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Education Law into Practice

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DECISIONAL REMEDIES FOR PROCEDURAL VIOLATIONS UNDER THE IDEA: LESSONS FROM AND FOR THE STATE COMPLAINT PROCESS^{a1}

The Individuals with Disabilities Education Act (IDEA) provides two alternative decisional avenues for dispute resolution.¹ The primary alternative is an impartial due process hearing (DPH), which is an adjudicative administrative mechanism. The other alternative, which is specified in the regulations of the IDEA and which receives far less attention than DPH in the legal literature, is the investigative administrative mechanism referred to as state complaint procedures (SCP).²

This brief empirical analysis is intended to provide lessons from and for SCP in relation to the remedial stage of DPHs in addressing procedural issues under the IDEA. The first part of this article provides an overview of (a) these two decisional mechanisms and (b) the procedural aspect of the IDEA. The second part presents an analysis of a sampling of SCP decisions specific to procedural issues under the IDEA. The final part discusses the findings of this analysis with a focus on (a) importing the extensive SCP use of purely procedural orders (PPOs) for rectifying violations to the corresponding remedial stage of DPHs and, rSeCciPpsr.ocally, (b) considering more explicitly the application of the DPH two-step test to

I. Overview of the Applicable Framework

Previously published research on the IDEA's DPH mechanism is generally abundant,³ although not approaching a critical mass until recently for the remedial stage of *724 DPHs.⁴ In rather complete contrast, the literature specific to the SCP mechanism represents a relatively thin line of scholarly attention.⁵

A. The Two Alternative Decisional Avenues

The DPH and SCP avenues of decisional dispute resolution have identifiable common-alties and differences.⁶ Although both avenues have a largely shared subject matter jurisdiction, one of the key differences is that in practice the decision-making basis in DPH primarily consists of court decisions whereas in SCP it primarily consists of the IDEA regulations and corollary state laws.⁷ Similarly, the remedial authority of both DPH and SCP is broad and injunctive, consisting of reimbursement, compensatory education, and PPOs; however, in practice hearing officers largely focus on reimbursement and compensatory relief whereas complaint investigators tend more toward corrective actions that are PPOs, such as training or directly undoing the violation.⁸ Finally, the traffic on the SCP avenue starts with markedly fewer filings but notably more decisions.⁹

B. The Procedural Aspect of the IDEA

The central issue under the IDEA is the core obligation to provide each eligible child with a free appropriate public education (FAPE).¹⁰ In addressing the meaning of FAPE, the Supreme Court's landmark decision recognized that the IDEA was “largely procedural in nature,” evidencing a clear Congressional conviction that “adequate compliance with the *725 procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”¹¹ Thus, the court's two-pronged definition of FAPE started with procedural compliance.¹² Based on the lower courts' gradual grafting of a harmless-error approach to *Rowley*'s procedural standard,¹³ the 2004 amendments of the IDEA codified an adjudicative approach that mandated a second step for procedural violations amounting to a substantive loss to the student or parents and that nevertheless authorized PPOs for procedural rectification.¹⁴ In contrast, neither the IDEA nor the case law specifically require the two-step test to procedural violations.¹⁵

Following the trend of court decisions,¹⁶ the prevailing practice in adjudicated DPHs has been to apply the codified two-step test without exercising the PPO alternative upon reaching the second step.¹⁷ The only source in the limited literature for SCP suggested that a one-step approach, with PPOs for violations, predominates, but the jurisdictional coverage, time period, and specific focus were insufficient for generalizable conclusions.¹⁸

II. Empirical Analysis of SCP Decisions

The purpose of this analysis is to determine whether the SCP decisions tend to address alleged procedural violations on a one-step or two-step basis, including the resulting *726 distribution of the remedies, or corrective actions. To provide a longitudinal dimension, the empirical “snapshots” were not only current for the latest complete year (2023) but also for the approximate midpoint since the 2004 amendments of the IDEA, which was a decade ago (2013).

The specific research questions are as follows:

1. To what extent did SCP decisions during the calendar year 2023 apply a two-step approach and, upon doing so to determine a violation at step 1 but no requisite loss to the student or parent at step 2, issue a PPO remedy?
2. To what extent did SCP decisions during the calendar year 2013 apply a two-step approach and, upon doing so to determine a violation at step 1 but no requisite loss to the student or parent at step 2, issue a PPO remedy?

