

# **Are the Outcomes of Hearing (and Review) Officer Decisions Different for *Pro Se* and Represented Parents?**

**By Perry A. Zirkel\***

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## I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) provides states with the option of having one or two tiers of administrative adjudication prior to the judicial level of dispute resolution.<sup>1</sup> Although the numbers of states that have only a hearing officer level and those that additionally have a second tier, i.e., review officer level, have fluctuated, the net direction and overall balance has been clearly in favor of a one-tier system.<sup>2</sup> Although originally established as a relatively informal and expedited means of adjudication in comparison to the courts,<sup>3</sup> these administrative levels have become increasingly legalized.<sup>4</sup> Given the costs of legal representation and the lack of attorneys with specialization in IDEA cases,<sup>5</sup> the question of whether there is a significant relationship

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<sup>1</sup> 20 U.S.C. § 1415(g) (2012); 34 C.F.R. § 300.514(b) (2014). For the concurrent jurisdiction of state and federal courts upon appeal of the administrative adjudication, see 20 U.S.C. § 1415(i)(2) (2012); 34 C.F.R. § 300.516 (2014).

<sup>2</sup> E.g., Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010) (reporting a downward trend from twenty-four two-tiered systems in 1991 to ten in 2010).

<sup>3</sup> Cf. Sonja Kerr, *Winkelman: Pro Se Parent of Children with Disabilities in the Courts (or Not?)*, 26 ALASKA L. REV. 271, 287 (2009) (observing that “[t]he IDEA’s administrative proceedings . . . were originally designed to be parent-friendly”).

<sup>4</sup> E.g., Perry A. Zirkel, Zorka Karanxha & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

<sup>5</sup> E.g., Kay Hennessy Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEO. J. ON POVERTY L. & POL'Y 193, 218–19 (2002) (reporting a survey showing an inadequate level of attorneys for the IDEA in various parts of the country); cf. Debra Chopp, *School Districts and Families under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 451, 452 n.127 (2012) (pointing out the low number of members of the Council of Parent Attorneys and Advocates in some states and that “[f]or lower-income families, who comprise the bulk of special education recipients, it is far more difficult to secure legal representation”); Elisa Hyman, Dean Hill Rivkin & Stephen

between attorney representation, i.e., whether the parents proceed *pro se*, and the case outcome, i.e., whether the parent prevails, looms large. Although the considerations include other factors, including parental choice regardless of affordable availability,<sup>6</sup> empirical information specific to this question would be useful.

## II. PREVIOUS RESEARCH

### A. Outcomes Analyses

Although various national studies have analyzed the outcomes, along with the frequency, of court decisions under the IDEA,<sup>7</sup> the only major national analysis of the outcomes of hearing officer

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A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 146 (2011) (advocating recruitment of more parent attorneys in special education); Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 282–83 (2005) (pointing out that the insufficiency of legal assistance under the IDEA extends to free legal service providers and is especially burdensome for low and middle income parents).

<sup>6</sup> For example, the plaintiff parents were so concerned about this issue that they proceeded all the way to the Supreme Court in *Winkelman v. Parma City School District*, 550 U.S. 516 (2007). The Court concluded that parents are entitled to proceed *pro se* in federal court to enforce their own independent rights under the IDEA. *Id.* at 535. For a discussion of the case and its subsequent lower court applications, see Perry A. Zirkel, *The Problematic Progeny of Winkelman v. Parma City School District*, 248 EDUC. L. REP. 1 (2009).

<sup>7</sup> E.g., Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (finding, based on a three-category scale that included an intermediate “mixed” category, that districts won the majority of IDELR-published decisions for the successive three-year segments of the period 1989–2002); Perry A. Zirkel & Amanda C. Machin, *The Special Education Case Law “Iceberg”: An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483, 503 (2012) (finding, based on a seven-category scale for issue category rulings, that the outcomes predominated in favor of districts for a small sample of published and unpublished decisions); Perry A. Zirkel & James Newcomer, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999) (finding, based on a five-category scale designed to ascertain changes upon judicial review, that the outcomes distribution generally favored district for IDELR-published decisions for the period 1975–1995).

decisions under the IDEA was Zirkel and Skidmore's recent study.<sup>8</sup> The others were largely limited to single states and imprecise outcome measures.<sup>9</sup>

In the national analysis, Zirkel and Skidmore analyzed a representative sample of 361 IDEA hearing and review officer

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<sup>8</sup> Perry A. Zirkel & Cathy L. 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, 538–40 (2014) (explaining that the other national studies were much more limited in scope and methodology); e.g., Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131 (2011) (reporting survey results from forty-one states for the single school year of 2005–2006 according to an imprecise three-category scale); Zirkel & D'Angelo, *supra* note 7, at 740, 745 (reporting outcomes for IDELR-published hearing and review officer decisions for 1989–2000 according to a similar three-outcome scale).

