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## The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison

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The purpose of this article is to provide an empirical comparison of the two decisional mechanisms under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup>—the hearing officer (HO) and the complaint procedures (CP) processes. The comparison warrants an initial and concise contextual background.

The IDEA is the most active source of litigation within the K-12 school context.<sup>2</sup> The adjudicative avenue under the IDEA starts with an impartial hearing at the administrative level.<sup>3</sup> Although the IDEA provides states with the option of a second, review officer level,<sup>4</sup> most states have chosen a one-

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<sup>1</sup> 20 U.S.C. §§ 1400–1419 (2012). For the implementing regulations, see 34 C.F.R. §§ 300.1–300.818 (2015).

<sup>2</sup> *E.g.*, Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (finding pronounced increase in special education court decisions in Westlaw database within the most recent decades while the overall level of education litigation remained relatively level).

<sup>3</sup> 20 U.S.C. § 1415(f).

<sup>4</sup> *Id.* at § 1415(g).

tier system of administrative adjudication preceding court action,<sup>5</sup> which is subject to the exhaustion doctrine.<sup>6</sup>

Despite receiving minimal scholarly attention in comparison to the impartial hearing process,<sup>7</sup> the alternative administrative avenue for

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<sup>5</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 (2010) (reporting that forty-one jurisdictions had a one-tier system). Since then, at least three states—Colorado, Indiana, and Ohio—have moved from a two- to one-tier system.

<sup>6</sup> E.g., Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009) (canvassing the case law application of the provision in the IDEA requiring utilization of the HO system prior to initiating suit in court).

<sup>7</sup> For a sampling of the relatively recent published literature specific to the IDEA's hearing officer process, see, for example, RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* 137–216 (2013); William H. Blackwell & Vivian V. Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts*, 5 SAGE OPEN 1 (Jan.–Mar. 2015), <http://sgo.sagepub.com/content/5/1/2158244015577669>; Ruth Colker, *California Hearing Officer Decisions*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 461 (2012); Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. VA. L. REV. 736 (2016); Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131 (2011); Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers Under the Individuals with Disabilities Act*, 83 N. DAKOTA L. REV. 109 (2007); Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46 (2003); Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 CASE W. RES. L. REV. 143 (2015); George F. Schultz & Joseph R. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decision Outcomes*, BYU EDUC. & L.J. 17 (2000); Michael B. Shuran & M.D. Roblyer, *Legal Challenge: Characteristics of Special Education Litigation in Tennessee Schools*, 96 NASSP BULL. 44 (2012); Cathy Skidmore & Perry A. Zirkel, *Has the Supreme Court's Schaffer Decision Placed a Burden on Hearing Officer Decision-Making under the IDEA?* 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 283 (2015); Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495 (2014); Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents?* 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 263 (2015); Perry A. Zirkel, *Balance and Bias in Special Education Hearings*, 22 J. DISABILITY POL'Y STUD. 67 (2013); Perry A. Zirkel, *Longitudinal Trends of Impartial Hearings under the IDEA: A Follow-Up Analysis*, 303 EDUC. L. REP. 1 (2014); Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings Under the Individuals with Disabilities Education Act*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 305 (2016); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONTANA L. REV. 403 (1994); 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); Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014); Sasha Pudelski, *Rethinking Special Education Due Process* (2013), [https://www.aasa.org/uploadedFiles/Policy\\_and\\_Advocacy/Public\\_Policy\\_Resources/Special\\_Education/AASARethinkingSpecialEdDueProcess.pdf](https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf). Aside from the relatively few articles cited *infra*, the scholarly attention to CP has been negligible. Indeed, many of the texts in special education law fail to even mention, much less explain, CP; Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013). E.g., CTR. FOR EDUC. & EMPLOYMENT, *STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW* (2014); NIKKI MURDICK, BARBARA GARTIN & GERARD FOWLER, *SPECIAL EDUCATION LAW* (2014); BEVERLY JOHNS, *YOUR CLASSROOM GUIDE TO SPECIAL EDUCATION LAW* (2016); PETER LATHAM, PATRICIA LATHAM & MYRNA MANDLAWITZ, *SPECIAL EDUCATION LAW* (2007); ALLAN G. OSBORNE & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW* (2014); MARK C. WEBER, RALPH MAWDSLEY & SARAH REDFIELD, *SPECIAL EDUCATION LAW* (2013); PETER WRIGHT & PAMELA DARR WRIGHT, *WRIGHTSTLAW: SPECIAL EDUCATION LAW* (2007). Others give it tertiary attention in comparison to the adjudicatory process. E.g.,

deciding disputes under the IDEA is the state educational agency's (SEA's) CP system.<sup>8</sup> This process, which is primarily addressed in the IDEA regulations,<sup>9</sup> is investigative rather than adjudicative,<sup>10</sup> with various other differences from the HO system.<sup>11</sup> In contrast, mediation, which is the third expressly established dispute resolution mechanism under the IDEA<sup>12</sup> and which is available in conjunction with both the CP<sup>13</sup> and HO<sup>14</sup> processes, is not decisional.<sup>15</sup>

As systematically synthesized elsewhere, the legal contours of CP<sup>16</sup> and their comparison with those of the HO avenue<sup>17</sup> reveal various similarities and differences, such as (1) the CP filing party being any individual or organization, with an implicit exception for the school district filing against the parent, as compared with the HO filing party being limited to the parent or district<sup>18</sup>; (2) the broadly but not entirely overlapping subject matter

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THOMAS GUERNSEY & KATHE CLARE, SPECIAL EDUCATION LAW 283–85 (2008); MITCHELL YELL, THE LAW AND SPECIAL EDUCATION 277 (2016).

<sup>8</sup> For a practical treatment of these two avenues along with the alternatives under Section 504, see 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). For a quick, simple guide that compares various IDEA dispute resolution mechanisms, extending to IEP facilitation and mediation, see <http://www.directionservice.org/cadre/pdf/DisputeResolutionProcessComparisonChart.pdf>

<sup>9</sup> 34 C.F.R. §§ 300.151–300.153. The IDEA legislation only addresses CP to a relatively limited extent. 20 U.S.C. § 1411(e)(2)(B)(i) (2012) (authorizing use of IDEA funds for CP); *id.* §§ 1412(a)(14)(E) and 1412(a)(10)(A)(v) (providing exclusive jurisdiction for CP for particular disputes, such as private school consultation complaints); and *id.* § 1415(f)(3)(F) (providing the right to an impartial hearing does not preclude parent from accessing CP).

<sup>10</sup> For example, a court characterized these two alternative avenues as follows: “[Under the IDEA, parents] can request a due process hearing, which entails a full-fledged adjudicatory proceeding, or they can file an administrative complaint with the designated state education agency, which must investigate and issue a decision within sixty days.” *Bd. of Educ. v. N.J. State Dep’t of Educ.*, 945 A.2d 125, 128 (N.J. Super. Ct. 2008). The investigative nature of the CP avenue means much lower transaction costs for the complainant in light of the absence of the increasingly legalized HO process. See Zirkel, Karanxha, & D’Angelo, *supra* note 7.

<sup>11</sup> *E.g.*, Perry A. Zirkel, *A Comparison of the IDEA’s Dispute Resolution Processes: Complaint Resolution and Impartial Hearings*, 326 EDUC. L. REP. 1 (2016) (providing a comprehensive two-column tabulation of the differences and commonalities between the CP and HO processes).

<sup>12</sup> Although the IDEA specifically provides for these alternatives, it does not prohibit—and state authorities, with federal encouragement, have explored—various other options, such as IEP facilitation. See, *e.g.*, CADRE: THE CTR. FOR APPROPRIATE DISP. RESOL. IN SPECIAL EDUC., <http://www.cadreworks.org> (last visited Sept. 24, 2017)

<sup>13</sup> *E.g.*, 34 C.F.R. § 300.152(a)(3)(ii).

<sup>14</sup> *E.g.*, *id.* § 300.510(a)(ii); § 300.506(a).

<sup>15</sup> *Id.* § 300.506(a). For the latest agency policy guidance concerning the HO, CP, and mediation processes under the IDEA, see Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act, 61 IDELR ¶ 232 (OSEP 2013).

<sup>16</sup> For a synthesis of the IDEA regulations, agency interpretations, and court decisions concerning CP, see Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 EDUC. L. REP. 1 (2015).

<sup>17</sup> See Zirkel, *supra* note 11.

<sup>18</sup> Compare 34 C.F.R. §§ 300.151(a)(1) and 300.153(a) (CP), with *id.* § 300.507(a)(1) (HO). The implicit exception is based on the overall compliance purpose of CP, which would appear to prevent a district filing against a parent, although not against another public agency under the IDEA.

jurisdiction<sup>19</sup> and remedial authority<sup>20</sup> of the CP and HO avenues; (3) the CP's silent relationship, as compared with the HO's direct linkage, with the judicial level<sup>21</sup>; and (4) the SEA responsibility for public availability of the HO, but not the CP, decisions.<sup>22</sup>

The following parts of this article provide an empirical analysis comparing CP and HO decisions. Part I provides an overview of the limited previous research concerning the CP, as compared with the HO, avenue of dispute resolution under the IDEA. Part II describes the methodology of this empirical analysis. Part III reports the results of the analysis. Part IV provides a discussion of the results, including integrated recommendations for policymaking and further research.

### I. RELATIVELY SCANT EMPIRICAL RESEARCH ON CP

In an early survey of SEA representatives, which was in the late 1990s, Suchey and Huefner found a prevailing perception that school district personnel had limited awareness of the CP in comparison to the HO process.<sup>23</sup> The literature lacks follow-up research of the extent of more general awareness as a result of the requirement in the 2006 IDEA regulations for the district's procedural safeguards notice for parents to include a "full explanation of . . . [t]he difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures."<sup>24</sup>

Similarly, other published research has been scant with regard to CP.<sup>25</sup> For example, limited to ninety seven CP decisions concerning students with autism for a Midwestern state during the five-year period 2004–2009, White

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<sup>19</sup> Compare *id.* §§ 300.136, 300.140(c) and 300.153(b) (CP), with *id.* §§ 300.140(a)-(b) and 300.507(a)(1) (HO).

<sup>20</sup> Compare *id.* §§ 300.151(b) and 300.156(e) (CP), with *id.* § 300.516(e) (HO by derivation).

<sup>21</sup> *Id.* § 300.516(a).

<sup>22</sup> 20 U.S.C. § 1415(h)(4)(A); 34 C.F.R. §§ 300.513(d)(2) and 300.514(c) (requiring the SEA, after redaction, to make the HO "findings and decisions available to the public"). Neither the IDEA legislation or regulations contains any corresponding requirement for making the CP decision available publicly, although they are subject to FOIA requests after redaction. For a much more comprehensive comparative analysis, which includes other legal sources beyond the regulations and which includes a much more detailed cataloging of similarities and differences, see Zirkel, *supra* note 11.

<sup>23</sup> Nicole Suchey & Dixie Snow Huefner, *The State Complaint Procedure under the Individuals with Disabilities Education Act*, 64 EXCEPTIONAL CHILD. 529 (1998). They identified the 35 respondents as CP managers. The survey findings at that time also included that 27 (77%) of the 35 respondents reported investigating substantive, as compared to procedural, violations; 32 (91%) reported addressing systemic violations; and 28 (80%) reported providing training for investigators. *Id.* at 535.

<sup>24</sup> 34 C.F.R. § 300.504(c)(5)(iii). It is unlikely that such details, added to the already dense coverage and typically small-print format of such notices have made a dramatic difference in the awareness of not only parents but also school personnel.

<sup>25</sup> In addition to the published studies, the occasional dissertations or conference papers have tended to be old and state-specific. E.g., Michael J. Opuda, *A Comparison of parents who initiated due process hearings and complaints in Maine (1997)* (doctoral dissertation, Virginia Polytechnic Institute and State University), <https://theses.lib.vt.edu/theses/available/etd-041799-201806/unrestricted/front.PDF>

found that the majority (71%) of the complaints concerned the child's individualized education program (IEP) and that almost half of the decisions (46%) were in favor of the district.<sup>26</sup> However, in addition to the limitations to one IDEA classification in a single state, the issue identification and outcomes analysis were clearly questionable, likely attributable to author's lack of formal legal training both generally and specifically in relation to the IDEA.<sup>27</sup>

In a more recent analysis of CP decisions, a distinguished law professor with substantial experience in legal issues under the IDEA analyzed eighty-one CP decisions in Ohio during a one-year period in 2012–2013.<sup>28</sup> In a three-outcomes categorization, she found that the distribution was as follows: parent prevailed on every issue – 22%; mixed (i.e., parent prevailed on some issues and district prevailed on others) – 42%; and district prevailed on every issue – 18%.<sup>29</sup> Her analysis did not extend to a systematic coding categorization or quantitative analysis of the issues.<sup>30</sup> Moreover, she did not engage in a direct comparison with the HO decisions for the same limited period due to their small number and the state's slow and "sloppy" action to make them available.<sup>31</sup> She concluded that CP in Ohio appeared to be more efficient and fair than the HO process, but recognized the need for further research to examine national trends.<sup>32</sup>

Finally, a frequency analysis of the SEA's data to the U.S. Department of Education's Office of Special Education Programs for the nine school years ending with 2014–15 showed that (a) the national total of CP filings was less than one third of the corresponding total of HO filings; (b) both of

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<sup>26</sup> Stacy E. White, *Special Education Complaints Filed by Parents of Students with Autism Spectrum Disorder in the Midwestern United States*, 29 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 80 (2013).