A. Method

The method was to use the specialized commercial electronic database, LRP's Special-EdConnection®, as the source, searching the “SEA decisions” for the years 2023 and 2013, for SCP decisions that addressed procedural violations under the IDEA.¹⁹ First, the Boolean search used various alternatives, including, for example, “(FAPE) and ((procedur%) ~ ({hearing officer} or {administrative law judge} or (ALJ)))” and “((noncomplian%) and (procedur%) ~ ({hearing officer} or {administrative law judge} or (ALJ))),”²⁰ yielding a pool of approximately 250 administrative decisions under the IDEA for each of the two selected years. Second, a review of the 2023 decisions identified approximately seventy SCP decisions that found at least one alleged procedural violation.²¹ Third, for the sake of maximizing jurisdictional diversity within a convenient sample of fifty qualifying SCP decisions for 2023, I randomly reduced the number of decisions from those states that yielded the highest frequency of qualifying decisions to include those states with only one decision. Next, the process was repeated for 2013, except that the basis for the adjustment in the third phase was to try to match the jurisdictional distribution of 2023.²² The final sample consisted

of fifty SCP decisions with procedural violations in 2023 and a corresponding sample of fifty qualifying decisions for 2013, with incomplete parallel jurisdictional distribution.²³

*727 Finally, I coded the procedural violations in each of the qualifying decisions,²⁴ as shown in Appendices I and II, in a table that identified in successively lettered columns (A) the case citation,²⁵ (B) the state,²⁶ (C) the approximate issues;²⁷ (D) the one- or two-step test,²⁸ (E) corrective actions;²⁹ and (F) clarifying comments.³⁰

B. Findings

Answering the first part of research question #1, the shaded entries in columns D and F of Appendix I show that of the fifty SCP decisions in 2023, seven (14%) explicitly used, and another ten (20%) arguably applied, the two-step approach that the IDEA mandates for the adjudicative avenue that starts with DPHs.³¹ For the second part of research question #1, columns E and F of Appendix I show that the appropriate approach is to provide a rectifying PPO for the procedural violation in the absence of the requisite step 2 loss.³² Incidentally, the entries in column F for the seven SCP decisions that explicitly applied the two-step test reveal that although citing the IDEA codification or the foundational case law for the codification, these decisions did not provide accompanying recognition that these cited sources were specific to DPHs, not SCPs.³³

The answer to both parts of research question #2 were similar to rather than significantly different from the corresponding findings for research question #1.³⁴ Specifically, for the first part of research question #2, the shaded entries in columns D and F of Appendix II show that *728 of the fifty SCP decisions in 2013, seven (14%) explicitly used, and another eight (16%) arguably applied, the two-step approach that the IDEA mandates for DPHs.³⁵ For the second part of research question #2, columns E and F of Appendix I generally show that the appropriate approach is to provide a rectifying PPO for the procedural violation in the absence of the requisite step 2 loss.³⁶ Moreover, in addition to the same incidental finding as in the corresponding seven explicit two-step 2023 decisions for the legal basis, one of the seven explicit two-step decisions in 2013 identified an agency interpretation that specifically prescribed for SCP the rectifying PPO remedy for procedural violations “even if [they] ... do not result in the denial of FAPE.”³⁷ This same SCP decision appropriately applied the two-step test to a procedural violation of predetermination, concluding that this procedural violation resulted in the requisite loss to the parents.³⁸

III. Discussion

This empirical examination of the remedial orders in SCP decisions that found procedural violations of the IDEA is not without notable limitations. A major example is that, unlike the national database that is relatively feasible for DPH decisions,³⁹ the limitations in the SpecialEdConnection® database⁴⁰ resulted in a sample of SCP decisions from less than half of the states and that was not uniform over time (here being in 2013 and 2023).⁴¹ Other cautionary considerations include the widely varying scope and style of SCP decisions among and within states; the reliance on the author's coding (without the added step of inter-rater agreement); and the limited size and selection of the two samples of SCP decisions.

Although more extensive, refined, and in-depth follow-up research is welcomed,⁴² the findings of the brief analysis not only reinforce previous calls for much more extensive and affirmative application of rectifying PPOs for procedural violations in DPH cases in the *729 absence of a requisite step 2 loss,⁴³ but also suggest that SCP investigators become more assiduous in explicitly recognizing their discretionary authority for applying the two-step test and the cogent legal basis for their residual and extensive use of PPOs.⁴⁴ The advantages include a more harmonious outcome alignment between the SCP and DPH avenues and a similarly more equitable balance between parents and school districts in the overall remedial results of exhausting these two decisional dispute resolution alternatives under the IDEA.⁴⁵

