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*Journal of Disability Policy Studies* 2013 24: 67 originally published online 12 October 2012

DOI: 10.1177/1044207312460890

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# Special Education Hearing Officers: Balance and Bias

Journal of Disability Policy Studies  
24(2) 67–74  
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DOI: 10.1177/1044207312460890  
jdps.sagepub.com



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## Abstract

The use of a simple 50%-50% box score of decisions for parents and districts, respectively, is a false measure of the impartiality of hearing officers under the Individuals with Disabilities Education Act (IDEA). This analysis canvasses relevant structural factors that the stakeholders, the mass media, and the professional literature have failed to recognize both generally and systematically. These factors include IDEA amendments, regulatory revisions, Supreme Court decisions, lower court precedents, and state system changes that cumulatively suggest that a more nuanced view is both appropriate and necessary.

## Keywords

law, litigation, IDEA

In recent years, parents have challenged the impartiality of hearing and review officers under the Individuals With Disabilities Education Act (IDEA) in terms of the percentage of decisions in favor of parents and districts. As a nationally publicized example, a *Wall Street Journal* article reported a prevailing parental perception that the hearing and review officer system is biased in favor of school districts based on the relative proportion of wins and losses (Golden, 2007). More specifically, the article reported the 2005–2006 outcomes of hearings in five selected states—California, Connecticut, Florida, Massachusetts, and New Jersey—that totaled as follows: 33 “parent wins” (15%), 146 “district wins” (66%), and 43 “split decisions” (19%). In apparent confirmation of imbalance being the measure of bias, the article reported that a federal court overturned an IDEA review officer decision in response to the parent-attorney’s claim of a previous ratio heavily in favor of district wins.

In another example, which did not receive such national exposure, a newspaper in California reported a class action suit by parents of students with disabilities challenging the California’s new hearing officers under the IDEA (Marshall, 2008). According to the article, the basis of the suit was that in the initial year after the California state education department awarded the state’s Office of Administrative Hearings (OAH) the contract in September 30, 2007, the OAH administrative law judges (ALJs) ruled completely in favor of parents in only 10% of the cases in comparison with a 50% rate under the previous contracting agency. The claim was that the new hearing officers did not meet the IDEA’s requirement of impartiality, with the attorney who

filed the suit on the parents’ behalf adding that “[they] don’t know the law.”

The implication of these news reports is the perception that a balanced ratio of outcomes is the measure of impartiality. Although limited deviations in either direction would be presumably be excusable, the 50%–50% standard is inferably the guiding standard for knowing and following the law, in this case the IDEA.

However, the case law is contrary to such perceptions and absent in the news coverage. For example, counter to the *Wall Street Journal* article, rather than providing confirmation, the court in an unpublished decision reversed the review officer’s decision on entirely different grounds (*Jessica K. v. Marple Newtown School District*, 2007). Indeed, in their published decisions to date concerning this issue, courts have, without exception, roundly rejected parental challenges of IDEA hearing/review officer bias that have been based on such box scores (e.g., *J.N. v. Pittsburgh School District*, 2008; *R.E. v. New York City Department of Education*, 2011; *R.K. v. New York City Department of Education*, 2011; *C.G. v. New York City Department of Education*, 2010; *W.T. v. Board of Education of School District of New York City*, 2010),

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pointing out that each case stands on its own merits, as the individualized emphasis of the IDEA reinforces. More recently, a federal court in New York rejected a parent's claim of review officer bias that relied on the high district success rate reported in the *Wall Street Journal*, finding that "the article fails to raise plaintiffs' argument above the vague and conclusory level" (*TC v. Valley Central School District*, 2011, p. 601). More generally, based on the applicable standard under the IDEA, courts have rejected most parent and district challenges to hearing and review officer bias, with the exceptions based on grounds entirely distinct from any record of wins/losses (Drager & Zirkel, 1994; Maher & Zirkel, 2007). Finally, the court's disposition of the reported California case was to deny the requested temporary restraining order, concluding that the parents had failed to show a likelihood of success on their IDEA and alternative constitutional claims (*C.S. v. California Department of Education*, 2008).

