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# **Creeping Judicialization In Special Education Hearings?: An Exploratory Study**

**By Perry A. Zirkel, Zorka Karanxha, and Anastasia D'Angelo\***

## **I. INTRODUCTION**

The Individuals with Disabilities Education Act (IDEA), is a funding act that provides an entitlement of a “free, appropriate, public education” (FAPE) for eligible students.<sup>1</sup> The cornerstone for dispute resolution under the IDEA is an impartial due process hearing, with a second-tier administrative review in some states and with a right to judicial review in either state or federal court.<sup>2</sup>

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1. 20 U.S.C.A. §§ 1401 *et seq.* (2005). The implementing regulations are at 34 C.F.R. Part 300. Congress passed the original version, the Education for All Handicapped Children Act, in 1975. It has been amended several times since then, including 1986, when attorneys' fees were added; 1990, when the legislation was re-named the IDEA; 1997, when the revisions included special provisions for discipline; and, most recently, 2004, when the various refinements included additions to fit the No Child Left Behind Act. *See, e.g.*, MITCHELL YELL, *THE LAW AND SPECIAL EDUCATION* 70-76 (2d ed., 2006). The most recent regulations were issued in 2006. 71 Fed. Reg. 46, 540 (Aug. 14, 2006).

2. 20 U.S.C.A. § 1415(f)-(i) (2005); 34 C.F.R. §§ 300.510-300.516 (2006). Currently, approximately 17 states have a second, review-officer tier, with the remaining 33 states opting for a one-tier, state-level hearing officer system. Eileen

Various commentators have decried the increased adversarial nature of due process hearings.<sup>3</sup> In what may be at least partial recognition of the problem,<sup>4</sup> the 2004 Amendments to the IDEA included fine-tuning of this dispute resolution mechanism, such as adding more detailed notice-pleading<sup>5</sup> and “resolution session”<sup>6</sup> steps before the hearing.<sup>7</sup> These provisions may contribute to,<sup>8</sup> whether or not they recognize, the increasingly burdensome nature<sup>9</sup> of the due process mechanism under the Act.<sup>10</sup>

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Ahearn, *Due Process Hearings: 2001 Update*, QTA: PROJECT FORUM 2 (April 2002) (available from the National Association of State Directors of Special Education).

3. See, e.g., Steven S. Goldberg: *The Failure of Legalization in Education: Alternative Dispute Resolution and the Education for All Handicapped Children Act of 1975*, 18 J.L. & EDUC. 441 (1989); Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process*, 42 EDUC. L. REP. (WEST) 491 (1988) (characterizing adversarial system of due process hearings as a failure and suggesting that mediation is not an effective alternative); Kevin Lanigan, et al., *Nasty, Brutish ... and Often Very Short: The Attorney Perspective on Due Process*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 213 (Chester E. Finn et al., eds. 2001) (criticizing lack of efficacy of due process hearings); Donal M. Sacken, *Reflections on an Adversarial Process: The Confessions of a Special Education Hearing Officer* (1988) (unpublished paper, on file with the author) (recommending elimination or at least improvement of the hearing process in light of its adversarial nature).

4. See, e.g., S. REP. NO 108-85, at 6 (2003): “The committee is discouraged to hear that many parents, teachers, and school officials find that some current IDEA provisions encourage an adversarial, rather than a cooperative, atmosphere, in regards to special education.”

5. 20 U.S.C.A. §§ 1415(b)(7), 1415(c)(2).

6. § 1415(f)(1)(B). The subsequent regulations further refined this new mechanism. 34 C.F.R. §§ 300.510(b)-(c) (2006).

7. The Amendments also bolstered the mediation mechanism (20 U.S.C.A. § 1415(e)); added qualifications for hearing officers (§ 1415(f)(3)(A)); specified limitation periods for filing for the hearing and for judicial review (§§ 1415(f)(3)(C), 1415(i)(2)(B)); and put limitations on the expansion of the hearing issues and the procedures-based decisions of hearing officers (§§ 1415(f)(3)(B), 1415(f)(3)(E)(ii)).

8. See *infra* notes 71-77 and accompanying text.

9. For commentary criticizing the “over-legalization” of the dispute-resolution procedures of the Act, see, e.g., Perry Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. L. REP. 35 (2005) (proposing a streamlined model for due process hearings); Perry Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994) (elaborating on the

However, there has been negligible empirical research to determine whether due process hearings, for which the IDEA regulations prescribe a relatively expedited period for completion,<sup>11</sup> have been subject to “creeping judicialization,” here referring to a gradualistic increase of the time-consuming proceduralism associated

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increased legalism and proposed streamlining of the hearing process); Perry Zirkel, *Why Reauthorization May Provide Only the Illusion of a Solution*, EDUC. WK., May 21, 2003, at 44; cf. Ann Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 7 (2000) (criticizing the “legalization of disability in schools” specifically with regard to the IDEA’s discipline protections); Donal Sacken, *Mayson v. Teague: The Dilemma of Selecting Hearing Officers*, 16 J.L. & EDUC. 187 (1987) (arguing for dismantling the hearing officer system at the state level, authorizing the local board of education to be the hearing body). Although conceptually imprecise, “legalization” in this context refers primarily to “court-like procedures to enforce and protect rights.” David Neal & David Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63, 65 (1985); cf. David Kirp & Donald Jensen, *What Does Due Process Do?* 73 PUB. INT. 75 (1983) (early characterization that due process hearings “degenerate into law-ridden affairs that often upset the participants”). For broader meanings of “legalization” in other educational contexts, see David Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976); Mark Yudof, *Legalization of Dispute Resolution, Distrust of Authority and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891.

10. Imbued with formal proceduralism, the courts have largely been limited to repeating the Supreme Court’s dictum that the administrative as well as judicial dispute resolution process under the IDEA is “ponderous.” *Honig v. Doe*, 484 U.S. 305, 322 (1985); *Burlington Sch. Comm. v. Mass. Dep’t of Educ.*, 471 U.S. 359, 370 (1985).

11. Specifically, in comparison to the generally much more time-consuming period for judicial proceedings, the regulations specify a maximum of 45 calendar days from the date of receipt of the hearing request to the date of the decision except for specific extensions of time that the hearing officer grants upon request of either party. 34 C.F.R. §§ 300.515(a), 300.515(c) (2006). For those states that have opted for a review-officer stage, the regulations provide for a 30-day period for such review, exclusive of extensions. § 300.511(b). As the comments accompanying the regulations make clear, these time limits are “long-standing.” 64 Fed. Reg. 12,618 (Mar. 12, 1999) (Attachment I to IDEA regulations). They date back to the original regulations in the late 1970. See, e.g., STEVEN S. GOLDBERG, *SPECIAL EDUCATION LAW* 169 (1982). In the legislative history of the original legislation, Senator Williams emphasized the importance of promptly providing eligible children with special education and related services, declaring: “It is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable....” 121 CONG. REC. 37, 416 (1975).

with the courts<sup>12</sup> and often referred to more generally and less precisely as “legalization” or “over-legalization.”<sup>13</sup> Illustrating the meaning of this concept, in the partially analogous context of labor arbitration<sup>14</sup> Krahmal and Zirkel’s longitudinal analysis of the Federal Mediation and Conciliation Services database revealed that grievance arbitration cases gradually increased from the early 1970s to the late 1990s in terms of available indicators of court-like formalization, such as the percentage of cases using transcripts and the average elapsed time from filing to decision.<sup>15</sup>

The literature to date includes at least limited empirical research concerning various aspects of IDEA due process hearings, such as

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12. For the source of the term “judicialization,” see Lawrence M. Friedman, *The Rise and Fall of Student Rights*, in SCHOOL DAYS, SCHOOL RULES 238, 251 (David Kirp & Donald Jensen eds. 1986). For the “creeping” aspect, see Andriy Krahmal & Perry Zirkel, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?* 16 OHIO ST. J. ON DISP. RESOL. 243 (2001).

