

**SPECIAL-EDUCATION LITIGATION: AN EMPIRICAL ANALYSIS  
OF NORTH CAROLINA’S FIRST TIER**

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#### ABSTRACT

Special-education litigation begins, under the terms of the Individuals with Disabilities Education Act (IDEA), with an “impartial due process” proceeding. States enjoy limited discretion to establish the manner by which they will effectuate this process. Variations in implementation exist. Most states offer a “single-tiered” process, and eight offer a “two-tiered” proceeding.

National debate about the effectiveness of these administrative proceedings has increased over the last decade. One contested question is whether a single-tiered or two-tiered administrative process better serves the objectives of the Act.

Meaningful empirical examination of these specialized proceedings has begun to inform this debate, but significant research gaps remain. No quantitative study of these processes exists for many states' systems, including for North Carolina's, a system with a unique two-tiered process. This Article begins to fill this research void.

It offers an empirical evaluation of first-tier decisions issued over a 12-year period in North Carolina's special-education due-process proceedings. It identifies statistically significant due-process implementation and outcome trends. It also evaluates the impact of factors intuitively believed to matter in

these cases. Examples of variables considered include the availability of pre-hearing mediation, changes in relevant statutory standards, type of disability accommodated, age of the child at issue, type of school, setting in which the dispute arose (rural or urban), and petitioners' representation status.

This analysis debunks some popular conceptions about these unique administrative proceedings, and it affirms the validity of others. It identifies one variable, legal representation during the first-tier review, as most significantly correlated with favorable outcomes for children with disabilities at this stage of litigation. Ultimately, it contributes new empirical data to the national conversation about outcomes of first-tier hearings in two-tiered due-process procedures under the IDEA.

## I. INTRODUCTION

Today, North Carolina's general statutes declare: "The goal of the State is to provide full educational opportunity to all children with disabilities who reside in the State."<sup>1</sup> As recently as 40 years ago, the opposite was true.

In 1965 the North Carolina General Assembly passed legislation to prevent children with disabilities from attending public schools.<sup>2</sup> This legislation fulfilled its objective in two ways: it codified the then-prominent practice to exclude children with "severe" disabilities from public schools, and it criminalized parents' efforts to enroll these children over school-system decisions to exclude them.<sup>3</sup>

The 1965 statute announced: "A child so severely afflicted by mental, emotional, or physical incapacity as to make it impossible for such a child to profit by instruction given in the public schools *shall not be permitted to attend the public schools* of the State."<sup>4</sup>

It then established: "If the parent or guardian of such a child persists in forcing his attendance after such a report has determined that the child should

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<sup>1</sup> N.C. GEN. STAT. § 115C-106.1 (2015); *see also* 20 U.S.C. § 1412(a)(2) (2013) (providing in federal law that states receiving funding under the Individuals with Disabilities Education Act must "establish[] a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal").

<sup>2</sup> 1965 N.C. Sess. Laws ch. 584, § 17, <http://www.ncleg.net/enactedlegislation/sessionlaws/html/1965-1966/sl1965-584.html>.

<sup>3</sup> *See* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 355-56 (1990) (summarizing legislative, administrative, and judicial activity from the late 1800s through the 1960s that either required or permitted the exclusion of children with disabilities from public schools).

<sup>4</sup> 1965 N.C. Sess. Laws ch. 584, § 17 (emphasis added), <http://www.ncleg.net/enactedlegislation/sessionlaws/html/1965-1966/sl1965-584.html>.

not attend the public schools, he *shall be guilty* of a misdemeanor and upon conviction *shall be punished* at the discretion of the court.”<sup>5</sup>

Momentum to change this reality gradually grew nationally and within North Carolina in the 1970s. Notably, in 1972, two federal district courts declared unconstitutional the wholesale exclusion of children with disabilities from public schools without due process or a rational reason.<sup>6</sup> They also introduced the affirmative principle that “[e]very retarded person between the ages of six and twenty-one years [shall be provided] access to a free public program of education and training appropriate to his learning capacities.”<sup>7</sup>

In 1974, shortly after issuance of these federal district court decisions and as Congress hammered out the details of the then-forthcoming Education for All Handicapped Children Act (EHA), the North Carolina General Assembly again took action on education for children with disabilities. It repealed North Carolina’s exclusionary and punitive 1965 statute and recognized that “no child . . . shall be excluded from service or education for any reason whatsoever.”<sup>8</sup>

In 1975, the EHA, the first iteration of the Individuals with Disabilities Education Act, became law.<sup>9</sup> At this time, the legacy of state statutes, like North Carolina’s 1965 statute, remained prevalent. In fact,

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<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> *See* Pa. Ass’n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 294–95, 297 (E.D. Pa. 1972) (entering a consent order resolving plaintiffs’ claims that exclusion of children with disabilities from public schools offends constitutional principles of due process and equal protection and requiring that “[e]very retarded person between the ages of six and twenty-one years [shall be provided] access to a free public program of education and training appropriate to his learning capacities” by the state); *see also* Mills v. Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972) (concluding that public schools may not exclude students merely because they have been labeled as behaviorally problematic, mentally retarded, emotionally disturbed, or hyperactive because “[d]efendants are required by the Constitution of the United States . . . to provide a publicly-supported education for these ‘exceptional’ children” and “[f]ailure to fulfill this clear duty to include and retain these children in the public school system . . . cannot be excused”).

<sup>7</sup> *Pa. Ass’n for Retarded Children*, 343 F. Supp. at 303. The language used to identify children with disabilities has changed significantly over time. This Article retains original language in quoted text, but it otherwise attempts to use modern terminology. Today, “person first” language is standard. The United States Supreme Court even recognized recently that “mental retardation” is an outdated characterization of a person with an intellectual disability and that it would not use that outdated term in its current opinions. *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (“Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.”).

<sup>8</sup> 1973 N.C. Sess. Laws ch. 1293, § 2, <http://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/1973-1974/SL1973-1293.html> (codifying “An Act to Establish Equal Educational Opportunities in the Public Schools; and For Other Purposes,” effective July 1, 1974).

<sup>9</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1491 (2011)).

congressional studies [at the time] revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. Indeed, one out of every eight of these children was excluded from the public school system altogether, many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out.<sup>10</sup>

The EHA affirmatively addressed the oppressive objectives of North Carolina's 1965 statute and others like it across the country. This landmark legislation established substantive and procedural rights in favor of children with disabilities and their parents.

Substantively, the EHA codified the right of children with disabilities to receive a free appropriate public education (FAPE).<sup>11</sup> This ended any notion, like that reflected in North Carolina's former 1965 legislation, that such children "shall not be permitted to attend public schools."<sup>12</sup>

Procedurally, the EHA provided parents with extensive notice and "due process" rights, empowering them to participate in their children's education and to enforce the rights established by the Act.<sup>13</sup> This ended the notion, previously codified in North Carolina's 1965 legislation, that parental participation in the education of their children with disabilities was criminal and appropriate for punishment.

Congress has revisited the terms of this landmark legislation, now renamed and known as the Individuals with Disabilities Education Act (IDEA),<sup>14</sup> multiple times since its original passage.<sup>15</sup> In each reauthorization, it

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<sup>10</sup> Honig v. Doe, 484 U.S. 305, 596–97 (1988).

<sup>11</sup> See, e.g., 20 U.S.C. § 1400(d)(1)(A) (2013) (establishing as one purpose for the Act "to ensure that all children with disabilities have available to them a free appropriate public education"); *id.* § 1401(9) (defining a "free appropriate public education" for purposes of the Act); 34 C.F.R. § 300.17 (2015) (detailing the meaning of a "free appropriate public education"); *id.* §§ 300.101–.113 (specifying the requirements that states must satisfy in order to be compliant with their obligation to provide a free appropriate public education to eligible children with disabilities under the IDEA).

<sup>12</sup> 1965 N.C. Sess. Laws ch. 584, § 17, <http://www.ncleg.net/enactedlegislation/sessionlaws/html/1965-1966/sl1965-584.html>.

<sup>13</sup> See 20 U.S.C. § 1415(a) (making clear that states "shall establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education"); see also *id.* § 1415(b)–(o) (detailing the procedural protections required by the IDEA); 34 C.F.R. §§ 300.501, 300.516 (same).

<sup>14</sup> Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (re-naming the legislation the Individuals with Disabilities Education Act). It warrants noting that the 2004 revisions to the IDEA characterized the reauthorized legislation as the Individuals with Disabilities Education Improvement Act (IDEIA). See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400–1491 (2009)). As a result, some now refer to this legislation as

has retained or strengthened the Act's fundamental goal to improve educational outcomes for children with disabilities through substantive and procedural protections for those children and their parents.<sup>16</sup>

Today, children's rights to attend public schools, regardless of their abilities, and parents' rights to participate in their children's education are well established in federal<sup>17</sup> and state law.<sup>18</sup>

This Article focuses on one of the fundamental procedural rights guaranteed by the IDEA: the right to an "impartial due process hearing." Both federal and state law now guarantee children with disabilities and their parents<sup>19</sup> a right to an administrative "impartial due process hearing,"<sup>20</sup> conducted expeditiously, through which they may challenge "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child,"<sup>21</sup> or the discipline of such child.<sup>22</sup>

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IDEIA or the 2004 Reauthorization. For purposes of this Article, it will be referred to as the IDEA, the acronym established for this legislation in 1990 with the passage of the Individuals with Disabilities Education Act Amendments of 1990.

<sup>15</sup> See Lisa Lukasik, *Asperger's Syndrome and Eligibility Under the IDEA: Eliminating the Emerging "Failure First" Requirement to Prevent a Good IDEA from Going Bad*, 19 VA. J. SOC. POL'Y & L. 252, 259–62 (2011) (detailing this legislative development).

<sup>16</sup> See *id.* at 260–61.

<sup>17</sup> See 20 U.S.C. § 1400(d)(1) (identifying the purposes of the federal legislation as, *inter alia*, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"; "to ensure that the rights of children with disabilities and parents of such children are protected"; and "to assist States, localities, and educational service agencies, and Federal agencies to provide for the education of all children with disabilities").

<sup>18</sup> See N.C. GEN. STAT. § 115C-106.2(a) (2015) ("The purposes of this Article are to (i) ensure that all children with disabilities ages three through 21 who reside in this State have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepares them for further education, employment, and independent living; (ii) ensure that the rights of these children and their parents are protected; and (iii) enable the State Board of Education and local agencies to provide for the education of all children with disabilities.").

<sup>19</sup> Parents may enjoy this right only until their child with a disability reaches a state's age of majority unless the parent secures legal guardianship of a child who has been determined to be incompetent or has been appropriately appointed to represent the educational interests of the child under the IDEA. See 20 U.S.C. § 1415(m); see also N.C. GEN. STAT. § 115C-109.2.

<sup>20</sup> 20 U.S.C. § 1415(f)(1)(A) (guaranteeing that "[w]henver a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing"); see also N.C. GEN. STAT. § 115C-109.6 (guaranteeing that "[a]ny party may file with the Office of Administrative Hearings a petition to request an impartial hearing").

<sup>21</sup> 20 U.S.C. § 1415(b)(6)(A) (identifying the substance upon which parties may file a complaint leading to an "impartial due process hearing"); see also N.C. GEN. STAT. § 115C-

In recent years, scrutiny of this procedural right has increased.<sup>23</sup> Academics have begun to compile data from a handful of states to develop an empirical foundation upon which to build a meaningful dialogue regarding its strengths and weaknesses.<sup>24</sup> To date, however, there has been no empirical

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109.6(a) (identifying the substance upon which parties may file a petition for an “impartial hearing” in North Carolina).

<sup>22</sup> 20 U.S.C. § 1415(k)(1)(H), (k)(3) (guaranteeing that the procedural rights afforded to children with disabilities and their parents extend to situations in which a child with a disability is removed from his public educational placement as part of school discipline); *see also* N.C. GEN. STAT. § 115C-109.6(a) (including “manifestation determinations” done in connection with decisions regarding the discipline of a child with disabilities within the list of matters available for “impartial due process hearings”).

<sup>23</sup> *See, e.g.*, Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 459–60 (2015) (examining the consequences of the legal practice to hold private, rather than public, adjudicatory proceedings in matters involving the rights of persons with disabilities and considering special-education due-process proceedings as an illustrative example); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1414 (2011) (arguing that the private enforcement mechanism in the IDEA leads to “predictable disparities in enforcement in favor of wealthier beneficiaries as opposed to poor beneficiaries”); Geoffrey F. Schultz & Joseph R. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decisions Outcomes*, 2000 BYU EDUC. & L.J. 17, 17 (reviewing the effect of hearing officer background on case outcomes); Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. DISP. ON RESOL. 459, 523 (2014) (acknowledging the national debate about due-process proceedings, defending them, and identifying meaningful modifications to improve the process overall); Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 214, 221 (2013) (examining decisions published in *Special Ed Connection* to identify the frequency of particular outcomes achieved through the IDEA’s administrative process in cases establishing a violation of FAPE); Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL’Y STUD. 3, 3–8 (2010) (offering an overview of the types of due-process systems employed across the country and how those systems are operated).

<sup>24</sup> *See, e.g.*, RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 137–216* (N.Y. Press 2013) (considering outcomes in Ohio, Florida, New Jersey, California, and the District of Columbia); Ruth Colker, *Special Education Complaint Resolution: Ohio*, 29 OHIO ST. J. DISP. RESOL. 371, 371–74 (2014) (identifying outcomes in Ohio’s special-education complaint proceedings and comparing them to outcomes in that state’s due-process proceedings); Perry A. Zirkel, *Special Education Hearing Officers: Balance and Bias*, 24 J. DISABILITY POL’Y STUD. 67 (2013) (identifying outcomes of a five-state study of administrative decisions in special-education cases in California, Connecticut, Florida, Massachusetts, and New Jersey); Perry A. Zirkel, *Judicial Appeals for Hearing/Review Officer Decisions Under IDEA: An Empirical Analysis*, 78 EXCEPTIONAL CHILDREN 375, 379 (2012) (analyzing 65 hearing officer decisions issued between 1982 and 2010 to identify outcome trends); Cali Cope-Kasten, Note, *Bidding (Fair)Well to Due Process: The Need for a Fairer Final State in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501, 522 (2013) (offering data on this process in Wisconsin and Minnesota); MELANIE ARCHER, *ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS, 1997–2002*, at 7 (2002), <http://dueprocessillinois.org/Access.pdf> (identifying outcomes in Illinois).

analysis of these statutorily guaranteed administrative “impartial due process hearings” in North Carolina. This Article begins that study.<sup>25</sup>

It examines administrative law judge (ALJ) decisions in North Carolina’s “first-tier” impartial due-process hearings. This Article draws its data from the complete, available body of North Carolina ALJ decisions resolving special-education complaints filed between January 2000 and December 2012.<sup>26</sup>

In Part II, this Article provides background on North Carolina’s unique implementation of the federal obligation to provide administrative “impartial due process hearings.” It also explains the source of and limitations on the body of ALJ decisions considered along with the methodology used to analyze those decisions.

Part III presents foundational data drawn from an analysis of 12 years of written ALJ decisions following due-process hearings in North Carolina’s special-education cases. It considers several widely debated changes in the law to measure their impact, if any, on outcomes in these hearings. Some of the statistical data uncovered refutes intuitive conceptions about how judicial decisions and legislative changes in the law influence outcomes at this stage.

Part IV compiles and presents data beyond the foundation introduced in Part III. It reports what actually happened, historically, in these hearings, eliminating the need to rely on anecdotal evidence in discussions about the effectiveness of this process. The data presented here includes statistics addressing, for example, which party most often initiated those proceedings, whether they were initiated more frequently in urban or rural counties, whether the parties were pro se or represented by legal counsel, and how frequently petitioners found success overall and under specified circumstances.<sup>27</sup>

Finally, this Article concludes by recognizing that additional research remains to be done to build on the initial empirical results presented here.

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<sup>25</sup> North Carolina has a two-tiered impartial administrative process. This Article publishes data on the first tier of these proceedings. An article offering an empirical analysis of the second tier is in progress.

<sup>26</sup> See *infra* notes 47–61 and accompanying text (explaining how the Author obtained the ALJ decisions considered through public records requests and acknowledging the possibility that gaps exist).

<sup>27</sup> See *infra* Part IV. Success (or failure) in the first-tier proceedings examined in this study does not equate to success (or failure) at large. The decisions examined here may be appealed to an administrative review office (for the second-tier review) before being appealed further to federal or state court. First-tier decisions may be overturned at any subsequent step in the process. A prevailing party at the first tier may end up “losing” on appeal. A failing party at the first tier may find “success” on appeal.

As a State Hearing Review Officer,<sup>28</sup> the Author does not advocate for any particular normative understanding of North Carolina's first-tier hearing procedure or the IDEA generally based upon the statistical analysis provided.<sup>29</sup> Instead, the Author and this Article simply contribute by providing previously unavailable and unexamined descriptive data.

This Article does, however, reach two irrefutable conclusions. First, North Carolina's first-tier "informal due process hearing" procedure represents progress. It embodies a complete reversal from the state's criminal treatment of parental involvement in the education of their children with disabilities 40 years ago. Further, parents' representation by an attorney stands out among all factors analyzed, including factors associated with specific changes in the law, as the one correlating most significantly with positive parental outcomes in first-tier special-education hearings.<sup>30</sup>

## II. NORTH CAROLINA'S SPECIAL-EDUCATION LITIGATION: BACKGROUND AND BEGINNINGS

Before reporting the statistical data derived from this study of North Carolina's first-tier decisions in special-education litigation, this Article presents necessary background. This Part offers an overview of the federal and state law governing the structure of the hearings. It then explains the methodology used to collect and evaluate the decisions examined.

### A. *Background on North Carolina's Unique Two-Tiered Administrative Process*

The IDEA requires states to provide an expeditious administrative review of complaints regarding the education of children with disabilities. But it allows states some flexibility in determining how to satisfy that obligation.