It is certainly understandable that both parties are concerned about outcomes. Although courts understandably focus on the individual case before them, including its particular facts, both parents and districts consider the odds of prevailing as one of the critical factors in the cost-benefit analysis of whether to litigate; indeed, one of the reasons to rely on an attorney is to find out the outcomes of not only pertinent precedents but also the applicable adjudicators. Both legal theory and practice have long recognized that one of the critical factors for attorneys in advising their clients whether to litigate (e.g., Priest & Klein, 1984) and, if so, whether to settle (Hoffman, 1991) is the likelihood of a favorable ultimate outcome on adjudication.

Interestingly, parents have applied solely to hearing/review officers their perception that special education law is not a level playing field as measured by such box-score outcomes. For example, parents have not raised such record-ratio challenges in either the media or in court to the impartiality of state or federal judges under the IDEA. Conversely, scholars have recognized the complexity of measuring the quality of judges, identifying multiple factors that do not include win-loss ratios (e.g., Cross, 2009).

More importantly, a balanced record of wins and losses is an illusory expectation in light of, on the cumulative effect of, several factors that the stakeholders, the mass media, and the professional literature have failed to recognize both generally and systematically. These factors have an incremental effect at the successive levels of dispute resolution under the IDEA. More specifically, the statute accords states the choice of one-tier (i.e., hearing officer only) or two-tier (i.e., hearing officer and review officer) system of administrative adjudication, followed by judicial review by appeal to either state or federal court. Thus, the successive potential levels are hearing officer, review officer, trial court, and appellate court. This article summarizes the various relevant factors at these successive

levels, with primary attention to IDEA hearing officers. The secondary supplementation for the succeeding levels is provided due to their effects on the outcomes of hearing officer decisions.

## Hearing Officer Level

The five most prominent factors that contribute to an expected ratio of hearing officer decisions that favors districts over parents and that also show the limitations of such a measure for impartiality are the (a) Supreme Court decisions interpreting the IDEA, (b) IDEA legislation and regulations, (c) lower court precedents, (d) structure of the state hearing/review officer systems, and (e) imbalance in case selection and party representation. In this approximate order but without strict separation, here are recent developments for these factors that, in combination, a balanced ratio is an invalid metric for hearing officer impartiality.

### Particular Recent Supreme Court Decisions

The Supreme Court has issued two decisions in the most recent decade that have notably contributed to the tilt in the balance between the parties at the impartial hearing level. In the first of these two decisions, *Schaffer v. Weast* (2005), the Court concluded that the burden of persuasion in a free, appropriate public education (FAPE) case is on the party filing for the hearing to challenge the Individualized Education Program (IEP), that is, the parent. Thus, in close cases, just as the tie goes to the runner in baseball, the decision goes in favor of the defendant district. As the Third Circuit observed, "What may have been a close case pre-*Schaffer* is, in the wake of *Schaffer*, no longer so" (*L. E. v. Ramsey Board of Education*, 2006, p. 392). Moreover, unlike baseball, the closeness of the call is not limited to a relatively rare instance, because the decisional factors are not as simple, visible, and clear. For example, in FAPE cases, parents frequently and understandably raise a variety of procedural as well as substantive challenges that require not only extensive fact finding but also the application of blurry standards of prejudicial effect and reasonable benefit.

The second of this pair of decisions, *Arlington Central School District Board of Education v. Murphy* (2006), is an even more significant contributor to the imbalance. The ruling that the IDEA does not provide for the costs of expert witnesses to prevailing parents preserved the balance favoring school districts, who have not only bigger budgets but also a staff of in-house experts with ready access to the child and with a subtle institutional pressures (as a team member, employee, and—in many cases—direct-service provider) to defend and support the district's position in the case. As a result, plaintiffs lost three intertwined benefits:

(a) strengthening their chance for prevailing via countervailing expert witnesses, (b) having the potential for the defendant district to shoulder these considerable costs, and (c) contributing to the district's incentive for a settlement.

Inasmuch as the IDEA is silent on the burden of proof and ambiguous in its provision of "costs" for prevailing parents, the Supreme Court in both of these cases left the policy making to Congress, thus making these two issues subjects for the political process during the next reauthorization of the IDEA.

