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# The Outcomes of Fully Adjudicated Impartial Hearings under the IDEA: A Nationally Representative Analysis with and without New York

Perry A. Zirkel & Diane M. Holben\*

## I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) provides eligible students with the right to a free appropriate public education (FAPE) as specified in an individualized education program (IEP).<sup>1</sup> An unusual feature of the IDEA is providing the parents of students with disabilities and their school districts with the right to a binding “impartial due process hearing” at the administrative level, subject to appeal.<sup>2</sup> This mechanism for administrative adjudication has been the subject of continuing policy debate<sup>3</sup> and occasional statutory

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<sup>1</sup> The provisions specific to state and local education agencies are at 20 U.S.C. §§ 1400–19, with those specific to FAPE and IEPs including *id.* §§ 1401(9), 1412(a)(1) (FAPE) and §§ 1401(14), 1414(d) (IEP). The corresponding regulations are at 34 C.F.R. §§ 300.1–300.817, with those specific to FAPE and IEPs at *id.* §§ 300.17, 300.301 (FAPE) and §§ 300.22, 300.320 (IEP definition). For the history of the IDEA, which was originally passed in 1975 as the Education of All Handicapped Children Act (EAHCA) and which included two prior consent decrees that introduced the right to a due process hearing, see Jeffrey J. Zettel & Joseph Ballard, *The Education for All Handicapped Children Act of 1975 (P.L. 94-142): Its History, Origins, and Concepts*, in SPECIAL EDUC. IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDS. 11 (Joseph Ballard, Bruce Ramirez, & Frederick Weintraub, eds., 1982).

<sup>2</sup> 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507–300.515. In addition to providing the concurrent jurisdiction of federal and state courts for judicial review, states have the option for a second review officer level of administrative adjudication. 20 U.S.C. §§ 1415(g), 1415(i)(1)–(2). The number of states providing for this second tier of review has gradually reduced from seventeen in 2002 to approximately seven, including the state with by far the most hearings— New York. See, e.g., Jennifer F. Connolly et al., *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. DISABILITY POL’Y STUD. 156, 157–58 (2019). Providing overlapping coverage, the regulations of Section 504 of the Rehabilitation Act applicable to elementary and secondary education, which parallel the IDEA model on a streamlined basis, also include the right to a due process hearing. 34 C.F.R. § 104.36. However, these Section 504 hearings are far less frequent and well established than those under the IDEA. See, e.g., Perry A. Zirkel, *The Public Schools’ Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135 (2012) (examining the legal sources and current practices specific to impartial hearings under Section 504 for students in the K-12 public school context).

<sup>3</sup> See, e.g., Sasha Pudelski, *Rethinking Special Education Due Process* (2013), <https://www.aasa.org/docs/default-source/resources/reports/aasarethinkingspecialduedueprocess.pdf> (proposing to replace due process hearings with IEP facilitation and mediation); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011) (criticizing the economic disparities of the hearing system and proposing that strengthening public enforcement would be more effective than tinkering with the present system of private

refinements.<sup>4</sup> One of the ongoing concerns in this policy consideration has been the win-loss rate of due process hearings (DPHs).<sup>5</sup> Similarly, the decisional outcomes rate has been the subject of litigation.<sup>6</sup> However, the rather extensive previous empirical research on the outcomes of DPHs has been flawed in various respects, particularly in the lack of representative accuracy on a national basis. This article will first address previous research about DPH outcome analyses from single states. Subsequently, this article will address DPH decision outcomes during a six-year period, as well as analyze the findings and conclusion of the conducted study.

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enforcement); Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 CASE W. RESV. L. REV. 143 (2015) (recommending moderate reforms such as eliminating the second tier and replacing the resolution session with IEP facilitation); Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO STATE J. ON DISP. RESOL. 495 (2014) (arguing that the present system of IDEA hearing is effective, subject to modest reforms); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994) (suggesting customized adaptation of the arbitration model for due process hearings, including subject matter experts as adjudicators, a problem-solving model, a one-day hearing, and finality for most cases); Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013) (urging an alternative to the impartial hearing system, such as a more effective mediation process, in light of subjective parental unfairness but also objective outcome unfairness, especially for unrepresented parents); cf. 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 (2021) (suggesting various improvements at the state level, including reduced costs, subsidized expert witnesses, procedural simplicity).

<sup>4</sup> For example, the 1997 amendments added a requirement for voluntary mediation in every state, and the 2004 amendments introduced other requirements, including a prehearing resolution session. See, e.g., Shaver, *supra* note 3, at 153–56.

<sup>5</sup> See, e.g., Weber, *supra* note 3, at 509–10 (discussing the perception that parents rarely win in due process hearings).

<sup>6</sup> The previous litigation tended to focus on individual claims of bias, with the courts showing an aversion to a box-score measure of impartiality. See, e.g., *R.G. v. Dep't of Educ. of N.Y.C.*, 61 IDELR ¶ 80, at \*2 n.3 (S.D.N.Y. 2013); *R.K. v. N.Y.C. Dep't of Educ.*, 56 IDELR ¶ 168, at \*11–12, *adopted*, 56 IDELR ¶ 201 (E.D.N.Y. 2011); *R.E. & M.E. v. N.Y.C. Dep't of Educ.*, 785 F. Supp. 2d 28, 39 (S.D.N.Y. 2010), *rev'd on other grounds*, 694 F.3d 167 (2d Cir. 2012); *C.G. v. N.Y.C. Dep't of Educ.*, 752 F. Supp. 2d 355, 361 (S.D.N.Y. 2010); *W.T. v. Bd. of Educ. of Sch. Dist. of N.Y.C.*, 716 F. Supp. 2d 270, 286 (S.D.N.Y. 2010); *A.D. & M.D. v. Bd. of Educ. of Sch. Dist. of N.Y.C.*, 690 F. Supp. 2d 193, 216–17 (S.D.N.Y. 2010); *J.N. v. Pittsburgh Sch. Dist.*, 536 F. Supp. 2d 564, 579 (W.D. Pa. 2008) (rejecting claims of review officer bias based on outcomes statistics). More recently, in response to a challenge to the hearing officer system in Virginia based on outcomes statistics, (<https://www.wrightslaw.com/law/pleadings/2022.0921.complaint.chaplick.v.virginia.doe.pdf>), the federal court issued a dismissal based on lack of standing of the organizational plaintiffs and failure to exhaust for the individual plaintiffs. *D.C. v. Fairfax Cnty. Sch. Bd.*, No. 1:22-cv-01070, 2023 WL 4765583 (E.D. Va. July 23, 2023). The decision is on appeal at the Fourth Circuit.

## II. PREVIOUS RESEARCH

As largely canvassed in 2014<sup>7</sup> and continuing thereafter, almost all previous DPH outcomes analyses have been limited to single states. Most of these single state studies were for periods ending at least ten years ago and, with a limited exception,<sup>8</sup> generally found a ratio approximating 2:1 in favor of districts,<sup>9</sup> with variations in the outcomes scales.<sup>10</sup>

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<sup>7</sup> Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Due Process Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO STATE J. ON DISP. RESOL. 525, 531–39 (2014).