<sup>27</sup> For example, she listed her credentials as a M.S. degree (*id.* at 80), her field as counseling and educational psychology (*id.*), and her research method as "inductive, content analysis" in the context of qualitative research (*id.* at 85 and 87). Moreover, the failure of her written analysis to distinguish factual findings from legal conclusions revealed a lack of familiarity with legal analysis.

<sup>28</sup> Ruth Colker, *Special Education Complaint Resolution: Ohio*, 29 OHIO ST. J. ON DISP. RESOL. 371 (2014).

<sup>29</sup> *Id.* at 377. She did not define "prevail" beyond explaining that it did not take into account whether the parent received the requested relief. *Id.* at 376. However, rather than the meaning associated with plaintiff recovery of attorneys' fees, it appears that she used the term to represent a win in the simple won-loss categorization. Moreover, she used "student" for what I have changed to "parent" for the sake of uniformity; this convention focuses on the overall overlap, rather than the nuanced distinction, between parental and student rights under the IDEA.

<sup>30</sup> However, her qualitative analysis identified "six issues that seemed to be amenable to relief for the student through [CP]: (1) who is in attendance at IEP meetings, (2) lack of parent communication/progress reports, (3) inadequate IEPs, (4) improper use of seclusion and restraint, (5) obligations of community schools, and (6) delays in evaluating students." *Id.*

<sup>31</sup> *Id.* at 393 and 399. However, she reported her earlier analyses of HO decisions in Ohio that found these overall results on a two-category outcomes scale:

- for the period 2002–2006 (n=86): pro-district – 70%, pro-parent – 30%
- for the period 2011–2013 (n=30): pro-district – 67%, pro-parent – 33%

*Id.* at 395.

<sup>32</sup> *Id.* at 406.

these totals dropped modestly during this period; (c) the national total of CP decisions dropped from a high of approximately 4,000 to a plateau of approximately 2,800 for each of the last six years; (d) the national total of HO decisions dropped more steadily and precipitously from a high of approximately 4,400 to a more uneven plateau of approximately 2,400 during the last six years; and, partially accounting for this decline in HO and CP decisions; and (e) the number of mediation requests, mediations held, and mediation agreements increased more moderately during the same period.<sup>33</sup> Moreover, approximately twelve states and other U.S. jurisdictions accounted for approximately 80% of this total of CP and HO activity.<sup>34</sup> Much more research is needed, particularly although not at all exclusively concerning CP and its relationship to HO.

## II. METHODOLOGY FOR DATA COLLECTION AND ANALYSIS

In light of the relatively scant previous research on CP, the purpose of this study was to compare CP decisions with HO decisions with regard to “issue categories” (ICs),<sup>35</sup> outcomes, and remedies.<sup>36</sup> The specific research questions for this comparative analysis were as follows:

- (1) Does the CP forum<sup>37</sup> differ significantly from the HO forum for the average ratio of IC rulings to case decisions?
- (2) Does the CP forum differ significantly from the HO forum for the IC outcomes distribution?
- (3) What are the corresponding frequencies of the ICs for the CP and HO forums?
- (4) What are the corresponding outcomes of the ICs for the CP and HO forums?
- (5) What are the relative frequencies of the various remedies between the CP and HO forums?
- (6) Based on a more qualitative review, what other

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<sup>33</sup> Trends in Dispute Resolution Activity under the Individuals with Disabilities Education Act, CADRE, <http://www.cadreworks.org/resources/cadre-materials/trends-dispute-resolution-under-idea> (last visited Sept. 24, 2017) Additionally, the ratio of filings to decisions was much higher for the HO than the CP avenue. *Id.*

<sup>34</sup> E-mail from Philip Moses, Director, Center for Appropriate Dispute Resolution in Special Education (CADRE) to Pery A. Zirkel, Professor Emeritus, Lehigh University (Dec. 1, 2016, 18:50 EST) (on file with author). The jurisdictions that accounted for the vast majority of CP and HO decisions for 2008–2015 were, in descending order: Puerto Rico, California, New York, District of Columbia, Massachusetts, Pennsylvania, Michigan, New Jersey, Texas, Connecticut, Maryland, and Illinois. *Id.* The top group was much more concentrated for the HO than the CP decisions; six jurisdictions accounted for slightly more than 90% of the HO decisions, whereas 29 jurisdictions accounted for the corresponding proportion of CP decisions. *Id.*

<sup>35</sup> This unit of analysis is purposefully smaller than a case and larger than each specific issue in the case. For its development and earlier use, see Zirkel & Skidmore, *supra* note 7, at 543.

<sup>36</sup> For operational definitions of these three variables, see *infra* Appendix I-B.

<sup>37</sup> “Forum” herein refers alternatively to the more metaphoric use of “avenue” for the two decisional dispute resolution processes under the IDEA.

differences between the HO and CP forums were notable?

The first step was to obtain a relatively representative national sample of CP and HO decisions. Due to the limited and uneven availability of these decisions among the states and other U.S. jurisdictions, particularly but not exclusively for CP cases,<sup>38</sup> and the concentration of the combination of these two avenues of dispute resolution activity in relatively few jurisdictions,<sup>39</sup> the sample was limited to five “states” within the top-twelve group.<sup>40</sup> They are referred to herein as states “A” through “E.” For each of these states, we obtained a random sample of 50 CP<sup>41</sup> and 50 HO<sup>42</sup> decisions for the seven-year period 2010–2016.<sup>43</sup> Thus, the comparison was for a total of 500 decisions, with half being from the CP avenue and half being from the HO avenue.<sup>44</sup>

The second step was a pilot test for two interrelated purposes: (1) developing a coding protocol,<sup>45</sup> and (2) attaining interrater agreement.<sup>46</sup> This piloting phase consisted of the two substeps: (a) the author developed a preliminary version of the coding protocol, including a taxonomy of ICs<sup>47</sup>

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<sup>38</sup> The differing accessibility of the CP and HO decisions does not conform to the identical regulatory requirement except to the extent of the imprecise language of this requirement. *See supra* text accompanying note 22.

<sup>39</sup> *See supra* note 34 and accompanying text.

<sup>40</sup> *Id.* The term “states” is used hereinafter generically to refer to not only the 50 states but also related jurisdictions, such as the District of Columbia and Puerto Rico. For a previous national study design that focused primarily on five states, see U.S. Gen. Accounting Office, GAO-03-897, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (2003), <http://www.gao.gov/new.items/d03897.pdf>.

<sup>41</sup> Where not available for the designated period on the respective SEA’s website, these decisions were obtained via the state’s Freedom of Information Act or informal request. As part of the sampling process, we excluded and randomly replaced six CP decisions because the issues were not under the IDEA or the respondent was not a school entity.

<sup>42</sup> These decisions were available for the designated period on the five SEA websites. As part of the sampling process, we excluded and randomly replaced three HO cases, all from state A, because the decision was limited to acknowledging that the parent had abandoned the claim.

<sup>43</sup> The period was sufficiently close but not exactly the same for each state due to variation among the SEAs in grouping the decisions (e.g., via filing v. decision date).

<sup>44</sup> One of the pertinent differences between the HO and CP avenues concerns the filing party; for HO, the parent or the district qualifies, whereas for CP, any individual or organization may file except the district. *See supra* note 18 and accompanying text. Here, 35 of the 250 HO cases had district-initiated ICs, either via filing or as a counterclaim, whereas all of the 250 CP cases were parent filings. Because the district-initiated ICs were part and parcel of the HO process and because they were typically in response to parental action, such as a request for an IEE at public expense or a refusal to provide consent for an evaluation or initial IEP, the primary basis of comparison was without excluding these HO ICs. However, footnotes to Tables 1–4, which correspond to research questions 1–4, provide a secondary comparison that excludes these HO ICs, thus having parent-initiated ICs on both sides of the comparative analysis.

<sup>45</sup> “Protocol” herein refers to the set of symbols and instructions for the coding of each of the 500 decisions.

<sup>46</sup> “Interrater agreement” is often referred to alternatively as “interrater reliability.” *E.g.*, KILEM LE GWET, *HANDBOOK OF INTER-RATER RELIABILITY* 1 (2014).

<sup>47</sup> *See supra* notes 35–36 and accompanying text.

and a five-category outcomes scale,<sup>48</sup> based on his previous pertinent analyses<sup>49</sup>; and (b) the author and a recent law graduate, who served as the research assistant for this purpose,<sup>50</sup> independently coded and jointly compared the results for successive groups of CP and HO decisions,<sup>51</sup> with cumulative resulting refinements of the coding protocol, until reaching a 90% level of agreement for all items.<sup>52</sup>

Upon completion of the piloting phase,<sup>53</sup> the research assistant coded on a master spreadsheet the remaining CP and HO decisions, with regular consultations with the author for resolution of the entries that caused questions and for finalization of the coding protocol.<sup>54</sup> Based on the cumulative entries, the major resulting changes in the protocol were as

<sup>48</sup> This scale of IC rulings ranged from conclusively in favor of the parent (designated as “1”) to conclusively in favor of the district (designated as “5”), with intermediate categories for inconclusive or graduated conclusive outcomes. For its previous use, see, for example, Zirkel & Skidmore, *supra* note 7, at 545.

<sup>49</sup> E.g., Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?*, 83 EXCEPTIONAL CHILD, 219 (2016); Zirkel & Skidmore, *supra* note 7.

<sup>50</sup> Zeke Van Keuren is a graduate of William and Mary Law School, where he participated in the special education clinic, and a member of the Georgia Bar.

<sup>51</sup> We used randomly selected groups of five CP or HO decisions for these successive coding trials.

<sup>52</sup> This criterion is generally accepted in corresponding educational research. E.g., Nelson C. Brunsting, Melissa A. Sreckovic, & Kathleen Lynn Lane, *Special Education Teacher Burnout: A Synthesis of Research from 1979 to 2013*, 37 EDUC. & TREATMENT CHILD, 681, 685 (2014); Ashley S. MacSuga-Gage & Nicholas A. Gage, *Student-Level Effects of Increased Teacher-Directed Opportunities to Respond*, 24 J. BEHAV. EDUC. 273, 280 (2015); Elizabeth Swanson, Michael Solis, Stephen Ciullo, & John W. McKenna, *Special Education Teachers’ Perceptions of Instructional Practices in Response to Intervention Implementation*, 35 LEARNING DISABILITY Q. 115, 119 (2012); Imad Zaheer & Perry A. Zirkel, *The Legal Content of School Psychology Journals: A Systematic Survey*, 51 PSYCHOL. IN SCH. 999, 1006 (2014) (using criterion of 90%); cf. Mickey Losinski, John W. Maag, Antonis Katsiyannis, & Robin Parks Ennis, *Examining the Effects and Quality of Interventions Based on the Assessment of Contextual Variables: A Meta Analysis*, 80 EXCEPTIONAL CHILD, 407, 412 (2014) (reporting range of 75%–100%, with average of 91%); Sterret M. Mercer, Alyssa M. Idler, & Jamie M. Bartfai, *Theory-Driven Evaluation in School Psychology Intervention Research: 2007–2012*, 43 SCH. PSYCHOL. REV. 119, 124 (2014) (reporting inter-rater agreement of 89% and above). It is more precisely a consensus measure of inter-rater agreement. Steven A. Semler, *A Comparison of Consensus, Consistency, and Measurement Approaches to Estimating Interrater Reliability*, 9 PRAC. ASSESSMENT RES. & EVALUATION (2004), <http://pareonline.net/getvn.asp?v=9&n=4>. For the other, generally more sophisticated measures, see, for example, GWET, *supra* note 46; Kevin A. Halgren, *Computing Inter-Rater Reliability for Observational Data: An Overview and Tutorial*, 8 TUTOR QUANTITATIVE METHODS IN PSYCHOL. 23 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3402032/>.

<sup>53</sup> We reached the requisite level of agreement after 35 CP decisions, but the corresponding process did not attain the target level until coding 75 HO decisions, thus leaving 210 CP decisions and 175 HO decisions for this second phase. The principal problem was the overlap among ICs, with the resulting difficulty of determining which one was the most appropriate coding entry. The generally more lengthy and complex nature of the HO decisions largely accounted for the longer period to establish the requisite agreement.