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<sup>28</sup> See N.C. GEN. STAT. § 115C-109.9 (2015) (authorizing State Hearing Review Officers and explaining their role in resolving due-process complaints in second-tier administrative hearings on appeal following issuance of written tier-one decisions, like those considered in this Article).

<sup>29</sup> To be clear, the data presented here may provoke particular ponderings about the effectiveness of existing laws protecting the relatively newly recognized right of children with disabilities to access free appropriate public education. This Article specifically does *not* suggest or encourage any particular resolution to such ideas. Instead, the purpose of this publication is simpler. It seeks only to open a window to previously shuttered factual data about North Carolina's special-education litigation at its inception and in its early administrative stages.

<sup>30</sup> See *infra* Part IV.A.3 (offering the data on the correlation between parental representation and hearing outcomes). Because school systems (both traditional and charter) were represented by attorneys in all tier-one hearings considered in this analysis, this data pool offered no control group without representation against which to compare school-system outcomes based upon the representation variable.

North Carolina employs a unique, but permissible,<sup>31</sup> means to satisfy the federal requirement for “impartial due process hearings” in this context.

The IDEA guarantees parents and school systems access to “an impartial due process hearing” to resolve disputes over the identification and evaluation of children with disabilities and the provision of FAPE.<sup>32</sup> The IDEA further provides that these impartial due-process hearings “shall be conducted [1] by the State educational agency *or* [2] by the local educational agency, as determined by State law.”<sup>33</sup> Participation in the state’s selected due-process hearing procedure begins litigation in special-education disputes.

Depending upon whether a state opts to conduct its initial administrative review through a local educational agency or the state educational agency, the IDEA may impose additional requirements on the process.

If a state opts to authorize “the *local* educational agency to conduct the [initial] due process hearing, [the state] *must* provide” an opportunity for parties to appeal that decision to the state educational agency.<sup>34</sup> On the other hand, if the state educational agency conducts the initial due-process proceeding, no administrative appeal is required.<sup>35</sup>

The former structure, in which special-education litigation begins with a hearing before a local educational agency followed by an administrative appeal to a state educational agency, is often referred to as a “two-tiered system.” This is because, in the usual case, it requires a “second-tier” administrative review before the state board of education.

The latter structure, in which special education begins in a hearing before the state board of education, is commonly characterized as a “single-

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<sup>31</sup> See *E.L. ex rel. Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 515–16 (4th Cir. 2014) (holding that North Carolina’s two-tiered administrative process is permissible under the IDEA); *O.M. ex rel. McWhirter v. Orange Cty. Bd. of Educ.*, No. 1:09-CV-692, 2013 WL 664900, at \*11 (M.D.N.C. Feb. 22, 2013) (concluding that North Carolina’s two-tiered administrative process is permissible under the IDEA); *L.K. ex rel. Henderson v. N.C. State Bd. of Educ.*, No. 5:08-CV-85-BR, 2010 WL 3239091, at \*6 (E.D.N.C. June 23, 2010) (noting that correspondence from the United States Office of Special Educational Programs indicates that the federal Department of Education participated in the development of North Carolina’s two-tiered administrative process and approved of it).

<sup>32</sup> 20 U.S.C. § 1415(f)(1)(A) (2013); 34 C.F.R. § 300.511(a) (2015).

<sup>33</sup> 20 U.S.C. § 1415(f)(1)(A) (emphasis added); see also 34 C.F.R. § 300.511(b) (providing also that the impartial due-process hearing required by the Act “must be conducted by the SEA [State Educational Agency] or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA”).

<sup>34</sup> *Wittenberg v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, No. 1:05CV00818, 2006 WL 2568937, at \*2 (M.D.N.C. Sept. 1, 2006) (emphases added); see also 20 U.S.C. § 1415(g)(1).

<sup>35</sup> 20 U.S.C. § 1415(g)(1) (remaining silent regarding any administrative appeal required in states whose state boards of education conduct the initial due-process hearing); see also *Wittenberg*, 2006 WL 2568937, at \*2 (“If the state elects to allow the local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency.”).

tiered system.” This is because it requires no federally mandated “second-tier” administrative review.

Most jurisdictions employ the single-tiered system.<sup>36</sup> In fact, 42 states, plus the District of Columbia, employ a single-tiered administrative process.<sup>37</sup>

Only eight states require a two-tiered administrative process.<sup>38</sup> Of the eight states with a two-tiered process, not all operate like North Carolina, where both the initial hearing and the administrative review are before state officers.<sup>39</sup>

<sup>36</sup> See, e.g., ALA. ADMIN. CODE r. 290-8-9.08 (2015); ALASKA ADMIN. CODE tit. 4, § 52.550 (2015); ARIZ. ADMIN. CODE § R7-2-405 (2015); ARK. CODE R. § 005.18.31-4 (LexisNexis 2015); CAL. CODE REGS. tit. 2, § 60550 (2015); COLO. REV. STAT. § 22-20-108 (2015); CONN. AGENCIES REGS. § 10-76h-16 (2015); 14 DEL. ADMIN. CODE § 926 (2015); D.C. MUN. REGS. tit. 5-E, § 3031 (2015); FLA. STAT. § 1003.57 (2015); GA. COMP. R. & REGS. 160-4-7.12 (2015); HAW. CODE R. § 8-60-68 (LexisNexis 2015); IDAHO ADMIN. CODE r. 08.02.03.109 (2015); 105 ILL. COMP. STAT. ANN. 5 / 14-8.02a (2015); 511 IND. ADMIN. CODE 7-45-9 (2015); IOWA ADMIN. CODE r. 281-41.514 (2015); LA. ADMIN. CODE tit. 28, pt. XLIII, § 514 (2015); 05-071, Ch. 101 ME. CODE R. § XVI (LexisNexis 2015); MD. CODE REGS. 13A.05.01.15 (2015); 603 MASS. CODE REGS. 28.08 (2015); MICH. ADMIN. CODE r. 340.1724f (2015); MINN. R. 3525.4770 (2015); 7-4 MISS. CODE R. § 1:300.514 (LexisNexis 2015); MO. CODE REGS. ANN. tit. 5, § 20-300.110 (2015); MONT. ADMIN. R. 10.16.3523 (2015); 92 NEB. ADMIN. CODE § 55-009 (2015); N.H. CODE R. EDUC. 1123.20 (2015); N.J. ADMIN. CODE § 1:6A-18.3 (2015); N.M. CODE R. § 6.31.2 (LexisNexis 2015); N.D. ADMIN. CODE 67-23-05-01 (2015); OR. REV. STAT. § 343.175 (2015); 22 PA. CODE § 16.63 (2015); 21-2-54:E R.I. CODE R. § 300.514 (LexisNexis 2015); S.D. ADMIN. R. 24:05:30:11 (2015); TENN. COMP. R. & REGS. 0520-01-09-.19 (2015); 19 TEX. ADMIN. CODE § 89.1185 (2015); UTAH CODE ANN. § 53A-15-305 (LexisNexis 2015); VT. STAT. ANN. tit. 16, § 2957 (West 2015); VA. CODE ANN. § 22.1-214 (2015); WASH. ADMIN. CODE § 392-172A-05115 (2015); W. VA. CODE R. § 126-16-11.4 (2015); WIS. STAT. § 115.80 (2015); 7 WYO. CODE R. § 7 (LexisNexis 2015); see also Weber, *supra* note 23, at 513 (noting a “trend in the states away from two-tier (hearing and decision and then review officer proceeding) system to one-tier processes”).

<sup>37</sup> See *supra* note 36 (offering citations to all 43 statutes providing single-tier due-process review proceedings in special-education cases); see also *Larson v. Int’l Falls Pub. Sch.*, No. Civ. 02-3611, 2002 WL 31108199, at \*5 (D. Minn. Sept. 18, 2002) (“[T]he Court notes that the notion that the [Minnesota] IHO level of review is local is a legal fiction.”); *Wittenberg*, 2006 WL 2568937, at \*4 n.4. *But see* *T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 845 (N.D. Ill. 1999) (“[T]he text of the Illinois statute which governed IDEA proceedings at the time of [the child’s] IEP reveals that *both* the Level I and Level II hearings are ‘state level’ hearings.”).

<sup>38</sup> See, e.g., KAN. STAT. ANN. § 72-974(b)(1)–(b)(1)(A) (2015) (“Any party to a due process hearing provided for under this act may appeal the decision to the state board by filing a written notice of appeal . . . . A review officer appointed by the state board shall conduct an impartial review of the decision.”); 707 KY. ADMIN. REGS. 1:340.12(1) (2015) (“A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board as assigned by the Kentucky Department of Education.”); NEV. ADMIN. CODE § 388.315 (2015) (“A party may appeal from the decision of a hearing officer . . . [and] a state review officer appointed by the Superintendent from a list of officers maintained by the Department shall conduct an impartial review of the hearing.”); N.Y. EDUC. LAW § 4404(1)(c) (McKinney 2015) (“The decision of the impartial hearing officer shall be binding upon both parties unless appealed to the state review officer.”); N.C. GEN. STAT. § 115C-109.9(a) (2015) (“Any party aggrieved by the findings and decision of a hearing officer . . . may appeal the findings . . . . The State Board, through the Exceptional Children Division, shall

The two-tiered system in North Carolina is unique because both tiers of administrative review are before a state, not local, authority. North Carolina does not authorize a local educational agency to render an initial decision. Instead, it authorizes the Office of Administrative Hearings<sup>40</sup> to deploy a state-employed, specially trained<sup>41</sup> administrative law judge (ALJ) to the county in which the dispute arose to resolve the first-tier hearing.<sup>42</sup> Then, it requires parties to appeal adverse ALJ decisions to a review officer appointed by the state board of education<sup>43</sup> before filing further appeal in federal or state court.<sup>44</sup>

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appoint a Review Officer from a pool of review officers . . . [who] shall conduct an impartial review . . . .”); OHIO REV. CODE ANN. § 3323.05(3)(h) (LexisNexis 2015) (“A party to a hearing . . . shall be accorded . . . [a]n opportunity . . . to appeal . . . to the state board, which shall appoint a state level officer who shall review the case and issue a final order.”); OKLA. ADMIN. CODE § 210:15-13-5(a) (2015) (“All Hearing and Appeal Officers assigned by the Oklahoma State Department of Education . . . are expected to remain impartial in discharging their responsibilities at all times.”); S.C. CODE ANN. REGS. 43-243(15)(b)(1) (2015) (“If the hearing required by Sec. 300.511 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA. If there is an appeal, the SEA must conduct an impartial review . . . .”).

<sup>39</sup> See, e.g., S.C. CODE ANN. REGS. 43-243(15)(b)(1) (“If the hearing required by Sec. 300.511 is conducted by a public agency *other than* the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA. If there is an appeal, the SEA must conduct an impartial review . . . .” (emphasis added)).

<sup>40</sup> “The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the [North Carolina] Constitution . . . .” N.C. GEN. STAT. § 7A-750. Parties initiating due-process proceedings in special-education litigation do so by filing a petition with the Office of Administrative Hearings. § 115C-109.6.

<sup>41</sup> See Memorandum of Understanding from the N.C. State Bd. of Educ., through the Dep’t of Pub. Instruction, Exceptional Children Div. to the N.C. Office of Admin. Hearings, at 3 (Nov. 27, 2006) (on file with the *West Virginia Law Review*). This Memorandum of Understanding requires the Department of Public Instruction (DPI) to “provide and pay tuition and costs for IDEA training to special education ALJs [administrative law judges] designated by the Chief Administrative Law Judge.” *Id.* It further requires that the “DPI will review with the Chief ALJ, on a yearly basis, the ongoing special education training needs of ALJs. ALJs hearing special education cases will be required to participate annually in IDEA training updates and are strongly encouraged to attend [other trainings].” *Id.* The Office of Administrative Hearings “will not appoint temporary ALJs,” who have not been specially trained, “to conduct special education hearings.” *Id.* at 4.

<sup>42</sup> See N.C. GEN. STAT. § 115C-109.6.

<sup>43</sup> See *id.* § 115C-109.9(a)–(b). Although typically decisions of ALJs are not appealed in this manner, the state administrative procedures act in Chapter 150B makes clear that appeal rights provided within it do not apply to special-education litigation. Chapter 150B provides that “[n]otwithstanding any other provision of this Chapter, timelines and other procedural safeguards required to be provided under IDEA and Article 9 of Chapter 115C of the General Statutes *must be followed* in an impartial due process hearing initiated when a petition is filed under G.S. 115C-109.6 with the Office of Administrative Hearings.” *Id.* § 150B-22.1(a) (emphasis added). In other words, the only appeals process for first-tier ALJ decisions in North Carolina’s special-education disputes is the one established by Chapter 115C and particular to special-education litigation.

As the Federal District Court for the Middle District of North Carolina summarized,

North Carolina has a two-tiered administrative process. At the first tier, “any party may file with the Office of Administrative Hearings [(‘OAH’)] a petition to request an impartial hearing with respect to any matter relating to the provision of a [FAPE] of a child[.]” The OAH then selects an Administrative Law Judge (“ALJ”) who [conducts the hearing “in the county where the child attends school or is entitled to enroll in school . . . unless the parties mutually agree” otherwise . . . and] “issue[s] a written decision[.]” At the second tier, “[a]ny party aggrieved by the findings and decision of a hearing officer . . . may appeal . . . by filing a written notice of appeal with the person designated by the State Board.” At that point, “[t]he State Board . . . appoint[s] a Review Officer [(“SRO”) to] . . . conduct an impartial review of the findings and decision appealed . . . [and] make an independent decision upon completion of the review.”<sup>45</sup>

Once the State Review Officer renders a decision, under both federal and North Carolina law, either party to the dispute may institute a civil action

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<sup>44</sup> See *id.* § 115C-109.9(d). Interestingly, not all decisions studied in this research accurately reflect this administrative process. Some ALJ decisions incorrectly state that parties may appeal these decisions *either* to superior court pursuant to Article 4 of Chapter 150B, the judicial review procedures of North Carolina’s Administrative Procedure Act, *or* in federal court under the IDEA. Other ALJ decisions reflect the law that parties may appeal these decisions by filing notice of appeal with the State Board of Education under Article 9 of Chapter 115C, North Carolina’s legislation on the education of children with disabilities.

<sup>45</sup> O.M. *ex rel.* McWhirter v. Orange Cty. Bd. of Educ., No. 1: 09-CV-692, 2013 WL 664900, at \*2 (M.D.N.C. Feb. 22, 2013) (some alterations in original) (internal citations omitted); see also 20 U.S.C. § 1415(d)(1)–(2) (2013) (requiring the procedural safeguards notice and detailing its contents and distribution); 34 C.F.R. § 300.504 (2015) (same); N.C. GEN. STAT. § 115C-109.1 (“The State Board of Education shall make available to parents a handbook of procedural safeguards. This handbook for parents shall be made available at least once each school year, except that a copy also shall be given to a parent [upon initial referral, parental request, or other significant moments in the special-education process, and] ‘shall include a full explanation’ [of key special-education rights and procedural requirements]. . . . The State Board shall place a current copy of the handbook for parents on its Internet Web site.”); PUB. SCHS. OF N.C., PROCEDURAL SAFEGUARDS: HANDBOOK ON PARENTS’ RIGHTS 18 (2009), <http://ec.ncpublicschools.gov/parent-resources/ecparenthandbook.pdf> (“A decision made in a due process hearing . . . is final, unless appealed. Either party involved in the hearing (you [parent] or the LEA [local educational agency]) may appeal the decision to the EC [Exceptional Children] Division within 30 days of receipt of the decision from the Office of Administrative Hearings. In other words . . . [i]f you [parent] disagree with the judge’s decision in a due process hearing, you may appeal it to the EC Division within 30 days of receiving the decision.”).

in federal or state court.<sup>46</sup> This civil action then proceeds as any other civil action instituted in federal or state court. Only a minority of cases, however, are litigated beyond North Carolina's administrative two-tiered due-process procedure.

The analysis presented here addresses written ALJ decisions issued following the first-tier due-process hearings in those cases in which complaints were initiated between January 2000 and December 2012.

*B. Explanation of Decision Acquisition, Study Methodology, and Inherent Limitations on the Analysis*

The statistical data offered in this Article derives from an analysis of 97 North Carolina ALJ decisions resolving special-education due-process complaints filed in the years 2000 through 2012. These decisions comprise all North Carolina tier-one decisions over the covered period available in print or electronic resources or via public records requests.<sup>47</sup>

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<sup>46</sup> See 20 U.S.C. § 1415(i)(2)(A) (2013) (establishing the right to “bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy” once the administrative process has run its course); N.C. GEN. STAT. § 115C-109.9(d) (identifying a right to appeal “the decision of the Review Officer” in a civil action in state or federal court).

