

# OUTCOMES TRENDS IN STATE COMPLAINT PROCEDURES DECISIONS UNDER THE IDEA\*

Perry A. Zirkel, Alyssa I. Fairbanks, & Natalie E. Jones\*\*

## Introduction

The Individuals with Disabilities Education Act<sup>1</sup> (IDEA) provides two alternative administrative, decisional dispute resolution mechanisms. The first, the due process hearings (DPH)<sup>2</sup> system, has received much of the attention and published analysis to date, in part, because DPH are a preceding step to filing a case in court.<sup>3</sup> Unlike DPH, the second decisional dispute resolution mechanism, the state complaint procedures (SCP) system,<sup>4</sup> which is an

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\*\* Perry A. Zirkel is university professor emeritus of education law at Lehigh University; Alyssa Fairbanks, Esq., is the special education dispute resolution team leader at the Office of Superintendent of Public Instruction in Washington; and Natalie E. Jones, Esq., is an education consultant and complaint investigator in the Bureau of Special Education at the Connecticut State Department of Education.

<sup>1</sup> 20 U.S.C. §§ 1400 *et seq.* (2018).

<sup>2</sup> The full version is “impartial due process hearing.” 20 U.S.C. § 1415(f) (2018). However, the legislation alternatively uses the more concise “due process hearing.” *E.g., id.* § 1415(b)(7)(B), 1415(c)(2)(E), 1415(e)(2)(A), 1415(f)(1)(B)(ii), 1415(f)(3)(B), 1415(f)(7)(B).

<sup>3</sup> For claims expressly filed under the IDEA that are subject to exhaustion of administrative proceedings, i.e., DPH, prior to the availability of judicial review. *See, 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, 361 (2009). As a separate matter beyond the scope of the instant empirical analysis, the IDEA requires exhaustion of claims on behalf of IDEA-eligible students under alternate legal bases, such as Section 504 of the Rehabilitation Act or the Fourteenth Amendment of the Constitution if their gravamen is the IDEA's core obligation of providing a free appropriate public education (FAPE). *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 340 Educ. L. Rep. 19 (2017).

<sup>4</sup> Only incidentally mentioned in the IDEA legislation (e.g., 20 U.S.C. §1412(a)(14)(E)), SCP is primarily addressed in the IDEA regulations. 34 C.F.R. §§ 300.151–300.153 (2019). Neither the IDEA legislation nor its regulations provide a specific label for this process, but the regulations use this generic label as the heading of the relevant sections. *Id.*

investigative rather than adjudicative avenue,<sup>5</sup> has garnered far less attention than that devoted to DPH. To help fill the gap, this analysis of SCP outcomes trends is a sequel to a recent article analyzing the frequency trends of SCP.<sup>6</sup>

## Previous Research

### DPH

The relatively extensive empirical research on DPH have focused on two variables, frequency and outcomes.<sup>7</sup> For frequency, a pair of analyses of the DPH frequency trends among the fifty states and two additional jurisdictions serve as the leading example.<sup>8</sup> They each examined the frequency of DPH filings for a recent multi-year period on both an overall and per jurisdiction basis. The source data were the compilations by the Center for Appropriate Dispute Resolution in Special Education (CADRE) of the annual reports that the U.S. Department of Education requires from each jurisdiction.<sup>9</sup> The first of these two articles analyzed the absolute numbers, whereas the second analyzed these numbers upon adjustment to a per capita basis in

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<sup>5</sup> For a comprehensive canvassing of the similarities and differences between these two mechanisms, see Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings: An Update*, 369 EDUC. L. REP. 550 (2019).

<sup>6</sup> Alyssa I. Fairbanks, Natalie E. Jones, & Perry A. Zirkel, *Frequency Trends in the State Complaints Procedures of the IDEA*, 394 EDUC. L. REP. 440 (2021).

<sup>7</sup> Most of the outcome analyses, *infra* note 10, also included frequencies, with some extending to a primary or secondary focus on other variables.

<sup>8</sup> Gina L. Gullo & Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Comparative Enrollments-Based Analysis*, 382 EDUC. L. REP. 454 (2020); Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 EDUC. L. REP. 870 (2020). The two additional jurisdictions were (1) the District of Columbia due to its integral relationship to and prominent activity under the IDEA and (2) Puerto Rico due to its unusually high DPH activity.

<sup>9</sup> CADRE, State (Part B) Dispute Resolution Summaries, <https://www.cadeworks.org/resources/cadre-materials/state-part-b-dispute-resolution-data-summaries>. In turn, the CADRE data are based on the state education agency annual reports under the IDEA to the U.S. Department of Education's Office of Special Education Programs. *Id* at 1. Thus, we rely on the federal departmental instructions to state education agencies in our definitions of relevant terms, such as "findings." *Infra* note 28 and accompanying text.

relation to the special education population of each jurisdiction. Their various findings included that relatively few states accounted for most of the DPH filings and decisions and that their frequency rankings changed moderately upon adjustment to a per capita basis.

