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DISTRICT-INITIATED DUE PROCESS DECISIONS UNDER THE IDEA: A FOLLOW-UP ANALYSIS[a1]

Under the Individuals with Disabilities Education Act (IDEA),[1] which provides for a free appropriate public education (FAPE) for each eligible child,[2] the first step for adjudication in many cases is the due process hearing (DPH).[3] The filing party for a DPH may be the parent or the school district.[4] The published research on the frequency and outcomes of DPH decisions has been relatively extensive generally, with the assumption that they were almost all attributable to parent filings.[5] Until recently, the research was relatively negligible for DPH decisions in which the school district was the filing party.[6] Serving as a springboard study, an analysis of DPH decisions in five states for the period 2010-2016, which was part of a comparison with the investigative administrative dispute resolution mechanism of the ***585** IDEA, provided initial frequency and outcomes data based on the issue category rulings (ICRs) in these decisions.[7]

The most recent step was an analysis of a random sample of 144 district-initiated DPH decisions[8] from the 50 states and the District of Columbia for the period 2013-2018.[9] The major findings were that (a) the district-initiated category accounted for 3.8% of the fully adjudicated DPHs for that recent period;[10] (b) independent education evaluations (IEEs) at public expense accounted for approximately half of the 157 ICRs in these decisions, with almost all of the remainder evenly split between consent for evaluations/reevaluations and FAPE for program/placement;[11] (c) the respective success rates for school districts in these three issue categories were, in descending order, 98% for consent for evaluations/reevaluations, 80% for FAPE program/placement, and 77% for IEEs at public expense;[12] and (d) the overall outcomes distribution upon converting the unit of analysis from ICRs to decisions was 79% for school districts, 4% mixed, and 17% for parents.[13]

The purpose of this follow-up analysis is to examine two variables within these district-initiated decisions that were potentially related to their outcomes--burden of persuasion and attorney representation. As the framework for this analysis, the next section explains the meaning and import of these two features of DPH decisions in the IDEA context, including the limited previous empirical research.

***586** Framework

Burden of Proof

Although technically encompassing the burden of production, the burden of proof is used herein as shorthand for burden of persuasion.[14] Neither the IDEA legislation or regulations explicitly address which party has the burden of persuasion at a DPH. Largely resolving the rather diverse lower court answers to this question,[15] the Supreme Court's 2005 decision in *Schaffer v. Weast* held that in a DPH under the IDEA "the burden lies, as it typically does, on the party seeking relief."[16] Due to the factual contours of the case, which was in the issue category of appropriate programs/placements, the Supreme Court alternatively and

more specifically held that "[t]he burden of proof in an administrative hearing challenging an IEP [i.e., individualized education program] is properly placed upon the party seeking relief."[17] For the same reason, the Court declined to decide whether its interpretation of the IDEA preempts state laws that place the burden of persuasion on school districts.[18]

The *Schaffer* Court's wording potentially raises questions in the context of district-initiated DPH decisions: (1) Does "the party seeking relief" automatically refer to the filing party?;[19] (2) Does the party "challenging an IEP" include a district that is seeking to validate or obtain approval for an IEP[20] or, more generally, for issues beyond appropriate program/placement, such as eligibility or IEEs?;[21] (3) Are the relatively few state laws that place the burden of persuasion, at least in some circumstances, on the district[22] binding in the many ***587** jurisdictions in which the courts have not addressed the preemption issue?[23] Subject to the analysis of district-initiated DPH decisions herein, the answer to all of these questions would seem to be "yes,"[24] except for the very few jurisdictions that have contrary judicial rulings.[25]

Based on the unusual circumstances of the case, the *Schaffer* Court included, by way of dicta, another relevant clarification. Pointing out that in this particular case the outcome effect of burden of persuasion only came into play due to the equal balance of the determinative evidence on each side,[26] the Court provided the reminder that "very few cases will be in evidentiary equipoise."[27] Thus, like the reputed rule in baseball that a tie goes to the runner, the burden of persuasion would only come into play in the truly exceptional case, otherwise being just a matter of preponderant evidence.