<sup>47</sup> The Author believes she has collected all written ALJ decisions publicly available. She has everything available in print or through electronic resources, and she has all she can acquire via records requests from the North Carolina Department of Public Instruction (DPI). On March 11, 2013, Ms. Lynn Smith, Dispute Resolution Consultant with the North Carolina Department of Public Instruction, indicated that the materials she had provided were “close to covering the cases” in our request, but that she still needed to provide “review decisions and would like to send . . . the federal case numbers.” E-mail from Lynn Smith, Dispute Resolution Consultant, Exceptional Children Div., N.C. Dep’t of Public Instruction, to Lisa Lukasik, Assistant Professor of Law, Campbell Law (Mar. 11, 2013, 17:10 EST) (on file with the *West Virginia Law Review*) (suggesting that all first-tier decisions had been provided and that only second-tier, review officer decisions remained outstanding). On March 25, 2013, Ms. Smith delivered what she believed to be the final batch of “review officer decisions” or second-tier decisions, and wrote that “[t]o the best of my knowledge, this is all the decisions.” E-mail from Lynn Smith, Dispute Resolution Consultant, Exceptional Children Div., N.C. Dep’t of Public Instruction, to Lisa Lukasik, Assistant Professor of Law, Campbell Law (Mar. 25, 2013, 19:01 EST) (on file with the *West Virginia Law Review*). At that time, the Author believed she had received all first and second-tier decisions over the covered period. As she reviewed the decisions, however, she identified a handful of cases that she believed were missing. She presented those case numbers at conferences in 2014 and early 2015, where school-system administrators, parents of children with disabilities, and school attorneys were present, seeking information from outside the Department of Public Instruction to locate the “missing” decisions. Because Lynn Smith retired in October 2013, the Author also corresponded with Mr. Bill Elvey, another Consultant with the North Carolina Department of Public Instruction. On April 3, 2014, Mr. Elvey indicated that he could not find the first-tier decisions the Author identified as missing from her collection, but he found one review officer decision with a citation to one of the missing first-tier decisions. E-mail from Bill Elvey, Dispute Resolution Consultant, Exceptional Children Div., N.C. Dep’t of Pub. Instruction, to Lisa Lukasik, Assistant Professor of Law, Campbell Law (Apr. 3, 2014 13:05

This section of the Article highlights the federal and state laws requiring ALJ decisions in special-education due-process proceedings to be made available to the public. It also acknowledges the practical inaccessibility of these decisions. It then details the means by which the Author acquired the decisions considered, the methodology used to analyze their outcomes, and the inherent limitations on the results of this study.

### 1. Decision Acquisition

Under the United States Code, ALJ decisions in special-education proceedings “shall be made available to the public.”<sup>48</sup> The IDEA expressly requires this as a “safeguard” against impropriety.<sup>49</sup> North Carolina recognizes this federal requirement in its special-education policies. These policies require that the “SEA [State Educational Agency], after deleting any personally identifiable information, must . . . [m]ake [special-education due-process] findings and decisions available to the public.”<sup>50</sup>

Neither federal law nor North Carolina’s special-education policies specify when or where administrative findings and decisions must be made available to the public. They are difficult to find.

ALJ decisions in North Carolina’s special-education due-process proceedings are not published in any print compilation. This means they are not bound together in books on shelves in libraries. They are not available in traditional online legal research databases containing other decisions of the North Carolina Office of Administrative Hearings.<sup>51</sup> Even a paid subscription

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EST) (on file with the *West Virginia Law Review*). Thus, although it is possible that some first-tier decisions may remain missing from the Author’s set, those decisions are not available at the time of this publication, either online, through records requests, or from any print or electronic database containing such administrative decisions.

<sup>48</sup> 20 U.S.C. § 1415(h)(4)(A) (2013) (requiring that all findings and decisions shall be made available to the public consistent with the requirements of § 1417(b), relating to the confidentiality of student data, information, and records).

<sup>49</sup> *Id.*

<sup>50</sup> PUB. SCHS. OF N.C., POLICIES GOVERNING SERVICES FOR CHILDREN WITH DISABILITIES § 1504.1.14(d)(2) (2014) [hereinafter N.C. POLICIES], <http://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/policies-children-disabilities.pdf> (requiring publication of ALJ decisions after a first-tier review); *id.* § 1504.1.15(c)(2) (requiring publication of state hearing officer decisions after a second-tier review).

<sup>51</sup> “The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the [North Carolina] Constitution . . .” N.C. GEN. STAT. § 7A-750. Parties initiating due-process proceedings in special-education litigation do so by filing a petition with the Office of Administrative Hearings. *Id.* § 115C-109.6. Although both Westlaw and Lexis contain databases with decisions rendered by ALJs in the Office of Administrative Hearings, neither of those databases contains special-education decisions rendered by ALJs pursuant to North Carolina General Statute section 115C-109.6.

to the *Individuals with Disabilities Education Law Report*<sup>52</sup> or *Special Ed. Connection*<sup>53</sup> does not provide all of North Carolina's ALJ decisions in special-education due-process proceedings.<sup>54</sup>

In the past, North Carolina's State Board of Education has published a smattering of ALJ decisions in special-education cases on its website, but it has never posted all of them. In fact, throughout the period of this study, the State Board of Education's website never posted *any* of the ALJ decisions for many of the years covered (2000, 2001, 2003, 2004, 2005, and 2012).<sup>55</sup> As of the date of publication, the page that previously held some of the decisions over the covered period had been updated to erase those decisions and include only decisions from years beyond the reach of this study, 2014 and 2015.<sup>56</sup>

The Author obtained the decisions considered in this Article over a three-year period through the cooperation of the Department of Public Instruction's Exceptional Children Division. At the time the Author's records requests began, many requested decisions had not been redacted to protect the children's confidentiality as required by federal<sup>57</sup> and state law.<sup>58</sup> Now that these decisions have been redacted, they may eventually appear on the State Board of Education's website. All decisions considered in this study are available on Campbell Law's Scholarly Repository.<sup>59</sup>

The analysis presented here reports the results observed through a systematic analysis of all presently available first-tier ALJ decisions in North Carolina's special-education due-process proceedings in cases filed from January 2000 through December 2012. This data set includes 97 ALJ decisions

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<sup>52</sup> *Individuals with Disabilities Education Law Report*, LRP PUBLICATIONS, [http://www.shoplrp.com/product\\_p/300001.htm](http://www.shoplrp.com/product_p/300001.htm) (last visited Nov. 5, 2015).

<sup>53</sup> SPECIAL ED CONNECTION, <http://www.specialedconnection.com/LrpSecStoryTool/splash.jsp> (last visited Nov. 5, 2015).

<sup>54</sup> While *some* of North Carolina's ALJ decisions in special-education decisions are available in these resources, *many* are missing. This Author compiled additional decisions not available in these resources through public records requests.

<sup>55</sup> *Hearing Decisions*, PUB. SCHS. OF N.C., <http://ec.ncpublicschools.gov/parent-resources/dispute-resolution/due-process-hearings/hearing-decisions> (last visited Nov. 5, 2015).

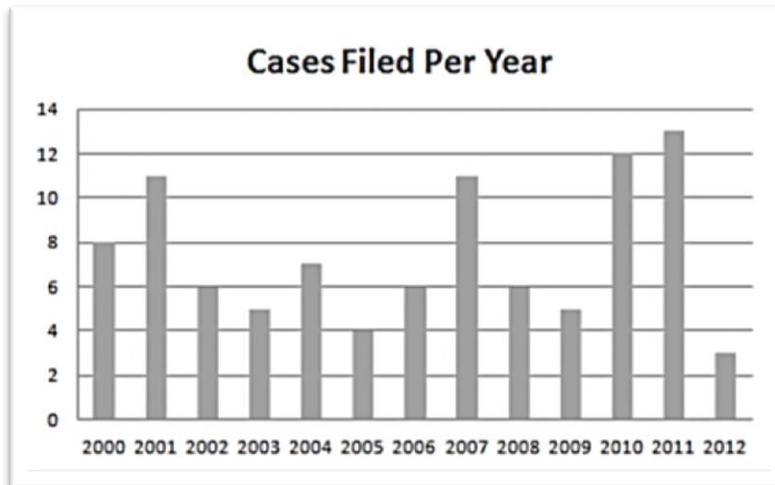
<sup>56</sup> *Id.*

<sup>57</sup> See 20 U.S.C. § 1415(h)(4)(A) (2013) (providing that decisions "shall be made available to the public consistent with the requirements of 20 U.S.C. § 1417(b)" (relating to the confidentiality of data, information, and records)); *id.* § 1417(b)–(c) (prohibiting disclosure of confidential information, including "any personally identifiable data, information, and records" for a particular child); 34 C.F.R. § 300.513(d) (2015) (requiring publication of hearing officer decisions "after deleting any personally identifiable information").

<sup>58</sup> See N.C. POLICIES, *supra* note 50, § 1504-1.14(d) (requiring that the State Educational Agency (SEA) must make hearing officer decisions public only "after deleting any personally identifiable information").

<sup>59</sup> *Scholarly Repository*, CAMPBELL LAW, <http://scholarship.law.campbell.edu/oah/> (last visited Nov. 5, 2015).

resolving cases filed throughout the covered period. The following table reflects the number of cases initiated and litigated through first-tier review in each year throughout the period studied.



The remainder of this section explains the methodology used to analyze these decisions and the inherent limitations on the results of that analysis.

## 2. Research Goals and Methodology

Many forms of empirical research are available to investigate targeted subjects or phenomena. The analytical approach depends in large part upon the study's objectives. The two primary objectives of this research did, in fact, determine the empirical methods utilized here.

This research initially sought to discover what actually happens in the proceedings studied. For example, how many special-education due-process complaints are, in fact, pressed through to a hearing annually? Has the rate changed as a result of changes in the law? What is the rate at which ALJs resolve these disputes in favor of parent petitioners versus school-system petitioners? Does this rate change by county, parties' representation status, disability of the child at issue, number of issues raised, or some other identifiable factor? What is the rate at which parents, as opposed to school systems, initiate due-process proceedings and press them through to final written decision? This study was designed to enable the Author to report this type of observable outcome data to establish a factual foundation for further dialogue about the strengths and weaknesses of the procedural process provided to parties in special-education disputes in North Carolina and across the country.

The second primary goal of this research was to compile data about the relation that particular variables might have to outcomes in first-tier due-

process proceedings in North Carolina. This study sought to establish the strength of correlations between particular variables to provide meaningful context about the observations reported.

Given this study's primary purposes to discover what is actually happening in North Carolina's first-tier due-process proceedings, and to identify particular variables that coordinate highly with particular outcomes or changes in outcomes, the Author relied upon two principal empirical methods.

First, the Author utilized an Excel spreadsheet to code all ALJ decisions studied, recording facts in each case on a number of significant variables. The coded variables included, *inter alia*, the identity of petitioner (parent or school system), the identity of respondent, parties' representation status (pro se or represented), the type of public school (traditional or charter), county of origin, the identity of the prevailing party, the type of disability of the child whose education was at issue, the age of the child whose education was at issue, the number of issues addressed by the ALJ, the number of witnesses presented by each party, whether the case was resolved on a procedural or substantive ground, the identity of the presiding ALJ, and the attorney of record for each party (if any). Once all of the decisions were coded, the Author grouped decisions based on select variables and combinations of variables to identify the outcomes reported.

Second, once the Author accumulated foundational data pursuant to the Excel analysis described above, three principal statistical measures were utilized to evaluate that data. Pearson's Chi-squared test determined the statistical significance of particular independent variables on outcomes identified. Pearson's product-moment coefficient identified the strength of correlation between particular variables. Finally, when evaluating the influence of multiple dependent variables simultaneously on outcomes in first-tier decisions, the Author used a multiple linear regression analysis.

### 3. Limitations Inherent in Study Methodology and Results

Research of the type reported here is subject to inherent limitations. This Article addresses them as they become significant to particular discussions. Two fundamental limitations, however, warrant recognition up front.

First, nothing about the data reported here offers any explanation of the merits of any particular case or of any group of cases. Whether petitioners bring meritorious complaints cannot be determined through this study. Additionally, whether ALJs resolve these complaints properly on the facts presented cannot be determined through this study. Thus, for example, the finding that parent petitioners rarely prevail when they proceed pro se does not provide any insight about whether pro se parent petitioners have meritorious complaints or whether ALJs resolve those complaints correctly on the facts presented.

Second, this study does not include special-education due-process complaints that are resolved short of a written ALJ decision via settlement<sup>60</sup> or that are pursued through the State's investigatory complaint process.<sup>61</sup> Thus, this study cannot determine whether consideration of complaints resolved under those circumstances would somehow illuminate the outcomes observed through this study.<sup>62</sup>

With this background and these caveats, this Article next discusses the foundational data drawn from these decisions.

### III. EMPIRICAL FOUNDATIONS: CHANGES IN THE LAW AND THEIR IMPACT ON TIER-ONE HEARING FREQUENCY AND OUTCOMES

The United States Government Accountability Office recently reported a general nationwide decline in the number of special-education "due process" cases pressed forward to a full, written decision.<sup>63</sup> Other analysts have identified increases in particular contexts.<sup>64</sup> As the search for data on the

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<sup>60</sup> The Department of Public Instruction publishes some data about aggregate numbers of mediations requested, but this Author did not have access to the complaints inspiring those mediations or the outcomes of those mediations, and they are not included in this study. *See End-of-Year Reports*, PUB. SCHS. OF N.C., <http://ec.ncpublicschools.gov/ec/parent-resources/dispute-resolution/end-of-year-reports> (last visited Nov. 5, 2015) (providing some data about numbers of special-education mediations).

<sup>61</sup> *See* N.C. POLICIES, *supra* note 50, §§ 1501-10.1–10.3 (adopting a state complaint procedure to address complaints "filed by an organization or individual from another State" (even if they are not a parent of a child with a disability) and requiring an "independent on-site investigation" if necessary); 34 C.F.R. §§ 300.151–53 (requiring that each state receiving funds under the IDEA must establish written procedures to permit filing complaints directly with the SEA on behalf of interested organizations and individuals, including non-parents and individuals and organizations from other states, and ensuring that such complaints are resolved within 60 days including through "an independent on-site investigation" if necessary).

<sup>62</sup> *See* Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571, 1614 (2001) (noting similar limitations inherent in an empirical study considering North Carolina ALJ decisions outside the special-education context).

<sup>63</sup> *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, SPECIAL EDUCATION: IMPROVED PERFORMANCE MEASURES COULD ENHANCE OVERSIGHT OF DISPUTE RESOLUTION 2 (2014), <http://gao.gov/assets/670/665434.pdf> (noting that most of the reported decline in the number of special-education cases nationally over the last decade is a result of a decline in the number of cases in New York, Puerto Rico, and the District of Columbia); Weber, *supra* note 23, at 508–09 (noting that according to one source "the latest data [through 2012] show[s] a 10% decline in the number of hearing requests over the past seven years, and a 58% decline in hearings held").

<sup>64</sup> *See, e.g., infra* notes 77–78 and accompanying text (offering the data from North Carolina reflecting an increase in the number of such cases in this State between 2007 and 2012 when compared to the period between 2000 and 2005); Perry A. Zirkel, *Autism Litigation Under the IDEA: A New Meaning of "Disproportionality"?*, 24 J. SPECIAL EDUC. LEADERSHIP 92, 95 (2011) (noting the results of a study concluding that the number of special-education cases pressed

prevalence of special-education due-process hearings continues, this Article offers the first consideration of North Carolina's unique impartial due-process hearing procedure, the frequency of these hearings in this State, and their outcomes.<sup>65</sup>

The North Carolina General Assembly substantially revised the state's special-education laws in 2006. These revisions included changes that could impact the number of special-education complaints filed and pressed forward to a full hearing.

The 2006 amendments, for example, clarified the state's goal with respect to educating children with disabilities as matching (and not exceeding) the baseline required by the IDEA;<sup>66</sup> incorporated the pre-hearing, state-funded mediation option introduced by the 2004 amendments to the IDEA;<sup>67</sup> reflected the 2005 United States Supreme Court decision in *Schaffer ex rel. Schaffer v. Weast*,<sup>68</sup> placing the burden of proof in special-education litigation proceedings on the petitioner, including petitioner parents; and enlarged the applicable statute of limitations.<sup>69</sup>

When this research began, the Author selected the particular 12 years (2000–2012) of study because this period spanned 6 years prior to North

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through to a written decision on the issues of FAPE and LRE increased over the 15-year period studied, from 1993 through 2008).

<sup>65</sup> Other academics have begun to empirically examine this process in other states and for other purposes. See, e.g., COLKER, *supra* note 24 (examining the shortcomings of the IDEA through its evolution and effectiveness in Ohio, Florida, New Jersey, California, and the District of Columbia); Colker, *supra* note 24 (identifying outcomes in Ohio's special-education complaint proceedings and comparing them to outcomes in that state's due-process proceedings); Perry A. Zirkel, *Special Education Hearing Officers: Balance and Bias*, 24 J. DISABILITY POL'Y STUD. 67 (2012) (evaluating claims of bias in special-education hearing officers and proposing five factors other than bias that generate disproportionate success for schools over parents).

<sup>66</sup> Before the 2006 amendments, the Fourth Circuit Court of Appeals concluded: "North Carolina apparently does require more than the [IDEA]. The special education program must provide the child with an equal opportunity to learn if that is reasonably possible, ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children." *Burke Cty. Bd. of Educ. v. Denton ex rel. Denton*, 895 F.2d 973, 983 (4th Cir. 1990). North Carolina's 2006 amendments repealed the statute interpreted by the Fourth Circuit Court of Appeals and replaced it with new legislation consistent with the standard established in the IDEA. See N.C. GEN. STAT. § 115C-106.1 (2015).

<sup>67</sup> See 20 U.S.C. § 1415(e) (2013) (requiring states to ensure that parties may resolve special-education "disputes through a mediation process" even "prior to filing of a complaint"); 34 C.F.R. § 300.506 (2015) (affirming and elaborating upon the pre-hearing mediation requirement in the IDEA).

<sup>68</sup> 546 U.S. 49, 49 (2005) (holding that under the IDEA, the burden is on the petitioner challenging an Individualized Education Plan).

<sup>69</sup> N.C. GEN. STAT. § 115C-109.6(b) ("Notwithstanding any other law, the party shall file a petition . . . that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis for the petition.").

Carolina's 2006 revisions to its special-education laws and 6 years after those revisions. The Author set out to determine the revisions' effects on the number of due-process complaints proceeding to a full first-tier hearing resolved through a written ALJ decision.

This section offers an overview of the 2006 amendments and 2005 Supreme Court decision that prompted the research offered here and then presents relevant data extracted from the database of catalogued ALJ decisions included in this study.

