

Longitudinal Trends in Impartial Hearings under the IDEA*

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Starting in the 1980s, litigation in the context of K–12 education has remained relatively level, while the segment concerning special education has been rather steadily on the rise.¹ The other distinguishing characteristic of this growth segment is that the driving force, the Individuals with Disabilities Education Act (IDEA),² provides an underlying system of administrative adjudication,³ which is subject to exhaustion.⁴ The centerpiece of this underlying system is the impartial hearing, alternatively called the due process hearing (DPH).⁵

Tracking the frequency of these impartial hearings is important not only as a wider

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¹ See, e.g., Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011). For analyses specific to special education, see Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (finding an upward trend from 1977 to 1997 but, using three-year increments, a slight decline in 1998–2000) (finding a steady, rather dramatic increase on a decade-by-decade basis from the 1970s through 2009–10); 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).

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

³ 20 U.S.C. § 1415(f) (2012); 34 C.F.R. § 300.511 (2012).

⁴ E.g., Lewis 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).

⁵ The IDEA also provides states with the option of a second administrative tier, or review officer level. 20 U.S.C. § 1415(g) (2012); 34 C.F.R. § 300.514(b) (2012). However, the number of states with two-tier systems dropped from twenty-four in 1991 to ten in 2011. 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). Although the overall trend has been in the direction of one tier, some jurisdictions have fluctuated in both directions. See, e.g., Eileen Ahearn, *Due Process Hearings: 2001 Update*, NASDSE Project Forum (April 2002), http://www.nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/131_ffb7747b-2f2e-4887-97a7-137cc145dd1b.pdf

indication of litigation activity under the IDEA but also as a likely predictor of the judicial level.⁶ For the longitudinal trend, the leading source was Zirkel and Gischlar’s analysis of adjudicated hearings under the IDEA from 1991 to 2005.⁷ Based on data reported by state education agencies and excluding the District of Columbia,⁸ they found a steady increase in the volume of decisions during the period 1991 to 1996, followed by a “relatively high, albeit uneven, plateau”⁹ from 1997 to 2005. They determined that the top five states in overall frequency during that time period, accounting for more than 80% of the total, were as follows: 1. New York (43%); 2. New Jersey (13%); 3. Pennsylvania (7%); 4. California (5%); and 5. Maryland (4%).¹⁰

The purpose of this short article is to extend the previous analysis—based on the availability of governmental data—to 1) the next six years, i.e., from 2006–07 through 2011–12, and 2) the other jurisdictions that the IDEA covers, such as the District of Columbia. The specific source of the data is the U.S. Department of Education’s Office of Special Education

⁶ Although the rate of appeal may vary, in general the pyramid-like structure of the adjudicative levels under the IDEA would suggest a significant, even less than complete correlation, between the number of adjudicated impartial hearings and the number of court decisions.

⁷ Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 21, 28 (2008). An earlier analysis was limited to the sampling of hearing officer decisions published in the Individuals with Disabilities Law Report (IDELR) database from 1977 to 2000, revealing a generally but not uniformly upward trend. Zirkel & D’Angelo, *supra* note 1, at 738–40. The relationship between IDELR-published hearing officer decisions and the population of hearing officer decisions appears to be moderate at best. Anastasia D’Angelo, J. Gary Lutz, J. & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions representative?* 14 J. DISABILITY POL’Y STUD. 241 (2004).

⁸ They relied on the published data from the National Association of State Directors of Special Education for the earlier period, adding their own survey for the years 2001–05. However, D.C. was the only jurisdiction that failed to respond to the survey. *Id.* at 24.

⁹ *Id.* at 25. 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.* at 26.