***730 Appendix I: State Complaint Decisions During 2023**

| A | B | C | D | E | F |
|--------------------------|-------|--|--------|-------------------|---|
| Case Citation | State | Issue(s) | Test | Corrective Action | Comment |
| (each starting with 123) | | | 1 or 2 | | |
| | | | | 1=policy change | |
| | | | | 2=straining | |
| | | | | 3=comp. ed. | |
| | | | | 4=other | |
| 33004 | CO | (a) timely IEP | 2 | 2, 3 | D-IDEA reg.+case law; |
| | | (b) service delivery statement | 2 | 2, 3 | E-3-deleg. am't |
| 33000 | CO | timely IEP | 2? | 4 | d-incidentally citing of IDEA reg.; |
| | | | | | E-1 policy rev.; |
| | | | | | E4-staff review for child |
| 24955 | CO | (a) IEP amendment | 2 | 4 | D-IDEA reg.+case law; |
| | | (b) parent requested IEP mtg. | 2 | 4 | D(b)-loss to parents; E4-do so |
| 30313 | DE | child find | 1 | 1, 2 | |
| 30311 | DE | (a) FBA/BIP | 1 | 3, 4 | E3-delegated am't; E4-do so |
| | | (b) restraint reporting | (2) | 2 | |
| | | | | | D2-"technical violation" |
| 20945 | DE | no IEP mtg. upon parent advocate | 1 | 2, 4 | E4-do so |
| 35592 | DC | parent IEP mtg. invitation; consider IEE | 1 | 4 | E4-do so |
| 35578 | DC | timely completion of initial eval. | (2) | 2, 3 | D-delayed FAPE |
| 35566 | DC | inspection of child's records | 1 | 1, 2, 4 | E4-do so in future |
| 35564 | DC | IEP mtg. w/o parent | (2) | 2 | D-PPO despite no substantive loss |
| 35548 | DC | child find & PSN | 1 | 2, (3), 4 | E3-delegated Q; E4-do so (consent, elig. eval.) |
| 30337 | IN | (a) bullying procedures | 1 | 1, 2, 4 | E4-student assemblies |
| | | (b) IEP mtg. for parental concerns | 1 | 2 | [OSEP+bullying law] |
| 30333 | IN | exclusion w/o PWN | 2 | 3, 4 | D-IDEA reg.; E3-delegated am't; E4-memo to staff |
| 17749 | IN | FAPE after disciplinary placement change & lack of PSN | 1 | [3], 4 | E3-vol. comp. ed. sufficient; E4-assurance letter |
| 32103 | KS | timely notice of IEP mtg. | 1 | 4 | E4-provide in future |

| | | | | | |
|-------|--------|---|---|------|----------------------------------|
| 32099 | KS | PWN for refusal of ESY services | 1 | 2 | |
| 21029 | KS | IEP mtg. for reeval. | 1 | 4 | E4-checklist for staff |
| 21011 | KS | late notice for MDR | 2 | 4 | D-IDEA leg.; E4-assurance letter |
| | (app.) | | | | |
| 19143 | KS | copy of IEP to service providers (sua sponte beyond 2 unsub. allegations) | 1 | 4 | E4-checklist for staff |
| 19137 | KS | timely eval., IEP mtg. notice, advocate particip./access | 1 | 2, 4 | E4-assurance letter |
| 31721 | MN | shortened school day | 1 | 3 | E3-delegated am't |
| 21871 | MN | PWN | 1 | 4 | E4-revise PWN form |
| 30377 | MT | timely AT eval. | 1 | 4 | E4-do so (in progress) |

| A | B | C | D | E | F |
|--------------------------|-------|---|--------|---|---|
| Case Citation | State | Issue(s) | Test | Corrective Action | Comment |
| (each starting with 123) | | | 1 or 2 | 1=policy change 2=training 3-comp. ed. 4=other | |
| 16709 | NE | measurable goals; transition plan | 1 | 2, 4 | E4-do so |
| 21933 | NV | parent request for evaluation | 2 | 1, (3), 4 | D-case law, E3-delegated Q; E4-do so |
| 29633 | NM | (a) progress reporting to parents | 2 | 4 | D-case law-no loss to child but must do so |
| | | (b) evaluation (partial child find) | 2 | 4 | |
| 29625 | NM | cumulative combo incl. measurable goals, progress reporting, PWNs | (2) | 2, 4 | D-cumulative violations; E4-facilitated IEP mtg. to do so |
| 16769 | NM | predetermination, PWN | 2? | 2, 4 | D-cited IDEA reg. seemingly incidentally; E4-facilitated IEP mtg. to do so+check others |
| 16753 | NM | IEP copy to teacher | 1 | 1 | |
| 25011 | OH | lack of MDR | 1 | 1, (3), 4 | E3-delegated Q; E4-do it |
| 24995 | OH | reconvene IEP team+ | 1 | 4 | E4-memo to staff |