<sup>9</sup> Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013) (examining hearing officer decisions in Minnesota and Wisconsin for the period 2000–2011); James R. Newcomer, Perry A. Zirkel & Ralph J. Tarola, *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 EDUC. L. REP. 449, 452 (1998) (examining the relationship between case characteristics and case outcomes for hearing officer decisions in Pennsylvania that were also adjudicated at the review officer level for the period 1973–1989); Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46 (2003) (examining issue category rulings of hearing officer decisions in Iowa for the period 1989–2001); Zirkel, Karanxha & D'Angelo, *supra* note 4 (analyzing outcomes and other characteristics of hearing officer decisions in Iowa for the period 1978–2005); Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997–2002*, DUE PROCESS ILLINOIS 1, 5–8 (Dec. 2002), available at <http://www.dueprocessillinois.org/Access.pdf> (analyzing hearing officer decisions in Illinois for the period 1997–2002); Gilbert K. McMahon, *NYS Special Education Impartial Hearing Outcomes*, MCMAHON ADVOCACY GROUP, <http://www.specialedlawadvocacy.com/NYS%20Special%20Education%20Impartial%20Hearing%20Outcomes.pdf> (last visited Apr. 27, 2014) (analyzing outcomes and frequency of hearing officer decisions in New York for the period 2002–2010); cf. Joseph McKinney & George F. Schultz, *Hearing Officers, Case Characteristics, and Due Process Hearings*, 111 EDUC. L. REP. 1069 (1996) (both only incidentally addressing outcomes for hearing officer decisions in one unidentified Midwestern state for the limited period 1992–1996 or 1993–1995); George F. Schultz & Joseph R. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decision Outcomes*, 2000 BYU EDUC. & L.J. 17 (2000). For a more comprehensive and specific summary, see Zirkel & Skidmore, *supra* note 8, at 531–40.

decisions published in the INDIVIDUALS WITH DISABILITIES LAW REPORT (IDELR)<sup>10</sup> for the thirty-five-year period of 1978–2012.<sup>11</sup> According to a specified typology of issue categories, such as child find, eligibility, FAPE-procedural, FAPE-substantive, and tuition reimbursement,<sup>12</sup> they found that the 361 decisions yielded 920 issue category rulings.<sup>13</sup> Based on a systematic process based on the judicial formulation of prevailing party status for attorneys' fees under the IDEA,<sup>14</sup> they conflated the five-category outcomes for the issue category rulings<sup>15</sup> into the two traditional categories of winning and losing for the decisions. As a result, they found that 52% of the decisions were in favor of the district and 48% were in favor of the parents.<sup>16</sup>

However, most of these outcome analyses did not address the possible relationship with attorney representation for parents. Moreover, the few studies that addressed this issue have been notably limited to relatively short or old periods, questionable measurement, and—in all but one analysis for the mid-1980s—single states. The following section summarizes these previous analyses in chronological order of their case samples.

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<sup>10</sup> This specialized reporter is available from LRP Publications. Although also available in hard-copy form, Zirkel and Skidmore used LRP's electronic database, LRP's Special Ed Connection®, for their representative sampling of IDELR decisions.

<sup>11</sup> The time period covered decisions from January 1, 1978 to December 31, 2012. For the details of their sampling procedure, see Zirkel & Skidmore, *supra* note 8, at 540–42.

<sup>12</sup> For their full typology, see *id.* at 570–75.

<sup>13</sup> Of the 361 decisions, 250 (69%) were at the hearing officer level, and the remaining 111 (31%) were at the review officer level. *Id.* at 550 n.149. As the authors observed, the IDELR process generally limits publication of decisions in two-tier states to those at the second tier, thereby inflating the number of review officer decisions and overestimating the proportion of review officer decisions to hearing officer decisions. *Id.* at 557 n.161.

<sup>14</sup> For an explanation of this conflation process, see *id.* at 547–50.

<sup>15</sup> For the explanation of this scale, see *id.* at 544–45.

<sup>16</sup> For this purpose, they excluded five decisions that were purely limited to inconclusive issue category rulings.

*B. Attorney Representation Analyses*

First, a pair of doctoral dissertations found that parent legal representation was significantly and positively related to the case outcome in hearing officer decisions in Pennsylvania for the period 1977–1986<sup>17</sup> and in New Jersey for the school year 1984–1985.<sup>18</sup> The limitations of both included the single state and early time period. For the Pennsylvania dissertation, additional notable limitations included an unclear outcomes scale,<sup>19</sup> design,<sup>20</sup> and representation-related findings.<sup>21</sup> For the New Jersey dissertation, additional notable limitations included a small sample in terms of duration and frequency,<sup>22</sup> an undefined outcomes scale,<sup>23</sup> and

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<sup>17</sup> Linda O'Connor Rhen, *An Analysis of Special Education Due Process Hearings in Pennsylvania, 1977–1986* (Nov. 1988) (unpublished Ed.D. dissertation, Temple University) (on file with author).

<sup>18</sup> Kathleen Regan, *Analysis of Mediation and Hearings to Resolve Parent-School Disputes in Special Education* (May 1990) (unpublished Ed.D. dissertation, Rutgers University) (on file with author).

