decisions from 1992–1996 were in favor of the parents).

⁴⁴ James R. Newcomer, Perry A. Zirkel, & Ralph J. Tarola, *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 *EDUC. L. REP.* 449, 452 (1998) (analyzing 347 cases in Pennsylvania for the period 1973–89 that were adjudicated at both the hearing officer and review officer levels, thus not including hearing officer decisions that were not appealed to the second tier).

outcomes for the hearing officer level in terms of a four-category scale: complete school district wins—64%, "conditional" school district wins—14%, "conditional" parent wins—6%, and complete parent wins—16%.⁴⁵ The outcomes at the review officer level were in terms of affirmances, conditional affirmances, remands, and reversals,⁴⁶ resulting in a slight decrease in district wins, including those that were conditional, from 78% to 72%.⁴⁷ Moreover, although reporting that the primary issue in dispute was significantly related to the outcome at both levels,⁴⁸ they neither specified the typology of issues nor the distribution of outcomes by issues or categories of issues.

Other studies limited to a particular state have applied more direct but still notably imprecise methods of classifying outcomes. In an effort to analyze specific factors that affect which party prevails in a due process hearing, Archer conducted a study⁴⁹ limited to the 285⁵⁰ due process hearing officer decisions issued in Illinois during a five year period (1997–2002) using a two-category outcome scale.⁵¹ Specifically, she classified the outcome as being in favor of the parents if they "substantially prevailed on at least one, but not necessarily all, of the major issues in a case"⁵² and, if not, in favor of the district. As a result, she reported that hearing officer decisions favored school districts in nearly 70% of the decisions during that five-year period,⁵³ with an overall upward trend for school districts wins from 62% in

⁴⁵ *Id.* at 453 (failing to define "conditional"—although by default, conditional outcomes presumably were those less than conclusive, the differentiation and meaning are not sufficiently clear.).

⁴⁶ *Id.* (featuring insufficiently precise outcomes categories—especially the use of "conditional" compounded by its lack of differentiation from the added category of remands, was not sufficiently precise).

⁴⁷ *Id.*

⁴⁸ *Id.* at 454.

⁴⁹ Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002*, ILL. DUE PROCESS, 5–8 (Dec. 2002), <http://www.dueprocessillinois.org/Access.pdf> (examining factors including who requested the hearing and whether the parties had attorney representation).

⁵⁰ *Id.* at 2, 15–17, 21 (Although reporting a total of 343 decisions during this time period, she tabulated outcomes based upon the specific factors with respect to only 285 of those.).

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ *Id.* at 5 (failing to make clear how cases were categorized where the issue was evenly split).

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1997–98 to a high of 80% in 2001–2002.⁵⁴ However, the notable limitations extended beyond the restricted geographic and chronological scope to the imprecise metrics. More specifically, in addition to using the default category for district-favorable outcomes without any differentiation for intermediate categories, she did not clarify how she measured "substantially prevailed." Furthermore, she did not identify or categorize the issues, thus not providing any traceable basis for those that were "major."⁵⁵

As another example, a pair of relatively recent studies was limited to the less litigious state of Iowa.⁵⁶ In the first study, Rickey tabulated the outcomes for 50 hearing officer decisions in Iowa from July 1989 to June 2001.⁵⁷ She first classified the adjudicated issues in each case into 11 broad categories,⁵⁸ equating to an average number of adjudicated issue categories of 2.5 per case.⁵⁹ She then reported the outcomes by issue category according to which party prevailed, utilizing three categories: district fully prevailed, parent fully prevailed, and a "mixed" category where neither party prevailed.⁶⁰ Although the outcomes for some of the issue categories were too small for meaningful comparison⁶¹ and the scale was unclear,⁶² the overall results across the issue

⁵⁴ *Id.* at 16.

⁵⁵ *Id.* at 2 (limiting her review to either the full hearing officer decision or a "summary" of it to derive the "major issues in the case," without providing an explanation of what issues were major and what issues were not).

⁵⁶ See e.g., Zirkel & Gischlar, *supra* note 12, at 27 (finding that Iowa ranked 42nd on an overall basis and 48th on a per capita basis in the total number of hearing officer decisions among the 50 states for the period 1991–2005).

⁵⁷ Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46, 46 (2003).

⁵⁸ *Id.* at 47–49 (using categories that initially mirrored issues identified in the IDEA (identification, evaluation, placement, and FAPE), then further dividing FAPE into smaller categories that included graduation and a catchall "other" category). She did not explain how she resolved overlapping or overbroad categories of issues, and the reported outcomes compounded rather than clarified the residual confusion.

⁵⁹ *Id.* at 47 (referring to "issues," although they more accurately amount to issue categories).

⁶⁰ *Id.* at 50.

⁶¹ See, e.g., *id.* at 51 (featuring the "graduation" and "other" categories, which comprised only two issues each).

⁶² See, e.g., *id.* (disregarding the specific legal meaning of "prevailed" in the context of the IDEA. The addition of "fully" seems to suggest a broader residual scope of "mixed" than her results revealed.).

categories were: for parents—34%, for districts—63%, and mixed—3%.⁶³ Finally, ignoring the ultimately common unit of analysis, Rickey did not conflate the identified issue category outcomes into case outcomes.

In the second study limited to the state of Iowa, Zirkel, Karanxha, and D'Angelo examined 145 hearing officer decisions from 1978 to 2005, finding that the number of issues per case gradually increased during that time period, while incidentally reporting the case outcomes as follows: parent wins—32%, school district wins—60%, and mixed—8%.⁶⁴ Because the outcomes analysis was peripheral to the focus of their study,⁶⁵ the authors neither defined the three categories of their scale nor examined the rulings for the issues. Moreover, they did not report the typology of issues, thus leaving unclear the level of categorization.

Similarly, in an analysis of due process hearing decisions within two not particularly litigious states under the IDEA, Minnesota and Wisconsin, Cope-Kasten incidentally reported the outcomes of 210 hearings conducted between 2000 and 2011.⁶⁶ She classified the issues into seven categories⁶⁷ and, based on a dichotomous scale, she reported the results by issue category. Then, based on whether the decision included a remedial order that favored the parents, she reported the outcomes by case, finding that parents prevailed in 10% and school districts prevailed "on all or most of the issues contested at the hearing"⁶⁸ in 90% of the cases. Although successively addressing both

⁶³ *Id.* at 50.

⁶⁴ Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 37 (2007).

⁶⁵ *Id.* at 35 nn.35–36. The authors acknowledged the imprecision of their outcome metric compared with the measurement of the indicators of their focus, which was judicialization of IDEA hearings.

⁶⁶ Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501, 519–25 (2013). She also analyzed the cases in terms of fairness, concluding that the due process system failed all three tests of fairness: objective, subjective, and outcome fairness. She defined "outcome fairness" as the impact of a decision on the student's education regardless of who was the prevailing party, which she examined at least in part qualitatively. *Id.*

⁶⁷ *Id.* at 508, 540. Her categories were notably mixed and overlapping in breadth, including, for example, IEPs (both content and implementation), transition services, and teacher qualifications. *Id.*

⁶⁸ *Id.* at 520–22. The enumerated remedies were an award of compensatory education, a reversal of a manifestation determination, a change of placement, and a particular course of action that the parents sought. *Id.* at 520–21. The interaction of these

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units of analysis, i.e., issue categories and cases, the respective outcomes measures were markedly imprecise.

Other recent analyses were limited to more litigious single states. For the leading two-tier state of New York,⁶⁹ McMahon reported the outcomes of hearing officer decisions between the 2002–2003 and 2009–2010 school years.⁷⁰ Although reporting the frequency of filings and adjudications for eighteen issue categories,⁷¹ he reported outcomes for cases, finding the following distribution of decisions: "support parent"—72%, "support school district"—17%, and "support in part [both]"—11%.⁷² Perhaps reflecting his role as a parent attorney,⁷³ McMahon did not identify the opposing trend in other jurisdictions, instead interpreting this "sizeable majority [as] fail[ing] as a victory for parents because to get to it results in great expense."⁷⁴ Moreover, although acknowledging that these decisions only accounted for 19% of the filings for this period, he did not examine the extent of the change in these outcomes upon appeal, such as the outcomes distribution at the

remedial orders with the issue categories was not clarified for determining this outcome distribution. For example, if a district won most of the issue categories in the case, but the hearing officer ordered one of the enumerated remedies, it is unclear which of the two designated outcomes applied.

⁶⁹ New York ranked first on both an overall basis and on a per capita basis in the aforementioned tabulation of the frequency of hearing officer decisions in the 50 states for the period 1991–2000. See Zirkel & Gischlar, *supra* note 12.

⁷⁰ Gilbert K. McMahon, *NYS Special Education Impartial Hearing Outcomes*, MCMAHON ADVOC. GROUP, <http://www.specialedlawadvocacy.com/NYS%20Special%20Education%20Impartial%20Hearing%20Outcomes.pdf> (last visited Apr. 27, 2014). Utilizing the state's database, including its issue categorization, he did not note the curious disparity between his frequency data in the relevant time periods and those of OSEP, even when allowing for differences in data collection in reporting; for example, he reported 2,024 hearings held in New York state for 2009–2010, *id.* at 8, while OSEP reported 425 hearings held and 928 complaints pending in 2009–2010. See *supra* notes 32–33 and accompanying text.

⁷¹ *Id.* at 4. The issue categories were listed without definition or other differentiation. The overlaps were obvious, such as among these three categories: disciplinary appeal, discipline-expedited, discipline-nonexpedited, manifestation determination, appeal of interim alternative education setting (IAES), and placement in IAES. Moreover, further reflecting the lack of uniform and comprehensive scope, the categories included tuition reimbursement and other reimbursement but not compensatory education. Finally, the reported frequencies did not take into account interrelated categories, such as placement and tuition reimbursement.

⁷² *Id.* at 5.

⁷³ *Id.* at 1 (identifying his affiliation as "the McMahon Advocacy Group").

⁷⁴ *Id.* at 6.

review officer level.⁷⁵

Another even more recent analysis⁷⁶ was limited to California⁷⁷ for only a one-year period (May 2010–June 2011) and was based on a two-category outcome scale, "pro-parent" and "pro-district."⁷⁸ Designating the dividing line between these two categories as whether "the parent prevailed on *any* ground," Colker reported these results: pro-parent—35% and pro-district—65%.⁷⁹ Although recognizing some of the inherent limitations in such a simplistic scale,⁸⁰ she neither identified the issue categories that she meant by "any ground" nor the differentiation of the rulings equating to "prevailed."

In the first of the few national studies, Zirkel and D'Angelo's analysis yielded the following outcomes distribution for IDELR-published court hearing and review officer decisions for the period 1989–2000: school districts—53%, mixed—22%, and parents—25%.⁸¹ As with the corresponding court outcomes, the outcomes scale was insufficiently clear.⁸² As an interrelated matter, the unit of analysis was not sufficiently differentiated in terms of the issue categories within the cases.

The only recent broad-based national analysis of administrative adjudicative outcomes under the IDEA was limited to the hearing level for forty-one states for the single school year of 2005–2006.⁸³ Accounting for

⁷⁵ *Id.* Part of the problem was the limitations of the database. For example, McMahon reported that it provided information on only 48 of an estimated 1150 review officer decisions for that time period. Nevertheless, an assessment of the outcomes warranted not only more precise metrics, such as the outcomes of coherent issue categories, but also other considerations, such as review officer decisions.

⁷⁶ Ruth Colker, *California Hearing Officer Decisions*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 461 (2012).

⁷⁷ Zirkel, *supra* note 12, at 27. California ranked 4th on an overall basis and 20th on a per capita basis in Zirkel & Gischlar's aforementioned, *supra* note 12, tabulation of the frequency of hearing officer decisions in the 50 states for the period 1991–2000.

⁷⁸ Colker, *supra* note 76, at 463.

⁷⁹ *Id.*

⁸⁰ *Id.* at 462. For example, Colker observed that it is "impossible to know what results were reached in cases that were settled" or if parties "choose to litigate truly weak cases and settle many strong cases. . ." *Id.*

⁸¹ Zirkel & D'Angelo, *supra* note 8, at 740, 745. Zirkel and D'Angelo used the same procedure as they did for the overall outcome distribution for court decisions, *supra* note 36, to calculate these results for hearing and review officer decisions.

⁸² *See* Zirkel, *supra* note 37.

⁸³ Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131 (2011).

the incomplete representation of states, Mueller and Carranza relied on a survey of the state education agencies to obtain the hearing officer decisions.⁸⁴ Despite repeated requests, nine states, including New York and New Jersey, did not respond. Moreover, twenty-four of the forty-one responding states provided only summaries rather than the full decisions. The authors classified the issues into eleven "broad categories," unclearly attributing limitations in classification to variability among the reporting states.⁸⁵ Based on a three-category scale without any operational definitions or issue differentiation, they reported these overall results: parent prevailed—30%, both parties prevailed—10%, and school district prevailed—59%.⁸⁶

The other national study was limited to Zirkel's analysis of the remedies in FAPE decisions in LRP's electronic database, Special Ed Connection®, for the period 2000–2012.⁸⁷ He identified 140 cases where a hearing or review officer found a denial of FAPE.⁸⁸ First, he classified the cases into the following FAPE categories: (1) procedural, (2) substantive, (3) implementation, and (4) a combination.⁸⁹ Next, he coded the cases into the following non-exclusive remedial categories: tuition reimbursement, compensatory education, money damages, prospective program revisions or services, and evaluation.⁹⁰ Finally, he coded the outcomes for the two predominant issue categories—tuition reimbursement and compensatory education—according to the following customized four-category scale: granted in full, granted in part, denied, or inconclusive. However, due to the relatively small cell sizes, he did not differentiate the outcome results for the

⁸⁴ *Id.* They resorted to a survey approach, because states vary widely as to whether they post the decisions on their websites and, if so, for which years.