| | | | | | |
|-------|----|---|-----|-----------|---|
| 16795 | OH | divorced father: IEP mtg. & records | 1 | 4 | E4-do so+memo to staff |
| 14127 | OH | child find & PSN | 1 | 3, 4 | E3-specified am't; E4-do so |
| 14125 | OH | PWN | 1 | 4 | E4-do so |
| 11341 | OH | child find & PSN | 1 | 2, 4 | E4-memo to staff |
| 16821 | OR | timely IEP & PWN | 1 | 2, 3 | E3-specified am't. |
| 16819 | OR | child find, PWN, IEE\$, IEP mtg. invitation | 1 | 2, (3), 4 | E3-conditional (if elig.); E4-IEE \$, elig. mtg. |
| 16813 | OR | child find/eval. | 1 | 2, (3) | E3-delegated Q |
| 16811 | OR | IEP mtg./notice, FBA, records (in disciplinary context) | 1/2 | 2, 4 | D-inconsistent mixture, E4-do so |
| 17975 | WA | (a) services during suspension | 1 | 3 | |
| | | (b) consent for FBA | 1 | 4 | E4-memo to staff |
| 17973 | WA | unilateral placement change | 2? | 2, (3) | D-case law but mix w. FTI; E2/3-delegated Q for multiple students |
| 17969 | WA | IEP mtg. or PWN | 1 | 2, 4 | E4-do so |
| 17953 | WA | parent particip & PWN | 1 | 2 | |
| 17939 | WA | recovery services | 1 | 4 | E4-IEP mtg. to consider |
| 30515 | WI | (a) allow child at IEP mtg. & | 1 | 2 | |
| | | (b) track disciplinary removals | 1 | (3), 4 | E3-delegated Q; E4-do so |
| 30505 | WI | change to shortened placement after yes MDR | 1 | (3), 4 | E3-delegated Q; E4- ensure staff know |
| 20541 | WI | predetermination & shortened day (disciplinary context) | 1 | 4 | E4-re-do (via IEP mtg.) |
| 10723 | WI | timely elig. eval. | 1 | 4 | E4-assurance letter (S was not elig.) |

| A | B | C | D | E | F |
|--------------------------|-------|----------|--------|-------------------|---------|
| Case Citation | State | Issue(s) | Test | Corrective Action | Comment |
| (each starting with 123) | | | 1 or 2 | 1=policy change | |
| | | | | 2=training | |
| | | | | 3=comp. ed. | |
| | | | | 4=other | |

| | | | | | |
|-------|----|------------------|---|--------|--|
| 29747 | WY | AT assessment | 2 | (1), 4 | D-IDEA reg.-no loss to child but do so |
| 29745 | WY | progress reports | 1 | 2, [3] | E4-vol. comp. ed. sufficient |

***732 Appendix II: State Complaints Decisions in 2013**

| A | B | C | D | E | F |
|-------------------------|-------|--|-------------|-------------------|--|
| Case Citation (/ - LRP) | State | Issue(s) | Test 1 or 2 | Corrective Action | Comment |
| | | | | 1=policy change | |
| | | | | 2=training | |
| | | | | 3=comp. ed. | |
| | | | | 4=other | |
| 115/38820 | AK | PWN | 2 | 2, 3 | D-IDEA reg |
| 114/6916 | CO | MDR; progress reporting | 2 | 2, 3 | D-IDEA leg.+case law |
| 113/44602 | CO | PWN | 2 | 2 | D-IDEA leg.+case law |
| 113/32793 | CO | IEP member excusal; IEP revision; measurable goals | 2 | 2, 3 | D-case law; E3-specific amount |
| 113/21474 | DE | IEP mtg. notices | (2) | 2, 3, 4 | E3-specified amount |
| 113/12352 | DE | timely IEP | (2) | (3), 4 | E3-delegated within limits |
| 113/5143 | DE | records | 1 | 4 | E4-memo to staff; list to SEA |
| 123/36913 | DC | IEP rev. | 1 | 3, 4 | E3-delegated w. min.; E4-do so |
| 123/36199 | DC | records; MDR | 1 | 2, 3 | |
| 123/36195 | DC | child find | 1 | 4 | E4-do so (elig. eval.) |
| 123/36191 | DC | IEP rev. (AT) | 1 | 4 | E4-do so |
| 114/22705 | FL | child find | 1 | 1, 2, 4 | E4-do so (elig. eval.) |
| 114/22660 | FL | IEP member excusal | 1 | 2 | |
| 114/22354 | FL | eval. (all susp. areas) | 1 | 4 | E4-do so |
| 114/9542 | IN | IEP rev.; IEP amendment | 1 | 2, 4 | E4-do so |
| 114/7455 | IN | consent (for FBA) | 1 | 2 | |
| 113/45124 | IN | notice/consent | 1 | 2 | C-1 of various issues |
| 113/36013 | IN | records | 1 | 2, 4 | E4-memo to staff |
| 114/13978 | MD | records, IEP team members, IEE | 1 | 4 | E4-do so+IEP mtg. to determine remedy and whether systemic |