A. *Statutory Changes in North Carolina's Special-Education Goals and Standard*

North Carolina's 2006 special-education amendments repealed former North Carolina General Statute section 115C-106, which set the previous special-education goal for the state.

The repealed statute established a state special-education standard *greater* than that required by the IDEA. It stated: "The General Assembly of North Carolina hereby declares that the policy of the State is to ensure every child a fair and full opportunity to reach his full potential . . . ." <sup>70</sup>

The Fourth Circuit Court of Appeals interpreted this now-repealed statute and concluded that "North Carolina apparently does require more than the [IDEA]. The special education program must provide the child with an equal opportunity to learn if that is reasonably possible, ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children." <sup>71</sup>

The IDEA requires (and has required throughout the period covered by this study) that in order to be eligible for federal assistance under the Act, each state must "establish[] a goal of providing full educational opportunity to all children with disabilities." <sup>72</sup> The IDEA does not require (and has never required) that the state offer a program that would allow each child to "reach her full potential" or enjoy an "equal opportunity to learn." <sup>73</sup>

North Carolina's "extra" statutory language about educating to a child's "full potential" and with "equal opportunity" was repealed from the

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<sup>70</sup> 2006 N.C. Sess. Laws 69 (repealing former N.C. GEN. STAT. § 115C-106, effective on and after July 1, 2006).

<sup>71</sup> *Burke Cty.*, 895 F.2d at 983.

<sup>72</sup> 20 U.S.C. § 1412(a)(2).

<sup>73</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189–200 (1982) (establishing that the EHA (Education of the Handicapped Act), now renamed the IDEA, contains "no requirement . . . that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children'" and "no additional requirement that the services . . . provided be sufficient to maximize each child's potential" or offer "strict equality of opportunity or services," but only "the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child").

North Carolina legislation in 2006 and replaced with language identical to that found in the IDEA. North Carolina's new legislation asserts: "The goal of the State is to provide full educational opportunity to all children with disabilities who reside in the State."<sup>74</sup>

This apparent equalization of the standards set by federal and state law could impact the number of claims asserted and the outcomes of those that persist through to a written ALJ decision. Intuitively, one might guess that following the reduction in the educational standard in North Carolina, parents would present fewer claims. Why? If we presume parents know the law, as we must, parents should demand less of public schools following the change in the law, realizing that their children's entitlement had decreased.

Intuitively, one might also guess that when the educational standard in North Carolina was reduced to equal the national one, parents would prevail less often in the claims asserted. Why? The educational entitlement over which they litigated decreased.<sup>75</sup> Data derived from this study casts some doubt on these intuitive conclusions.<sup>76</sup>

On the first question, whether the reduction of North Carolina's educational standard to equal the national one reduces the number of claims pressed by parents to full hearing, the data counters intuition. This change in the law did not reduce the number of claims heading to full hearing. Instead, there was a 22% increase in the number of cases litigated to a final ALJ decision in the six-year period *after* passage of the 2006 amendments as compared to the six-year period prior to their passage.<sup>77</sup>

Although North Carolina's general public school population increased over this period, the number of children entitled to receive services under the IDEA did *not*. Instead, in North Carolina in the years following the 2006 amendments, the number of children between the ages of 3 and 21 entitled to

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<sup>74</sup> N.C. GEN. STAT. § 115C-106.1.

<sup>75</sup> One might alternatively hypothesize, of course, that there should be no change in outcomes under this circumstance because school systems would simply diminish their provision of services so as to maintain the risk of loss at comparable levels.

<sup>76</sup> See *infra* Part IV.A.

<sup>77</sup> From 2000 to 2005, there were 41 cases. From 2007 to 2012, there were 50 cases. The rate of increase =  $(50-41)/41 = 22\%$ . This calculation treats the year of 2006 as a year of transition (and does not include the six cases filed that year). This is so for one primary reason: it is impossible to determine precisely when each case was filed, as no filing date is offered in the decisions, making it difficult to determine whether each was filed before or after the statutory change became effective in July 2006. While the decisions often identify when the hearing was held, they do not indicate precisely when the complaint was filed. Thus, a case heard in August may have been filed before or after the statutory change became effective. Interestingly, the number of fully litigated complaints increased between 2006 and 2012, while the number of North Carolina children eligible for IDEA's protections decreased. See *infra* note 78 and accompanying text. Further research beyond the scope of this Article is required to determine the cause of the increase in the number of fully litigated cases and the decline in the total number of children served under the IDEA.

services under the IDEA declined by 2.43% from 192,451 children in 2006 to 187,767 children in 2011.<sup>78</sup> In other words, although the *total number* of children in public school in North Carolina increased 4.39% from 1,444,481 in 2006 to 1,507,865 in 2011, the most recent year for which this data is available,<sup>79</sup> the *number of those children who were eligible* for special education under the IDEA decreased.<sup>80</sup> Despite the decrease in the relevant population, the number of special-education cases to proceed through full hearing increased over that period by 22%.<sup>81</sup>

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<sup>78</sup> See IDEA Section 618 Data Products: State Level Data Files, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bcc> (last visited Nov. 5, 2015) [hereinafter *State Level Data Files*]. Although the total number of North Carolina children served under the IDEA increased slightly in 2012 over 2011 to 190,098, *id.*, there remained an overall decline of 1.22% in the number of children served since 2006. This Article reports the measure of decline through 2011 in the text above because 2011 is the most recent year for which the National Center for Educational Statistics has reported comparison data on the total number of children educated in North Carolina public schools. It is interesting to note that the number of IDEA-eligible children in North Carolina between 2000 and 2006 increased by 11.20% from 173,060 in 2000 to 192,451 in 2006. *Id.* This growth in the number of IDEA-eligible children was consistent with the growth in the number of children enrolled in public schools generally in North Carolina during the period from 2000 through 2006. Over that period, the number of children enrolled in public schools increased by 11.66% from 1,293,638 in 2000 to 1,444,481 in 2006. See Table 203.20: Enrollment in Public and Secondary Schools by Region, State, and Jurisdiction: Selected Years 1990 Through Fall 2023, DIGEST OF EDUCATION, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_203.20.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_203.20.asp) (last visited Sept. 30, 2015) [hereinafter DIGEST STATISTICS].

<sup>79</sup> See DIGEST STATISTICS, *supra* note 78. The National Center for Educational Statistics projects, but does not offer an accurate count of, the total number of children educated in North Carolina public schools in 2012. This projection estimates the total number of children educated in North Carolina public schools in 2012 to be 1,515,700. *Id.* Assuming this projection was correct, the total number of children educated in North Carolina public schools from 2006 through 2012 increased by 4.93% while the number of IDEA-educated children declined over the same period by 1.22%, as explained in footnote 78.

<sup>80</sup> Other authors have considered the reasons for changes in IDEA eligibility numbers. See, e.g., Mark Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83 (2009). Such analysis is beyond the scope of this Article, which seeks only to disclose data regarding first-tier hearings to inspire further research and normative consideration by others. It is worth recognizing, however, that North Carolina's decrease in IDEA-eligible students from 2006 to 2011 is consistent with a national decline in IDEA-eligible students over the same period, despite a slight national increase in public school enrollment overall. Across the country in 2006, 6,693,279 students received aid under the IDEA, see *State Level Data Files*, *supra* note 78, and 49,315,842 students were enrolled in public schools, see DIGEST STATISTICS, *supra* note 78. However in 2011 only 6,530,522 students received aid under the IDEA, see *State Level Data Files*, *supra* note 78, despite an increase in the overall public school population to 49,521,669 students, see DIGEST STATISTICS, *supra* note 78. This reflects a 2.431% decrease nationally, similar to the 2.434% decline in North Carolina, in the number of IDEA-eligible students between 2006 and 2011, despite a slight national increase in public school enrollment by .417%.

<sup>81</sup> It warrants mention that North Carolina experienced an increase in the number of complaints initiated even after the 2004 amendments to the IDEA that authorized the imposition

On the second question, whether parents prevail less often under North Carolina's reduced educational standard for children with disabilities, the data is interesting and invites further study. It should be noted, of course, that the data presented here does not inform causation. Nothing here suggests that the change in the law causes any change in win/loss rates for parents. Factors other than changes in the law impact these rates. Most significantly, according to this research, changes associated with parental representation and pro se status<sup>82</sup> change at roughly the same rate as the changes in the win rate for parents before and after the 2006 amendments.<sup>83</sup>

With this caveat, generally speaking, intuition pans out here to a small, but statistically insignificant, degree. The percentage of cases in which parents prevailed on at least one issue dropped 9.7 percentage points in the six years following passage of the amendments.<sup>84</sup> Conversely, the percentage of cases in which school systems prevailed on at least one issue increased by 13.5 percentage points over the same period.<sup>85</sup>

Notably, however, the number of pro se parents also increased in the six years following the 2006 amendments.<sup>86</sup> This number increased by nearly 8 percentage points. This increase in parental pro se status closely approximates the decrease in parental success. And pro se status better predicts parental success than the changes in North Carolina's special-education laws<sup>87</sup>

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of attorneys' fees on parents and parents' attorneys for filing or pursuing frivolous due-process proceedings.

<sup>82</sup> See *infra* Part IV.A.3 (discussing the data regarding outcomes for parties represented by parents as compared to parties proceeding pro se).

<sup>83</sup> The parental "win" rate, treating a "win" as success on any part of a claim even if not the entire claim, declined by 9.7 percentage points, and parental representation by counsel declined by 7.7 percentage points.

<sup>84</sup> Parents prevailed on at least one issue in 13 of 41 cases between 2000 and 2005, 31.7% of the cases over that period. From 2007 to 2012, parents prevailed on at least one issue in only 11 of 50 cases, or 22.0% of the cases over that period. The p-value representing the statistical significance of the change in "win" rates pre- and post-2006 is .096, too high to represent statistical significance using Pearson's Chi-squared measure.

<sup>85</sup> Schools prevailed on at least one issue in 33 of 41 cases between 2000 and 2005, or in 80.5% of the cases. From 2007 to 2012, schools prevailed on at least one issue in 47 of 50 cases, or in 94.0% of the cases. Notably, however, this increase in school "wins" is not statistically significant using Pearson's Chi-squared measure (p = .099).

<sup>86</sup> While this research cannot establish the cause of this observation, two changes in the law are interesting to think about in this context. First, the change in North Carolina's substantive entitlement in 2006 raises the question of whether some attorneys have begun tightening the standards by which they might take cases to minimize their risk of loss. Additionally, the addition of authority to impose attorneys' fees upon parents' attorneys, should they pursue what ends up being characterized as a frivolous claim, may have deterred some attorneys from getting involved in these cases. Observations like these are merely speculation for further research.

<sup>87</sup> It is impossible to determine which, if any, of the significant changes in 2006 (the change in the educational standard applied to children with disabilities, the addition of pre-complaint

governing children with disabilities using a multiple linear regression analysis.<sup>88</sup>

*B. Statutory Changes in the Availability of State-Funded, Pre-Complaint Mediation Prior to Initiating Tier-One Hearings*

Just as scrutiny of first-tier decisions following the 2006 changes to the statutory educational standard for children with disabilities revealed some counter-intuitive results, an examination of those decisions in light of the 2006 addition of pre-hearing mediation options also exposes counter-intuitive results. This section first explains the 2006 amendments regarding availability of pre-hearing mediation and then reports the data on the effect of these amendments on the numbers of cases pressed forward through a full hearing.

mediation, the change in the statute of limitations, etc.) correlated most with the observable effects on frequency and outcomes in first-tier special-education cases. Thus, this Article cannot and does not conclude that the change in the standard (which is the focus of this section of this Article) had the effect of decreasing parents' success. Again, however, the decline in parental success by 9.7 percentage points was not statistically significant at this time ( $p = .096$ ). Should the pattern observed here continue, however, it could become statistically significant, particularly given its current proximity to significance.

<sup>88</sup> The following table reflects the results of a multiple linear regression analysis of outcomes (parental success) measured against the dependent variables of representation status and pre- or post-2006 filing, showing that the two dependent variables account for approximately 40% of the outcome (see Multiple R value) and that the influence of pro se status is statistically significant ( $p = .0002$ ) at a coefficient of  $-.36$ , but the influence of pre- or post-2006 is not ( $p = .99$ ):

Regression Statistics								
Multiple R	0.403426351							
R Square	0.16275282							
Adjusted R Square	0.141284944							
Standard Error	0.414738528							
Observations	81							
ANOVA								
	df	SS	MS	F	Significance F			
Regression	2	2.608063716	1.304032	7.581225897	0.000980153			
Residual	78	13.41662764	0.172008					
Total	80	16.02469136						
	Coefficients	Standard Error	t Stat	P-value	Lower 95%	Upper 95%	Lower 95.0%	Upper 95.0%
Intercept	0.471480753	0.084860097	5.555977	3.69692E-07	0.302537278	0.640424228	0.302537278	0.640424228
Pro Se	-0.360931598	0.093501017	-3.86019	0.000232219	-0.547077823	-0.174785372	-0.547077823	-0.174785372
Pre-2006	0.001404889	0.093271002	0.015062	0.988020826	-0.184283411	0.187093189	-0.184283411	0.187093189

Again, no causal determinations about any factor considered may be reached by this study. All information is merely descriptive and reflective of correlations. This Author continues to further catalogue the ALJ decisions under review to determine whether any additional meaningful statistical patterns emerge. This Author also encourages others to engage in further study seeking greater understanding about causation.

Until mid-2005, the IDEA required that mediation be available only after a due-process complaint was filed. In the 2004 re-authorization of the Act, in provisions that took effect on July 1, 2005, Congress required that states make mediation available *whether or not* any party had requested a due-process hearing.<sup>89</sup>

North Carolina revised its special-education legislation to reflect this new federal requirement in 2006. From that time forward, North Carolina's law has stated: "It is the policy of this State to encourage local educational agencies and parents to seek mediation involving any dispute under this Article, including matters arising *before or after* filing" a due-process complaint seeking a hearing before an ALJ.<sup>90</sup>

North Carolina's policies governing services for children with disabilities further require that each *local* educational agency "must ensure that procedures are established and implemented to allow parties to disputes involving any matter under these Policies, *including matters arising prior to the filing of a petition for a due process hearing*, to resolve disputes through a mediation process."<sup>91</sup> They also require that the "SEA [state educational agency] must bear the cost of the mediation process," making it free for parents of children with disabilities *and* for local school systems.<sup>92</sup>

Given that North Carolina's 2006 amendments to its special-education laws aligned federal and state law on the substantive educational goal of the legislation and added a non-adversarial, pre-hearing mediation option, one might expect the number of fully litigated special-education claims to decline post amendments. This did not happen.

From January 2000 to December 2005 (prior to the effectiveness of North Carolina's 2006 revisions), 41 of the special-education cases available for this research progressed through a full contested case hearing and written ALJ decision. From January 2007 through December 2012 (following the effectiveness of North Carolina's 2006 revisions), 50 special-education cases progressed through a full contested case hearing and written ALJ decision. As

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<sup>89</sup> 20 U.S.C. § 1415(e)(1) (2013) (requiring mediation even in "matters arising prior to the filing of a complaint"). According to the legislative record, Congress enacted this change to (1) capitalize on cost savings realized through previous special-education mediations and (2) reduce the adversarial character of special-education proceedings. The Senate Committee on Health, Education, Labor, and Pensions reported that it revised the mediation timeline in order to build upon the national success in resolving disputes through mediation. S. REP. NO. 108-185, at 36-37 (2003). The Committee noted Michigan and Texas surveys that found 82.3% and 96%, respectively, of people who used mediation would do so again. *Id.* In Texas, 77% of cases settled in mediation. *Id.* at 37. This saved an estimated \$50 million in attorneys' fees and litigation expenses. *Id.* California experienced even greater success, with 93% of mediated cases settling. *Id.*

<sup>90</sup> N.C. GEN. STAT. § 115C-109.4(a) (2015) (emphasis added).

<sup>91</sup> N.C. POLICIES, *supra* note 50, § 1504-1.7(a) (emphasis added).

<sup>92</sup> *Id.* § 1504-1.7(b)(4).

noted above, this reflects a 22% increase in the number of cases litigated to a final ALJ decision in the six-year period *after* passage of the 2006 amendments as compared to the six-year period prior to that passage.<sup>93</sup> Interestingly, the two years in which the greatest numbers of fully litigated cases were filed, 2010 (12 cases) and 2011 (13 cases), both arose after this change in the law.

This statistical increase does not establish that the 2006 amendments *caused* an increase in fully litigated tier-one hearings. To the contrary, other factors, beyond the special-education laws of the state, may have influenced this increase. In fact, across the country in many jurisdictions the rate of fully litigated hearings is declining.<sup>94</sup> However, as noted above, the number of children served in special education in North Carolina decreased from 192,451 in 2006 to 190,098 in 2012,<sup>95</sup> representing a 1.22% decrease in the number of students served while the rate of fully litigated tier-one hearings increased by 22%. A comprehensive study of factors that might influence the rate of increase in special-education litigation is beyond the scope of this Article.

In the end, this research does *not* determine whether North Carolina's 2006 amendments changing the state's special-education goal and providing pre-hearing mediation at public expense had any direct *causal* impact. This research does reflect an uptick in litigation between 2007 and 2012 when compared to numbers in 2000 through 2005. Notably, however, in 2012, the most recent year considered, the smallest number (three) of special-education contested cases reached final written decision by an ALJ. It has yet to be determined whether this downtick in fully litigated tier-one hearings indicates the beginning of a trend toward fewer fully litigated cases or stands alone as an outlier.<sup>96</sup> Further research may begin to answer these questions.

### C. Clarification of the Burden of Proof and Statute of Limitations

Two clarifications of procedural obligations on participants in North Carolina's first-tier special-education claims warrant attention. In 2005, the Supreme Court clarified that the burden of proof in these administrative

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<sup>93</sup> See *supra* note 77 and accompanying text (demonstrating the manner in which this 22% increase was determined).