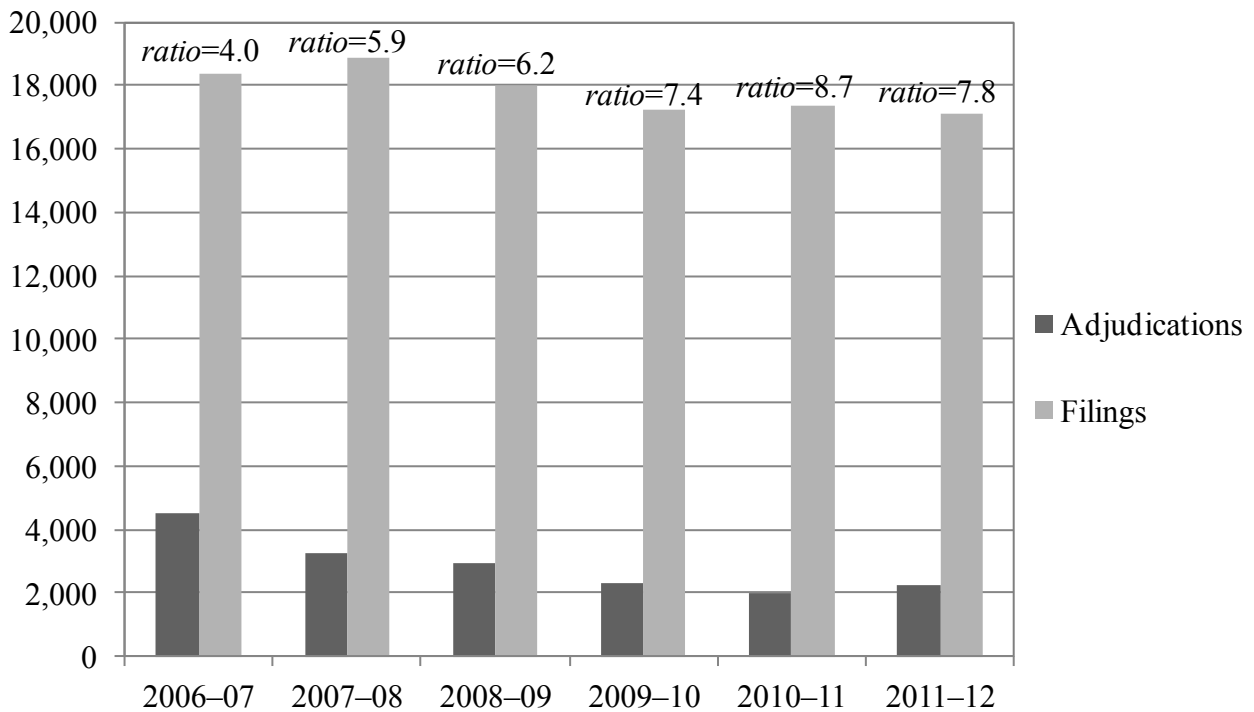
¹⁰ *Id.* at 27. The next four, with the rest of the states each accounting for 1% or less, were: 6. Illinois (3.3%); 7. Connecticut (3.2%); 8. Texas (2.4%); and 9. Massachusetts (2%). *Id.* Zirkel-Gischlar also separately calculated rankings based on a per capita basis in relation to special education enrollments, with those above a ratio of 100 per 10,000 students being: 1. New York, 2; New Jersey; 3. Hawaii; 4. Connecticut; 5. Rhode Island; 6. Maryland; 7. Pennsylvania; and 8. New Hampshire. *Id.*

(OSEP) compilation of the annual reports from each IDEA jurisdiction.¹¹

RESULTS

Figure 1 shows the six-year trend for the total number of due process hearing (DPH) complaints filed and the number of hearings complaints adjudicated, i.e., resulting in a written decision, respectively. The ratio above each pair of bars is the ratio between filings and adjudications for the year.

Figure 1. Longitudinal Trend of DPH Filings and Adjudications



Examination of Figure 1 reveals that for the second half of the six-year period both the filings and adjudications stabilized at a moderately lower level, while the ratio of filings to adjudications moved to a moderately higher level. Thus, the decline was much less pronounced

¹¹ Technical Assistance and Dissemination Network, Historical State-Level IDEA Data Files - Dispute Resolution, <http://tadnet.public.tadnet.org/pages/712> (for the school years 2006-07 through 2010-11); 2011-2012 Part B IDEA Dispute Resolution, <https://explore.data.gov/Education/2011-2012-IDEA-Part-B-Dispute-Resolution/deib-aj7g> (for the school year 2011-12).