For DPH outcomes, CADRE does not provide corresponding data because the annual reports do not extend to any categorization of the decisions beyond their frequency. However, a patchwork of analyses, which were each limited to various not-recent periods in one or two states and which used widely varying outcome categories and units of analysis, tend to gravitate toward a 2:1 ratio in favor of school districts.<sup>10</sup> The few national outcome studies reinforced this overall

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<sup>10</sup> See, e.g., Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997–2002* (Dec. 2002), <http://www.dueprocessillinois.org/Access.pdf> (finding the following outcomes distribution for Illinois DPHs during 1997–2002: 68% in favor of districts, with the remainder being those in which the parents “substantially prevailed on at least one of the major issues in the case”); William H. Blackwell & Vivian V. Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts*, SAGE OPEN 1 (Jan.–Mar. 2015), <http://sgo.sagepub.com/content/10/1177/2158244015577669> (finding the following outcomes distribution for Massachusetts DPHs during 2006–2013: 63% for districts, 10% mixed, 27% for parents); Ruth Colker, *California Hearing Officer Decisions*, 32 J. NAT’L ASS’N ADMIN. LAW JUDICIARY 461 (2012) (finding the following outcomes distribution for California DPHs during 2010–11: 65% for districts, with the rest being those in which “the parent prevailed on any ground”); 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) (finding the following outcomes distribution for Minnesota and Wisconsin DPHs during 2000–11: school districts prevailed “on all or most of the issues contested at the hearing” - 90%, with remainder being for parents); Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina’s First Tier*, 118 W. VA. L. REV. 736 (2016) (finding the following outcomes distribution for North Carolina DPHs during 2000–12: completely for districts - 58%; partially for each side - 28%, and completely for parents - 14%); 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 (1998) (finding the following outcomes distribution for Pennsylvania DPHs during 1973–89: complete school district wins - 64%, “conditional” school district wins - 14%, “conditional” parent wins - 6%, and complete parent wins - 16%); Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL’Y STUD. 46 (2003) (finding the following outcomes distribution for Iowa DPHs during 1989–2001: 63% for districts, 3% mixed, and 34% for parents); G. Thomas Schanding et al., *Analysis of Special Education Due Process Hearings in Texas*, SAGE OPEN 1 (Apr.–June 2017), <http://sgo.sagepub.com/content/doi.org/10.1177/2158244017715> (finding the following outcomes distribution for Texas DPHs during 2011–15: 79% completely for districts, 3% split, and 18% completely for parents); 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 (2000) (finding the following outcomes distribution for a midwestern state’s DPHs during 1992–96: favorable “rulings” for districts - 55% and “favorable . . . rulings” for parents - 45%); Michael B. Shuran & M.D. Roblyer, *Legal Challenge: Characteristics of Special Education Litigation in Tennessee Schools*, 96 NASSP BULL. 44 (2012) (finding the following outcomes distribution for Tennessee DPHs during 1997–2007: district “prevailed” - 66%, parent “prevailed” - 33%); Perry A. Zirkel, Zorka Karanxha, & Anastasia D’Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. LAW JUDICIARY 27 (2007) (finding the following outcomes distribution for Iowa DPHs during 1978–2005: 60% for districts, 8% mixed, and 32% for parents).

conclusion along with its tempering qualification of methodological limitations, including varying units and categories of analysis.<sup>11</sup> In the leading example, Zirkel and Skidmore defined and analyzed the issue category rulings (ICRs) for a national sample limited to IDELR-published<sup>12</sup> DPH decisions for the period 1978–2012.<sup>13</sup> For the outcomes, they specified a customized five-category scale ranging from completely in favor of the district to completely in favor of the parent.<sup>14</sup> For the chronological trend, they found an initially fluctuating pattern that increasingly favored districts during the most recent five-year intervals.<sup>15</sup> On an overall basis, the outcomes distribution for the ICRs was moderately skewed in favor of districts, but the ultimate distribution for decisions depended on the procedure for conflation to this traditional unit of analysis.<sup>16</sup>

## SCP

In contrast, the IDEA’s SCP mechanism has received limited scholarly attention. The

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<sup>11</sup> Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL’Y STUD. 131 (2011) (finding the following outcomes distribution for DPHs in 41 states during 2005–06: districts “prevailed” - 59%, both parties “prevailed” - 10%, and parents “prevailed” - 30%); Perry A. Zirkel & Anastasia D’Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (finding the following outcomes distribution for DPHs in IDELR database during 1989–2000: 53% for districts, 22% mixed, and 25% for parents).