⁸⁵ *Id.* at 135 (reporting "convoluted cod[ing] because of the variability in the data that were available across the states"). Their interrater reliability for this variable (.58) was low in relation to research norms.

⁸⁶ *Id.* at 137. Compounding the lack of clarity, they also unclearly reported another outcome category—"neither" prevailed (.5%)—and, confusingly referring without definition to "decision rule," excluded still another outcome category—"split." *Id.*

⁸⁷ Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013). This database includes but is not limited to decisions published in LRP's print reporter, IDELR. Akin to Westlaw and LEXIS, it extends to other decisions, which are designated with an LRP (similar to a WL or LEXIS) access number.

⁸⁸ *Id.* at 225. He also separately identified and analyzed eighty-four court denial-of-FAPE decisions.

⁸⁹ *Id.* at 222–23, 225.

⁹⁰ *Id.* at 223–24.

hearing and review officers from those in the court decisions.⁹¹

In sum, the previous research lacks an empirical analysis of frequency and outcomes that (1) includes not only hearing but also review officer decisions, (2) is national in scope, (3) is relatively up-to-date and yet sufficiently long for meaningful longitudinal analysis; and (4) includes both cases and issue category rulings as units of analysis. Finally, in addition to careful framework of issue categories, the review of previous research reveals that the outcomes variable needs (a) a sufficiently differentiated and defined scale, (b) a procedure for taking into account among the issue category rulings the overlap between FAPE and its principal two remedies—tuition reimbursement and compensatory education, and (c) a procedure for conflating issue category rulings to case outcomes.

III. METHOD

As the next step in the development of this line of research, the purpose of this study was to determine, on a national and relatively comprehensive yet current longitudinal basis, the frequency and outcomes of hearing/review officer (H/RO) decisions under the IDEA based on various methodological refinements. These refinements included: (1) tabulating the issue categories in each hearing/review officer decision, (2) using a defined and differentiated five-category outcomes scale, and (3) adjusting the outcomes analysis to address the overlap of FAPE with remedies and the conflation of issue categories into cases. Starting reasonably soon after the implementation of the IDEA, the analysis covered the decisions spanning the 35-year time period between January 1, 1978 and December 31, 2012.

A. Database and Data Collection

The source of the data was LRP's Special Ed Connection®, an electronic database that includes H/RO decisions and various other forms of law-related information concerning students with disabilities, such as court decisions and state complaint resolution rulings. The data collection process followed two successive steps to identify the target population and representative sample. First, we obtained a list of IDELR-published decisions from Special Ed

⁹¹ *Id.* at 230–31. In contrast, due to the larger cell sizes, he differentially reported the frequency results for hearing and review officers, yielding sixty-one tuition reimbursement rulings and fifty-five compensatory education rulings, which included cases that contained more than one remedial ruling.

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Connection®⁹² via the advanced search screen and the dropdown menu option for "Administrative Rulings and Decisions,"⁹³ using the search term "disab%"⁹⁴ for successive segments of the time period⁹⁵ then excluding any decision that was not published in IDELR.⁹⁶ This procedure yielded a target population of 4,353 decisions.⁹⁷

Second, the procedure for obtaining from this target population a representative sample was (a) determining the requisite minimum sample size for representativeness, which was 351,⁹⁸ and (b) applying linear random

⁹² SPECIAL ED CONNECTION®, <http://www.specialedconnection.com> (last visited March 12, 2014). Like Westlaw, Special Ed Connection® is a commercial database available only on a subscription basis. Special Ed Connection® includes but is not limited to the contents of IDELR, which previously was available only in bound volumes. See Zirkel, *supra* note 87.

⁹³ This step necessarily eliminated other primary law sources, such as statutes, regulations, and court decisions, as well as agency (e.g., OSEP) policy letters.

⁹⁴ The symbol "%" serves as a wildcard character for obtaining variations of the root term. See *Search Tips*, SPECIAL ED CONNECTION®, http://www.specialedconnection.com/LrpSecStoryTool/search_tips.html (last visited Apr. 27, 2014).

⁹⁵ The reason for using successive segments was a limitation in the system; each search will yield a maximum of 1,000 possible hits.

⁹⁶ Zirkel, *supra* note 87; SPECIAL ED CONNECTION®, *supra* note 92. In recent years, following the Westlaw and Lexis models, the publisher has included additional H/RO decisions that are only available electronically and that are distinguishable by having an LRP, rather than IDELR, citation. Although including the LRP-designated decisions would have expanded the target population, we opted to limit the target population to IDELR-published decisions for the following preponderant combination of reasons (in order of importance): (1) including the LRP-only citations would skew the case coverage to the recent years; (2) the IDELR decisions are generally more accessible than the electronic-only decisions for scholars (and practitioners); and (3) for comparison purposes, IDELR is the predominant database for the previous relevant research.

⁹⁷ It was not feasible to target the universe of adjudicated hearings because states are far from uniform or complete in complying with the regulatory requirement to make the H/RO decisions "public." 34 C.F.R. § 300.524(c)(2).

⁹⁸ We used the Krejcie and Morgan method for this purpose; they provide a chart based on their formula. Robert Krejcie & Daryle W. Morgan, *Determining Sample Size for Research Activities*, 30 EDUC. & PSYCHOL. MEASUREMENT 607-10 (1970). For previous empirical analyses in education law that relied on this approach, see, e.g., Irene Gavin & Perry A. Zirkel, *An Outcome Analysis of School Employee-Initiated Litigation: A Comparison of 1977-81 and 1997-2001 Decisions*, 232 EDUC. L. REP. 19, 23 (2008); Anastasia D'Angelo & Perry A. Zirkel, *An Outcome Analysis of Student-Initiated Litigation: A Comparison of 1977-81 and 1997-2001 Decisions*, 226 EDUC. L. REP. 539, 542 (2008); William H. Lupini & Perry A. Zirkel, *An Outcome Analysis of Education Litigation*, 17 EDUC. POL'Y 257, 261 (2003).

sampling⁹⁹ within the target population to exceed this requisite minimum.¹⁰⁰ Exclusions, although infrequent, were as follows: (1) state complaint process rulings;¹⁰¹ (2) hearing officer decisions based exclusively on the overlapping but separable coverage of § 504 of the Rehabilitation Act;¹⁰² and (3) H/RO decisions based exclusively on state gifted education laws.¹⁰³ Conversely, if the H/RO decided IDEA issues in addition to those under § 504¹⁰⁴ or state laws for gifted education,¹⁰⁵ we included the decision, but limited the tabulation to the adjudicated IDEA issues. This process yielded a representative sample of 361 decisions.¹⁰⁶

After consultation and training sessions with the first author based on successive pilot subsamples, the second author read and coded each case via entries in the following spreadsheet columns: (a) IDELR citation, (b) year of decision, (c) state, (d) adjudicative level (i.e., hearing or review officer), (e)

⁹⁹ The aforementioned system limitation, *supra* note 95, precluded use of a pure randomization procedure. However, this linear procedure is an acceptable alternative, because, as the publisher's representative confirmed, there is no consistent factor in the sequencing of the H/RO decisions within each successive time period of publication. E-mail from Amy Slater, Editor, IDELR, to first author (Jan. 27, 2014, 15:02 EST) (on file with first author).

¹⁰⁰ After a pilot test, we did so by identifying every twelfth H/RO decision under the IDEA and/or a corollary state special education law in the chronological list of decisions. If the twelfth decision did not meet this selection criterion (i.e., was instead in one of the foregoing exclusions), we substituted the next qualifying case on the list for it.

¹⁰¹ *See, e.g.*, Worthington City Sch. Dist., 49 IDELR ¶ 149 (Ohio SEA 2012); Lake Park Audubon Indep. Sch. Dist. #2889, 50 IDELR ¶ 117 (SEA Minn. 2008). The IDEA's implementing regulations require all states to adopt a complaint process for resolving the same types of issues that may be raised in a due process hearing. 34 C.F.R. §§ 300.151-.153 (2012).

¹⁰² *See, e.g.*, Boston Pub. Sch., 47 IDELR ¶ 240 (Mass. SEA 2007); Livingston Twp. Bd. of Educ., 40 IDELR ¶ 111 (N.J. SEA 2003). § 504 has a broader definition of disability and a set of regulations for K-12 public schools that provides various procedural safeguards, including the right to an impartial hearing. 29 U.S.C. §§ 705(20), 794 (2012); 34 C.F.R. pt. 104 (2012). *See, e.g.*, PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (2011); Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings Under Section 504*, 22 WIDENER L.J. 135 (2012).

¹⁰³ Abington Sch. Dist., 21 IDELR 630 (Pa. SEA 1994).

¹⁰⁴ *E.g., In re K.M.*, 29 IDELR 1027 (Vt. SEA 1999).

¹⁰⁵ *E.g.*, New York City Sch. Dist. Bd. of Educ., 21 IDELR 87 (N.Y. SEA 1990).

¹⁰⁶ We exceeded the minimum by a reasonable amount due to the infrequent false positives, i.e., exclusions that led to substitutions, in the sampling frame, i.e., initial list, thus allowing for a slightly larger target population.

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issue category (IC), and (f) outcome. For the IC, the specific typology, including definitions and citations, appears in the Appendix. In summary, the ICs, within successive broad headings, are the following bulleted items:¹⁰⁷

Identification:

- Child Find
- Evaluation
- Eligibility
- Independent Educational Evaluation (IEE)

Program/Placement:

- FAPE Substantive
- FAPE Procedural
- Least Restrictive Environment (LRE) Placement
- Extended School Year (ESY)
- Discipline

Remedies:

- Tuition Reimbursement
- Compensatory Education

Adjudicative:

- Jurisdiction
- Other Adjudicative
- Miscellaneous

On the spreadsheet, each decision has a separate row for each of its ICs, thus allowing for multiple entries. For example, if in a given case the H/RO ruled on both FAPE Substantive and FAPE Procedural claims, we coded each of these IC entries separately.¹⁰⁸

For the outcomes, each row contains an IC ruling according to a customized scale. For this purpose we adapted the Chouhoud and Zirkel five-category outcome scale, which they had formulated for more discrete IC rulings.¹⁰⁹ More specifically, their context was different in two relevant

¹⁰⁷ The Miscellaneous catch-all rubric is limited; thus, rather than a bulleted category, it serves alone as an IC.

¹⁰⁸ Conversely, if the H/RO identified and decided several claims of procedural violations of FAPE, we coded them as one FAPE Procedural IC entry. We also included 13 hearing officer rulings that were not appealed at the review officer level.

¹⁰⁹ Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353 (2008). Their outcome scale was as follows: 1 = conclusive for student; 2 = inconclusive for student, 3 = inconclusive for both parties; 4 =

respects: (1) their outer boundaries were far narrower,¹¹⁰ resulting in no need to differentiate conclusive outcomes;¹¹¹ and (2) their sample was limited to court decisions, resulting in the need for differentiation of inconclusive outcomes.¹¹² Thus, the customization of the Chouhoud-Zirkel five-category scale¹¹³ for the present study was to conflate inconclusive outcomes into the third, middling category and to substitute largely conclusive for the second and fourth categories. The resulting scale was as follows for each adjudicated

inconclusive for district; 5 - conclusive for district. This outcome scale for issues was a refinement the Lupini and Zirkel seven-category outcome scale for cases s, which was as follows: 1 = conclusive decision completely favoring students, employees, or others; 2 = conclusive decision largely but not completely favoring students, employees, or others; 3 = inconclusive decision favoring students, employees, or others; 4 = conclusive or inconclusive split decisions; 5 = inconclusive decision favoring school authorities, 6 = conclusive decision largely but not completely favoring school authorities, and 7 = conclusive decision completely favoring school authorities. See Lupini & Zirkel, *supra* note 98, at 263–64. Chouhoud and Zirkel's scale conflated the third, fourth, and fifth categories from Lupini and Zirkel's outcome scale because they used issues as their unit of outcome analysis and their selected judicial issue—whether suspensions of ten days or less were a violation of specific forms of procedural due process—did not necessitate further differentiation.

¹¹⁰ Chouhoud & Zirkel, *supra* note 109, at 367. The authors used this issue-based unit of analysis for subsets of procedural due process claims in court cases specific to K–12 student suspensions of ten days or less. For its earlier use in another relatively narrow context, see Margaret McMenamin & Perry A. Zirkel, *OCR Rulings under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. POSTSECONDARY EDUC. & DISABILITY 55 (2003).

¹¹¹ In contrast, empirical analyses of broader units of analysis, such as court decisions, employed a seven-category scale, with differentiation between complete and predominant conclusive outcomes. See, e.g., Lupini & Zirkel, *supra* note 98, at 263–64; Perry A. Zirkel, *The Autism Case Law: Administrative and Judicial Rulings*, 17 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 84 (2002); Zirkel, *supra* note 35, at 378–79; Zirkel & Machin, *supra* note 40.