### *Shifting Legislative and Regulatory Framework*

However, not auguring well for the parents' side, Congress keeps postponing the next reauthorization, and the last reauthorization contained a whole host of singly subtle but cumulatively significant slanting of the relative balance between the two parties to IDEA adjudication. For example, as Zirkel (2007) cataloged more comprehensively, IDEA 2004 included the following illustrative revisions that carefully crafted the rules for discipline, more specifically suspensions or expulsions of more than 10 consecutive days: (a) added a third special circumstance—where the child with a disability causes serious bodily harm—that allows a district to unilaterally move the child in a 45-day interim alternate educational setting, (b) expanded the duration of these settings by changing from calendar to school days, (c) streamlined the team and heightened the standard for manifestation determinations, and (d) narrowed the scope of protection for "deemed to know" children (20 U.S.C. §§ 1415(k)). The 2006 IDEA regulations extended this direction for the 11th cumulative day of removal by dropping the prior functional behavioral assessment (FBA) requirement and lightening the source and extent of the FAPE standard (Zirkel, 2007).

Although discipline is not a major staple of IDEA litigation, which starts with due process hearings, these subtle changes serve at least as a symbolic illustration of Congress's tilting of the proverbial playing field. Moreover, in those cases where parents have filed for an impartial hearing to challenge disciplinary changes in placement, the outcomes reflect the uphill battle they now face. For manifestation determination cases under IDEA 2004, for example, Zirkel (2010) found that parents lost almost two thirds of the hearing officer decisions, with express reliance on the new, causation standard and burden of proof being notably frequent. In the only such case that was the subject of a published judicial appeal, a school district in Virginia issued a 5-month suspension to a high school student with an emotional disability for paintball vandalism of school property after determining that this incident was not a manifestation of his disability. The parents challenged the manifestation determination, and the hearing officer rendered a decision in favor

of the district, which the federal court subsequently upheld based on the new, causality standard for manifestation determinations (*Fitzgerald v. Fairfax County School Board*, 2008).

Similarly symbolic of the pro-district adjustment in IDEA 2004 was the introduction of "reverse" attorneys' fees, so that such consequences of prevailing are no longer a one-way street in the parents' direction. This lane in the other direction is limited to possible liability for the district's legal fees for the parents' attorney in frivolous cases and for the parents in harassing cases (20 U.S.C. § 1415[i][3][B]-[II]-[iii]). This provision potential could have the chilling effect of weeding out due process filings that were less likely to favor parents. However, this potential counteractive effect on the balance of hearing officer outcomes has remained largely only theoretical, because the courts have—with rare exception (e.g., *Bridges Public Charter School v. Barrie*, 2011)—rejected district claims of frivolous or harassing IDEA litigation (e.g., *District of Columbia v. West*, 2010; *R.P. v. Prescott Unified School District*, 2011).

Another, more potent example of the shifting IDEA framework consists of the successive changes in the 2004 legislation and the subsequent regulations that were victories for the parent side but removed from hearing officers' jurisdiction, thus not crediting the hearing officers with a more parent-favorable record. Specifically, IDEA 2004 effectively made absolute the parent's right to refuse consent for initial special education services (20 U.S.C. § 1414[a][1][D][ii][II]), and a December 2008 amendment to the IDEA regulations provided parents with the unilateral right to revoke consent for special education services, similarly eliminating the district's option to challenge the matter via a due process hearing (34 C.F.R. §§ 300.9[c][3] and 300.300[b][4]). Thus, these winning outcomes for parents do not appear in tallies of hearing officer decisions, because they are beyond the subject matter jurisdiction of IDEA hearings. Previously, district had the option to file for an impartial hearing to request that the hearing officer override the parents' right to consent. Those cases, which had a mix of outcomes, albeit more in favor of districts than parents, were now 100% wins for parents but without a hearing. Thus, this shift the parents' direction does not show up in an outcomes tabulation of hearing officer decision.

### *Interacting Lower Court Interpretations*

As Zirkel (in press) explained more comprehensively, the courts have not only resisted heightening the relatively relaxed *Rowley* substantive standard but also have eroded rather than tightening *Rowley's* procedural standard for FAPE. In interacting with the successive recent amendments of the IDEA, the courts have done so in multiple ways.