<sup>8</sup> GILBERT K. MCMAHON, NYS SPECIAL EDUC. IMPARTIAL HEARING OUTCOMES (n.d.), <http://www.specialedlawadvocacy.com/news.html> (finding strong pro-parent skew approximating 80% in New York due process decisions 2002–2009).

<sup>9</sup> See, e.g., MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS, 1997-2002 (2002), <http://www.dueprocessillinois.org/Access.pdf> (finding a marked pro-district skew in Illinois DPH decisions during 1997–2002); William H. Blackwell & Vivian V. Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*, SAGE OPEN (2015), <https://journals.sagepub.com/doi/full/10.1177/2158244015577669> (finding a marked pro-district skew in Massachusetts DPH decisions in 2005–2013); Ruth Colker, *California Hearing Officer Decisions*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 461 (2012) (finding a marked pro-district skew in California DPH decisions in 2010–2011); Kevin Hoagland-Hanson, *Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV. 1805 (2015) (finding a modest pro-district skew in Pennsylvania DPH decisions in 2008–2012); Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. VA. L. REV. 735 (2016) (finding a marked pro-district skew in North Carolina DPH decisions in 2000–2012); James Newcomer et al., *Hearing and Review Officer Cases*, 123 EDUC. L. REP. 449 (1998) (finding a marked pro-district skew in Pennsylvania DPH decisions that were appealed to the review officer level 1973–1989); Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46 (2003) (finding a marked pro-district skew in Iowa DPH decisions during 1989–2001); G. Thomas Schanding et al., *Analysis of Special Education Hearings in Texas*, SAGE OPEN (2017), <https://journals.sagepub.com/doi/full/10.1177/2158244017715057> (finding a marked pro-district skew in Texas DPH decisions in 2011–2015); Michael B. Shuran & M.D. Roblyer, *Legal Challenges: Characteristics of Special Education Litigation in Tennessee*, 96 NASSP BULL. 44 (2012) (finding a marked pro-district skew in Tennessee DPH decisions in 1996–2007); Perry A. Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007) (finding a marked pro-district skew in Iowa DPH decisions for 1978–2005); cf. 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 (2017) (finding a marked pro-district skew in five states' DPH decisions in 2010–2016); Cope-Casten, *supra* note 3 (finding a marked pro-district skew in Minnesota and Wisconsin DPH decisions for 2000–2011); Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131 (2011) (finding a marked pro-district skew in a sample of 575 decisions across forty-one states in 2005–2006).

<sup>10</sup> The outcomes scales varied, with the most common versions consisting of two or three categories. The two-category scales typically did not make clear how they classified decisions that were partially in favor of each party. The three-category scales mitigated this problem, but often did not provide any specifics for the classification of decisions that were at the margin of each category. *Id.*

The only two previous analyses that aimed at a national scope ended at least a decade ago, and, even more significantly, were not representative of the total population of fully adjudicated DPH decisions for the nation.<sup>11</sup> Both used the commercial database of LRP Publications,<sup>12</sup> which is limited to the varying proportion of DPH decisions that the states submit to the publisher, and that the publisher selects for inclusion depending on space and other proprietary considerations.<sup>13</sup> As a result, this sample is not representative of the national pool of DPH decisions, which the state education agencies generally make available per an IDEA regulatory requirement.<sup>14</sup> The first analysis found the following distribution for the period 1989–2000: for school district - 53%; mixed - 22%, and for parent - 25%.<sup>15</sup> However, the sample also included review officer decisions, and the authors relied on the publisher’s undefined designation of “partial[.]” for the mixed outcomes category.<sup>16</sup>

The second analysis was limited to a random sample of both DPH and review officer

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<sup>11</sup> Zirkel & Skidmore, *supra* note 7; Perry A. Zirkel & Anastasia D’Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002).

<sup>12</sup> This database started in print as the Individuals with Disabilities Education Law Reports (IDELR) and subsequently became available electronically as SpecialEdConnection®.

<sup>13</sup> Evident by reviewing the contents of the LRP database, the coverage of hearing officer decisions is particularly limited in states with a review officer tier, such as New York. Otherwise, the basis for the information about the extent of DPH decision coverage in the LRP database is limited to the author’s informal interactions with various successive legal editors of IDELR. For early evidence of the questionable representativeness of the LRP-available DPH decisions, see Anastasia D’Angelo et al., *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL’Y STUD. 241 (2004) (finding questionable representativeness in the frequency and outcomes of the DPH decisions in the LRP database for six randomly selected states, which did not include New York).

<sup>14</sup> 20 U.S.C. § 1415(h)(4)(A); 34 C.F.R. §300.514(c)(2) (requiring states to make DPH decisions available to the public). However, the regulation does not require a particular procedure. The policy guidance of the IDEA’s administering agency takes the position that such matters are left to the discretion of the states, within the requirements for confidentiality. Letter to Von Ruden, 30 IDELR ¶ 402 (OSEP 1998). The only other applicable agency guidance interprets the IDEA regulations as establishing a 5.5-year minimum period for the public availability of the decisions. Letter to Anonymous, 69 IDELR ¶ 253 (OSEP 2017). However, it does not specify how quickly the states must make the decisions publicly available.

<sup>15</sup> Zirkel & D’Angelo, *supra* note 11, at 745.

<sup>16</sup> *Id.* at 737–38.

decisions in the LRP database for the period 1978–2012.<sup>17</sup> In an attempt at more precise measurement, the authors used issue categories, such as eligibility, free appropriate public education (FAPE)-procedural, and FAPE-substantive, as the unit of analysis and a five-category outcomes scale.<sup>18</sup> As a result, the overall outcomes distribution was as follows: completely for district – 45%; largely for district – 6%; inconclusive or split –8%; largely for parent –8%; completely for parent –35%.<sup>19</sup> However, the problems they encountered included the determination of the “largely” outcomes categories and the conflation from issue category rulings to decisions as the ultimate unit of analysis.<sup>20</sup> Moreover, in retrospect, the resulting conflated distribution of 52% for district and 48% for parent based on the judicial meaning of “prevailing party” status for attorneys’ fees<sup>21</sup> is questionable due to the incomplete information in various DPH decisions for these two remedies, the failure of the analysis to provide commensurate categorization for other remedies, and the variation in applying the general standard for prevailing status.<sup>22</sup> Finally, acknowledging the major limitation of the incomplete

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<sup>17</sup> Zirkel & Skidmore, *supra* note 7, at 540–42.

<sup>18</sup> *Id.* at 543–45.

<sup>19</sup> *Id.* at 553. However, this distribution understated the pro-district effect of the correction procedure for tuition reimbursement and compensatory education. *Id.* at 554. Moreover, the overall pro-district skew was most pronounced for the final five-year interval of 2008–12. *Id.*

<sup>20</sup> The initial difficulty was in weighting different subcategory rulings within an issue category but the compounded subsequent problem was in conflation from issue category to decision as the ultimate unit of analysis. For the initial unit of analysis, the extent of relief in some cases conflicted with the balance of the multiple subcategory rulings. For the ultimate unit of analysis, the added difficulty was that two forms of relief—tuition reimbursement and compensatory education—were issue categories, thus overlapping with FAPE procedural and FAPE substantive. *See, e.g., id.* at 546–50.