However, as documented in the Appendix, a closer examination included not only adjudications, which are the end of the first-tier process, but also filings, which mark the initiation of this impartial hearing process. Addressing both filings and adjudications, along with the ratio between filings and adjudications, Table 1 identifies the top six jurisdictions,¹² which accounted for 80% of the filings¹³ and 90% of the adjudicated DPHs for the six-year period.¹⁴ The figures for the two “Total” columns are annualized averages for the sake of relative accuracy and user-friendliness.¹⁵

¹² “Jurisdictions” in this context refers to the 51 states plus the other separate geographic entities identified in the OSEP data compilations, *supra* note 11.

¹³ The next group, which brought the cumulative proportion to 90% of the total for the period, was as follows: 7. Massachusetts (n=582); 8. Illinois (n=340); 9. Texas (n=318); 10. Maryland (n=278); 11. Connecticut (n=211). The rest of the states, starting with Florida (n=167) each had less than 1,000 filings for the six-year period.

¹⁴ The next cluster for the period was as follows: 7. Hawaii (n=29); 8. Texas (n=27); 9(tie). Illinois (n=21); 9(tie). Maryland (n=21); and 9(tie). Massachusetts (n=21). The rest of the states, starting with Connecticut (n=14) each had less than 100 adjudicated DPHs for the six-year period.

¹⁵ The primary reason is that policymakers and practitioners are accustomed to collecting and viewing such data on an annual basis.

Table 1. The Top Jurisdictions in Terms of Adjudicated DPHs

	Adjudications		Filings		Filings/ Adjudications
	Rank	Av'g. Total	Rank	Av'g. Total	Ratio ¹⁶
Puerto Rico	1	1,009	4	1,860	1.84
District of Columbia	2	817	3	2,007	2.46
New York	3	569	1	6,078	10.69
California	4	93	2	2,694	28.92
Pennsylvania	5	67	6	776	11.60
New Jersey	6	55	5	854	15.57

Table 1 shows that the same six jurisdictions lead the rest of the nation in both DPH filings and adjudications, but the ratio of filings to adjudications varies so much¹⁷ that the rank order within this group is different for each of these measures. Puerto Rico and the District of Columbia are the leaders for adjudications, but New York and California are the leaders for filings.

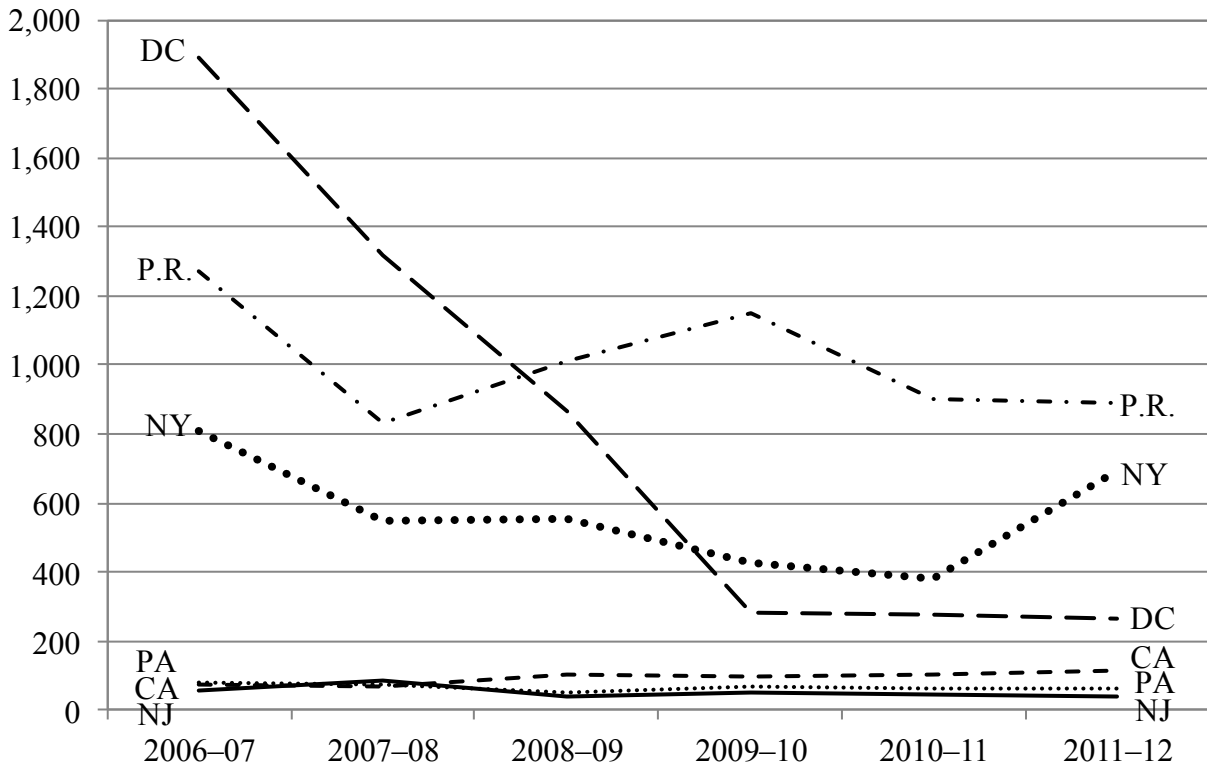
Finally, Figure 2 presents the longitudinal trend in the number of adjudicated DPHs for the top six states, as identified in Table 1 for adjudications, but here presented as six-year totals