The most notable pertinent example in the last reauthorization was the legislative codification of the harmless-error approach that the lower court progeny of *Board of Education v. Rowley* (1982) had developed for procedural violations. In this landmark decision, the *Rowley* Court interpreted the original version of the IDEA to provide for a two-pronged standard of FAPE. Viewing Congress as emphasizing access via procedures, the Court concluded that the purpose of the legislation was to “open the door” (p. 192) rather than provide a high substantive floor. Thus, the *Rowley* Court concluded, the standards for FAPE were as follows: (a) Did the district comply with the various applicable procedures? and (b) Is the IEP “reasonably calculated to enable the child to receive educational benefits?” (pp. 206–207). The substantive standard was relatively low; indeed, as the dissent pointed out, a district could apparently meet it by providing a teacher with a loud voice to Amy Rowley, whose disability was deafness.

Despite the *Rowley* Court’s emphasis on procedural compliance, Congress codified the relaxation of *Rowley*’s lower court progeny by expressly providing in IDEA 2004 that—with a limited exception—a hearing officer may only find a denial of FAPE for procedural violations that “[i]mpeded the child’s right to FAPE” or “[c]aused a deprivation of educational benefit” (20 U.S.C. § 1415[f][3][E]), thus effectively connecting the procedural compliance standard to the substantive benefit standard. The limited exception is where the district has “[s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of [FAPE]” (20 U.S.C. § 1415[f][3][E]). With limited exceptions (e.g., *Drobnicki v. Poway Unified School District*, 2010), parents have not succeeded in preponderantly proving this exception in the clear majority of court decisions thus far (e.g., *A.M. v. Monrovia Unified School District*, 2010; *E.H. v. Board of Education*, 2009). Similarly and more starkly, appellate courts in recent years have undercut the IDEA structure of providing for corollary state laws that may provide higher standards by treating such standards as merely procedural and thus subject to this defendant-friendly, harmless-error approach (*A.C. v. Board of Education*, 2009; *L.M. v. Capistrano Unified School District*, 2009). As also explained elsewhere in more detail (Zirkel, in press), the courts have tended to sweep various issues that the special education community would regard as substantive, such as present levels, measurable goals, and transition services under this procedural umbrella, thus subjecting them to the district-favorable no-harm-no-foul approach.

Despite the persistent efforts of parent attorneys based on the successive amendments to the original Act, the lower court decisions have resolutely refused to raise *Rowley*’s substantive standard despite the various successive amendments to the original Act (Zirkel, 2008). The Ninth Circuit Court of Appeals recently reversed the only outlier

decision, thus making consistent the long line of published court decisions that have retained the relatively low substantive floor for FAPE (*J.L. v. Mercer Island School District*, 2010).

In another relevant aspect of *Rowley*, the lower courts have interpreted its concluding dicta about leaving the choice of “educational method . . . to state and local educational agencies” (p. 207) as generally establishing a deference, which starts at the hearing and review officer levels, to districts. This general expansion of the *Rowley* dicta goes well beyond methodological issues and ignores the dicta’s tandem phrase “in cooperation with the parents . . . of the child” (p. 207). For example, in applying the *Rowley* reasonably calculated test to an IEP that the parents had successfully challenged at the hearing, the Seventh Circuit Court of Appeals correctively concluded,

The hearing officer substituted her judgment for that of the school administrators. The hearing officer thought the administrators were mistaken and they may have been. However, the administrators were not unreasonable. (*Alex R. v. Forrestville Valley Community Unit School District*, 2004, p. 611)

Similarly, in upholding a district’s extended school year policy for students with disabilities, a federal district court cited *Rowley* for “the strong deference” accorded to local and state education authorities (*McQueen v. Colorado Springs School District No. 11*, 2006, p. 1309).

The addition in IDEA 2004 of the requirement that the IEP statement of the special education and related services for the child be based on “peer-reviewed research to the extent practicable” (20 U.S.C. § 1414[d][1][A][i][IV]) has not become the corresponding “lever for . . . elevation of the substantive standard for FAPE” (Zirkel, 2008). Instead, as Etscheidt and Curran (2010) recently canvassed and as additional, published court decisions (e.g., *B.H. v. W. Clermont Board of Education*, 2011; *Doe v. Hampden-Wilbraham Regional School District*, 2010) have confirmed, the bulk of the case law has taken a district-deferential view of this language, resulting in the prevailing precedents continuing the relatively relaxed substantive standard under *Rowley*.

Finally, the courts application of the “snapshot” standard for FAPE, which assesses the appropriateness of the IEP in terms of what the IEP team knew or had reason to know at the time of developing the IEP that is at issue in the case is another subtle but significant skew in special education litigation. Specifically, the various courts that use this standard use subsequent evidence in determining appropriateness only when it shows progress, not lack of progress (Zirkel, 2011b).