<sup>12</sup> “IDELR” refers to the Individuals with Disabilities Education Law Reports, which is a commercially available specialized database that includes a limited national sample of DPH and SCP decisions.

<sup>13</sup> Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014). ICR is a unit of analysis that is more precise than the case or decision. It consists of defined categories of adjudicated issues, such as child find, eligibility, FAPE procedural, FAPE substantive, discipline, and adjudicative within a sequentially identified typology. *Id.* at 549, 570–75.

<sup>14</sup> *Id.* at 544–45. The intermediate outcome categories were: largely for district, inconclusive or split, and largely for parents. *Id.*

<sup>15</sup> *Id.* at 554–55.

<sup>16</sup> *Id.* at 555–56. The specific outcomes distribution for ICRs was as follows: completely for districts—40%, largely for districts—6%, inconclusive or split—8%, largely for parents—8%, and completely for parents—34%. For example, conflating ICRs to decisions for a win-loss categorization using a customized application of the attorneys’ fees standard for “prevailing” party status (*id.* at 547–50), the results were 52% for districts and 48% for parents (*id.* at 555–56).

first analyses provide very limited data for SCP frequency<sup>17</sup> or outcomes.<sup>18</sup> A subsequent outcomes analysis based on a random sample of fifty SCP decisions for five of the states with the highest frequency of SCP during 2010–16 revealed that the outcomes distribution for ICRs was 50% for each party and, upon conflation on a best-for-parents basis within the case, 34% for districts and 66% for parents.<sup>19</sup> A follow-up analysis revealed a marked variance in the outcomes distribution of the ICRs and, on this conflation basis, the decisions among the five states.<sup>20</sup> Next, in a 2017 survey of state education agencies, the respondents reported that for the previous year 62% of the decisions found noncompliance, with the remaining 38% with no such findings.<sup>21</sup> A more recent frequency and outcome analysis was even more limited in its scope, only examining SCPs in relation to school district income and minority characteristics in five states for the 2017–

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<sup>17</sup> Nicole Suchey & Dixie Snow Huefner, *The State Complaint Procedure under the Individuals with Disabilities Education Act*, 64 EXCEPTIONAL CHILD. 529, 535 (1998) (reporting frequency of filings for each of forty-five states for 1993 and 1994).

<sup>18</sup> Ruth Colker, *Special Education Complaint Resolution: Ohio*, 29 OHIO ST. J. ON DISP. RESOL. 371, 377 (2014) (finding for eighty-one SCP decisions in Ohio in 2012–13 the following outcomes distribution: parent prevailed on every issue - 22%; parent prevailed on some issues and district prevailed on others - 42%; and district prevailed on every issue - 18%); Stacy E. White, *Special Education Complaints Filed by Parents of Students with Autism Spectrum Disorder in the Midwestern United States*, 29 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 80 (2013) (finding, inter alia, for seventy-nine SCP decisions in 2004–09 concerning students with autism in an unidentified midwestern state that that 46% were in favor of the district).

<sup>19</sup> Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act*, 16 CONN. PUB. INT. L.J. 169, 179–80 (2017). The overall average of ICRs per case was 2.04. *Id.* at 178. The best-for-parents basis counts the decision in favor of the parents if any of the ICRs was found to be a violation. *Id.* at 180. The overall purpose of this analysis was to compare the outcomes distributions of SCP and DPH, finding, for example, that the success rate, or percentage of ICRs and decisions in favor of parents, was significantly higher in the SCP than the DPH forum. *Id.* at 179–80.

<sup>20</sup> Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA: Has the Road Less Travelled By Made All the Difference?* 30 J. SPECIAL EDUC. LEADERSHIP 88, 91 (2017) (finding that the parents' success rate per state ranged from 32% for ICRs and, on the same conflation basis, 36% for decisions to 64% and 92%, respectively). This follow-up analysis found that the success rates among these five states also varied markedly for DPH ICRs and decisions. *Id.*

<sup>21</sup> Kirsten Hansen & Perry A. Zirkel, *Complaint Procedure Systems under the IDEA: A State-by-State Survey*, 31 J. SPEC. EDUC. LEADERSHIP 108, 111–12 (2018).

18 school year.<sup>22</sup>

Finally, modeled after the foregoing DPH analysis of the national CADRE-compiled data,<sup>23</sup> we conducted a longitudinal and jurisdictional analysis of the frequency of SCP filings and decisions for the eleven-year period from 2008–09 to 2018–19.<sup>24</sup> The findings included (1) a fluctuating longitudinal frequency for both filings and decisions, with a gradually upward trend line; and (2) a marked concentration, although less than that for DPH, among the “top” group of the fifty-one jurisdictions.<sup>25</sup>

### Method

The purpose of this article is to provide the SCP outcome trends that accompany those identified for the predecessor frequency analysis for the fifty states and the District of Columbia.<sup>26</sup> The only difference in the target population of SCP cases is updating it to add the CADRE data for 2019–20, which became available in the interim.