<sup>19</sup> The reference point for the first four categories was the position of the respective party, with a particularly unclear one being “decision which [sic] supported the position of neither party.” Moreover, the final category—agreement of the parties—would seem to suggest a settlement, not a hearing officer decision. Rhen, *supra* note 17, at 53.

<sup>20</sup> She characterized the design as the “causal comparative method.” *Id.* at 54. Yet, without any matched comparison group, causal inferences were not appropriate.

<sup>21</sup> On the positive side, Rhen was able to determine parties’ representation in all 578 records that she analyzed, which extended to the second tier. Rhen, *supra* note 17, at 85. She found that the district had legal counsel in 77% of the cases, the parent had legal counsel in 44% of the cases, and a lay advocate represented the parents in an additional 21% of the cases. *Id.* However, the chi-square finding of a significant difference was not limited to parental legal representation (or lack thereof) and the outcome of the “decision which [sic] supported the position of the parent[.]” but also failed to take into consideration whether the district had legal representation in each of the respective cases. *Id.* at 102. Adding further confusion, Rhen concluded that the schools’ prevalent legal representation appeared to have an effect on the outcomes of the hearing despite finding no significant difference for this district variable. *Id.* at 104, 144.

<sup>22</sup> The period was twelve months, and the number of usable hearing officer cases was forty-four (out of a total of fifty-seven). Regan, *supra* note 18, at 40, 56–58.

<sup>23</sup> Regan’s only mention of the outcome scale was in the data collection form, which simply referred to the “prevailing party (who won)” without any operational

questionable statistical analysis.<sup>24</sup>

Next, a national governmental analysis of hearing officer decisions for the period 1984–1988 reported that parents with legal representation were successful in 59% of the cases, but the success rate for those without legal representation averaged 43%.<sup>25</sup> However, the basis for these results was a survey of state directors of special education, thus leaving in question the extent of missing or misinterpreted data, especially in the absence of a uniform outcome designation. Moreover, the report did not include the extent to which the district had legal representation in these cases.<sup>26</sup>

Third, in their analysis of hearing officer decisions, McKinney and Schultz reported that “the use of an attorney increased the probability of favorable rulings for the parents.”<sup>27</sup> However, their analysis was limited to cases decided in a single state during 1993–1995 and included all “major” issue rulings rather than just the overall decisions.<sup>28</sup>

Fourth, Archer’s aforementioned<sup>29</sup> study of hearing officer

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definition that showed the treatment of multiple issues and the extent of relief for each one. *Id.* at 102.

<sup>24</sup> Regan used chi-square, which, as an inferential statistic, is used to determine whether the results are generalizable from the sample to the population. Regan, *supra* note 18, at 56. Yet, her target population and her sample (except for the cases in which the information was insufficient) were the same, obviating the applicability of inferential analysis. *Id.*

<sup>25</sup> U.S. GENERAL ACCOUNTING OFFICE, SPECIAL EDUCATION: THE ATTORNEY FEES PROVISION OF PUBLIC LAW 99-372, 5 (Nov. 1989), <http://www.gao.gov/assets/80/77573.pdf>.

<sup>26</sup> Each of the two compared groups for parent legal representation had two possible subcategories of district attorney representation, posing the potential for differential results. In cases where parents had legal representation, the parents’ success rate could depend on whether the district did or did not have legal representation. Conversely, in cases where parents proceeded *pro se*, the outcome could vary depending on whether the district had or did not have an attorney as its spokesperson.

<sup>27</sup> McKinney & Schultz, *Hearing Officers, Case Characteristics, and Due Process Hearings*, *supra* note 9, at 1073.

<sup>28</sup> *Id.* More specifically, McKinney and Schultz identified the bases for their discriminant analysis as 105 “major issues” in seventy-one decisions, without defining what it means for a party to prevail, and without reporting the numbers of rulings or decisions in each attorney representation category. *Id.*

<sup>29</sup> See Archer, *supra* note 9 and accompanying text.

decisions in Illinois for the period 1997–2002 found, via chi-square analysis, a statistically significant difference in the success rate between cases in which the parents had legal representation (50%) and those in which they did not (17%).<sup>30</sup> However, in addition to its single-state scope, the limitations of this study include questionable impartiality,<sup>31</sup> interpretation,<sup>32</sup> and outcome measurement.<sup>33</sup>

Finally, in an unpublished undergraduate senior thesis limited to twenty-nine autism-related hearing officer decisions in Connecticut for the period 1998–2003, Becker found that districts had legal counsel in all of the cases and that parents' success rates were 60% and 14% with and without legal representation, respectively.<sup>34</sup> However, in addition to the restricted jurisdictional and temporal scope, the limitations included not only the student classification<sup>35</sup> but also the outcome designations<sup>36</sup> and numbers.<sup>37</sup>

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<sup>30</sup> Archer, *supra* note 9, at 7. The analysis was based on 276 of the 343 decisions in which Archer was able to identify whether each party had legal representation. *Id.*

<sup>31</sup> *Id.* at 22. According to her acknowledgments, the author, who is reportedly the parent of a child with autism, conducted the study under the auspices of a parent attorney. *Id.*

<sup>32</sup> *Id.* at 11. Archer interpreted the statistical analysis as showing “effect” of attorney representation, while—as explained *infra* text accompanying notes 60–66—this design and statistic does not justify causal characterizations. Archer, *supra* note 9, at 11.