¹¹² Unlike the H/RO process, dismissal and summary judgment motions are common in court cases. When the ruling is a denial of such a motion, the outcome is inconclusively in favor of the opposing party because it only preserves the IC for further proceedings. These rulings are even more common among IDEA cases due to fact finding at the H/RO level(s). Moreover, rulings that grant dismissal motions based on the IDEA's exhaustion doctrine are inconclusively for the defendant, because they too are preserved for further proceedings, initially at the H/RO level(s) and potentially upon judicial review.

¹¹³ See Chouhoud & Zirkel, *supra* note 109.

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IC:¹¹⁴

1. = completely in favor of the parent
2. = largely in favor of the parent¹¹⁵
3. = inconclusive and/or split decision¹¹⁶
4. = largely in favor of the school district¹¹⁷
5. = completely in favor of the school district

B. Data Analysis

The analysis was based on the following frequency and outcome questions for the study's representative national sample of H/RO cases¹¹⁸:

1. What was the overall frequency of (a) the cases and (b) the IC

¹¹⁴ Outcome categories 1, 2, 3, 4 and the "split" segment of category 3, inferably in contrast with inconclusive segment of the middle category, were all for conclusive IC rulings.

¹¹⁵ See, e.g., In the Matter of a Child with a Disability, 20 IDELR 708 (Conn. SEA 1993) (agreeing with parent that private therapy funded by district should continue, but only for specified period of transition until appropriate district therapist could be located); Wilkes-Barre Sch. Dist., 37 IDELR ¶ 110 (Pa. SEA 2002) (affirming an award of reimbursement for two of three parent-requested IEEs but not for the third).

¹¹⁶ The "inconclusive" subcategory are for rulings, which are rare at the H/RO as compared with the judicial level, where the H/RO addressed the issue but deferred deciding it for one reason or another. See, e.g., Vestavia Hills City Bd. of Educ., 51 IDELR ¶ 59 (Ala. SEA 2008) (ordering, in light of conflicting evidence of child's eligibility, a second evaluation team meeting to make a new determination); Glendale Unified Sch. Dist., 26 IDELR 803 (Cal. SEA 1997) (remanding determination of an appropriate placement to the IEP team). "Split" rulings are those that equally favor both sides. See, e.g., Berkshire Hills Reg'l Sch. Dist. 43 IDELR ¶ 153 (SEA Mass. 2005) (ruling that the parents' unilateral placement was appropriate but awarding district reimbursement for only day portion, not residential portion, of tuition); Bd. of Educ. of the Portage Pub. Sch., 25 IDELR 372 (Mich. SEA 1996) (ruling that child was eligible on the basis of both a specific learning disability as proposed by the parent and speech/language impairment as proposed by the district).

¹¹⁷ See, e.g., San Antonio Indep. Sch. Dist., 44 IDELR ¶ 176 (Tex. SEA 2005) (concluding that district's reevaluation was timely and the failure to request consent for a medical evaluation was not a denial of FAPE, but directing the district to consider again whether additional evaluations were necessary); Wrentham Pub. Sch., 37 IDELR ¶ 200 (Mass. SEA 2002) (finding that the district's proposed program and placement offered FAPE but ordered IEP team to make minor, specific revisions to IEP).

¹¹⁸ The sequence of the questions in proceeding from frequency to outcomes starts with cases as the unit of analysis, moves to the more precise measure of IC rulings, and ends, in question no. 6, with a return to the case unit of analysis.

- rulings?
2. Which states had the highest frequency of (a) cases and (b) IC rulings?
 3. What was the longitudinal trend in the frequency of (a) cases and (b) IC rulings?
 4. What was the outcomes distribution of the IC rulings?
 5. What was the longitudinal trend of the outcomes of the IC rulings?
 6. What was the outcomes distribution of the cases?

The answers to these questions required two additional methodological refinements.

First, the analysis to answer Question 4 required a procedure to correct the skew in the initial outcome data for tuition reimbursement and compensatory education ICs. The skew arose from the overlap between each remedy and its preceding denial of FAPE ruling. Specifically, reporting the results of the tuition reimbursement and compensatory education rulings only, without accounting for the parental losses (i.e., 5s) at the initial stage, overstated the proportion of rulings in the parents' favor (i.e., 1s and 2s).¹¹⁹ The two-step correction procedure was to (1) find each case under the other ICs¹²⁰ where the parents identifiably sought but the H/RO did not address tuition reimbursement, compensatory education, or both,¹²¹ due to either

¹¹⁹ In contrast with Zirkel's study, *see* Zirkel, *supra* note 87, which was limited to IC rulings for each of these two remedies for a selectively skewed sample of denial of FAPE cases, the analysis here considered the whole array of ICs and outcomes, including no denial (i.e., a 5 on the scale) as well as denial (i.e., a 1 on the scale) for FAPE Procedural and/or FAPE Substantive. As explained more fully in the Appendix, *infra* notes 247–49, we coded tuition reimbursement or compensatory education only when an H/RO reached the merits at the remedial stage, having ruled in favor of the parents on the underlying IC, which usually was whether the district had denied FAPE (Procedural and/or Substantive). The selective effect was to eliminate the parental losses for the underlying ICs, which was the first step in the analysis for either remedy. Thus, the correction procedure readjusted the Compensatory Education and Tuition Reimbursement results to provide a more holistic and balanced view that shows the interaction with the underlying ICs.

¹²⁰ Most of these were in FAPE Substantive or FAPE Procedural categories but a few arose in overlapping other ICs, such as Child Find and Eligibility.

¹²¹ This correction procedure nevertheless left residual skew in the compensatory education cases. The reason is that the tuition reimbursement cases were generally readily identifiably by the facts—specifically, the parents' unilateral placement of the child—even if the H/RO did not identify this remedy as being at issue. In contrast, the compensatory education claims did not have such a factual signal, and the H/RO in some cases did not identify this requested remedy because it did not end up at issue and, unlike

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ruling in favor of the district (i.e., a 5 or a 4) or an inconclusive ruling (i.e., a 3);¹²² and (2) import those 5s and 4s¹²³ to the applicable remedial IC—tuition reimbursement or compensatory education. This procedure resulted in a second, revised analysis for the tuition reimbursement and compensatory education ICs on a segregated basis, thus avoiding double-counting or undercounting the underlying ICs in the first, broader analysis.¹²⁴

Second, answering Question 6 required returning from the outcomes distribution on a five-category IC basis back to the outcome distribution on an almost entirely two-category case basis.¹²⁵ The reason for the translating transition from the more precise unit of analysis for outcomes is that the common conception is that: (1) the unit of analysis is the case as a whole;¹²⁶ and (2) the outcome is either winning or losing.¹²⁷ Absent a carefully conceived model for this adjustment in previous studies,¹²⁸ consideration of available alternatives¹²⁹ led to selection of the use of "prevailing party,"¹³⁰

tuition reimbursement, did not have as a clearly cognizable legal, as well as factual, analysis.

¹²² These IC rulings warranted special attention due to the inclusion of split rulings in this outcome category.

¹²³ The importation procedure was to add the single most district-favorable underlying outcome on a case-by-case basis.

¹²⁴ See *infra* Tables 1, 2.

¹²⁵ The limited exception is for the relatively few purely inconclusive cases, i.e., those where none of the ICs was a ruling of 1, 2, 4, 5, or a 3 that was in the conclusively split subset.

¹²⁶ See Zirkel & D'Angelo, *supra* text accompanying note 81. Yet the majority (63%) of the cases in this sample consisted of two or more IC rulings, which obviously did not necessarily share the same outcome. The conflation of the varying number and level of more discrete issues into ICs—particularly for the ICs of FAPE Procedural, Related Services, and Discipline—resulted in differentiation between "completely" and "largely," thus increasing the variance in IC outcomes.

¹²⁷ Although the IC analysis shows the more nuanced and precise picture, the translation to the more common language needs to be defensibly disciplined.

¹²⁸ The closest was the best-for-plaintiff approach, adopted in Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 344 (2011). However, it was more fitting for cases where plaintiffs used a "spaghetti strategy" of numerous and widely varying federal and state claims. *Id.* at 346. The result was an average ratio of 7.5 IC rulings per case. *Id.* at 340.

¹²⁹ Possible alternatives included: (1) calculating the mean of the IC rulings in a case on a straight average or weighted average basis; (2) classifying outcomes based on Zirkel and Lyons' "single most favorable plaintiff-favorable claim ruling"; and (3) an

by way of analogy from the attorney fees jurisprudence under the IDEA¹³¹ as the most appropriate conflation procedure for this specific study.

More specifically, courts have generally agreed that the parents are the prevailing party if they have obtained a material alteration to the legal relationship between the parties through an adjudication (not a settlement)¹³² that achieves for any significant issue some of the benefit they sought in filing the hearing.¹³³ Although not easily applicable in limited subcategories of cases, such as identification¹³⁴ and dismissals,¹³⁵ prevailing status only

overall subjective judgment. *Id.* at 344. None of these alternatives appeared to be sufficiently objective, particularly in light of the purely speculative weight of each IC. In the absence of such mathematical precision, we opted for a judicially established formulation, especially one that has direct monetary consequences.

¹³⁰ The previous empirical analyses that used "prevailing" as an outcome category did so without a carefully conceived and applied definition. *See Archer, supra* note 49; *Rickey, supra* note 57; *Cope-Kasten, supra* note 66; *supra* text accompanying notes 51–54, 60–63, 68.

¹³¹ The IDEA specifically authorizes attorney fees to the prevailing party by federal district courts. 20 U.S.C. § 1415(i)(3)(B)(I) (2012).

¹³² To attain status as a "prevailing" party, courts generally require that the party obtain relief through "court-ordered change," *see, for example., Robert K. ex rel. T.K. v. Cobb Cnty. Sch. Dist.*, 279 F. App'x 798, 801 (11th Cir. 2012) (quoting *Loggerhead Turtle v. Cnty. Council*, 307 F.3d 1318, 1323–23 (11th Cir. 2002)), or with "judicial imprimatur," *e.g., S.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x 851, 860 (5th Cir. 2012).

¹³³ *See, e.g., Ector Cnty Indep. Sch. Dist. v. V.B.*, 420 F. App'x 338, 341 (5th Cir. 2011); *J.D. ex rel. Davis v. Kanawha Cnty. Bd. of Educ.*, 571 F.3d 381, 386–87 (4th Cir. 2009); *Miller ex rel. S.M. v. Albuquerque Pub. Sch.*, 565 F.3d 1232, 146–47 (10th Cir. 2009); *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 825 (9th Cir. 2007); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 479 (7th Cir. 2003). A simpler way to convey the threshold requirement is that "the hearing officer's order must give [the parent] the ability to "require[] the [school district] to do something [it] otherwise would not have to do." *V.S. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1233 (9th Cir. 2007) (quoting *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000)). Serving as a reminder of the connection to parental benefit, an alternative variation is that the order must "modify the defendant's behavior in a way that benefits the plaintiff." *Miller v. Bd. of Educ. of the Albuquerque Pub. Sch.*, 565 F.3d 1232, 1247 (10th Cir. 2009) (quoting *Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 729 (10th Cir. 1996)).

¹³⁴ *See, e.g., Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255 (9th Cir. 2009); *D.S. v. Neptune Sch. Dist.*, 264 F. App'x 186 (3d Cir. 2009). For the meaning of identification in this context, *see infra* Appendix.

¹³⁵ *See, e.g., Dist. of Columbia v. Jeppsen*, 514 F.3d 1287 (D.C. Cir. 2008) (remanding to the district court to determine whether a parent-requested dismissal

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requires that the issue be significant,¹³⁶ not necessarily central or primary,¹³⁷ and that the relief be more than purely technical or *de minimis*,¹³⁸ not necessarily substantial.¹³⁹

Exemplifying the application of this standard for the conflation from ICs to cases, we classified the parents as prevailing if they received partial relief, such as a portion of their claim for tuition reimbursement,¹⁴⁰ an award of compensatory education even if indeterminate or for less than the amount sought,¹⁴¹ or an order for the district to pay for or provide at public expense one or more of the parents' requested IEEs.¹⁴² Conversely, we classified the cases in the opposite category, i.e., in favor of the district,¹⁴³ if either the IC rulings were limited to 5s or—if at least one IC ruling was other than a 5, any relief that the parents obtained was merely *de minimis* or failed to require the school district to do something it was not otherwise obligated to do.¹⁴⁴ Thus, the conflating procedure to determine whether the parent prevailed was to: (1) segregate into

following a settlement agreement provided a basis for an award of counsel fees as a prevailing party).

¹³⁶ See, e.g., *D.K. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 501 (3d Cir. 2012) (citations omitted).

¹³⁷ See, e.g., *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025 (9th Cir. Cir. 2006).

¹³⁸ See, e.g., *PILCOP v. Pocono Mountain Sch. Dist.*, 491 F. App'x 316 (3d Cir. 2012); *V.S. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1233 (9th Cir. 2007) (quoting *Shapiro v. Paradise Valley Unified Sch. Dist.*, 374 F.3d 857, 865 (9th Cir. 2004)).

¹³⁹ See, e.g., *P.N. v. Clementon Sch. Dist. Bd. of Educ.*, 442 F.3d 848 (3d Cir. 2006).

