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**Education Law into Practice**
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## IS APPEALING A HEARING OFFICER'S DECISION LIKELY TO RESULT IN A MAJOR OUTCOME CHANGE IN THE FINAL COURT DECISION?[a1]

Adjudications under the Individuals with Disabilities Education Act (IDEA)[1] continue to be an active area of education litigation at both the hearing officer (HO) and court levels.[2] One of the many questions for IDEA litigants, in light of the considerable costs and time of this "ponderous" process,[3] is whether to appeal an adverse HO decision.

The previous empirical analyses suggested that to the extent that the basis is the likelihood of decisional change, the answer seemed to be no.[4] However, these analyses did not extend to wider and more recent case samples after 2016. The purpose of this brief analysis is to examine the extent of decisional change between HO and final court decisions in a random sample of both published and unpublished court decisions for the 4.5-year period since the end of 2016.

### Method

The random sample consisted of 132 court decisions available in the electronic database SpecialEdConnection®. The Boolean search identified cases broadly via the search terms "Individuals with Disabilities Education Act" and "School" for the period January 1, 2017 through June 30, 2021. The selection was limited to those cases that included IDEA rulings on the merits, thus excluding cases limited to non-final adjudicative issues, such as exhaustion, stay-put and additional evidence, or final issues precluding or resulting ***2** from the merits, such as statute of limitations or attorneys' fees. Conversely, if the case was subject to further judicial proceedings, the selection was based on the final decision on the merits.

For each selected case, the author recorded the citation, the overall HO decision, the appealing party, and the final court decision. The outcomes scale for the HO and court decisions was limited to three broad categories: P=in favor of the parent; mixed=rulings in favor of both parties or inconclusive rulings; and SD=in favor of the district.[5] Finally, a comments column not only denoted any intermediate levels (i.e., review officer decisions in two-tier states or trial-level courts if the final decision was at the appellate level) but also, if there was an outcomes change, whether it appeared to be slight, major, or complete.[6]

### Results

The final sample of 132 court decisions included 15 (11%) with intervening review officer decisions;[7] only 1 state court decision;[8] and 43 (33%) federal appeals court decisions.[9] Table 1 reports the outcomes of the HO and final court decisions in the aforementioned[10] broad categories.

**TABLE 1: OVERALL OUTCOMES AT THE HO AND FINAL COURT LEVELS**

| | For Parent | Mixed | For School District |
|---|---|---|---|
| **HO Level** | 18% | 11% | 70% |
| | (n=24) | (n=15) | (n=93) |
| **Final Court Level** | 20% | 22% | 58% |
| | (n=27) | (n=29) | (n=76) |

***3** Review of Table 1 reveals that the HO decisions that one or both parties appealed to a final court decision were very strongly skewed toward the district side at the HO level but were less strongly skewed at the final court level, largely attributable to the increased proportion in the mixed category. More specifically, at the concluding ends of this categorical scale the ratio changed from 3.9:1 at the IHO level to 2.9:1 at the final court level.[11]

Table 2 provides the extent and direction of change at the final court level for (a) all 132 cases and (b) each of the three initial outcome categories. The column headings represent the successive aforementioned[12] categories of the continuum of change in the direction of the Parent (P) and the School District (SD). The rows provide the distribution of these change categories for the HO decisions that were, at this initial level, in each outcome category and for all 132 cases together.

**TABLE 2. EXTENT AND DIRECTION OF DECISIONAL CHANGE FOR HO TO FINAL COURT LEVEL**

| | Complete Reversal P ← | Major Change P ← | Minor Change P ← | No Change | Minor Change → SD | Major Change → SD | Complete Reversal → SD |
|---|---|---|---|---|---|---|---|
| **For P** | 4%*[13] | | | 71% | 13% | | 13% |
| **(n=24)** | (n=1) | | | (n=17) | (n=3) | | (n=3) |
| **Mixed** | | 20% | 40% | 27% | 13% | | |
| **(n=15)*** | | (n=3) | (n=6) | (n=4) | (n=2) | | |
| **For SD** | 6% | 14% | 3% | 76% | | | |
| **(n=93)** | (n=6) | (n=13) | (n=3) | (n=71) | | | |
| **Overall** | 5% | 13% | 7% | 70% | 4% | | 2% |