<sup>33</sup> First, Archer relied on an imprecisely termed version of the then-applicable definition of whether the parent prevailed for purposes of attorneys' fees under the IDEA—“substantially prevailed on at least one . . . major issue[] in a case” (emphasis added). *Id.* at 3. Second, her application of this definition was, according to her provided example, questionable. *Id.* More specifically, she classified the parent as prevailing in a case in which the hearing officer ordered reimbursement for the independent educational evaluation but denied reimbursement for the tuition and transportation of the unilateral placement. *Id.*

<sup>34</sup> Kate Belf-Becker, Who Prevails in Special Education and Why? 9, 11 (Dec. 15, 2003) (unpublished B.A. senior thesis and projects, Trinity College) (on file with Trinity College Digital Repository), available at <http://digitalrepository.trincoll.edu/theses/94/>.

<sup>35</sup> *Id.* at 9. The twenty-nine decisions imprecisely defined as “regarding autism” accounted for only 14% of the Connecticut decisions for this period. *Id.*

<sup>36</sup> *Id.* at 9–10. Belf-Becker identified the outcome distribution in terms of the prevailing party, without any definition, as follows: parents prevailed in 41% of cases, both parties prevailed in 7% of cases, and the district prevailed in 52% of cases. *Id.*

### III. METHOD

The purpose of this study is to determine on a national basis for a thirty-five-year period whether attorney representation is significantly related to the outcome of IDELR-published hearing and review officer decisions under the IDEA.<sup>38</sup> The research questions address this purpose first overall and next for the hearing officer decisions and review officer decisions separately.<sup>39</sup>

The sample consisted of the hearing and review officer decisions in Zirkel and Skidmore's aforementioned<sup>40</sup> frequency and outcomes study. The specific time period for the decisions was from January 1, 1978 to December 31, 2012.<sup>41</sup> The spreadsheet coding of each decision consisted of (1) the case citation in IDELR, (2) whether the case was a hearing officer or review officer decision,<sup>42</sup> (3) whether an attorney represented the parent,<sup>43</sup> (4) whether an attorney represented the district,<sup>44</sup> and (5) the outcome of the case based on Zirkel and

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<sup>37</sup> *Id.* at 10. Belf-Becker's accompanying chart showing the number of cases in each category did not square with these percentages. *Id.*

<sup>38</sup> For an explanation of "IDELR," see *supra* note 10 and accompanying text.

<sup>39</sup> As shown in the Results section, the research questions were as follows:

1. Is there a statistically significant difference in the outcomes of the hearing and review officer decisions in which both parties had legal representation and those in which only the district had legal representation?

2. Is there a statistically significant difference in the outcomes of the hearing officer decisions between those in which both parties had legal representation and those in which only the district had legal representation?

3. Is there a statistically significant difference in the outcomes of the review officer decisions between those in which both parties had legal representation and those in which only the district had legal representation?

<sup>40</sup> See *supra* notes 8, 11–16 and accompanying text.

<sup>41</sup> See *supra* note 11.

<sup>42</sup> Almost 70% of the decisions were at the hearing officer level. See *supra* note 13.

<sup>43</sup> For this information, the author first examined the captioning information for the case. However, if the parties' representation was not available there, the author then reviewed the full opinion, which sometimes included this information in either the introductory paragraphs or in the legal analysis section of the decision.

<sup>44</sup> See *supra* note 43 for an explanation of the procedure used for obtaining this variable.

Skidmore's prevailing-party procedure for conflation of the issue category rulings.<sup>45</sup> Due to missing information, the number of usable cases consisted of 207 hearing officer decisions and 62 review officer decisions.<sup>46</sup> Moreover, although there were four theoretically possible combinations for attorney representation, none of the cases fit in two of these alternatives, specifically cases in which only the parent, not the district, had legal representation, or cases in which both parties did not have attorney representation.<sup>47</sup> The analysis comparing the two remaining groups—cases in which both parties had attorney representation and those in which only the district, not the parent, had attorney representation<sup>48</sup>—was via Pearson chi-square,<sup>49</sup> a nonparametric inferential statistic used to determine whether the extent of association<sup>50</sup> was significant, and thus likely to be generalizable to the target population.<sup>51</sup>

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<sup>45</sup> See *supra* text accompanying notes 14–15.

<sup>46</sup> These numbers respectively represented 83% of the hearing officer decisions and 56% of the review officer decisions. The analysis excluded the relatively negligible number of otherwise usable cases in which the outcome at the hearing officer level (n=2) or review officer level (n=1) was inconclusive. For an explanation of these excluded cases, see Zirkel & Skidmore, *supra* note 8, at 556 n.157.

<sup>47</sup> Although not essential for the immediate parent-representation focus of this study, having sufficient data for these other two alternatives would have provided a fuller picture of the outcome relationship for both parties.