The major advantage, as compared to the available national data that CADRE reports for DPH,<sup>27</sup> is the U.S. Department of Education includes an outcomes indicator for SCP in its annual collection from state education agencies. More specifically, the Department’s instructions require

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<sup>22</sup> U.S. GOV’T ACCOUNTABILITY OFF., SPECIAL EDUCATION: DISPUTE RESOLUTION ACTIVITY IN SELECTED STATES VARIED BASED ON DISTRICT CHARACTERISTICS 15–17, 19 (2019), <https://www.gao.gov/products/GAO-20-22> (finding that the frequency of SCPs, when adjusted for the number of special education students, was slightly higher in very low-income than very high-income school districts and twice as high for very high-minority than for very low-minority districts and that the proportion of SCPs with findings of noncompliance were also higher for both very low-income and very high-minority districts).

<sup>23</sup> *Supra* notes 8–9 and accompanying text.

<sup>24</sup> Fairbanks et al., *supra* note 6. Per the model of the preceding DPH frequency analysis, the fifty-one jurisdictions consisted of the fifty states and the District of Columbia. *Id.* at 445.

<sup>25</sup> *Id.* at 447.

<sup>26</sup> *Supra* notes 24–25 and accompanying text.

<sup>27</sup> *Supra* note 9.

not only the number of SCP decisions, which are the complaints that result in a “report,” but also those “with findings of noncompliance,” which are decisions that determine that the district has committed one or more violations of the IDEA.<sup>28</sup> Dividing the number of decisions with findings by the number of decisions yields a percentage, abbreviated herein as the “success rate.”

The specific questions for this analysis are:

1. For the twelve-year period starting in 2008–09, what was the longitudinal trend for the overall annual success rate (i.e., percentage of decisions with findings)?
2. For this same twelve-year period, what is the success rate of the fifty-one jurisdictions ranked from highest to lowest?

## Results

### Question 1

Figure 1 shows the twelve-year trend for the success rate for the nation (i.e., the fifty states and the District of Columbia as a whole).

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<sup>28</sup> U.S. Department of Education, *EDFacts* Submission System (ESS), *EMAPS* User Guide: IDEA Part B Dispute Resolution Survey, Release 11 (September 2021), <https://www2.ed.gov/about/inits/ed/edfacts/emaps-idea-part-b-dispute-resolution-user-guide.pdf>. The corresponding terms and definitions for what is referred to more generically as decisions and decisions with findings are, respectively:

- Complaint with report issued – A written decision was provided by the SEA to the complainant and public agency regarding alleged violations of a requirement of Part B of IDEA (*id.* at 32).
- Report with findings of noncompliance – The written decision provided by the SEA to the complainant and public agency in response to a written, signed complaint, which finds the public agency to be out of compliance with one or more requirements of Part B of IDEA of 34 CFR Part 300 (*id.* at 34)

*Figure 1. Longitudinal Success Rate:  
Per Year Percentage of Decisions with at Least One Finding of Noncompliance*

Examination of Figure 1 reveals that the complainants' success rate in SCP has fluctuated between 56.6% and 72.7% during the period 2008–09 and 2019–20, with a gradual and oscillating downward trend.<sup>29</sup>

## **Question 2**

In response to question 2, the Appendix provides a list of the fifty-one jurisdictions arranged from the highest to lowest SCP success rate for the same twelve-year period, with the overall success rate as the final row. Review of the Appendix reveals that the overall SCP rate for the entire period across the fifty states and the District of Columbia was 63.8% and that the jurisdictions ranged from 82.3% down to 33.4%. The top ten jurisdictions, which all had success rates above 75%, were: 1-Maryland; 2-South Carolina; 3-Washington state; 4-Kentucky; 5-

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<sup>29</sup> For the twelve-year period, the most recent year had the lowest success rate (56.8%), although the cluster of this year with the previous three years appeared to form a possible plateau at a level lower than the first and second four-year segments.

Wyoming; 6-New York; 7-New Mexico; 8-Minnesota; 9-West Virginia; and 10-South Dakota. Conversely, the bottom eight jurisdictions, which all had success rates below 50%, were 44-Georgia; 45-Virginia; 46-Texas; 47-Tennessee; 48-Louisiana; 49-New Jersey; 50-Iowa; and 51-Hawaii.