¹⁴⁰ See, e.g., *Bd. of Educ. of the Enlarged City Sch. Dist. of the City of Saratoga Springs*, 26 IDELR 211 (N.Y. SEA 1997).

¹⁴¹ See, e.g., *New York City Dept. of Educ.*, 46 IDELR ¶ 88 (N.Y. SEA 2006).

¹⁴² See, e.g., *Wilkes-Barre Area Sch. Dist.*, 37 IDELR ¶ 110 (Pa. SEA 2002).

¹⁴³ This category alternatively and residually is a win for the district in this dichotomous conception.

¹⁴⁴ See, e.g., *Sch. Dist. of Philadelphia*, 28 IDELR 1109 (Pa. SEA 1998) (agreeing with parents that the student was eligible for special education under category of learning disability, but finding district's IEP appropriate despite a different eligibility classification, and thus no basis for an award of compensatory education or tuition reimbursement); *Greater Albany Sch. Dist.*, 41 IDELR ¶ 198 (N.Y. SEA 2004) (concluding that the school district had denied the non-custodial parent a meaningful opportunity to participate in prior IEP meetings, but awarding no remedy beyond that which the district was already obligated to provide—future access to education records and notice of changes to the child's educational programming).

one group those cases that included ICs with a "1" or "2" or a "3" split (but not inconclusive) ruling,¹⁴⁵ and (2) apply the judicially established standards for "prevailing" status to each of these cases,¹⁴⁶ with special attention to parent-favorable ICs in the Adjudicative and Miscellaneous categories.¹⁴⁷

IV. RESULTS

With respect to research questions 1 and 2,¹⁴⁸ the sample of 361 cases¹⁴⁹ consisted of 920 IC rulings.¹⁵⁰ The ten states with the highest number of cases and IC rulings, respectively, were as follows:

| Rank | Cases | | | Rank | IC Rulings | | |
|---------|---------------|--------------|------------|--------|---------------|--------------|------------|
| | State | No. of Cases | % of total | | State | No. of Cases | % of total |
| 1 | California | 70 | 19% | 1 | California | 181 | 20% |
| 2 | New York | 51 | 14% | 2 | New York | 142 | 15% |
| 3 (tie) | Massachusetts | 26 | 7% | 3 | Pennsylvania | 75 | 8% |
| 3 (tie) | Pennsylvania | 26 | 7% | 4 | Texas | 76 | 8% |
| 3 (tie) | Texas | 26 | 7% | 5 | Massachusetts | 51 | 6% |
| 6 | Illinois | 16 | 4% | 6 | Illinois | 42 | 5% |
| 7 (tie) | Connecticut | 11 | 3% | 7 | Indiana | 34 | 4% |
| 7 (tie) | New Jersey | 11 | 3% | 8 | Connecticut | 26 | 3% |
| 9 | Alabama | 10 | 3% | 9(tie) | New Hampshire | 24 | 3% |
| 10 | Indiana | 9 | 2% | 9(tie) | Ohio | 24 | 3% |

¹⁴⁵ See, e.g., *Miller v. Bd. of Educ. of the Albuquerque Pub. Sch.*, 565 F.3d 1232, 1247 (10th Cir. 2009) (considering that the degree of success is factored into the amount of the attorney fee award, not a party's entitlement thereto).

¹⁴⁶ See *supra* notes 125–39 and accompanying text. Some courts have inserted an additional criterion that a prevailing party's remedy must be one that fosters the purposes of the IDEA. See, e.g., *El Paso Ind. Sch. Dist. v. Richard R.*, 591 F.3d 417, 421–22 (5th Cir. 2009). Assuming without deciding that this criterion is sufficiently established, it was superfluous for our case sample because its ICs are limited—with the negligible exception of the parent-favorable rulings in the Adjudicative and Miscellaneous groupings—to claims "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). See *supra* note 133.

¹⁴⁷ The reason for this special attention, which was a case-by-case review of such decisions, was to exclude technical or other limited rulings that did not meet the judicial standard of prevailing. See *supra* notes 138–39 and accompanying text.

¹⁴⁸ See *supra* text accompanying note 118.

¹⁴⁹ In turn, the 361 cases consisted of 250 (69%) first-tier, i.e., hearing officer, decisions and 111 (31%) second tier, i.e., review officer, decisions.

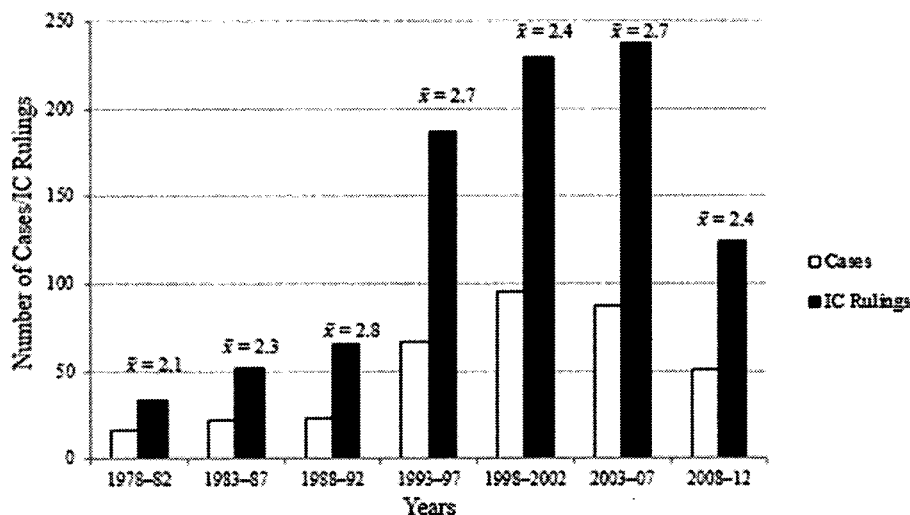
¹⁵⁰ Thus, the overall ratio of IC rulings to cases was 2.5.

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The respective groups of relatively high-frequency states cumulatively accounted for 71% of the cases and 84% of the IC rulings. The limited differences in the members and ranking, especially at the lower end, were attributable to the varying ratios of IC rulings to cases. For example, the average IC rulings-to-case ratios, in descending order, for the eight states with more than ten cases were: Texas and Pennsylvania—2.9; New York—2.8; Illinois and California—2.6; Connecticut—2.4; New Jersey and Massachusetts (tied)—1.9.¹⁵¹

Answering the aforementioned¹⁵² research question 3, Figure 1 provides the longitudinal trend in the frequency of cases and IC rulings, for successive five-year segments of the overall period. The ratio of IC rulings-to-cases for each successive interval appears above the respective pairs of bars.

Figure 1. Longitudinal Trend of Cases and IC Rulings



This Figure shows a steady upward trend in the number of cases and IC rulings until a leveling off in 2003–2007 and then a relatively dramatic drop

¹⁵¹ Some of the remaining states had higher IC ruling-to-case ratios than those for these eight states, but their small numbers of cases were an overriding limitation. For example, Alaska and New Mexico had respective ratios of 7.0 and 4.0, but the basis amounted to two cases in Alaska and one in New Mexico.

¹⁵² *Id.*

in 2008-12.¹⁵³ The ratio of IC rulings-to-cases fluctuated without a distinct directional trend within the range of 2.13 to 2.83.

In answer to research question 4, Table 1 provides the frequency and outcomes distribution of the ICs and their overall groupings.

Table 1. Overall Frequency and Outcome for Each IC and its Overall Group

| Issue Category | Frequency (% Total) | Outcomes Parent District | | | | |
|---------------------------------------|------------------------|-----------------------------|-----------|-----------|-----------|------------|
| | | 1 | 2 | 3 | 4 | 5 |
| Identification | | | | | | |
| Eligibility | 52 (6%) | 31% | 4% | 8% | 0% | 58% |
| Evaluation | 49 (5%) | 14% | 10% | 6% | 8% | 61% |
| IEE | 42 (5%) | 26% | 14% | 5% | 5% | 50% |
| Child Find | 19 (2%) | 32% | 5% | 5% | 0% | 58% |
| Subtotal Identification | 162 (18%) | 25% | 9% | 6% | 4% | 57% |
| Program/Placement | | | | | | |
| FAPE Substantive | 303 (33%) | 35% | 7% | 8% | 7% | 41% |
| FAPE Procedural | 96 (10%) | 26% | 10% | 7% | 11% | 44% |
| FAPE Substantive w/LRE | 51 (6%) | 29% | 4% | 4% | 8% | 55% |
| Discipline | 27 (3%) | 48% | 0% | 7% | 0% | 44% |
| LRE Placement | 26 (3%) | 35% | 0% | 12% | 8% | 46% |
| ESY | 19 (2%) | 47% | 11% | 5% | 0% | 42% |
| Subtotal Program/Placement | 522 (57%) | 34% | 7% | 8% | 7% | 43% |
| Remedies | | | | | | |

¹⁵³ The clustering of years into larger intervals masks more refined fluctuations. For example, on a yearly basis the number of decisions ranged from a low of 4 in 1978 to a high of 207 in 1997.

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| | | | | | | |
|---------------------------------------|-------------------|------------|------------|------------|-----------|------------|
| Tuition Reimbursement | 74 (8%) | 49% | 7% | 4% | 6% | 34% |
| Compensatory Education | 40 (4%) | 33% | 39% | 5% | 5% | 18% |
| Subtotal Remedies | 114 (12%) | 43% | 18% | 5% | 5% | 29% |
| Adjudicative | | | | | | |
| Hearing Procedures including Evidence | 52 (6%) | 31% | 2% | 21% | 6% | 40% |
| Other Adjudicative | 59 (6%) | 31% | 3% | 3% | 7% | 54% |
| Subtotal Adjudicative | 111 (12%) | 30% | 3% | 12% | 6% | 8% |
| Miscellaneous | 11 (1%) | 18% | 0% | 27% | 0% | 55% |
| TOTALS | 920 (100%) | 33% | 8% | 8% | 6% | 45% |

A review of Table 1 first in terms of the overall groupings of ICs reveals that: (1) Program/Placement was by far the leader in terms of frequency, accounting for the clear majority (57%) of the IC rulings, with Identification (18%) a distant second; and (2) Identification was first in terms of a pro-district balance of outcomes, with Remedies being the only overall grouping where—prior to the aforementioned¹⁵⁴ correction procedure—the balance favored the parents. Next, reviewing the table at the IC level reveals that: (1) the most frequent IC was FAPE Substantive (33%), with FAPE Procedural (10%) being in relatively distant second place; and (2) the most district-favorable outcomes balance was for Evaluation, while the most parent-favorable IC outcomes balance—again prior to the correction procedure—was for Tuition Reimbursement.

Based on the relevant correction procedure, which applied the aforementioned¹⁵⁵ adjustments to the Remedies categories, Table 2 provides the revised results for the Tuition Reimbursement and Compensatory Education ICs.

¹⁵⁴ See *supra* notes 119–23 and accompanying text.

¹⁵⁵ *Id.*

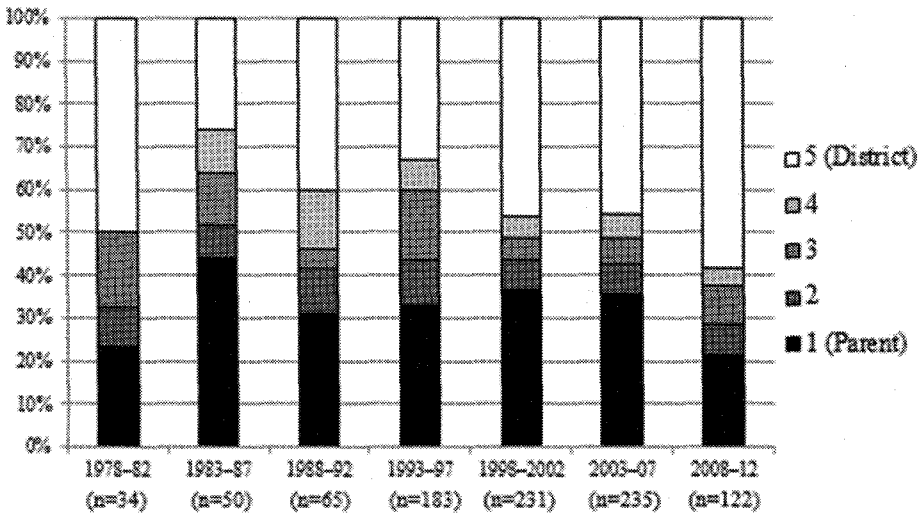
Table 2. Original and Corrected Outcome Distribution for the Two Remedial ICs

| Issue Category | Frequency | Outcomes Parent District | | | | |
|------------------------|-----------|-----------------------------|-----|----|----|-----|
| | | 1 | 2 | 3 | 4 | 5 |
| Tuition Reimbursement | 74 | 49% | 7% | 4% | 6% | 34% |
| Tuition Reimbursement | 106 | 32% | 5% | 4% | 6% | 51% |
| Compensatory Education | 40 | 33% | 39% | 5% | 5% | 18% |
| Compensatory Education | 55 | 24% | 27% | 4% | 7% | 38% |

In comparison to the initial outcomes distribution for these two remedies, Table 2 reveals that the balance shifted from a parent-favorable to a district-favorable pattern upon considering each of these remedies more holistically—i.e., from the outset of the case, thus including the underlying IC, such as whether the district denied FAPE—rather than on a truncated basis, i.e., only at the remedial stage.

