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Exploring The Use of Witness Testimony in Special Education Due Process Hearings

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Abstract

The Individuals with Disabilities Education Act 2004 (IDEA) protects the rights of parents and/or guardians of children with disabilities to utilize the due process system to settle disagreements with school districts regarding their children's Individualized Education Program (IEP). In the event that these disputes move before a due process hearing officer, it is common for each side to enlist experts to provide testimony to support one of the parties involved. In the current study, we examined the use of expert witness testimony in due process hearings in five large states throughout the United States. Findings indicated several concerning trends, such as data reporting differences between states, and parents/guardians having less attorney representation and utilizing witness testimony less frequently than school districts. In addition, we found that hearing officer decisions were most often decided in the favor of the districts. We will discuss these findings in the context of a social justice framework and suggest recommendations.

Keywords: Special Education, Due Process, Witness Testimony, Social Justice, Families

Exploring the Use of Witness Testimony in Special Education Due Process Hearings

Since the passage of P.L. 94-142 in 1975, renamed the Individuals with Disabilities Education Act (IDEA, 2004), the rights of parents and/or guardians of children with disabilities to be active partners with schools in developing their children's Individual Education Programs have been both codified and identified as a critical quality control component, recognizing parents as powerful advocates for their children (Ferguson et al., 2014; Ong-Dean, 2009; Sauer & Lalvani, 2017). In the event of disagreements with school districts regarding their children's Individualized Education Programs (IEPs) parents and/or guardians can utilize the due process system. Should the dispute move before a due process hearing officer, it is common for each side to enlist experts to provide testimony to support one of the parties involved. An expert witness can be defined as an individual with specialized professional knowledge who uses their expertise to provide opinions related to the facts of a case (Yell et al., 2008).

To understand the due process system, researchers have examined many influencing factors (e.g., cost, attorney use, student characteristics). The findings from these studies are used to inform stakeholders and hopefully, improve the system. However, few studies have assessed the use of expert witness testimony. In order to address this gap, we collected and analyzed due process case data to determine who acted as expert witnesses, how often expert testimony was used by districts and parents and/or guardians, and what impact it may have had on hearing outcomes.

Literature Review

The Individuals with Disabilities Education Act (IDEA, 2004) is designed to ensure that all eligible students with disabilities receive a free appropriate public education in the least restrictive environment (IDEA Regulations, §§ 300.101 - 300.120). In order to accomplish this,

school district personnel collaboratively plan with parents and/or guardians to develop an Individualized Education Program (IEP) for each eligible student. Under IDEA, parents/guardians are required IEP team members (§ 300.321) and are afforded protections regarding their role and participation in shared decision-making processes (§ 300.322). Despite the intention of IDEA for this process to be collaborative, there are instances in which school personnel and parents/guardians disagree on the services and supports provided to the student. In these situations, the IDEA regulations outline a multi-layered process for dispute resolution (§§ 300.151 - 300.153; 300.506 - 300.520).

One avenue available to parents/guardians is filing a complaint with their state education agency (§§ 300.151 - 300.153). In this circumstance, the state education agency has a maximum of 60 days to review the complaint, conduct the investigation, and issue a written decision (§ 300.152). During this process, school personnel and parents/guardians can choose to engage in voluntary and optional forms of dispute resolution such as mediation. Additionally, the parties may choose to resolve some of the issues through a due process hearing (see description in following paragraphs) while having other parts of the issue addressed through the state complaint process (§ 300.151(c)). At the conclusion of the complaint investigation, the state education agency issues a written decision. Both school district personnel and parents/guardians have the option to appeal the decision according to processes established by their state.

Mediation is another avenue for dispute resolution outlined in the IDEA regulations (§ 300.506). Mediation is a voluntary process during which a qualified, impartial mediator guides the parents and/or guardians and school district personnel through a process of examining the disagreement and coming to a shared agreement. The state education agency is responsible for both providing a list of qualified mediators and covering the costs of mediation [§ 300.506(3-4)].