<sup>54</sup> During both phases, we replaced with additional random selections from the CP and HO pools the few cases that were not within the boundaries of the IDEA and corollary state special education – specifically, six CP decisions, including three from state A that were limited solely to the Family Educational Rights and Privacy Act (FERPA) and another from state D concerned bullying without any reference to disability or special education, and three HO cases from state A that resulted in dismissal based on abandonment by the parent complainant.



follows: (1) adding an IC for enforcement,<sup>55</sup> (2) collapsing the outcomes scale to the conventional two categories,<sup>56</sup> (3) adjusting remedies to include district-initiated HO ICs that had rulings in favor of the district and results limited to authorization or non-liability,<sup>57</sup> and (4) differentiating a more nuanced set of remedy categories than the usual broad typology including but not limited to tuition reimbursement and compensatory education<sup>58</sup> and extending to disaggregation of the “multiple” category.<sup>59</sup> Appendix I provides the final version of the coding protocol. The culminating phase consisted of not only the finalization of the protocol but also retrospective re-coding of the affected entries.<sup>60</sup>

For each decision, which amounted to a row on the spreadsheet, the entries were three- column sets, consisting of the respective coding (based on Appendix I) of each IC, its outcome, and, if any, its remedy. The resulting analysis was largely quantitative, consisting of relatively simple descriptive

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<sup>55</sup> The major reason was to reduce the Miscellaneous IC for any component issues that were not negligible in frequency.

<sup>56</sup> Compared with the original five outcome categories (*see supra* note 48), these two win/loss categories were “in favor of the parent” and “in favor of the district.” The major reason was to make the analysis more user-friendly, given the limited number of affected rulings. More specifically, this conflation was limited to three HO IC rulings: for two of them, changing an outcome entry of “4” for slight prospective modifications to the IEP to “5,” and for the third, changing the outcome remedy from “2” for a compensatory education award that included a slight reduction for a nonprejudicial, limited initial period to “1.”

<sup>57</sup> The authorization was typically in the overriding of parental refusal to consent to evaluation or placement change, and the non-liability was uniformly for IEE ICs where the district sought to validate, per 34 C.F.R. § 300.502(b)(2), its refusal to provide an IEE at public expense. In both situations, the entry was “DE,” or declaratory relief, although the indirect effect was akin to a prospective order. Although not at all a bright line, the decision was to include these entries as remedies rather than as “NA,” or not applicable, because the initiating party obtained what it sought, even though the gain did not constitute not a tangible, affirmative action. In contrast, parent-filed ICs, such as eligibility and FAPE, for which the HO ruled in favor of the district, were coded as NA rather than DE because the initiating party did not obtain what it sought.

<sup>58</sup> Tuition reimbursement and compensatory education are the two principal remedies under the IDEA. *See, e.g.,* Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 214 (2013) (analyzing the frequency and outcomes of remedies for denials of FAPE in a sample of HO and court decisions under the IDEA). However, a remedial categorization warrants not only more comprehensive coverage but also adjustment for the interaction between these two remedies and FAPE. *See* Zirkel & Skidmore, *supra* note 7, at 546–47. After the pilot phase, the adjustment for this comparative analysis was to eliminate these two categories from the IC typology, reserving their entries exclusively for the separate remedies coding.

<sup>59</sup> The original version of the remedies typology consisted of the following broad categories: declaratory, prospective placement, other purely prospective orders, reimbursement, compensatory education, miscellaneous, and—for those orders covering more than one of these single categories—multiple. The final, more differentiated version (*infra* Appendix I-A) added subcategories for other purely prospective orders, reimbursement, and compensatory education. The differentiation addressed not only the nature of the retrospective relief (e.g., reimbursement of tuition v. reimbursement of other items, such as IEE) but also the nature of the prospective relief (e.g., placement and notable subcategories of “other”) and its scope (e.g., applicable only to the individual child v. applicable more widely). Moreover, in light of the aforementioned (*supra* note 58) interaction, the final version of the overall protocol removed tuition reimbursement and compensatory education from the IC typology so that they exclusively appeared in the remedies entries, thus avoiding confusing overlap.

<sup>60</sup> The author closely supervised and directly participated in this finalization process, double-checking many of the coding entries.

statistics, such as the mean,<sup>61</sup> and corresponding inferential statistics, such as a *t*-test or chi-square test.<sup>62</sup> The qualitative additions were supplementary and based on the entries in the Comments column of the spreadsheet and the subjective impressions of the two coders.<sup>63</sup>

### III. FINDINGS IN RESPONSE TO THE RESEARCH QUESTIONS

#### *1. Does the CP forum differ significantly from the HO forum for the average ratio of IC rulings to case decisions?*

Presenting the results in response to question 1, Table 1 shows that both the CP and the HO decisions averaged close to two IC rulings per case, with no statistically significant difference between these two forums.<sup>64</sup>

**Table 1. Frequency Distribution of Cases and IC Rulings by Forum**

Forum	No. of Cases	No. of Rulings	Average of Rulings/Case	<i>t</i>
HO Cases <sup>65</sup>	250	486	1.94	-0.83ns <sup>66</sup>
CP Cases	250	510	2.04	
Total	500	996	1.99	

<sup>61</sup> The “mean” refers to the mathematical average.

<sup>62</sup> The *t*-test determines whether the difference between two means for the sample is likely generalizable to the accessible population. The chi-square ( $\chi^2$ ) test is the corresponding inferential statistic for frequency distributions. *E.g.*, MEREDITH D. GALL ET AL., EDUCATIONAL RESEARCH 325–27 (2007). For inferential analysis in general, the conventional minimum level of probability (*p*) is *p* < .05, representing a 95% probability that the results are not due to random chance. *E.g.*, DAVID C. HOWELL, FUNDAMENTAL STATISTICS FOR THE BEHAVIORAL SCIENCES 148 (2004).

<sup>63</sup> For the two coders, see *supra* text accompanying notes 50–54.

<sup>64</sup> The customary degrees of probability (designated as “*p*”) are .05 and .01, equating to 95% and 99%, respectively. L.R. GAY ET AL., EDUCATIONAL RESEARCH 329 (2009).

<sup>65</sup> An alternate analysis is limited to parent-initiated ICs. See *supra* note 44. In 35 (14%) of these 250 HO cases, accounting for 38 (8%) of these 486 IC rulings, the district was the filing (n=32) or counterclaiming (n=3) party. For the remaining, i.e., parent-filed, HO cases, the average ratio was 2.06, which also was not significantly different (*t* = 0.13, *p* = .90) from the CP cases, which all were parent-filed.

<sup>66</sup> ns=not statistically significant. For this *t*-test value, *p* was .41 in comparison to the conventional minimum (see *supra* note 64).

2. Does the CP forum differ significantly from the HO forum for the IC outcomes distribution?

Presenting the results and statistical analysis in response to question 2,<sup>67</sup> Table 2 reveals that the outcomes distribution was significantly more favorable to parents via the CP than via the HO avenue.<sup>68</sup> More specifically, the IC rulings in the CP forum approximated a 50-50 outcomes distribution, whereas the overall ratio of IC rulings in the HO forum was slightly more than 3:1 in favor of districts rather than parents.

Table 2. Distribution of IC Rulings by Forum

Forum	In Favor of Parent	In Favor of District	$\chi^2$
HO (n= 486) <sup>69</sup>	24% (n=114)	76% (n=372)	73.14***
CP (n=510)	50% (n=253)	50% (n=257)	

\*\*\*  $p < .001$ .

Upon conversion from ICs to cases as the unit of analysis on a best-for-parent basis,<sup>70</sup> the difference remained statistically significant at the .001

<sup>67</sup> Here, because the data represent a frequency distribution, the inferential statistical test is  $\chi^2$  analysis. See *supra* note 62.

<sup>68</sup> The level of probability was very high in comparison to the conventional minimum. See *supra* note 64.

<sup>69</sup> The corresponding alternate analysis is limited to parent-initiated ICs. See *supra* notes 44 and 65. For the 38 of these IC rulings in which the district was the filing or counterclaiming party, the outcomes distribution was 8% in favor of the parent and 92% in favor of the district. For the remaining, i.e., parent-filed, HO rulings, the outcomes distribution was 25% in favor of the parent and 75% in favor of the district, which was also significantly different from the CP rulings at the .001 level ( $\chi^2=62.41$ ).

<sup>70</sup> For previous uses of this method, which uses the single most favorable plaintiff-favorable ruling for conflating ICs to cases, see, e.g., Susan Bon & Perry A. Zirkel, *The Time-Out and Seclusion Continuum: A Systematic Analysis of Case Law*, 27 J. SPECIAL EDUC. LEADERSHIP 35 (2014); Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299 (2014); Mark A. Paige & Perry A. Zirkel, *Teacher Termination Based on Performance Evaluations*, 300 EDUC. L. REP. 1 (2014); Zirkel & Hetrick, *supra* note 49; Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 344 (2011). Other, much less frequent alternatives include (1) calculating the mean of the IC rulings in a case on a straight average or weighted average basis; (2) resorting to an overall subjective judgment; or (3) approximating the prevailing party approach that the IDEA used for attorneys' fees. See, e.g., Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525, 547-48 (2014).

level of probability whether viewed overall<sup>71</sup> or only upon comparing the parent-filed HO cases with the CP cases.<sup>72</sup>

*3. What are the corresponding frequencies of ICs for the CP and HO forums?*

In response to question 3, Table 3 lists the proportion and number of rulings in each IC for the CP and HO forums, respectively. To highlight the major differences, those for the frequent ICs are designated with dark shading and bold font, and those for the much less frequent ICs (here totaling less than 10%) are designated with the light gray shading.

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<sup>71</sup> Upon conversion to cases without the aforementioned (*supra* note 44) exclusion on the HO side, the parent v. district distribution was 32% v. 68% for HO cases compared with 66% v. 34% for CP cases ( $\chi^2=59.23$ ,  $p<.001$ ).

<sup>72</sup> Upon conversion after excluding the district filings and counterclaims, the parent v. district distribution on the HO side changed from 25%-75% for ICs (*see supra* note 69) to 38%-62% for cases, which was still significantly less favorable than the unchanged (*see supra* note 71) outcomes distribution on the CP side ( $\chi^2=43.66$ ,  $p<.001$ ).

**Table 3. Frequency of Rulings for Each IC by Forum**

Issue Category	HO <sup>73</sup>	CP
Technical	3% (n=13)	0% (n=0)
Child Find	5% (n=22)	4% (n=19)
Evaluation	7% (n=32)	8% (n=39)
Eligibility	4% (n=17)	1% (n=3)
Notices	4% (n=17)	8% (n=39)
IEE	6% (n=29)	3% (n=13)
FAPE Intertwined or Undifferentiated	3% (n=14)	1% (n=3)
FAPE Substantive	28% (n=135)	2% (n=10)
FAPE Procedural	22% (n=105)	40% (n=205)
FAPE Implementation	6% (n=28)	28% (n=143)
Related Services	4% (n=17)	1% (n=4)
LRE	3% (n=12)	3% (n=14)
ESY	3% (n=15)	<1% (n=2)
Discipline	4% (n=18)	3% (n=14)
Enforcement	1% (n=4)	<1% (n=2)
Miscellaneous Other	2% (n=8)	0% (n=0)

As the highlighting reveals, the major differences for the relatively frequent ICs, consist of (a) the markedly higher proportion of CP rulings for FAPE Implementation and FAPE Procedural, and (b) the markedly higher proportion of HO rulings for FAPE Substantive. The differences among the less frequent ICs largely reinforce (a) the procedural emphasis of CP in

<sup>73</sup> The secondary, alternate basis for comparison is to limit the HO ICs to those that were parent-initiated. *See supra* notes 44, 69, and 72. Almost all (95%) of the 38 district-filed and -counterclaimed ICs were for IEE liability (n=17), Evaluation consent (n=12), and FAPE placement authorization or validation (n=7). Upon sorting out these ICs, the respective percentages for the remaining, i.e., parent-filed ICs remained the same except for the reduction for IEE (from 6% to 3%) and Evaluation (from 7% to 4%) and the modest increase, largely due to the lower net total, for the high-frequency ICs of FAPE substantive (from 28% to 29%) and FAPE Procedural (from 22% to 24%).

terms of the notably higher proportion for Notices, and (b) the substantive emphasis of HO in terms of the notably higher proportions for Eligibility, IEEs (at public expense), Related Services, and ESY. The relative proportions for the so-called “Technical” ICs, such as stay-put and timely filing, also reflect the adjudicative nature of the HO forum.

*4. What are the corresponding outcomes of the ICs for the CP and HO forums?*

For this corollary to the previous question, Table 4 addresses the outcomes distribution among the ICs for the respective forums. For the sake of space, given the obverse sides of the final two-category outcomes scale,<sup>74</sup> the reported percentages are for the rulings in favor of the parents. The parenthetical entries show the basis for each percentage.<sup>75</sup> Partly paralleling Table 3, the major differences for the high-frequency ICs are highlighted with dark shading and bold font. However, given the questionable generalizability of the parents’ success rate<sup>76</sup> for the low frequency ICs, those percentages based on denominators, or frequencies, of 15 or less for both forums were exempt from the highlighting. Thus, the highlighting in light gray shading is limited in this table to the ICs with medium frequency levels for both forums. Consequently, within the relatively more parent favorable overall outcomes for the CP forum,<sup>77</sup> the particular parent-favorable differential applies to the ICs of Notices, Evaluation, Child Find, FAPE Procedural and FAPE Implementation.<sup>78</sup>

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<sup>74</sup> See *supra* note 56 and accompanying text.