¹⁶ A limitation in these ratios is that the filings and adjudications are not necessarily directly connected as the same cases. Although the IDEA regulations provide a 75-day deadline, subject to hearing officer extensions (34 C.F.R. § 300.515), a case may extend from one year to another, especially if the filing is later in the year.

¹⁷ The ratios for the second cluster of states (*supra* note 14) were as follows: Hawaii - 4.40; Texas - 11.78; Illinois - 16.32; Maryland - 13.44; and Massachusetts - 28.15. The overall filings-to-adjudications ratio for all of the jurisdictions together was 6.20.

rather than their annual averages.

Figure 3. Longitudinal Trend of Adjudicated DPHs for Top Six Jurisdictions



Review of Figure 3 reveals three subgroupings among the top six jurisdictions. First, standing relatively along, the District of Columbia experienced a precipitous drop in the first half of the period, followed during the second half with stability at the much lower level. Second, Puerto Rico and New York fluctuated in a net downward direction to levels that ended with respectively more limited reductions. In contrast, the third subgroup—California, New Jersey, and Pennsylvania—remained relatively steady at lower levels for the entire period.¹⁸

¹⁸ However, although relatively modest in relation to the scale of Figure 2, the changes in these three states were not negligible during the six-year period:

	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
California	74	67	104	95	105	114
New Jersey	55	88	42	54	48	52
Pennsylvania	81	75	54	66	61	64

DISCUSSION

The primary overall finding of this analysis was—as the next step after the dramatic rise and then leveling off during 1991–2005¹⁹ the clearly downward longitudinal trend for adjudicated DPHs during this most recent available six-year period, ending at a seemingly relatively stable level less than half that of the start of the period. On first impression, especially when also considering the generally increased ratio between filings and adjudications in Figure 1, the reduction would seem to be attributable to the nationally systemic emphases 1) initiated in the 2004 amendments and 2006 regulations of the IDEA, including extending the option of mediation to the period before filing for a DPH²⁰ and—more notably—adding the innovation of a resolution session as a prerequisite to the DPH²¹; and 2) supplemented by the continuing alternative dispute resolution (ADR) activities of the OSEP-funded National Center on Dispute Resolution in Special Education,²² such as IEP facilitation.²³

However, this conclusion would not appear to be the explanation, at least in terms of primary attribution, for two reasons. First, the number of filings has declined to a much less considerable extent. Accounting for the difference in trend lines is the higher ratio for filings to cases for the second half of the period, showing that a smaller proportion of the case are ending short of adjudication, including via alternate forms of dispute resolution.²⁴

¹⁹ See *supra* notes 7–9 and accompanying text.

