

# EDUCATION LAW INTO PRACTICE

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## DISTRICT-INITIATED DUE PROCESS HEARING DECISIONS UNDER THE IDEA: FREQUENCY AND OUTCOMES\*

by

Perry A. Zirkel, Ph.D., J.D., LL.M and Diane M. Holben, Ed.D.\*\*

The Individuals with Disabilities Education Act (IDEA)<sup>1</sup> is the primary federal legislation for special education in public schools. Its core obligation for school districts is the provision of a free appropriate public education (FAPE) to eligible students.<sup>2</sup> The primary adjudicative mechanism, which the parties must exhaust before judicial determinations of FAPE,<sup>3</sup> is the due process hearing (DPH).<sup>4</sup> The filing party for a DPH may be the parent or the school district.<sup>5</sup> The IDEA regulations for “standard” DPHs<sup>6</sup> require school district filings for denial of independent educational evaluations (IEEs) at public expense<sup>7</sup> and, with limited exceptions,<sup>8</sup> permit school district filings to override lack of parental consent for evaluations.<sup>9</sup> Additionally, per the IDEA’s structure,<sup>10</sup> a limited number of the IDEA’s

\* *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 398 EDUC. L. REP. 8 (April 28, 2022).

\*\* Perry A. Zirkel is university professor emeritus of education law at Lehigh University. He is a Past President of the Education Law Association. Diane M. Holben is assistant professor of professional and secondary education at East Stroudsburg University.

1. 20 U.S.C. §§ 1401 *et seq.* (2018).

2. *Id.* at §§ 1402(9) and 1412(a)(1). *See, e.g.*, Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE Under the IDEA*, 346 EDUC. L. REP. 18 (2017) (outlining the decisional criteria for FAPE that Congress and the courts have delineated under the IDEA).

3. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 340 EDUC. L. REP. 19 (2017).

4. 20 U.S.C. § 1415(f).

5. *Id.* § 1415(f)(1)(A). “School district” is used herein as the most common form of the specific statutory term in this context, which is “local education agency.” *Id.* § 1401(19).

6. “Standard” is used herein as an unofficial term to distinguish the special provisions for “expedited”

DPHs, which are reserved for the limited situation of disciplinary changes in placement. 20 U.S.C. § 1415(k)(3)–(4) (2018); 34 C.F.R. §§ 300.532–.533 (2019), which include a provision for district initiation for possible 45-day interim alternate education settings in danger-based cases. 34 C.F.R. § 300.532(a)–(b). However, the analysis herein does not extend to expedited DPHs, which have separate timelines and procedures. *Id.*

7. 34 C.F.R. § 300.502(b)(2) (requiring the district to promptly either provide the IEE at public expense or file a DPH to prove that its own evaluation is appropriate or that the IEE does not meet the district’s criteria).

8. *Id.* § 300.300(d)(4) (precluding districts from resorting to DPHs for overriding lack of parental consent for evaluations of home-schooled and parentally-placed students).

9. “Evaluation” is used herein generically to encompass initial evaluations and reevaluations. For the pertinent consent override provision specific to each, see *id.* § 300.300(a)(3) (initial evaluations) and § 300.300(c)(1) (reevaluations). Conversely, the IDEA regulations preclude school districts from resorting to DPHs for lack of consent for initial services (*id.* § 300.300(b)(3)) and for revocation of consent for continued services (*id.* § 300.300(b)(4)).

10. For agency guidance as to additions to the IDEA’s consent provisions, see Letter to Anonymous, 80

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corollary state laws provide varying additions to the consent requirements,<sup>11</sup> thus providing the potential for more district-initiated DPHs seeking an override.

Empirical research on the frequency and outcomes of DPHs under the IDEA has been extensive.<sup>12</sup> A common perception is that parents initiate almost all of these hearings.<sup>13</sup> Yet, the research to date concerning the initiating party for DPH decisions provide notably limited findings concerning frequency<sup>14</sup> and outcomes of hearings in which a school district is the initiating party.<sup>15</sup>

The purpose of this analysis is to provide a more accurate national snapshot of district-initiated DPH decisions. The specific questions for the analysis are as follows:

IDELR § 23 (OSEP 2021).