## Discussion

### Bounding Limitations

Three overall limitations specific to the source data serve as a frame for interpretation of the findings of this outcomes analysis. The first two expressly applied to the predecessor, frequency-focused article as well.<sup>30</sup> First, the accuracy and uniformity of the data depend primarily on the input of that data at the state education agency level. The contributing and overlapping factors at that level include (a) the turnover and diligence of the personnel delegated to perform this task, (b) the commitment and quality of the supervision; and (c) the fidelity in complying with the federal instructions for the annual accountability reporting, for which the dispute resolution data are only a limited part.<sup>31</sup>

Second, an overlapping and less obvious limitation is based on the Department of Education's instructions for the data collection.<sup>32</sup> Because the purpose is annual accountability

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<sup>30</sup> Fairbanks et al., *supra* note 6, at 449.

<sup>31</sup> As part of its supervisory and monitoring efforts under the IDEA, OSEP requires SEAs to report annually specified dispute resolution data, including for SCP and DPH. *Supra* notes 9, 28.

<sup>32</sup> The Department's instructions manual, *supra* note 28, includes the following relevant definitions in addition to the aforementioned counterparts for decisions and decisions with findings:

- Written, signed complaints – A signed, written document submitted to the state education agency (SEA) by an individual or organization (complainant) that alleges a violation of a requirement of Part B of IDEA of 34 CFR Part 300 (*id.* at 35)
- Complaint withdrawn or dismissed – A written, signed complaint that was withdrawn by the complainant for any reason or that was determined by the SEA to be resolved by the complainant and the public agency through mediation or other dispute resolution means, and no further action by the SEA was required to resolve the complaint; or a complaint dismissed by the SEA for any reason, including that the complaint does not include all required content (*id.*)

rather than longitudinal analysis, the relevant data includes two qualifying categories. First, some complaints do not reach a decision due to the “withdrawn or dismissed” category, which includes not only settlements but also dismissals “for any reason,” including but not limited to insufficiency. Thus, the success rate, akin to DPH outcomes, is based on full decisions and does not include summary dispositions beyond just insufficiency of the required content. Second and much less obvious without examining the data collection instructions for both DPH and SCP, the decisions, or “reports issued,” which serve as the denominator for calculating the success rate percentage, does not include the “complaint pending” category, which represents complaints that are either still under investigation or awaiting issuance within the year in question. These pending cases are not included in the data for the following years, thus remaining as missing with regard to their ultimate disposition in the Department’s data collection and CADRE compilation.

Although a major factor for DPHs, the combination of these two categories represents a much smaller, although still practically significant, proportion of the SCP cases. For example, for the two mid-point years during this period of 2013–14 and 2015–16 together, the decisions represented 15% of the filings for DPH and 61% of the filings for SCP.<sup>33</sup> More specifically, for SCP during this illustrative two-year period, the remaining 39% amounted to 3929 filings that did not result in a decision, consisting of 3629 in the dismissed or withdrawn category and 300 in

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- Complaint pending – A written, signed complaint that is either still under investigation or the SEA’s written decision has not been issued (*id.* at 32)

<sup>33</sup> CADRE, *supra* note 9, at 3. These illustrative data are based on the “U.S. and Outlying Areas,” thus extending to beyond the fifty states and the District of Columbia to a few other jurisdictions, which represent relatively negligible additions to the overall frequencies.

the pending category.<sup>34</sup>

The third overall limitation derives from the nature of the source data but is applicable to the outcomes, not the frequency, variable. Specifically, the implicit two-category scale of decisions with findings and those without findings that resulted in the success percentage does not provide any differentiation as to the total number and nature of the violations that the complainant alleged, and that the decision found. Thus, the extent to which the decision was in favor of the district and the parent in terms of number or weight is not available in this metric as compared, for example, to the less precise or more differentiated outcome scales applied thus far in the DPH research.<sup>35</sup> Moreover, neither the previous nor the present analysis extends to the nature and extent of the remedial relief ordered in these administrative decisional mechanisms under the IDEA.<sup>36</sup>

Within these bounding limitations, the next two subsections provide tentative interpretations of the results for each of the two questions of this outcomes analysis. These interpretations include comparison to the DPH findings in the successive studies that served as the initial template for the predecessor SCP frequency analysis and this outcomes sequel.<sup>37</sup>

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<sup>34</sup> *Id.* at 16–17. The 300 cases in the pending category included 189 cases that were subject to mandatory deferral under 34 C.F.R. § 300.152(c) due to concurrent DPHs.

<sup>35</sup> *Supra* notes 10–16 and accompanying text.