Although the professional literature includes various analyses of *Schaffer* and advocacy for amending the IDEA to address the burden of persuasion,[28] the published empirical research on the burden of proof in DPH decisions is relatively scant. For example, an analysis of 192 DPH decisions pre-*Schaffer* and 65 DPH decisions for the post-*Schaffer* period ending in 2013 found that although after *Schaffer* a significantly higher percentage of DPH decisions addressed or applied the burden of persuasion and placed it on the filing party, there was no significant difference in the outcomes distribution of the decisions and none of decisions explicitly identified its effect based on the closeness of the case.[29]

***588 Attorney Representation**

The IDEA provides both parties with the right to legal representation.[30] However, in various jurisdictions specialized attorneys are not available or affordable to parents.[31] Moreover, some parents may opt to proceed pro se in DPHs as a matter of personal choice.[32] Relatively extensive empirical research has consistently shown that in the face of school districts almost universally having attorney representation in DPH decisions, parents with attorney representation have prevailed to a significantly higher extent than those who proceeded pro se.[33] However, none of these analyses have separately examined the role of attorney representation of parents in those DPH decisions in which the district was the filing party.

Method

This follow-up analysis for the burden of persuasion and attorney representation variables was based on the same nationally representative sample of district-initiated DPH decisions as the forerunner examination of frequency and outcomes.[34] For burden of persuasion, the author coded each decision as to whether its contents (a) directly *addressed* which party that had this burden and, if so, the cited authority for this conclusion, and (b) ***589** regardless of such direct determination, *applied* this burden.[35] For attorney representation, the author coded a "yes" or "no" for whether the school district and, separately, the parent had legal counsel.[36] For those decisions in which the parent was pro se, the coding included an accompanying note if the decision reported that the parent did not appear at the hearing, resulting in an *ex parte* proceeding. Finally, the results were re-weighted for the four high-volume states to be representative of the national database.[37]

Results

Table 1 provides the distribution of the decisions that (a) directly addressed which party had the burden of proof and/or (b) indirectly did so by applying the burden of proof to an identified party.[38]

Table 1: Extent of Express Treatment of Burden of Persuasion in the Decisions

NEITHER	ONLY ADDRESSED	BOTH	ONLY APPLIED
16%	42%	39%	3%
16%	81% Addressed 42%) Applied		

The first row of percentage entries in Table 1 reveals that most of the decisions specifically addressed the burden of persuasion either alone (42%) or in combination with explicitly applying it (39%), with the remainder not mentioning this matter either directly or indirectly (16%). The bottom row, which conflates the overlapping "both" category, shows that approximately 80% of the district-initiated decisions address the burden of persuasion and approximately 40% apply it, with 16% not mentioning it at all.

Closer examination of the contents of the decisions that addressed the burden of persuasion revealed that (a) these decisions almost uniformly determined that the burden was on the school district; (b) the vast majority cited *Schaffer* as the basis for the determination, without particular distinction among the issue categories; (c) the relatively few state laws that place the burden on school districts were rarely cited regardless of the issue category; (d) the decisions in a handful of states, led by the relatively high-frequency jurisdictions of California and Pennsylvania, largely used boilerplate language for this matter; and (e) none of the decisions explicitly identified the burden of proof as determining the outcome per a tie-breaking effect. The relatively few unusual and largely questionable variations included ***590** Alabama and Texas IEE decisions that relied on the IEE regulations without any accompanying explanation; a California IEE decision that cited *Schaffer* for a burden-shifting approach; a Connecticut decision that cited its state regulation, which is specific to program/placement, for an IEE burden-of-proof determination; a Massachusetts program/placement decision that interpreted *Schaffer* to place the burden on the parent as the "challenging" party even though the district initiated the hearing process;[39] and an Ohio program/placement decision that relied on a 1995 Third Circuit decision that *Schaffer* effectively reversed. Additionally, the aforementioned Pennsylvania boilerplate formulation explicitly acknowledged *Schaffer*'s limitation to cases in equipoise, with a few of these decisions going a step further to disclaim any outcome effect. Finally, moving from identification to application, a Massachusetts decision similarly referenced this limitation, pointing out that although the case was "closely contested," the evidence was not "closely balanced."[40]

Table 2 reports the percentage of the ICRs that were in favor of parents for those who had attorneys and those who were pro se for each of the issue categories and the total sample.[41]

Table 2: Success Rate of Parents With and Without Attorney Representation[42]

	ATTORNEY-REPRESENTED	PRO SE[43]
IEEs	61%	10%
Consent	0%	2%
FAPE	49%	10%
(Misc.)	(50%)	(100%)
TOTAL	53%	9%

[The preceeding image contains the references for footnotes [42] and [43]].