FAPE accounts for the bulk of the litigation under the IDEA (e.g., Zirkel & Rose, 2009). Thus, the district-deferential application of the *Rowley* standard has cumulatively shifted the precedents further and further away

from outcomes in favor of parents. A recent empirical analysis of the hearing/review officer and court decisions specific to FBAs and behavior intervention plans (BIPs) clearly shows this longitudinal trend (Zirkel, 2011a). The percentage of rulings in favor of parents shifted steadily from 63% in the parents' favor in 1998–2001 to 18% in 2010.

### Shifting State System Nuances

Next, the state systems for IDEA administrative adjudication have changed in various relevant ways. In recent years, more and more states, including the majority of those accounting for most of the adjudicated hearings, have opted for not only one-tier systems but also for hearing officers who are full-time and/or predominantly of a legal rather than special education background (Zirkel & Scala, 2010). The increasing use of central panels of ALJs reinforces the deference to districts, here as part of the more general doctrine of deferring to the adjudications of administrative agencies. In a recent private conversation, a chief ALJ recently dismissed the notion of a balanced ratio of decisions under the IDEA, explaining that the presumption is that the various administrative agencies of the state—based on their specialized mission and expertise—are usually correct. The explanation concluded with the rhetorical question, “Do you think they could and should be wrong in half of the cases?” Moreover, the overall gradualistic trend since the passage of the original form of the Act in 1975 has been toward legalization of the process, including increasing complexity, such as the number and nature of issues, and reliance on cited legal authority, such as the relevant regulations and court decisions (Zirkel, Karanxha, & D’Angelo, 2007). This judicialization process for IDEA hearing officers has increasingly shifted the decision making of hearing officers to strict statutory construction and reliance on precedent.

Consider, for example, the decision in *Mason City School District* (2001), where the hearing officer in Iowa was a special education professor. She ruled in favor of the parent with regard to the appropriateness of the child’s BIP based on a set of standards that she derived from a selection of legal sources, largely hearing officer decisions from various jurisdictions. Like an article that she authored for a special education journal (Etscheidt, 2006) on the same subject, the lens for her selection and analysis was obviously professional best practices. In contrast, the Seventh Circuit Court of Appeals illustrated the judicial approach to the same issue (*Alex R. v. Forrestville Valley Community Unit School District*, 2004) as follows:

As the [hearing officer] in *Mason City* stated, “[t]he specific components of the [behavioral intervention plan] are not identified either in the federal statute or the regulations.” . . . [The parent], nevertheless, urges

us to follow the lead of the [hearing officer] in *Mason City*, who manufactured the substantive criteria of a sufficient [BIP] based on a string of administrative opinions. We decline the invitation. . . . In short, the District’s [BIP] could not have fallen short of substantive criteria that do not exist, and so we conclude as a matter of law that it was not substantively invalid under the IDEA. (p. 615)

Iowa recently became the latest state to change from hearing officers with predominant special education backgrounds to attorneys who are full-time ALJs. It is much more likely that these ALJs will fall in step with *Alex R.* rather than *Mason City*.

Finally, the selection of cases presented to hearing officers and the attorney representation of the parties is skewed toward districts. For case selection or sifting, it is generally recognized that districts have a propensity to settle—prior to or during the hearing—cases that clearly favor the parent due to the costs of the litigation process. For example, in a recent report concerning the hearing officer system in Massachusetts found that school districts had settled the vast bulk of the parents’ 500 requests during the previous year. Thus, preserving for decision only those cases that they expected to be clear winners, the districts were not surprised at the heavy proportion of hearing officer cases decided in their favor (Zirkel, 2009). Moreover, the amended IDEA’s requirement of a “resolution session” between the parties prior to a due process hearing, for the purpose of providing the district with “the opportunity to resolve the complaint,” has facilitated settlements, thus increasing the skewing effect of this sifting process (20 U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510[a][2]).