<sup>36</sup> Empirical analysis of the remedial aspect of DPH or SCP decisions has been very limited to date. *See, e.g.*, Perry A. Zirkel, *Adjudicative Remedies for Denial of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. LAW JUDICIARY 220 (2013) (analyzing the frequency of major remedies ordered in a limited sample of 224 IDELR-published adjudicative decisions under the IDEA during the period 2000–2012, which included on a non-differentiated basis approximately 120 DPH decisions); Zirkel, *supra* note 19, at 185–88 (comparing the frequency distribution of DPH remedies and SCP corrective actions for a systematic sample among five of the most active states). The present analysis does not extend to more extensive and intensive examination of outcomes because the source data are limited to “findings.” Further limiting the extent of available data, the IDEA regulations require the public availability of DPH, not SCP, decisions. 34 C.F.R. §§ 300.513(d)(2) (2019).

<sup>37</sup> The DPH analyses were slightly different in their time period and jurisdictional scope. They included one other jurisdiction (Puerto Rico due to its specialized justification for DPH) and did not extend to 2018–19 and 2019–20 (due to the unavailability of these data at the time of publication).

## Question 1

The findings in response to the first question showed an oscillating pattern that gradually trended downward from approximately a 70% success rate in 2008–09 to a 57% rate in 2019–20.<sup>38</sup> This slow but not steady trend downward for the success rate for SCP decisions is in the opposite direction to the frequency of SCP decisions.<sup>39</sup> If outcomes and frequencies were the only dimensions, these opposing directions would seem strange, because a decreasing success rate would serve as a disincentive to resorting to the SCP mechanism. However, various other factors are at play, including, as limited examples, (a) the success rate of not only DPH under the IDEA but also the Department of Education’s Office for Civil Rights’ complaint resolution process under Section 504, (b) the aforementioned intervening role of the “withdrawn or dismissed” (including settlements) and “pending” categories,<sup>40</sup> and (c) the knowledge and perceptions of parents and other potential SCP complainants.<sup>41</sup>

Although the gradual downward trend in the SCP success rate poses a complex question, one possible contributing factor that warrants systematic exploration is what may be a gradual increase in the proportion of complaint investigators who are attorneys.<sup>42</sup> If indeed this proportion is increasing, which is limited to our informal observation and speculation, it tends to gravitate to the use of and reliance on case law in SCP decisions per the training of attorneys

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<sup>38</sup> *Supra* Figure 1.

<sup>39</sup> Fairbanks et al., *supra* note 6, at 447.

<sup>40</sup> *Supra* notes 29–31 and accompanying text.

<sup>41</sup> Knowledge in this context includes awareness of the success rate in light of the paucity and availability of these empirical analyses. Similarly, perceptions in this context includes the overall levels of parental satisfaction, in contrast with disputes, relative to special education.

<sup>42</sup> A survey of state education agencies in 2017 revealed that 26% of SCP investigators had a law degree. Hansen & Zirkel, *supra* note 21, at 111. However, given the paucity of research on SCP, the literature lacks the corresponding proportions for earlier or subsequent years.

instead of the traditional exclusive focus on IDEA and corollary state regulations per the compliance orientation of non-attorney state education agency personnel. The primary effect on success rate is the tempering role of the two-part harmless-error approach for procedural violations and the similarly relaxed judicial standard for IEP-implementation claims.<sup>43</sup>

Of course, alternative and additional explanations are subject to thoughtful consideration as possible hypotheses for further research. For example, have school districts generally improved their compliance with the IDEA across the fifty-one jurisdictions during this twelve-year period? If district compliance has remained relatively stable, have the complainants' perceptions of districts' compliance become more negative, thus causing a higher proportion of decisions without any findings of noncompliance? Did the number of findings per decision or the nature and extent of the corrective actions counter the ostensible downward trend? Have the mix among procedural, substantive, and implementation FAPE claims changed during this time period, thus affecting the overall success rate per year?

## **Question 2**

First, the overall success rate for the entire period of 63.8% generally aligns with the limited previous successive analyses.<sup>44</sup> Although the CADRE compilations, due to the scope of the Department of Education's data collection, do not provide any DPH outcomes data, the cumulatively rather extensive outcomes analyses for DPH suggest as much as the approximately

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<sup>43</sup> See, e.g., Zirkel, *supra* note 19, at 195–97 (observing the traditional strict regulatory approach of SCP and the more relaxed court-developed standards for the procedural and implementation dimensions of alleged denials of free appropriate public education). For procedural FAPE claims, in comparison to the uniform, mandated use of the two-step approach in DPH decisions, SCP decisions vary not only as to whether they at all apply the second, substantive loss step but also, for those that do apply it, whether they do so solely for the remedy, or corrective action.