***591** Table 2 reveals that, with limited exceptions,[44] the parents with attorney representation were distinctly more successful than those who proceeded pro se. Part of this overall difference may be attributable to the compounding disadvantage of failing to appear in some of the pro se hearings, which was particularly frequent for the consent and FAPE issue categories.[45]

Discussion

The results for the burden of proof in this follow-up analysis of district-initiated DPH decisions reveal a general consensus not only that the burden is on the school district but also that its outcome-determinative effect is, at least expressly in the decisions, negligible. The consensus is largely based on the broader holding and default rationale of *Schaffer*,[46] and the outcome-determinative effect is based on its equipoise clarification.[47] These overall findings largely align with the scant previous research, which was limited to a less representative and older sampling of DPH decisions that were largely parent-initiated.[48] Moreover, the results, with limited exceptions,[49] confirmed a "yes" answer to the residual questions from *Schaffer*, albeit via generally cursory analyses.[50] Finally, even though these DPH decisions are unusual to the extent of being district-initiated, the frequent direct or indirect identification of the burden of proof is questionable because it not only is mere surplusage but also may have the inadvertent effect of tipping the scales in favor of the other party rather than simply focusing on preponderance of the evidence.

The results for attorney representation square with the extensive previous research.[51] This similarly dramatic difference disfavoring pro se parents is surprising to the extent that the variability is limited for district-initiated decisions, which tend to have outcome odds that are 4:1 in favor of districts.[52] The very low success rates for pro se parents are compounded by the notable proportion of these DPH decisions in which the parents fail to participate in the hearing.[53] On the other hand, the particular advantages that districts have in these cases[54] apply to both attorney-represented and pro se parent cases, thus not explaining the outcomes differential. An intervening but hidden factor is the screening effect of the settlements, withdrawals, and 19-to-1 ratio.[55] Overall, the significant disparity underlines the lack of affordable and available parent-side special education attorneys in many parts of the country.

***592** More research is needed, including qualitative analyses of party perceptions and case dynamics and both quantitative and qualitative analyses of lay advocates. Nevertheless, these findings should help inform policymakers as well as practitioners in their activities to refine the provisions of the IDEA and corollary state laws for just and efficient dispute resolution for students with disabilities.

Footnotes

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1 20 U.S.C. §§ 1401 *et seq.* (2018).

2 *Id.* §§ 1402(9), 1412(a)(1).

3 The reason is the exhaustion doctrine. For cases overly brought under the IDEA, the application is a matter of judicial policy and precent. For claims on behalf of IDEA-eligible students under alternative bases, such as Section 504, the application of this doctrine is based on the IDEA's exhaustion provision (20 U.S.C. § 1415(f)). For the most recent interpretation of this provision, see Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 340 Educ. L. Rep. 19 (2017) (requiring exhaustion of such claims if their gravamen is the IDEA's core obligation of providing a free appropriate public education).

4 20 U.S.C. § 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).

5 *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, 529-40 (2014) (canvassing previous frequency and outcomes analyses in addition to presenting the results of its own national analysis).

6 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).

7 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 selected states during the period 2010-2016 were district-initiated via either filing (n=32) or counterclaim (n=3), which amounted to thirty-eight (8%) of the 486 issue category rulings). The outcomes distribution of these district-initiated ICRs was 8% for parents and 92% for districts. *Id.* at 179 n.69. Moreover, the most frequent issues addressed by these thirty-eight rulings were independent educational evaluations at public expense--45%; consent for evaluation--32%, and program/placement authorization or

validation--18%. *Id.* at 181 n.73. Finally, based on the binary outcomes scale that is compatible with the more precise nature of ICRs as the unit of analysis, the parents' success rate for each of these three categories was: 12% for independent educational evaluations, 0% for consent, and 0% for program/placement. *Id.* at 183 n.79.

8 "Initiated" in this context is synonymous with what is often referred to as those DPHs in which the school district was the "filing" party.