  

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **(n=132)** | (n=6) | (n=17) | (n=9) | (n=92) | (n=5) | | (n=3) |

[The preceding image contains the reference for footnote [13]]

For the extent of decisional change, Table 2 shows that for the cases overall, the overwhelming majority (81%) had only slight (11%) or no (70%) change and that this trend also applied to the IHO decisions that were completely in favor of either the parents or the districts. The limited exception was for the relatively few IHO decisions in the mixed category, which still had 80% within the slight or no change zone but a much lower proportion (27%) in the central no-change segment of this shaded zone. For the direction of decisional change, Table 2 shows that the net effect was moderately toward the parents' side, which is attributable to not only the heavy proportion of IHO decisions in the completely "for SD" category, thus being all appealed by P, but also the pronounced skew toward P appeals of the mixed IHO decisions.[14]

***4 Discussion**

Two overlapping limitations serve as overriding cautions in interpreting the results of this updated analysis. First, like the predecessor analyses,[15] the cases were limited to court decisions, thus using the court opinion to determine the underlying IHO decision. Therefore, this approach depended on the court's characterization, which was often relatively concise and global. More significantly, this top down, or reverse approach, failed to capture the much broader body of IHO decisions that were (a) not appealed, (b) settled or abandoned prior to a court decision, or (c) not included in the source database.[16] Second, the effect of the settlement and other dispositions that do not result in a court decision within this otherwise relatively broad database extends to a pronounced extent to the period between filing and decisions at the IHO level. For example, an analysis of all fully adjudicated IHO cases (not just those in SpecialEdConnection®) revealed that the ratio of filings to adjudications was almost 20-to-1, meaning that almost 95% of the cases ended in withdrawal, abandonment, or settlement.[17]

Within these overall limitations, the findings in this updated analysis align with those of the predecessor analyses despite the limited differences in methodology.[18] Appealing an adverse IHO decision is unlikely to result in major decisional change at the final court level. Thus, the main message appears to be the same: under the adjudicative mechanism of the IDEA, parties should focus their efforts on prevailing at the IHO stage if proceeding to a decisional disposition at that adjudicative level[19] and, conversely, should think twice before deciding to appeal and proceed to a final court decision. Yet, in light of the aforementioned[20] limitation of alternate dispute resolution, primarily but not at all entirely consisting of settlement,[21] the considerations for each side are not at all limited to the likely extent and direction of ***5** decisional change. For example, although the settlement process is subject to unsettled competing theories and the category of cases is an important differentiating variable,[22] the factors that contribute to the parties' determination of whether to appeal an IHO decision to court are part and parcel of the larger process under the IDEA, starting with filing and including settlements, and not at all limited to the odds of a conclusively favorable decision. For school districts the inferable other contributing factors extend, for example, to (1) public relations generally and the experience with the particular plaintiff-parents, (2) the extent, including exceptions and control, for insurance coverage, and (3) the transactions costs, including attorneys' fees potentially on both sides. Conversely, the various contributing factors for parents inferably include (a) the emotional perceptions for and against engaging in this adjudicative process, (b) the costs of attorneys' fees and the prospect of obtaining prevailing status (which is not identical to a completely for P ruling[23]), and (c) the odds of obtaining a favorable settlement.

For this recent sampling of appealed cases, the win rates for parents at the IHO level were notably lower than those prevalent for IHO cases regardless of whether appealed. More specifically, the ratio here of 3.9:1 in favor of districts,[24] although not including the limited mixed category,[25] poses a much more adverse win rate than for IHO decisions more generally.[26] Although

  

settlements have a skewing effect on the outcome distribution of IHO decisions generally,[27] the particular adverse distribution of these cases raises questions as to the parties' selection for appeal. In any event, the ultimate outcomes distribution at the final court level is, on a net basis, only moderately different, largely to the extent of increasing the proportion of the broad mixed category at the expense of the "for SD" category.[28] Yet, as the extent and direction analysis reveals, the moderating effect does not appear to be dramatically in favor of one party or the other.[29]