<sup>21</sup> *Id.* at 547–49, 550.

<sup>22</sup> In general, the courts have tended to apply this standard less automatically or liberally than the authors did upon their conflation. *E.g., compare* J.M. v. Oakland Unified Sch. Dist., 804 F. App’x 501, 503 (9th Cir. 2020) (ruling that parents were not a prevailing party upon winning the issues of an interim alternate, but not the ultimate, placement); S.P. v. Pa. Dep’t of Educ., 731 F. App’x 113, 116 (3d Cir. 2018) (ruling that parents were not entitled to attorneys’ fees upon obtaining independent educational evaluation at public expense); Giosta v. Midland Sch. Dist. 7, 542 F. App’x 523, 524–25 (7th Cir. 2013) (declining attorneys’ fees when the relief was relatively limited

coverage of the LRP database,<sup>23</sup> the authors recommended analyzing the outcomes of a more complete database for the purpose of generalizability.<sup>24</sup>

### III. METHOD

The purpose of this study was to determine the national outcomes distribution of DPH decision outcomes for a relatively recent six-year period. A secondary purpose was to determine whether New York decisions were such a distinct and major outlier to justify omitting them for a more precise picture of the overall outcomes account. The resulting research questions for this analysis were:

1. What is the overall outcomes distribution of DPH decisions among the fifty states and the District of Columbia?<sup>25</sup>
2. Was the outcomes distribution for the New York DPH decisions so distinct and their frequency so large as to differentiate this state in arriving at the overall representation

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although including compensatory education and a new evaluation), *with* H.E. v. Walter D. Palmer Learning Partners Charter Sch., 873 F.3d 406, 413 (3d Cir. 2017) (ruling that parents qualified as a prevailing party upon obtaining purely prospective procedural relief, which in this case was a DPH).

<sup>23</sup> The analysis also included the other major dimension of DPHs, frequency, for which the authors found that New York was second among the states, accounting for 14% of the decisions. Zirkel & Skidmore, *supra* note 7, at 550. This finding reflects the limitations of the LRP database. *Supra* note 13. In contrast, analyses of the more complete data of the federally funded Center on Alternate Dispute Resolution in Special Education (CADRE) have consistently found that New York is by far, among the fifty states and the District of Columbia, the leader in the number of DPH decisions. *See, e.g.,* Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Analysis*, 376 EDUC. L. REP. 870, 878–80 (2020) (finding that New York accounted for the majority of the DPH decisions nationally for the period 2012–2017, excluding the outlier jurisdiction of Puerto Rico and at a level approximately four times the second-place jurisdiction, the District of Columbia).

<sup>24</sup> Zirkel & Skidmore, *supra* note 7, at 567–68.

<sup>25</sup> We included the District of Columbia in light of its integral place in the history of the IDEA and its usual inclusion with the fifty states in previous empirical analyses. *See, e.g.,* Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed*, 73 ADMIN. L. REV. 833, 834 n.3, 848 (2021). Conversely, we did not include Puerto Rico based on its previously determined “outlier” status. *Id.* at 838 n.20. As a primary reason for this status, the high number of DPH decisions in Puerto Rico stemmed from a class action lawsuit in 1980 that recently appears to have run its course. *See, e.g.,* Lydia Vélez v. Departamento de Educacion, 209 PRSC 79 (P.R. 2022).

of the outcomes of DPH decisions for the nation?<sup>26</sup>

### *A. Nationally Representative Sample*

As specified in a previous article,<sup>27</sup> we assembled a nationally representative pool of fully adjudicated DPH decisions for a series of empirical analyses. The multi-step process included (1) collecting all DPH decisions that were accessible from the states and the District of Columbia for the then-more-recent commonly available six-year period of January 1, 2013 to December 31, 2018<sup>28</sup>; (2) selecting a random and sufficient sample from the four jurisdictions, led by New York, that have particularly high numbers of DPH decisions and formulating corresponding weighting factors for each of these states<sup>29</sup>; and (3) screening out those decisions that did not meet specified criteria for being “fully adjudicated,” including an evidentiary hearing and a written final decision, under the IDEA.<sup>30</sup> The final pool consisted of 2,512 decisions.<sup>31</sup>

Next, for the purpose of this analysis, we randomly selected a sample size within the

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<sup>26</sup> For the initial bases for formulating this question, see *supra* notes 8–9, 13, 23–24 and accompanying text.

<sup>27</sup> Holben & Zirkel, *supra* note 25, 847–53 (2021) (describing in detail the multi-step procedure for assembling the nationally representative pool of fully adjudicated DPH decisions). For the meaning of “fully adjudicated,” see *infra* note 30 and accompanying text.

<sup>28</sup> The resulting total population for the fifty states and the District of Columbia was 11,348 decisions. Holben & Zirkel, *supra* note 25, at 848. For the applicable IDEA regulation and agency guidance for public availability, see *supra* note 14.

<sup>29</sup> These original and sampled numbers for the four jurisdictions, which together accounted for approximately 85% of the step one pool of decisions were New York (7,224 original, 360 sampled), District of Columbia (990 original, 277 sampled), Pennsylvania (614 original, 238 sampled), and California (584 original, 230 sampled). Holben & Zirkel, *supra* note 25, at 846 n.67. The number of sampled cases for each of these four states is based upon a statistical estimation of the minimum number of cases needed to adequately represent each state in the overall pool of cases. *Infra* note 36.

<sup>30</sup> Holben & Zirkel, *supra* note 25, at 849–51 (specifying the criteria for an evidentiary hearing and a written decision that is final). The applicable IDEA regulations and agency guidance were the basic framework for these criteria. *Id.* We also excluded the relatively few decisions that were expedited, solely under Section 504 or a state law separate from rather than corollary to the IDEA, or from the state complaint process. *Id.* at 849.

<sup>31</sup> *Id.* at 852. This pool included 30 decisions designated as “marginal.” *Id.*



range of the representativeness recommendations of two authoritative sources.<sup>32</sup> Specifically, using a random number generator, we selected 250 DPH decisions from the pool of 2,512 decisions. We also used a random number generator for replacement of the relatively few DPH decisions for which (a) the redactions were so extensive so as to preclude a reasonable determination of outcomes or (b) the goodness of fit was insufficient for the specified purposes of our analysis.