²⁰ 20 U.S.C. § 1415(e)(1) (2012); 34 C.F.R. § 300.506(a) (2012).

²¹ 20 U.S.C. § 1415(f)(1)(B) (2012); 34 C.F.R. § 300.510 (2012). Other changes that may have had a dampening effect were the addition of more specific prehearing notice-pleading, including sufficiency provision, for DPHs (20 U.S.C. § 1415(c)(2); 34 C.F.R. § 300.508) and a two-year statute of limitations (20 U.S.C. § 1415(a)(6)(B); 34 C.F.R. § 300.511(e)).

²² <http://www.directionservice.org/cadre/index.cfm>

²³ Facilitated IEP Meetings: An Emerging Practice, <http://www.directionservice.org/cadre/pdf/Facilitated%20IEP%20for%20CADRE%20English.pdf>

²⁴ Alternatively, the filings that do not result in adjudications may be attributable to withdrawals, dismissals that are not counted as adjudications, or settlements independent of alternative dispute

Second, upon examining Figure 3's corresponding trend during the same period for the leading jurisdictions, which account for 90% of the adjudications²⁵ and 80% of the filings,²⁶ the reduction appears to be largely attributable to relatively few jurisdictions, particularly the District of Columbia. More specifically, the District of Columbia (71%)²⁷ and Puerto Rico (17%)²⁸ together accounted for almost 90% of the overall reduction of 2,273 adjudications.²⁹ Thus, it may be that other factors, such as organizational changes in the District of Columbia,³⁰ may additionally or alternatively account for the overall decline. The relatively steady level in the third tier of the leading states—California, New Jersey, and Pennsylvania³¹—would seem to suggest that the aforementioned³² systemic changes in the IDEA did not have a major dramatic national effect. Nevertheless, although accounting for much smaller segments of the overall DPH trend, other states experienced notable reductions based on the systemic and/or state-specific factors.³³

The second major finding was the continuation of the previous picture revealing two

resolution mechanisms. The respective proportions for each of these dispositions warrants follow-up research.

²⁵ See *supra* text accompanying note 14.

²⁶ See *supra* note 12.

²⁷ The number of adjudications in the District of Columbia dropped 1,625 from 1,893 in 2006–07 to 268 in 2011–12.

²⁸ The number of adjudications in the Puerto Rico dropped 384 from 1,271 in 2006–07 to 887 in 2011–12. New York accounted for an additional 5% of the overall reduction, declining 117 adjudications from 810 in 2006–07 to 693 in 2011–12.

²⁹ The total number of adjudications declined from 4,534 in 2006–07 to in 2,261 in 2011–12.

³⁰ For example, possible contributing factors, in addition to increased use of resolution sessions, were improvements in the District of Columbia's 1) DPH system, such as the selection, evaluation, and training of its hearing officers; 2) state education agency, such as its mediation and complaint resolution processes, and 3) predominant local education agency, such as DPH decision implementation. E-mail from D.C. former chief hearing officers Deusdedi Merced, Feb. 4, 2014, 10:20 EST (on file with author) and Lynwood Beekman, Feb. 3, 2014, 21:55 EST (on file with the author). The jurisdictionally specific policies and practices concerning attorneys' fees may also have played a contributing role. *Id.*

³¹ See *supra* note 18 and accompanying text.

³² See *supra* note 20–21.

³³ For the next cluster of states (*supra* note 14), the starting and ending levels during this six-year period were as follows: Hawaii - 28 → 19; Texas - 45 → 13; Illinois - 29 → 14; Maryland - 22 → 14; and Massachusetts - 26 → 18.

worlds of DPHs—a relatively small number of jurisdictions accounting for most of them³⁴ and the remaining jurisdictions each having a relatively negligible level of DPHs. The differences in the leading group from the findings for the previous longer period of 1991 to 2005³⁵ were 1) the addition—in positions #1 and #2—of Puerto Rico and the District of Columbia, and 2) the lowered position of California.³⁶ The high position of the District of Columbia is not surprising in light of its high level of court decisions under the IDEA.³⁷ However, the DPH data for Puerto Rico are unexpected in light of its correspondingly negligible level of IDEA court decisions,³⁸ but the Puerto Rico Department of Education’s representative has confirmed that these DPH figures are accurate.³⁹ Although OSEP’s data collection procedures have mitigated the previous problem of lack of uniformity in terminology and time periods,⁴⁰ the open question for Puerto Rico serves a reminder that the quality of the data ultimately depend on the reporting personnel, who vary in their stability, expertise, and motivation.