9 Perry A. Zirkel & Diane M. Holben, *District-Initiated Due Process Decisions under the IDEA: Frequency and Outcomes*, 398 Educ. L. Rep. 8 (2022). Among the 144 decisions, thirteen had two ICRs, thus accounting for a total of 157 rulings across the issue categories. *Id.* at 12. Moreover, the results were re-weighted for representativeness based on the following multipliers for the random sampling of the four jurisdictions with the highest volume of fully adjudicated decisions: New York--17.8, District of Columbia--3.5, California--2.5, and Pennsylvania-- 2.4. *Id.* at 10 n.18. For the original compilation of this most complete national database, 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).

10 Zirkel & Holben, *supra* note 9 at 10. In addition, because both parties filed in 1.4% of the decisions, usually as a result of consolidation of separate filings, the parent-initiated category accounted for 94.8% of the decisions. *Id.*

11 Additionally, the Miscellaneous category accounted for a relatively negligible number of ICRs, which mostly concerned continued eligibility upon the district's exiting determination. *Id.*

12 *Id.* A two-category outcomes scale--in favor of parents and in favor of school district--applied to ICRs as the unit of analysis.

13 *Id.* For this three-category outcomes scale applicable to the larger unit of analysis, "mixed" represents those decisions that had one ICR in favor of the parents and another ICR in favor of the district. *Id.*

14 *See, e.g.*, Thomas A. Mayes, Perry A. Zirkel, & Dixie S. Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings under the Individuals with Disabilities Education Act*, 108 W. Va. L. Rev. 27, 33-34 (2005). For the separable issue of quantum, or standard, of proof, see *id.* at 35.

15 *Id.* at 46-72.

16 546 U.S. 49, 51, 58 (2005). The Court explained its reference to the "usual" application as the so-called "default rule" that in most areas of civil litigation "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims." *Id.* at 57.

17 *Id.* at 62:

> We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [the student], as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion.

18 *Id.* at 61-62 ("Because no such law or regulation exists in Maryland, we need not decide this issue today.").

19 In a limited minority of cases, the school district may take the offensive to avoid tuition reimbursement, compensatory education, or other costly remedies, thus seeking only indirect relief via a declaratory judgment.

20 *E.g.*, D.B. v. Esposito, 675 F.3d 26, 35 n.3, 278 Educ. L. Rep. 716 (1st Cir. 2012) ("We understand [*Schaffer*] to mean that a school system does not incur the burden of proof merely by preemptively seeking an administrative determination that a proposed IEP would

comply with the IDEA ... [thereby] defending the adequacy of the IEP, not challenging it .... However, if a school system challenges an existing IEP as over-accommodating, the burden presumably lies with the school system").

21 For IEEs at public expense, the applicable regulations would seem to suggest placing the burden on the district upon its filing independent of or reinforcing *Schaffer*. 34 C.F.R. § 300.502(b)(2) (2018) (specifying that if refusing provision of an IEE 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)).

22 The states that currently fit in this limited category are (1) Delaware, Nevada, New Jersey, and New York for all IDEA DPHs; (2) Connecticut and, most recently, New Hampshire for program and placement; and (3) Georgia in unusual circumstances subject to hearing officer discretion. *E.g.*, Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act*, 38 J. Nat'l Ass'n Admin. L. Judiciary 1, 21 n.93 (2018).

23 For the rare and perhaps only applicable exception, see M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 458-59, 228 Educ. L. Rep. 684 (8th Cir. 2008) (ruling that *Schaffer* preempts the former Minnesota legislation, which placed the burden of proof on the district). For an analysis on the interaction of *Schaffer* and post-*Schaffer* state laws, see Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings under the Individuals with Disabilities Education Act*, 13 Conn. Pub. Int. L.J. 1 (2013).

24 The respective reasons are (1) the "default rule" basis of the basis of the holding (*supra* note 16); (2) the breadth of the repeated initial statement of the holding (*supra* note 17 accompanying text); and (3) the limited, brief ruling in the Eighth Circuit (*supra* note 23) and the acquiescence or reliance in all of the other jurisdictions (e.g., Anello v. Indian River Sch. Dist., 355 F. App'x 594, 598, 255 Educ. L. Rep. 60 (3d Cir. 2009) (citing the Delaware law); Escambia Cnty. Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1264-65 (N.D. Ala. 2005) (relying on the former Alabama regulation)).