If the disagreement is resolved through mediation, a legally binding agreement is executed by the parties.

If mediation is unsuccessful, or if the parties did not choose to engage in mediation, the next level of dispute resolution under IDEA is the due process complaint (§§ 300.507 - 300.508). Either the parents/guardians or school district personnel may file the due process complaint. After filing the due process complaint, the two sides are required to participate in a resolution meeting within 15 days of the complaint being filed unless both sides agree to waive this step (§ 300.510). The resolution meeting is an opportunity for the school district to resolve the parents' and/or guardians' concerns with the guidance of an impartial hearing officer. If the concerns cannot be addressed, then the parties proceed to a due process hearing (§ 300.512). A due process hearing is a protracted process that typically involves attorney representation for one or both parties and evidential discovery through both document review and witness testimony. At the conclusion of the due process hearing, the hearing officer issues a legally binding final decision (§ 300.514). Both parties have the right to appeal the decision to a state or United States district court with the appropriate jurisdiction (§ 300.516).

The Costs of Special Education Due Process Hearings

Special education due process hearings are financially costly and contribute to deteriorated relationships between parents/guardians and school district personnel (Cope-Kasten, 2013). Pudelski (2016) surveyed over 200 school superintendents to examine their perspectives on the detrimental aspects of due process hearings. The superintendents reported that the average legal fees for a school district resulting from a special education due process hearing were over \$10,000, which is consistent with a figure reported by Mueller (2009) in a previous study. Beyond financial costs, 95% of the superintendents reported that school personnel involved in

due process hearings experience high or very high levels of stress. In order to avoid the financial costs and other negative effects of due process hearings, almost 50% of the superintendents reported that they agreed to parental requests regarding special education services that they felt were inconsistent with IDEA requirements.

Parents/guardians also experience the negative effects of special education due process hearings both financially and in their relationships with school district personnel (Wright & Wright, 2014). While average legal costs of over \$10,000 are detrimental to school districts (Pudelski, 2016), these expenses can be even more overwhelming for parents. Adding \$10,000 in attorney fees to a household budget is comparatively much more adversely impactful than that same amount on a school district operating budget. Burke and Goldman found in their 2014 study of families of children with ASD had pursued mediation and/or due process that “families with greater incomes were significantly more likely to file due process or mediation” (p. 1351). To further exacerbate this issue, two studies (Blackwell & Blackwell, 2015; Schanding et al., 2017) found that parents prevail in special education due process hearings at notably higher rates when they utilize attorney representation. Regarding parents/guardians representing themselves in order to reduce costs, 57% of the 175 special education attorneys responding to a national survey reported that due process hearings were not an effective means for parents to resolve disputes with school districts (Wettach & Sanders, 2021). Beyond financial costs, the further deterioration of relationships between parents and/or guardians and school district personnel resulting from due process hearings has been noted by multiple authors over the past 20 years (Lanigan et al., 2001; Mueller, 2009; Mueller & Carranza, 2011; Ong-Dean 2009).

Expert Witnesses in Special Education Due Process Hearings

The use of expert witnesses is another aspect of the costliness of special education due

process hearings. Importantly, expert witnesses, as individual with specialized professional knowledge who uses their expertise to provide opinions related to the facts of a case, are the only individuals in a special education due process hearing whose *opinions* influence the final outcome (Yell et al., 2008). Expert witness fees have been reported to cost from hundreds of dollars up to tens of thousands of dollars (Reed, 2008; Wettach & Sanders, 2021; Yell et al., 2008).