| | | | | | |
|-----------|----|--|-------|-----------|--|
| 114/3901 | MD | (a) IEP review; IEP copy; record | 1 | 4 | E4-do so+systemic rev. |
| | | (b) IEP services (clarity) | (2) | (3) | E3-delegated determ. of remedy |
| 114/3895 | MD | IEP rev.; progress reports | | | E4-do so+system rev. |
| 114/15701 | MN | PWN | 1 | 2 | |
| 113/28307 | MN | IEP mtg. notice; timely evals. & IEPs | 1 | 2, 4 | E4-do so+systemic reports |
| 114/11629 | MT | IEP rev.; IEP mtg. notice; consent+ | 1 | 1, 4 | E4-do so |
| 113/8924 | MT | PWN | 1 | 1 | E1-policy review; E4-do so |
| 113/39712 | NV | mtg. notices; progress reports; IEP rev. | 1/(2) | 2, 3 | E4-tutoring reimb. |
| 115/20268 | NM | IEP contents; copy to tchrs.; MDR+ | 2 | 1, 2, (3) | C+=sua sponte; D-case law; E1-written procedures; E3-delegated Q w. stds. |
| 115/20203 | NM | IEP copy to tchrs.; reeval.; elig. | 1 | 1, 4 | E1-written proced.+audit; E4-do so |
| 115/13154 | NM | records | 1 | 4 | E4-revise form |
| 115/13149 | NM | (a) PWN | 2 | 2, 4 | D-case law but still "do so" (OSEP); E4- facilitated IEP mtg. |
| | | (b) predetermination | 2 | | |
| 113/49826 | OH | eval. | 1 | [4] | E4-LEA proactive re-do |
| 113/39305 | OH | eval.; PWN | 1 | [4] | E4-LEA vol. did so |
| 113/39108 | OH | child find | 1 | [4] | E4-LEA resolved it |
| 113/39016 | OH | PWN | 1 | 4 | C-1 of 12 issues; E4-do so |
| 113/39010 | OH | disciplinary change in placement | 1 | 2, (3), 4 | E3-delegated Q; E4-do so |
| 113/39000 | OH | timely IEP mtg. notices | (2) | 4 | D-"strict[]" (good faith) [but missed impact on parents instead of child]; E4- do so |
| 113/21478 | OH | progress reporting; IEP members; IEP rev; IEP mtg. | 1 | 4 | E4-do so+signed memo |
| 113/12584 | OH | IEP rev.; IEP contents; PWN | 1 | 2, [4] | E4-on-site visit for sua sponte concerns (substantive) |
| 113/22781 | OR | IEES; PWN | 1 | 1, 2, 4 | E4-do so |
| 113/18964 | OR | PWN | 1 | 4 | E4-memo to violating staff |
| 113/11145 | OR | MDR | (2) | 2, 3 | E3-specific am't |
| 113/8867 | OR | progress reporting | 1 | 2 | |
| 115/12297 | SD | IEP mtg. notice & timely copy | (2) | 2, 4 | D-PPO even if no FAPE denial |
| 114/35916 | WI | restraint (state law) | 1 | 2 | |

| | | | | | |
|-----------|----|--------------------------------------|-----|-----------|---|
| 114/35315 | WI | timely IEP | (2) | 4 | D-no impact in summer E4-plan for timely IEPs |
| 114/35223 | WI | (a)timely evaluation | (2) | (3) | E3-delegated Q |
| | | (b) restraint (state law) | 1 | 4 | E4-system rev. |
| 114/31439 | WI | timely eval. (parent referral) | 1 | 1, 2, (3) | E3-delegated Q |
| 114/30938 | WI | evaluation request | (2) | (3), 4 | E3/4-expedited elig. eval.+ conditional delegated Q |
| 116/35903 | WY | progress reporting, eval. (systemic) | 2 | 2 | [but confusing re FTI as procedural] |
| 116/35899 | WY | IAES FAPE procedure | 1 | 2, (3) | E3-delegated Q |