### *B. Outcomes Coding*

Based on the pertinent prior research,<sup>33</sup> we selected the decision as the unit of analysis and the following three categories as more reasonable than the win-loss dichotomy:<sup>34</sup>

1 = completely in favor of the parent

2 = mixed

3 = completely in favor of the district

First, to obtain inter-rater reliability for the outcomes coding, we engaged in three rounds of co-scoring, with ten decisions per round, attaining the goal of 90% agreement after the initial rounds.<sup>35</sup>

Next, the first author coded the remaining 220 DPH decision outcomes according to the

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<sup>32</sup> Jacob Cohen, *A Power Primer*, 112 PSYCH. BULL. 155, 157 (July 1992) (recommending, for  $p < .05$ , sample sizes of 107 and 154 for chi-square analysis, assuming a small or medium effect size, respectively); Robert V. Krejcie & Daryle W. Morgan, *Determining Sample Sizes for Research Activities*, 30 EDUC. & PSYCH. MEASUREMENT 607, 608 (1970) (recommending, for  $p < .05$ , a sample size of 333 for a population of 2,500).

<sup>33</sup> *Supra* Section II of this article.

<sup>34</sup> While not selecting it here, the unit of analysis of issue category rulings, with its five-category outcomes scale, may be fitting for follow-up research.

<sup>35</sup> The specific results of the rounds were Round 1 – 80% agreement; Round 2 – 90% agreement; and Round 3 – 90% agreement. Further, Cohen’s kappa values for all three rounds exceeded 0.80, signifying “near perfect” agreement between the raters. Robert L. Johnson & Kelvin Terrell Pompey, *Kappa Coefficient of Agreement*, SAGE ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, MEASUREMENT, AND EVALUATION 915, 916 (2018).

three-category scale, along with any clarifying comments. The resulting shared Google sheet contained the state and number identifying each decision, the outcomes category entry, and the comments column. The second author then uploaded the numerical entries into SPSS, version 29. To ensure a proportional representation for each jurisdiction, we applied a weighting factor for the decisions in the final sample for each of the four high-frequency states.<sup>36</sup>

To analyze the coded data for research question one,<sup>37</sup> we first calculated the non-weighted distribution of DPH outcomes and then applied the weighting factors for the four high-frequency jurisdictions to arrive at the percentages of each outcomes category both nationally and for New York.—For a more focused analysis for research question two,<sup>38</sup> we calculated (1) the proportion of the decisions attributable to New York; (2) a chi-square test of independence to determine whether the outcomes distribution for New York and that for the other fifty jurisdictions together was statistically significant at a high level of probability<sup>39</sup>; and (3) the conditional follow-up of a Cramer’s V effect size test to determine the magnitude of any

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<sup>36</sup> Based on the sampling procedure of the original article (Holben & Zirkel, *supra* note 25 and accompanying text), the weighting factors for the high-litigation states were California - 2.49, District of Columbia - 3.55, New York - 17.80, and Pennsylvania - 2.40. All other states received a weighting factor of 1.0. The calculation of the weighting factor applied the exclusion rate from the initial screening for fully adjudicated decisions to the total number of decisions for each jurisdiction. For example, Pennsylvania’s total number of decisions for the six-year time period was 614. The random sample of Pennsylvania decisions selected from this pool consisted of 238 cases. From these 238 selected decisions, 17 (7%) were excluded, or screened out, as not meeting the definition of “fully adjudicated.” *Id.* Applying that 7% exclusion rate to the total number of decisions (n=614) in the six-year time period yielded an estimate of 44 excluded cases, or 570 included cases, if all cases for the jurisdiction were screened. Therefore, the ratio of estimated included cases in the population to actual included cases in the random sample is 570/238, yielding a weighting factor of 2.4. In establishing the final sample for this analysis, we used these weighting factors as multipliers to restore a proportion for these four jurisdictions that reflects their overall representation in the national case population of 11,348 decisions, thereby converting the 250 unweighted cases into an actual weighted sample of 1,083 cases.

<sup>37</sup> *Supra* text accompanying note 25.

<sup>38</sup> *Supra* text accompanying note 26.

<sup>39</sup> A chi-square test for independence compares frequency distributions for two categorical variables to determine the degree to which they differ. Brian S. Gordon, *Chi-Square Test*, in SAGE ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, MEASUREMENT, AND EVALUATION 268, 269 (Bruce B. Frey ed., 2018).

significant differences resulting from the chi-square analysis.<sup>40</sup>

#### IV. FINDINGS

Table 1 presents the outcomes distribution of the DPH decisions, after applying the re-weighting multipliers, for all of the jurisdictions together, including New York. Thus, the percentages are based on the weighted-number ( $n_w$ ) in each subcategory.<sup>41</sup>

Table 1. *National Distribution of Decision Outcomes w/o Differentiation for New York*

Outcome	National
For Parent	67% ( $n_w=722$ )
Mixed	11% ( $n_w=119$ )
For District	22% ( $n_w=242$ )

Review of Table 1 reveals that the national distribution that includes New York is strongly skewed in favor of parents, with a limited proportion of decisions in the intermediate “mixed” category.

Second, we found that New York accounted for the clear majority of the national total of fully adjudicated decisions,<sup>42</sup> thus potentially having a major effect on the overall outcomes

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<sup>40</sup> In contrast to the p-value, which indicates the statistical significance of differences in the chi-square distribution, *infra* note 44, the calculation of effect size measures the magnitude of the difference, which provides the researcher with a sense of the practical effects of any statistically significant differences. See, e.g., Jacob Cohen, *Things I Have Learned (So Far)*, 45 AM. PSYCH. 1306, 1310 (1990). The Cramer’s V test uses the results of the chi-square algorithm to estimate the practical effects of these differences. See, e.g., Christopher J. Ferguson, *An Effect Size Primer: A Guide for Researchers and Clinicians*, 40 PRO. PSYCH. RES. & PRAC. 532, 533–34 (2009).

<sup>41</sup> The corresponding unweighted number ( $n_u$ ) for each outcomes category for the sample of 250 cases was as follows:

For Parent  $n_u=85$   
 Mixed  $n_u=45$   
 For District  $n_u=120$

<sup>42</sup> Specifically, after re-weighting based on the respective multipliers for the four high-frequency jurisdictions, New

results. Table 2 provides the outcomes distribution for New York as compared to the other fifty jurisdictions taken together, along with the corresponding chi-square analysis, based on the weighted numbers.<sup>43</sup>

Table 2. *Distribution of Decision Outcomes for New York and the Remainder Nationally*

Outcome	New York	National w/o New York	Chi-Square ( $\chi^2$ )
For Parent	84% (n <sub>w</sub> =641)	26% (n <sub>w</sub> =81)	$\chi^2$ (df=2, n=1083) = 342.57*** Cramer's V = .562
Mixed	5% (n <sub>w</sub> =36)	26% (n <sub>w</sub> =83)	
For District	12% (n <sub>w</sub> =89)	48% (n <sub>w</sub> =153)	

\*\*\* p<.001

The columns for New York and the national level without New York reveal dramatically distinct outcomes distributions, with the proportions being notably different for each category. Overall, the skew in New York was overwhelmingly in favor of the parents, with a small percentage in the mixed category, whereas the national level without New York was skewed more moderately toward the district, approaching a 2:1 ratio, with a sizeable proportion in the mixed category. The column for the chi-square analysis revealed that the outcomes distribution for New York was significantly different from that of the combination of the other fifty jurisdictions at a very high

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York accounted for 766 (66.7%) of the total number (1083) of decisions in Table 1.