A third major finding is the wide variance among the filings-to-adjudications ratios. For example, among the eleven leading jurisdictions, the ratios varied from Puerto Rico (1.84) and

³⁴ The concentration is more acute for the adjudications, but it is still pronounced for the filings. Compare *supra* text accompanying note 15, with note 12.

³⁵ See *supra* text accompanying note 10.

³⁶ See *supra* Table 1.

³⁷ E.g., Perry A. Zirkel, *Case Law under the IDEA*, in *IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS* 669 (2012) (revealing more than 60 published decisions from the District of Columbia during the six years of data).

³⁸ *Id.* (revealing only one published court decision from Puerto Rico during the six years of these data). Other reasons for skepticism include comparing Puerto Rico with the District of Columbia in terms of 1) the availability of legal counsel specialized in the IDEA, and 2) the propensity of litigiousness.

³⁹ E-mail from Daiber N. Carrión Muñoz, Feb. 21, 2014, 16:21 EST (on file with author). As one contributing factor, she identified the Rosa Lydia Velez class action suit as increasing “parent interest and willingness to file due process requests and . . . contribut[ing] to developing a body of attorneys and advocates who assist parents with such filings.” *Id.* For information about this class action settlement agreement and related system-wide issues, see Pleito de Clase, <http://pleitodeclase.com/>; OSEP letter to Puerto Rico Department of Education (2005), www2.ed.gov/fund/data/report/idea/partbapr/baprltr05-pr.pdf; Puerto Rico Civil Rights Commission, Access to Education of Minors with Learning Conditions (2008), <http://observatorioeducacionespecial.org/wp-content/uploads/2013/08/Vigencia-de-los-Hallazgos-en-ingles-2008.pdf> www2.ed.gov/fund/data/report/idea/partbapr/baprltr05-pr.pdf

⁴⁰ Zirkel & Gischlar, *supra* note 7, at 23, 25.

District of Columbia (2.46) to Massachusetts (28.52) and California (28.92).⁴¹ This wide disparity suggests differences in not only the prevailing party practices but also ADR effectiveness among the jurisdictions.⁴² Moreover, on an overall basis, the ratio of filings to adjudications was more than six to one,⁴³ which is more than double the ratio for the 1990s.⁴⁴ Consequently, in light of not only the wide variance but also the overall average, more in-depth analyses of the OSEP data, including the number of pending DPHs, withdrawals, dismissals, resolution sessions, and mediations,⁴⁵ are warranted.

Thus, this brief analysis is a continuation of, and springboard for, further research concerning DPH trends of interest to both policymakers and practitioners. In addition to further mining of the OSEP data regarding frequency trends,⁴⁶ other empirical research should extend to outcomes of DPHs⁴⁷ and the perceptions of the parties.⁴⁸

⁴¹ See *supra* note 13 and Table 1.

⁴² For example, the high ratio in Massachusetts may reflect its reportedly effective mediation practices (<http://archives.lib.state.ma.us/bitstream/handle/2452/113469/ocn752506007.pdf?sequence=1>) and its ADR innovations of advisory opinions (<http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/advisory-opinion-process.html>) and, to a lesser extent due to its relative recency, SpedEx (<http://spedexresolution.com/>)

⁴³ See *supra* note 17 (reporting overall ratio of 6.20).

⁴⁴ Specifically, for the period 1991–2000, the overall ratio between filings and adjudications was 2.83. Ahearn, *supra* note 5 (reporting filings that totaled 73,433 and adjudications that totaled 25,916).