Equal representation for both parties is one of the prerequisites for balanced win–loss rates. Yet, as many parent and even state representatives have agreed, various parts of the country have a notable shortage of specialized and affordable attorneys to represent parents in IDEA cases (Seven & Zirkel, 2002). As a result, districts generally have attorney representation more frequently than do parents. For example, an analysis of due process cases in Illinois from 1997 through 2002 found this distribution of attorney representation: districts (94%) and parents (44%; Archer, 2002). The 278 decisions in the same study yielded the following significant difference in win rate for parents: those with attorney representation (50.4%) versus those without attorney representation (16.8%). The 2004 IDEA amendments (20 U.S.C. § 1415[b][7][B]) and the 2006 IDEA regulations (34 C.F.R. § 300.508[c]-[f]) further contributed to the judicialization of due process hearings by requiring a threshold complaint sufficiency step that is obviously borrowed from the notice-pleading process of the courts. This legal complexity compounds the disadvantage of parents who do not have available sufficiently economical and specialized legal

representation. Similarly, a quick search of federal appellate decisions where parents proceeded pro se, that is, without an attorney, not surprisingly revealed that the outcomes have heavily favored the districts, which had legal counsel (e.g., *B.D. v. Puyallup School District*, 2011; *C.O. v. Portland Public Schools*, 2012; *Council Rock School District v. Bolick*, 2012; *G. S. v. Cranbury School District*, 2011; *Ruffin v. Houston Independent School District*, 2012).

As a transition to the next level, recognize that the typical two-category outcomes classification, and even the addition of an intermediate “split decision” category, is an oversimplified metric. Litigation under the IDEA, starting with due process hearings, defies a binomial won–lost classification with the case as the unit of analysis. In recent years, special education cases present several issues. Moreover, the decision on each issue is not necessarily completely in favor of either party, and where it is not, classifying the outcome on a multipoint scale is difficult because the weight of each issue varies in terms of not only cost but also importance to each party. Take the relatively easy example of a recent case in Pennsylvania (*Heather D. v. Northampton School District*, 2007). The parents claimed that the school district had denied their child, who had multiple disabilities, an appropriate education under the IDEA from first through eighth grade. Thus, they sought 8 years (i.e., 8,640 hr) of compensatory education at a rate of US\$132 per hour, totaling US\$1.14 million plus attorney’s fees. Subsequent to lengthy administrative proceedings, including a 12-session due process hearing, the federal district court ultimately awarded the parents  $2,428 \text{ hr} \times \text{US}\$75 = \text{US}\$182,000$ , in addition to their attorney’s fees. Mathematically, measured against the parents’ original claim, the ultimate decision predominantly favored the district, but this outcome classification is questionable in terms of its financial and precedential significance. The problem of establishing a won–loss box score is compounded for cases that have various issues, such as eligibility, FAPE for more than one IEP based on both procedural and substantive grounds, and/or least restrictive environment (LRE), especially where the issues are not quantifiable in monetary terms.

As another reason for the inadequacy of a case-based two- or even three-category outcome metric is the special meaning of “prevailing” plaintiff for recovery of attorneys’ fees under the IDEA. The courts have generally agreed that parents meet the prerequisite of prevailing if they materially altered the legal relationship between the parties by succeeding in adjudication on any significant issue that achieves some of the benefit they sought in filing the hearing (e.g., *J.D. v. Kanawha County Board of Education*, 2009; *Miller v. Albuquerque Public Schools*, 2009). Thus, the parents need not completely win an issue, much less the case, to qualify for attorneys’ fees, thus serving as a contributing factor in the calculus for settlements as well as in the classification of hearing or court outcomes.

## Review Officer Level

For the review officer level, two other contributing factors apply. First, in the dwindling number of states that have retained a second tier, one of the justifications is that—via a relatively expedited and economical review procedure—this second administrative-adjudicatory level will provide corrective uniformity in applying the IDEA and the corollary state special education law. As Golden’s (2007) *Wall Street Journal* article makes clear, New York, which is the most active state in terms of due process hearings (Zirkel & Gischlar, 2008), is the leading example of accentuated parental concern with the changed win–loss ratio at the second tier.

The second contributing factor overlaps with, and serves as a transition to, the initial court level, especially because in the increasing number of one-tier states—currently 40 plus the District of Columbia (Zirkel & Scala, 2010)—the next level is judicial review. Specifically, concomitant with the aforementioned trend of cases to have multiple issues, parents tend to appeal more often than do districts because (a) districts tend to win more issues than parents and (b) districts are more likely to “cut their losses,” especially when the outcome is mixed or the issue is not institutionally crucial. As a result, parents tend—often based on their higher emotional and economic stakes—to give the review level a higher proportion of literally losing issues, which runs counter to an objective expectation of an even ratio of successes.