11. *E.g.*, 005-18-8 ARK. CODE R. § 8.10.2(B) (requiring parental consent for change from private school placement); FLA. STAT. § 1003.5715 (requiring parental consent for placement in “an exceptional student education center”); IOWA ADMIN. CODE R. 281-41.324(5)(b) (requiring consent for an “interim IEP”); KAN. STAT. 72-3430(b)(6) (requiring consent for major changes to services or placement); 603 MASS. CODE REGS. 28.05(b)(7) (requiring parental consent for implementing *any* proposed IEP) and 28.07(1)(b) (requiring district initiation of DPH for reevaluation or change in placement after initial services if lack of consent would result in denial of FAPE); 8 VA. ADMIN. CODE § 20-81-170(E) (requiring parental consent for changes in classification, revisions in the IEP, and partial or complete termination of eligibility).
12. *E.g.*, Perry A. Zirkel & Cathy A. 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, 529–40 (2014) (canvassing previous frequency and outcomes analyses in addition to presenting the results of its own national analysis).
13. *E.g.*, 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, 520 (2013) (mentioning that “parents are almost always the parties initiating the hearing”); Rachel Hitch, *Flags on the Play!: We’re on the Same Team*, 48 J.L. & EDUC. 87, 90 (2019) (characterizing district-initiated DPHs as “extremely rare”); Jane R. Wettach & Bailey K. Sanders, *Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys*, 20 CONN. PUB. INT. L.J. 239, 245 (2021) (commenting that “the vast majority of due process cases are initiated by parents”).
14. Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina’s First Tier*, 118 W.VA. L. REV. 735, 766 (2016) (finding that 3% of the DPH decisions in North Carolina for the period 2000–2012 were district-initiated, without addressing their issues and outcomes); Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL’Y STUD. 131, 137 (2011) (finding that 14% of the DPH decisions from forty-one states were district-initiated, although not identifying the specific time period of the decisions; not including the high-volume jurisdictions of New York, New Jersey, and the District of Columbia; and not specifically addressing the issues and outcomes in these cases); Michael B. Shuran & M.D. Roblyer, *Legal Challenge Characteristics of Special Education Litigation in Tennessee*, 96 NASSP BULL. 44, 57 (2012) (finding that 12% of the DPH decisions in Tennessee were district-initiated, although not identifying the time period, issues, or outcomes of these cases); Cathy A. Skidmore & Perry A. Zirkel, *Has the Supreme Court’s Schaffer Decision Put a Burden on Hearing Officer Decision-Making under the IDEA?*, 35 J. NAT’L ASS’N OF ADMIN. L. JUDICIARY 283, 297 (2015) (finding that 19% of the post-Schaffer DPH decisions from 2005 to 2013 that identified or applied the burden of persuasion were district-initiated, without identifying the issues or outcomes).
15. Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 178 n.65 (2017) (finding that 14% of a representative sample of 250 DPH decisions for five relatively high-volume states during the period 2010–2016 were district-initiated via either filing (n=32) or counterclaim (n=3), which amounted to 38 (8%) of the 486 issue category rulings). The outcomes distribution of these issue category rulings was 8% for parents and 92% for districts. *Id.* at 179 n.69. Moreover, the most frequent issues for these thirty-eight rulings were independent educational evaluations at public expense – 45%; consent for evaluation – 32%, and FAPE placement authorization or validation – 18%. *Id.* at 181 n.73. Finally, the parents’ success rate for these three categories were IEEs – 12%, consent – 0%; and FAPE – 0%. *Id.* at 183 n.79.