13. See *supra* note 9. This Ninth Circuit observation shows the application to the IDEA:

Working out an acceptable educational program must, in the end, be a cooperative effort between parents and school officials; the litigation process is simply too slow and too costly to deal adequately with the rapidly changing needs of children.... In addition, litigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful here, since parents and school officials must—despite any bad feelings that develop between them—continue to work closely with one another. As this case demonstrates, when combat lines are firmly drawn, the child’s interests often are damaged in the ensuing struggle.

Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1400 n.5 (9th Cir. 1994).

14. See, e.g., Spencer Salend & Perry Zirkel, *Special Education Hearings: Prevailing Problems and Practical Proposals*, 19 EDUC. & TRAINING MENTALLY RETARDED 29 (1984) (suggesting various expediting features of labor arbitration for IDEA due process hearings). Showing the possible analogy, the House version of the 2004 amendments to the IDEA provided for voluntary binding arbitration, although the Conference Committee settled on the Senate version, which did not. H.R. REP. NO. 108-779, at 213 (2004).

15. See Krahmal & Zirkel, *supra* note 12. The other factor was the number of days charged, which is specific to this private form of dispute resolution as compared with due process hearings under the IDEA.

characteristics of hearing officers,<sup>16</sup> state practices for hearings,<sup>17</sup> parties' perceptions of fairness,<sup>18</sup> costs of due process hearings,<sup>19</sup> outcomes (i.e., percentage of wins) in due process hearings,<sup>20</sup> and factors related to outcomes.<sup>21</sup>

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16. See, e.g., Ann P. Turnbull, Bonnie Strickland, & H. Rutherford Turnbull, *Due Process Hearing Officers: Characteristics, Needs, and Appointment Criteria*, 48 EXCEPTIONAL CHILD. 48 (1981) (finding that North Carolina hearing officers were almost evenly divided among attorneys, educators, and former educators); cf. Joy Markowitz, Eileen Ahearn & Judy Schrag, *Dispute Resolution: A Review of Systems in Selected States* 13-16 (June 2003) (available at [www.nasde.org](http://www.nasde.org)) (reporting characteristics of hearing officer systems as limited part of study of 10 diverse states).

17. See, e.g., Antonis Katsiyannis & Kathe Klare, *State Practices in Due Process Hearings: Considerations for Better Practice*, 12 REMEDIAL & SPECIAL EDUC. 54 (1991) (state-by-state survey included the number of tiers, hearing officers, scheduled hearings, and hearing decisions as of 16 years ago); cf. Julie Underwood, *NSBA Survey on Delegation* (1999) (available at [www.law.seattleu.edu/aljho/resources/surveys](http://www.law.seattleu.edu/aljho/resources/surveys)) (survey as to whether state delegated its special education hearings to a non-education agency); James Thomeczek, *Special Education Due Process under IDEA 2004* (2006) (paper presented at the annual meeting of the Education Law Association, on file with the author) (discussing number of hearing requests in 2004-05 and 2005-06).

18. See, e.g., Milton Budoff & Alan Orenstein, *Special Education Appeals Hearings: Are They Fair and Are They Helping?*, 2 EXCEPTIONAL EDUC. Q. 37 (1981) (finding disillusionment on both sides after the early Massachusetts hearings); Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Due Process Hearings*, 57 EXCEPTIONAL CHILD. 546 (1991) (finding negative perceptions, particularly among parent participants, in Pennsylvania hearings during 1980-84); cf. Martha L. Morvant & Richard W. Zeller, *Oregon Dispute Resolution Study: Trends, Uses and Satisfaction* (August 1997) (Western Regional Resource Center, Eugene, OR) (finding both parents and districts to be evenly split between being satisfied and dissatisfied during 1989-96).

19. See, e.g., Jay G. Chambers, Jenifer J. Harr & Amynah Dhanani, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* (May 2003) (available from ERIC, access no. ED 480760) (estimating the cost of a due process hearing in 1999-2000 to be in the range of \$8,160-\$12,000 not including personnel time); cf. David Yeager et al., *A Study of Issues and Costs to Districts Relation to Special Education Complaints, Mediation, and Due Process Hearings in the State of Texas* (2000) (available from ERIC, access no. ED 455604) (\$17,000 average cost for limited sample of 11 hearings in 1998-99).

20. See, e.g., U.S. GENERAL ACCOUNTING OFFICE, *SPECIAL EDUCATION: THE ATTORNEY FEE PROVISION OF PUBLIC LAW 99-371* (1989) (finding that parents "prevailed in all or part" in 43% of the hearings nationwide in 1984-88); Barbara Kammerlohr, Robert Henderson & Steven Rock, *Special Education Due Process*

The published research that is longitudinal and relatively recent is even more limited. In a compilation of reports from the various states, the National Association of State Directors of Special Education (NASDSE) reported an increase in the total number of hearings held nationwide, from 1574 to 3020, during the period from 1991 to 2000, with a high point in 1996 of 3,555 and a gradual decrease since then.<sup>22</sup> For the entire period, the leading six

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*Hearings in Illinois*, 49 EXCEPTIONAL CHILD. 417 (1983) (finding that parents won 20% of the early hearings in Illinois); Peter Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, L. & CONTEMP. PROBS. 89 (1985) (finding that parents won in whole or part 36% of the first four years of hearings in Pennsylvania); Thomas Smith, *Status of Due Process Hearings*, 48 EXCEPTIONAL CHILD. 232 (1981) (finding that parents won 37% of the early hearings nationwide); Perry Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731, 740 (2002) (finding that parents won 29% of the published hearing/review officer decisions nationally for 1989-2000 and that 21% of the outcomes were mixed). The categorization of wins and losses is subject to complexity more than consensus. See, e.g., Milton Budoff, Alan Orenstein & John Abramson, *Due Process Hearings: Appeals for Appropriate Public School Programs*, 48 EXCEPTIONAL CHILD. 180, 181 (1981); Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350, 354 (2001).