## Initial Court Level

Under the IDEA provision for concurrent jurisdiction, the initial court of review in the federal judiciary is its trial court, but in many states, the initial court of review is at the intermediate, appellate level. In either event, courts tend—as the aforementioned example in *Alex R.* shows—to be much more legalistic than hearing and review officers, thus unaffected by professional norms in special education that are not part of the legislative or regulatory framework. Finally, as empirically evident in successive studies (Newcomer & Zirkel, 1999; Zirkel, 2012), courts tend to provide due deference to hearing and review officer decisions, especially in their factual foundations. Thus, to the foreseeable extent that hearing and review officer outcomes favor districts, this factor contributes to a similar trend at the judicial level.

## Appellate Court Level

Finally, the effect not only culminates but also in circular fashion reverberates at the appellate court level. The culminating and confirming effect is marked by deference to the trial court’s decision via relaxed standards of judicial review, such as whether the lower court’s decision was

clearly erroneous or an abuse of discretion. The reverberating effect is via the doctrine of stare decisis, or precedent. More specifically, the appellate courts are the predominant source of judicial precedents. Thus, the Seventh Circuit's ruling in *Alex R.* that BIPs were, in effect, automatically appropriate, was binding on the trial courts, review officers, and hearing officers in the three states of its jurisdiction. In addition, it may well play a persuasive role in adjudications in the many states that lack an applicable precedent for this issue.

## Concluding Commentary

The underlying assumption that a balanced ratio of outcomes in favor of parents and districts is the proper metric for assessing the impartiality of special education adjudicators is fundamentally flawed. Each of these factors is relatively limited on its own, but their cumulative cascading effect is so systemic and inevitable that—quite the opposite—an even box score for a large quantity of decisions during the past decade or so would suggest adjudication that is by the numbers rather than based on the individual merits of the case within the applicable legal framework. In light of these factors, it is not at all surprising that various studies have found that the conclusive decisions in favor of districts clearly outnumber the conclusive decisions in favor of parents at both the hearing/review officer and judicial levels (Zirkel & D'Angelo, 2002).

Part of the problem is empirical. The evolving state of outcomes research reveals that the measurement should start on an issue-by-issue, rather than entire-case, basis, and the outcomes scale should be nuanced to differentiate rulings that are not completely or conclusively in favor of one party of the other. The aforementioned *Heather D.* decision illustrates the differentiation between conclusive decisions that are not completely in favor of one side. The rulings on motions for summary judgment, dismissals, and preliminary injunctions, which are all much more endemic to the judicial levels, cause the need to differentiate inconclusive outcomes. For example, if the district files, and the adjudicator denies, a motion for dismissal, the outcome is in favor of the parent but only inconclusively; the adjudicator's further proceedings on the same issue may result in a conclusive decision in either direction.

The larger problem is political. If parents seek a level playing field in litigation, the proper place to achieve this balance is in the policy-making forum, that is, federal and state special education legislation and regulations, which provide the framework for litigation. For example, some states have reversed the effect of *Schaffer v. Weast* via legislation or regulations, and Congress will have the opportunity to reexamine this issue on the national level during the next reauthorization. Without such directives, courts have unsurprisingly followed *Schaffer's* rationale in extending its application to other IDEA

issues, such as LRE (*L.E. v. Ramsey Board of Education*, 2006) and eligibility (*Antoine M. v. Chester Upland School District*, 2006). To whatever extent that the training, accountability, or—as recently canvassed (Zirkel & Scala, 2010)—other system-wide characteristics, such as selection and background, of hearing and review officers are a concern, federal and state legislation and regulation is the appropriate forum to formulate the applicable standards and allocate the appropriate resources.

In sum, for various reasons endemic to our rather complicated legal system, assessing the impartiality of hearing review officers based on their win-loss records misconceives the concept of legally informed and party-neutral decision making. The carpenter's level, like the surveyor's plumb bob, is a tool for assessing the playing field, not the umpire. Blaming hearing or review officers for a lack of balance between wins and losses entirely misses the mark and, for sake of equity or justice for parents and their children with disabilities, is “free” but not “appropriate.”

## Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

## Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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