<sup>94</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 63, at 2 (noting that most of the reported decline in the number of special-education cases nationally over the last decade is a result of a decline in the number of cases in New York, Puerto Rico, and the District of Columbia); Weber, *supra* note 23, at 508–09 (noting that, according to one source, “the latest data [through 2012] show[s] a 10% decline in the number of hearing requests over the past seven years, and a 58% decline in hearings held”).

<sup>95</sup> See *State Level Data Files*, *supra* note 78.

<sup>96</sup> The Exceptional Children Division is beginning to load new decisions on its website. Some are posted from 2014 and 2015. See *Hearing Decisions*, *supra* note 55 (reporting selected 2014 decisions from Winston-Salem/Forsyth County, Johnston County, and Cherokee County and selected 2015 decisions from Charlotte-Mecklenburg).

hearings rested with the petitioner, including petitioner parents. The following year, the North Carolina legislature amended the governing statute of limitations to expand it from 60 days to 1 year. Although the clarification of placement of the burden of proof had no impact in this State, the expansion of the statutory limitation period opened the door to a larger basis for claims.

### 1. Burden of Proof

In 2005 in *Schaffer ex rel. Schaffer v. Weast*,<sup>97</sup> the United States Supreme Court held that petitioners in special-education cases, including petitioner parents, retain the burden of proof, and more particularly the burden of persuasion, on all claims asserted.<sup>98</sup> Until that time, jurisdictions had been split on this question. Some courts held that after a parent identified a concern about a child not receiving the education to which the child was entitled under the IDEA, the burden of persuasion shifted to the school system to establish that the school offered a free appropriate public education through a properly developed individualized education plan (IEP) in the least restrictive environment.<sup>99</sup>

In North Carolina, however, ALJs had always imposed the burden of proof on the petitioner, including parent petitioners.<sup>100</sup> Well before *Schaffer*, one North Carolina ALJ explained the following in response to petitioner parents' motion to assign the burden of proof to the respondent school district:

After receiving briefs and arguments, the Undersigned ruled . . . that the Petitioners bore the burden of proof. Neither the statutes involved nor the Fourth Circuit case law address

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<sup>97</sup> 546 U.S. 49, 49 (2005).

<sup>98</sup> *Id.* at 56–57 (noting that the “burden of proof” historically encompassed both the burden of persuasion and the burden of production and emphasizing that this case implicates only the burden of persuasion, attaching to the party who will lose if the evidence is closely balanced).

<sup>99</sup> *See, e.g., Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3rd Cir. 1993) (“In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child’s education), and greater overall educational expertise than the parents.”); *Lascari ex rel. Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1188–89 (N.J. 1989) (stating that in view of the school district’s “better access to relevant information,” parents’ obligations “should be merely to place the issue of appropriateness of the IEP” before the school, and “the school board should then bear the burden of proving that the IEP was appropriate”).

<sup>100</sup> *See, e.g., Student v. Wake Cty. Pub. Sch. Sys. Bd. of Educ.*, No. 01 EDC 0171 and No. 01 EDC 0802, slip op. at 3 (N.C. Office of Admin. Hrgs. Sept. 11, 2002); *Parent v. Wake Cty. Pub. Sch. Bd.*, 00 EDC 1452, slip op. at 10 (N.C. Office of Admin. Hrgs. Dec. 6, 2001); *Student v. Cabarrus Cty. Bd. of Educ.*, 00 EDC 0616, slip op. at 13 (N.C. Office of Admin. Hrgs. June 4, 2001); *Parent v. Columbus Cty. Bd. of Educ.*, 00 EDC 0705, slip op. at 13 (N.C. Office of Admin. Hrgs. Jan. 18, 2001).

the issue of burden of proof. The other circuits are mixed. The Undersigned found that in this particular case that the burden of proving tha[t] an IEP that had been jointly developed and implemented for the length of time involved failed to meet the legal standards as well as the other issues presented at hearing fell to the party [the Petitioner parents] challenging the plan . . . .<sup>101</sup>

Given that North Carolina placed the burden of proof on petitioners throughout the period covered by this research, and long before *Schaffer* in 2005, it is not surprising that the legislature did not change that burden in its 2006 overhaul of the State's special-education law.<sup>102</sup> And it makes sense that this decision had no identifiable impact on outcomes here.<sup>103</sup>

## 2. Statute of Limitations

Although North Carolina had already placed the burden of proof on petitioners prior to the Supreme Court's decision in *Schaffer*, North Carolina held on to its 60-day statutory limitations period until prompted by changes in the federal law to enlarge it.

The 2004 revisions to the IDEA, which took effect on July 1, 2005, introduced for the first time a federal statute of limitations in special-education administrative claims. The relevant 2004 revision provided:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time

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<sup>101</sup> *Wake Cty.*, No. 01 ED 0171 and No. 01 EDC 0802, slip op. at 3.

<sup>102</sup> A number of jurisdictions have, however, modified their state special-education laws to place the burden of proof on school systems, even in cases where the parent is the petitioner. *See, e.g.*, N.J. STAT. ANN. § 18A:46-1.1 (West 2015) (providing that the burden of proof in special-education cases falls on the school system); N.Y. EDUC. LAW § 4404(1) (McKinney 2015) (imposing the burden of proof on school systems to establish that the school offers FAPE, but leaving burden of proof on parents when they seek "tuition reimbursement for a unilateral placement" in a private school); NEV. ADMIN. CODE § 388.507 (2015) ("Whenever a due process hearing is held pursuant to the [IDEA] . . . the school district has the burden of proof and the burden of production."). Other states continue to consider legislation to accomplish this goal. *See* S. 0390, 2015 Gen. Assemb., Reg. Sess. (Md. 2015); H. 0344, 2015 Gen. Assemb., Reg. Sess. (Md. 2015); MD. COAL. FOR SPECIAL EDUC. RIGHTS & BURDEN OF PROOF, [www.burdenofproofmd.org](http://www.burdenofproofmd.org). (last visited Nov. 5, 2015). No such legislation has been considered in North Carolina.

<sup>103</sup> *See supra* Part III.A–B (offering the statistical data to support the conclusion that the 2006 changes in North Carolina's special-education laws had no statistically significant impact on frequency or outcomes of first-tier hearings).

limitation for requesting such a hearing under this [part], in such time as the State law allows.<sup>104</sup>

At the time this federal legislation passed and took effect, North Carolina relied upon a generic 60-day limitation period imported from the state administrative procedure act. This catch-all provision provided that “[u]nless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days.”<sup>105</sup>

The 60-day statutory limitation period presented a challenge to parents seeking review of issues arising under the IDEA. Claims were regularly dismissed in violation of that limit.<sup>106</sup>

Following implementation of the 2004 revisions to the IDEA, in 2006 the North Carolina legislature revised its special-education laws. In these revisions, the North Carolina legislature included a specific statutory limitations period within the State’s special-education laws. As a result, when this legislation became effective on July 10, 2006, the catch-all provision in North Carolina’s administrative procedure act no longer applied in this context. Instead, the particular limitation period began to apply. This limitation period extended the time within which complaints arising under the IDEA must be asserted in a due-process complaint from 60 days to 1 year.<sup>107</sup> While one might expect this change to reduce the number of cases dismissed on procedural grounds in the most recent six years under review,<sup>108</sup> that was not the case. This change had no statistically significant impact on the number of claims ultimately dismissed by written decision of an ALJ for violation of the statute of limitations.

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<sup>104</sup> 20 U.S.C. § 1415(f)(2)(C) (2013).

<sup>105</sup> N.C. GEN. STAT. § 150B-23(f) (2015); C.M. *ex rel.* J.M. v. Bd. of Educ., 241 F.3d 374, 384–85 (4th Cir. 2001), *cert. denied*, 534 U.S. 818 (2001) (holding that the North Carolina Administrative Procedure Act’s sixty-day statute of limitations was appropriately applied in special-education cases and was consistent with IDEA along with the accompanying notice requirements contained in the North Carolina statute).

<sup>106</sup> *See, e.g.*, *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 1129 (N.C. Office of Admin. Hrgs. Feb. 7, 2007); *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 1284 (N.C. Office of Admin. Hrgs. Jan. 2007); *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 0464 (N.C. Office of Admin. Hrgs. July 17, 2006); *C.L. v. N. High Sch. Principal*, 04 EDC 0268 (N.C. Office of Admin. Hrgs. Feb. 8, 2005); *Student v. Bd. of Educ.*, No. 04 EDC 0838 and No. 04 EDC 0854 (N.C. Office of Admin. Hrgs. Nov. 22, 2004); *Student v. Cabarrus Cty. Bd. of Educ.*, 00 EDC 0616 (N.C. Office of Admin. Hrgs. June 4, 2001); *Parents v. Terrel Lane Middle Sch.*, 01 EDC 0210 (N.C. Office of Admin. Hrgs. Apr. 2, 2001); *Student v. Charlotte-Mecklenburg Schs.*, 01 EDC 0110 (N.C. Office of Admin. Hrgs. Feb. 23, 2001).

<sup>107</sup> N.C. GEN. STAT. § 115C-109.6(b).

<sup>108</sup> In fact, from 2000 through 2006, only eight claims were dismissed on these procedural grounds, but from 2007 through 2012, 18 cases were dismissed.

Ultimately, recent changes in law ranging from re-calibrating the level of education required for children with disabilities to lengthening the statute of limitations, failed to have the impacts intuitively expected. Even free pre-complaint mediation, which has reduced the number of fully litigated due-process proceedings nationwide, has not correlated with that consequence here. Further research is necessary to fully understand these outcomes.

#### IV. STATISTICAL SIGNIFICANCE: TRANSCENDING TIER-ONE ANECDOTES WITH DATA AND RECOGNIZING THE IMPORTANCE OF REPRESENTATION

Having established in Parts II and III the legal and empirical foundation necessary to give context to statistical data depicting the current litigation landscape in North Carolina's special-education due-process proceedings, this Part shifts gears and offers the litigation data. It introduces data on North Carolina's fully litigated first-tier special-education litigation in three categories: data on parents and children, data on traditional public schools, and data on charter schools.

##### A. *Data on Parents*

Empirical review of first-tier administrative decisions in special-education cases reveals a number of interesting statistical observations about the parents involved. First, parents are overwhelmingly petitioners, not respondents, in these cases. Second, parent petitioners rarely prevail in first-tier hearings. Third, parent outcomes improve with legal counsel. Finally, with two exceptions, parent outcomes remain consistent regardless of the age of the child whose education is at issue or the type of disability accommodated. This section of the Article reports the data supporting each of these observations.

##### 1. Parents, Not Schools, Typically Initiate First-Tier Due-Process Proceedings

Both federal and state laws establish that parents of children with disabilities *and* public school systems educating those children (both traditional and charter) may originate due-process proceedings. These proceedings protect the substantive right of children with disabilities to a free appropriate public education in the least restrictive educational environment possible.

The IDEA requires that states provide “an opportunity for *any party*” to present a due-process complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child [with a disability], or the provision of a free appropriate public education to such child.”<sup>109</sup> The IDEA's implementing regulations make clear that a “parent or a

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<sup>109</sup> 20 U.S.C. § 1415(a)(6)(A) (emphasis added).

public agency may file a due process complaint” on any of these special-education issues.<sup>110</sup>

North Carolina law mirrors federal law on this point. North Carolina General Statutes section 115C-109.6 reiterates that “[a]ny party” may file a petition for an “impartial hearing with respect to any matter relating to the identification, evaluation, or educational placement of a child [with a disability], or the provision of a free appropriate public education [FAPE] of [such] child, or a manifestation determination.”<sup>111</sup> The State Board of Education Department of Public Instruction’s special-education policies likewise confirm that a “parent or an LEA [local educational agency] may file a request for a due process hearing on matters related to the identification, evaluation or educational placement of a child with a disability, the provision of FAPE to the child or a manifestation determination.”<sup>112</sup>

Although both parents and school systems are equally entitled to initiate due-process proceedings to ensure the full enforcement of the IDEA,<sup>113</sup> parents and school systems do not initiate and pursue these proceedings in equal numbers.

Of the 97 ALJ decisions collected, catalogued, and considered in this analysis, parents of children with disabilities initiated the due-process proceedings in 94 of them.<sup>114</sup> In other words, 96.9% of all the ALJ decisions issued over the 12-year period covered by this study resolved complaints raised by parents.

It warrants observation that although 96.9% of due-process proceedings under the IDEA are initiated by parents, only a miniscule fraction of parents of children with disabilities actually press disputes to this stage. For example, in 2011, the year covered by this research with the largest number of fully litigated cases, 187,767 children with disabilities were eligible for services under the IDEA in North Carolina’s public schools.<sup>115</sup> And in that year only 11

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<sup>110</sup> 34 C.F.R. § 300.507(a).

<sup>111</sup> N.C. GEN. STAT. § 115C-109.6.

<sup>112</sup> N.C. POLICIES, *supra* note 50, § 1504-1.8(a)(1).

<sup>113</sup> Neither parents nor school systems are *required* to initiate due-process proceedings, however. And school systems in particular are not required to initiate due process even when school officials believe a child is one with a disability who is not receiving appropriate accommodations under the IDEA if the child’s parents are informed and the parents refuse consent. *See, e.g.*, *K.A. v. Fulton Cty. Sch. Dist.*, 741 F.3d 1195, 1206 (11th Cir. 2013) (holding that a school district is not required to invoke due process when a parent revokes consent to a changed IEP).

<sup>114</sup> Only the following three of the total available set of ALJ decisions reviewed involved school-system petitioners: *Cabarrus Cty. Bd. of Educ. v. Parent*, No. 04 EDC 1131 (N.C. Office of Admin. Hrgs. Aug. 12, 2004); *Cumberland Cty. Bd. of Educ. v. Father*, No. 01 EDC 1802 (N.C. Office of Admin. Hrgs. Jan. 2002); *Cumberland Cty. Bd. of Educ. v. Mr.*, No. 00 EDC 0465 (N.C. Office of Admin. Hrgs. Feb. 12, 2001).

<sup>115</sup> *See State Level Data Files, supra* note 78.

parents filed contested cases that ultimately led to a written decision of an ALJ. This means a mere .007% of the families who could initiate the impartial due-process hearing available under the IDEA actually did so, pressing their complaints through to full, written decision before an ALJ.

## 2. Parents Rarely Prevail Without an Attorney

Litigation outcomes reflected in written ALJ decisions following first-tier due-process hearings favor school systems. As noted above, of the 97 decisions available for analysis, parents of children with disabilities initiated 94, and school systems started 3.<sup>116</sup> This section presents parents' win/loss records in the 94 cases parents initiated.

In considering these win/loss records, the Author emphasizes three important initial observations. First, the win/loss data presented here derives *only* from cases in which the parties did not settle their disputes at a resolution meeting prior to hearing,<sup>117</sup> during mediation,<sup>118</sup> or in the course of the first-tier hearing as evidence was exposed. Second, the data presented here reflects *only* cases in which a due-process complaint culminated in a written decision issued by an ALJ. Finally, nothing about the data presented here addresses the *merits* of any of the due-process claims counted, and nothing about the data here can establish the *cause* of the success or failure of any particular claim or group of claims.

With these caveats in mind, the win/loss records tabulated in the decisions reviewed in preparation of this Article present a provocative picture of North Carolina's special-education litigation at its first-tier administrative review.

How often did petitioner parents prevail at the first-tier administrative review on *all* issues raised in their complaints before the Office of Administrative Hearings (OAH) over this period? Parents fully prevailed 13.8% of the time.<sup>119</sup>

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<sup>116</sup> See *supra* note 114 and cases cited therein.

<sup>117</sup> See 20 U.S.C. § 1415(f)(1)(B) (2013) (requiring a resolution meeting after a due-process complaint has been filed, but before hearing, unless specified circumstances exist); 34 C.F.R. § 300.510 (2015) (same); N.C. GEN. STAT. § 115C-109.7 (2015) (same); N.C. POLICIES, *supra* note 50, § 1504-1.11 (same).

<sup>118</sup> See 20 U.S.C. § 1415(e) (requiring pre-hearing mediation be available, regardless of whether a due-process complaint has been filed, at no cost to parties); 34 C.F.R. § 300.506 (2015); N.C. GEN. STAT. § 115C-109.4 (same); N.C. POLICIES, *supra* note 50, at § 1404-1.7 (same).

<sup>119</sup> It is interesting to consider this statistic in the context of win rates in other states. For example, in Iowa, parents won in 32% of the cases studied. Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 37 (2007). In Wisconsin and Minnesota, parents *with attorneys* prevailed fully 14% of the time. Cope-Kasten, *supra* note 24, at 37.

Of the 94 due-process complaints initiated by parents of children with disabilities from 2000 through 2012 and *not* resolved prior to completion of the first-tier hearing, parents prevailed following decision by the first-tier ALJ on *all* issues in their complaints in 13 cases.<sup>120</sup> And no parent prevailed on *all* issues in a due-process proceeding at any time during the last three years of the study.<sup>121</sup>

Considering a similar question from an alternative perspective, parents lost on *all issues* raised in their special-education complaints 72.3% of the time. They lost on everything in 68 cases out of the 94 cases they presented as petitioners.

Parent petitioners, of course, may raise more than one issue in a single due-process complaint. This raises a new question: How often did petitioner parents prevail on one issue, but lose on another in their first-tier review before OAH? Parents prevailed on at least one issue, and lost on at least one issue in an additional 13 cases, 13.8% of the time.