***6** Yet, the overall limitations suggest the need to engage in much more penetrating empirical analyses of IDEA IHO filings, including the use of the PACER docketing system for those that reach the court level.[30] Such research warrants extension to accompanying analyses of the perceptions and objective reports of the parties and their legal counsel to obtain a more complete and nuanced picture of the IDEA litigation iceberg.[31]

In any event, this brief updating analysis provides current and concise findings from an impartial perspective that will help inform the parties, interested practitioners, and special education policy makers as to the relationship between IHO and court decisions under the IDEA.[32] The ultimate goal is a more efficient and effective dispute resolution system that benefits both individual students with disabilities and the responsible education agencies.

Footnotes

a1 *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 authors and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 393 Ed.Law Rep. [1] (October 28, 2021).

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1 20 U.S.C. §§ 1401-1439 (2018).

2 The IDEA provides for a hearing officer level and the state option of a second, review officer level with subsequent appeal to state or federal court. *Id.* § 1415(g)-(i). For the rather robust exhaustion requirement, see, for example, Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. Nat'l Admin. L. Judiciary 349 (2009). For frequency trends at the HO and court levels, see, respectively, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 Ed. Law Rep. 1 (2011) (finding that special education is a significant segment of court cases in the K-12 context); Gina L. Gullo & Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Comparative Enrollments-Based Analysis*, 382 Ed. Law Rep. 454 (2020) (revealing a slightly ascending overall trend of HO decisions during the most recent ten years).

3 *Honig v. Doe*, 484 U.S. 305, 322, 43 Ed. Law Rep. 857 (1988) (citing *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 370, 23 Ed.Law Rep. 1189 (1985).

4 E.g., Perry A. Zirkel & Cathy Skidmore, *Judicial Appeal of Due Process Hearings: Extent and Direction of Decisional Change*, 29 J. Disability Pol'y Stud. 22 (2018) (finding that 70% of the issue category rulings in a random sample of 116 published court decisions for the period of 1998-2016 had only slight or no change from the HO level to the final court level). For similar findings for corresponding analyses limited to single states and periods ending before 2016, see Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions under the IDEA*, 78 Exceptional Child. 375 (2012); James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 Exceptional Child. 469 (1999).

5 All of these outcomes use the case as the unit of analysis, with the exception of any rulings on excluded issues, such as Section 504 or attorneys' fees.

6 These change categories were broad approximations based on not only the ruling on the merits but also, to the extent separately addressed in the remedy. This column of the data collection spreadsheet also identified the nature of the mixed rulings in terms of (a)

  

the overall extent that they favored each party and (b) any inconclusive rulings. The inconclusive rulings were remands for further proceedings, which may have resulted in a settlement, abandonment, or unreported ruling on the merits.

7 According to the most recent survey of the 50 states and the District of Columbia, eight had a second tier during the 4.5 year period of this analysis. Jennifer F. Connolly, Perry A. Zirkel, & Thomas A. Mayes, *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. Disability Pol'y Stud. 156, 158 (2019) (identifying Kansas, Kentucky, Nevada, New York, North Carolina, Ohio, and South Carolina and inadvertently missing Oklahoma). For the 15 cases, the leader by far was New York (n=11), with the remainder being Kentucky (n=2), Kansas (n=1), and North Carolina (n=1).

8 *J.J.E. v. Indep. Sch. Dist.* 279, 69 IDELR ¶ 105 (Minn. Ct. App. 2017).

9 The most frequent circuits, thus with intervening district court decisions, were the Ninth Circuit (n=15) and the Second and Third Circuits (each with n=6).

10 *Supra* text accompanying note 5.

11 These respective ratios simply represent 70%/18% and 58%/20%, respectively.

12 *Supra* text accompanying note 6.