Responding to research question 5, Figure 2 provides the longitudinal trend in the outcomes distribution of the ICs in the same five-year intervals as in Figure 1.

Figure 2. Longitudinal Trend of IC Rulings



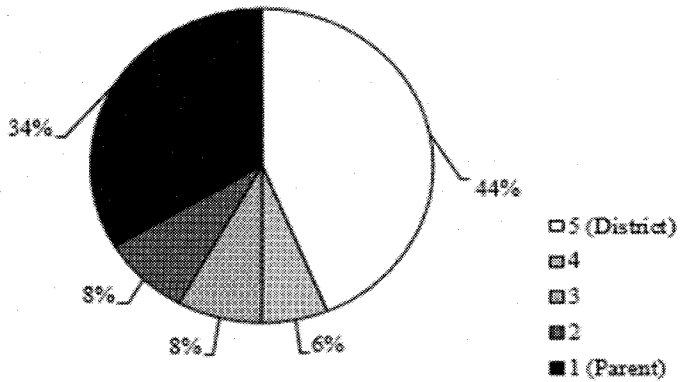
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This figure shows that the overall balance of IC rulings predominated in favor of school districts in the earliest and—even more clearly—latest five-year intervals. However, the intervening segments from 1987 to 2007 were much more balanced and fluctuating. Moreover, the intermediate outcomes—i.e., 2s, 3s, and 4s—became less pronounced during the most recent three intervals than they were during the earlier ones.

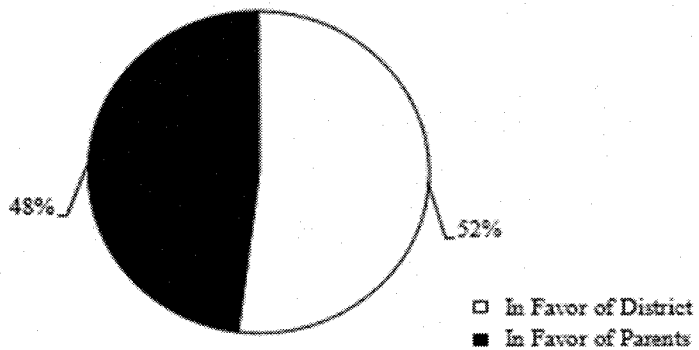
Finally, in response to research question 6 and the aforementioned conflating procedure, Figure 3 provides a comparison of the two successive overall pie-chart distributions: (1) the five-category outcomes for all of the ICs; and (2) the prevailing party outcome categorization for all of the cases.

Figure 3. Comparison of Outcomes Distribution of ICs and Cases

IC Outcomes:



Case Outcomes:



Examination of Figure 3 reveals that the outcomes distribution for ICs on balance favored districts, but with the intermediate outcomes serving as notable intervening categories,¹⁵⁶ whereas the outcomes distribution for cases represented a much more even balance between districts and parents, with the purely inconclusive category excluded as negligible.¹⁵⁷

V. DISCUSSION

This section sequentially summarizes and discusses the findings in relation to each of the research questions. At the end, this section presents recommendations for future research in this specialized but significant field of administrative law.

In response to research question 1, the overall frequency finding for this 35-year period amounted to 361 IDELR published cases containing 920 IC rulings. Other than meeting the requisite standard for representativeness,¹⁵⁸

¹⁵⁶ The 2s, 3s, and 4s—each representing relatively equal segments within this intermediate group—together amounted to almost one sixth of all ICs. See *supra* Tables 1 and 2.

¹⁵⁷ Of the 361 cases, our conflation procedure resulted in 172 in favor of the parents and 184 in favor of the school district. The remaining five cases fit into this marginal, inconclusive category; each was limited to adjudicative IC rulings with the case outcome of the merits preserved for future proceedings. Encinitas Union Sch. Dist., 31 IDELR ¶ 198 (Cal. SEA 1999) (denying the district's motion for a continuance of the hearing, admission of an attorney pro hac vice, and consolidation, but partially granting its requests for *subpoenas duces tecum*); Secaucus Bd. of Educ., 41 IDELR ¶ 81 (N.J. SEA 2004) (granting the parent's motion to dismiss his complaint without prejudice and dismissing the district's counterclaim but observing district's apparent violations and parent's right to re-file); Brocton Cent. Sch. Dist., 49 IDELR ¶ 24 (N.Y. SEA 2007) (annulling hearing officer's dismissal of the parents' claims without a hearing and remanding for a decision on the merits); Salisbury Twp. Sch. Dist., 26 IDELR 919 (Pa. SEA 1997) (vacating hearing officer's orders pending an evidentiary hearing); Lower Moreland Twp. Sch. Dist., 18 IDELR 1160 (Pa. SEA 1992) (vacating hearing officer's dismissal of the father's hearing request, concluding that he had standing to challenge the child's IEP and placement). One alternative for these five cases was to treat them as a separate slice in the second pie chart, but the purpose of that conflation was to arrive at the customary two categories. A second alternative was to treat them as being in favor of the district because they did not meet the prevailing standard, but the explicitly preserved further proceedings could result in prevailing status. The third alternative, which we selected, was to exclude them from the analysis, because—although all of the cases were theoretically inconclusive to the extent that they were subject to judicial appeal—on balance this option came closest to their special status of being expressly inconclusive.

¹⁵⁸ See Krejcie & Morgan, *supra* note 98 and accompanying text.

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the sample size of 361 decisions is not in itself noteworthy. For comparability purposes, its target population is 4,353 decisions. This seemingly sizable total is only a subset of all H/RO decisions,¹⁵⁹ subject to the submission/selection process for IDELR publication.¹⁶⁰ Thus, although our sampling procedure in terms of size and selection generally supports representativeness of IDELR published decisions, its representativeness of all H/RO decisions merits caution in light of the limited evidence of generalizability.¹⁶¹ The iceberg metaphor, as applied to IDEA adjudications, serves as a reminder not only of the multiple layers of the process, starting with unpublished H/RO decisions and culminating in the tip of published, final court decisions, but also the blurring fluidity within and among these levels.¹⁶² Moreover, being a representative and, thus generalizable, sample of the IDELR-published decisions is of value in itself to the extent that these decisions are often cited in other H/RO decisions, helping to fill in gaps and

¹⁵⁹ See, e.g., Zirkel & Gischlar, *supra* note 12 (finding 37,069 first-tier adjudications for the 15-year period 1991–2005, albeit within a distinctly upward longitudinal trajectory. Moreover, they observed inconsistencies in these data in terms of lack of a uniform reporting framework).

¹⁶⁰ The sources of variance include: (1) differences in the extent that states submit their H/RO decisions to the publisher of IDELR; (2) the succession during this 35-period of editors who conduct the publisher's selection; (3) the space available in each issue of IDELR with the priority being on other, higher sources of law, such as court decisions; (4) changes in state systems between one and two tiers; and (5) the effect of multiple selection criteria, such as geographic balance.

¹⁶¹ Anastasia D'Angelo, J. Gary Lutz, & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL'Y STUD. 241 (2004) (finding a moderate relationship between published and unpublished IDEA hearing officer decisions within a few selected states). Based on IDELR's selection priority on review officer decisions in two-tier jurisdictions, the interrelated limitation is that our sample likely had a higher proportion of second-tier decisions than did the total population. Specifically, the proportion of second-tier decisions was 31%. See *supra* note 149. As only an approximate comparison, because the time period was not the same and missing data caused an underestimate of the second-tier decisions, Ahearn's data yielded a second-tier subtotal amounting to 2,592 (9%) of 28,508 H/RO decisions for 1991–2000. Eileen Ahearn, *Due Process Hearings: 2001 Update*, NASDSE Project Forum (April 2002), available at http://www.nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/131_ffb7747b-2f2e-4887-97a7-137cc145dd1b.pdf (the changes over time among the state structures, which has been in the direction of one-tier systems but only on a net, rather than consistent basis, contributes to the imprecision of such comparisons). See also Zirkel & Scala, *supra* note 4.

¹⁶² See, e.g., Zirkel & Machin, *supra* note 40 (focusing on the fluidity in the IDEA judicial process, including settlements, but extending to the underlying H/RO level).

shape the law.¹⁶³

More significant is the companion finding of 920 IC rulings, representing an overall ratio of 2.5 per case. The previous research has been largely limited to the case as the unit of analysis, and the relatively few exceptions that addressed ICs lacked an explicit or carefully conceived taxonomy.¹⁶⁴ The only study that produced an overall ratio of IC rulings to cases was limited to a 12-year period in Iowa—thus, although its finding was the same ratio of 2.5,¹⁶⁵ differences in time period, geographic scope, and issue categorization limited its validating effect.¹⁶⁶

Answering the first part of research question 2, the states with the highest number of cases were California, New York, Massachusetts, Pennsylvania, Texas, Illinois, Connecticut, New Jersey, Alabama, and Indiana. This finding for the published sample is moderately consistent with the previous interstate frequency analyses of all hearing officer decisions.¹⁶⁷ The prominent differences when not limited to IDELR-published first-tier adjudications included (1) the District of Columbia and Puerto Rico being in the leading positions, and (2) Massachusetts and Texas not being in the top five group.¹⁶⁸

¹⁶³ See, e.g., Muscogee Cnty. Sch. Sys., 27 IDELR 275 (Ga. SEA 1997) (citing Yankton Sch. Dist., 22 IDELR 272 (S.D. SEA 1994) in support of its pendency ruling); Pasadena Ind. Sch. Dist., 58 IDELR ¶ 210 (Tex. SEA 2012) (relying on North Hills Sch. Dist., 39 IDELR ¶ 254 (Pa. SEA 2003) for its determination on the appropriateness of ESY services). For the contrast between the weight of these IDELR-published decisions at the H/RO versus the court levels, compare *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004), with *Mason City Cmty. Sch. Dist.*, 36 IDELR ¶ 50 (Iowa SEA 2001). Although H/RO decisions do not have formal precedential force, those published in IDELR are more likely to have the gap-filling effect because they are generally much more accessible across jurisdictions and with indexing and other search features.

¹⁶⁴ Zirkel & Machin, *supra* notes 40–41 and accompanying text; Zirkel, *supra* note 42 and accompanying text; Rickey, *supra* notes 57–63 and accompanying text; Cope-Kasten, *supra* notes 66–68 and accompanying text.

¹⁶⁵ See *supra* text accompanying note 59.

¹⁶⁶ A separate study in Iowa for a much longer, comparable period provided additional limited support, finding a range from 1–2 in the early years to 3 in the later years but without a clear typology. D'Angelo, Karanxha, & Zirkel, *supra* note 64, at 41.

¹⁶⁷ Zirkel & Gischlar, *supra* note 12 and accompanying text; Zirkel & Scala, *supra* note 4 and accompanying text; Zirkel, *supra* note 35 and accompanying text..

¹⁶⁸ *Supra* note 167. The largely correlated prevalence of the District of Columbia and New York in published court decisions tends to confirm their high ranking. See, e.g., Perry A. Zirkel, *Case Law under the IDEA*, in *IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS* 669 (2012).

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The differences may be attributable in part to the limitation of the earlier studies to the hearing officer level and to shorter periods of time, but the distinction between IDELR-published and all H/RO decisions remains as an inevitable, albeit imprecise, contributing factor. In any event, the historic pattern persists of "two worlds"—one limited to a relatively small number of litigious jurisdictions that account for 90% of the H/RO cases and the other consisting of the vast majority of jurisdictions where the H/RO adjudications are relatively negligible.

For the second part of question 2, the states with the highest frequency of IC rulings paralleled, with slight variation in rankings, the top six for cases—however, the last four of the top ten varied more notably between the two units of analysis.¹⁶⁹ The differences in the ranks are obviously attributable to variations in the ratios of IC rulings to cases.¹⁷⁰

In turn, the reasons for the ratio variations are less clear. Perhaps, as a judicialization study in Iowa¹⁷¹ suggested, the higher ratio signals an evolutionary maturation, with cases becoming more complex as not only the law develops but also attorneys achieve more specialization. However, this factor provides only a partial explanation, because the ratios are not consistently higher for the high-frequency, i.e., more experienced, states. An overlapping contributing factor may be the so-called "spaghetti strategy" that Zirkel and Lyons observed in their examination of the liability litigation concerning the use of constraints with special education students.¹⁷² More specifically, the attorneys in some states may be resorting to the strategy of raising multiple issues to increase the odds of at least one of them "sticking," i.e., producing an outcome that leads to not only remedial relief but also attorneys' fees. However, because the Zirkel-Lyons study was at a different level and subject of litigation, where the remedial relief included money damages and the bases for the issues extended well beyond the IDEA,¹⁷³ this factor also only provided a limited contribution. Finally, overlapping with the first two possible contributing factors, the wide variance in the availability of parent attorneys and advocates with a specialization in IDEA cases may help

¹⁶⁹ See *supra* text accompanying notes 150–51. More specifically, in changing the tabulation from cases to IC rulings, New Hampshire and Ohio replaced New Jersey and Alabama in lower subgroup of the top ten. *Id.*

¹⁷⁰ See *supra* note 151 and accompanying text.

¹⁷¹ D'Angelo, Karanxha, & Zirkel, *supra* note 64 and accompanying text.

¹⁷² See *supra* note 129.