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1. What is the proportion of district-initiated DPH decisions (a) overall, and (b) which states are at the low and high ends?<sup>16</sup>
2. Overall, what is the frequency and outcomes distribution of the rulings for the major issue categories within these decisions?
3. Overall, what is the overall outcomes distribution for the decisions?<sup>17</sup>

### Method and Results

For the only nationally representative database of fully adjudicated DPH decisions for a recent six-year period,<sup>18</sup> we first identified the three categories of party initiation in the 2512 “standard” decisions<sup>19</sup> in the unweighted sample. Next, we applied proportional weighting multipliers to represent the total population of 9,858 standard decisions. The frequency distribution of the three categories for the initial pool and next are in bold font, after the arrow symbolizing the proportional re-weighting,<sup>20</sup> for all the standard decisions is as follows:

- (a) district-initiated – 230 (9.2%) → **370 (3.8%)**<sup>21</sup>
- (b) parent-initiated – 2,192 (87.3%) → **9,348 (94.8%)**
- (c) both – 90 (3.6%) → **140 (1.4%)**<sup>22</sup>

Thus, the answer to research question #1(a)<sup>23</sup> is that 3.8% of the DPH decisions nationally during the six-year period 2013–2018 were in the district-initiated category.

For question #1(b),<sup>24</sup> Table 1 displays the states with the nine highest and nine lowest frequency rates of district-initiated due process decisions after removing the jurisdictions

16. “Initiated” in this context is synonymous with what is often referred to as those DPHs in which the school district was the “filing” party. “Overall” extends here to the District of Columbia, and “states” is used broadly herein to include this special jurisdiction.

17. This question includes the transition from the outcomes distribution for ICRs overall to the outcomes distribution for decisions.

18. For the data collection procedures, including the uniform identification of “fully adjudicated” DPH decisions issued from January 1, 2013 to December 21, 2018, see Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed . . .*, 73 ADMIN. L. REV. 833, 848–53 (2021). The resulting final pool included random samples of the four particularly high-frequency jurisdictions, which in descending order of frequency are New York, the District of Columbia, Pennsylvania, and California and which together accounted for 85% of the cases. For representative results, any analysis requires re-weighting of the cases from these four jurisdictions. *Id.* at 848–49 nn.67–68. The respective multipliers to adjust the sample proportionally to represent state populations were as follows: NY - 17.8, DC - 3.5, CA - 2.5, and PA - 2.4.

19. *Supra* note 6. The unweighted pool contained 123 expedited decisions.

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20. The so-called re-weighting was to apply the respective multiplier for each of the four high-volume states (*supra* note 18) to reflect the distribution in the total target populations of decisions.

21. A few states, including Colorado and Maryland, allow for appeals of state complaint decisions via due process hearings. Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures under the Individuals with Disabilities Education Act*, 368 EDUC. L. REP. 24, 44 (2019). The 230 cases included two that were district appeals of state complaint decisions per Colorado law. Although technically district-initiated DPHs, they were excluded from analyzed sample of cases due to their atypical, original initiation via the alternate decisional dispute resolution avenue of the IDEA. Their number was so negligible as not to affect the overall results.

22. This limited “both” category typically consists of consolidation of district-initiated and parent-initiated DPHs, often without specifying which one was first, whether they were independent of each other, and the claims specific to each party. Due to their hybrid and insufficiently differentiated nature and limited number, this category is separated and excluded from this “district-initiated” analysis.

23. *Supra* text accompanying note 16.

24. *Id.*

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with less than nine such decisions for the six-year time period.<sup>25</sup> The “n” in the first column refers to the total number of decisions regardless of initiating party for each jurisdiction within the aforementioned overall population of 9,858 standard decisions.