21. See, e.g., Martin Diebold & Robert Simpson, *An Investigation of the Effect of Due Process Hearing Officer Occupation on Placement Decisions*, 11 DIAGNOSTIQUE 69 (1986) (finding nonsignificant relationship between hearing officer occupational status and placement decisions in response to vignettes); Geoffrey Schultz & Joseph McKinney, *Special Education Due Process Hearings*, 2000 BYU EDUC. & L.J. 17 (finding gender and attorney v. non-attorney occupation of hearing officer significantly related to settlement of cases in one Midwestern state during 1992-96); James Newcomer, Perry Zirkel & Ralph Tarola, *Characteristics of Special Education Hearing and Review Officer Cases*, 123 EDUC. L. REP. 449 (1998) (finding three of ten case characteristics, including background of the hearing officer, to be significantly related to the outcome of hearing officer cases in Pennsylvania during 1973-89); James Newcomer & Perry Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999) (finding moderate relationship between hearing/review outcome and court outcome). For an initial and inconclusive exploration of the relationship to SES, see Michael Kirst & Kay Bertken, *Due Process Hearings in Special Education: Some Early Findings from California*, in SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION, AND FINANCE (Jay Chambers & William Hartman eds., 1983).

22. Eileen Ahearn, *Due Process Hearings: 2001 Update*, QTA FORUM 6 (April 2002) (available at [www.nasdse.org](http://www.nasdse.org)). The GAO report, *supra* note 20, only

jurisdictions in order, were New York, the District of Columbia, New Jersey, Pennsylvania, California, and Maryland; together they accounted for nearly eighty percent of all of the hearings held.<sup>23</sup> In a study limited to published hearing officer decisions, which is different in more than one respect from “hearings held,”<sup>24</sup> Zirkel & D’Angelo analyzed the number of cases for three-year periods from 1977-79 and 1998-2000, finding a low frequency in the initial period, then a higher, relative plateau during 1980-91, and successive increases during the last decade.<sup>25</sup> Again, relatively few states accounted for the majority of the cases.<sup>26</sup>

In general, the data management of the various states for due process hearings is notably wanting both in terms of completeness

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covered the decreasing sub-period of 1996-2000. U.S. GENERAL ACCOUNTING OFFICE: SPECIAL EDUCATION: NUMBERS OF DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS (September 2003). A recently completed follow-up survey that did not include the District of Columbia (primarily due to its singular lack of response) revealed that the period from 1997 to 2005 represented an uneven plateau and that the ranking of the states varied somewhat when their totals were adjusted in relation to special education enrollments. Perry Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis* (2007) (journal article under review, on file with the author).

23. See GAO Report, *supra* note 20, at 13-14. The data are imprecise due to various factors, including differing definitions of “hearings held” and “years”. Eileen Ahearn, *Due Process Hearings: 1999 Update*, QTA FORUM 2 (December 1999) (available at [www.nasdse.org](http://www.nasdse.org)). Moreover, the analysis does not include IDEA hearings conducted by the Department of Defense Office of Hearings and Appeals and those in U.S. territories and the Commonwealth of Puerto Rico.

24. See, e.g., Anastasia D’Angelo, J. Gary Lutz & Perry Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?* 14 J. DISABILITY POL’Y STUD. 241 (2004). The differences include that the published cases were full, written decisions that were submitted and selected for publication in the Individuals with Disabilities Education Law Report (IDELR).

25. Zirkel & D’Angelo, *supra* note 20, at 740. For the period from 1977-79, the number was 126; for the intermediate period, the number averaged 271, and the final three-year periods the successive subtotals were 337, 577, and 693. *Id.*

26. The top five states, together accounting for 55.2% of the published decisions, were, in order: New York, California, Massachusetts, Pennsylvania, and Texas. *Id.* at 744. However, when the frequencies were adjusted in proportion to special education enrollments, the leading five states were Vermont, Massachusetts, Maine, Delaware, and New Hampshire. *Id.* at 744 n.47.



and uniformity.<sup>27</sup> The only state that had and was willing to share a complete set of the due process decisions—other than those states that previously had only a *de minimis* number of decisions—was Iowa.<sup>28</sup> Nevertheless, Iowa has had relatively few decisions,<sup>29</sup> and it is known for a relatively proactive general and special education system.<sup>30</sup> In a previous analysis, Rickey & Wilson reported that Iowa had fifty adjudicated hearings from 1989-90 to 2000-01, representing rather steady successively lower levels averaging five and three per year for the first and second halves, respectively, of this period.<sup>31</sup> They attributed the reduction to Iowa's successive provisions for various resolution provisions, including a pilot project for pre-appeal conferences in 1987 and the institutionalized (via state

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27. See, e.g., Markowitz at al., *supra* note 16; Howard Schrag & Judy Schrag, *National Dispute Resolution Use and Effectiveness Study* (Summer 2004) (available at [www.directionservice.org](http://www.directionservice.org)).

28. We contacted via email and/or telephone the responsible staff member in each state. Those with *de minimis* numbers, based on less than 1% (n=30) of the decisions for the period 1991-2000, were Alaska (est. 15 decisions), Idaho (24), Montana (20), New Mexico (22), North Dakota (16), Utah (14), and Wyoming (20). Ahearn, *supra* note 22, at 6.

29. For example, for the period 1991-2000, Iowa had 42 decisions, placing it 39th of 50 states in total number of hearings held during 1991-2000. *Id.* Its rank when the total number of hearings is adjusted for the size of special education enrollments in each state was 48th. See Zirkel & Gischlar, *supra* note 22.

30. See, e.g., IOWA DEP'T OF EDUC., SPECIAL EDUCATION ELIGIBILITY STANDARDS (2006) (providing Iowa's generic RTI model for special education eligibility); see also Martin J. Ikeda et al., *Agency-Wide Implementation of Problem-Solving Consultation*, 11 SCH. PSYCH. Q. 228 (1996) (describing Heartland Area Education Agency's multilevel problem-solving method for prereferral intervention as a result of Iowa's successive statewide initiatives); Elizabeth A. Jankowski, *Heartland Area Education Agency's Problem Solving Model*, 22 RURAL SPECIAL EDUC. Q. 29 (2003) (providing updated information on Heartland's model based on state-wide encouragement of alternative assessment and delivery systems); W. David Tilly, *Diagnosing the Learning Enabled: The Promise of Response to Intervention*, 32 PERSPECTIVES 20 (Winter 2006) (referring to "many benefits Iowans have experienced throughout the past 15 years of evolving towards [a response to intervention model]"); see also *infra* note 32.

31. Kristen Rickey & Dee Ann Wilson, *A Report on Special Education Due Process Hearings in Iowa* 8 (September 2003) (available at <http://www.iowa.gov/educate/content/view/607/587/1/3>). The cadre of hearing officers is relatively small and stable, serving part-time in this role and largely being university professors with special education expertise. *Id.* at 12-13, 39. At least one of the professors, Larry Bartlett, has a law degree.

regulations) pre-appeal conference process in 1995.<sup>32</sup> Their other findings included a 35% success rate for parents on an issue-by-issue basis and considerable variance in the number of issues per hearing, the number of sessions per hearing, and the percentage of parties represented by attorneys; but they did not analyze these variables longitudinally.<sup>33</sup>

## II. METHOD

The Iowa Department of Education provided a full set of the 145 written hearing officer decisions from the implementation of the IDEA to the end of 2005.<sup>34</sup> With supervision and consultation from the first author, the other two authors developed and refined a coding system until they reached a 95% level of interrater reliability on an initial random sample of cases. Each of these two authors then coded half of the cases. The variables and coding categories, along with clarifying notes, are as follows:

Descriptive variable:<sup>35</sup>

- Outcomes: parents won, mixed, and district won<sup>36</sup>

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32. *Id.* at 40. The state's innovative efforts in terms of providing to the intermediate units—called “area education agencies” (AEAs)—mediation training in 1995 and resolution facilitator process in 2000 were also notable. *Id.* The “pre-appeal conference” process provided the opportunity to access the state-trained mediators prior to filing for a hearing, an innovation not incorporated into the IDEA until the 2004 amendments. E-mail from Professor Larry Bartlett, Iowa hearing officer and attorney (Jan. 7, 2006) (on file with author).