Footnotes

- a1 *Education Law Into Practice* is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 419 Educ. L. Rep. 723 (March 28, 2024).
- aa1 Dr. Zirkel is University Professor Emeritus of Education and Law at Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association. Although remaining responsible for the contents of this article, the author expresses appreciation to experienced state complaint investigator Bill Elvey and Delaware's dispute resolution coordinator Maria Locuniak for their constructive feedback.
- 1 20 U.S.C. § 1400 *et seq.* “Decisional” in this context excludes alternative dispute resolution mechanisms available under the IDEA that do not provide a binding third-party decision. *Id.* §§ 1415(e) (requiring each state to offer mediation), 1416(a)(3)(B) (requiring monitoring the use of voluntary binding arbitration). Various corollary state laws provide other such alternatives, including facilitated IEPs and settlement conferences. See Andrew M.I. Lee & Perry A. Zirkel, *State Laws for Pre-Hearing Phase of Due Process Hearings under the Individuals with Disabilities Education Act*, 40 J. Nat'l Ass'n Admin. L. Judiciary 1, 16 (2021).
- 2 34 C.F.R. §§ 300.151-300.153. The only reference in the IDEA legislation is rather incidental. 20 U.S.C. § 1411(e)(2)(B)(i) (authorizing use of IDEA funds for SCP).
- 3 For a comprehensive synthesis of the research focused on the frequency and outcomes of DPHs, see 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, 528-39 (2014). For more recent research on DPH frequency, see Gina L. Gullo & Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Comparative Enrollments-Based Analysis*, 382 Educ. L. Rep. 454 (2020); Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 Educ. L. Rep. 870 (2020). For more recent research on DPH outcomes, see Perry A. Zirkel & Diane M. Holben, *The Outcomes of Fully Adjudicated Impartial Hearings under the IDEA: A Nationally Representative Analysis with and without New York*, 44 J. Nat'l Ass'n Admin. L. Judiciary 126 (2023).
- 4 See, e.g., Perry A. Zirkel, *Adjudication under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights but Inequitably Paltry Remedies*, 56 Conn. L. Rev. 201 (2023) (pointing out the insufficient scholarly attention to and hearing officer application of the adjudicative authority for remedies under the IDEA).

- 5 For an overall sampling of this limited research, *see* Perry A. Zirkel, Alyssa Fairbanks, & Natalie E. Jones, *Outcomes Trends in State Complaints Procedures Decisions*, 396 Educ. L. Rep. 24, 27-28 (2022).
- 6 *See, e.g.*, Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes--Complaint Procedures and Impartial Hearings: An Update*, 369 Educ. L. Rep. 550 (2019) [hereinafter *Overall Comparison*] (providing a systematic and comprehensive comparison of SCP and DPH); 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) [hereinafter *Empirical Comparison*] (comparing the frequency and outcomes of the issues in SCP and DPH decisions in five active states during 2010-2016); Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution under the Individuals with Disabilities Education Act*, 23 J. Special Educ. Leadership 100 (2010) (tracing the alternatives of DPH and SCP under the IDEA in relation to the corresponding adjudicative and investigative routes under Section 504).
- 7 *See, e.g.*, *Overall Comparison*, *supra* note 6, at 551-52. Although clearly only to a secondary extent, SCP decisions cite federal and state guidance interpreting the regulations. *See, e.g.*, *Empirical Comparison*, *supra* note 6, at 189 n.88.
- 8 *See, e.g.*, *Empirical Comparison*, *supra* note 6, at 185. A related difference is that DPH focuses on the individual child, whereas SCP may extend to systemic relief. *See, e.g.*, *Overall Comparison*, *supra* note 6, at 555.
- 9 Center for Appropriate Dispute Resolution in Special Education (CADRE), IDEA Dispute Resolution Data Summary for U.S. and Outlying Areas: 2011-12 to 2021-22, at *4 (2023), <https://www.cadeworks.org/search/2021%E2%80%932022%20Summary%20National>. The difference is the relatively high proportion of cases that are withdrawn/abandoned or settled in the DPH avenue. *Id.* (“DPCs withdrawn, dismissed, or resolved w/o hearing”).
- 10 20 U.S.C. §§ 1402(9), 1412(a)(1). *See, e.g.*, *Sytsema v. Acad. Sch. Dist.*, 538 F.3d 1306, 1312, 236 Educ. L. Rep. 94 (10th Cir. 2008) (characterizing FAPE as the “central pillar of the IDEA”).
- 11 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 158 U.S. 176, 206, 5 Educ. L. Rep. 34 (1982).
- 12 *Id.* at 207 (“First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?”). The Supreme Court’s recent revisitation was limited to the substantive standard for FAPE, thus refining the second of the two questions in *Rowley*. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386, 399 (2017) (holding that the IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”). For the eventual development of the failure-to-implement and capable-to-implement dimensions beyond procedural and substantive FAPE, *see* Perry A. Zirkel, *An Adjudicative Checklist of Criteria of the Four Dimensions of FAPE under the IDEA*, 346 Educ. L. Rep. 18 (2017).
- 13 *See, e.g.*, Allan G. Osborne, *To What Extent Can Procedural Violations of the IDEA Render an IEP Invalid?* 185 Educ. L. Rep. 15 (2004) (summarizing the *Rowley* progeny as follows: “if procedural ... deficiencies in an IEP do not compromise the student’s right to [a substantively] appropriate education or the parents’ right to participate in the process, the courts have let the IEP stand”).
- 14 20 U.S.C. § 1415(f)(3)(E):
- (ii) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--
- ...