Of the 94 due-process complaints initiated by parents of children with disabilities from 2000 through 2012 and *not* resolved prior to completion of the first-tier hearing, parents prevailed following the hearing before the first-tier ALJ on *at least one* issue in their complaints in 26 cases,<sup>122</sup> or 27.7% of the

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<sup>120</sup> Student v. Orange Cty. Bd. of Educ., No. 08 EDC 2969 (N.C. Office of Admin. Hrgs. June 18, 2009); Student v. Cabarrus Cty. Bd. of Educ., No. 07 EDC 2339 (N.C. Office of Admin. Hrgs. Aug. 29, 2008); Student v. Granville Cty. Bd. of Educ., No. 07 EDC 1605 (N.C. Office of Admin. Hrgs. Nov. 29, 2007); Student v. Charlotte-Mecklenburg Bd. of Educ., No. 06 EDC 1129 (N.C. Office of Admin. Hrgs. Feb. 7, 2007); Student v. Charlotte-Mecklenburg Bd. of Educ., No. 06 EDC 1284 (N.C. Office of Admin. Hrgs. Jan. 2007); Student v. New Hanover Cty. Sch. Bd. of Educ., No. 06 EDC 0500 (N.C. Office of Admin. Hrgs. Aug. 25, 2006); Father v. Randolph Cty. Sch. Bd. of Educ., No. 05 EDC 1543 (N.C. Office of Admin. Hrgs. Apr. 18, 2006); Parents v. Winston-Salem/Forsyth Cty. Bd. of Educ., No. 03 EDC 1637 (N.C. Office of Admin. Hrgs. June 20, 2005); Student v. Harnett Cty. Bd. of Educ., No. 02 EDC 1461 (N.C. Office of Admin. Hrgs. Dec. 23, 2002); Father v. Randolph Cty. Sch. Bd. of Educ., No. 01 EDC 1263 (N.C. Office of Admin. Hrgs. Aug. 16, 2002); Parent v. Johnston Cty. Schs., No. 02 EDC 0067 (N.C. Office of Admin. Hrgs. June 21, 2002); Ms. v. Wake Cty. Bd. of Educ., No. 01 EDC 0204 (N.C. Office of Admin. Hrgs. Feb. 27, 2002); Mr. L. v. Hickory Pub. Schs., No. 01 EDC 0878 (N.C. Office of Admin. Hrgs. Dec. 13, 2001).

<sup>121</sup> See, e.g., *Orange Cty. Bd. of Educ.*, No. 08 EDC 2969 (N.C. Office of Admin. Hrgs. June 18, 2009) (reflecting the most recent case in the period covered by this study in which a parent petitioner prevailed on all issues).

<sup>122</sup> Student v. Johnston Cty. Bd. of Educ., No. 11 EDC 04970 (N.C. Office of Admin. Hrgs. Apr. 12, 2012); Student v. Wake Cty. Bd. of Educ., No. 11 EDC 3178 (N.C. Office of Admin. Hrgs. Nov. 2011); Student v. Chapel Hill-Carrboro City Sch. Bd. of Educ., No. 10 EDC 1370 (N.C. Office of Admin. Hrgs. Oct. 7, 2011); Student v. Wake Cty. Pub. Sch. Bd. of Educ., No. 09 EDC 4193 (N.C. Office of Admin. Hrgs. Apr. 16, 2010); Student v. T.D., No. 09 EDC 2328 (N.C. Office of Admin. Hrgs. Dec. 2009); Student v. T.D., No. 09 EDC 2329 (N.C. Office of Admin. Hrgs. Dec. 2009); *Orange Cty. Bd. of Educ.*, No. 08 EDC 2969; *Cabarrus Cty. Bd. of Educ.*, No. 07 EDC 2339; *Charlotte-Mecklenburg Bd. of Educ.*, No. 07 EDC 1389 (N.C. Office of Admin. Hrgs. Feb. 15, 2008); *Granville Cty. Bd. of Educ.*, No. 07 EDC 1605; Student v.

time. These 26 cases include, of course, the 13 cases discussed previously in which parents prevailed on *all* issues and the 13 cases in which parents both prevailed and lost on at least one issue.

Considering this question of partial parental success from another perspective, parents lost on *at least one issue* 86.2% of the time. Of the 94 complaints brought by parent petitioners, they experienced loss on at least one issue in 81 cases.

The following table reflects some of the data described above in this section. It illustrates each of the following pieces of data: (1) the number of due-process complaints filed and pursued through a full hearing by parents of children with disabilities from 2000 through 2012, (2) the number and percentage of cases in which the petitioner parents prevailed on all issues over that same period,<sup>123</sup> and (3) the number and percentage of cases in which petitioner parents prevailed before an ALJ on at least one issue presented for hearing.<sup>124</sup>

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Charlotte-Mecklenburg Bd. of Educ., No. 07 EDC 1074 (N.C. Office of Admin. Hrgs. Aug. 30, 2007); *Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 1129; *Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 1284; *New Hanover Cty. Sch. Bd. of Educ.*, No. 06 EDC 0500; *Randolph Cty. Sch. Bd. of Educ.*, No. 05 EDC 1543; *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 0464 (N.C. Office of Admin. Hrgs. July 17, 2006); *Winston-Salem/Forsyth Cty. Bd. of Educ.*, No. 03 EDC 1637; *Harnett Cty. Bd. of Educ.*, No. 02 EDC 1461; *Mr. C. v. Union Cty. Pub. Schs.*, No. 02 EDC 0622 (N.C. Office of Admin. Hrgs. Nov. 21, 2002); *Student v. Wake Cty. Pub. Sch. Sys. Bd. of Educ.*, No. 01 EDC 0171 and No. 0802 (N.C. Office of Admin. Hrgs. Sept. 11, 2002); *Randolph Cty. Sch. Bd. of Educ.*, No. 01 EDC 1263; *Wake Cty. Bd. of Educ.*, No. 01 EDC 0204; *Johnston Cty. Schs.*, No. 02 EDC 0067; *Mr. L. v. Hickory Pub. Schs.*, No. 01 EDC 0878 (N.C. Office of Admin. Hrgs. Dec. 13, 2001); *Hickory Pub. Schs.*, No. 00 EDC 0128; *Student v. Caldwell Cty. Schs.*, No. 01 EDC 0083 (N.C. Office of Admin. Hrgs. Mar. 22, 2001).

<sup>123</sup> This table reflects outcomes in cases in which petitioners prevailed on *all issues* identified in their due-process complaints because, in a majority of cases, ALJs resolve all issues in favor of a single party. Of the first-tier final ALJ decisions considered in preparation of this Article, 86.6% ended with a single party prevailing on all issues. In only a relatively small minority of cases (13.4%), the ALJ reached a split decision and determined that each party prevailed on portions of the complaint.

<sup>124</sup> Some of the outcomes reflected in this chart were appealed to the second-tier administrative review before a State Hearing Review Officer. In those cases, the State Hearing Review Officer may (or may not) have reversed some of the ALJ outcomes during the second-tier review. This Article does not contain data on the rate at which parties pursue second-tier administrative review or the outcomes of such appeals. The Author has acquired and is reviewing and cataloging North Carolina's Senior Review Officer (S.R.O.) decisions in special-education matters from 2000 through 2012 and will publish the results of that review once complete.

Type of Petitioner	Winning percentage in cases pursued through issuance of a written ALJ decision from 2000 through 2012 in cases in which this party prevailed on <u>all claims</u> .	Winning percentage in cases pursued through issuance of a written ALJ decision from 2000 through 2012 in cases in which this party prevailed on <u>at least one issue</u> .
Parent of a Child with a Disability n = 94	13.8% n = 13	27.7% n = 26 (note that this number includes those cases reflected to the left in which parent petitioners prevailed on all issues)

These parental success rates are consistent with parental success rates in other states where due-process proceedings have been examined, but they are inconsistent with parental success rates in the District of Columbia where parents enjoy higher rates of representation by legal counsel. In Ohio, for example, another state with a two-tiered due-process proceeding, parents prevailed in 32.7% of the cases studied, and it was “nearly impossible for parents to prevail in Ohio without the assistance of highly sophisticated legal counsel.”<sup>125</sup> Similarly, in Florida, parents prevailed in only 15.1% of the cases initiated, and only one parent prevailed without an attorney or an advocate.<sup>126</sup> Likewise, in New Jersey, in emergent relief petitions, parents prevailed in approximately 17% of the cases they initiated, and 63.7% of prevailing parents were represented by an attorney.<sup>127</sup>

In contrast to the relatively low rates of parental success in North Carolina, Ohio, Florida, and New Jersey, parents prevailed in over half (57%) of the 100 cases resolved between 2010 and 2011 in the District of Columbia.<sup>128</sup> In the District of Columbia, however, in contrast to North Carolina and other states where data is available, “legal counsel nearly always represented” parents of children with disabilities.<sup>129</sup> This raises the next question: Does parental representation correlate with an increase in favorable outcomes for parents in North Carolina’s first-tier hearings?

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<sup>125</sup> COLKER, *supra* note 24, at 149, 151.

<sup>126</sup> *Id.* at 160 (noting that the single parent who prevailed without an attorney or advocate was a “social worker who seemed to have some expertise in special education matters”).

<sup>127</sup> *Id.* at 177.

<sup>128</sup> *Id.* at 211.

<sup>129</sup> *Id.*

### 3. Parents' Representation Matters

Although school systems typically retain legal counsel in special-education litigation proceedings,<sup>130</sup> parents often do not. In *Winkelman ex rel. Winkelman v. Parma City School District*,<sup>131</sup> the Supreme Court highlighted and expansively interpreted the authority of parents to appear pro se throughout these unique proceedings. This section of the Article first offers background on the law authorizing parents to represent themselves and their children pro se in these matters. It then presents the statistical relationship between parental representation and hearing outcomes.

In *Winkelman*, the Supreme Court addressed the question of “whether parents, either on their own behalf or as representatives of the child, may proceed in court [in a special-education appeal under the IDEA] unrepresented by counsel though they are not trained or licensed as attorneys.”<sup>132</sup> The Court held that non-lawyer parents of a child with a disability *may* represent themselves and the interests of their children pro se in federal court, because IDEA grants parents independent, enforceable rights that include the entitlement to a free appropriate public education for their child.<sup>133</sup> The Court premised its conclusion on recognition that

[a]ll concede that . . . parents ha[ve] the statutory right to contribute to this process [of developing their child's independent educational program to ensure the child's access to a free appropriate public education] and, when agreement [can] not be reached, to participate in administrative proceedings including what the Act refers to as an “impartial due process hearing.”<sup>134</sup>

The Court then determined that because “[t]he parents enjoy enforceable rights at the administrative stage . . . it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.”<sup>135</sup>

Through its analysis, the Supreme Court highlighted and affirmed parents' authority to proceed in special-education litigation pro se. Naturally, then, North Carolina ALJs see a good number of pro se parents in special-education due-process proceedings. Given the complexity of the law in this

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<sup>130</sup> School-system parties were represented by counsel in 100% of the cases in which it was possible to determine from the written ALJ decisions whether counsel appeared.

<sup>131</sup> 550 U.S. 516, 533 (2007) (holding that the IDEA provides independent and enforceable rights to parents, and these rights extend to appropriate public education for their children).

<sup>132</sup> *Id.* at 520.

<sup>133</sup> *Id.* at 516.

<sup>134</sup> *Id.* at 519–20 (citing 20 U.S.C. § 1415(f)(1)(A) (2000)).

<sup>135</sup> *Id.* at 526.

area, unrepresented parents may face challenges without some legal training or support.

State Hearing Review Officer Joe D. Walters characterized this challenge poignantly in resolving a second-tier review of a due-process complaint brought by a *pro se* parent against the Cumberland County Schools. He wrote:

This case illustrates the risks a *pro se* parent takes in a due process hearing. There are very specific rules and procedures to follow. Both Petitioners and Respondents are held to the same standard and must follow these rules and procedures. No specific exception is allowed for a *pro se* parent. The rules and procedures are clearly set forth in federal law, state law, federal regulations, and state policies. A failure to follow those rules and procedures can be fatal to a potentially legitimate claim. Regardless of how valid a claim may be, the ALJ and Review Officer are both restricted by the specificity of the applicable laws, regulations, and policies.

The Respondent's attorney [the school system's attorney] must represent his client. In this case, he clearly used the specifics in the law to argue for the Respondent's position. That the Petitioner [parent] perceived this as unfair and did not allow her to present her full case is regrettable, but both parties have the same hearing rights. . . . In this instance, Respondent [school system] exercised those rights to the detriment of the Petitioner's [parent's] case.

The Petitioner [parent], in this case, had several claims that may have succeeded if presented in accordance with the laws, regulations, and policies. The Review Officer, however, does not and cannot decide for the Petitioner simply because Petitioner is a *pro se* parent. To favor a *pro se* parent when they are not following the required procedures would indicate bias in favor of the parent.<sup>136</sup>

State Hearing Review Officer Walter's candid assessment of the impact of proceeding *pro se*, along with research in other states concluding that it is "nearly impossible" for parents to prevail without an attorney,<sup>137</sup> invites a comparison of outcomes in cases in which parents retain legal counsel to represent their interests and in which parents proceed *pro se*.

As noted above, 97 written ALJ decisions issued in North Carolina from 2000 through 2012 form the basis for the analysis in this Article. In the

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<sup>136</sup> *Petitioner v. Cumberland Cty. Schs.*, 12 EDC 03259 (N.C. Office of Admin. Hrgs. July 19, 2012) (State Review Officer decision).

<sup>137</sup> COLKER, *supra* note 24, at 151.

overwhelming majority (89.7%) of the 97 ALJ decisions reviewed, the ALJ stated plainly whether legal counsel appeared on behalf of any, all, or none of the parties to the proceeding. In ten of these decisions (10.3%), however, it was impossible to discern whether the parties were represented in the first-tier due-process proceeding leading to the written ALJ decision.<sup>138</sup>

Of the ten cases in which it was impossible to discern whether any party to the proceeding was represented, most were time barred or failed to state a claim properly. These procedural and pleading errors might suggest that the petitioners in those cases were pro se, but lawyers make these mistakes, too. This analysis thus treats as non-determinative all ten cases in which the ALJ decision did not clearly state whether a party was represented. All cases non-determinative on representation status were excluded from the analysis of that factor. This means the total number of cases considered in this sub-section of the study is 87.

Pro se petitioners account for just over half (54%) of the petitioners in first-tier due-process proceedings in which it is possible to discern from the written ALJ decision whether parties retained counsel. This 12-year study identified 45 written first-tier decisions with pro se petitioners.

All (100%) of the pro se petitioners in these cases were parents of children with disabilities. None (0%) of the identified pro se petitioners in the period covered by this study were school systems.<sup>139</sup>

Pro se respondents account for only 2.3% of the respondents in first-tier due-process proceedings in which it was possible to discern from the written ALJ decision whether parties retained counsel.<sup>140</sup> Again, all (100%) of

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<sup>138</sup> See *Student v. Warren Cty. Bd. of Educ.*, No. 00 EDC 0817 (State Review Officer decision) (missing ALJ decision required reliance on State Hearing Review Officer decision to discern what happened at the first-review, and although the parent was represented before the SRO, it remains unclear whether the parent was represented before the ALJ at the first-tier hearing); *Student v. Caldwell Cty. Sch.*, No. 01 EDC 0083 (N.C. Office of Admin. Hrgs. Mar. 22, 2001) (same); see also *Parent v. Buncombe Cty. Schs.*, No. 10 EDC 7420 (N.C. Office of Admin. Hrgs. Mar. 22, 2011); *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 11 EDC 0938 (N.C. Office of Admin. Hrgs. Feb. 14, 2011); *Student v. Union Cty. Bd. of Educ.*, No. 10 EDC 6732 (N.C. Office of Admin. Hrgs. Feb. 4, 2011); *Mother v. Buncombe Cty. Schs.*, No. 10 EDC 6857 (N.C. Office of Admin. Hrgs. Nov. 22, 2010); *Student v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, No. 10 EDC 2793 (N.C. Office of Admin. Hrgs. Sept. 17, 2010); *Student v. Buncombe Cty. Bd. of Educ.*, No. 09 EDC 4879 (N.C. Office of Admin. Hrgs. Sept. 8, 2009); *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 05 EDC 0731 (N.C. Office of Admin. Hrgs. July 18, 2005); *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 05 EDC 0700 (N.C. Office of Admin. Hrgs. July 18, 2005).

<sup>139</sup> Of course, it is possible that there was a pro se school-system petitioner among those in the ten cases in which it is impossible to determine whether the parties had counsel at the first-tier hearing. This Article neither proves nor disproves that possibility.

<sup>140</sup> See *Cabarrus Cty. Bd. of Educ. v. Parent*, No. 04 EDC 1131 (N.C. Office of Admin. Hrgs. Aug. 12, 2004); *Cumberland Cty. Bd. of Educ. v. Father*, No. 01 EDC 1802 (N.C. Office of Admin. Hrgs. Jan 2002).

the pro se respondents in these cases were parents of children with disabilities. None (0%) of the identified pro se respondents were school systems.<sup>141</sup>

Given the frequency with which parents appear pro se in special-education litigation, one might intuit that this approach frequently yields favorable results. It generally does not.<sup>142</sup>

Pro se parents prevailed on *all* issues in only 1 of the 45 cases initiated and prosecuted by pro se parent petitioners.<sup>143</sup> In other words, pro se parent petitioners who pressed their due-process complaints forward through a hearing to issuance of a written ALJ decision prevailed on their entire claim only 2.2% of the time. Notably, in the single case in which a pro se parent petitioner prevailed on all claims presented, the parent had assistance from a non-attorney advocate.<sup>144</sup> As such, while this study included the parent as a pro se parent because she did not retain *legal* counsel, the prevailing parent did have *some* counsel and assistance.