<sup>43</sup> The corresponding unweighted number (n<sub>u</sub>) for each outcomes category for the sample of 250 cases was as follows:

	New York	National w/o New York
For Parent	n <sub>u</sub> =36	n <sub>u</sub> =49
Mixed	n <sub>u</sub> =2	n <sub>u</sub> =44
For District	n <sub>u</sub> =5	n <sub>u</sub> =114

level of probability<sup>44</sup> and a moderate effect size.<sup>45</sup> In other words, it is highly likely that the distinct difference between the outcomes in New York and the rest of the nation for this sample is generalizable to the total population of fully-adjudicated decisions.

## V. DISCUSSION

The interpretation of the findings of this outcomes analysis is limited to three areas on a macro—or overall—basis from a research perspective: conclusion, implications, and limitations/recommendations.

### **Overall Conclusion**

This empirical analysis concluded that New York is a clear outlier. It not only accounts for two-thirds of all of the fully adjudicated decisions for this relatively recent six-year period,<sup>46</sup> but also has a distinctly different outcomes pattern.<sup>47</sup> Thus, ascertaining the overall outcomes distribution of fully adjudicated DPH decisions, New York should be differentiated from the rest of the nation.

Moreover, for several reasons, New York City is almost entirely responsible for this outlier status.<sup>48</sup> First, it accounts for approximately 95% of New York state’s fully adjudicated

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<sup>44</sup> The conventional prerequisite levels of probability for statistical significance are  $p < .05$  or  $p < .01$ . Hyung Won Kim, *p Value*, in SAGE ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, MEASUREMENT, AND EVALUATION 1195 (Bruce B. Frey ed., 2018).

<sup>45</sup> Although various fields of study differ in their interpretations of effect sizes, we used the framework of the aforementioned source for social sciences, which identifies a minimum effect size of .2 for small effect, .5 for moderate effect, and .8 for large effect. Ferguson, *supra* note 40, at 533.

<sup>46</sup> Although the end of the period is already five years old, we found it infeasible to improve further upon the periods for the previous pertinent research (*supra* note 9) because (1) some of the states are very slow in making their decisions available, and (2) we do not have external funding or qualified research assistants for the time-consuming process of collecting the decisions and screening out those that are not fully adjudicated.

<sup>47</sup> Comparing McMahon’s earlier outcomes findings in New York (*supra* note 8) with the corresponding findings for other jurisdictions (*supra* note 9) provided the initial basis for the hypothesis for this confirming finding.

<sup>48</sup> For a discussion of contributing factors for New York City’s outlier status, including its “policy-based and bureaucratic decision-making,” its high per capita rate of DPH filings, and its high percentage of special education

decisions<sup>49</sup> and has its own hearing-officer system.<sup>50</sup> Second, it has a mounting and staggering backlog of DPH cases<sup>51</sup> that resulted separately in a class action lawsuit,<sup>52</sup> and, as one of outgoing Mayor de Blasio's last actions before leaving office, a sudden shift in the hearing-officer system from contracted private attorneys to the City's administrative law judge agency.<sup>53</sup>

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students see Joseph B. Tulman et al., *Are There Too Many Due Process Cases?*, 18 UDC L. REV. 249, 266–71 (2015). Tulman et al. also characterized the District of Columbia and Puerto Rico as outliers. *Id.* at 253. However, while we agree with Tulman regarding Puerto Rico, we do not concur about the District of Columbia for two key reasons: first, they only focused on frequency per capita in 2012–2013, whereas the frequency overall and per capita have both dropped dramatically in subsequent years. *See, e.g.*, Zirkel & Gullo, *supra* note 23, at 873; Gina L. Gullo & Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Comparative Enrollments-Based Analysis*, 382 EDUC. L. REP. 454, 458 (2020). Second, the outcomes as found herein were well within the norm of the non-New York jurisdictions and, as found in our predecessor analysis, the District of Columbia has become a leader in the timely completion of its fully adjudicated DPH decisions. Holben & Zirkel, *supra* note 25, at 857.

<sup>49</sup> E-mail from Cathryn Tisenchek, Supervisor of Due Process Unit, New York State Education Department, to Diane Holben, Associate Professor of Education, East Stroudsburg University (Aug. 24, 2020, 14:14 EST) (reporting that New York City accounted for 96% of the DPH decisions for New York State during the six-year period 2013–2018).

<sup>50</sup> *See, e.g.*, Impartial Hearings, NYC PUBLIC SCHOOLS, <https://www.schools.nyc.gov/learning/special-education/help/impartial-hearings> (last visited Nov. 8, 2023).

<sup>51</sup> *See, e.g.*, Reema Amin, *As Special Education Complaints Soar in NYC, the State Wants Hearing Officers to Take More Cases*, CHALKBEAT (Nov. 15, 2021, 3:16 PM), <https://ny.chalkbeat.org/2021/11/15/22784104/nyc-special-education-complaints-backlog-hearing-officers>; *see also* Holben & Zirkel, *supra* note 25, at 831 n.33. According to the City's representative, as a result of a significant upward trajectory in DPH case filings starting in 2017, the backlog reached 11,000 cases in November 2021. E-mail from Liz Vladeck, General Counsel of NYC Public Schools, to Noel Garcia, Deputy Commissioner of Special Education Division of NYC Office of Administrative Trials and Hearings, and Dan Morton Bentley, General Counsel of New York State Education Department (Nov. 1, 2023) (on file with author).

<sup>52</sup> *J.S.M. v. N.Y.C. Dep't of Educ.*, No. 20-cv-705 (E.D.N.Y. filed Feb. 7, 2020). For the complaint and related filings including an order on motion for partial summary judgment on Sept. 6, 2023, *see J.S.M. v. New York City Department of Education* (1:20-cv000705), CT. LISTENER (last updated Nov. 6, 2023), <https://www.courtlistener.com/docket/16820426/jsm-v-new-york-city-department-of-education/>.

<sup>53</sup> *See, e.g.*, Susan Edelman, *De Blasio's Sudden Shift of Special-Ed Hearings a "Betrayal" of Families Lawyers Say*, N.Y. POST (Jan. 1, 2022), <https://nypost.com/2022/01/01/de-blasio-shifts-doe-special-ed-hearings-at-11th-hour/> (reporting outgoing mayor's order delegating the authority for IDEA hearings to the City's Office of Administrative Trials and Hearings (OATH)); *see also* E.F. v. Adams, 80 IDELR ¶ 191 (S.D.N.Y. 2022) (denying a motion for preliminary injunction against the change in the City's DPH system). According to its representative, OATH has explored various special strategies, including bundling cases, direct testimony only by affidavit, and oral closing arguments to address the backlog. Noel Garcia, Deputy Comm'r of OATH of Special Educ. Hearings Div., Handling Large Volume Dockets, Presentation at the annual conference of the National Association of the Administrative Law Judiciary (Oct. 16, 2023) (PowerPoint on file with author). According to the school district's representative, OATH has made dramatic progress in resolving the bottleneck since fully taking over in July 2022, but the case costs had already amounted to \$1.1 billion as of the end of four months of the fiscal year 2023. Vladeck, *supra* note 51.