33. See Rickey *supra* note 31, at 10-11, 14-15. Other variables that they analyzed included student characteristics and appeals to state or federal court. *Id.* at 19-22, 33-38. For a published analysis that is limited to some of these non-longitudinal findings, see Kristen Rickey, *Special Education Due Process Hearings*, 14 J. DISABILITY POL'Y STUD. 46 (2003).

34. The date of the first decision in the set was 30 May 1978, and that of the last decision was 26 September 2005. One decision was the dismissal on the grounds of subject matter jurisdiction; even though there was no hearing, there was a full opinion.

35. The outcome variable, along with the total number of cases, are merely descriptive dimensions for the population of hearing officer decisions overall.

36. Inasmuch as this variable was merely descriptive rather than an indicator of judicialization and inasmuch as the percentage of cases in the mixed category was limited, we did not tabulate outcomes on an issue-by-issue basis.

Judicialization variables:<sup>37</sup>

- Attorney representation<sup>38</sup>: both sides, parent side only, defendant side only, and neither side<sup>39</sup>
- Duration A: number of calendar days from date of filing to date of decision<sup>40</sup>
- Duration B: number of sessions of the hearing<sup>41</sup>
- Complexity: number of issues that the hearing officer decided<sup>42</sup>
- Legalism A: number of legal citations that the hearing officer included<sup>43</sup>

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37. These variables, like those used in Krahmal & Zirkel, *supra* note 12, are merely indicia that, as partial or proxy measures, provide evidence of judicialization as defined by this study on a cumulative basis. No one of them is an entirely independent or complete measure.

38. This variable served as a transition, being used both descriptively (overall) and as an indicator of judicialization (longitudinally).

39. Under Iowa law, the AEA must participate in the hearing along with the local school district. Inasmuch as this feature is not generalizable to other states and inasmuch as there were no differences in attorney representation between the AEAs and local districts, we conflated these two entities into the defendant side for this variable.

40. Where the decision did not report the specific filing date, we estimated it where the decision provided sufficient other information, such as the date of the last recorded event with either the local school district or the AEA. In approximately 12% of the cases we did not have sufficient information to extrapolate a reasonable estimate. Moreover, we used the date of the decision for categorizing the case as to year. Given the negligible number of cases in which the hearing officer's decision indicated an officially granted postponement, we counted the entire period from filing to decision.

41. Although correlated moderately with duration, the number of separate hearing sessions served as a separable indicator of judicialization. For example, some cases had multiple sessions but back-to-back or closely proximate, whereas others had fewer sessions but spread widely apart.

42. For consistency, we used the date of decision for categorizing the case as to year. We counted the number of separable issues that the hearing officer decided; if either or both parties raised an issue but the hearing officer did not address it, we did not include it.

43. We counted each specific citation of primary legal sources, such as a statutory subsection, court decision, or hearing officer decision that appeared in the legal conclusions section of the hearing officer's opinion except for repetitions. Attempts at weighting the citations in terms of degree of reliance or significance were unsuccessful in terms of interrater reliability.

- Legalism B: variety of legal source categories that the hearing officer cited<sup>44</sup>
- Length: number of pages of the hearing officer's decision<sup>45</sup>

### III. RESULTS

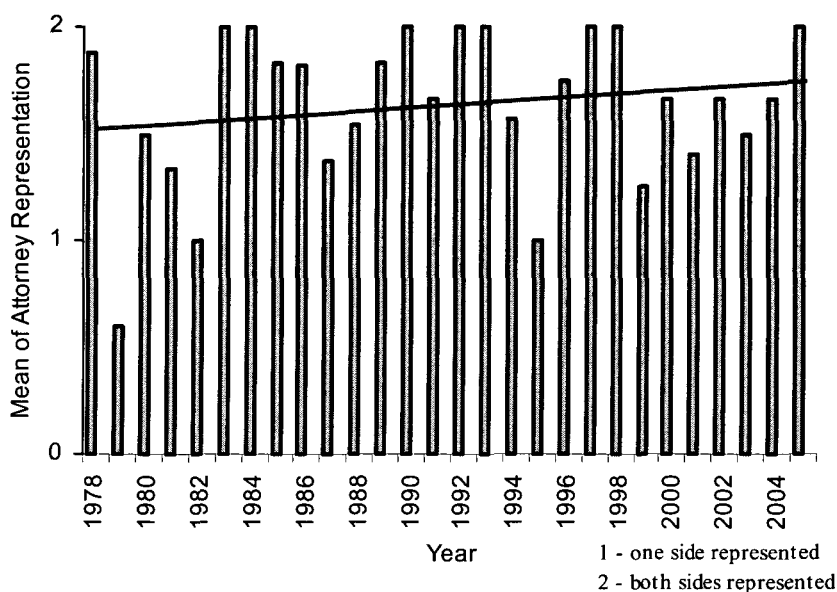
The outcomes of the 145 hearing officer decisions were: parents won = 32%; mixed = 8%; and defendant won = 60%. As for attorney representation on an overall basis, parent side had an attorney in 82% of the cases and the defendant side had an attorney in 90% of the cases. More specifically, the distribution was: both sides represented = 67%; parent only = 15%; defendant only = 13%; and neither side = 5%.

Figure 1 re-examines the variable of attorney representation longitudinally. The coding for each case, which formed the vertical axis for this bar graph, was: "0" = neither party had attorney representation; "1.0" = one party or the other had attorney representation; and "2.0" = both parties had attorney representation. Each bar in the graph represents the average on this 0-to-2 scale for the year.

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44. We used the following categories of legal sources: 1) legislation and regulations; 2) court decisions; 3) hearing and review officer decisions; 4) published policy interpretations (e.g., the commentary accompanying the IDEA regulations and U.S. Office of Special Education Programs policy letters); and 5) miscellaneous other (e.g., IDEA legislative history and state attorney general opinions).

45. Again, although overlapping with the number of issues, the length of the decision served as another one of multiple indicia of judicialization.

*Figure 1. Attorney Representation*

An examination of Figure 1 reveals a very gradual overall trend, with notable fluctuations, in the direction of complete attorney representation. More specifically, in the first few years, on average one side or the other had attorney representation,<sup>46</sup> whereas in recent years both parties had an attorney in the majority of the cases.<sup>47</sup>

The first duration variable, the number of days from filing to decision on an annual average basis, is presented in Figure 2.

46. During 1978-83, 70% of parents had attorney representation, whereas 89% of the LEAs (and 54% of the AEs) had such representation. Where parents did not have attorney representation, they typically had lay advocates.