¹⁷³ Thus, their overall ratio of "claim rulings" to cases was three times higher, i.e., 7.5. *Id.* at 340.

account for the variance in state ratios of IC rulings to cases.¹⁷⁴ Given the lack of attention to this ratio in previous studies, it is a prime candidate for further research, with a more refined IC taxonomy serving as a more precise metric to determine the nature and extent of the variation.¹⁷⁵

Whatever the reasons for the variation in ratios, the most frequent states for published cases and IC rulings are only partially consistent with the corresponding comparison among jurisdictions for all decisions.¹⁷⁶ The differences may be attributable to time period, unit of analysis, or single versus combined tiers. Generalizability issues, such as the selective effect of the publication process,¹⁷⁷ may be an additional or alternative explanation.

In response to question 3, the longitudinal trend in the frequency of both cases and IC rulings amounted to a steady upward phase from the initial interval in 1978–82 until a leveling off in 2003–2007 and then a relatively dramatic drop in 2008–2012.¹⁷⁸ This finding is consistent with the patchwork of previous research that was limited to segments of this overall period and that, more significantly in terms of generalizability, extends to the unpublished decisions.¹⁷⁹ The contributing factors for this decline may include: (1) the resolution process introduced in the latest version of the IDEA;¹⁸⁰ (2) the expansion of other alternative dispute resolution methods¹⁸¹

¹⁷⁴ See, e.g., Kay Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?* 9 GEORGETOWN J. ON POVERTY L. & POL'Y 193, 218–20 (2002) (finding, via national survey, nonavailability in several states of parent attorneys and advocates for special education cases).

¹⁷⁵ For example, the taxonomy in the Appendix treats all adjudicated claims of procedural violations of FAPE as one category, whereas the next level of categorization would differentiate these various procedural subcategories, such as (1) parental participation, (2) other IEP team membership, (3) IEP ingredients, (4) IEP process, (5) notice, (6) evaluation, (7) confidentiality, and (8) other.

¹⁷⁶ Zirkel & Gischlar, *supra* note 12 and accompanying text; Zirkel & D'Angelo, *supra* note 36 and accompanying text.

¹⁷⁷ See *supra* note 162.

¹⁷⁸ See *supra* Figure 1.

¹⁷⁹ See *supra* notes 26–35 and accompanying text. However, the only other previous study that included review officer decisions was within the first stage and limited to IDELR-published decisions. See Zirkel & D'Angelo, *supra* note 8 and accompanying text.

¹⁸⁰ 20 U.S.C. § 1415(f)(1)(B) (2012). The companion provision that extended the availability of mediation before filing for a hearing may have also played a contributing role. *Id.* § 1415(e)(1). Although the 2004 amendments added these provisions, the effective date of the amendments was not until July 1, 2005, and the regulations, which specified the relevant requirements, did not take effect until October 2006. Recent data

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in various states, such as IEP facilitation,¹⁸² and those specific to a particular state, such as SpedEx in Massachusetts,¹⁸³ and Creative Agreement Training¹⁸⁴ and the Evaluative Conciliation Conference¹⁸⁵ in Pennsylvania; (3) the parent-side perception of a pro-outcome trend of H/RO decisions;¹⁸⁶ and (4) the downturn in the national economy.¹⁸⁷ Regardless of the exact

concerning the ratio of filings to adjudications at the first tier suggest that the resolution session provision may be having a mitigating effect. For example, CADRE has reported that the percentage of due process complaints that have resolved or at least dissolved without full adjudication, i.e., a hearing resulting in a written decision, has increased since 2005. Zeller, *supra* note 32, at 2–3.

¹⁸¹ CADRE has developed a continuum of various special education dispute resolution processes and practices. *CADRE Continuum of Processes and Practices*, CADRE, <http://www.directionservice.org/cadre/continuumnav.cfm> (last visited Apr. 30, 2014).

¹⁸² See, e.g., Zeller, *supra* note 32, at 2–4; Mueller & Carranza, *supra* note 83, at 137. In contrast, for proposed, rather than present, variations, see *supra* notes 20–21 and accompanying text.

¹⁸³ SPEDEx, <http://spedexresolution.com/> (last visited Dec. 20, 2013). Massachusetts also has long had two other alternatives in its special education law—"settlement conferences" and "advisory opinion procedures." MASS. GEN. LAWS ch. 71B, § 2A(a) (2010). For further official information on the advisory opinion option, see *Advisory Opinion Process*, MASS. BUREAU SPECIAL EDUC. APPEALS, <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/advisory-opinion-process.html>. For further information on the settlement conference, see Reece Erlichman, Michael Gregory, & Alisia St. Florian, *Settlement Conference as a Form of ADR in Special Education*, 29 OHIO ST. J. ON DISP. RESOL. (forthcoming May 2014).

¹⁸⁴ *Trainings*, OFFICE FOR DISP. RESOL., <http://odr-pa.org/trainings/> (last visited Apr. 27, 2014).

¹⁸⁵ *Evaluation Conciliation Conference (ECC)*, OFFICE FOR DISP. RESOL., <http://odr-pa.org/alternative-dispute-resolution/evaluative-conciliation-conference/> (last visited Apr. 27, 2014).

¹⁸⁶ See, e.g., Golden, *supra* notes 10–11 and accompanying text. Although the majority of the previous studies seem to provide confirming evidence (*supra* notes 36–91 and accompanying text), the purpose of the present study is to provide a more precise picture of the outcome trend. Nevertheless, to the extent that parents and/or their attorneys have the perception of adverse outcome odds, it would have a dampening effect on initiating the H/RO process, especially given its obvious costs in terms of not only the fees of attorneys/advocates and experts, but also the consequences of becoming an adversary of the child's school.

¹⁸⁷ This factor overlaps with and accentuates the fiscal side of the previous factors. *Id.* For the accentuated difficulties, see, e.g., AASA Report, *supra* note 17, at 7–8 (observing that, "the cost and complexity of a due process hearing hinder low- and

combination of reasons, the reduction in the IDELR-published H/RO cases, which largely appears to extend to H/RO cases overall,¹⁸⁸ would seem to signal a likely reversal in the consistently upward trajectory of court decisions under the IDEA.¹⁸⁹

However, as a result of the addition of the second unit of analysis, the longitudinal picture of Figure 1 includes the ratio of IC rulings to cases. This new, ratio variable did not reflect any particular upward or downward pattern, instead oscillating between a range of 2.1–2.8 for each five-year interval. This finding is somewhat surprising in relation to the Zirkel, Karanxha, and D'Angelo judicialization premise, which included an ascending longitudinal trend in the number of issues in their single-state study.¹⁹⁰ The disparity in findings may be attributable to (1) their study's limitation to one state¹⁹¹ compared to this study's national sample; (2) the more limited difference in time period;¹⁹² (3) their tabulation based on the hearing officer's identification of the issues¹⁹³ compared to our basis in the IC taxonomy; and (4) their use of all hearing officer decisions¹⁹⁴ in comparison to our use of IDELR-published decisions at both the hearing officer and review officer levels. In any event, this indicator of judicialization or, more narrowly, of case complexity does not evidence the hypothesized upward trajectory within IDELR-published H/RO decisions, although the aforementioned¹⁹⁵ finding revealed notable differences among the states.

In response to question 3, the leading frequency finding was the predominance of IC rulings in the program/placement grouping, and the leading outcome finding was the general pro-district skew with the initial

middle-income parents from exercising the procedural protection provisions to which they are entitled," including the H/RO process).

¹⁸⁸ See *supra* notes 32–34 and accompanying text.

¹⁸⁹ Zorka Karanxha & Perry A. Zirkel, *Longitudinal Trends in Special Education Case Law: Frequencies and Outcomes of Published Court Decisions*, J. SPECIAL EDUC. LEADERSHIP (forthcoming); Zirkel & Johnson, *supra* note 24.

¹⁹⁰ Zirkel, Karanxha, & D'Angelo, *supra* note 64, at 41 (finding that the average number of issues per case increased from approximately 1–2 during 1978–1990 to 3 during 1990–2005). In their study, this indicator was only one of several variables examined in relation to their hypothesis.

¹⁹¹ *Id.* at 35 (noting the limitation to decisions in Iowa).

¹⁹² The difference was the approximately 7.3 years. *Id.* at 35 n.34 (identifying the end of their time period as September 2005).

¹⁹³ *Id.* at 35 n.34.

¹⁹⁴ *Id.* at 35.

¹⁹⁵ See *supra* note 151 and accompanying text.

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exception—prior to the correction procedure—of the IC rulings specific to remedies. The predominance of program/placement is consistent with previous research at the hearing officer level.¹⁹⁶ It also comports with the preeminent position of FAPE in the IDEA's statutory scheme¹⁹⁷ and in the related case law.¹⁹⁸ The general pro-district outcome trend also aligns with previous research,¹⁹⁹ but the more precise metrics here show the need for more careful analysis. For example, the refinement in the outcomes for the ICs of tuition reimbursement and compensatory education, in light of the overlapping and interacting effect of the underlying, mostly FAPE rulings, shows that initial impressions may be misleading; when the underlying rulings are appropriately imported into the distribution, the odds of parental success for tuition reimbursement and compensatory education are notably less than the unadjusted analysis had suggested.²⁰⁰

For the results of both questions 3 and 4, a finding that particularly merits discussion, initially because it is unexpected in its non-negligible frequency, is the Adjudicative grouping. Although general adjudicative issues, such as standing, and jurisdiction, and those specific to the IDEA, such as the exhaustion doctrine²⁰¹ and the additional evidence provision,²⁰²

¹⁹⁶ See, e.g., Mueller & Carranza, *supra* note 83, at 136 (reporting that the most frequent issues in their national study of hearing officer decisions were placement (25%) and IEP and program appropriateness (24%)).

¹⁹⁷ See *supra* note 2 and accompanying text. For judicial recognition, see, e.g., *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008) (characterizing FAPE as "the central pillar of the IDEA").

¹⁹⁸ For example, the first and foremost Supreme Court decision under the IDEA focused on the meaning of FAPE. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Moreover, this landmark decision has spawned an extensive progeny of lower court decisions. See, e.g., Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education"?*, 28 NAT'L ASS'N ADMIN. L. JUDICIARY 399, 401 n.17 (2008) (observing that "FAPE is the most litigated issue under IDEA."). Furthering the fertile framework for H/RO decisions concerning FAPE, the judicial progeny of *Rowley* has also resulted in codification in the IDEA. See *infra* note 242.

¹⁹⁹ See *supra* notes 36–91 and accompanying text.

²⁰⁰ This adjustment reflects movement to a broader view within the case. The corresponding reexamination of the outcomes trend for cases comes with the conflating procedure under question 6, which is reported *supra* and which is discussed *infra*.

²⁰¹ See Wasserman, *supra* note 5.

²⁰² See, e.g., Andriy Krahmal, Perry A. Zirkel & Emily Kirk, "Additional Evidence" under the Individuals with Disabilities Education Act, 9 TEX. J. CIV. LIB. & CIV. RTS. 201 (2004) (discussing 20 U.S.C. § 1415(i)(2)(C)).

are relatively frequent at the judicial level,²⁰³ one would expect them to be relatively rare at the more informal and expedited process of H/RO decisionmaking. Yet, the adjudicative grouping accounted for 12% of the ICs, which is as many as in the remedies group prior to the correction procedure. Approximately half of these ICs were in the hearing procedure category, such as whether evidence was admissible or whether the hearing officer improperly raised and addressed an issue. The other half concerned miscellaneous adjudicative ICs, such as stay-put and statute of limitations.

This surprising frequency, although still tertiary in comparison to the predominance of FAPE, fits with the "creeping judicialization" characterization of the IDEA first-tier hearings.²⁰⁴ It also may be attributable in part to the inclusion of second tier, or review officer, decisions in the study sample.²⁰⁵

The outcomes distribution of the adjudicative ICs also merits interpretation. Because these ICs are merely preliminary to the merits, the results in the conclusive category in favor of parents (i.e., 1s) may be in a sense inconclusive, because most of them are merely the gateway to an outcome on the merit-based ICs in the case.²⁰⁶ Conversely, however, other outcomes for Adjudicative ICs, i.e., 2s, 3s, 4s, and 5s did not automatically invoke the same reconsideration because they were either typically tangential

²⁰³ Another example exclusive to the judicial review level of the IDEA is attorneys' fees. 20 U.S.C. § 1415(i)(3)(B). For a sampling of the extensive resulting litigation, see *supra* notes 132–47.

²⁰⁴ Zirkel, Karanxha & D'Angelo, *supra* note 64.

²⁰⁵ Review officer decisions accounted for almost one third of the sample. See *supra* note 149. Adjudicative issues, such as the admissibility of evidence, the impartiality of the hearing officer, and the authority of the hearing officer are more likely to arise at the second than the first tier.

²⁰⁶ See, e.g., Montgomery Cnty. Pub. Sch., 37 IDELR ¶ 206 (Md. SEA 2002) (ruling in favor of the parents on the adjudicative issue of the timeliness of their claims—whether based on the statute of limitations or the doctrine laches—but finding in favor of the district on the substantive issue of FAPE). The conflation procedure (*supra* notes 132–47 and accompanying text), with the special attention including the Adjudicative ICs that were 1s, ensured that the case met the prevailing standard. Thus, this Maryland hearing officer decision did not meet this standard. In contrast, only an occasional case with a 1 for an Adjudicative IC met this standard. See, e.g., Bd. of Educ. of Arlington Cnty. Sch. Dist., 40 IDELR ¶ 28 (N.Y. SEA 2003) (ruling in favor of the parent on the stay-put issue resulting in conclusion that the district was responsible for reimbursement of the private school placement during the course of the hearing).