Third, payment issues associated with City-specific features of its special education implementation continue to contribute to the “Syspheap” and distinctive nature of its DPH cases.<sup>54</sup> These features include the so-called “Nickerson letters” for implementing enforcement of the long-standing *Jose P. v. Ambach* class action.<sup>55</sup> They also include related service authorizations (RSAs) and special education teacher support services (SETTS), which effectively amount to partial vouchers.<sup>56</sup> Compounded by the relatively murky provisions in New York’s so called “dual enrollment” law that the courts have interpreted as providing added rights to students with disabilities in nonpublic schools,<sup>57</sup> these vouchers have led to abuses by private

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<sup>54</sup> See, e.g., Beth Hawkins, *Due Process, Undue Delays: Families Trapped in NYC’s Decades-Long Special Ed Bottleneck*, THE74 (June 7, 2023), <https://www.the74million.org/article/due-process-undue-delays-families-trapped-in-nycs-decades-long-special-ed-bottleneck>.

<sup>55</sup> See, e.g., *Jose P. v. Ambach*, 669 F.2d 865, 867–68 (2d Cir. 1982) (explaining, in its affirmance, that in each of three cases consolidated in the class action, federal district court Judge Nickerson issued judgments in 1979 and 1980 concluding that New York City had failed to timely evaluate and place students under the IDEA and ordered a detailed remedial plan recommended by a court-appointed special master); see also *Student with a Disability v. N.Y. SEA*, No. 14-026, 553 IDELR 298 (N.Y. SEA Apr. 16, 2014), <https://www.sro.nysed.gov/decision/2014/14-026>; Judge Nickerson also issued a further order in *Jose P. v. Ambach*, 553 IDELR 298 (E.D.N.Y. 1982) (explaining that “[the remedy commonly known as a ‘Nickerson letter’] authoriz[es] a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent.”).

<sup>56</sup> See, e.g., OFFICE OF N.Y.C. COMPTROLLER BRAD LANDER, *COURSE CORRECTION: EXPANDING AND STRENGTHENING SPECIAL EDUCATION SERVICES IMPROVES STUDENT OUTCOMES AND REDUCES COSTLY DUE PROCESS CLAIMS* 16 (2023), <https://comptroller.nyc.gov/reports/course-correction/>

Although DOE is supposed to issue RSAs and P4s [i.e., SETTTS] to parents of eligible students automatically when DOE has been unable to assign a provider to meet a child’s service mandate, this often does not happen. Furthermore, once DOE issues the voucher, although DOE is supposed to continue to help the parent find a provider, in practice, the parent must find a provider to accept the voucher on their own. Finding a provider has become increasingly difficult because DOE has not increased the rate for RSA/P4 providers in at least 20 years and is failing to pay the providers in a timely manner. *Id.*

<sup>57</sup> N.Y. EDUC. LAW § 3602-c. See, e.g., *R.G. v. N.Y.C. Dep’t of Educ.*, 585 F. Supp. 3d 524, 530 (S.D.N.Y. 2022) (interpreting this New York law and its cited related state law as providing DPH jurisdiction for challenging the services offered to nonpublic school students with disabilities); *Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K.*, 926 N.E.2d 250, 252 (N.Y. 2010) (interpreting the dual enrollment law as entitling the child to a 1:1 aide in the nonpublic school based on his individual need for FAPE as equal access). The primary effects on DPHs are expanding the right to services for students with disabilities in public schools and providing the jurisdiction for hearing officers to apply this expanded right. For the contrasting corresponding provisions under the IDEA, see 20 U.S.C. § 1412(a)(10)(A) (providing a limited, conditional right to “equitable services” for children placed by their parents in private schools); 34 C.F.R. § 300.140(a) (limiting DPH jurisdiction to the child find issue for such children).

schools and private providers that overlap with the backlogged agenda of the City’s DPH system.<sup>58</sup> Another contributor to the distinguishable nature of the City’s DPH decisions is the particular emphasis on tuition reimbursement for unilateral private placements,<sup>59</sup> which is another target of shifting mayoral policies.<sup>60</sup> In a recent report, the New York City comptroller’s findings included that the school system’s spending for due process hearing claims increased from \$33 million in 2012 to \$372 million in 2022, with the spending increase predominantly stemming from payments for SETTTS, RSAs, and tuition reimbursement.<sup>61</sup>

Strongly reinforcing the outlier conclusion is the nature of the New York decisions, in the comments that the first author recorded upon entering the outcomes data, all but one of the forty-three DPH decisions from New York in the reviewed sample were from New York City, and

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<sup>58</sup> See, e.g., Brian Rosenthal, *How Hasidic Schools Seize on Special Ed Windfall*, N.Y. TIMES (Dec. 29, 2022), <https://www.nytimes.com/2022/12/29/nyregion/hasidic-orthodox-jewish-special-education.html> (reporting such abuses resulting from the interaction with the “unusually generous state law” applicable to special education students in nonpublic schools and shifting mayoral policies, including that “[m]ore than two dozen different companies have opened in the past eight years, . . . [with s]ome of them now bill[ing] more than \$200 an hour per student—five times the government’s standard rate—for what is essentially tutoring”).

<sup>59</sup> See, e.g., Jessica Winter, *The Parents Who Fight the City for a “Free Appropriate Public Education,”* THE NEW YORKER (May 11, 2023), <https://www.newyorker.com/news/annals-of-education/the-parents-who-fight-the-city-for-a-free-appropriate-public-education> (providing a parent’s perspective in relation to the ongoing private school tuition reimbursement controversy in New York City and referring to the City’s DPH system as a “bizarro world”).

<sup>60</sup> See, e.g., Joseph Berger, *Fighting Over When Public Should Pay Private Tuition for Disabled*, N.Y. TIMES (Mar. 21, 2007), <https://www.nytimes.com/2007/03/21/education/21education.html>; Jim Epstein, *In New York, Rich Disabled Kids Get the City to Send Them to Private School*, REASON (Jan. 25, 2018, 2:04 PM), <https://reason.com/video/2018/01/25/voucher-special-needs-reimbursement-nyc/>; Alex Zimmerman, *Banks Wants to Cut Private School Payments for NYC Students with Disabilities*, CHALKBEAT (Aug. 11, 2022, 4:32 PM), [https://ny.chalkbeat.org/2022/8/11/23302326/david-banks-special-education-private-school-tuition-nyc#:~:text=Banks%20wants%20to%20cut%20private%20school%20payments](https://ny.chalkbeat.org/2022/8/11/23302326/david-banks-special-education-private-school-tuition-nyc#:~:text=Banks%20wants%20to%20cut%20private%20school%20payments;); Alex Zimmerman, *New York City Now Spends \$325 Million a Year to Send Students with Disabilities to Private Schools*, CHALKBEAT (Jan. 7, 2019, 1:19 PM), <https://ny.chalkbeat.org/2019/1/7/21106489/new-york-city-now-spends-325-million-a-year-to-send-students-with-disabilities-to-private-schools>.