47. During 2000-05, 96% of LEAs and 95% of AEs had attorney representation, while the parents' level remained at 70%.

Figure 2. Average Number of Days from Filing to Decision

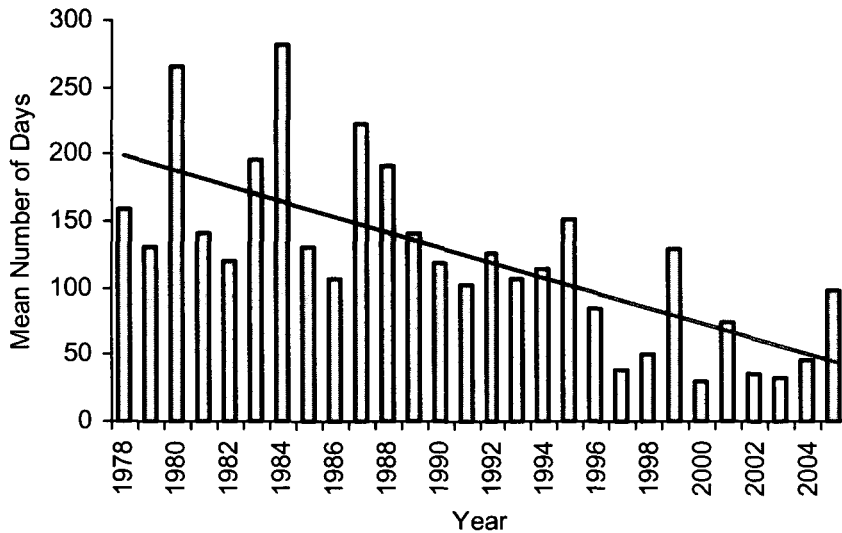


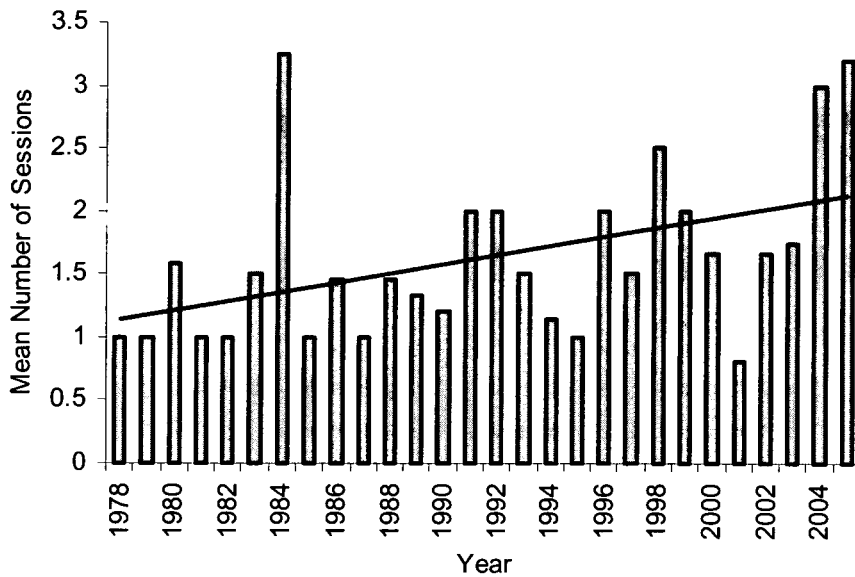
Figure 2 reveals considerable variance but an overall rather acute trend toward shorter rather than longer duration. More specifically, in the initial six-year period in the wake of the initial IDEA regulations (i.e., 1978-83), the average duration was 169 days, whereas the most recent six-year period (i.e., 2000-05) averaged 52 days, which is much closer to but still above the 45-day period prescribed in the regulations.<sup>48</sup>

The second duration variable, the number of sessions per case, is presented in Figure 3. Again, each bar in the graph represents the average for that year.

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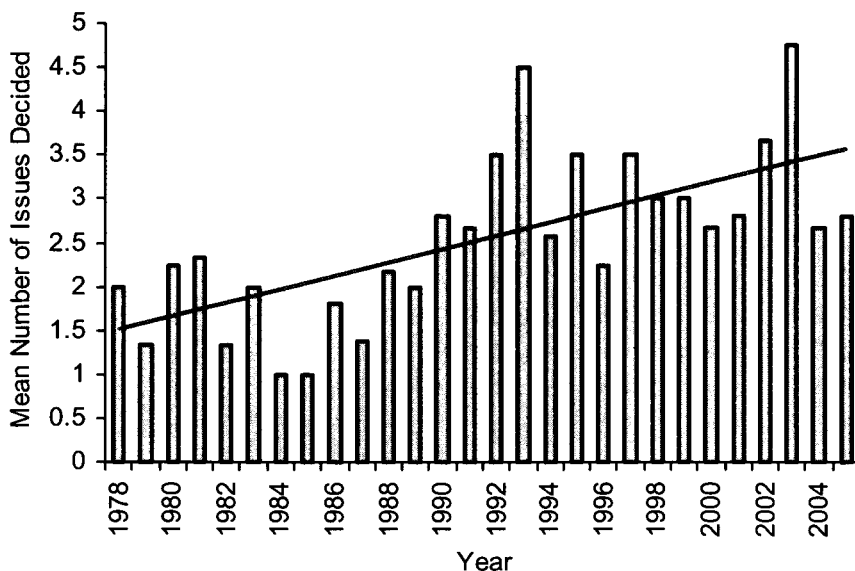
48. 34 C.F.R. § 300.515(a) (2006).

Figure 3. Average Number of Sessions per Case



Although again not without fluctuation, Figure 3 shows an overall notable slope toward more sessions per case. More specifically, the trend has shifted from a norm of one session per case to an average of two sessions per case.

Figure 4 portrays the complexity variable, the annual average for the number of issues decided per case.

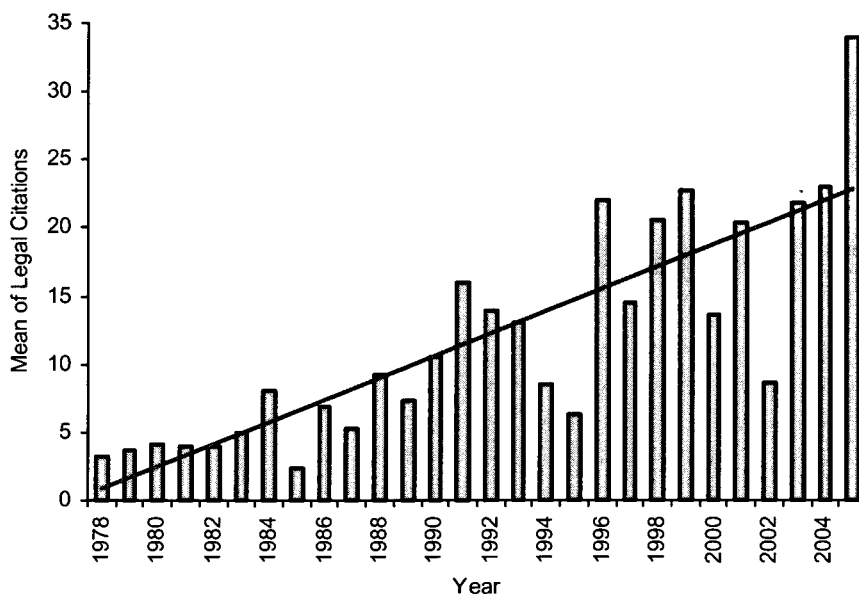
*Figure 4. Average Number of Issues Decided per Case*

As Figure 4 reveals, the trend line clearly is in the direction of a higher number of issues decided in each case when averaged on a yearly basis. More specifically, the norm has shifted from 1-2 issues per case in the early years to an average of 3 issues per case in recent years.