The use of expert witnesses to achieve successful results in special education due process hearings is particularly important for parents and/or guardians. In their survey of 175 special education attorneys, Wettach & Sanders (2021) reported that 75% of respondents indicated that expert witnesses were necessary for receiving favorable rulings in special education due process hearings. This finding was emphasized by attorneys who represented parents and/or guardians. Among the parent/guardian attorneys in their sample, 93% indicated that expert witnesses were a necessary part of a winning due process hearing case. The authors observed that school districts were less dependent on the use of expert witnesses because they often have school district personnel with the same expertise as outside professionals who may be hired as expert witnesses. Therefore, school districts may not need to expend additional funds to benefit from the expertise of specialized professional knowledge. Parents/guardians, on the other hand, carry this cost burden for themselves.

Although the IDEA regulations permit courts to award reimbursement for attorney fees (§ 300.517), parents and/or guardians are not allowed to recover fees for expert witnesses. This is a direct result of a U.S. Supreme Court ruling in *Arlington Central School District Board of Education v. Murphy* (2006). In a 6-3 vote, the Supreme Court decided that parents were no longer entitled to recoup the fees of expert witnesses in special education due process hearings.

This decision has been viewed by multiple authors as having an adverse impact on parents being able to access the resources necessary to prevail in special education due process hearings (Reed, 2008; Roshangar, 2006; Wettach & Sanders, 2021).

The original purpose of the research was to identify the use of witness testimony in special education due process hearings and the outcomes of the cases where witnesses were used, for both families and districts. We had envisioned utilizing quantitative methods to determine the answers to the questions: 1) Who are considered the experts? 2) Who do the experts work for (parents and/or guardians or districts)? 3) What are the outcomes? And 4) Does the presence of expert testimony correlate to the outcomes? However, when the data were being collected, we soon determined that, due to differences in state reporting, we needed to discuss state reporting procedures as findings. Finally, our findings have inspired us to utilize a social justice lens to discuss the patterns in the data that we encountered.

Theoretical framework

Social justice in education can be defined as the commitment to challenging inequalities (e.g., social, cultural, economic) imposed on individuals arising from any differential distribution of power, resources, and privilege (Adams et al., 2007). Part of the social justice theoretical framework is not only informing practitioners and users of information, but also to call upon decision makers to be reflective of current practices to encourage openness, collaboration, and information sharing.

While all parents and/or guardians have the right to file for due process hearings in special education and provide witnesses to support their claims, not all parents have the same access and means to qualified witnesses. The US Supreme Court ruled in *Arlington Central School District Board of Education v. Murphy* in 2006 that parents were no longer entitled to

recoup the fees of expert witnesses in due process hearings. Reed (2008) argued that this decision would negatively impact parents' due process rights under IDEA (2004) by creating an undue financial burden. We know that income is a factor in due process hearings in general, as evidenced by the U.S. Government Accountability Office (GOA) report that, "In general, a greater proportion of very high-income districts had dispute resolution activity, and these districts also had higher rates of dispute resolution activity than very low-income districts" (2019). What is less well understood is the relationship between parents' access to, and use of, witness testimony and hearing outcomes.

Method

Definitions

At the beginning of this project, the authors used the term expert witness. We based this use on the definition of an expert witness provided by Yell et al. (2008) as "an individual who has special knowledge within a field that allows him or her to provide an opinion on the meaning of the facts presented" (p. 113). However, we soon realized that the use of the term "expert" was limiting and in many cases unclear, as witness testimony, both in person and written, is not always identified in the court documents as expert and yet all testimony appears to be valued and impactful. Therefore, we will be using the term witness testimony as an overarching term and specify, when possible, if testimony is written or in person. We did not include parent and/or guardian, student, or other family member testimony in our findings.

Data Collection

The authors randomly selected 250 recent (past 10 years) publicly available due process cases to review the use of witness testimony. We chose the past ten years to ensure that we were examining current trends and to ensure that the cases examined were after the *Arlington vs.*

Murphy (2006) decision. The data sources included publicly available information about individual state's due process hearings that were readily available online. We focused on five large states representing different regions in the United States (Mid-Atlantic, Southeast, Midwest, Southwest, West Coast) and examined 50 cases per state. Examining different regions in the US was an attempt to determine patterns and differences nationally. In the SW state, there were significantly fewer due process cases than were available in the other states. However, this state also provided the outcomes from complaint investigations on the same website as the due process hearings. We decided to include these complaint investigations into our analysis (see Table 1).