*Table 1: States with Lowest and Highest Percentage Rates of District-Initiated DPH Decisions*

Lowest Rates		Highest Rates	
State (n)	% District-Initiated	State (n)	% District-Initiated
AZ (n=26)	0%	NH (n=18)	44%
DC (n=984)	0%	CA (n=573)	27%
KY (n=15)	0%	FL (n=9)	26%
LA (n=10)	0%	CO (n=32)	25%
NM (n=25)	0%	CT (n=66)	22%
NV (n=18)	0%	MN (n=18)	19%
OR (n=10)	0%	WA (n=83)	16%
NY (n=6,406)	.3%	NJ (n=131)	15%
TX (n=156)	2.0%	IN (n=18)	14%

Table 1 shows that the states vary widely in their frequency rates of district-initiated DPH decisions, ranging from 0% in seven jurisdictions to 44% for New Hampshire. The presence of the two jurisdictions with the highest overall “n”s, especially New York, obviously were major contributing factors in the relatively low national percentage average.

In response to the remaining two questions, the data collection and analysis were limited to this district-initiated category across the fifty-one jurisdictions. In accordance with an established formulation for a requisite level of representativeness,<sup>26</sup> we randomly selected 144 of the 230 DPH decisions in the district-initiated category for this purpose.<sup>27</sup> To reflect the target population of 370 district-initiated decisions, we re-weighted the resulting distribution of issue category rulings (ICRs) and their outcomes by the same applicable multipliers.<sup>28</sup>

The first author coded these decisions for the frequency and outcomes of their ICRs.<sup>29</sup> The taxonomy of ICR codes for this purpose was as follows:

- 25. These two groups of nine states equate to the first and fourth quartiles of the distribution. WALLEN, HOW TO DESIGN AND EVALUATE RESEARCH IN EDUCATION 99 (2006).
- 26. Robert V. Krejcie & Daryle W. Morgan, *Determining Sample Size for Research Activities*, 30 EDUC. & PSYCH. MEASUREMENT 607, 608 (1970).
- 27. For the high-frequency states of CA, DC, NY, and PA, the process represented a two-stage random sampling. Step one was the original random selection of cases from the pool of all decisions issued within the six-year time period, and step two was a random sampling of the cluster of these decisions that were district-initiated. See JACK R. FRANKEL & NORMAN E.
- 28. For the re-weighting process, see *supra* notes 18 and 20. To maintain proportionality at the DPH-decision unit of analysis, we tested splitting the weighting factor among all issue category rulings in the decision (e.g., a CA case with two issues would split the multiplier of 2.5 into 1.25 for each issue). However, the difference in results between the two methods was negligible, so we retained the original re-weighting procedure.
- 29. ICR refers to broad categories of IDEA issues, such

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- consent = consent for evaluation or reevaluation<sup>30</sup>
- IEE = independent educational evaluation at public expense<sup>31</sup>
- FAPE = appropriate IEP or placement<sup>32</sup>
- misc. = other miscellaneous ICRs<sup>33</sup>

First, the resulting frequency and outcomes analysis was tabulated for ICRs per category with this binary scale: P = in favor of the parent and SD = in favor of the school district.<sup>34</sup> Next, the results were analyzed overall (i.e., upon conflation of the issue categories) by decisions on a tripartite scale: P, mixed, and SD.<sup>35</sup>

The random sample of 144 decisions resulted in 157 ICRs, because thirteen decisions each had a pair of ICRs.<sup>36</sup> Table 2 presents the distribution of the ICRs by category and by outcome, with the re-weighted results reported in bold font.

*Table 2: Frequency and Outcomes Distribution of ICRs by Category and Overall*

	<i>For P</i>	<i>For SD</i>
<i>IEE</i> (n=84) → <b>53%</b>	20% (n=17) → <b>23%</b>	80% (n=67) → <b>77%</b>
<i>FAPE</i> (n=34) → <b>21%</b>	18% (n=6) → <b>20%</b>	82% (n=28) → <b>80%</b>
<i>Consent</i> (n=34) → <b>22%</b>	3% (n=1) → <b>2%</b>	97% (n=33) → <b>98%</b>
<i>Misc.</i> (n=5) → <b>3%</b>	80% (n=4) → <b>67%</b>	20% (n=1) → <b>33%</b>
<b><i>TOTAL</i> (n=157) → 100%</b>	18% (n=28) → <b>19%</b>	82% (n=129) → <b>81%</b>