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to the outcome of the case²⁰⁷ or, for those that were 3s, relatively insignificant.²⁰⁸ Nevertheless, for the sake of thoroughness and accuracy, we included all Adjudicative IC rulings in the case-by-case part of the conflation procedure to avoid any misleading effects in classifying case outcomes.

In response to Question 5, the longitudinal trend of IC rulings continuously predominated in favor of school districts but with fluctuation among the five-category outcome scale. The only relatively consistent movement—a reduction in the span of intermediate outcomes during the most recent three intervals as compared with the earlier ones—was not particularly significant. In the absence of previous longitudinal outcome analyses, particularly with the more precise unit of analysis in combination with the more precise outcome scale, the overall conclusion is rather tentative and brief: the proverbial pendulum has vibrated rather than remaining still, but it does not appear to have shifted on a macro level in the direction of either parents or districts.

Finally, addressing question 6, the overall conflation of five-category IC outcomes into two-category case outcomes, via a relatively rigorous "prevailing party" basis,²⁰⁹ reveals a much more balanced overall pattern for H/RO decisions than previously perceived or found. More specifically, contrary to the aforementioned²¹⁰ *Wall Street Journal* article and the previous, methodologically limited research,²¹¹ the win-loss ratio is quite close to 50-50—specifically, 48% in favor of parents and 52% in favor of

²⁰⁷ See, e.g., *In re Child with Disability*, 507 IDELR 278 (Ill. SEA 1985) (ruling at the review officer level in favor of district on the parents' challenges to hearing officer procedures in favor of the parents on underlying substantive FAPE claim).

²⁰⁸ Moreover, those Adjudicative ICs that were 3s, i.e., inconclusive or split generally favored neither or both parties. See, e.g., *Encinitas Union Sch. Dist.*, 31 IDELR ¶ 198 (Cal. SEA 1999) (ruling in favor of district on some discovery requests but not on others); *Salisbury Twp. Sch. Dist.*, 26 IDELR 919 (Pa. SEA 1997) (vacating and remanding a portion of the hearing officer's order for a determination on the merits).

²⁰⁹ The added advantage of this conflation procedure is that it aligns with the parents' opportunity to recover attorneys' fees, which is a considerable factor in terms of the costs to the district and, indirectly, the relief to the parents. This factor is not only important in terms of the immediate end result of the first or second-tier administrative adjudication, but also the parties' determination as to whether to settle the case before the hearing/review officer's decision or to proceed to a judicial appeal. It can also lead to separate litigation for judicial determination as to whether the parent is entitled to attorneys' fees and, more commonly, what the amount, including the added time for this collection litigation, ultimately is.

²¹⁰ See *Golden*, *supra* note 10 and accompanying text.

²¹¹ See *supra* notes 36–91 and accompanying text.

districts, discounting the few inconclusive decisions.²¹² This rather striking difference from previous research merits the careful attention of not only practitioners and policymakers, but also scholars and researchers. Similarly meriting more careful accounting is the proportion of filings for first-tier hearings that are settled without a hearing, thus tending to skew the odds of the remaining, i.e., adjudicated, cases in favor of districts to the extent that the merits of the case is one of the key considerations for their decision to opt for settlement.²¹³ For example, the overall ratio of filings to adjudications for the period 1991–2000 was almost 3:1.²¹⁴ This ratio suggests that—although some of the two thirds of the filings ended with abandonment or withdrawal²¹⁵—a high proportion of the potential adjudications resulted in settlement.²¹⁶ Thus, the overall balance of "cases"—conceived more broadly as complaints filed for IDEA hearings—may actually be even farther in favor of parents

²¹² See *supra* note 158 and accompanying text. For various reasons, a balanced 50-50 outcomes ratio in hearing/review officer decisions is not necessarily a measure of impartiality. See Zirkel, *supra* note 15. Whether it is a desideratum as a measure of social justice is a much more complex issue.

²¹³ This consideration is one of the skewing effects that Zirkel, *supra* note 15, discussed.

²¹⁴ Ahearn, *supra* note 162 (reporting filings that totaled 73,433 and adjudications that totaled 25,916). Similarly focusing on the total population rather than a published sampling, Zirkel in a more recent study found that for the six years from 2006–2007 through 2011–2012, the ratio of filings to adjudications at the hearing officer level was 6.2. See Zirkel, *supra* note 36.

²¹⁵ Although the IDEA allows districts to file for hearings, parents account for the vast majority of filings. For example, Mueller & Carranza, *supra* note 83, at 137, reported that for the 2005–2006 decisions in 41 states, the initiating parties were: parents—86%, districts—14%). These percentages are based on adjudications, not filings. We were not able to find any sources that provided filing or settlement data by party.

²¹⁶ In the at least partially analogous area of employment discrimination suits under the Americans with Disabilities Act, studies have found that the majority ended in settlements. Kathryn Moss, Michael Ullman, Jeffrey W. Swanson, Leah M. Ranney & Scott Burris, *Prevalence and Outcome of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 306 (2005); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization?: Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184–87 (2010).

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VI. CONCLUSION

Using this study as a springboard, the directions of follow-up research are several. First, replicating this study with more in-depth refinements, such as formulation and application of (a) an IC taxonomy that extended to the next level of specificity²¹⁷ and (b) an alternate or improved procedure for conflation of outcomes to the case level, would test the interrater reliability for, and sound accuracy of, the findings as well as extend their scope and specificity.²¹⁸ Second, proceeding vertically upward from this foundation sample of IDELR-published H/RO decisions to the judicial levels of the proverbial special education litigation iceberg, tracking the extent and direction of the change in outcomes would provide fruitful measures of both judicial deference and the final overall balance.²¹⁹ Third, proceeding vertically downward to filings, research should systematically examine the number and nature of dispositions of due process hearing complaints short of full adjudication, i.e., completion of the hearing with issuance of a written decision.²²⁰ Fourth, proceeding horizontally from this foundation to all H/RO

²¹⁷ See *supra* note 176. Another useful refinement would be to develop a more effective procedure for detecting those cases where parents seek compensatory education. Unlike tuition reimbursement, for which the factual signal typically included in the H/RO opinion is the parents' unilateral placement of the child, compensatory education does not have such a distinguishing trigger, and the adjudicator may not mention this remedy if the underlying IC ruling is in favor of the district. However, this procedure will likely necessitate extrinsic evidence beyond the H/RO decision, thus being a subset of the recommendation *infra* note 220.

²¹⁸ Extending the longitudinal scope forward would also examine whether the present trends continue in the near future.

²¹⁹ This approach would cross-check from a more accurate angle Zirkel's research study, *supra* note 42, which proceeded from the top down rather than from the bottom up. Moreover, it would provide a fuller picture of which party is resorting to appeal and for which ICs.

²²⁰ The U.S. Department of Education recently made available data on these other dispositions, such as settlements, at least for the 2006–2007 through 2011–2012. *Historical State-Level IDEA Data Files—Dispute Resolution*, TECHNICAL ASSISTANCE & DISSEMINATION NETWORK, <http://tadnet.public.tadnet.org/pages/712> (last visited May 14, 2014); *Part B IDEA Dispute Resolution*, DATA.GOV, <https://explore.data.gov/Education/2011-2012-IDEA-Part-B-Dispute-Resolution/deibaj7g> (last visited May 14, 2014).

decisions, at least in well-selected jurisdictions,²²¹ would provide more solid evidence as to the relationship between the IDELR-published and the unpublished decisions or, viewed on a larger scale, the generalizability of such findings. Finally, miscellaneous other useful lines of inquiry extending from this foundation include (1) re-analyzing these frequency data based on a per capita basis in relation to special education enrollments;²²² (2) comparing the outcomes among the high-frequency states;²²³ (3) comparing the outcomes of hearing officer with review officer decisions;²²⁴ (4) comparing the H/RO outcomes between parents with and without legal representation;²²⁵ (5) comparing the frequency and outcomes of H/RO cases and ICs with those of the IDEA state complaint resolution process (CRP);²²⁶ (6) applying such a carefully differentiated outcomes analysis to judicial decisions under the IDEA;²²⁷ and (7) extending empirical research, both quantitatively and qualitatively, to the full record of the case and the parties' perceptions.²²⁸

²²¹ The criteria should include not only availability, particularly on a relatively complete longitudinal basis, but also activity, with the focus being on the relatively few jurisdictions in the "world" that accounts for most of the litigation activity.

²²² For an earlier example, see Zirkel & Gischlar, *supra* note 12.

²²³ Such a comparison, uniformly based on these improved metrics, would lead to investigation of the reasons for the statistically and practically significant differences.

²²⁴ This recommendation may be viewed as a subset of the vertical line of inquiry. See Zirkel, *supra* note 220 and accompanying text.

²²⁵ This recommendation would expand part of Archer's study in Iowa to a national level using the more refined five-point outcome scale. See Archer, *supra* note 49.

²²⁶ See *supra* note 101. For the differences between the H/RO and CRP processes under the IDEA (along with the alternate avenues under Section 504), see Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010). For the legal foundation and boundaries of the CRP process, see, for example, Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2008).

²²⁷ The five-category outcome scale would require customization to the judicial process, where motions for dismissal, summary judgment, and preliminary injunctions require differentiation of inconclusive outcomes, for example, Lupini & Zirkel, *supra* note 98, and—depending on the scope—smaller units of analysis than cases, for example, Chouhoud & Zirkel, *supra* note 109 (issue rulings); Lyons & Zirkel, *supra* note 128 (claim rulings).

²²⁸ Such in-depth research requires careful selection, special access, and considerable resources. However, early studies illustrated that such research is both feasible and enlightening. See, e.g., MILTON BUDOFF & ALAN ORENSTEIN, SPECIAL EDUCATION APPEALS HEARINGS: THEIR FORM AND THE RESPONSE OF PARTICIPANTS

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Ending symmetrically where we started, such systematic national research is far preferable to ill-informed impressions.²²⁹ Such careful, comprehensive, and impartial analyses, in tandem with traditional legal scholarship, benefits (1) policymakers who periodically amend the IDEA and corollary state laws, (2) practitioners who implement them, including H/ROs, and (3) both parents and districts who share an interest in the effective education of students with and without disabilities.

(1979) (analyzing procedures and perceptions of Massachusetts due process hearings in 1974–77); Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Due Process Hearings*, 57 *EXCEPTIONAL CHILD*. 546 (1991) (analyzing perceptions of parties participating in Pennsylvania due process hearings in 1980–1984); Peter J. Kuriloff, *Is Justice Served By Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 *LAW & CONTEMP. PROBS.* 89 (1985) (analyzing the relationship of several transcript variables and outcomes of Pennsylvania due process hearings in 1976–1979).

²²⁹ See *supra* text accompanying notes 10–14.

APPENDIX

The following customized classification was the basis for identifying each of the adjudicated ICs (listed below in italics):²³⁰

Identification:

- *Child Find*: either the collective issue of whether the district provided the IDEA-required notice to the public,²³¹ or the individual issue of whether the district had reason to suspect that the student may have been eligible and yet did not conduct an evaluation²³²
- *Evaluation*: either the initial evaluation for a student suspected of needing special education services (as a result of child find²³³ or parent request²³⁴), or the required²³⁵ re-evaluations for continuation and revision of special education services²³⁶
- *Eligibility*: determination through an evaluation by a multidisciplinary team that a student fits one or more of thirteen

²³⁰ For this purpose, we reviewed and refined the rather broad issue categories of previous studies (e.g., Newcomer & Zirkel, *supra* note 23; Rickey, *supra* note 57) in light of IDELR's detailed topical index. The result was four successive broad groupings, each consisting of readily identifiable and reasonably significant issues designated as reasonably specific categories. The descriptions of these ICs and their accompanying footnotes reflect and, for the purposes of clarification and replication, resolve various areas of inevitable overlap.

²³¹ 20 U.S.C. § 1412(a)(3) (2012); 34 C.F.R. § 300.111 (2012).

²³² The references in the legislation and regulations are less direct and complete than for collective child find. 20 U.S.C. § 1412(a)(10)(A)(iii)(I) (2012); 34 C.F.R. § 300.111(c)(i) (2012). Nevertheless, this individual child find obligation is widely recognized. See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012); M.B. v. Hamilton Se. Sch. Dist., 668 F.3d 851 (7th Cir. 2011); Compton Unified Sch. Dist. v. Addison, 598 F.3d 1191 (9th Cir. 2010); A.P. v. Woodstock Bd. of Educ., 370 F. App'x 202 (2d Cir. 2010).

²³³ Although bordering child find, which concerns whether the district had reason to suspect eligibility, the initial evaluation concerns the appropriateness of the resulting process for determining eligibility. See, e.g., Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 297 EDUC. L. REP. 637, 639–40 (2013).

²³⁴ 20 U.S.C. § 1414(a)(1)(B) (2012); 34 C.F.R. § 300.301(b) (2012).

²³⁵ 20 U.S.C. §§ 1414(a)–(c) (2012); 34 C.F.R. §§ 300.301–.305 (2012).