<sup>48</sup> Thus, conversely, in light of the uniform legal representation of districts, the comparison is between cases in which the parents proceeded *pro se* and cases in which they proceeded with an attorney.

<sup>49</sup> The more specific designation is the chi-squared test of Pearson. For more detailed descriptions and explanations, see, e.g., PRISCILLA E. GREENWOOD & MIKHAIL S. NIKULIN, A GUIDE TO CHI-SQUARED TESTING (1st ed. 1996).

<sup>50</sup> In this context, association may be formulated in terms of either difference or relationship, which are used interchangeably herein. For chi-square testing more specifically, the question is framed in terms of whether the distribution of observed cases differs significantly from the expected distribution.

<sup>51</sup> Here, the target population is the IDELR-published hearing and review officer decisions during this period, for which Zirkel & Skidmore, *supra* note 8, at 541–42, derived a representative sample. On a larger and more cautious scale, the ultimate population may be viewed as all of the hearing and review officer fully adjudicated decisions. See, e.g., Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings under the IDEA*, 302 EDUC. L. REP. 1 (2014). For the fluid and complex nature of the much larger, full “iceberg,” see, Zirkel & Machin, *supra* note 7, at 512.

## IV. RESULTS

This section reports the findings of the three research questions. Derived from the purpose of the study, the research questions compare the outcomes of the two groups of cases first for the overall usable sample and then for each of the separate tiers of administrative adjudication under the IDEA.<sup>52</sup>

Research Question 1: Is there a statistically significant difference in the outcomes of the hearing and review officer decisions between those in which both parties had legal representation and those in which only the district had legal representation?

Table 1: Chi-Square Analysis of Attorney Representation and All Case Outcomes

| <b>Attorney Representation</b> | <b>Parent Win</b> | <b>District Win</b> | <b>Chi Square</b>     |
|--------------------------------|-------------------|---------------------|-----------------------|
| Both Sides                     | 58% (n=119)       | 42% (n=86)          | $\chi^2 = 37.84^{**}$ |
| District Only                  | 14% (n=9)         | 86% (n=55)          |                       |

\*\*  $p < 0.001$

Table 1 reveals that the answer to the first research question is Yes. More specifically, the outcomes of the hearing and review officer decisions were significantly more favorable to parents in the cases in which they had legal representation than in those in which they did not have legal representation, given that the districts had legal representation in all of the cases. The parents won the majority of the cases in which they had legal counsel, but only won a small minority of cases in which the parents proceeded *pro se*.

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<sup>52</sup> See *supra* text accompanying notes 38–39.

Research Question 2: Is there a statistically significant difference in the outcomes of the hearing officer decisions between those in which both parties had legal representation and those in which only the district had legal representation?

Table 2: Chi-Square Analysis of Attorney Representation and Hearing Officer Case Outcomes

| <b>Attorney Representation</b> | <b>Parent Win</b> | <b>District Win</b> | <b>Chi Square</b>     |
|--------------------------------|-------------------|---------------------|-----------------------|
| Both Sides                     | 57% (n=84)        | 43% (n=63)          | $\chi^2 = 30.58^{**}$ |
| District Only                  | 15% (n=9)         | 85% (n=51)          |                       |

\*\*  $p < 0.001$

Table 2 reveals that answer to the second research question is also Yes. The outcomes for parents with legal representation were significantly more favorable than those for parents who proceeded *pro se* for the hearing officer decisions, which were the majority of all of the cases.<sup>53</sup>

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<sup>53</sup> The hearing officer decisions comprised 77% of the total sample of usable cases. *See supra* text accompanying note 46.

Research Question 3: Is there a statistically significant difference in the outcomes of the review officer decisions between those in which both parties had legal representation and those in which only the district had legal representation?

Table 3: Chi-Square Analysis of Attorney Representation and Review Officer Case Outcomes

| Attorney Representation | Parent Win | District Win | Chi Square         |
|-------------------------|------------|--------------|--------------------|
| Both Sides              | 60% (n=35) | 40% (n=23)   | $\chi^2 = 3.36$ ns |
| District Only           | 0% (n=0)   | 100% (n=4)   |                    |

Note: ns=not statistically significant<sup>54</sup>

Table 3 provides a different answer for research question 3 than for research questions 1 and 2; the difference between outcomes for parents with legal representation and outcomes for parents who proceeded *pro se* was not statistically significant for the review officer decisions. However, the cell sizes for the review officer decisions in which only the district, not the parent, had legal representation were smaller than the minimum generally required for chi-square analysis.<sup>55</sup> Thus, a more definitive conclusion would require replication with a sample that provided sufficient cell sizes.

## V. DISCUSSION

### A. Tier One: Hearing Officer Level

The results of this national thirty-five-year study confirms the various limited, largely single-state analyses that attorney

<sup>54</sup> The alternative approach of Yates correction for continuity yielded the same chi-square value of 3.36 and  $p < .07$ .