⁴⁵ See *supra* note 11. For an initial analysis of the various interrelated variables during the eight-year period ending with 2011–12, see CADRE’s State and National Dispute Resolution Data Summaries: Part B (Feb. 2014), <http://www.directionservice.org/cadre/aprsppb.cfm>. CADRE’s summary reported, for example, that during this eight-year period, filings have decreased by 15%, adjudicated hearings have decreased by 58%, and mediations have increased approximately 4%. Trends in Dispute Resolution under the Individuals with Disabilities Education Act (Dec. 2013), http://www.directionservice.org/cadre/pdf/Trends_DR_IDEA_DEC2013.pdf. In a February 2014 CADRE webinar concerning these analyses, presenters Dick Zeller and Amy Whitehorn observed that little is known about the specific within the relatively large numbers for “pending hearings” and the “complaints resolved without a hearing.” Dispute Resolution National Trends: 8 Years of APR/Section 618 Data, <http://www.directionservice.org/cadre/DRtrendswebinar.cfm>

⁴⁶ For a corresponding springboard study of Office for Civil Rights data concerning students designated with 504 plans (and those with IEPs), see Perry A. Zirkel & John M. Weathers, Section 504-Only Students: Updated Data (2014) (manuscript under review).

⁴⁷ For a relatively limited example, see Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL’Y STUD. 46 (2003) (tabulating the outcomes of the 50 adjudicated DPHs from 1989 to 2001 in Iowa).

Appendix: Annual Filings and Adjudications for 2006–11, with Their Ratios for 53 Jurisdictions

<u>State</u>	<u>Adjudications Average</u>		<u>Filings Rate</u>		<u>Ratio of Filings to Adjudications</u>
	<u>Rank</u>	<u>Total</u>	<u>Rank</u>	<u>Total</u>	
Alabama	24	4	16	107	29.14
Alaska	22	4	43	15	3.63
Arizona	21	4	24	58	13.31
Arkansas	37	2	40	19	8.69
California	4	93	2	2694	28.92
Colorado	34	2	38	22	9.29
Connecticut	12	14	11	211	14.92
Delaware	36	2	41	16	7.38
District of Columbia	2	817	3	2007	2.46
Florida	17	7	12	167	22.70
Georgia	25	4	17	101	27.55
Hawaii	7	29	14	127	4.40
Idaho	40	2	46	10	5.90
Illinois	9	21	8	340	16.32
Indiana	16	7	20	73	9.95
Iowa	48	1	47	10	14.25
Kansas	43	1	39	21	15.63
Kentucky	47	1	37	22	26.20
Louisiana	29	3	34	24	7.83
Maine	23	4	27	36	9.91
Maryland	10	21	10	278	13.44
Massachusetts	11	21	7	582	28.37
Michigan	20	5	18	74	14.87
Minnesota	38	2	30	30	13.69
Mississippi	28	3	35	23	7.32
Missouri	35	2	19	74	31.57
Montana	52	0	49	5	NA*
Nebraska	51	0	50	3	NA*
Nevada	42	1	23	59	44.38
New Hampshire	13	13	22	59	4.51
New Jersey	6	55	5	854	15.57
New Mexico	26	4	29	32	9.05
New York	3	569	1	6078	10.69
North Carolina	27	3	25	58	17.30
North Dakota	53	0	53	0	NA*
Ohio	18	7	13	157	23.00
Oklahoma	46	1	33	26	25.50
Oregon	44	1	32	27	23.43
Pennsylvania	5	67	6	776	11.60

⁴⁸ For an early example, see 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 DPHs from 1980 to 1984).

Puerto Rico	1	1009	4	1860	1.84
Rhode Island	19	6	28	32	5.68
South Carolina	31	3	44	14	5.31
South Dakota	50	1	52	3	5.00
Tennessee	41	2	26	57	34.00
Texas	8	27	9	318	11.78
Utah	49	1	48	6	11.67
Vermont	39	2	36	22	13.10
Virgin Islands	32	2	45	11	4.64
Virginia	14	10	21	71	6.87
Washington	15	10	15	112	11.60
West Virginia	33	2	42	16	6.71
Wisconsin	30	3	31	30	10.41
Wyoming	45	1	51	3	2.83

* Due to zero adjudications, the ratio was not applicable (NA) for each of these three states.