25 For the first part of question 2, *see supra* note 20. For the second part of question 2, see M.B. v. S. Orange/Maplewood Bd. of Educ., 55 IDELR ¶ 18 (D.N.J. Aug. 3, 2010) (for exiting the student from eligibility); Anello v. Indian River Sch. Dist., 52 IDELR ¶ 11 (D. Del. 2009), *aff'd on other grounds,* 355 F. App'x 594, 255 Educ. L. Rep. 60 (3d Cir. 2009) (for child find). For question 3, *see supra* note 23.

26 Schaffer v. Weast, 546 U.S. at 55.

27 *Id.* at 58; *see also id.* at 69 (Breyer, J., dissenting) ("rara avis--a case of perfect evidentiary equipoise").

28 *E.g.*, Selene A. Almazan, Andrew A. Feinstein, & Denise S. Marshall, *Quality Education for America's Children with Disabilities: The Need to Protect Due Process*, 5 Child & Family L. J. 1, 24 (2017) (recommending placing the burden of persuasion on the school district); Terrye Conroy, Mitchell L. Yell, & Antonis Katsiyannis, *Schaffer v. Weast: The Supreme Court on the Burden of Persuasion When Challenging IEPs*, 29 Remedial & Special Educ. 108 (2008) (summarizing the decision and advocating Congressional reversal); Luke Hertenstein, Note, *Assigning the Burden of Proof in Due Process Hearings: Schaffer v. Weast and the Need to Amend the Individuals with Disabilities Education Act*, 74 U.M.K.C. L. Rev. 1043 (2006) (advocating Congressional reversal of Schaffer). *But see* Jennifer M. Burns, Note, *Schaffer v. Weast, Why the Complaining Party Should Bear the Burden of Proof in an Administrative Hearing to Determine the Validity of an IEP under the IDEA*, 29 Hamline L. Rev. 567 (2006) (supporting the approach in Schaffer).

29 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 (2015). The vast majority (85%) of this sampling consisted of parent-filed DPH decisions. *Id.* at 297.

30 20 U.S.C. § 1415(h) ("the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities"). The other referenced "individuals" refers to lay advocates, who may

accompany but not represent the parents except in the handful of states that have laws authorizing such representation. *See* Zirkel, *supra* note 22, at 19.

31 *See, e.g.*, Kay Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 Georgetown J. on Poverty L. & Pol'y 193, 218-19 (2002) (reporting survey results for perceived insufficiency of parent attorneys in special education); *cf.* Almazan et al., *supra* note 28, at 27-28 (recommending increased legal services for parents of special education students, especially for low-income families).

32 *See, e.g.*, Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 219 Educ. L. Rep. 39 (2007) (discussing whether parents who represented their children in several DPHs have the right to do so in federal court).

33 *E.g.,* Lukasik, *supra* note 6, at 777 (finding rates of partially or completely prevailing for pro se v. represented parents of 7% v. 34% in 87 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, 274 (2014) (finding rates for prevailing for pro se v. represented parents of 15% v. 57% for 209 DPH decisions nationally during 1978-2012); 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, 528 (2013) (finding rates for partially or completely prevailing for pro se v. represented parents of 2% and 36% in 210 DPH decisions in Minnesota and Wisconsin during 2000-11); 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 rates of prevailing for pro se v. represented parents of 16% and 59% in 512 DPH decisions in Pennsylvania during 2008-13); Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois*, 1997-2002, at 5-8 (Dec. 2002) (unpublished manuscript), http://www.dueprocessillinois.org/Access.pdf (finding rates of prevailing for pro se v. represented parents of 17% and 50% in 343 DPH decisions in Illinois during 1997-2002); G. Thomas Schanding et al., *Analysis of Special Education Due Process Hearings in Texas*, Sage Open 1 (Apr.-June 2017), http://sgo.sagepub.com/content/doi.org/10.1177/2158244017715 (finding success rates of pro se v. represented parents 12.5% and 34% for 139 Texas DPH decisions during 2011-15); Kate Belf-Becker, *Who Prevails in Special Education and Why?*, at 9, 11 (Dec. 15, 2003) (unpublished senior thesis), http://digitalrepository.trincoll.edu/theses/94/ (finding success rates of pro se v. represented parents of 14% and 60% in 29 DPH decisions in Connecticut during 1998-2003). These analyses did not differentiate district-filed DPH decisions but presumably are predominantly parent-filed cases in light of the general trend. *Supra* note 10 and accompanying text.