<sup>61</sup> *Id.* at 2, 12. In contrast, the mainstay for DPH decisions more generally, which are the procedural and substantive requirements for IEPs, was a relatively minor issue in these claims. *Id.* For another example of the particular prominence of such payment issues in New York City, see, *M.G. v. DOE (Bronx Related Services): Notice of Proposed Class Action Settlement*, NYC PUBLIC SCHOOLS <https://www.schools.nyc.gov/learning/special-education/help/m.g.-vs-doe-notice-of-proposed-class-action-settlement> (last visited Nov. 6, 2023) (providing notice of 2021 settlement of class action lawsuit concerning RSA vouchers).



unlike this single decision and the general range of decisions from the other fifty jurisdictions, these forty-two New York City decisions shared a distinct combination of characteristics. First, although the other jurisdictions' DPH decisions varied in length and complexity, with those from California and Washington State being at one end for multiple issues and detailed analyses, the New York City decisions were beyond the other extreme in largely being short and with cursory legal analysis, with more attention to the parties' positions than to specific factual findings and legal conclusions. Second, an undue proportion of the cases concerned the aforementioned<sup>62</sup> City-focused issues of tuition reimbursement, RSAs, SETTTS, and Nickerson letters rather than the staple categories of identification (including child find, evaluation, and eligibility) and FAPE (including the procedural and substantive dimensions).<sup>63</sup> Third, and most significant, in at least one-third of these decisions, the defendant New York City school system explicitly or implicitly defaulted on its liability.<sup>64</sup> Exemplifying the few New York DPH decisions in the reviewed sample that were in the district's favor were the single case outside the City, a case in which the hearing officer found a denial of FAPE but awarded no remedy,<sup>65</sup> and a case clearly based on res

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<sup>62</sup> *Supra* notes 55–61 and accompanying text.

<sup>63</sup> For overviews of these staples, see Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 TCHR. EDUC. & SPECIAL EDUC. 263 (2015) (providing an overview of the key components); Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility Under the IDEA*, 357 EDUC. L. REP. 30 (2018) (focusing on the threshold identification component); Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE Under the IDEA*, 346 EDUC. L. REP. 318 (2017) (focusing on the central FAPE component). For the wider catalog of IDEA issues, see Zirkel & Skidmore, *supra* note 7, at 570–73.

<sup>64</sup> This frequent default of liability is often accompanied by the lack of district legal representation at a sizeable number of NYC due process hearings. Unlike other states, the New York City Department of Special Education authorizes trained non-attorney representatives to serve as the district representative at the impartial hearing in lieu of an attorney. See NEW YORK CITY DEPARTMENT OF EDUCATION, SPECIAL EDUCATION STANDARD OPERATING PROCEDURES MANUAL 121 (2021), <https://infohub.nyced.org/in-our-schools/working-with-the-doe/special-education-providers/standard-operating-procedures-manual>. The high frequency of district default of liability on primarily City-specific issues (e.g., RSAs, SETTTS, tuition reimbursement) may incentivize the use of these non-attorney representatives to reduce the litigation costs to the district.

<sup>65</sup> No. 2014-IH(1254) (July 30, 2014), <https://www.p12.nysed.gov/specialed/dueprocess/decisions/home.html> (in third zip file for “2014 Decisions”).

judicata.<sup>66</sup> Similarly, exemplifying the few decisions in the mixed category was a case in which the parent won for central issue of eligibility but did not obtain the requested parts of relief at the City-specific rate enhancement<sup>67</sup> and a case in which the hearing officer awarded RSAs for only part of the requested period.<sup>68</sup>

### **Overall Implication**

The major implication of the outlier conclusion is that both policymakers and stakeholders under the IDEA should differentiate New York in examining and evaluating the national outcomes distribution of DPH decisions. For example, in considering whether the outcomes distribution of a particular jurisdiction reasonably raises issues warranting systemic reform,<sup>69</sup> an overall basis of comparison should be the national outcomes distribution without, rather than with, the New York cases. Institutional authorities and individual stakeholders in New York should consider the findings, which indicate that its norm differs from the general pattern of other jurisdictions.<sup>70</sup> Indeed, although previous analyses have concluded that special education litigation—at both the hearing officer and the court levels—amounts to “two worlds,” with a small cluster of jurisdictions accounting for most of the frequency,<sup>71</sup> this analysis demonstrates that

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<sup>66</sup> No. 510456-171338-20180831 (Aug. 30, 2018), <https://www.p12.nysed.gov/specialed/dueprocess/decisions/home.html> (in third zip file for 2018 Decisions (New York City)).

<sup>67</sup> No. 2013-348 (Aug. 1, 2013), <https://www.p12.nysed.gov/specialed/dueprocess/decisions/home.html> (in first zip file for “2013 Decisions”).

<sup>68</sup> No. 2013-544 (Jan. 16, 2013), <https://www.p12.nysed.gov/specialed/dueprocess/decisions/home.html> (in second zip file for “2013 Decisions”).

<sup>69</sup> *See, e.g., supra* note 6.

<sup>70</sup> *Supra* Table 2.

<sup>71</sup> *E.g., Zirkel & Gullo, supra* note 23, at 875 n.33 (referring to “two worlds” of DPH decisions); Tessie Rose Bailey & Perry A. Zirkel, *Frequency Trends of Court Decisions Under the IDEA*, 28 J. SPECIAL EDUC. LEADERSHIP 3, 9 (2015) (finding court decisions under the IDEA to fit the same two-worlds pattern).

New York City represents a distinct planet within the universe of DPH decisions. Indeed, the longitudinal national data that CADRE periodically reports for the frequency of fully adjudicated DPHs are largely dependent on the fluctuating policies and practices in New York City.<sup>72</sup>

### **Research Limitations and Recommendations**

The two principal limitations exist at the macro and micro levels, respectively. At the macro level, it is crucial to consider outcomes, like frequency and data, within the context of the proverbial “iceberg” of litigation.<sup>73</sup> For example, under the IDEA, the filtering effect of pre-DPH decision dispositions manifests in the varying filing-to-decision ratios within each jurisdiction,<sup>74</sup> and post-DPH decision dispositions significantly include settlements and varying levels of judicial appeal.<sup>75</sup>

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<sup>72</sup> *Supra* note 23. For an example of these dispute resolution data trends, see THE CENTER FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION, IDEA DISPUTE RESOLUTION DATA SUMMARY FOR U.S. AND OUTLYING AREAS: 2010-11 TO 2020-2021 12 (2022), <https://www.cadeworks.org/resources/cadre-materials/2020-21-dr-data-summary-national>. Another limitation of the CADRE data is that, due to mandated collection procedures, states do not record those DPH decisions when the filing occurs in one reporting year and the decision falls into a subsequent year. U.S. DEP’T OF EDUC., *EMAPS USER GUIDE: IDEA PART B DISPUTE RESOLUTION SURVEY 22* (2023), <https://www2.ed.gov/about/inits/ed/edfacts/index.html>. Such instances are not negligible because the average period from filing to decision for non-expedited cases is approximately 200 days. Holben & Zirkel, *supra* note 25, at 853. Moreover, the delay in New York’s public posting of its decisions—often 2-3 years after issuance—complicates the verification of CADRE’s accuracy. For example, New York only posted the 2020 decisions in late summer 2023. *E.g.*, E-mail from Tracy Davidson, Supervisor of Due Process Unit, N.Y. State Education Department, to Diane Holben, Associate Professor of Education, East Stroudsburg University (Sept. 4, 2023) (reporting that New York recently published its decisions for 2020 and plans to post the decisions for 2021 later in the year); *Impartial Hearing Decisions*, NYS EDUCATION DEPARTMENT), <https://www.nysed.gov/special-education/impartial-hearing-decisions>.