The researchers collectively developed a research tool to determine the best way to organize the information. The tool was a spreadsheet whereby we entered data on the following indicators: case number, use of attorney (by district or parent/guardian), student's age and primary and, if present secondary disability, the nature of the dispute, the witnesses called, the witness' recommendations, and the outcomes (prevailing party and decisions).

Data collection was conducted by the researchers with the help of a graduate student who was trained in the use of the data collection tool. Data were then transferred to an Excel spreadsheet. The first author reviewed the data from four states and the third author reviewed one state's data. In addition, the researchers, as a group, evaluated five randomly selected cases from each state to discuss terminology and evaluate the accuracy of the data collection and ensure agreement about content and terminology.

Data Analysis

Each case was evaluated for attorney representation, the number and types of expert witnesses that testified, whether they were testifying on behalf of the parent/guardian or the

district, and the hearing officer's decision. As each state varied in the amount of information available, we could not gather this information about each indicator from each state. As each state had different reporting procedures (see findings), we reported quantitative data where possible. SPSS statistical software was used to conduct chi-squared tests and calculate odds ratios to further examine if the use of expert witness testimony was a potential factor in which party (district or parent/guardian) prevailed in the due process hearing. We also examined the trends in the data to determine commonalities and differences across states. In our analysis, it became apparent that the reporting trends were a specific finding to be discussed.

Results

Variability of Data Access Within and Across States

Accessing the data

Districts all provided publicly available links to the due process data. Most of these data were housed on the states' department of education websites, with one state that linked to a secondary website. We needed to request access (via email) to one state's cases prior to 2017. The data were presented in different formats across states. Most states presented the data by year, and one state presented the data by district. Most sites contained due process cases, and any accompanying appeals, in the same section, whereas one state (which had significantly fewer cases) presented the complaint reports, due process hearings, and review decisions on the same webpage, under different headings. Some states included in their reporting hearings that focus on violations of Section 504 of the Rehabilitation Act, whereas others clearly state that Section 504 violations are separate from IDEA and will not be discussed in due process hearings. The two

states with the highest average annual income (Mid-Atlantic state and the Western Coast state) had significantly more due process cases per year than the other three states.

Determining the witness participation

There were several differences in reporting across states. Some states (Mid-Atlantic) provided detailed court decisions and accompanying evidence (with lists of witnesses and their academic credentials), and some provided summaries with limited details. One state (Midwest) listed the witnesses providing testimony but did not always delineate on whose behalf they were testifying. In some states, witness names, roles and whether they were testifying on behalf of the petitioner or respondent were all redacted.

There were differences in case reporting within states. Within the same states, some cases include representing attorney information on the cover page and some referenced attorneys in the body of the discussion. Finally, the witness testimony was referenced differently within states as well. Some cases included a section titled “expert witness” with a list of the people and their credentials, whereas others included testimony in the discussion of evidence.

The Use of Witness Testimony

Four states (West Coast, Midwest, Southeast and Southwest) evidenced witness testimony in most cases reviewed and in one state (Mid-Atlantic) roughly half of the cases had witness testimony from districts or parents and/or guardians. Across all states, districts had witnesses more often than parents/guardians (Table 1).

In states where it was clear if the witness was appearing on behalf of the school district or the parents, we found that school districts used more witnesses per case than parents and/or guardians. In the Mid-Atlantic state, school districts used a mean of 3.2 witnesses per case and parents used 1.9 witnesses per case. In the West Coast state, school districts used a mean of 3.2

witnesses per case and parents/guardians used 1.5 witnesses per case. Although it could not always be determined who the witnesses appeared on behalf of, in the Midwest state, the average number of expert witnesses was 8 per case. Examples of school district witnesses included school administrators, general and special education teachers, therapists (e.g. speech and language, behavioral, occupational) and school psychologists. Examples of parent/guardian witnesses included board certified behavior analysts, psychologists, and physicians. The disparity between both the overall use of witness testimony and the number of witnesses used per case was consistent across all of the states.