<sup>75</sup> The denominator is the frequency reported in Table 3, whereas the numerator is the number of these rulings with an outcome in favor of the parent rather than the district.

<sup>76</sup> “Success rate” simply refers to the percentage of IC rulings in favor of parents, but it has two alternative measures corresponding to the primary and secondary alternatives for the HO ICs. See *supra* note 44. The primary measure, which is the basis for the analysis in Tables 5A and 5B, includes all of the HO ICs regardless of the initiating party. The secondary measure, which is the basis for the alternate analysis in the footnote connected to each of these two tables, is without the district-initiated HO ICs.

<sup>77</sup> See *supra* Table 2 and notes 69, 71–72.

<sup>78</sup> The sequence here is in descending order of the differences between the percentages without regard to the medium v. high frequency distinction of the highlighting. However, the impact on the overall percentages in Table 2 is largely from the high frequency FAPE ICs, including partially counterbalancing pro-district skew for the FAPE Substantive rulings.

**Table 4. Rulings in Favor of Parents for Each IC by Forum**

Issue Category	HO <sup>79</sup>	CP
Technical	(2/13=) 15%	NA*
Child Find	(5/22=) 23%	(9/19=) 47%
Evaluation	(2/32=) 6%	(19/39=) 49%
Eligibility	(5/17=) 29%	(0/3=) 0%
Notices	(0/17=) 0%	(24/39=) 62%
IEE	(6/29=) 21%	(4/13=) 31%
FAPE Intertwined or Undifferentiated	(6/14=) 43%	(0/3=) 0%
FAPE Substantive	(36/135=) 27%	(2/10=) 20%
FAPE Procedural	(24/105=) 23%	(95/205=) 46%
FAPE Implementation	(12/28=) 43%	(89/143=) 62%
Related Services	(4/17=) 24%	(3/4=) 75%
LRE	(2/12=) 17%	(1/14=) 7%
ESY	(4/15=) 27%	(0/2=) 0%
Discipline	(3/18=) 17%	(5/14=) 36%
Enforcement	(2/4=) 50%	(2/2=) 100%
Miscellaneous Other	(1/8=) 13%	NA*

\*N.B.: The two entries of NA (not applicable) are attributable to the absence of any rulings.

<sup>79</sup> The secondary, alternate basis for comparison is to limit the HO ICs to those that were parent-initiated. See *supra* notes 44, 69, 72, and 73. The parents' success rate for the 38 district-initiated ICs with an "n" above 5 were as follows: IEE (n=17) – 12%, Evaluation (n=12) – 0%, and FAPE Substantive (n=7) – 0%. Upon excluding the district-initiated ICs, the percentages in favor of the parents for the remaining, i.e., parent-initiated HO ICs notably changed only for IEE (increasing from 21% to 33%) and Evaluation (increasing from 6% to 10%).

*5. What are the relative frequencies of the various remedies between the CP and HO forums?*

First, because IC rulings in favor of parents did not at all equate to the remedial orders,<sup>80</sup> this question's reference to "various remedies" warrants a customized unit of analysis, here referred to an "instance of a single or multiple remedy."<sup>81</sup> Second, in light of the inequalities primarily attributable to the overall difference in parents' success rate between the HO and CP forums,<sup>82</sup> the comparison is based on percentages, which amount to the relative frequencies of each remedy in relation to each forum's total of the customized unit of analysis.<sup>83</sup> Finally, the answer to this question warrants consideration of two complicating factors: (a) the several instances of the multiple category,<sup>84</sup> and (b) the notable number of cases where the single or multiple remedies covered more than one IC on an interrelated basis.<sup>85</sup>

As a result, the forum comparison for the relative frequencies of remedies is presented in a pair of tables. The first one (Table 5A) provides the relative frequencies on the basis of the original, broad remedial categories.<sup>86</sup> The next one (Table 5B) provides the relative frequencies on the basis of the more differentiated remedial categories, including disaggregation of the multiple category.<sup>87</sup>

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<sup>80</sup> First, because the declaratory remedy was specific to district-initiated ICs and exclusive to the HO forum, 35 of the 156 instances of a single or multiple HO remedy (*see infra* note 81 and accompanying text) were, in tandem with a district-favorable ruling in favor of the district, a declaratory remedy for the district (either authorization that overrode the parents' refusal of consent or validation of the districts' refusal to pay for an IEE). Second and more unexpectedly, 11 of the remaining 121 instances on the HO side and in 1 of the 249 instances on the CP side (*id.*), were rulings in favor of the district accompanied with a remedy for the parent. Finally and conversely contributing to the overall asymmetry, a limited subset of ICs were rulings in favor of the parent that did not yield a remedy: two HO IC rulings based on the equities and five CP rulings based on proactive district corrective action.

<sup>81</sup> Although based on the aforementioned (*supra* note 35 and accompanying text) unit of analysis of the IC rather than the case, this customized version for the analysis of remedies uses the term "instance" so as to count each coded entry of a remedy regardless of whether the IC ruling was in favor of the parent or the district. Moreover, for the sake of uniformity, the count of these instances was based on the final remedy categories in Appendix I-A, including "multiple" for those ICs that resulted in more than one of the other categories. The totals for this customized unit were 156 for the HO forum and 249 for the CP forum, amounting to an overall total of 405 instances of a single or multiple remedy.

<sup>82</sup> *See supra* Table 2 and note 69.

<sup>83</sup> *See supra* note 81 and accompanying text. More specifically, the 156 instances for HO and the 249 instances for CP served as the respective denominators for calculating the percentage within each forum.

<sup>84</sup> "Multiple" here refers to remedial orders that consisted of more than one of the single original broad categories. *See supra* text accompanying note 59.

<sup>85</sup> "Interrelated" here refers to remedies that covered more than one IC ruling, usually without any particularly differentiation. For the 405 instances of a single or multiple remedy, 94 were interrelated. The relative frequency of these interrelated instances was the almost identical for the HO (37 of 156 instances=24%) and CP (57 of 249 instances=23%) forums.

<sup>86</sup> *See supra* note 59 (declaratory, prospective placement, other purely prospective orders, reimbursement, compensatory education, miscellaneous, and—for those orders covering more than one of these single categories—multiple).

<sup>87</sup> For the sake of uniformity, the percentages for both tables were based on the same aforementioned (*supra* note 83) denominators.



Table 5A provides the relative frequency of each broad remedial category in overall descending order<sup>88</sup> without the disaggregation of multiple remedies and the other more nuanced differentiations. The findings from this rather broad-based analysis of remedies are only tentative, subject to not only the more fine-grained quantitative analysis in Table 5B but also the additional insights of the subsequent qualitative analysis in response to question 6.

**Table 5A. Relative Frequency of Each Remedy  
by Forum on Broad Basis**

Remedy	HO (n=156)	CP (n=249)
Other Purely Prospective Order <sup>89</sup>	29% (n=45)	57% (n=141)
Multiple	22% (n=34)	20% (n=49)
Compensatory Education	10% (n=16)	21% (n=51)
Declaratory Only <sup>90</sup>	21% (n=33)	0% (n=0)
Reimbursement <sup>91</sup>	10% (n=15)	2% (n=4)
Prospective Placement <sup>92</sup>	8% (n=13)	0% (n=0)
Miscellaneous	0% (n=0)	2% (n=4)

As highlighted again with light and dark gray shading, this initial comparison suggests a higher relative remedial frequency for the HO forum for declaratory relief, reimbursement, and prospective placement, which are all at least in part an artifact of their identified contours.<sup>93</sup> Conversely, subject to the more differentiated analysis, the CP forum appears to have a

<sup>88</sup> This descending sequence was based on the percentages for the two forums together, although resulting in a varying sequence for each forum separately.

<sup>89</sup> In light of the primary status (in terms of parent preference and individual strength) of placement among the prospective remedies, this secondary category is for “other” prospective relief, such as orders for notices, IEP meetings, training, or policy review.

<sup>90</sup> This remedy was limited to district-initiated ICs. However, it was the least bounded remedial category because it could arguably extend to almost any ruling in favor of districts. *See supra* note 57 and accompanying text.

<sup>91</sup> This generic category is not limited to tuition reimbursement, extending broadly to other direct payments, such as for IEEs, transportation, and tutoring. *See supra* note 59.

<sup>92</sup> This category, as compared with other purely prospective orders, represents a limited subset of FAPE substantive ICs.

<sup>93</sup> *See supra* notes 90–92.

higher propensity for other purely prospective orders and compensatory education awards.

Next, Table 5B provides a more refined analysis of these remedy-related data. The refinements, per the aforementioned methodological adjustments,<sup>94</sup> consist of (a) differentiation of the “other purely prospective,” “compensatory education,” and “reimbursement” into their resulting subcategories, and (b) disaggregation of the multiple instances into their component single-category remedies. The calculation of the percentages uses fractionalization for the multiple-category disaggregation per affected IC for the new numerator<sup>95</sup> and the same “instance” unit of analysis for the denominator.<sup>96</sup> The result is that both Tables 5A and 5B amount to a broad and more refined percentage distributions for the same overall base, akin to two successively focused pie charts for the same pie.

The sequence for Table 5B, however, is in terms of the remedial subcategory groupings, proceeding from the one (i.e., declaratory relief) with a present effect to those with a prospective effect to those with a retrospective effect (e.g., the subcategories of compensatory education). The n’s in this table have decimals based on the aforementioned<sup>97</sup> disaggregation for ICs with multiple remedies.

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<sup>94</sup> See *supra* note 59.

<sup>95</sup> More specifically, the fraction is based on the number of component remedies divided by the affected ICs. For example, if the multiple entry consisted of three single remedies, the fraction for the following numbers of ICs in the case with this entry were as follows: one IC – .33; two ICs – .67; and three ICs – 1.0. The resulting subtotal is listed as the parenthetical “n” directly after each percentage in Table 5B.

<sup>96</sup> Thus, although the n’s, which served as the numerators for the percentages, varied, the denominators for Table 5B were the same n’s as for Table 5A. See *supra* notes 81–83 and accompanying text.

<sup>97</sup> See *supra* notes 95–96 and accompanying text.

**Table 5B. Relative Frequency of Each Remedy  
by Forum on Disaggregated Basis**

Remedy	HO (n=156)	CP (n=249)
Declaratory Only	<b>21%</b> (n=33.5)	<b>0%</b> (n=0)
Prospective Placement	<b>12%</b> (n=18.5)	<b>&lt;1%</b> (n=0.5)
Other Purely Prospective Order – Individual	36% (n=56.0)	17% (n=42.2)
Other Purely Prospective Order – Collective	<b>0%</b> (n=0)	<b>33%</b> (n=81.7)
Other Purely Prospective Order – Individual & Collective	2% (n=3.0)	17% (n=43.3)
Compensatory Education – Fully Awarded	6% (n=8.7)	6% (n=14.0)
Compensatory Education – Partially Awarded	7% (n=10.5)	0% (n=0)
Compensatory Education – Delegated to IEP Team	<b>1%</b> (n=1.0)	<b>20%</b> (n=49.5)
Compensatory Education – Unspecified	3% (n=4.0)	3% (n=7.5)
Reimbursement – Tuition	7% (n=10.8)	<1% (n=1)
Reimbursement – IEE or Other Non-Tuition-Related	6% (n=10.0)	2% (n=5.3)
Miscellaneous	0% (n=0)	2% (n=4.0)

First, the more refined analysis of Table 5B reinforces, by increasing the more broadly identified stark difference, the HO-particular frequency for (a) prospective placement and, due to the methodological choice for district-

initiated ICs,<sup>98</sup> (b) declaratory relief. Second, this more refined analysis reveals the previously not detected conversely stark difference for the CP-particular frequency for collective prospective orders and, to a lesser but still major extent, the delegated approach to compensatory education orders. On the other hand, what seems on first impression to be a major difference for HO individual prospective orders largely evaporates upon taking into consideration the over-arching and counterbalancing effect of the CP prospective orders that are both collective and individual in scope. Finally, at the less frequent level, the relative absence of tuition reimbursement cases in the CP forum is particularly notable.<sup>99</sup>

A few caveats are warranted for interpretation of these more refined findings. First, the approach for comparing the relative frequencies of the two forums was not simple, particularly for the more differentiated version; however, alternative calculations of the percentages based on whole numbers rather than fractionalization did not markedly change the differences.<sup>100</sup> Second, the disaggregation of the multiple category to resolve the first complicating factor<sup>101</sup> posed the trade-off of over-counting the component remedies, although the fractionalization process had a mitigating effect. Finally, the other complicating factor of “interrelated” instances did not seem to warrant an additional calculation adjustment in light of the lack a straightforward solution and the counterbalancing proportion between the two forums.<sup>102</sup>

*6. Based on a more qualitative review, what other differences between the HO and CP forums were notable?*

Beyond the quantitative coded entries,<sup>103</sup> the reading of the HO and CP decisions resulted in some qualitative conclusions regarding the forum differences and, secondarily, the forum commonalities.<sup>104</sup> These

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<sup>98</sup> See *supra* note 80.