The first legalism variable, which is the number of specific citations per case on an average annual basis, is arrayed in Figure 5.



Figure 5. Average Number of Legal Citations Per Case

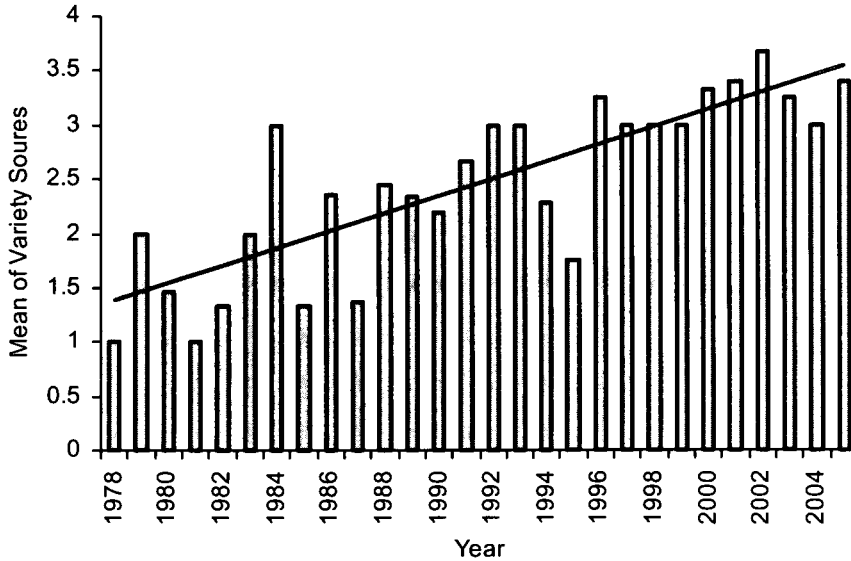


A review of Figure 5 reveals notable variation but a rather steep upward trend in terms of number of specific citations in the legal conclusions section of the hearing officer decisions. More specifically, in the initial six-year period (i.e., 1978-83), the average number of citations per case was approximately 4 legal citations per case, whereas the most recent six-year period (i.e., 2000-05) averaged approximately 20 legal citations per case.

The companion legalism variable, which is the variety of legal sources<sup>49</sup> on an average annual basis, is pictured in Figure 6.

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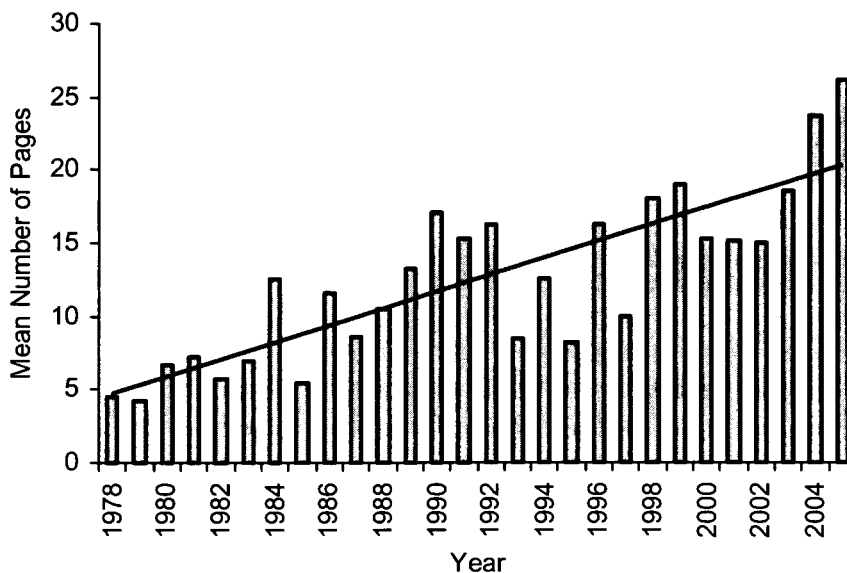
49. See *supra* note 44.

*Figure 6. Average Variety of Legal Source Categories Cited*

For the limited number of categories, Figure 6 shows a fluctuating but at least moderately steep ascending overall pattern in the variety of legal source categories cited in the hearing officer decisions. More specifically, in the initial six-year period (i.e., 1978-83), the average number of legal source categories per case was approximately one category per case, whereas the most recent six-year period (i.e., 2000-05) averaged three categories per case.

Finally, Figure 7 charts the average length of the hearing officer decisions per year.

Figure 7. Average Length of Written Opinions



The trend line in Figure 7 reveals a pronounced upward direction in the length of hearing officer decisions, moving from an average of approximately 6 pages in the early years to approximately 19 pages in recent years.

#### IV. DISCUSSION

Overall, the findings of this exploratory study, limited to the single state of Iowa, were that six of the seven indicia were in the direction of increased judicialization, with the trend for the 6 generally fitting a broad “creeping” characterization,<sup>50</sup> ranging from slightly (attorney representation) to more steeply (citations and pages) upward trend lines with moderating variance. The one clear exception was the first duration variable, representing the length of time from filing to hearing. This exception may be attributable to

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50. *See supra* notes 12, 25 and accompanying text. The range of some of the indicia, such as attorney representation, was relatively limited, thus having a potentially moderating effect on the slope of the trend line. Nevertheless, the notable variation contributes to this gradualistic characterization.

various possible explanations, including: 1) systematic efforts to reach the 45-day period prescribed in the IDEA regulations;<sup>51</sup> 2) imprecision in measuring this variable due to insufficient information, including possible extensions granted but not mentioned in the decision;<sup>52</sup> and/or 3) the manageable magnitude and largely non-attorney membership of the hearing officer system in Iowa.<sup>53</sup> Yet, the results for the other duration variable—number of sessions per case—mitigated the reverse direction of the first.<sup>54</sup>

Moreover, the cumulative upward trend line for the other variables, with some stretching the meaning of “creeping” despite notable fluctuation,<sup>55</sup> confirmed the judicialization characterization. The upward trend for some of these indicia, particularly the total number and the source categories of the legal citations, are partially attributable to the evolution of this specialized field, which has been subject to substantial intervening legislative amendments,<sup>56</sup> consequently revised regulations, and rather abundant case law.<sup>57</sup> Yet, this explanation is incomplete, especially in light of the relative

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51. A U.S. Office of Special Education Program review in 1990 contributed to this trend, but otherwise the state education department informally reinforced the need for timeliness as part of its regular monitoring process. E-mail from Dee Ann Wilson (Dec. 20, 2006)(on file with author).

52. See *supra* note 40.

53. See *supra* note 31 and accompanying text. In contrast, the overall national trend is toward full-time attorney administrative law judges, which both is a result and cause of increasing judicialization. See, e.g., Julie Underwood, *NSBA Survey on Delegation* (1999) (available at [www.law.seattleu.edu/aljho/resources](http://www.law.seattleu.edu/aljho/resources)).