<sup>73</sup> *See, e.g.*, Perry A. Zirkel, *The Role of Law in Special Education*, EXCEPTIONALITY (in press), <https://doi.org/10.1080/09362835.2023.2274350> (depicting the successive and not entirely or permanently frozen levels of IDEA litigation within the iceberg metaphor, including settlements, hearing officer decisions, review officer decisions, and the various succeeding judicial levels); *cf.* 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) (comparing the outcomes of published versus unpublished court decisions under the IDEA).

<sup>74</sup> *E.g.*, Zirkel & Gullo, *supra* note 23, at 878–81 (finding filing-to-adjudication ratios for DPH decisions during 2012–2017 ranging from 2.3 (Idaho) to 93.5 (Tennessee), and averaging approximately 19.3).

<sup>75</sup> *See, e.g.*, Perry A. Zirkel, *Is Appealing a Hearing Officer’s Decision Likely to Result in a Major Outcome Change in the Final Court Decision?*, 393 EDUC. L. REP. 1 (2021) (finding that for a sample of IDEA DPH decisions in the LRP database that proceeded to a final judicial appeal had either no (70%) or slight (11%) change). For examples of judicial appeals within our final sample of 250 DPH decisions, see *E.B. v. Baldwin Park Unified Sch. Dist.*, 77

At the micro level, the key caveat is be aware of the limitations in subjecting adjudicative decisions to empirical measurement. More specifically, much like the challenge of selecting a representative sample of “fully adjudicated” DPH decisions, there was also uncertainty when categorizing decisions into the three-category outcomes scale. This uncertainty primarily arose in cases where the determination was borderline, meaning it was very close to the dividing line between categories. For outcomes, the two determining factors are the rulings and the relief. In most cases they two factors were in the same direction, i.e., in favor of the district, some in favor of each side (thus, “mixed”), or in favor of the parent. However, the close judgment call was in the occasional case in which (a) the issue rulings were in favor of the parent but the hearing officer did not award any relief or, even more rare, (b) the issue rulings were in favor of the district but the hearing officer ordered a consolation-like remedy.<sup>76</sup> Although the broad mixed category avoided the difficulty of determining the relative weight of issues, such as cases with two or more issues and rulings split between the parties or cases in which the hearing officer ordered less relief than the parent sought, close calls arose when the parent-favorable issue or relief was very limited.

As a result, further research is recommended to determine whether more precisely defined classification of decision outcomes is feasible. Other recommended lines of follow-up research within the same final pool of DPH decisions apply to New York and the overall group, respectively. For the decisions in New York, illustrative recommendations include (a) comparing the issues and outcomes between the fully adjudicated cases in New York City before and those

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IDELR ¶ 164 (C.D. Cal. 2020) (affirming a California DPH decision); *Lubbock-Cooper Indep. Sch. v. Sherri D.*, 74 IDELR ¶ 18 (N.D. Tex. 2019) (reversing a Texas DPH decision).

<sup>76</sup> Herein, we decided on a “for district” classification in both of these marginal situations.

after the change to the new, ALJ system, and (b) ascertaining the extent of appeals to the review officer level and, for those appeals, the extent of change in the outcomes distribution. For the decisions in all of the jurisdictions together, with due differentiation for New York, it would appear worthwhile to determine whether the decision outcomes significantly differed (a) between hearing officer systems that use full-time administrative law judges and those that rely on part-time contracted attorneys, or (b) among the major issue categories, such as eligibility and FAPE. Moreover, it would be worthwhile to extend the present outcomes analysis in the future to an updated representative sampling of fully adjudicated decisions. Such an application should include determining whether the recent change in the hearing officer system in New York City affects the national outcomes distribution in the next few years.<sup>77</sup>

In conclusion, obtaining an accurate national snapshot of the outcomes distribution for DPH decisions warrants a not only wide, but also split screen. Overall, the approximate 2:1 pro-district ratio with a non-negligible mitigating mixed category for the national outcomes distribution without New York correlates closely with the outcomes distribution at the judicial tip of the litigation iceberg.<sup>78</sup> In contrast, an equalized win-loss distribution is not the ultimate measure of a fair, accurate, and impartial DPH system under the IDEA. Such an expectation fails to recognize various factors that weigh in favor of districts, such as (a) the relatively low substantive structuring, including the ad hoc individualized nature, of the IDEA, (b) the

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<sup>77</sup> Edelman, *supra* note 53.

<sup>78</sup> See, e.g., Perry A. Zirkel & Zorka Karanxha, *Longitudinal Trends in Special Education Case Law: An Updated Analysis*, J. SPECIAL EDUC. LEADERSHIP (forthcoming) (finding outcomes distribution for published court decisions under the IDEA during 1998–2022 of 55% for districts, 19% mixed, and 26% for parents). This comparison uses the decision at the DPH and at the court levels as the unit of analysis. As a result, states that seek a national frame of reference for examining the outcomes distribution in their own jurisdiction should recognize not only reasonable variance among the states but also another relevant difference. Specifically, with or without New York, the results reported in Table 1 and 2 are not averages of the percentages using each state as the unit of analysis, which would weight each state equally rather than in proportion to the frequency of their DPH decisions.

imbalance of power and expertise, including specialized legal representation, between the parties, and (c) the skewing effect of the strata below and above the hearing officer level in the litigation iceberg, including judicial deference and precedent.<sup>79</sup>

Moreover, although there is merit in the selection, compensation, training, and accountability of hearing officers, the higher and broader priority should be focusing resources on achieving improved outcomes as a matter of education rather than adjudication. Parents, districts, and our nation share an interest in optimizing the outcomes of special education, with the standard being collaboration based on evidence-based professional best practice as differentiated from competition to win or lose based on the legal minimum.

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<sup>79</sup> See, e.g., Perry A. Zirkel, *Special Education Hearing Officers: Balance and Bias*, 24 J. DISABILITY POL'Y STUD. 66 (2012) (explaining more comprehensively the fallacy of a 50%-50% box score for DPH decisions under the IDEA).