<sup>55</sup> Although statisticians disagree on the lower threshold for cell size, the conservative position sets the minimum at 5.0. E.g., DAVID C. HOWELL, FUNDAMENTAL STATISTICS FOR THE BEHAVIORAL SCIENCES 452–53 (5th ed. 2004).

representation for parents at the hearing officer level is related to the outcome. However, this conclusion merits caution at two levels. First, this study is not without limitations for the hearing officer level, including (1) the notable, although not overwhelming, extent of missing data, which may affect the representativeness of the results;<sup>56</sup> (2) the limited total number of usable cases, which precluded a more complete examination of the outcome relationship of attorney representation;<sup>57</sup> and (3) the use of IDELR-published decisions, which makes questionable the generalizability to the total population of hearing officer decisions.<sup>58</sup>

The second, wider set of limitations applies to all of the relevant research to date. The major overall caveat is that such relationship and difference research<sup>59</sup> does not establish causality. Just because there is a difference in the outcomes does not necessarily mean that attorney representation “makes” (i.e., is the sole or even primary reason for) the difference. If everything else were equal, the attorney factor would be the likely cause, especially in light of the general

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<sup>56</sup> This problem was much less pronounced but still not negligible for hearing officer decisions, as compared with review officer decisions. More specifically, in one-sixth of the first tier decisions, the available information was insufficient as to whether each party had legal representation. *See supra* note 46 and accompanying text. Yet, for the total usable sample, the outcomes distribution for the parents and districts was 48% and 52%, respectively, which is identical to the proportions that Zirkel and Skidmore found overall. *See supra* text accompanying note 16.

<sup>57</sup> *See supra* text accompanying note 47. Due to the district-skewed distribution of attorney representation, a very large sample would be necessary to obtain sufficient cell sizes for the other two possible combinations.

<sup>58</sup> The publisher’s selection process is the primary intervening variable, and LRP maintains proprietary secrecy about the specific criteria and consistency of this process. *See, e.g.*, e-mail from Amy Slater, Editor, IDELR, to Perry A. Zirkel (Jan. 27, 2014, 16:34 EST) (on file with author). Although the availability of information and its results vary widely from state to state, it may well be that the extent of legal representation for each party has a different distribution for the total population. For example, in California for 2013–2014, parents had legal representation in 84% of the first tier cases and districts had representation in only 73% of the first tier cases, but these data are not only limited in time period and jurisdiction—they are also based on filings, not adjudications. OFFICE OF ADMINISTRATIVE HEARINGS, SPECIAL EDUCATION DIVISION QUARTERLY DATA REPORT: JANUARY 1, 2014–MARCH 31, 2014 (Apr. 28, 2014), *available at* <http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20Q3%20FY%2013-14%20Final.pdf>.

<sup>59</sup> *See supra* note 50.

trend toward increasing legalization of IDEA hearings.<sup>60</sup> However, an experimental design is not practicable in this context,<sup>61</sup> and a quasi-experimental study, which would match cases for equivalence in IDEA issues and decisional difficulty, and otherwise control for other relevant variables on an ex post facto basis, would be much more complex and arduous. For the present design, one problem is the possible nonequivalence of the cases. For example, it may be that *pro se* parents were less likely to withdraw or settle cases in which the odds were objectively not in their favor. The reasons are that an attorney is not as emotionally involved with the case<sup>62</sup> and also has the legal savvy to better assess those odds and effectuate early disposition of the case.<sup>63</sup> On an overlapping and interacting basis,<sup>64</sup> it may be that the parents who are more likely to afford an attorney

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<sup>60</sup> For the specific evidence of legalization, see Zirkel, Karanxha & D'Angelo, *supra* note 4. One example is the addition of a more formal and specific notice-pleading requirement in the IDEA amendments of 2004. 20 U.S.C. §§ 1415(b)(7), (c)(2) (2012).

<sup>61</sup> In contrast, a randomized study in the much more limited and controlled context of Harvard's law school clinic found that that the offers of representation had no statistically significant effect on the probability that unemployment claimants would prevail in their ALJ cases. See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Legal Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2149–53 (June 2012). However, the authors acknowledged the various differences with the “gold-standard” of experimental research, including that they were not able to control actual use of legal representation from the clinic, much less from other sources. *Id.* at 2121–24.

<sup>62</sup> This rationale is consistent with the long line of case law that disqualifies parent-attorneys who represent their own children in IDEA actions from receiving attorneys' fees if they prevail. *E.g.*, *Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419 (3d Cir. 2008); *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *S.N. ex. rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006); *Doe v. Bd. of Educ. of Baltimore Cnty.*, 165 F.3d 260 (4th Cir. 1998); *Erickson v. Bd. of Educ. of Baltimore Cnty.*, 162 F.3d 289 (4th Cir. 1998), *superseded by Doe v. Bd. of Educ. of Baltimore Cnty.*, 165 F.3d 260 (4th Cir. 1998). Moreover, the IDEA incentivizes attorneys to settle cases via its timely settlement offer provision. See 20 U.S.C. §§ 1415(i)(3)(D)(i), (E) (2012).

<sup>63</sup> Starting at the decision whether to take the case, the attorney has this screening function, and part of the attorneys' training and experience is also facilitating withdrawal of the case or negotiating a settlement.