The first column of Table 2 answers the frequency part of research question #2. The most frequent category of district-initiated ICRs is IEEs at public expense, accounting for

as identification, FAPE, and discipline, that are each subject to a ruling in the case. Thus, ICRs represent a more precise unit of analysis than the case, or decision, allowing for a more definitive binary outcomes distribution. For previous examples of the use of this unit of analysis, see Cope-Casten, *supra* note 13, at 508; Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46, 46 (2003); Zirkel & Skidmore, *supra* note 12, at 540; Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 175–76 (2017); Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions under the IDEA: An Empirical Analysis*, 78 EXCEPTIONAL CHILD. 375, 378 (2012); Perry A. Zirkel & Amanda C. Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483, 503 (2012); James R. Newcomer, Perry A. Zirkel, & Ralph J. Tarola, *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 EDUC. L. REP. 449, 452 (1998).

**30.** For related IDEA framework provisions, see *supra* notes 8–9 and accompanying text.

**31.** For related IDEA framework provisions, see *supra* note 7 and accompanying text.

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**32.** For related state law framework provisions in addition to the IDEA's residual discretionary coverage beyond initial provision of services and consent revocation (*supra* note 9), see *supra* note 11.

**33.** This catchall is for any other ICRs that have such a small number of cases as not to warrant a separate category. Conversely, if any category beyond the three in the original coding template emerged as having a notable number, it would be separably added to the tabulation.

**34.** The relatively rare cases that had a nonbinary outcome within an issue category (e.g., different rulings among more than one requested IEE at public expense) were disaggregated for uniformity, given that the re-examination for decisions, as the ultimate unit of analysis, provided for a tripartite outcomes scale.

**35.** The "mixed" category was for decisions that had different rulings within an issue category (*id.*) or rulings in more than one issue category.

**36.** These thirteen cases included those in which both rulings were different within one issue category in addition to those in which the two rulings were in separate issue categories. *Supra* notes 34–35.

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approximately half of the unweighted ICRs and rising to almost two-thirds of the weighted ICRs. Tied in a distant second place, the categories of consent for evaluation<sup>37</sup> and appropriateness of program or placement<sup>38</sup> each accounting for approximately one-fifth of the unweighted ICRs, with the small remainder being miscellaneous.<sup>39</sup>

In turn, columns two and three of Table 2 answer the outcomes part of research question #2. On an overall basis, the outcomes of the ICRs are in favor of school districts (81%) rather than parents (19%) on approximately a 4:1 ratio. For each of the major categories, the proportion in favor of school districts is 98% for the consent for evaluation category and successively lower district-favorable skews of 80% and 77% for the FAPE and IEE categories. The percentage is parent-favorable (67%) only for the miscellaneous category but the number of ICRs is so small as to limit its significance.<sup>40</sup>

Table 3 provides the overall outcomes distribution upon analysis by decision.

*Table 3: Outcomes of District-Initiated DPH Decisions*

<i>For P</i>	<i>Mixed</i>	<i>For SD</i>
15% (n=21) → <b>17%</b>	4% (n=6) → <b>4%</b>	81% (n=117) → <b>79%</b>

In response to research question #3, Table 3 shows that the overall outcomes distribution for the decisions, after re-weighting to represent all of the district-initiated DPH decisions, is rather strongly skewed in favor of districts. With the limited proportion of decisions with mixed outcomes (4%), the outcomes in favor of school districts rather than parents still approximate a 4:1 ratio.

**Discussion**

The interpretation of the findings merits caution in light of the differences among states in two interacting relevant respects. First, for the overall proportion of DPH decisions, a small group of jurisdictions led by far by New York accounts for most of the activity.<sup>41</sup> Second, as exemplified by some of these high-activity states, the proportions of district-initiated cases or their ICR categories was distinctly high or low.<sup>42</sup> Within these caveats, the interpretation follows in relation to each of the three research questions successively.

37. In a couple of the cases the consent was for a diagnostic placement and thus have a FAPE dimension with the primary categorization of evaluation.