54. The correlation between these two variables was more limited than might be expected. See *supra* note 41. Even within a more limited time period, more sessions means the allocation of more resources and at least the potential for intensified adversariness.

55. The notable fluctuation is likely attributable in part to the relatively small number of cases, both totally and annually, in Iowa in comparison to the litigious cluster of states. Although having more than a *de minimis* level of decisions, Iowa is within the distinctly lower cluster of states, being 42nd on a total basis and 48th on a per capita basis. See *supra* note 29.

56. See *supra* note 1.

57. See, e.g., Perry Zirkel, *The “Explosion” in Education Litigation: An Update*, 114 EDUC. L. REP. 341 (1996) (finding a steep increase in the number of court decisions in special education during recent decades while the number of court decisions in regular education was in gradual decline).

non-litigious milieu and proactive posture of the state of Iowa.<sup>58</sup> There is every reason to suspect that the problems of increased judicialization, starting with the hearing-length variable, are much more pronounced in the litigious states that account for most of the IDEA hearings.<sup>59</sup>

Pending study in such states, these initial results suggest that both policy makers and practitioners, especially the impartial hearing officers in each state, should carefully consider the trade-offs of this increasing judicialization.<sup>60</sup> Unlike labor arbitration,<sup>61</sup> for which the collective bargaining agreement is the controlling framework,<sup>62</sup> special education hearings have a detailed legal framework, starting

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58. See *supra* notes 29-32 and accompanying text.

59. In the absence of corresponding systematic study in such states, anecdotal evidence abounds. For example, an experienced New York parent attorney reported that in her state, which is second only to the District of Columbia in the number of due process hearings held, compliance with the 45-day maximum prescribed in the IDEA regulations "almost never occurs." Mary Lunch, *Who Should Hear the Voices of Children with Disabilities: Proposed Changes in Due Process in New York's Special Education System*, 55 ALB. L. REV. 179, 184 (1991).

60. "Judicialization" as an initial matter is salutary as a matter of due process in dispute resolution. The problem is when it reaches and extends beyond what may variously be determined as the tipping point, such that the costs outweigh the benefits. The old saying "Justice delayed is justice denied" exemplifies, albeit simplistically, this concept. Although some suggest that increased judicialization leads to increased consistency, this generalization would not appear to apply under the IDEA due to: 1) the emphasis of each individual child with a disability; 2) the fuzzy and subjective nature of the underlying field of special education; and 3) the variety among as well within states as to the qualifications and orientations of hearing officers. As an ancillary matter, the relationship of this trend to the outcome of the case in terms of which side prevailed is unclear. For example, in an early study in Pennsylvania, when legalization was at its first stage, Kuriloff, *supra* note 20, found mixed results as to whether such indicia appeared to affect the outcome of the hearing. For example, the number of parents' witnesses was a significant factor, but their use of a lawyer was not. On the district side, neither the number of witnesses nor the use of a lawyer was a significant factor.

61. See Krahmal & Zirkel, *supra* note 12.

62. Although said agreement is ultimately based on collective bargaining legislation, which in several states extends to public schools, and court decisions provide the rest of the legal framework, labor arbitrators' use of statutes, court decisions, and other sources of "external" law has been notably limited and subject to longstanding controversy. See, e.g., Perry Zirkel, *The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards*, 1 DET. C. L. REV. 31 (1985).

with the IDEA legislation and, as a result of an express right of judicial review,<sup>63</sup> including extensive case law.<sup>64</sup> Although legal maturation of a field will mean more well-developed judicialization, at least in terms of the indicia in this study based on legal citations, at some point maturation becomes senescence. Moreover, the IDEA is peculiarly individualized in its orientation, thus running counter to the generalizing goal of *stare decisis*, and a primary aim of IDEA due process hearings, like grievance arbitration, is expedited dispute resolution.<sup>65</sup> The need for economy in terms of limiting the transaction costs of IDEA hearings<sup>66</sup> should be equally obvious.<sup>67</sup>

Thus, it is arguably the case that the incremental, albeit gradualistic, increase in legalism associated with such hearings beyond the original expedited intent<sup>68</sup> ultimately tends to benefit the legal establishment rather than the student with a disability, who

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63. Moreover, unlike labor arbitration, judicial review under the IDEA is not particularly deferential. See, e.g., James Newcomer & Perry Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILDREN 469 (1999).

64. See Zirkel & D'Angelo, *supra* note 20, at 740 (finding rather steady and steep upward trend in the number of published hearing officer and court decisions from 1977-79 through 1998-2000). For an overview of the Supreme Court decisions under the IDEA, see Perry Zirkel, *A Primer of Special Education Law*, 38 TEACHING EXCEPTIONAL CHILDREN, 62 (2005).

65. See *supra* note 11. The courts' rather broad tendency to take additional evidence under the IDEA undercuts the alternate purpose of providing a record for judicial review. See, e.g., Andriy Krahmal, Perry Zirkel & Emily Kirk, "Additional Evidence" under the Individuals with Disabilities Education Act: The Need for Rigor, 9 TEX. J. C.L. & C.R. 201 (2004).

66. As a quick example of such costs, the stenographic expense for Pennsylvania hearings in fiscal year 2005-06 was \$629,374. PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION, ANNUAL REPORT JULY 1, 2005-JUNE 30, 2006 Exh. 22, at 23 (2006). Obviously, the number and length of hearing sessions correlate with this cost, and the stenographer is less expensive than various other personnel, such as the attorneys and expert witnesses.

67. For example, the average per pupil cost of special education is approximately twice that of regular education, and the IDEA provides less than one fifth of that costly difference. See Jay G. Chambers, Jenifer J. Harr & Amynah Dhanani, *What Are We Spending on Special Education Services in the United States, 1999-2000?* (June 2004) (available at <http://CSEF-air.org/publications/seepnational/AdvRpt1.pdf>).

68. See *supra* note 11.

needs prompt services,<sup>69</sup> or the school system, which has limited resources for its educational mission.<sup>70</sup>

Although perhaps recognizing the problem,<sup>71</sup> the Congressional prescription in the latest amendments to the IDEA,<sup>72</sup> particularly the strengthened notice-pleading feature and extended timeline for the hearing decision, clearly borrow from, and potentially add to, the judicialization trend. Time will tell whether the new pre-hearing procedures reduce the frequency and complexity of cases that go to hearing,<sup>73</sup> but the likely trade-off will be not only more technical threshold issues, such as whether the complaint was sufficiently specific,<sup>74</sup> but also closer and more complex cases, thus meaning longer duration to decision. Of all these initial indicia of judicialization, the duration variable would appear to be the one that is potentially most amenable to correction<sup>75</sup> and potentially most deleterious to the parties, including but not limited to the child.<sup>76</sup>

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69. See *supra* note 11.. Echoing Senator Williams' concern 16 years later, a clinical professor of law who represents parents of special education children, spoke from her own extensive experience: "I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development." Lunch, *supra* note 59, at 187.