<sup>44</sup> *Supra* note 18 (82% and 54%); *supra* text accompanying notes 19 (66%) and 21 (62%).

opposite 2:1 ratio, although the units of analysis and outcomes scales vary widely.<sup>45</sup> In any event, this overall finding appears to add support to the previous finding for more limited jurisdictions of a significantly higher outcomes distribution for SCP than DPH upon a uniform basis of measurement.<sup>46</sup>

Second, the success rate rankings among the fifty-one jurisdictions, which the Appendix lists in descending order, represent a wide range that confirms the significant variance in the earlier, more limited inter-state comparison.<sup>47</sup> Moreover, these rankings do not appear to correlate closely with the frequency rankings for either SCP or DPH.<sup>48</sup> For SCP, for example, the top ten jurisdictions here include only one of the top ten jurisdictions for SCP frequency on an unadjusted basis and one on a per capita basis.<sup>49</sup> Conversely, the bottom eight jurisdictions here included none of the bottom eight jurisdiction for SCP on an unadjusted basis and only one on a per capita basis.<sup>50</sup> Similarly for DPH, the top ten jurisdictions for SCP success rates here included three of the top ten jurisdictions for DPH frequency on an unadjusted and only two on a

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<sup>45</sup> *Supra* notes 10–16 and accompanying text.

<sup>46</sup> *Supra* note 19. As the initial unit of analysis, ICRs were uniform not only between but also within SCP and DPH. Unlike SCP findings, which were based on the complainant’s allegations and the investigator’s formulation and thus varied widely depending on the complainant and the investigator, the ICR was based on a fixed typology of issues that applied equally to both SCP and ICR and two expert coders who achieved high interrater agreement. The metric at the decisional level for both SCP and DPH approximates via the best-for-complainant conflation approach approximates, although is not precisely the same, as the identification of “findings” in the CADRE data. *Id.*

<sup>47</sup> *Supra* note 20.

<sup>48</sup> Although the following examples are limited to direct correlation, a similar overall review similarly suggests the lack of a strong inverse correlation.

<sup>49</sup> Fairbanks et al., *supra* note 6, at 454 (New York ranked 8<sup>th</sup> on an unadjusted basis, and Maryland ranked 4<sup>th</sup> on a per capita basis).

<sup>50</sup> *Id.* (Iowa tied for 45<sup>th</sup> on an adjusted basis).

per capita basis.<sup>51</sup> Conversely, the bottom eight jurisdictions for SCP success rates included only one of the bottom eight jurisdictions for DPH frequency on an unadjusted basis and two on a per capita basis.<sup>52</sup>

Variation among states is an intrinsic part of the federal system of our nation, as evident in the structure of “cooperative federalism” of the IDEA.<sup>53</sup> However, does the wide range in the success rate among the jurisdictions arguably extend beyond this expected variation? This tentative conclusion focuses on the “tails,” or groupings at the opposite ends, of the distribution. More specifically, is it fair and just that the success rate for the five states in the top group is more than twice that of the four states in the bottom group?<sup>54</sup> To the limited extent that it may be analogous, the corresponding range among U.S. Courts of Appeals in IDEA cases could seem to weigh against what may be the first-impression answer.<sup>55</sup> Yet, differences from the adjudicative avenue, especially limited to federal appeals courts and their multi-state regions, and for the time

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<sup>51</sup> Gullo & Zirkel, *Comparative Enrollments-Based Analysis*, *supra* note 8, at 465 (among the same fifty-one jurisdictions but for the more limited period of 2012–17, New York ranked 1<sup>st</sup>, Maryland ranked 6<sup>th</sup>, and Washington tied for 9<sup>th</sup> on an unadjusted basis, whereas New York ranked 2<sup>nd</sup> and Maryland ranked 8<sup>th</sup> on a per capita basis).

<sup>52</sup> *Id.* at 466 (Iowa ranked 44<sup>th</sup> on an adjusted basis, and Iowa and Louisiana respectively ranked 46<sup>th</sup> and 47<sup>th</sup> on a per capita basis).

<sup>53</sup> *E.g.*, Schaffer v. Weast, 546 U.S. 49, 52 (2005) (citing Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (9th Cir. 1999) and Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 183 (1982)).

<sup>54</sup> The Appendix shows that the top five states had success rates above 80% and bottom four states had success rates below 40%. Indeed, the top state (South Carolina) had a success rate that was 2.5 times that of the bottom state (Hawaii).