Prevailing Parties

The school districts were most often the prevailing parties across all states in the due process hearings (Table 1). Statistical analyses were performed to determine if the use of attorneys and/or expert witnesses were potential factors in parent/guardians prevailing in due process hearings. Chi-squared tests of independence showed significant interaction effects ($p < .001$) for these conditions. When expressed in terms of a simple odds ratio, parents/guardians were 1.2 times more likely to win when they used expert witness testimony and 2.9 times more likely to win when they used an attorney. The impact of witness testimony was also mentioned in the case summaries. The lack of expert testimony was cited in one decision as a reason that the petitioners (the parents) did not prevail in the case, “They presented no expert testimony indicating that ESY (Extended School Year) services were necessary” (Southeast state), “the IHO (Independent Hearing Officer) notes that no expert testimony was presented at the hearing regarding Student’s loss of educational benefit or his present educational needs” (Southwest state).

The Due Process vs. Complaint Investigation Discrepancy

Similar to the due process claims, the complaint investigations included detailed descriptions of the facts of the case and claims of both parties. However, the complaint investigations did not include any witness testimony and it was unclear if lawyers were involved. What was striking was prevailing parties in the complaint investigations were most often the parents and/or guardians (Table 1).

Discussion

Utilizing a social justice framework to evaluate the findings resulted in several problematic realities needing further examination. The first and most concerning of these was the apparent discrepancy between both the frequency of the use of witnesses and the number of witnesses per case between parents/guardians and districts. There appears to be a true difference in power in a system that is designed to afford parents and/or guardians an equal voice in the decisions made about their children's Individualized Education Programs. The second area of concern was the lack of access to the information about due process hearings that would allow for thorough examination of the system as a whole.

Power, Resources, and Privilege

Our findings showed that school districts more often had attorney representation and used witnesses more often than parents/guardians. We also found that in due process data across all states, school districts prevailed more often than parents, which was consistent with Mueller and Carranza's (2011) findings. Our findings were also consistent with those of Blackwell and Blackwell (2015) who found that families who were represented by lawyers had fewer cases dismissed due to improper filings and as a result, more favorable outcomes. We further found that, consistent with Yell et al. (2008), the use of witness testimony, in some states, impacted the

decisions made by the hearing officers, as evidenced by the hearing officers' statements directly discussing how a lack of witness testimony influenced the outcome of the cases.

Districts tend to provide witnesses more often in due process hearings than families and also call more witnesses than families per case. This adds another (non-reimbursable) cost for families. This finding is consistent with Louie's (2020) determination that school districts will overutilize witnesses on their behalf as they have the means to do so, therefore not allowing equal access to representation in the hearings. This can lead to parents and/or guardians feeling powerless. Families bear the burden of locating and paying for expert witnesses. In many areas of the country, there are shortages in the number of board-certified behavior analysts, speech and language therapists, and developmental pediatricians (Carson et al., 2021; Keller et al., 2020; Yingling et al., 2021). These shortages increase the likelihood that school districts would have greater access to, and possibly employ, the few professionals who could act as expert witnesses in hearings in a region. Indeed, most of the witnesses who appeared on behalf of districts were employees (e.g. administrators and teachers).

Although our sample of complaint investigations was small, it is worth noting that there is an increase in the use of conflict resolution strategies (e.g., mediation) nationally (U.S. GAO, 2014). We found that in these instances, without the use of witnesses, the outcomes were more favorable for parents/guardians.