13 This case was an outlier, revealing the inevitably imprecise outer boundaries of the change category continuum. Although the IHO ruling was conclusively in favor of the parents concerning the alleged denial of FAPE, they successfully appealed to increase substantially the amount of the resulting compensatory education award. *Rayna P. v. Campus Cmty.* Sch., 72 IDELR ¶ 214 (D. Del. 2018).

14 Although the table does not include these data, the parents were the sole appealing party in 10 (67%) of the 15 IHO decisions in the mixed outcome category and both parties appealed in all but one of the remaining cases in this category.

15 *Supra* note 4.

16 This third subgroup was presumably the most limited, because this database extends well beyond the "published" court decisions in the previous analyses. Yet, bench decisions in federal or state courts and trial-level state court decisions under the IDEA are usually not included in any of the usual databases.

17 Gullo & Zirkel, *supra* note 2, at 880 (reporting a filings/adjudications ratio of 19.3 for the 50 states and D.C. for the period 2012-2017).

18 Other than the major differences of the more recent time period and the broader case database, the limited modifications were the conflated unit of analysis (the case rather than the issue category ruling) and outcomes categorization (mixed in lieu of more differentiated intermediate outcomes). The conflation was based on not only the relatively brief nature of this analysis but also the relatively small numbers in the more differentiated scales.

19 These efforts should include, to the extent feasible, specialized legal representation, expert witnesses, and effective preparation.

20 *Supra* text accompanying note 17.

21 *See, e.g.*, Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J.L. Econ. & Org. 898, 902 (2012) (finding that the frequency of settlement represented about two-thirds of ultimate outcomes in a five year sample of federal district court veil-piercing corporate cases); Perry A. Zirkel & Diane M. Holben, *Spelunking in the Litigation Iceberg: Exploring the Ultimate Outcomes of Inconclusive Rulings*, 46 J.L. & Educ. 195, 210 (2017) (finding that almost two thirds of 352 inconclusive court rulings in bullying cases ended in settlement); Kathryn Moss, Michael Ullman, Jeffrey Swanson, Leah M. Ranney & Scott Burris, *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 Mental & Physical Disability L. Rep. 303, 305 (2005) (reporting that 58% of ADA Title I cases analyzed ended in a settlement, with the majority of the remaining outcomes favoring the defendants).

22 *See, e.g.*, David Glicksberg, *Does the Law Matter? Win Rates and Law Reforms*, 11 J. Empirical Legal Stud. 378, 381-82 (2014) (identifying four competing theoretical approaches over-arching the settlement process); Theodore Eisenberg & Henry Farber, *Why Do Plaintiffs Lose Appeals? Biased Judges, Litigious Losers, or Low Trial Win Rates?* 15 Am. L. & Econ. Rev. 73, 99 (2013)

  

(revealing wide variance among broad case categories that do not come close to the specific adjudicative process and particular issues prevalent under the IDEA).

23 *See, e.g.*, 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, 548-50 (2014).

24 *Supra* text accompanying note 11.

25 *Supra* Table 1 (accounting for 11% of the IHO decisions).

26 Although varying in time period, jurisdictional scope, and outcome scales, the ratio among IHO cases more generally gravitates to an approximate 2:1 or lower ratio in favor of districts. *See* Zirkel & Skidmore, *supra* note 23, at 533-39, 555.

27 It may be that this skewing effect also applies to the appealed IHO decisions, such that the ones that end up with a final court decision are those that are not close in terms of outcome odds.

28 *Supra* Table 1. The inconclusive segment of this broad intermediate category, which consists of remands, do not necessarily favor either party, and the other mixed outcomes, may or may not be significant in terms of attorneys' fees or remedies, depending on the extent and nature of the other mixed outcomes.

29 *Supra* Table 2.

30 The federal courts' administrative office initiated the Public Access to Court Records (PACER) system. http://www.pacer.gov/. Commercial databases, including Westlaw and LEXIS, have developed docketing services that include such data for customized purposes.

31 *See, e.g.*, Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & Educ. 483 (2012).

32 One of the incidental findings of this analysis is that more than half of the initially identified court decisions fit in the exclusions for the technical transactional issues of an increasingly ponderous and time-consuming adjudicative process under the IDEA.

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