<sup>99</sup> The single instance for the CP forum concerned compliance with a tuition reimbursement order of a previous CP decision. The other subcategory for reimbursement showed a similar difference but not such a negligible level for the CP forum. Moreover, the actual difference for tuition reimbursement is more pronounced than these percentages reveal, because the reported HO frequency is an under-count for tuition reimbursement due to the aforementioned (*supra* note 58) coding procedure. Because FAPE is one of the prerequisite steps, removing the confounding overlap by treating tuition reimbursement solely as a remedy, not also as a differentiated IC, removes from the tabulation those decisions where the HO does not reach the remaining steps and thus does not address tuition reimbursement.

<sup>100</sup> The two variations to the whole number approach were (a) keeping the same denominators (thus, providing uniformity), and (b) increasing the denominator to the same extent as the numerator (so that the sum of the percentage in each column is 100%). For example, the second variation resulted in only two changes that amounted to more than 1%—reducing declaratory relief from 23% to 19% and collective prospective from 33% to 30%.

<sup>101</sup> See *supra* note 84 and accompanying text.

<sup>102</sup> See *supra* note 85 and accompanying text.

<sup>103</sup> For the respective spreadsheet features of the quantitative and qualitative entries, see *supra* text accompanying notes 61–63.

<sup>104</sup> A sequel article will address the separable issue of the differences and commonalities among the five states for these two forums.

conclusions are tentative due to the limited sampling of five states,<sup>105</sup> the subjectivity of the two coders,<sup>106</sup> and the absence of formal qualitative research methods.<sup>107</sup>

The notable differences are more pronounced than the commonalities. First, in comparison to the HO decisions, the CP decisions tended to be short and lack legal rigor, including but not limited to the absence of judicial decisions. The factual findings were often rather brief, without careful evidentiary analysis and explanation. The legal conclusions were often not clearly distinct from the factual findings and were based entirely on the IDEA and corollary state regulations.<sup>108</sup> With rare exception, the CP decisions were devoid of any express recognition and application of court decisions.<sup>109</sup>

Second, supplementing the quantitative finding of the notably higher frequency and parent-favorable outcomes for procedural FAPE issues,<sup>110</sup> the CP decisions tended to use a compliance-oriented, strict standard that focuses on the district rather than the two-step, harmless error approach specific to the individual child that the lower courts developed after *Board of Education v. Rowley*<sup>111</sup> and that Congress codified for the adjudicative avenue in the 2004 amendments of the IDEA.<sup>112</sup> The HO decisions used the two-step approach rather uniformly, whereas the CP decisions—with very limited exceptions<sup>113</sup>—used the one-step approach. Similarly, the CP

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<sup>105</sup> See *supra* notes 39–40 and accompanying text.

<sup>106</sup> See *supra* notes 47–60 and accompanying text.

<sup>107</sup> See, e.g., UWE FLICK, AN INTRODUCTION TO QUALITATIVE RESEARCH 443 (2009) (describing the technique of triangulation); Jennifer Attride-Stirling, *Thematic Networks: An Analytic Tool for Qualitative Research*, 1 QUALITATIVE RES. 385 (2001) (presenting a web-like tool for identifying themes).

<sup>108</sup> A few CP decisions cited external authority closely related to the regulations, such as SEA guidance (state A) or federal agency guidance (state A).

<sup>109</sup> Only about 1% of the CP decisions cited case law, including one from state C that cited *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) for the qualitative approach to compensatory education and one from state E that oddly cited a substantive FAPE court ruling for the two-step, harmless error approach for procedural FAPE. Unusually, one CP decision from state B, in an amendment to the remedy upon reconsideration, explained its choice of a calculus different from *Reid*, reasoning that because CP is not an adjudicatory avenue, it is not bound to follow the otherwise applicable federal appellate court's formula for compensatory education.

<sup>110</sup> See *supra* Tables 3–4 and accompanying text.

<sup>111</sup> 458 U.S. 176, 206–07 (1982) (ruling that FAPE under the IDEA amounts to procedural and substantive standards—respectively, whether school district complied with the various applicable procedures and whether the IEP “reasonably calculated to enable the child to receive educational benefits?”).

<sup>112</sup> 20 U.S.C. § 1415(f)(3)(E) (2012) (prohibiting an IDEA HO from finding a denial of FAPE for a procedural violation unless it caused specified harm to the child or parent). For an empirical examination of FAPE-Procedural court decisions subsequent to the 2004 amendments, see Zirkel & Hetrick, *supra* note 49. For follow-up examination of those specific to the parental participation prong in these amendments, see Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?* 15 CONN. PUB. INT. L.J. 1 (2016).

<sup>113</sup> The limited exceptions included three CP decisions in state A, one CP decision in state B, and one CP decision in state C.

decisions exhibited a strict compliance approach to FAPE implementation in comparison to the more lenient HO approach.<sup>114</sup>

Third, the CP decisions rarely addressed substantive issues, such as whether the child was eligible or whether the IEP was reasonably calculated to yield educational benefit.<sup>115</sup> Yet, an oddity exclusive to some of the HO decisions was a substantially appropriate standard for substantive FAPE, ruling in favor of the district upon determining that a limited additional service was needed.<sup>116</sup>

Fourth, in comparison to the HO decisions, the CP decisions tended to be more activist in terms of going beyond the complaint to identify and address, *sua sponte*, additional issues. Reflecting their compliance posture, it was not unusual for CP decisions to identify violations that were not in the complaint<sup>117</sup> and/or to extend the remedy beyond the child who was the subject of the complaint.<sup>118</sup> In contrast, such *sua sponte* action was rare among the HO decisions.<sup>119</sup>

Fifth, the remedies in the CP decisions tended to be broader but shallower than those in the HO decisions. For breadth, as the aforementioned results found quantitatively,<sup>120</sup> the CP decisions tended to extend to other students, either via a more collective-type remedy, such as training or policy review/revision, or via an order to extend the child-specific remedy to similarly situated students.<sup>121</sup> Yet, for depth, the CP remedies

<sup>114</sup> For example, in state B, a CP decision ordered compensatory education of 90 minutes of counseling for the failure to implement the IEP's weekly counseling provision for three sessions, whereas an HO decision cited the less strict judicial approach in concluding that the failure to implement 280 minutes of IEP-specified behavior services was not sufficient to warrant a remedy.

<sup>115</sup> Moreover, in these few cases, rather than citing *Rowley* or its more nuanced progeny that have culminated in the *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the CP decision merely mentioned the reasonably calculated language.

<sup>116</sup> These HO decisions were almost entirely limited to state D.

<sup>117</sup> Although having similar requirements for the contents of the complaint, the CP forum lacks the specific sufficiency procedure required for the HO forum and allows for third-party complaints that further reinforce its compliance focus. See Zirkel, *supra* note 11, at 2 nn.34–35 (citing agency policy interpretation that clarifies that such a procedure is implicitly permissible as compared with the express requirement in 34 C.F.R. § 300.508(d)).

<sup>118</sup> See *infra* text accompanying notes 121–122.

<sup>119</sup> For example, a HO decision in state C raised and decided an FAPE Procedural IC as harmless (under the aforementioned two-step test), and an HO in state A ordered a post-decision evaluation (with an override of possible parental non-consent) despite rejecting the parents' three ICs (FPP, FS, and IEE—per Appendix 1-A). Such action is contrary to the applicable case law, especially after the notice-pleading additions in the 2004 IDEA amendments. *E.g.*, *C.W.L. v. Pelham Union Free Sch. Dist.*, 149 F. Supp. 3d 451 (S.D.N.Y. 2015); *District of Columbia v. Walker*, 109 F. Supp. 3d 58 (D.D.C. 2015); *Lofisa S. v. State of Haw. Dep't of Educ.*, 60 IDELR(LRP) 191 (D. Haw. 2013); *Saki v. State of Haw., Dep't of Educ.*, 50 IDELR(LRP) 103 (D. Haw. 2008).

<sup>120</sup> See *supra* Table 5B and accompanying text.

<sup>121</sup> In some of these cases, the CP decision ordered the district to determine whether there were similarly situated students, whereas in others the CP decision made this determination as part of the investigative process. In either event, such collective action is inferably within the broad remedial authority of the CP forum. Off. of Spec. Educ., *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 61 IDELR(LRP) 232, at items B-8, B-9, and B-10 (2013). For more explicit support, see Letter from Off. of Spec. Educ. to Anderson, in 54 IDELR(LRP) (2010) (commenting, while addressing settlement agreements, that “if the State complaint

tended to be less specific and substantive than their HO counterparts. For example, the remedial orders of training and policy review/revision, which were almost entirely limited to the CP forum,<sup>122</sup> typically did not have quality-oriented specifications, such as duration and depth of training, other than what appeared to be a boilerplate requirement for submission of the corrective action documentation to the SEA. Similarly, the CP child-specific rulings and remedies were often rather limited and light,<sup>123</sup> especially with regard to any retrospective relief.<sup>124</sup> Reflecting this non-rigorous approach to relief, several CP decisions accepted the voluntary remedial actions of the district without further analysis or relief.<sup>125</sup>

Sixth, overlapping with the previous two points, it was more common for CP decisions to contain dicta.<sup>126</sup> However, the difference was less dramatic than for *sua sponte* determinations and collective remedies, with more than a handful of HO decisions providing such non-binding recommendations.<sup>127</sup>

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alleges systemic noncompliance or the State has reason to believe that the violations are systemic, it must investigate the matter . . . . [and] provide for appropriate remedies to other affected students”) (emphasis added).

<sup>122</sup> The limited exception on the HO side consisted of two decisions in state E that ordered training for the child’s staff and IEP team, respectively. The case law strongly supports broad equitable authority to HOs, although generally tied specifically to the individual child and issue(s) in the case. *See generally* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2011). Although the case law concerning the HO’s authority to order training is not clearly settled, neither of these HO decisions addressed it.

<sup>123</sup> As specific examples, a CP decision in state A provided as relief that the district “should consider” assigning a chaperone and convening an IEP team; a CP decision in state C delegated to the IEP team determining whether the violation had a prejudicial impact and, if so, determining the remedy; a CP decision in state D accepted the district’s prospective, contingent assurance without any compensatory relief; another in state D ordered only a memorandum to the child’s teachers; and another in state D that specified as the remedy for failing to implement the 2012–13 IEP provision for progress reporting to ensure that the 2013–14 IEP “reflect the correct frequency of reporting progress to the parents.”

<sup>124</sup> With a narrow exception, CP decisions did not provide the remedy of tuition reimbursement. *See supra* note 99 and accompanying text. Moreover, for compensatory education, CP decisions much more frequently than HO decisions delegated the determination to the IEP team, sometimes not only for calculation of the amount but also for the prerequisite substantive denial of FAPE. For the judicial case law *contra* to the delegation approach, *see infra* notes 129–130.

<sup>125</sup> This rather routine acceptance may be, at least in part, attributable to the administering agency’s insistence of a written decision even upon such settlement-like action. Letter from Off. of Spec. Educ. Programs to Johnson Chapman (Date of Letter), in 116 LRP 43238 (2015); Letter from Off. of Spec. Educ. Programs to (First Name) Lipsitt, in 67 IDELR(LRP) 126 (2015). In contrast, the uncritical acceptance of district-initiated relief among the HO decisions was limited to one IC in state C.

<sup>126</sup> A CP decision in state A, which further blurred the line by routinely listing the corrective actions under the heading “Recommendations,” unusually relied on best practice for its remedial dicta.

<sup>127</sup> For example, HO decisions in state B respectively recommended that the district explore an alternative placement and that the parent take steps to ensure the child’s attendance. Similarly, an HO decision in state D recommended mediation for improving communication between the parties. More unusual in its scope were two HO decisions in state A. In one of them, the HO decision included a recommendation for the parent’s attorney to become more familiar with special education law in light of legal misstatements. Even more unusual, the other HO decision extended its relief beyond the identified issues, whether interpreted as dicta or binding. After ruling in favor of the district on the identified substantive, causality issue for a manifestation determination upon a disciplinary change in placement,

Finally and also not as dramatically different, the CP orders for compensatory education typically were not clear as to whether they were using a qualitative or quantitative approach for calculating compensatory education<sup>128</sup> and they often delegated the determination of whether and/or how much compensatory education to the IEP team regardless of whether they were in a jurisdiction that had adopted the qualitative approach.<sup>129</sup> However, although they sometimes cited court decisions concerning compensatory education, it was not uncommon for the HO decisions to be cursory rather than cogent in their application of the case law standards, with the calculus being rather cryptic and the issue of delegation to the IEP team<sup>130</sup> often ignored.

Conversely, the notable commonalities between the CP and HO forums were more limited. They tended to relate to the remedial orders, often synonymously referred to as “corrective actions” in the CP decisions. First, confirming the quantitative analysis,<sup>131</sup> in a notable minority of both the HO and CP decisions, the relationship between the IC rulings and the remedial relief was not clearly symmetrical. In these “interrelated” instances, it was often difficult to determine the relative allocations within an umbrella-like remedy to each of the underlying identified IDEA violations.