<sup>55</sup> *E.g.*, Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law: Frequency and Outcomes of Published Court Decisions 1998–2012*, 27 J. SPECIAL EDUC. LEADERSHIP 55, 60 (2014) (finding that the success rate, derived by combining the conclusively for parent and mixed categories and deleting the inconclusive categories within a five-category outcome scale, ranged from 40% in the D.C. Circuit down to 14% in the Eighth Circuit for IDEA cases for the period 1998–2012); Perry A. Zirkel & Anastasia D’Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731, 747 (2002) (finding that the success rate, formed by combining the completely-for-parent and mixed categories within a three-category outcome scale, ranged from 72.1% in the D.C. Circuit down to 29.1% in the Tenth Circuit for IDEA cases for the period 1989–2000).

periods and outcomes scales of the few available, cited analyses limit the weight of such comparisons. Thus, the question remains open for evaluation by the stakeholders and policy makers under the IDEA.

The reasons for the wide variance in the SCP success rates among the fifty-one jurisdictions may include, for example, (a) differences in interpreting and applying the IDEA, including not only the aforementioned<sup>56</sup> legal training factor for the complaint investigators but also the prevailing conservative-liberal values among the cultures of the states;<sup>57</sup> (b) the differences among the state statutes and regulations in the extent of requirements added to those of the IDEA, (c) the extent of the perceived and actual IDEA compliance among the school districts within each jurisdiction; (d) variance in not only the availability of alternative dispute mechanisms but also the activity of parent training or advocacy centers in assisting parents with filing complaints; and (f) the extent that parents and other potential complainants are aware of and amenable to the SCP mechanism under the IDEA. The identification and assessment of the contributing factors to the inter-jurisdictional variance are similarly fertile subjects for scholarly exploration and policy consideration.

### **Conclusion**

This exploratory analysis of SCP outcomes is intended as the second in a pair of initial steps to providing more systematic and careful attention to this decisional dispute resolution avenue at a level comparable to the continuing analysis of the IDEA's more well-known DPH mechanism. Subsequent steps should include both quantitative and qualitative analyses of SCP at

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<sup>56</sup> *Supra* notes 41–42 and accompanying text. To the extent that attorney investigators are more likely to use case law in their decisions, the variance among jurisdictions in the binding precedents may add to the variance attributable to this factor.

<sup>57</sup> The “liberal”-“conservative” dichotomy refers here to the common conception that in this context amounts to relaxed or strict applications of regulatory provisions instead of refined definitions and differentiation of these terms.

both the national and state levels, including (a) the nature and efficacy of the state education agency SCP procedures and personnel, including the proportion of attorney investigators, (b) the perceptions of the stakeholders, including knowledge and perception of this alternative as compared to the DPH avenue, (c) the interrelationship with the availability of and access to other dispute resolution options at the state level, and (d) refined analyses of SCP outcomes, including the extent of violations and the nature of the resulting remedies. Finally, those analyses in or including the near future will need to consider COVID-19's impact at both the national and state levels.

**Appendix. Success Rate in the 51 Jurisdictions in Descending Rank Order and Overall  
for the Period 2008–09 through 2019–20**

<b>Rank</b>	<b>Jurisdiction</b>	<b>Success Rate</b>	<b>Rank</b>	<b>Jurisdiction</b>	<b>Success Rate</b>
1	Maryland	82.3 %	27	Ohio	65.4 %
2	South Carolina	81.7 %	28	Utah	63.8 %
3	Washington	81.5 %	29	New Hampshire	63.6 %
4	Kentucky	80.6 %	30	Mississippi	63.2 %
5	Wyoming	80.5 %	31	Nebraska	63.1 %
6	New York	79.8 %	32	Arizona	62.4 %
7	New Mexico	76.3 %	33	Kansas	61.8 %
8	Minnesota	75.7 %	34	Massachusetts	60.4 %
9	West Virginia	75.2 %	35	Maine	59.0 %
10	South Dakota	75.1 %	36	Alabama	56.6 %
11	North Carolina	73.9 %	37	Alaska	56.4 %
12	Idaho	72.4 %	38	Oklahoma	55.2 %
13	District of Columbia	72.0 %	39	Oregon	53.9 %
14	Michigan	71.7 %	40	North Dakota	53.5 %
15	Illinois	70.9 %	41	Nevada	52.5 %
16	Rhode Island	70.1 %	42	Missouri	52.2 %
17	California	70.0 %	43	Florida	50.5 %
18	Arkansas	69.8 %	44	Georgia	48.7 %
19	Colorado	69.4 %	45	Virginia	47.6 %
20	Vermont	68.9 %	46	Texas	47.1 %
21	Wisconsin	68.5 %	47	Tennessee	40.9 %
22	Montana	68.1 %	48	Louisiana	40.8 %
23	Delaware	67.7 %	49	New Jersey	40.3 %
24	Indiana	67.3 %	50	Iowa	35.2 %
25	Connecticut	66.1 %	51	Hawaii	33.4 %
26	Pennsylvania	65.8 %		<b>OVERALL</b>	<b>63.8 %</b>