38. Most of the ICRs in this FAPE category did not expressly hinge on the consent requirement of some state laws (*supra* note 11), with the notable exception of the Florida legislation, which requires consent for placement in a special education center and which accounted for approximately a third of that state’s cases.

39. The most frequent ICRs in the miscellaneous category concerned whether the student continued to be eligible upon the district’s exiting determination.

40. However, the parent-favorable skew for the eligibility-exiting ICRs, which predominated in this infrequent category (*supra* note 40), may suggest a possible more generalizable trend.

41. *Supra* note 18. For the specific frequency trends among the various jurisdictions both with and without adjustments for their special education population, see 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).

42. On an overall basis, for example, California accounted for a disproportionately high number of district-initiated DPH decisions, and at the other extreme New York had a disproportionately low number and the District of Columbia had none at all within this six-year period. On a category-by-category basis, for example, 80% of the Pennsylvania cases had an IEE ICR, and California accounted for approximately a third of the consent ICRs.

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### Question #1: Overall Frequency Rate

The finding that the proportion of all district-initiated DPH decisions nationally during a recent six-year period was only 3.8% tends to confirm the general perception about parent initiators<sup>43</sup> and counter the limited research extending beyond a single state.<sup>44</sup> Although the proportion varies widely among the states, the low overall level is likely attributable in significant part to New York and the District of Columbia. Each of these leading jurisdictions in the volume of DPH decisions, which accounted for a multiplier effect in the sample for this analysis,<sup>45</sup> had a negligible rate of district-initiated decisions that far outweighed the high rate for California's less pronounced "n."<sup>46</sup> Moreover, because the New York City school system and the District of Columbia Public Schools accounted for most of the decisions in each of these two jurisdictions,<sup>47</sup> the particular litigation strategy of these two large school districts, which each has its own legal department, as to the extent of initiating DPHs may be a major contributing factor to this overall dampened national level.<sup>48</sup>

A converse contributing factor is the aforementioned subset of IDEA regulations that mandate or permit district-initiated DPHs and the limited extent of state laws that add to the IDEA's consent requirements.<sup>49</sup> As discussed further *infra*, the IDEA provisions specific to IEEs at public expense and overrides for lack of consent for evaluations accounted together for approximately two-thirds of the district-initiated DPH decisions. However, perhaps due to the intervening factor of the widely varying filing-to-adjudication rates among the jurisdictions,<sup>50</sup> which largely but imprecisely are attributable to settlements, the subset of state laws that expanded consent requirements did not, with the limited exception of the Florida legislation, have a notable additive effect in these district-initiated DPH decisions.<sup>51</sup>

### Question #2: Frequency and Outcomes by Issue Category

For frequency, the predominant position of the IEE category in Table 2, accounting for the majority of the ICRs, is not surprising in light of the mandatory nature of the IDEA regulation, which requires the district to either pay for the IEE or file for a DPH to justify its denial.<sup>52</sup> The proportion of decisions in this category does not represent all of the DPH decisions specific to IEEs at public expense, because a review of the subsequent IEE judicial rulings shows that in more than a negligible number of cases the parents were the filing party at the DPH level.<sup>53</sup>

43. *Supra* note 13 and accompanying text.

Regs. tit. 5, § 5-E3109.2 (2017).

44. Mueller & Carranza, *supra* note 14.

48. In contrast, per Table 1 *supra*, New Hampshire's exceedingly high rate (44%) did not significantly influence the national average due to its low-activity status (n=18).

45. *Supra* notes 18 and 20.

46. *Supra* Table 1 and accompanying text.

49. *Supra* notes 6–11 and accompanying text.

47. New York City accounts for more than 90% of the DPH decisions in the state of New York. See Holben & Zirkel, *supra* note 18, at 841 n.33. No corresponding percentage is readily available for the District of Columbia, but many of the DPH decisions are attributable to the D.C. Public Schools as the defendant. Office of the State Superintendent of Education, Hearing Officer Determinations (2021), <https://osse.dc.gov/service/hearing-officer-determinations>.