Second and much more commonly, both the CP and HO decisions were far from thorough in explaining the equitable tailoring of the relief.<sup>132</sup> The

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the HO—having incidentally found procedural problems with the manifestation determination—directed the SEA to institute corrective actions to address the district’s procedural violations.

<sup>128</sup> For an overview of these two approaches, with special attention to the qualitative approach that *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) established, see Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*, 339 EDUC. L. REP. 10 (2017).

<sup>129</sup> The D.C. Circuit in *Reid*, 401 F.3d at 526, and, subsequently, the Sixth Circuit in *Board of Education v. L.M.*, 478 F.3d 307 (6th Cir. 2007) ruled that HOs may not delegate their authority for this purpose to IEP teams based on the IDEA prohibition that the HO may not be a district employee. It is unclear whether this non-delegation barrier applies to the CP mechanism, which is an SEA obligation without commensurate specifications for impartiality. Given their aforementioned eschewal of case law, the CP decisions did not address this issue at all.

<sup>130</sup> *Id.* For the earlier, conflicting case law concerning delegation for compensatory relief, see, for example, Zirkel, *supra* note 122, at 24 n.114. For more recent case law concerning the *Reid* nondelegation approach to compensatory education, compare *Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011) (following *Reid*), with *Mr. I. v. Maine Sch. Admin. Unit No. 55*, 480 F.3d 1 (1st Cir. 2007); *T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902 (C.D. Ill. 2012); *A.L. v. Chicago Pub. Sch. Dist. No. 299*, 57 IDELR ¶ 276 (N.D. Ill. 2011); *State of Haw. Dep’t of Educ. v. Zachary B.*, 52 IDELR ¶ 213 (D. Haw. 2009) (opposing or distinguishing *Reid*). For extension to other equitable relief under the IDEA, compare *M.S. v. Utah Sch. for the Deaf*, 822 F.3d 1128 (10th Cir. 2016) (extending *Reid v. District of Columbia* to prospective placement relief), with *Doe v. Reg’l Sch. Unit No. 21*, 60 IDELR ¶ 228 (D. Me. 2013) (distinguishing *Reid* in upholding HO order for trial period and contingent placement).

<sup>131</sup> See *supra* note 80 and accompanying text.

<sup>132</sup> One reason for this lack of careful tailoring is that the remedy is at the end of the written decision, which itself marks the last step in a rather restricted decision-making period. In comparison to the ponderous open-ended judicial process under the IDEA, the regulations specify a 75-day period for HO and a 60-day period for CP, with limited exceptions. 34 C.F.R. §§ 300.510(b)-(c), 300.515(a) and 300.515(c) (resolution period of 30 days and hearing period ending in written decision within 45 days for HO); *id.* § 300.152(a) (CP). Another reason may be the secondary attention often given in the complaint and its subsequent processing to the remedy as compared with the factual findings and the



CP remedies were often rather perfunctory and formulaic. In partial contrast, the HO decisions tended to be more individualized but sometimes not careful and consistent to limit their remedies to rulings that were in favor of the complainant. Obverse to the maxim of “for every wrong, the law provides a remedy,”<sup>133</sup> the applicable case law establishes that a hearing officer is without authority to order a remedy in the absence of a violation of the IDEA.<sup>134</sup> Supplementing the quantitative finding,<sup>135</sup> in some cases the HO FAPE rulings were in favor the district, but the decision ordered limited relief, seemingly either as a palliative consolation prize or as non-unitary conception of substantive FAPE.<sup>136</sup> Only one such HO decision, which was in state E, expressly relied on the limited IDEA exception for remedying nonprejudicial procedural FAPE violations.<sup>137</sup>

#### IV. Discussion of the Findings

Overlapping with the more open-ended nature of the qualitative findings in extending to external authority and interpretive assessment, this concluding part discusses the results in terms of previous research, applicable case law, and practical significance. The sequence follows the order of the research questions, with the exception of the integrating the findings from the last research question into those for the earlier questions.

First, the similarity of the HO and CP forums in the ratio of ICs to cases is not surprising in light of (1) the similar subject matter jurisdiction of the

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applicable law. Whatever the reasons, however, for the parties, this part of the written decision may well be the most significant. In the wake of a ruling in favor of the parents, they understandably want to know “as a result, what does my child receive to compensate for the loss and rectify the matter for the immediate future?” and the district, at the same time, is calculating the cost in terms of time, money, and other limited resources. Moreover, both sides would expect a cogent explanation showing how the specific nature and extent of the remedial answer fit the particular violation(s).

<sup>133</sup> *E.g.*, *Kennedy v. Edenfield*, 126 S.E. 779, 780 (Ga. 1925) (“the great cardinal principal [sic] that for every wrong the law provides a remedy”); *see also* *Leo Feist, Inc. v. Young*, 138 F.2d 972, 974 (7th Cir. 1943) (“It is an elementary maxim of equity jurisprudence that there is no wrong without a remedy”); *Brennan v. Midwestern Life Ins. Co.*, 259 F. Supp. 673, 680 (N.D. Ind. 1966) (“the [ancient] maxim, *Ubi jus, ibi remedium*—Where there is a right, there is a remedy”).

<sup>134</sup> *E.g.*, *N.W. v. Boone Cty. Bd. of Educ.*, 763 F.3d 611 (6th Cir. 2014) (invalidating a reimbursement order in the absence of denial of FAPE); *Sch. Bd. of Martin County v. A.S.*, 727 So. 2d 1071 (Fla. Dist. Ct. App. 1999) (invalidating an order to add services to the IEP in the wake of ruling that it was appropriate).

<sup>135</sup> The tabulation of remedies identified eleven HO instances of such asymmetry. *See supra* note 80.

<sup>136</sup> Of these eleven HO decisions, the six in state D illustrated these two inferable rationales. Four of them ordered limited revisions to the IEP, seeming to suggest that FAPE was not all or nothing. The other two, suggesting more of a palliative extra, added an evaluation or reevaluation, with one of them couching it as an authorization contingent upon either party’s dissatisfaction with the child’s progress. The single CP instance of such asymmetry, which was in state C, ruled that the alleged violation was nonprejudicial but ordered the district “to ensure that the violation does not recur.”

<sup>137</sup> 20 U.S.C. § 1415(f)(3)(e)(iii); 34 C.F.R. § 300.513(a)(3). For one of the few court decisions similarly recognizing and applying this limited exception, *see Dawn G. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014).

two forums,<sup>138</sup> (2) the relative maturation of the IDEA after 40-plus years of experience,<sup>139</sup> and (3) the relative breadth of the IC coding.<sup>140</sup> The number of issues expressly identified in each forum may well differ significantly, given the adjudicative nature of the HO process as compared with the compliance-investigative nature of the CP process. For example, the HO process tends to rely on the parties for issue identification, including the mandatory sufficiency process,<sup>141</sup> whereas the CP process tends to be more activist, including *sua sponte* addition of issues.<sup>142</sup> However, this drilled-down level is left for future exploration as one of several recommended directions for follow-up research based on this springboard study.

Second and probably the most practically significant among the findings, the statistically significant, i.e., generalizable, difference in the outcomes between the two forums merits careful consideration. More specifically, the parents' success rate was clearly more favorable for the CP than the HO forum, whether analyzed in terms of ICs or cases either overall or limited to those that were parent-initiated.<sup>143</sup> The difference, which is only partially attributable to the screening effect of the higher filings-to-decisions ratio for HO than for CP,<sup>144</sup> increases the potential for forum-shopping and gamesmanship that are not exclusive to the parents' side. For example, the one-directional regulatory requirements for CP deferral and binding effect to HO decision-making<sup>145</sup> has already led to offensive district

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<sup>138</sup> See Zirkel, *supra* note 11, at 2 nn.18–19 (citing 34 C.F.R. §§ 300.153(b) and 300.507(a)(1)). However, the scope of jurisdiction is not entirely identical; for various relatively limited differences, see *id.* at 2 nn.20–25).

<sup>139</sup> Congress passed the original version of this legislation in 1975. The subsequent decades of experience gradually crystallized the modern version of the legal issues in dispute, regardless of the decisional forum.

<sup>140</sup> Although this unit of analysis is more precise than the case (see *supra* note 35) and its typology was relatively systematic (see *supra* note 49), its customization and application resulted in far fewer issues than the HO and CP decisions typically identified. The overlapping reasons included (1) the purposefully wider scope of “issue category” than “issue”; (2) the removal of tuition reimbursement and compensatory education from the IC typology (see *supra* note 58); and (3) the various other coding rules for conflation within the IC entries (see *infra* Appendix I-A).

<sup>141</sup> See Zirkel, *supra* note 11, at 2 n.35 (citing 34 C.F.R. § 300.508(d)).

<sup>142</sup> See *supra* notes 117–119 and accompanying text.

<sup>143</sup> See *supra* table 2 and notes 70–72. Indeed, given that the nature of the CP process makes attorney representation much less likely for parents, limiting the comparison to pro se parents may well yield a more dramatic disparity in favor of the CP avenue. See, e.g., Lukasik, *supra* note 7, at 771; Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents?* 34 J. NAT'L ADMIN. L. JUDICIARY 263 (2015) (finding that unrepresented parents had a significantly lower success rate in the HO process than did those with legal counsel).

<sup>144</sup> See *supra* note 33. The screening effect tends to sort out clearly district-unfavorable cases via settlements. However, some of the filings that do not reach decision are not attributable to settlements or are settlements based on considerations other than outcome odds. Moreover, more rigorous compliance orientation of CP, as exemplified in the significant differences in frequency and outcomes for FAPE Procedural and FAPE Implementation in Tables 3–4, show that the disparity in outcomes goes well beyond the screening factor.

<sup>145</sup> 34 C.F.R. § 300.152(c)(1)–(2).

gamesmanship to foreclose the advantageousness of the CP avenue.<sup>146</sup> However, this tactic indirectly reveals the potential parental ploy of successively, rather than simultaneously, resorting to the CP and HO processes.<sup>147</sup> As a matter of practice and policy, the finding of the more favorable outcomes of the CP, as compared to the HO, avenue reinforces the need for more careful consideration of the design and use of the present dispute resolution roadmap. To the extent that the policy choice, by action or omission, maintains the present statistically significant differential in favor of parents, the practical significance is that it reinforces the parent-friendly advantages of low cost<sup>148</sup> and, in most jurisdictions, finality.<sup>149</sup>

The third finding, which reveals the relatively low frequency of substantive rulings in the CP, in comparison to the HO, forum,<sup>150</sup> serves as a reminder of the trade-offs upon considering revision in the current route map. More specifically, the predominance of procedural FAPE rulings for CP and substantive FAPE rulings for HO<sup>151</sup> reflects the almost purely regulatory reliance of CP investigators in comparison to the addition of the case law framework for HO adjudicators.<sup>152</sup> For the sake of cross-forum uniformity, should the CP forum use the two-step harmless-error approach for procedural FAPE rulings that the *Rowley* progeny developed and Congress codified for IDEA adjudications?<sup>153</sup> Alternatively, for the sake of intra-forum uniformity, should the responsible agencies<sup>154</sup> bar the occasional exceptions to the prevailing one-step CP analysis?<sup>155</sup> The answers will directly affect the selection, training, and expectations for CP personnel. In any event, the administering agency's repeated reminders that the CP should address substantive, not only procedural, matters,<sup>156</sup> have gone largely

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<sup>146</sup> Dear Colleague Letter, 65 IDELR ¶ 151 (OSERS/OSEP 2015) (“A [district’s] filing of a due process complaint after the parent has filed a State complaint on the same issues may unreasonably deny a parent the right to use the State complaint process.... The Department strongly believes that it is in the best interest of parents and school districts to respect the parents’ choice of forum for resolution of their disputes.”). The recognized advantages include a much lesser burden for parents in terms of the costs of pursuing the claim to a decision, but the more favorable outcome differential is a heretofore not previously proven additional significant consideration in terms of cost-benefit analysis.

<sup>147</sup> For recognition of this “savvy” strategy to get “two bites at the apple” and the potential of additional bites via Section 504, see Zirkel & McGuire, *supra* note 8, at 109–10. For indirect agency recognition of this two-bite parental option, see Letter to Deaton, 65 IDELR ¶ 241 (OSEP 2015); Letter to Riffel, 34 IDELR ¶ 292 (OSEP 2000) (opining that the SEA may not postpone corrective actions upon completion of CRP when parent files for impartial hearing on some or all of same issues in the interim).

<sup>148</sup> See *supra* note 10.

<sup>149</sup> CP decisions are not subject to appeal in most states. See Zirkel, *supra* note 11, at 2 nn.67–68.

<sup>150</sup> See *supra* Table 3.

<sup>151</sup> *Id.*

<sup>152</sup> See *supra* notes 108–109 and accompanying text.

<sup>153</sup> See *supra* notes 111–112 and accompanying text.