Pro se parents prevailed on *at least one* issue in 5 of the 45 cases initiated and prosecuted by pro se parent petitioners.<sup>145</sup> In other words, pro se parent petitioners who pressed their due-process complaints forward through a hearing to issuance of a written ALJ decision prevailed on *something*, but not necessarily everything, presented in their complaint 11.1% of the time. Of course, one of the five cases in which a pro se parent prevailed on at least one issue is *the same* case counted above, in which the pro se parent prevailed on all issues with the assistance of a non-attorney advocate. Notably, of the remaining four cases in this group, two involved the same parent.

Taken together, these facts about pro se parent petitioners produce a noteworthy data point. Over the 12-year period covered in this study, only four

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<sup>141</sup> Again, of course, it is possible that there was a pro se, school-system respondent among those cases in which it is impossible to determine whether the parties had counsel. This Article neither proves nor disproves that possibility.

<sup>142</sup> See Weber, *supra* note 23, at 509 (recognizing after surveying the literature that although parents “do win” when they appear pro se, “the rate of winning goes up dramatically when [parents] have attorney representation”).

<sup>143</sup> Student v. Harnett Cty. Bd. of Educ., No. 02 EDC 1461 (N.C. Office of Admin. Hrgs. Dec. 23, 2002). It is statistically significant ( $p = .0003$ ), using a Chi-squared test in which  $p$  equals the likelihood that this would happen by chance, that parents prevail so infrequently on all issues in a case when they appear pro se.

<sup>144</sup> *Id.*, slip op. at 1 (indicating that the parent enjoyed the assistance of a non-attorney advocate).

<sup>145</sup> Student v. T.D., No. 09 EDC 2329 (N.C. Office of Admin. Hrgs. Dec. 2009); Student v. T.D., No. 09 EDC 2328 (N.C. Office of Admin. Hrgs. Dec. 2009); Student v. Charlotte-Mecklenburg Bd. of Educ., No. 07 EDC 1074 (N.C. Office of Admin. Hrgs. Aug. 30, 2007); Student v. Harnett Cty. Bd. of Educ., No. 02 EDC 1461 (N.C. Office of Admin. Hrgs. Dec. 23, 2002); Mr. C. v. Union Cty. Pub. Schs., No. 02 EDC 0622 (N.C. Office of Admin. Hrgs. Nov. 21, 2002). It is statistically significant ( $p = .00006$ ), using a Chi-squared test in which  $p$  equals the likelihood that this would happen by chance, that parents so infrequently prevail on *something*, at least one issue, in a case when they appear pro se.

parents have successfully resolved a claim or part of a claim without the assistance of an attorney at the first-tier impartial due-process procedure.

Parents have also appeared unrepresented as respondents in two due-process proceedings initiated by school systems. These pro se parent respondents lost in both instances.<sup>146</sup> No pro se parent respondent prevailed during the period covered by this study.

Of the 87 written ALJ decisions in which representation of the parties could be clearly established, parents appeared pro se, as noted above, in 47 instances (45 times as a petitioner and twice as a respondent).<sup>147</sup> Parents appeared through legal representation in 40 instances (39 times as a petitioner and once as a respondent).<sup>148</sup> In other words, parents appeared unrepresented 54% of the time and through legal counsel 46% of the time.

Represented parent petitioners prevailed on *all* issues in their due-process complaints in 12 of the 39 cases in which parents petitioned through an attorney.<sup>149</sup> In other words, represented parent petitioners who pressed their due-process complaints forward through a hearing to issuance of a written ALJ decision prevailed on their *entire* claim 30.8% of the time.<sup>150</sup>

Parent petitioners prevailed on *at least one* issue in 20 of the 39 cases in which they retained legal counsel to initiate and prosecute their due-process complaints. In other words, represented parent petitioners who pressed their

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<sup>146</sup> See *Cabarrus Cty. Bd. of Educ. v. Parent*, No. 04 EDC 1131 (N.C. Office of Admin. Hrgs. Aug. 12, 2004); *Cumberland Cty. Bd. of Educ. v. Father*, No. 01 EDC 1802 (N.C. Office of Admin. Hrgs. Jan. 2002). Given the small sample size (3) of parent respondents, this loss rate does not show statistical significance using a Chi-squared test, and no inferences can be drawn from this result. Here,  $p = .08$ , and it must be less than  $.05$  to indicate significance. Nonetheless, these results offer an accurate historical reflection of the outcomes in these cases.

<sup>147</sup> See *Cabarrus Cty.*, No. 04 EDC 1131; *Cumberland Cty.*, No. 01 EDC 1802.

<sup>148</sup> See *Cumberland Cty. Bd. of Educ. v. Mr.*, No. 00 EDC 0465 (N.C. Office of Admin. Hrgs. Feb. 12, 2001).

<sup>149</sup> See *Student v. Orange Cty. Bd. of Educ.*, No. 08 EDC 2969 (N.C. Office of Admin. Hrgs. June 18, 2009); *Student v. Cabarrus Cty. Bd. of Educ.*, No. 07 EDC 2339 (N.C. Office of Admin. Hrgs. Aug. 29, 2008); *Student v. Granville Cty. Bd. of Educ.*, No. 07 EDC 1605 (N.C. Office of Admin. Hrgs. Nov. 29, 2007); *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 1129 (N.C. Office of Admin. Hrgs. Feb. 7, 2007); *Student v. Charlotte-Mecklenburg Bd. of Educ.*, No. 06 EDC 1284 (N.C. Office of Admin. Hrgs. Jan. 2007); *Student v. New Hanover Cty. Sch. Bd. of Educ.*, No. 06 EDC 0500 (N.C. Office of Admin. Hrgs. Aug. 25, 2006); *Father v. Randolph Cty. Sch. Bd. of Educ.*, No. 05 EDC 1543 (N.C. Office of Admin. Hrgs. Apr. 18, 2006); *Parents v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, No. 03 EDC 1637 (N.C. Office of Admin. Hrgs. June 20, 2005); *Father v. Randolph Cty. Sch. Bd. of Educ.*, No. 01 EDC 1263 (N.C. Office of Admin. Hrgs. Aug. 16, 2002); *Parent v. Johnston Cty. Schs.*, No. 02 EDC 0067 (N.C. Office of Admin. Hrgs. June 21, 2002); *Ms. v. Wake Cty. Bd. of Educ.*, No. 01 EDC 0204 (N.C. Office of Admin. Hrgs. Feb. 27, 2002); *Mr. L. v. Hickory Pub. Schs.*, No. 01 EDC 0878 (N.C. Office of Admin. Hrgs. Dec. 13, 2001).

<sup>150</sup> It is statistically significant ( $p = .0003$ ), using a Chi-squared test in which  $p$  equals the likelihood that this would happen by chance, that parents would prevail so much more frequently on all issues in a case when they appear represented as compared to pro se.

due-process complaints forward with the assistance of legal counsel through a hearing to issuance of a written ALJ decision prevailed on *something*, although not necessarily everything, in their complaints 51.3% of the time.<sup>151</sup>

Over the 12-year period covered in this study, only one written ALJ decision reflects a case with a represented parent respondent in a due-process proceeding initiated by a school system. The represented parent respondent prevailed in that case.<sup>152</sup>

The following table reflects some of the data described above in this section. This format facilitates side-by-side comparisons of outcomes between cases where parents of children with disabilities appear pro se and cases where parents appear through legal counsel. The table illustrates each of the following pieces of data: (1) the number of due-process complaints filed and pursued through a full hearing by particular types of parents (pro se versus represented petitioners and respondents) from 2000 through 2012, (2) the percentage and number of complete “wins” involving each type of parent over the same period, and (3) the percentage and number of cases in which each type of parent prevailed on at least one issue in the written ALJ decision issued in the case.<sup>153</sup>

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<sup>151</sup> It is worth emphasizing that this win rate for represented parents is statistically significant, exceeding the expected win rate, using a Chi-squared test ( $p = .00006$ ). Considering similar data from another perspective, it is interesting to note that the represented parent petitioners lost their entire claims only 48.7% of the time, in 19 cases.

<sup>152</sup> *Cumberland Cty.*, No. 00 EDC 0465 (illustrating a represented parent’s success as a respondent in overcoming a school system’s attempt to completely exclude a student with a disability as a dangerous student under a provision of the IDEA that has since been substantially revised).

<sup>153</sup> Some of the outcomes reflected in this chart were appealed to the second-tier administrative review before a State Hearing Review Officer. In those cases, the State Hearing Review Officer may (or may not) have reversed some of the ALJ outcomes during the second-tier review. This Article does not contain data on the rate at which parents, pro se or represented, pursue second-tier administrative review or the outcomes of such appeals.

Type of Parent	Percentage of claims in which this type of parent prevailed on <u>all issues</u> .	Percentage of claims in which this type of parent prevailed on <u>at least one issue</u> .
Pro se Petitioner n = 45	2.2% n = 1* *This parent was not entirely pro se. She had a <i>non-attorney advocate</i> representing her.	11.1% n = 5* *As acknowledged to the left, one of these parents was not entirely pro se. And two of these cases involved the same parent.
Pro se Respondent n = 2	0% n = 0	0% n = 0
Represented Petitioner n = 39	30.8% n = 12	51.3% n = 20
Represented Respondent n = 1	100% n = 1	100% n = 1

The Author emphasizes again that the cause of the outcomes reflected in the ALJ decisions included in the chart above cannot be determined from the information presented. There was no means by which the Author could determine, for example, whether parents achieve higher success rates with attorneys because attorneys take only the strongest cases, because they navigate the procedure better, or because of some other reason or combination of reasons. The Author notes, however, that in the District of Columbia where “legal counsel nearly always represent[s]” parent petitioners, the parental success rate is at 57%, similar to North Carolina’s 51.3% success rate in the group of cases in which legal counsel represented parents and in contrast to North Carolina’s 11.1% success rate for unrepresented parents.

Ultimately, although the data in this study of North Carolina’s first-tier decisions correlates parents’ representation status with greater likelihood of parental success in first-tier special-education due-process proceedings, it does not demonstrate causation.<sup>154</sup>

#### 4. Age of the Child and the Type of Disability Do Not Correlate with Particular Outcomes in Tier-One Decisions and/or Likelihood of Representation, with Two Exceptions

Speculation abounds about whether parents of children with particular disabilities are more likely to litigate than others. Education observers have

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<sup>154</sup> The Pearson’s correlation coefficient representing the strength of this relationship is  $r = .455$ . Pearson’s correlation coefficients between .3 and .5 are generally considered to be medium strength correlations. Anything at .5 or higher is considered to be a high strength correlation.

suggested, often based on intuition, that special-education litigation is more or less likely at certain ages or grades. In North Carolina, however, given the sample size in this research, these independent variables indicate no statistically significant impact on the likelihood that a parent will bring a due-process complaint, prevail through this process, or seek legal representation—with two exceptions. Parents of children with autism across various ages are more likely than other parents to secure legal representation for first-tier hearings in special-education disputes. And parents of pre-kindergarten children with autism persisted in special-education disputes through full hearing and written decision at a statistically significantly higher rate than parents of children with other disabilities.<sup>155</sup>

Of the 97 cases considered, not all identified the child's age or disability. When a claim was dismissed on procedural grounds, as beyond the statute of limitations, for example, ALJs had no reason to identify the child's age or disability, and their decisions made no mention of them. Additionally, in some instances, the child's age, grade, and/or disability were redacted to protect the confidentiality of the child. The total number of cases examined in which the child's age or grade<sup>156</sup> was identified was 76. The total number of cases in which the child's disability was identified was 65.

Out of the 76 cases that identified the child's age or grade, 6 involved a child in the 2 years of pre-kindergarten (ages 3 and 4); 27 involved a child in the 6 years of elementary school (ages 5 through 10); 13 involved a child in the 3 years of middle school (ages 11 through 13); and 30 involved a child in the 4 years of high school (ages 14 through 18).<sup>157</sup>

Although these totals appear at first blush to present a relative increase in fully litigated contested cases involving high school children with disabilities, given the small sample size, this difference is not statistically significant.<sup>158</sup> The grade of the child with a disability at issue has no

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<sup>155</sup> Causation cannot be determined from these numbers, and factors beyond the scope of this research may influence this outcome. Notably, three of the four parents of pre-kindergarten children with autism had legal counsel and the fourth parent was an attorney himself.

<sup>156</sup> Of the decisions in which a child's age and/or grade are identified, some decisions identify only the child's grade, others identify only the child's age, and still others identify both. For purposes of this analysis, the Author used common age ranges for grades in North Carolina to establish grades for students whose grades were not identified. It then utilized grade to determine whether a particular grade or school type was more or less likely to appear in a contested due-process proceeding litigated to full decision by an ALJ.

<sup>157</sup> Generally speaking, the ages identified in the text correspond with the grades specified. There are a few instances, of course, in which a child had been held back for a year or two, and his age exceeded the ages typically found in a particular group of grades. In these instances, the child was included in the grade grouping specified for the child, regardless of the child's age.

<sup>158</sup> Overall, this sample included an average of 5.07 first-tier written decisions per grade. When broken down by grade, it included an average of only 3 first-tier written decisions per grade in the pre-school years, 4.5 first-tier written decisions per grade in elementary school, 4.3

statistically significant bearing on the likelihood that a parent will press a claim through a hearing to a written decision by an ALJ.

Similarly, and as one would expect, the win/loss rates for parents at each grade level (pre-kindergarten, elementary, middle, and high school) are constant, with no statistically significant variance.<sup>159</sup> In other words, parents are no more likely to win or lose should they bring a claim at a particular stage in their child's education.

The same is true with respect to the likelihood that parents will proceed *pro se*, without legal representation. Although more parents of high school students appeared *pro se* than did parents of students at other stages, this heightened ratio is not statistically significant applying Pearson's Chi-squared test to compare this sample to the population at large.<sup>160</sup>

In the group of 65 cases that identified the child's disability or disabilities, 38 cases (58.5%) involved a child with multiple disabilities.<sup>161</sup> In all of these cases, a wide variety of disabilities were identified. This group included, *inter alia*, anxiety disorder, Asperger's Syndrome, attention deficit hyperactivity disorder, autism, bipolar disorder, blindness, cerebral palsy, deafness, depression, developmental delay, diabetes, dyslexia, emotional disturbance, Fragile X Syndrome, obsessive-compulsive disorder, oppositional defiant disorder, quadriplegia, seizure disorder, and speech impairments.<sup>162</sup>

Of the cases presented, two notable patterns emerge with respect to autism. First, in the six pre-kindergarten cases, involving children ages three and four, autism is identified as one of the child's disabilities in four of the six cases. In other words, autism appeared in 66.6% of the pre-kindergarten decisions over this 12-year period. In contrast, autism only appeared in 10 of the 59 cases across other age groups; this means that from kindergarten through high school, autism appeared in only 16.9% of the decisions over this 12-year

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first-tier written decisions per grade in middle school, and a more substantial 7.5 first-tier written decisions per grade in high school. Nonetheless, this apparent increase in fully litigated cases in high school is not statistically significant ( $p = .07$ ) using a Chi-squared test.

<sup>159</sup> The Chi-squared test produced a p-value of .90, indicating no significant difference from expected values across grade levels.

<sup>160</sup> The Chi-squared test produced a p-value of .52, indicating no significant difference from expected values across grade levels.

<sup>161</sup> Three additional cases asserted the child at issue had "multiple disabilities" without specifying those disabilities with any greater precision. *See* Student v. Buncombe Cty. Sch. Dist. Bd. of Educ., No. 08 EDC 2971 (N.C. Office of Admin Hrgs. Aug. 17, 2009); Student v. Hertford Cty. Bd. of Educ., No. 09 EDC 2330 (N.C. Office of Admin. Hrgs. July 16, 2009); Student v. Granville Cty. Bd. of Educ., No. 07 EDC 1605 (N.C. Office of Admin. Hrgs. Nov. 29, 2007). These 3 cases were not included in the 65 with identified multiple disabilities.

<sup>162</sup> One interesting observation is that of the 65 cases in which disability was specified, 22 included a diagnosis of Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD), and most diagnoses of ADD or ADHD appeared co-morbid with other diagnoses. Only four cases in the sample studied involved a child with ADD or ADHD and no other co-diagnosis.

period. The disproportionate number of fully litigated cases involving autism in pre-kindergarten is a statistically significant anomaly, even taking into account the small sample size.<sup>163</sup>

Second, parents of all children with autism were more likely than parents of children with any other disability to retain legal counsel for their first-tier special-education hearing. Of the 14 autism cases in this sample, 12 (85.7%) had representation. In contrast, only 22 of the 49 cases (44.9%) in which representation status was clear in the written decision, in which disability was specified, and in which autism was not involved, had representation. This difference in the rate of representation in cases involving autism is statistically significant.<sup>164</sup>

Recognizing that autism stands out as a disability with outlier results invites additional research here.<sup>165</sup> This is particularly so because these parents have accessed legal representation, which correlates with greater success rates for families, at higher rates than parents of children with other disabilities.<sup>166</sup> More broadly, however, neither age nor disability of the child shows a statistically significant impact on outcomes or parental choices regarding representation in special-education due-process proceedings.

#### B. Traditional School-System Data

School systems initiate due-process proceedings in markedly fewer numbers than parents of children with disabilities. To keep these cases in context, this section begins with data demonstrating that most school systems over the 12-year period studied were not involved in hearings litigated through to a full, written decision *at all*, neither as a petitioner nor as a respondent.<sup>167</sup>

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<sup>163</sup> Statistical significance using Pearson's Chi-squared test demonstrates that this occurrence was unlikely to have been by chance ( $p = .0015$ ).

<sup>164</sup> Statistical significance using Pearson's Chi-squared test demonstrates that this occurrence was unlikely to have been by chance ( $p = .0018$ ).

<sup>165</sup> Professor Colker noted in her research that parents of children with autism are more likely than parents of children with other disabilities to bring due process in Ohio, Florida, and California, but not in D.C. COLKER, *supra* note 24, at 148, 161, 211.