34 Zirkel & Holben, *supra* note 9.

35 After skimming each written decision for any reference to directly identifying the allocation and/or applying it, the author double-checked via multiple uses of the "Find" feature of Microsoft Word. For the identification, the searches were for "burden," "proof," and "persuasion." The cited basis typically was *Schaffer* or, occasionally, a state law or lower court decision. For the application, the searches were for more varied words including "met" (as in "met its burden"), "established," "proved," or "showed" (typically followed by the predicate part of the issue, such as "the evaluation was appropriate").

36 For the seven decisions, which were from a total of four states, that did not indicate whether the parties had legal representation, the author obtained this information from the dispute resolution coordinator of the respective state education agencies. As a result, there were no missing data.

37 For the national database, including the applicable multipliers, see Holben & Zirkel, *supra* note 9.

38 *Supra* note 35 and accompanying text.

39 Triton Pub. Sch., Mass. BSEA Case No.1400006 (Dec. 18, 2013), https://www.mass.gov/lists/bsea-decisions-2013-2015

40 *Id.*

41 For the issue categories, see *supra* note 11 and accompanying text. The analysis did not include the three decisions, each amounting to one ICR, in which the district was pro se. In these excluded cases, which were in Connecticut (n=1) and Hawaii (n=2), the parent was also pro se. Conversely, this analysis was based on ICRs, thus disaggregating the outcomes for the thirteen decisions that had two rulings. *Supra* Zirkel & Holben, note 9, at 12.

42 "Success rate" in this context refers to the percentage of ICRs in favor of the parents, with the obverse being the percentage in favor of the school district based on the two-category outcome scale for ICRs. *See supra* note 12 and accompanying text.

43 The pro se category included the following proportion per issue category in which the parent did not participate in the proceeding: IEE - 21%; consent - 55%; FAPE - 60%; Misc. - 0%. All of these *ex parte* ICRs were in favor of the school district with one limited exception. In this decision, which was in Massachusetts, the hearing officer ruled in favor of the no-show parent with regard to consent, but the requested evaluation unusually was an assessment of the family/home circumstances, and the companion ruling for FAPE was in favor of the district's proposed change to a therapeutic placement largely obviated the need for any such evaluation. Interestingly, the hearing officer included burden-of-proof reasoning:

Where a proposed evaluation, such as this one, is both intrusive and unwelcome, the School bears a significant burden of demonstrating either that there is no less burdensome means available to elicit information that is necessary to craft an appropriate IEP for a student, or that the assessment is likely to result in a substantial home service related benefit to the student. Here, the School has not met that burden.

Millbury Pub. Sch., Mass. BSEA Case No. 18-01409D (Nov. 10, 2017), https://www.mass.gov/lists/bsea-decisions-2016-to-date-by-school-district#districts-i-n-

44 The consent category accounted for one exception, which was attributable to (a) the general lack of variability in the outcomes, which were 98% in favor of the district (Zirkel & Holben, *supra* note 9, at 8), and (b) the unusual nature of the single decision in favor of the pro se parent (*supra* note 43). The Miscellaneous category was the other, negligible exception, being limited to 3% of the district-initiated ICRs. *Id.* at 12.

45 *Supra* note 43.

46 *Supra* note 16 and accompanying text.

47 *Supra* notes 26-27 and accompanying text.

48 Skidmore & Zirkel, *supra* note 29 and accompanying text.

49 *E.g., supra* note 39 and accompanying text.

50 *Supra* text accompanying notes 19-25.

51 *Supra* note 33.

52 *Supra* text accompanying note 13.

53 *Supra* note 43.

54 The primary advantages are case selection and limited scope, which are both particularly pronounced for the consent-for-evaluation category.

55 Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 Educ. L. Rep. 870, 880 (2020). The filings-to-adjudications ratios varied widely among the jurisdictions. *Id.* at 878-80.

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