Openness, Collaboration, and Information Sharing

A key component of social justice theory is understanding that disparate groups need access to critical information. Information sharing builds trust and addresses some of the power differential between groups. Since its original passage as PL 94-142, IDEA (2004) has protected the rights of parents and/or guardians of children who receive special education to have a voice

in their children's education at every stage in the process, from consenting to evaluation, developing an Individualized Education Program and, if necessary, contesting decisions made by school districts (Mead & Paige, 2008). However, in order to exercise their rights, parents must be aware of them. As a first step in the process, IDEA (2004) requires that states provide parents/guardians of children who receive special education services a written description of their rights and the procedural safeguards under the law. Yet, a study examining the readability of these documents found that they were difficult to read with only 4%-8% at the required reading level (Fitzgerald & Watkins, 2006), creating an information disparity between parents and/or guardians and school districts. This lack of information may impact the parents/guardians in the event that there is a dispute with the district. Parents and/or guardians need to understand their right to a due process hearing. This lack of accessible information, paired with the financial burden of hiring a lawyer and locating and paying witnesses may preclude most families from being able to advocate for their children as protected by federal law.

Finally, the lack of consistent data reporting creates an information gap for parent advocates and lawmakers. Without clear and consistent data, we cannot know what the national trends are with respect to due process hearings. This information is critical to determine the impact of witness testimony on outcomes.

Limitations

This research is not without its limitations. One limitation was that each state shared the information differently; for example, one of the states redacted the information and it was difficult to decipher the student issues and who were the expert witnesses. Mueller et al. (2011) and Zirkel et al. (2008) also noted this limitation in their analysis of due process hearings across the United States in which authors stated there was a lack of uniformity and reliability within the

hearing data publicly shared. The authors encourage states to develop a uniform practice for reporting due process cases as uniformity would lend itself to oversight. This recommendation is also consistent with recommendations from the US Government Accountability Office (GOA, 2014).

Conclusion

While it is ideal that parents and/or guardians and school districts work together to collaborate on issues that are presented, this solution is not always achievable (Margolis, 1998). One suggestion is that resources are equitable and parents/guardians have access to the same representation, including expert witnesses, that school districts have (Adams & Bell, 2016). Families can seek reimbursement for attorneys' fees, but many still do not have attorney representation. As advocates, we should identify ways to better educate parents and/or guardians about their rights, including whether alternative conflict resolution options would result in more favorable outcomes.

This research extends on the work of Blackwell and Blackwell (2015) which explores special education due process hearings in one state in the Northeast and Blackwell and Gomez (2019). This research highlights the need for a more equitable process for parents/guardians to use expert witnesses during due process hearings. Additional research should explore the characteristics of each due process case including, if available, race, ethnicity, and socio-economic status of the parents/guardians.

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<http://www.casecec.org/>

Table 1*Attorney, Witness Testimony and Case Outcomes*

Region	Attorney or Advocate*			Witness Testimony			Outcomes in Cases with Parent/Guardian Witnesses			Outcomes Overall**		
	District	Parent/Guard.	Un-Clear	District	Parent/Guard.	Un-Clear	District	Parent/Guard.	Split	District	Parent/Guard.	Split
Mid-Atlantic	94%	64%	0%	56%	38%	0%	68%	11%	21%	78%	16%	12%
West-Coast	100%	62%	0	84%	58%	0%	33%	22%	44%	50%	24%	26%
Mid-West	94%	58%	6%	96%	40%	10%	65%	20%	15%	64%	20%	16%
South-West n=16 <i>Due Process</i>	94%	56%	6%	94%	38%	0%	67%	0%	33%	62.5%	12.5%	25%
South-West n=34 <i>Complaint Investigation</i>	Not listed			Not listed			Not Applicable			32%	59%	9%
South-East	94%	48%	16%	74%	30%	4%	47%	27%	27%	60%	18%	22%

*Use of advocates was limited (4 states each had 1/ The SE state had 8)

**Dismissed cases were counted as being decided for the district