50. *E.g.*, Zirkel & Gullo, *supra* note 42, at 878–80 (ranging from 2.9 to 93.5 for the 51 jurisdictions from 2012 to 2017).

51. *Supra* note 39.

52. *Supra* note 7 and accompanying text.

Although the number of charter schools has steadily increased to account for approximately half of the total enrollment, some of the charters are not separate local education agencies under the IDEA. See D.C. Mun.

53. See, *e.g.*, MP v. Parkland Sch. Dist., 79 IDELR ¶ 126 (E.D. Pa. 2021); Hopewell Twp. Bd. of Educ. v. C.B., 77 IDELR ¶ 20 (D.N.J. 2020). For various additional, earlier decisions, see Perry A. Zirkel,

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In contrast, the district-initiated DPH decisions in the FAPE and evaluation-consent categories in Table 2 are not quite as frequent as expected. For the FAPE category, the reason is the high-stakes nature of the consent requirements for initial IEPs in the IDEA and for additional changes in program or placement in some state laws. Instead, more often the DPH decisions in the FAPE category appear to be school districts taking the offensive to validate IEP changes, likely to gain parental acceptance or limit liability for retrospective relief. For the evaluation-consent category, the reason for expecting a higher frequency is the almost certain district win probability. The likely countervailing factors are the transaction costs of the DPH and the practical problems in the implementation of such “winning” decisions. As both a transaction cost and practical problem is the likely increased hostility of the parents, who may be less than cooperative in the district’s implementation of the evaluation<sup>54</sup> or who may stymie any ensuing FAPE step.<sup>55</sup>

For outcomes, the almost complete district win rate for the consent category<sup>56</sup> is not unexpected due to (a) the limited nature of evaluation, as compared to services, and the subsequent parental veto rights,<sup>57</sup> and (b) the particularly pronounced lack of representation,<sup>58</sup> including default decisions, in this category.<sup>59</sup>

The 80% win rate for FAPE was higher than expected at first glance but not surprising after considering the advantages of school districts in terms of case selection<sup>60</sup> and legal

*Independent Educational Evaluation Reimbursement under the IDEA: The Latest Update*, 341 EDUC. L. REP. 555, 559 nn.17–20 (2017).

54. In light of implementation issues, the “order” section of these DPH decisions vary widely from those that merely authorize the evaluation to those that specify various steps and accompanying deadlines for the parents’ and the district’s obligations for completing the evaluation. Moreover, those that have detailed orders, if it is a reevaluation rather than initial evaluation, sometimes include a warning that if the parent fails to cooperate, they forfeit any rights and protections under the IDEA.

55. Alternatively, the parents may withdraw the child from the district for enrollment elsewhere, including homeschooling or a private school, or use the subsequent steps of refusing consent for initial services or revoking consent for subsequent services, which are not subject to DPH overrides. *Supra* note 9.

56. The single parental win in the consent category of the 144-case sample was negligible in its outcome significance because rather than the usual student evaluation, the district sought consent for an assessment of the child’s home circumstances, and the hearing officer deemed such an assessment unnecessary in light of the companion and primary ICR that the district’s proposed IEP met the standards for FAPE.

57. *Supra* note 56.

58. Various analyses have found that parents with legal representation have obtained a significantly higher proportion of outcomes in DPH decisions that those

who were pro se. *E.g.*, Lukasik, *supra* note 14, at 777 (finding dramatic difference for parents with legal counsel as compared to pro se parents in DPH decisions in North Carolina during 2000–12); Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents?*, 34 J. NAT’L ASS’N OF ADMIN. L. JUDICIARY 264, 258–71, 274 (2014) (summarizing previous analyses in other jurisdictions and reporting an analysis for Pennsylvania with a different method that all found the same trend); Kevin Hoagland-Hanson, Note, *Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV. 1805, 1821 (2015) (reporting similar dramatic difference for DPH decisions in Pennsylvania during five-year period starting with 2008–09).