<sup>154</sup> Such policy revisions may be at the federal level via the IDEA regulations or agency policy interpretations or, as with various other IDEA issues, left instead for more limited possible uniformity of the state level.

<sup>155</sup> See *supra* note 113 and accompanying text.

<sup>156</sup> Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) (citing in items B-6 and B-8 the need to address

unheeded,<sup>157</sup> but this difference may be attributable to stakeholder perceptions in addition to or instead of forum practices.<sup>158</sup>

The other major finding in relation to the third research question is the corresponding notable skew toward the CP, rather than HO, forum for FAPE implementation rulings.<sup>159</sup> Yet consideration of these frequency findings must extend to the corresponding outcome findings in response to the fourth research question.

More specifically, the bold-faced findings in Table 4 show the more favorable parental success rate for not only the FAPE Procedural category, which is attributable to the aforementioned different analysis,<sup>160</sup> but also the FAPE Implementation category, which is similarly attributable to differential decision-making approaches. More specifically, given their reliance on court decisions, the HO decisions tend to follow one of the two overlapping judicial approaches for failure-to-implement claims,<sup>161</sup> whereas the CP decisions employ the clearly stricter per se approach.<sup>162</sup> Thus, the particularly more parent-favorable outcomes for these two categories likely

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not only procedures but standards); Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000) (same); 71 Fed. Reg. 46,601 (Aug. 14, 2006) (“We believe that an SEA, in resolving a complaint challenging the appropriateness of a child’s educational program or services or the provision of FAPE, should not only determine whether the public agency has followed the required procedures to reach that determination, but also whether the public agency has reached a decision that is consistent with the requirements in Part B of the Act in light of the individual child’s abilities and needs”); Letter to Ash, 23 IDELR 647 (OSEP 1995) (same); cf. Letter to McWilliams, 66 IDELR ¶ 111 (OSEP 2015) (rejecting SEA interpretation that CP jurisdiction does not extend to appropriateness, of BIPs).

<sup>157</sup> See *supra* note 115 and accompanying text. The lack of more substantive rulings may be attributable not only to institutional inertia, but also the rather oblique language of these repeated reminders, which refer to “standards” and “requirements” rather than “substantive” rulings. Moreover, the agency guidance is particularly parsimonious in remedying the substantive IC of eligibility. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232, at item B-6 (OSEP 2013) (“If [CP] determines that the public agency’s eligibility determination is not supported by the child-specific facts, [CP] can order the public agency, on a case-by-case basis, to reconsider the eligibility determination in light of those facts.”).

<sup>158</sup> The ultimate choice is that of the complainant, although the forum policies and practices affect that choice. Moreover, the advice of attorneys on the parent side may also be a contributing factor, with the likely reasons for disfavoring the CP forum being not only the lack of adjudicative fact finding and formal argumentation but also the prevailing authority against availability of attorneys’ fees. Compare *Vultaggio v. Bd. of Educ.*, 343 F.3d 598 (2d Cir. 2003); *Johnson v. Fridley Pub. Sch.*, 36 IDELR ¶ 129 (D. Minn. 2002); *Megan C. v. Indep. Sch. Dist. No. 625*, 57 F. Supp. 2d 776 (D. Minn. 1999); *Grandview Sch. Dist. No. 200 v. Sanchez*, 66 IDELR ¶ 81 (Wash. Ct. App. 2015); 71 Fed. Reg. 46,602 (Aug. 14, 2006) (no), with *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023 (9th Cir. 2000) (yes).

<sup>159</sup> See *supra* Table 3.

<sup>160</sup> See *supra* notes 151–152 and accompanying text. The agency guidance is rather ambiguous as to the possible applicability of the second, loss-of-benefit step for procedural violations. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232, at item B-6 (OSEP 2013) (charging CP with the duty to determine whether the district followed procedures consistent with applicable standards and whether its action was “supported by the data on the individual child’s abilities and needs”).

<sup>161</sup> E.g., Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. NAT’L ADMIN. L. JUDICIARY 409 (2016) (reciting the materiality-alone approach of *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007). and the materiality/benefit approach of *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)).

<sup>162</sup> See *supra* note 114 and accompanying text.

contributes to their higher frequency and, in turn, the higher parent success rate for the CP forum overall. The procedural orientation of the CP forum is likely also the primary explanation for the parent-favorable outcomes differential for the notice, evaluation, and—to a lesser extent—child find categories.<sup>163</sup>

The reflections on these comparative findings for the FAPE substantive, procedural, and implementation categories raise the larger issue of whether the CP forum, which understandably has a different process for fact finding,<sup>164</sup> *should* adhere in its legal conclusions to the same framework on which the HO forum relies? More specifically, does the CP's prevailing practice of largely ignoring the substantial body of judicial case law that resolves ambiguities and fills gaps in the IDEA constitute appropriate policy? With the limited exception of a brief explanation in one CP decision in state B,<sup>165</sup> this issue was unaddressed, whether intentionally or inadvertently. A seeming similarity is the corresponding complaint resolution process of the U.S. Department of Education's Office for Civil Rights (OCR) for enforcing Section 504 in the K–12 context. However, OCR's avoidance of case law is inferably selective rather than complete.<sup>166</sup> Moreover, OCR expressly avoids substantive educational issues under Section 504 except for “extraordinary circumstances.”<sup>167</sup>

The resolution of this overall policy issue is too complex and lacking in sufficient information and deliberation for an immediate answer. A starting point is recognition of a basic structural distinction. Like OCR, the SEA is part of the executive branch. More specifically, CP is part of the SEA's supervisory responsibility under the IDEA, thus being a matter of monitoring and effectuating compliance.<sup>168</sup> In contrast, the HO forum is a part of the IDEA's separable adjudicative mechanism,<sup>169</sup> which is by its

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<sup>163</sup> Yet, given the lack of a corresponding frequency differential for these categories, the relationship between outcomes and frequency is not so simple or causal as the foregoing domino-like theory for the FAPE procedural implementation categories. The interactive effects between these two overall variables and among the various issue categories and other contributing factors merits follow-up research.

<sup>164</sup> See, e.g., *Everett H. v. Dry Creek Joint Elementary Sch. Dist.*, 68 IDELR ¶ 190, at \*4 (E.D. Cal. 2016) (observing that among the differences with HO, “[CP] does not include full procedural protections like the right to confront and cross-examine witnesses”)

<sup>165</sup> See *supra* note 109.

<sup>166</sup> E.g., Dear Colleague Letter, 68 IDELR ¶ 52 (OCR 2016) (concerning Section 504 and the ADA in relation to students with ADHD, with citations limited to two Supreme Court decisions from 1979 and 1985); Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR ¶ 115 (OCR 2014) (citing only an Eleventh Circuit decision in acknowledging the different judicial standard at least with regard to money damages);

<sup>167</sup> Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, 67 IDELR ¶ 189, at item 5 (OCR 2015).

<sup>168</sup> For example, in the commentary accompanying the most recent IDEA regulations, the U.S. Department of Education explained: “We view the State complaint procedures as a very important tool in a State's exercise of its general supervision responsibilities . . . to monitor [school district] implementation of the requirements in Part B of the Act.” 71 Fed. Reg. 46,694 (Aug. 14, 2006).

<sup>169</sup> However, its separability in terms of independence from the state's supervisory responsibility under the IDEA is less than complete. See, e.g., Letter to Keenan, 20 IDELR 1166A (OSEP 1993)

nature more akin to a passive or at least neutral referee. Reflecting and reinforcing this basic structural difference, the IDEA's administering agency puts more scrutiny and accountability on the SEAs for the CP than the HO mechanism.<sup>170</sup> Although useful for explaining or harmonizing other findings,<sup>171</sup> this underlying institutional difference is only the beginning of an explanation that requires more careful and concerted examination to determine the extent that case law should apply to CP.<sup>172</sup>

The findings for the fifth research question, which concerns the relative frequencies of the remedies for the HO and CP forums, were the most difficult to analyze and assess. The likely reason is the general lack of careful attention to HO and CP remedies in (a) the IDEA,<sup>173</sup> (b) the decisions themselves,<sup>174</sup> and (c) previous empirically-styled scholarly literature.<sup>175</sup>

Within the limitation of the aforementioned complications<sup>176</sup> and caveats,<sup>177</sup> the major findings appear to be the CP skew for the delegated approach to compensatory education and for prospective orders with a

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(clarifying that training and other such SEA activities specific to HOs are part of its supervision of the IDEA).

<sup>170</sup> See, e.g., Letter to Zirkel, 68 IDELR ¶ 142 (OSEP (2016) (interpreting the deadline for remedial actions in 34 C.F.R. § 300.600(e))

<sup>171</sup> For example, the executive mission of the CP forum, including systemic compliance and enforcement, helps explain the differential findings in favor of its use of *sua sponte* action (see *supra* notes 117–118 and accompanying text), dicta (see *supra* notes 125–126 and accompanying text), and collective remedies (see *supra* notes 120–121 and accompanying text).

<sup>172</sup> It may be argued that various findings and observations of this study, including the CP forum's use of a one-step test for FAPE procedures, the asymmetry between rulings and remedies, and Congress's references in the IDEA to the adjudicative mechanism (either explicitly or implicitly including HOs), represent a cumulative justification for the differential use of case law. However, the cogency of this argument will depend on more systematic investigation and open deliberation.

<sup>173</sup> The IDEA legislation's reference to remedial authority is limited to the courts. 20 U.S.C. § 1415(i)(1)(C) (providing that the reviewing court "shall grant such relief as the court determines is appropriate"). Perhaps in light of the general recognition that HOs have derivative remedial authority (e.g., Zirkel, *supra* note 122, at 8 n.29), the IDEA regulations' reference is limited to the CP forum. 34 C.F.R. § 300.151(b)(1) (requiring, for FAPE denials, "corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement)").

<sup>174</sup> See *supra* note 132 and accompanying text. For judicial confirmation with regard to HO decisions, see, e.g., B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016) (reversing and remanding HO compensatory education award for lack of reasoned explanation); Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005) (reversing HO compensatory education award for not meeting the *Reid* standard of "an informed and reasonable exercise of discretion"); Somberg v. Utica Cmty. Sch., 67 IDELR ¶ 233 (E.D. Mich. 2016) (viewing HO's denial of compensatory education as not entitled to deference due to lack of explanation and justification); L.O. v. E. Allen Cty. Sch. Corp., 58 F. Supp. 3d 882 (N.D. Ind. 2014) (invalidating various HO orders in the absence of sufficient factual foundation or legal violations); Cupertino Union Sch. Dist. v. K.A., 75 F. Supp. 3d 1088 (N.D. Cal. 2014) (vacating and remanding HO compensatory education award for lack of evidentiary support); I.S. v. Town Dist. of Munster, 64 IDELR ¶ 40 (S.D. Ind. 2014) (same); District of Columbia v. Pearson, 923 F. Supp. 2d 82 (D.D.C. 2013) (ruling that any FAPE-related remedial relief requires not only HO ruling that district denied FAPE but also reasonably specific evidentiary basis). The pertinent case law is negligible for CP because in most jurisdictions CP decisions are not subject to judicial appeal. See Zirkel, *supra* note 11, at 2 nn.67–68.

<sup>175</sup> For a limited exception, see Zirkel, *supra* note 58.

<sup>176</sup> See *supra* notes 81–85 and accompanying text.

<sup>177</sup> See *supra* notes 100–102 and accompanying text.

collective effect.<sup>178</sup> Although contrary to the adverse majority judicial view of the delegated approach, which is rooted in the impartiality requirement for HOs,<sup>179</sup> neither court decisions generally nor the rationale for this particular judicial view appear to apply to CP decisions. Yet, its use is subject to question. First, in some of the CP decisions, the delegation extended to the threshold issue of whether the child was entitled to compensatory education, usually for FAPE procedural ICs and thereby subverting their one-step test by delegating the second, substantive effect step to the IEP team. Second, although delegation aligns with IEP team's conception of a continuing partnership, it fails to square with the recognized reality of a power imbalance in such teams,<sup>180</sup> especially but not exclusively for low-income parents,<sup>181</sup> and which may well have contributed to the district action warranting remediation. The more advisable use of the delegated approach for compensatory education would be for the CP decision to resolve the second, substantive step; reserve the compensatory—as compared with prospective—relief for determination of such a prejudicial effect; and specify a minimum level of compensatory services as the starting point for the IEP team's individualized refinement.<sup>182</sup>

Similarly, the CP bent for prospective orders that extend beyond the individual child align with the compliance-oriented and open-ended nature of this enforcement mechanism; however, the notably routinized nature of these orders<sup>183</sup> and the limited, if any, accompanying retrospective relief<sup>184</sup> temper the aforementioned<sup>185</sup> relatively parent-favorable nature of the CP forum. Moreover, it would be advisable that the underlying *sua sponte* identification and investigation of issues beyond the complaint<sup>186</sup> provide

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<sup>178</sup> In contrast, the HO skew for declaratory relief is merely an artifact of the choice to code the successful district-initiated IC rulings with a remedial entry of “DE” rather than “NA.” See *supra* notes 44 and 57.