(II) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(III) Caused a deprivation of educational benefit.

(iii) Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

For an analysis of the applicable federal case law before and after this provision in the 2004 amendments of the IDEA, which found inadequate attention to the parental prong of step 2, see Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?*, 15 Conn. Pub. Int. L.J. 1 (2015).

15 The only IDEA regulations specific to SCP remedies require addressing “(1) [t]he failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) [a]ppropriate future provision of services for all children with disabilities.” 34 C.F.R. § 300.151(b).

16 See, e.g., Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?* 83 Exceptional Child. 219 (2016) (finding a pronounced pro-district effect in the judicial remedial rulings for procedural FAPE cases as a result of the two-step analysis).

17 See, e.g., Zirkel, *supra* note 4, at 209 & n.40.

18 *Empirical Comparison*, *supra* note 6, at 189 (constituting an incidental qualitative finding based on a random sample of SCP decisions in five active states during 2010-2016).

19 Because the IDEA only requires state education agencies (SEAs) to make DPH decisions available to the public, this commercial database is the only relatively broad source for SCP decisions. However, the cross-state coverage of SCP decisions in this commercial database is not comprehensive or consistent. Due to proprietary reasons, the information about the procedures for this database is limited, but the sourcing of DPH and SCP decisions presumably is via a standing freedom of information act request to state education agencies (SEAs), and neither the states' submission nor the publisher's selection of the decisions has been uniform over time.

20 These two overlapping search strings resulted in the following respective number of “SEA” decisions: 2023-- 200 and 237; 2013--104 and 193.

21 This review successively included (a) screening the SCP decisions from the DPH decisions, (b) identifying those that contained alleged procedural violations, and--because it was necessary for determining whether the decision used the one- or two-step test-- (c) identifying those that found noncompliance. Although the boundaries of “procedural” are not a bright line, illustrative exclusions were the relatively frequent allegations of failure to implement the IEP, substantive FAPE, and least restrictive environment.

22 Based on the limited comprehensiveness and consistency in the only available database (*supra* note 19 and accompanying text), complete matching was not feasible. For example, targeted searches revealed that the database lacked any qualifying SCP decisions in 2013 for Kansas and Washington. Conversely, the database yielded multiple qualifying decisions for Florida and Maryland in 2013 but, upon re-checking, no qualifying decisions for those two states in 2023.

23 More specifically, based on the different submission from states and possibly also the different selection of the publisher, the distribution was as follows for 2023 (fifteen states) and 2013 (sixteen states), respectively:

| | | | | | | | | | |
|--|----|----|----|----|----|----|----|----|----|
| | AK | CO | DE | DC | FL | IN | KS | MD | MN |
|--|----|----|----|----|----|----|----|----|----|

| | | | | | | | | | |
|------|----|---|---|---|----|---|----|----|---|
| 2023 | -- | 3 | 3 | 5 | -- | 3 | 6 | -- | 2 |
| 2013 | 1 | 3 | 3 | 4 | 3 | 4 | -- | 3 | 2 |

| | MT | NE | NV | NM | OH | OR | SD | WA | WI | WY |
|------|----|----|----|----|----|----|----|----|----|----|
| 2023 | 1 | 1 | 1 | 4 | 6 | 4 | -- | 5 | 4 | 2 |
| 2013 | 2 | -- | 1 | 4 | 8 | 4 | 1 | -- | 5 | 2 |