<sup>64</sup> Greiner & Pattanayak, *supra* note 61, at 2193–94, usefully differentiated these factors as “client-induced” and “[l]awyer-[i]nduced” selection effects.

also have the resources to hire experts<sup>65</sup> and more successfully “play the game” of this adversarial dispute resolution process.<sup>66</sup>

Other factors beyond case equivalence merit consideration. For example, depending on the particular circumstances of the case, the hearing officer may inadvertently or deliberately re-balance the process and its outcome in light of the underdog status of the unrepresented parent.<sup>67</sup> Additionally, even without such compensatory treatment or a favorable outcome, the parent may perceive cathartic value in the IDEA hearing.<sup>68</sup> As a final example,

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<sup>65</sup> The Supreme Court’s decision in *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), which held that the attorneys’ fees shifting provision of the IDEA does not extend to expert witness fees, served to accentuate this factor.

<sup>66</sup> For a discussion of the wealth-based disparities in the private enforcement mechanism of the IDEA, primarily including the hearing officer dispute resolution system, see Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (Aug. 2011). For references to the enforcement and information “game,” see *id.* at 1426, 1438.

<sup>67</sup> *E.g.*, Richard Bartos, *IDEA Due Process Hearings Where the Parents Are Not Represented by Legal Counsel* 81, 86 (2002), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.law.seattleu.edu%2Fdocuments%2Faljho%2Fresources%2FBartosUnrepresentedParents.pdf&ei=dzvRU5bUEs3roATmjYLgBw&usg=AFQjCNFwpMos-WURmlTlaAmc4AnaBtaJpg&bvm=bv.71778758,d.cGU> (observing that “[w]hen a parent or party has no attorney or experienced advocate, it becomes increasingly difficult for the hearing officer to remain impartial”); Lyn Beekman, *Addressing the Needs of In Pro Per Parents and Lay Advocates* (2010) (on file with the author) (observing that “[t]here is probably no more difficult situation for a hearing officer than try to in a fair yet orderly fashion [accommodate] the needs of an unrepresented parent”). For more general treatment of underdog status and its hidden benefits, see MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* (2013) (setting forth the actual advantages of being apparently disadvantaged, including the theory of desirable difficulty). For the broad boundaries of hearing officer impartiality, see, e.g., Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries*, 83 N. DAKOTA L. REV. 109 (2007).

<sup>68</sup> *Cf.* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 99 (1989) (observing that “the most frequently cited objective of lay litigants in adjudicatory proceedings was to ‘tell my side of the story’”); Brian Walker, *Lessons That Wrongful Death Tort Law Can Learn from the September 11 Victim Compensation Fund*, 28 REV. LITIG. 595, 611 (2009) (citing the therapeutic value of adjudicatory hearings to some plaintiffs).

the unrepresented parents' use of lay advocates may serve as an intervening variable.<sup>69</sup>

Moreover, relevant wider frames of reference for the empirical examination of the role of legal representation for parents include: (1) the filing stage, including whether the parent or the district initiated the case,<sup>70</sup> (2) the ratio of filings to adjudications,<sup>71</sup> including whether the parties settled the case and, if so, the extent to which the parent obtained the requested relief,<sup>72</sup> and (3) the judicial appeal stage, including the final resolution of the case.<sup>73</sup>

The common sense expectation, at least within the legal

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<sup>69</sup> The availability and the permissibility of lay advocates representing parents at due process hearings vary widely from state to state. *E.g.*, Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19, 21–22 (2007). The alternative role of lay advocates as consultant advisers and expert witnesses also varies, although it may have decreased in recent years. *Id.* at 26.

<sup>70</sup> *E.g.*, Mueller & Carranza, *supra* note 8, at 137 (finding that the district was the filing party in 14% of the hearing officer decisions for the period 2005–2006 among the responding forty-one states in a survey of state special education directors).

<sup>71</sup> For the recent six-year period starting in 2006–2007, the average ratio of filings to adjudications was 6:20. Zirkel, *supra* note 51, at 5. The ratio varied widely from state to state, with ten states having ratios above 25:1. *Id.* at 10. The role of attorneys in such high-ratio states may well be more important to assess before, rather than at, the hearing.

<sup>72</sup> *See, e.g.*, JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 108–11 (2009) (examining the new attorney role of “conflict resolution advocacy” in light of the increased prevalence of settlements); *cf.* Stewart J. Schwab & Michael Heise, *Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 CORNELL L. REV. 931, 934 (2011) (observing more generally, in an analysis of the relationship between plaintiff demands and final settlement amounts in employment discrimination cases, that “although most litigation ends in settlements, we know frustratingly little about the outcomes or the process of settlements”). The legal literature specific to settlements of IDEA hearing officer cases is negligible in terms of the dynamics of the process. Instead, it is limited to the law concerning settlements of IDEA cases more generally in relation to attorneys' fees. Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard To Do*, 43 LOY. L.A. L. REV. 641 (2010).