<sup>179</sup> See *supra* notes 128–129.

<sup>180</sup> See, e.g., Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802 (2008) (proposing free educational advocate services); Margaret M. Wakelin, Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263 (2008) (similarly but more specifically suggesting IDEA amendment adding legal advocates to the IEP team based on the disparity between parents' “social power” and “their legal power” in the private enforcement process).

<sup>181</sup> See, e.g., 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 (2012) (suggesting increased public enforcement of the IDEA along with expansion of free and low-cost legal services); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2012) (proposing strengthened public enforcement in light of the socioeconomic disparity of the adjudicatory mechanism); Elisa Hyman, Dean Hill Rivkin & Stephen 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 (2011) (proposing IDEA amendments to strengthen the balance in the IEP and private enforcement process).

<sup>182</sup> Various CP decisions in state B exemplified this practice.

<sup>183</sup> See *supra* text accompanying note 122.

<sup>184</sup> See *supra* notes 123–125 and accompanying text.

<sup>185</sup> See *supra* text accompanying note 143.

<sup>186</sup> See *supra* notes 117–118 and accompanying text.

the district with prior notice to and an opportunity to respond as a matter of prudent practice.<sup>187</sup>

By extension, the overall finding of a higher parental success rate for the CP forum is accompanied by a general trend toward lighter remedial relief for the individual child,<sup>188</sup> albeit with more likely extension on a cursory basis to similarly situated students.<sup>189</sup> These trends merit the scrutiny of not only the parties but also the SEAs responsible for the CP and HO processes. The remedies aspect warrants particular attention on an event wider basis, including the need for intensive professional training and more extensive legal scholarship.

In conclusion, this empirical analysis is intended as a stimulus for more comparative and comprehensive attention to the two decisional dispute resolution forums under the IDEA. Policy makers, practitioners, and scholars need to more carefully consider and coordinate the heretofore largely neglected CP forum, its alignment with the more well-developed HO forum,<sup>190</sup> and the possible benefits of legislating other decisional alternatives.<sup>191</sup>

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<sup>187</sup> E-mail from Mark Ward, Attorney, Kansas State Department of Education to Perry A. Zirkel, Professor Emeritus, Lehigh University (Jan. 9, 2017, 8:44 EST) (on file with author) (citing basic due process and a similarly proactive interpretation of 34 C.F.R. § 300.152(a)(3)).

<sup>188</sup> The relative absence of tuition reimbursement for the CP forum (*see supra* text accompanying note 99) exemplifies this trend toward “light” remedial relief. Although contrary to its express authority to order “monetary reimbursement” (*see supra* note 173), the reasons may be the case law development of this remedy, including its multi-step test, and its subsequent codification that authorizes “a court or a hearing officer” to order reimbursement when the parent meets these steps. 20 U.S.C. § 1412(a)(10)(C)(ii)-(iv); 34 C.F.R. § 300.148(c)-(e). However, the non-effect of the case law again in CP remains subject to question, and the codification is not exhaustive or exclusive, as illustrated by its failure to address the essential step of a proper, or appropriate, unilateral placement. Although not addressing the CP-HO difference, the Supreme Court rejected the view that the IDEA codification was exclusive with regard to tuition reimbursement. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 241–43 (2009).

<sup>189</sup> *See supra* notes 120–125 and accompanying text.

<sup>190</sup> “Well-developed” may become “over-developed” at some not-too-distant point during the current trend of “judicialization” of the IHO forum. *See* Zirkel, Karanxha, & D’Angelo, *supra* note 7. Increasing the efficacy of the CP forum to come closer to the legalized features of the HO forum must be on a balanced basis so as to maintain CP’s cost-benefit advantages, including relatively low transaction costs, more timely completion rates, and generally more extensive expertise in special education.

<sup>191</sup> For example, in addition to non-decisional alternatives beyond mediation (*see supra* note 12), the decisional options include the arbitration model. S. James Rosenfeld, *It’s Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT’L. ASS’N ADMIN. L. JUDICIARY 545 (2012); Spencer Salend & Perry Zirkel, *Special Education Hearings: Prevailing Problems and Practical Proposals*, 19 EDUC. & TRAINING MENTALLY RETARDED 29 (1984); Edward Feinberg, Jonathan Beyer, Philip Moses, & Judy Schrag, *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education* 26 (2002), <http://www.directionservice.org/cadre/pdf/Beyond%20Mediation.pdf>



## APPENDICES

*Appendix 1-A: Final Coding Protocol*

**Issue Category (IC) Codes:** [see Appendix I-B for further explanations]

<b>TE</b>	Technical issues either at the threshold (e.g., timely filing) or interlocutory (e.g., stay put)
<b>CF</b>	Child find
<b>NO</b>	Notices (e.g., procedural safeguards notice, prior written notice)
<b>EV</b>	Evaluation (including requirement to “consider” IEE and consent requirement – specify in Comments column), but not notices for evaluation (which should be NO) or IEE at public expense
<b>IEE</b>	Independent educational evaluation at public expense
<b>EL</b>	Eligibility
<b>F</b>	FAPE – undifferentiated, i.e., unspecified whether P or S and broadly extended to include the threshold entitlement for FAPE and placement that does not fit under LRE or one of the specific FAPE categories
<b>FSP</b>	FAPE – intertwined, i.e., both P and S interwoven almost equally and easily conflatable, but not for two-step FP analyses)
<b>FS</b>	FAPE – substantive
<b>FPC</b>	FAPE – procedural: required IEP components (specify in Comments column)
<b>FPT</b>	FAPE – procedural: IEP team (except parent) (specify in Comments column)
<b>FPP</b>	FAPE – procedural: parent participation (specify in Comments column)
<b>FPO</b>	FAPE – procedural: other (specify in Comments column)
<b>FI</b>	FAPE – implementation (i.e., failure to implement)

- RS**     Related service (unless if integrated under FS or FP - code as FS or FP with Comment) – including assistive technology and aides
- ESY**    Extended school year
- LRE**    Least restrictive environment alone, as evidenced by application of separate test or reliance on relevant regulations (unless if combined with FS or FSP - code instead as FS with Comment re LRE)
- DIS**    Discipline (often conflation of the various requirements for disciplinary changes in placement)
- EN**     Enforcement of another HO or CP decision or a settlement agreement
- MI**     Miscellaneous (specify in Comments column)

**Outcome Codes:**<sup>192</sup>

**1** = in favor of Parent

**5** = in favor of School District

N.B.:    For applicable ICs, use \*\* when district is the filing (or counterclaiming) party; however, apply this scale regardless of which party was the initiator of the IC.

**Remedy Codes:**

**DE**    = Declaratory only (including stay-put and permission for evaluation)

**PP**    = Prospective placement (specify in Comments column – e.g., residential placement and/or continuation of placement)

**POI**   = Other purely prospective order specific to the individual student in the complaint (specify in Comments column – e.g., particular service or training)

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<sup>192</sup> The original version included three intermediate categories: **2** = Largely in favor of Parent – only where compelling (i.e., resolve doubts in favor of “1”); **3** = Inconclusive or split (specify in Comments column); and **4** = Largely in favor of School District – only where compelling (i.e., resolve doubts in favor of “5”).

- POC** = Other purely prospective order collective in scope rather than specific to the individual student (e.g., staff training, district wide policy review) (specify in Comments column – e.g., particular service or training)
- POB** = Other purely prospective order that is both POI + POC (specify in Comments column – e.g., particular service or training)
- TR** = Tuition reimbursement including directly connected items (only if reached, and add asterisk, specifying in Comments column if less than the full parental request or otherwise unusual)
- R** = Reimbursement remedies other than and not added to tuition reimbursement, such as IEE, tutoring, transportation (only if reached, and add asterisk, specifying in Comments column if less than the full parental request or otherwise unusual)
- CEF** = Compensatory education when complainant's request or missed amount of services is identified and fully awarded (only if reached, and add asterisk, specifying in Comments column the amount)
- CEP** = Compensatory education when complainant's request is identified and only partially awarded (only if reached, and add asterisk, specifying in Comments column the requested and awarded amounts)
- CED** = Compensatory education when delegated to IEP team (only if reached, and add asterisk to specify any particulars)
- CEU** = Compensatory education but unspecified as to previous CE categories (e.g., specific amount but unclear whether full or partial)
- MU** = Multiple (specify in the Comments column each of the component remedies)
- MI** = Miscellaneous (specify in Comments column)
- NA** = Not applicable (usually but not always where outcome is 5, with exceptions denoted with an \* and specified in Comments column, such as violation w/o a remedy)

**Coding Rules:**

- Identify the ICs holistically, i.e., based on not only the complaint but also the stated issue(s), if the adjudicator/investigator identified them, and his/her analysis (i.e., conclusions and remedies, if any).
- Include “*sua sponte*” ICs with this designation in Comments column only if definitive outcome, but note in the Comments column those not qualified for coding.
- For other than *sua sponte* ICs, apply a de facto approach (e.g., insufficient evidence for decision amounts to a “5” whereas a reasonably implicit violation, even with dicta recommendation, amounts to a “1”).
- Conflate issues (both subcategories and multiple IEPs) within IC except to the extent of different outcomes and/or different remedies; however, where multiple remedies for same subcategory or IEP and same outcome, use MI and identify in Comments column the remedies. Conversely, do not conflate where the coding system provides a separate IC.
- Conflate separate steps for IEE (e.g., whether district’s evaluation was appropriate) and for FAPE-Procedural (e.g., if required and proven, whether substantively prejudicial).
- Limit IEE IC to issues of public expense, usually amounting to reimbursement, treating the separable district obligation of consideration of the IEE under the broad evaluation IC.
- If an IC is decided based on TE grounds, code as TE, and note in the Comments column what the IC would have been, if not TE, had the IC been decided on the merits.
- In overlapping procedural and substantive FAPE ICs, err on the side of procedural rather than substantive.
- Exclude ICs based on other federal/state statutes (e.g., FERPA or § 504) unless the IC ruling explicitly cites the IDEA in addition to the other statute – cite the exclusion in the Comments column.

- Similarly, exclude state statutes that are clearly not corollary to the IDEA, citing this exclusion in the Comments column.
- However, exclude the case if it is entirely based on § 504 or another separable federal or state statute even where the IDEA is used by analogy.
- Note in the Comments column district-initiated ICs, and where the ruling is a 5, enter DE (declaratory relief) for authorization, or override of denial of consent, for EV or FS and for validation, or enforcement, of refusal of liability for IEE.

*Appendix 1-B: Explanation of Issue Categories (ICs)*

**Preliminary:**

- *Technical*: either threshold issues, such as jurisdiction, mootness, or timely filing, or interlocutory issues specific to the proceedings, rather than the merits of the case, such as "stay put" and evidentiary objection
- *Notice*: procedural safeguards notice and prior written notice

**Identification:**

- *Child Find*: either the collective issue of whether the district provided the IDEA-required notice to the public or, more often, the individual issue of whether the district had reason to suspect that the student may have been eligible and yet did not conduct an evaluation
- *Evaluation*: either the initial evaluation for a student suspected of needing special education services (as a result of child find or parent request) or the required re-evaluations for continuation and revision of special education services, including the tangential requirement to "consider" the IEE
- *Independent Educational Evaluation (IEE)*: the parents' right to what is, in effect, a second expert opinion at public expense as to the initial evaluation or reevaluation
- *Eligibility*: determination through an evaluation by a multidisciplinary team that a student fits one or more of thirteen eligible classifications under the IDEA and that the student requires specially design instruction

**Program/Placement:**

- *FAPE Substantive*: determination of whether the IEP meets the substantive standards in *Rowley* and its progeny, which extend beyond this IEP formulation to IEP implementation
- *FAPE Procedural*: determination of whether the school district prejudicially violated any of the procedural protections in the IDEA, within these subgroups:

- *Components of the IEP*: e.g., goals and present educational levels
  - *Members of the IEP team*: e.g., LEA representative and special education teacher
  - *Parental Participation*: e.g., predetermination
  - *Other*: miscellaneous procedural ICs not fitting in the above three subgroups
- *FAPE Implementation*: determination of whether district failed to implement the IEP so as to constitute denial of FAPE
- *Related Services*: issue of whether child needed a particular service separate from FAPE substantive and procedural issue categories above
- *Extended School Year (ESY)*: the threshold determination of whether the child is entitled to special education and related services beyond the regular school year and, if so, the extent of this entitlement
- *LRE Alone*: determination of whether the present or proposed placement is the least restrictive environment (LRE) according to applicable criteria separate from FAPE

**Other:**

- *Discipline*: largely suspensions, expulsions, and exclusions, including the threshold determination of whether the removal constituted a disciplinary change in placement and, if so, the resulting determination of whether the district violated applicable requirements for manifestation determinations, interim alternate educational settings, and functional behavioral assessments or behavioral intervention plans
- *Enforcement*: settlement agreement or previous HO or CP decision
- *Miscellaneous*: catch-all for various issues beyond the preceding categories, such as amendment of student records and disclosure