- 24 Thus, for the many decisions that contained multiple issues, the coding was limited exclusively to the allegations of procedural, not other (*e.g.*, substantive FAPE) violations.
- 25 For 2023, the entry was abbreviated to the number after “123 LRP” because all of the decisions started with this same first part. For 2013, because the first part was not uniform, the abbreviated entry consisted of the number before and after the common core of “LRP.”
- 26 “States” herein includes the District of Columbia, thus potentially representing 51 jurisdictions.
- 27 The issues were limited to those that found procedural violations, thus not including unsubstantiated procedural allegations or either substantiated or unsubstantiated allegations that were not procedural. The level of these issue categories was not uniform or precise, because this column merely illustrated the scope of “procedural” in this context. Overall, the acronyms in the appendices were as follows: AT=assistive technology; BIP=behavioral intervention plan; ESY=extended school year; FBA=functional behavioral assessment; FTI=failure to implement; IAES =interim alternative educational setting; IEE\$=independent educational evaluation at public expense; IEP=individualized education program; LEA=local education agency; MDR=manifestation determination review; OSEP=Office of Special Education Programs; PSN =procedural safeguards notice; PWN=prior written notice.
- 28 The coding entries for the test for procedural violations were as follows: 2=explicit two-step test; (2) or 2?= arguable or other questionable two-step test; 1=one-step test.
- 29 The numbers designating the categories of corrective actions were as follows: 1=policy revision; 2=training; 3=compensatory education; or 4=other (*e.g.*, “do so”=rectifying PPO).
- 30 Each comment started with letter of the column to cross-reference the clarifying entry.
- 31 “Arguably” in this context refers to those decisions in which the application of the two-part test was questionably implicit, usually based on consideration of denial of FAPE, incidental reference to the applicable IDEA regulation, or mention of a “technical” violation.
- 32 Both reinforcing and extending the rectifying PPO approach regardless of the requisite loss, not only the seven cases in 2023 that explicitly applied the two-step test and the various other decisions that either arguably applied the two-step test but also those many more SCP decisions that clearly stopped at the one-step analysis liberally issued PPOs.
- 33 *Supra* note 14 and accompanying text. Moreover, none of these decisions cited the accompanying non-preclusive provision in the codification that authorized rectifying PPOs. *Id.*

34 An incidental similarity is that with the exception of Colorado, the minority of states with decisions that explicitly applied the two-step test were not uniform in evidencing this approach.

35 For the meaning of “arguably” in this context, see *supra* note 31.

36 As in the 2023 decisions (*supra* note 32), the 2013 decisions extended this approach regardless of the one- or two-step test.

37 Albuquerque Pub. Schs., 115 LRP 13149, at *11 (N.M. SEA 2013). The cited guidance from OSEP, which administers the IDEA, is as follows:

An SEA's responsibility to ensure that [school district's] noncompliance is identified and corrected in a timely manner is not altered because the noncompliance is procedural. Even if the [district] believes that procedural noncompliance does not result in the denial of FAPE to an individual child at present, we believe that an SEA must require the [district] to correct the procedural noncompliance because it could affect the [district's] ability to ensure the future provision of FAPE to eligible children.

Letter to Copenhaver, 53 IDELR ¶ 165 (OSEP Oct. 31, 2008), <https://sites.ed.gov/idea/idea-files/policy-letter-october-31-2008-to-mountain-plains-regional-resource-center-director-john-copenhaver/>.

38 *Id.* at *15.

39 *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, 847-53 (2021).

40 *Supra* note 19.

41 *Supra* note 23.

42 As one brief example, it would be worthwhile to explore whether SCP has become more legalized in its use of attorneys as complaint investigators and in the use of case law and sources other than the IDEA and corollary state regulations in decision making. The incidental finding here of an insubstantial difference between 2013 and 2023 in the treatment of procedural violations suggested the need for more definitive examination. For related previous research, see *Empirical Comparison*, *supra* note 6, at 189 (observing that the SCP decisions in five states during 2010-16 tended to be relatively short and lacking in legal rigor and case citations); Kirstin Hansen & Perry A. Zirkel, *Complaint Procedure Systems under the IDEA: A State-by-State Survey*, 31 J. Special Educ. Leadership 108, 111 (2019) (finding that approximately one quarter of the complaint investigators in 2017 were attorneys).

43 *See, e.g.*, Zirkel, *supra* note 4, at 218-19; Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 39 J. Nat'l Ass'n Admin. L. Judiciary 1, 15-18 (2019).

44 *Supra* note 37 (in comparison to *supra* text accompanying note 33). Yet, it must be recognized that the much tighter timeline and higher case load for SCP decisions, as compared to DPH decisions, pose special challenges for investigators' efficient fact finding and legal conclusions. The general turnover of investigators and the varying operational procedures within and among states contribute to the special challenges of the SCP avenue and help explain the lack of uniformity in the application of the two-step approach (*supra* note 34). Despite these limiting factors, the consistent prevalence in SCP decisions of rectifying PPOs for procedural violations serves as an effective reciprocal lesson for DPHs.

45 Yet, key structural differences between these two decisional avenues will affect the nuances of the more harmonized remedial actions. In addition to the aforementioned example of the scope of the relief (*supra* note 8), another example is the role of the IEP team for determining compensatory services. *See, e.g.*, *Overall Comparison*, *supra* note 6, at 554 (encouraging delegation in SCP but limiting

it in DPH); Letter to Deaton, 65 IDELR ¶ 241 (OSEP 2015) (“However, because the IDEA contemplates that the IEP Team, which includes the child’s parent, is best equipped to make informed decisions regarding the specific special education and related services necessary to provide FAPE to the child, [SCP] should carefully consider whether ordering the provision of services not previously in the IEP is appropriate and necessary to ensure the provision of FAPE.”).

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