<sup>73</sup> *Cf.* Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions Under the IDEA*, 78 EXCEPTIONAL CHILD 375, 380 (2012) (finding a strong positive relationship between the administrative outcome and the final judicial outcome upon appeal for IDEA cases in Illinois).

community,<sup>74</sup> that legal representation makes an outcome-determinative difference at due process hearings, in terms of being the causal factor, is not necessarily correct.<sup>75</sup> Indeed, after canvassing the extensive research literature purporting to measure quantitatively the effect of legal representation in various administrative adjudication contexts, including but far from limited to special education, Greiner and Pattanayak concluded that our empirical basis for causal inferences is woefully limited, and they warned that for this issue “instinct and conjecture can be wrong in a way that matters.”<sup>76</sup>

### B. Tier Two: Review Officer Level

The different finding for the review officer level may be attributable to differences in these levels of administrative adjudication. For example, although not entirely uniform, the typical process at the second tier is to rely on the record that the hearing officer established, thus narrowing the litigants’ role to submitting written briefs in support of their positions upon administrative appeal.<sup>77</sup> Additionally or alternatively, the lack of statistical

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<sup>74</sup> *E.g.*, Chopp, *supra* note 5, at 451 (citing Hyman); Hyman, Rivkin & Rosenbaum, *supra* note 5, at 114 (relying solely on Archer’s Iowa study).

<sup>75</sup> Conversely, the overall conclusion is not that attorney representation is a null factor. Rather, it is likely a contributing factor, but the extent of its effect and its interaction with other factors is much more complex than the typical causal conclusion. Hyman, Rivkin & Rosenbaum, *supra* note 5, at 114.

<sup>76</sup> Greiner & Pattanayak, *supra* note 61, at 2178–79, 2182. At an even more nuanced level, their referenced gold standard of experimental and quasi-experimental research has its limitations in terms of valid causal inferences. *See, e.g.*, Christopher J. Lemons, Douglas Fuchs, Jennifer K. Gilbert & Lynn S. Fuchs, *Evidence-Based Practices in a Changing World: Reconsidering the Counterfactual in Education Research*, 43 EDUC. RESEARCHER 242, 242 (2014) (observing that samples and their populations can change significantly over time).

<sup>77</sup> The IDEA legislation provides the parties with the same procedural safeguards at both tiers, including the right to present and cross-examine witnesses. 20 U.S.C. § 1415(i) (2012). However, the IDEA regulations expressly condition this general right on the review officer’s authority to “[s]eek additional evidence if necessary.” 34 C.F.R. § 300.514(b)(2)(iii) (2014). Moreover, in the declining minority of states that have a second tier, this authority is interpreted as discretionary and is exercised only rarely. For example, the regulations in New York, which is one of the leading states in terms of hearing officer adjudications,

significance here is likely attributable to the small cell sizes.<sup>78</sup> More specifically, in our sample, the *pro se* category consisted of only four usable cases, and the outcome was in favor of the district in every one of them, in comparison to only 40% of the cases in which both parties had legal representation. Given the limitation of chi-square with regard to cells with *n* values of less than five, a more robust sample may have yielded different results. In any event, as the title of this article suggests, the primary focus is on the first tier in light of its much higher frequency of adjudications<sup>79</sup> and the declining number of two-tier states.<sup>80</sup>

## VI. CONCLUSION

In sum, the response to the question set forth in the title of this article is that the outcomes for *pro se* parents at the IDEA hearing officer level appear to be significantly less favorable than those in which both parties have legal representation—at least for IDELR-published decisions. The national scope and thirty-five-year period of this analysis, along with methodological refinements, confirms the more limited findings of previous research. However, the finding of a difference does not necessarily mean that attorney representation made, i.e., caused, this difference. As with many issues, the causal question warrants more careful examination than immediately meets the eye. Although providing legal representation for parents in IDEA cases starting at the hearing officer level makes eminent sense from a policy perspective, the trade-offs and the alternatives warrant

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expressly treats this matter as discretionary to the review officer. N.Y. COMP. CODES R. & REGS. tit. 8, § 279.10(b) (2013). Moreover, the review office in New York considers additional evidence in less than 10% of its cases, and then only in the form of documents, not testimony. E-mail from Justyn Bates, Chief Review Officer, New York Office of State Review, to Perry A. Zirkel (July 26, 2014, 15:37 EST) (on file with author). For the record review, the prevailing standard is largely deferential to the hearing officer's factual findings. *E.g.*, *Carlisle Sch. Dist. v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995) (requiring the review officer to “defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion”).

<sup>78</sup> See Howell, *supra* note 55 and accompanying text.

<sup>79</sup> See *supra* note 13.

<sup>80</sup> See Zirkel & Scala, *supra* note 2.

concomitant consideration.<sup>81</sup> Moreover, within the boundaries of economics and ethics, the empirical research to date warrants not only cautious interpretation but also well-designed expansion, including mixed quantitative-qualitative methodology. Finally, because they are the ultimate implementers of the established current policies, impartial hearing officers under the IDEA are invited to provide their well-informed responses to the findings of this study.

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<sup>81</sup> At the other extreme, for example, consider the alternative of a relatively informal problem-solving model for IDEA due process hearings. Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 66 MONT. L. REV. 403, 403 (1994).