59. The parents lacked legal representation for 94% of these decisions, including default decisions in one half of these unrepresented cases. The district did not have legal representation in 2% of these decisions.

60. In these cases, with the partial exception of those in the IEE category, the school district had the flexibility to choose its battle, presumably selecting the cases with issues, facts, and timing, that optimized the odds of a favorable outcome. Even in the IEE cases, the school district had latitude not to file, having the option beyond paying for the IEP to deny payment based on risk assessment that the parent would either not challenge the denial by initiating a due process hearing or would initiate a hearing but would not likely prevail based on the individual case, including its factual contours, the parents’ representation, and the jurisdiction’s outcomes trend.

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representation.<sup>61</sup> The 77% win rate of IEEs provided a more definitive pro-district skew nationally than revealed in the limited previous research.<sup>62</sup>

### Question #3: Overall Outcomes Distribution for Decisions

For outcomes, whether the unit of analysis is ICRs (Table 2) or decisions (Table 3), the overall ratio approximated 4:1 in favor of school districts, which is more pronounced than the district-favorable skew for DPH decisions more generally.<sup>63</sup> This more severe pro-district skew appears to be largely attributable to the interaction of (a) the limited nature of these issue categories as compared, for example, with FAPE cases for tuition reimbursement or compensatory education for a year or more, and (b) lack of legal representation for parents in 78% (in contrast with lack of legal representation for districts in 2%) of these DPH decisions, which included lack of a parental appearance and, thus, default decisions in one-third of these unrepresented cases.<sup>64</sup> Conversely, the general agreement among the decisions that addressed or applied the burden of persuasion that it was on the district, as the filing party,<sup>65</sup> was not a significant factor in shifting the outcomes in the parents' direction.

In sum, the DPHs in which school districts are the filing party merit more attention based in part on their particular issue categories and outcome trends. This analysis is intended to stimulate more extensive and more intensive research, including (a) specifically analyzing the relationship of legal representation, lay advocates, and state laws within district-initiated cases; (b) systematically comparing parent-initiated cases for each of the significant variables; and (c) applying qualitative approaches to not only the decisional but also the settlement and post-decisional stages.

61. Interacting with the selection factor, school districts in these cases had the advantage of considering in which cases, based on availability, affordability, timing, and attitude the parents were least likely to have an attorney.

62. See, e.g., William H. Blackwell & Gomez, *Independent Educational Evaluations as Issues of Dispute in Special Education Due Process Hearings*, 4 J. HUM. SERV. 1 (Feb. 2019), <https://scholarworks.sfasu.edu/jhstrp/vol4/iss1/2> (finding 67% of IEE ICRs in favor of districts in DPHs decisions in fourteen states for the period 2014–2016 without identifying the filing party); Zirkel, *supra* note 6, at 183 n.79 (finding 88% of IEE ICRs in favor of parents in the district-initiated DPH decisions of five states for the period 2010–2016).

63. The comparable results vary depending on the jurisdictional coverage, time period, outcomes scale, and unit of analysis but generally are moderately in favor of school districts. E.g., Mueller & Carranza,

*supra* note 14, at 137 (approximately a 2:1 ratio within three-category scale for DPH decisions in 41 states during 2005–06); Zirkel & Skidmore, *supra* note 12, at (approximately 50% v. 42% within five-category scale for ICRs nationally from 1979 to 2012).

64. For the relationship of attorney representation and favorable outcomes for parents, see *supra* note 59.

65. See *Schaffer v. Weast*, 546 U.S. 49, 59 (2005) (ruling that the burden of persuasion under the IDEA “lies where it usually falls, upon the party seeking relief”). The placement of this burden on the school district is particularly clear in the IDEA regulations for the predominant IEE category. 34 C.F.R. § 300.502(b)(2) (specifying that if refusing provision at public expense, the district must file for a DPH “to show that its evaluation is appropriate” or “demonstrate[. . .] that the evaluation obtained by the parent did not meet agency criteria” (emphasis added)).