70. See *supra* note 67.

71. See *supra* note 4 and accompanying text.

72. See *supra* notes 5-7 and accompanying text.

73. An initial survey suggested a possible positive impact, but the authors acknowledged the possibility of other contributing factors, and their survey had notable limitations, including: 1) only tabulating hearing requests; 2) lack of responses from a fifth of the states, such as California, New Jersey, and Pennsylvania; and 3) comparing data for the calendar years 2004 and 2005 rather than before and after the July 1, 2005 effective date of the new provisions. See Thomeczek, *supra* note 17. Moreover, even if the new provisions succeed in reducing the number of hearings, it may be a weeding out process that results in more complex and contentious cases going to hearing and thereby being more likely to go on to judicial appeal.

74. See, e.g., *M.S.-G. v. Lenape Re'l High Sch. Dist. Bd. of Educ.*, 47 IDELR ¶ 72 (D.N.J. 2007) (upholding hearing officer's dismissal of the case for failure to satisfy IDEA's pleading requirements).

75. This suggestion raises the sensitive but significant issue of the selection and training of IDEA hearing officers, which varies from state to state but, in terms of specified competency areas, is the subject of a new IDEA provision. 20 U.S.C. § 1415(f)(3)(A)).

76. For the first author's most recent reminders in continuing criticism of dilatory hearing officer decisions, see, e.g., Centennial Sch. Dist., 46 IDELR ¶ 55

Adversariness often not only contributes to but also results from extended hearings. Indeed, although it is indisputable that Congress intended the opposite,<sup>77</sup> it has already been asserted that the new provisions may increase rather than decrease “the adversarial nature of special education dispute resolution.”<sup>78</sup> Yet, perhaps the most salutary finding in this exploratory study is that despite an upward trend for the other indicia of legalization, hearing officers were able to achieve a significant downward trajectory in the duration from filing to decision, coming close to the “tipping” point established by the IDEA regulations of forty-five days.<sup>79</sup>

Finally, it is rather ironic that the current special education case before the Supreme Court concerns whether parents have the right to proceed pro se in federal court cases under the IDEA.<sup>80</sup> Reaching the High Court, the case exemplifies the current trend toward legalistic dispute resolution under the IDEA, and yet at the same time the plaintiff-parents seek to obviate a primary indicator of judicialization, attorney representation.

In any event, the judicialization of special education, including but not limited to the effect of the new IDEA dispute resolution provision, merits more longitudinal analyses.<sup>81</sup> Based on this

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(Pa. SEA 2006); Wissahickon Sch. Dist., 46 IDELR ¶ 149 (Pa. SEA 2006); Lancaster Sch. Dist., 44 IDELR § 266 (Pa. SEA 2006).

77. See, e.g., Demetra Edwards, *New Amendments to Resolving Special Education Disputes: Any Good IDEAs?* 5 PEPPERDINE DISP. RESOL. L.J. 137, 149 (2005) (citing Sen. Report 108-85 (Nov. 3, 2003)).

78. *Id.* at 150.

79. See *supra* note 48 and accompanying text.

80. *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 467 (2006) (cert. granted).

81. One of the contributing factors to legalization in special education has been the continuing revisions in the IDEA legislation and regulations. See, e.g., Dixie Huefner, *The Legalization and Federalization of Special Education*, in EDUCATING STUDENTS WITH DISABILITIES 355 (John Wills et al. eds., 1997) (attributing increased adversariness to the addition of the attorneys fee provision in the 1986 amendments to the IDEA). Another is the movement of the Supreme Court cases from central substantive issues, such as the meaning of “free appropriate education” and “related services,” to increasingly technical, litigation issues, such as burden of proof and pro se suits. Compare Perry Zirkel, *A Primer of Special Education Law*, 38 TEACHING EXCEPTIONAL CHILDREN 62 (2005) (summary of major precedents starting with *Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984)), with *Winkelman v. Parma City Sch. Dist.*, 150 Fed. Appx. 406 (6th Cir. 2005), *cert.*



relatively fruitful but nevertheless limited exploratory study, we also recommend follow-up analyses in more litigious states, such as those that account for the bulk of the IDEA due process hearings,<sup>82</sup> using more extensive quantitative indicia<sup>83</sup> of judicialization as well as more in-depth studies of its causes and consequences<sup>84</sup> not only within<sup>85</sup> but also across<sup>86</sup> states and other IDEA jurisdictions.<sup>87</sup>

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*granted*, 127 S. Ct. 467 (2006); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006); and *Schaffer v. Weast*, 546 U.S. 49 (2005). Other contributors include the judicializing trend of IDEA hearing officers (*supra* note 53); the undeniably limited school district resources for the costs of special education (*supra* note 67) and the understandably high emotions of parents; the individualized nature of the IDEA, which limits the settling scope of the *stare decisis* doctrine; the “soft” state of the art/science of special education; and the particular “hyper lexis” condition of the United States.

82. See *supra* notes 22-23.

83. See *supra* note 37.

84. Such studies, at least in part, should be qualitative, thus exploring indicia and related factors that are not subject to the limitations of quantitative analysis. For example, some observers hypothesize that high cost issues, such as tuition reimbursement, have become the dominant source of IDEA hearings, contributing to the increasing judicialization, but the first author’s experience as an IDEA review officer for more than 15 years suggests that issues that are high stakes in other ways, such as manifestation determination reviews in the wake of proposed expulsion, continue to be a source of hearings and that psychodynamics within families and, more often, between families and schools are the invisible driving force rather than the surface issues. Case studies and other qualitative approaches are the way to explore such factors and their interactions.

85. One example is the percentage of hearings that were appealed at the subsequent successive levels, which in two-tier states include a review officer and which in any event extend to the concurrent jurisdiction of state and federal courts for review. Additionally, access to full case records and/or party representatives, per the model of Goldberg & Kuriloff, *supra* note 18, would allow for fuller measures of the number of issues and additional indicia, such as number of transcript pages, exhibits, and legal objections. Additionally, accurately assessing the significance of legal sources and the complexity of legal issues will further contribute to testing the judicialization hypothesis. As an example of the complexity factor, consider this observation from one of the Iowa hearing officers:

The issues ... seem much more complex than those two decades ago. I am in the third year of my only current assigned hearing. The primary issue was whether the State Education Department had jurisdiction over the expulsion of a 16 year-old from a group home (Medicaid) because he had various education-like components in his Medicaid Plan. We took a long continuance when a federal district court upheld my ruling (against the

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parents). There were 13 attorneys up to that point. The only remaining issue is the legality of the interagency agreements between the Departments of Education and Human Services.

Bartlett, *supra* note 32. For the federal district court's decision that he referenced, see *Baker v. G & G Living Centers, Inc.*, 45 IDELR ¶ 185 (N.D. Iowa 2006).

86. An example of inter-state comparison would be the use of discovery procedures, which depends on what state law allows when specifically clear and what the parties do when the state law is silent or ambiguous. The limited pertinent legal authority suggests that this matter is within the hearing officer's authority unless contradicted by state law. *See, e.g., S.T. v. Sch. Bd.*, 783 So.2d 1231 (Fla. Dist. Ct. App. 2001); Letter to Stadler, 24 IDELR 973 (OSEP 1996).

87. *See supra* note 32.