<sup>166</sup> Other scholars have examined access to representation and hearing success using parental wealth as a factor. *See, e.g.*, 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, 156–59 (2011). Wealth information was not available to this Author, making it impossible for this Author to determine whether parental representation of parents of children with autism, or other disabilities, correlated with parental wealth.

<sup>167</sup> It is likewise true that most North Carolina parents of children with disabilities are not involved in due-process proceedings that extend through to full, written decision following a first-tier hearing before an ALJ. *See supra* Part IV.A (offering explanation of similar data on parents).

### 1. Most Traditional School Systems Are Not Involved in Due-Process Proceedings

North Carolina's cities and municipalities operate 115 school systems across the State. Of those 115 traditional public school systems, only 31 over the period studied were involved in special-education due-process proceedings that have gone to full hearing and required a written decision by an ALJ. This means that only 27% of North Carolina's traditional public school systems have been involved in contested complaints—in this context—over the past 12 years. Most traditional public school systems have avoided special-education disputes or resolved them prior to a full hearing culminating in a written decision by an ALJ.

North Carolina maintains 2,613 traditional public schools.<sup>168</sup> Of those schools, only 93 at most (excluding from the total number of cases considered in this study the 4 cases involving charter schools) have been involved in these contested special-education matters. This means that at most 3.5% of North Carolina's traditional public schools have been involved in contested special-education disputes that could not be resolved prior to a written decision by an ALJ.

It is impossible, however, to determine which schools, in particular, have been involved in these cases. In most available ALJ decisions, the name of the school attended by the child with a disability was redacted as confidential student information. But even assuming that each case involving a traditional public school identifies a “new” school that was not a party to another due-process proceeding over the period studied,<sup>169</sup> it is clear that the overwhelming majority of the State's traditional public schools, at least 96.3% of them, were not involved in contested special-education disputes over the 12-year period studied.

### 2. School Systems Rarely Initiate Claims

School systems initiated the proceedings in only 3 out of 97 cases that persisted through issuance of a final ALJ decision. In other words, since 2000, school systems have initiated only 3.1% of all due-process matters that required a full hearing before resolution. And although parents have initiated due-

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<sup>168</sup> Derrick Meador, *North Carolina Education*, ABOUT EDUCATION, <http://teaching.about.com/od/ProfilesInEducation/a/North-Carolina-Education.htm> (last visited Nov. 6, 2015).

<sup>169</sup> This is unlikely given that the decisions evaluated suggest by their particulars, in some instances, that the same parent and student are involved in multiple claims in a single year. But it cannot be conclusively established because the identities of the parent and child are redacted from these decisions as required by law.

process proceedings each year over the period studied, a school system has not initiated a fully tried due-process proceeding since 2004.<sup>170</sup>

With a sample size this small, the data reflected cannot be understood to represent trends. Instead, it simply informs about the outcomes in this group of cases. With that caveat, this Article offers the following data.

One initial noteworthy observation appears: although the set of due-process complaints initiated by school systems from 2000 through 2012 is much smaller than the set of due-process complaints initiated by parents over the same period, the “win rate” is larger.

School-system petitioners prevailed on *all* issues in their complaints 66.7% of the time. Of the three due-process complaints initiated by school-system petitioners, school-system petitioners prevailed in two. Both “winning” due-process complaints involved school-system efforts to evaluate a child to determine the child’s eligibility for special educational services over parents’ objections. Both “winning” due-process complaints involved pro se parent respondents.<sup>171</sup>

A school-system petitioner has lost only once.<sup>172</sup> In that case, the school system sought to establish that a child with a disability could be excluded from school as a danger to himself and others.<sup>173</sup> The ALJ determined that the school system failed to meet its burden of proof and did not demonstrate that maintaining the child in his current educational placement was substantially likely to result in injury to the child or others.<sup>174</sup> This school-system complaint involved a *represented* parent respondent.<sup>175</sup>

The following table reflects some of the data described above in this section. It illustrates, in a format intended to facilitate side-by-side comparisons of tier-one outcomes, each of the following pieces of data: (1) the number of due-process complaints filed and pursued through a full hearing by both parents of children with disabilities and schools systems from 2000 through 2012, (2) the number of cases in which the particular petitioner prevailed on all issues

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<sup>170</sup> The only three instances in the data sample considered in this analysis in which a school system initiated a due-process proceeding occurred in 2000, 2001, and 2004.

<sup>171</sup> See *supra* Part IV.A.3 (offering an analysis of the statistical significance of the correlation between parental representation and favorable parental outcomes and demonstrating the increased likelihood of school-system success in claims brought by pro se parents).

<sup>172</sup> See *Cumberland Cty. Bd. of Educ. v. Mr.*, No. 00 EDC 046 (N.C. Office of Admin. Hrgs. Feb. 12, 2001).

<sup>173</sup> *Id.*, slip op. at 2. The federal authority relied upon to initiate this due-process complaint was repealed and replaced in the 2004 reauthorization of the IDEA.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 3.

over that same period,<sup>176</sup> and (3) the percentage of cases in which each type of petitioner prevailed before an ALJ on all issues presented for hearing.<sup>177</sup>

Type of Petitioner	Percentage of cases pursued through issuance of a written ALJ decision from 2000 through 2012 in which this party prevailed on all claims presented in their complaint.
Parent of a Child with a Disability (both pro se and represented) n = 94	13.8% n = 13
School System Educating a Child with a Disability n = 3	66.7% n = 2

As noted, the cause of the disparate outcomes reflected in the first-tier ALJ decisions considered here cannot be determined from the information presented. And the sample size in cases in which complaints were initiated by school systems is too small to extract outcome trends.<sup>178</sup>

But other data points discernable from these records can be and have been explored. As noted above, of the factors considered in this study, the variable most highly correlated with particular outcomes is parental representation by counsel.<sup>179</sup> Even this variable, however, cannot be identified as the cause of the disparate outcomes reflected here based on the study conducted. This research invites further exploration of causal influences on outcomes.

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<sup>176</sup> This table reflects outcomes in cases in which petitioners prevailed on *all issues* identified in their due-process complaints because in a majority of cases, ALJs resolve all issues in favor of a single party. Of the first-tier final ALJ decisions considered in preparation of this Article, 86.6% ended with a single party prevailing on all issues. In only a relatively small minority of cases (13.4%), the ALJ reached a split decision and determined that each party prevailed on portions of the complaint.

<sup>177</sup> Some of the outcomes reflected in this chart were appealed to the second-tier administrative review before a State Hearing Review Officer. In those cases, the State Hearing Review Officer may (or may not) have reversed some of the ALJ outcomes during the second-tier review.

<sup>178</sup> When comparing “win” rates of school petitioners to parent petitioners, the schools’ higher win rate as petitioners is consistent with schools’ overall win rate and does not show statistical significance compared to parent petitioners’ win rates using Pearson’s Chi-squared measure ( $p = .55$ ). This data is offered here only to show historically what has happened in these cases.

<sup>179</sup> See *supra* Part IV.A.3.

### 3. In this Sample, Urban School Systems Were Only Slightly More Likely than Rural School Systems to Face Represented Parents in Due Process, but the Difference Was Not Statistically Significant

Parents of children with disabilities in North Carolina's urban and rural counties are almost equally involved in contested special-education disputes that press through first-tier hearings to written decision. For purposes of this analysis, a county was considered "urban" if it had a population over 250,000 according to 2012 census data. By this measure, Mecklenburg (including Charlotte, North Carolina, and a population of 967,971), Wake (including Raleigh, North Carolina, and a population of 952,143), Guilford (including Greensboro, North Carolina, and a population of 501,018), Forsyth (including Winston Salem, North Carolina, and a population of 357,850), Cumberland (including Fayetteville, North Carolina and a population of 323,011), and Durham (including Durham, North Carolina, and a population of 282,081) counties are included in the "urban" group.<sup>180</sup>

Of the 97 decisions in this 12-year study, 40 (41.2%) arose from claims filed in urban school systems and 57 (58.8%) arose in rural school systems.

In urban systems, 19 out of 36 cases (52.8%) in which representation status was known involved parents with legal representation. In rural systems, 21 out of 51 cases (41.2%) in which representation status is known involved parents with legal representation. Although school systems in urban communities were slightly more likely than school systems in rural communities to face represented parents in due process in the population of cases studied, this difference is not statistically significant given the sample size.<sup>181</sup>

#### C. Charter School Data

School-system *petitioners* prevailed in the first tier of administrative review in 66.7% of all special-education due-process cases they initiated. School-system *respondents* prevailed at the same level of review on at least one issue in 81 of the cases they defended, or 86.2% of the time. These are impressive winning percentages, and they inspire curiosity about whether *all* public school systems—charter and traditional—prevail at equal rates.

This section offers background on charter schools' obligations toward children with disabilities under the IDEA and North Carolina law, considers charter schools' enrollment of children with disabilities, and provides charter

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<sup>180</sup> See *North Carolina Population by Count—Total Residents*, U.S.PLACES.COM, <http://www.us-places.com/North-Carolina/population-by-County.htm> (last visited Nov. 6, 2015).

<sup>181</sup> The difference in representation status between urban and rural communities is not statistically significant using Pearson's Chi-squared test ( $p = .377$ ).

school special-education litigation outcome data derived from final ALJ decisions issued over the 12-year period covered in this study.

The IDEA provides that children in charter schools are entitled to special-education services to the same extent as children in traditional public schools. IDEA's regulations state plainly that "[c]hildren with disabilities who attend public charter schools and their parents retain all rights" under the Act.<sup>182</sup>

The IDEA's regulations distinguish between charter schools that stand alone as independent local educational agencies (LEAs) and charter schools that are part of a network of public schools within an overarching LEA.<sup>183</sup> In North Carolina, charter schools operate as independent LEAs for purposes of the provision of special-education services to children with disabilities.<sup>184</sup> As such, IDEA's regulations require each North Carolina charter school to be individually "responsible for ensuring that the requirements of [the Act] are met."<sup>185</sup>

North Carolina's charter school legislation further emphasized, during the period covered by this research, that a charter school "shall not discriminate against any student on the basis of . . . disability."<sup>186</sup> The State's current legislation continues to provide that a charter school cannot, except as stated in the approved charter document, "limit admission to students on the basis of intellectual ability, measures of achievement or aptitude, athletic ability, [or] disability," among other things.<sup>187</sup>

Despite the clarity in the relevant law, "questions have been raised about whether charter schools are appropriately serving students with disabilities."<sup>188</sup> According to the Government Accounting Office,

Charter schools [have historically] enrolled a lower percentage of students with disabilities than traditional public schools. . . . In school year 2009–2010, which was the most recent data available at the time of our review, approximately 11 percent

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<sup>182</sup> 34 C.F.R. § 300.209(a) (2015); *see also id.* § 300.2(b)(1)(ii) (stating that the provisions of the Act "[a]pply to all political subdivisions of the State that are involved in the education of children with disabilities, including . . . [l]ocal educational agencies [traditional public school systems] . . . and public charter schools").

<sup>183</sup> *Id.* § 300.209(b)–(d).

<sup>184</sup> N.C. GEN. STAT. § 115C-106.3(11)(b) (2015).

<sup>185</sup> 34 C.F.R. § 300.209(c).

<sup>186</sup> N.C. GEN. STAT. § 115C-238.29F(g)(5) (2013) (recodified and amended 2014).

<sup>187</sup> N.C. GEN. STAT. § 115C-218.45(c) (2015) (as amended in the 2015 session, 2015 N.C. Sess. Laws ch. 248, § 3.(b), <http://www.ncleg.net/enactedlegislation/sessionlaws/html/2015-2016/sl2015-248.html>).

<sup>188</sup> U.S. GOV'T ACCOUNTING OFFICE, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 2 (2012), <http://www.gao.gov/assets/600/591435.pdf>.

of students enrolled in traditional public schools were students with disabilities compared to about 8 percent of students enrolled in charter schools.<sup>189</sup>

This statistical disparity holds true in North Carolina, although North Carolina's disparity is not as great as the national one. During the 2009–2010 school year, the most recent year with available data, North Carolina's traditional public schools enrolled 1% more students with disabilities than its charter schools.<sup>190</sup> Notably, this measure does not take into account the nature of the disabilities in the children enrolled in each type of public school. It only takes into account the number of children with a disability of any kind.

Observers of charter school impacts have raised concerns not only that charter schools enroll fewer children with disabilities than traditional public schools, but also that the educational outcomes for those children in charter schools are not as favorable as for the same children in traditional public schools. In North Carolina, though, researchers report mixed educational impacts resulting from charter education of children with disabilities. This research suggests that North Carolina's charter schools generally (when compared to traditional public schools generally) offer some educational benefits and some drawbacks.

According to Stanford University's Center for Research on Educational Outcomes, North Carolina's charter school students with disabilities performed *better* than traditional school students with disabilities on reading assessments<sup>191</sup> but performed *worse* than traditional school students with disabilities on math assessments.<sup>192</sup>

Although charter schools must ensure their students with disabilities receive the education to which they are entitled under the IDEA, and although mixed reviews exist regarding their success in doing that effectively, only four due-process complaints against North Carolina's charter schools have resulted in issuance of a final ALJ decision over the twelve-year period subject to this analysis.<sup>193</sup> The first charter school case to result in issuance of an ALJ decision arose in 2009, and there were two ALJ decisions issued that year. Then, two additional cases arose and were resolved in 2012.

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 8; *see also* STANFORD UNIV. CTR. FOR RES. ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY 18, 39 (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>.

<sup>191</sup> STANFORD UNIV. CTR. FOR RES. ON EDUC. OUTCOMES, *supra* note 190, at 42.

<sup>192</sup> *Id.* at 43.

<sup>193</sup> *See* Student v. Union Acad. Charter Sch., No. 12 EDC 12388 (N.C. Office of Admin. Hrgs. Feb. 4, 2013); Student v. Union Acad. Charter Sch., No. 12 EDC 1501 (N.C. Office of Admin. Hrgs. May 25, 2012); Student v. T.D., No. 09 EDC 2329 (N.C. Office of Admin. Hrgs. Dec. 2009); Student v. T.D., No. 09 EDC 2328 (N.C. Office of Admin. Hrgs. Dec. 2009).

Of the four ALJ decisions issued in due-process complaints against charter schools, the charter schools prevailed on *at least one* issue in 100% of the cases. The charter schools prevailed on *all issues* in 50% of the cases.

Considering the four charter school cases in isolation, then, these schools appear to have fared comparably to traditional public schools<sup>194</sup> in the first-tier administrative review in special-education litigation. In other words, no meaningful difference in litigation outcomes at the first-tier administrative review in special-education cases appears in the data considered.

Notably, however, because the number of charter school decisions available for review is so small, the results produced through this analysis are not reliable to indicate trends. Instead, they may fairly be viewed *only* as reporting on outcomes in these specific instances rather than as a predictor of outcomes in charter school cases generally.<sup>195</sup>

Equally notable, the *cause* of the limited number of fully litigated due-process complaints against charter schools is beyond the scope of this research and cannot be determined from the information available here.<sup>196</sup> Likewise the *cause* of charter schools' high success rate in special-education litigation at the first-tier administrative review cannot be determined from the data available here.

#### V. CONCLUSION: WRAPPING UP AND LOOKING FORWARD

With nearly 100 ALJ decisions in special-education cases catalogued and analyzed, this research is only the beginning. Much work remains to be done, but some strong data trends emerged early.

Most strikingly, attorneys make a material difference. Outcomes overall are "better" for parties who have them. Also notably, the number of fully litigated cases increased in North Carolina over the period studied, even after the addition of new, free-to-the-parties alternative dispute resolution options.

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<sup>194</sup> Charter schools actually fared slightly worse than traditional public schools. Charter schools won outright in only two of four cases (50%). Traditional public schools won outright in 68 out of 93 cases (73.1%). But this difference was not statistically significant using Pearson's Chi-squared measure ( $p = .08$ ).

<sup>195</sup> See *supra* note 146 (noting that  $p = .08$  on this data point).

<sup>196</sup> The sample of charter school decisions may be small for any number of reasons, some suggesting favorable things about the provision of special education in those schools and others suggesting unfavorable things about it. For example, it may be that there are few cases because parents and children are served consistently in accordance with the IDEA and state law or because charter schools respond promptly and effectively to correct errors when they arise. On the other hand, it may be that there are few cases because violations are so egregious that parents abandon charter schools entirely and return to traditional public schools without seeking relief or because charter schools settle cases promptly knowing their violations of the law are apparent and egregious. It is impossible to determine based on the sample presented.

More fundamentally, of course, the IDEA and its state counterpart represent meaningful progress from the pre-legislation era in which parental participation in the educational process for their children with disabilities was criminalized. While parents may not prevail in most cases, particularly when they proceed pro se, their participation is encouraged and protected. Parents know that and exercise their rights, finding at least occasional success in the process.

The broad and ongoing goal of this research remains to identify and communicate information that might assist all participants in the special-education process—public school administrators, educators, resource personnel, and support staff, as well as parents and family members of children with disabilities (along with the attorneys for each)—in realizing the ideal expressed in the IDEA nearly 40 years ago: to accept “[d]isability [as] a natural part of the human experience [that] in no way diminishes the right of individuals to participate in or contribute to society” and to “[i]mprov[e] educational results for children with disabilities”<sup>197</sup> so that they might secure an opportunity to do what they are “fitted to do.”<sup>198</sup>

All involved in special education, in schools and in homes, in courtrooms and in offices, work hard every day to fulfill the law’s objectives. This research seeks and shares its data so that it might inform conversations about how to make this work easier, and less adversarial, for schools and families down the road.

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<sup>197</sup> 20 U.S.C. § 1400(c)(1) (2013).

<sup>198</sup> See JOHN DEWEY, *DEMOCRACY AND EDUCATION* 308 (1944) (stating that “to find out what one is fitted to do and to secure an opportunity to do it is the key to happiness”).