²³⁶ This issue category also includes the requirement for parental consent for evaluation or reevaluation. 20 U.S.C. §§ 1414(a)(1)(D)(i)(I), (c)(3) (2012); 34 C.F.R. §§ 300.300(a)(1), (c)(1) (2012).

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eligible classifications under the IDEA and that the student requires specially design instruction²³⁷

- *Independent Educational Evaluation (IEE)*: the parents' right to what is, in effect, a second expert opinion as to the initial evaluation or reevaluation, including the requirements concerning consideration and reimbursement²³⁸

Program/Placement:

- *FAPE Substantive*: determination of whether the IEP meets the substantive standards in *Rowley* and its progeny,²³⁹ which extend beyond this IEP formulation to IEP implementation²⁴⁰
- *FAPE Procedural*: determination of whether the school district prejudicially²⁴¹ violated any of the procedural protections in the

²³⁷ Although abutting evaluation and not separately defined in the IDEA, the focus of eligibility is the bottom-line determination of whether the child is eligible under the IDEA's two-pronged definition of disability. 20 U.S.C. § 1401(3) (2012); 34 C.F.R. § 300.8 (2012).

²³⁸ 20 U.S.C. §§ 1415(b)(1), (d)(2)(A) (2012); 34 C.F.R. § 300.502 (2012). *See, e.g., Perry A. Zirkel, Independent Educational Evaluations at Public Expense under the Individuals with Disabilities Education Act*, 38 J.L. & EDUC. 223 (2009).

²³⁹ *See supra* note 2.

²⁴⁰ *See, e.g., Woods v. Northport Pub. Sch.*, 487 F. App'x 968 (6th Cir. 2012); *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478 (4th Cir. 2011); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007); *Melissa S. ex rel. Karen S. v. Sch. Dist.*, 183 F. App'x 184 (3d Cir. 2006); *L.C. v. Utah State Bd. of Educ.*, 125 F. App'x 252 (10th Cir. 2005); *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603 (7th Cir. 2004). For more specialized analyses, these implementation cases may constitute a separable subcategory, see, for example, *Zirkel, supra* note 87.

²⁴¹ The *Rowley* progeny developed a two-part test for procedural violations, with the second part amounting to educational loss (and, thus, connecting to the substantive side). *See, e.g., Ridley Sch. Dist. v. M.R.*, 680 F.3d 260 (3d Cir. 2012); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011); *L.M. ex rel. Sam M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 (9th Cir. 2009); *A.C. ex rel. M.C. v. Bd. of Educ.*, 553 F.3d 165 (2d Cir. 2009); *Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008); *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060 (7th Cir. 2007); *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006); *L.T. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80 (1st Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); *DiBuo ex rel. DiBuo v. Bd. of Educ.*, 309 F.3d 184 (4th Cir. 2002); *Sch. Bd. v. K.C.*, 285 F.3d 977 (11th Cir. 2002). For codification in the most recent version of the IDEA, with a possible

IDEA, including parent participation and provision of prior written notice²⁴²

- *LRE Placement*: determination of whether the location of the out-of-school program is the least restrictive environment (LRE)²⁴³
- *Extended School Year (ESY)*: the threshold determination of whether the child is entitled to special education and related services beyond the regular school year and, if so, the extent of this entitlement²⁴⁴
- *Discipline*: largely suspensions, expulsions, and exclusions, including the threshold determination of whether the removal constituted a disciplinary change in placement and, if so, the resulting determination of whether the district violated applicable requirements for manifestation determinations, interim alternate educational settings, and functional behavioral assessments or behavioral intervention plans²⁴⁵

Remedies:

- *Tuition Reimbursement*: determination of whether the parent is entitled to recover the costs of a unilateral private placement from

exception for parental participation, see 20 U.S.C. § 1415(f)(3)(E)(ii) (2012); 34 C.F.R. § 300.513(a) (2012).

²⁴² 20 U.S.C. §§ 1414(a)–(d), 1415(b)–(d) (2012); 34 C.F.R. §§ 300.322, 300.503 (2012).

²⁴³ 20 U.S.C. § 1412(a)(5)(A) (2012); 34 C.F.R. § 300.114(a) (2012). Placement issues sometimes presented a blurred overlap between FAPE and LRE. For the sake of consistency, we limited this IC to prospective placements outside of the school district, typically in private settings. *See, e.g.*, Chester Twp. Bd. of Educ., 35 IDELR ¶ 208 (N.J. SEA 2000) (ruling that the school district failed to determine that it provided necessary supplementary aids and services in the regular education environment before proposing an out of district placement). On the other hand, we classified disputes where both sides sought different placements within the district, including LRE claims, under the FAPE Substantive IC. *See, e.g.*, Gwinnett Cnty. Sch. Dist., 33 IDELR ¶ 114 (Ga. SEA 1999) (ruling that the school district's program in a school other than the neighborhood school provided FAPE).

²⁴⁴ Based on judicial interpretations of the statutory standard of FAPE, only the IDEA's regulations, 34 C.F.R. § 300.106 (2012), codify the concept of ESY. For the continuing case law, see, for example, *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008); *Kenton Cnty. Sch. Dist. v. Hunt*, 384 F.3d 269 (6th Cir. 2004).

²⁴⁵ 20 U.S.C. § 1415(k) (2012); 34 C.F.R. §§ 300.530–.537 (2012). For the related case law, see, for example, Perry A. Zirkel, *Discipline of Students with Disabilities: A Judicial Update*, 235 EDUC. L. REP. 1 (2008).

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the school district²⁴⁶

- *Compensatory Education*: determination of whether the parent is entitled to this other retrospective remedy²⁴⁷ for denial of FAPE²⁴⁸

²⁴⁶ 20 U.S.C. § 1412(a)(10)(C) (2012); 34 C.F.R. §§ 300.148(c)–(e) (2012). For the full multi-step test, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012). Inasmuch as the primary, but not sole, criterion for this remedy is "if the ... hearing officer finds that the agency had not made a [FAPE] available to the child," tuition reimbursement inevitably overlaps with FAPE. 20 U.S.C. § 1413(a)(C)(ii). If the H/RO resolved the matter at this first step by finding that the district had provided FAPE, we classified the IC only in one or more of the FAPE ICs. *See, e.g.*, Palm Beach Cnty Sch. Dist., 43 IDELR 102 (Fla. SEA 2005); Lemon Grove Sch. Dist., 20 IDELR 59 (Cal. SEA 1994) (ruling in favor of the school district on claim for tuition reimbursement after concluding that the district's proposed program and placement were not a denial of FAPE). Conversely, we added an IC entry of tuition reimbursement where the H/RO, after determining that the district had deprived the child of FAPE, proceeded to decide the remaining steps of the test for tuition reimbursement. *See, e.g.*, Bd. of Educ. of the City Sch. Dist. of the City of New York, 24 IDELR 199 (N.Y. SEA 1996) (determining that the district violated its FAPE obligation but denying tuition reimbursement upon ruling that the parents' unilateral placement was not appropriate); New York City Dep't of Educ., 44 IDELR ¶ 178 (N.Y. SEA 2005) (granting tuition reimbursement where school district denied FAPE and parent established that the private placement was appropriate and that the equities favored the parent, thereby meeting all three prongs of the tuition reimbursement test). Where the H/RO addressed the tuition claim without ruling on an underlying FAPE claim, we included an IC ruling entry only for tuition reimbursement. *See, e.g.*, Bd. of Educ., 29 IDELR 644 (N.Y. SEA 1998) (applying tuition reimbursement test after the district conceded that its placement was not appropriate). We also similarly treated analogous requests for reimbursement, such as for private tutoring, where the H/RO applied the same test. *See, e.g.*, Napa Valley Unified Sch. Dist., 39 IDELR ¶ 277 (Cal. SEA 2003) (awarding reimbursement for specific tutoring services after determining that the school district denied such services as part of its FAPE obligation). Where a parent failed to provide the requisite ten day notice of an intention to place the child in private school at public expense, 20 U.S.C. § 1412(a)(6)(10)(C)(iii)(bb) (2012), we included tuition reimbursement as an IC entry; in these cases, the H/RO discussed the notice provision as part of the analysis of the tuition reimbursement test. *See, e.g.*, Lincoln Cnty. Sch. Dist., 37 IDELR ¶ 208 (Ore. SEA 2002) (finding that the parents' failure to provide the ten-day notice was not fatal to their tuition reimbursement claim).

²⁴⁷ Neither the statute nor the regulations explicitly reference the adjudicative remedy of compensatory education, but the courts have developed it, by derivative of their broad equitable discretion for relief under the IDEA and via analogy to tuition reimbursement, as within the remedial authority of H/RO. *See, e.g.*, Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies*, 45 URB. LAW. 281 (2013); Perry A. Zirkel, *Compensatory Education Services: An Annotated Update of the Law*, 291 EDUC. LAW REP. 1 (2013); Perry A.

Adjudicative:²⁴⁹

- *Hearing Procedures including Evidence*: non-substantive rulings relating to the conduct of the hearing²⁵⁰ including the required 5-day disclosure of evidence,²⁵¹ and admission or exclusion of evidence²⁵²

Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act*, 110 PENN ST. L. REV. 879 (2006). For H/RO remedial authority more generally, see Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011).

²⁴⁸ As with tuition reimbursement, we coded an entry only for a FAPE IC if the H/RO effectively mooted the compensatory education claim at the first step by ruling that the district did not deny FAPE. *See, e.g.*, Montgomery Cnty. Pub. Sch., 37 IDELR ¶ 206 (Md. SEA 2002) (ruling that the district did not deny FAPE and, thus, the compensatory education claim need not be addressed). Similarly, we coded both FAPE and compensatory education ICs where the H/RO, after determining that the district had deprived the child of FAPE, proceeded to decide whether and/or how much compensatory education to award. *See, e.g.*, San Antonio Ind. Sch. Dist., 44 IDELR ¶ 176 (Tex. SEA 2005) (awarding compensatory education after determining that the district had denied the student FAPE).

²⁴⁹ In light of the increased "judicialization" of the H/RO process, Zirkel et al., *supra* note 64, we extended the coding beyond IC rulings on the merits to those that were specific to this decisionmaking process. These threshold ICs are much more pronounced at the court level, as evident for the broader scope of adjudication. *E.g.*, PERRY A. ZIRKEL, A DIGEST OF SUPREME COURT DECISIONS AFFECTING EDUCATION 221–35 (2010) (illustrating, under the rubric of "procedural parameters" and via summaries of Supreme Court decisions, various technical issues specifically to adjudication, such as standing, statute of limitations, and mootness). The IDEA adds more specialized adjudicative issues. *See, e.g.*, Andriy Krahnal, Perry A. Zirkel & Emily J. Kirk, "Additional Evidence" under the *Individuals with Disabilities Education Act: The Need for Rigor*, 9 TEX. J. C.L. & C.R. 201 (2004); Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries*, 83 N.D. L. REV. 109 (2007); Wasserman, *supra* note 6; Perry A. Zirkel, "Stay-Put" under the IDEA: An Annotated Overview, 286 EDUC. L. REP. 12 (2013).

²⁵⁰ *See, e.g.*, Bd. of Educ. of New York City, 46 IDELR ¶ 236 (N.Y. SEA 2006) (review officer finding no error in hearing officer's refusal to permit testimony of a witness).

²⁵¹ *See, e.g.*, Shasta Union High Sch. Dist., 16 IDELR 482 (Cal. SEA 1990) (hearing officer denying motion to preclude consideration of evidence provided less than five days prior to hearing).

²⁵² *See, e.g.*, Northside Indep. Sch. Dist., 60 IDELR ¶ 27 (Tex. SEA 2012) (hearing officer refusing to consider summaries of testimony of persons not called as witnesses).

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- *Other Adjudicative*: variety of other technical issues specific to the proceedings, rather than the merits, of the case, such as "stay put"²⁵³ and residency²⁵⁴

Miscellaneous:²⁵⁵

- Catch-all for various issues beyond the preceding categories, such as amendment of student records²⁵⁶ and disclosure of records to an outside agency²⁵⁷

²⁵³ 20 U.S.C. § 1415(j) (2012); 34 C.F.R. § 300.518(a) (2012). *See, e.g.*, Malden Pub. Sch., 42 IDELR ¶ 73 (Mass. SEA 2004) (ruling that the school did not violate stay-put in making adjustment to the configuration of classes where the adjustment was not a fundamental change in service).

²⁵⁴ *See, e.g.*, Galesville-Ettrick-Trempleau Sch. Dist., 19 IDELR 419 (Wis. SEA 1992) (ruling that the hearing officer properly dismissed an appeal by a parent whose child did not reside in the school district at the time the parent made the out of district placement request).

²⁵⁵ This limited catchall category was reserved for any other issues not listed in the preceding, relatively encompassing ICs. For each of these entries, we identified the issue in the Comments column of the spreadsheet.

²⁵⁶ *See, e.g.*, *In re* E.F., 503 IDELR 300 (Conn. SEA 1982) (ruling that the district must amend student's records to accurately reflect that the student did not have a disability).

²⁵⁷ *See, e.g.*, Bensalem Twp. Sch. Dist., 32 IDELR 26 (Pa. SEA 1999) (finding that school district properly provided records pursuant to court order after child was charged with a criminal offense).

