

# Due Process Hearing Systems Under the IDEA: A State-by-State Survey

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## Abstract

The primary mechanism for dispute resolution under IDEA (Individuals with Disabilities Education Act) is a due process hearing. The total number of adjudicated hearings under IDEA has dropped from the high level during the latter part of the 1990s and the early part of the current decade. Yet relatively few jurisdictions, led by the District of Columbia and New York, account for the overwhelming majority of these decisions. This article presents the results of a state-by-state survey of the hearing officer system. This current “snapshot” identifies the key features, including (a) whether the system is one-tier or two-tiered; (b) whether the IHOs are part-time or full-time; (c) whether their legal background is primarily in law or special education; (d) which agency assigns them and its procedures for the assignment; and (e) what is the updated volume of adjudicated hearings—i.e., those conducted to completion resulting in a written decision.

## Keywords

impartial hearing officers, one-tier, two-tier, due process

The Individuals with Disabilities Education Act (IDEA) obligates school districts to identify students with disabilities and provide them with a free and appropriate public education, or “FAPE,” that includes special education services. At times, school districts and parents disagree about whether a child is eligible under the IDEA or whether the proposed services are appropriate. The primary mechanism for dispute resolution under the IDEA is a due process hearing. More specifically, the IDEA regulations [§ 300.507(a)] provide that “a parent or a public agency may file a due process complaint on . . . the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.”

Under the IDEA provision for due process hearings [§ 1415(g)], states have a choice of a one-tier system that is limited to the hearing officer level, or a two-tier system that provides a second officer review level to the administrative dispute resolution system prior to either party resorting to court action. In a one-tier system, the state provides a pool of impartial hearing officers (IHOs)—who in some states are full-time state employees in the role of administrative law judge and in other states are part-time, contracted attorneys or special education personnel—to conduct administrative adjudications. IDEA has historically provided only brief and broad requirements for hearing officers limited to impartiality, prohibiting state education department employment, local district employment (with regard to the child at issue), or other professional conflict of interest [§ 1415(f)(3)(A)].

Because of continuing concerns about the time-consuming and adversarial nature of this administrative dispute resolution mechanism (Goldberg & Kuriloff, 1991; Zirkel, 1994, 2005), Congress included in the amendments to the IDEA, which went into effect on July 1, 2005, new requirements. First, IDEA 2004 added proficiency qualifications for hearing officers, requiring competence in conducting hearings, knowledge of special education law, and ability to write legally appropriate decisions [§ 1415(f)(3)(A)]. This new provision still leaves ample latitude for state-by-state choices as to the background, selection, and part-time versus full-time status of hearing officers. Second, IDEA added the requirement of a “resolution session” as an informal dispute-resolution step prior to a due process hearing [§ 1415(f)(1)(B)]. One of the features of this new procedure is that the school district may not bring its attorney if the parents are not accompanied by their attorney. Whether this new resolution session provision is reducing the number of due process hearings has been subject to speculation (Edwards, 2005).

The continuing contentions about the nature and operation of the one-tier and two-tier systems under IDEA have

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surfaced not only in the mass media (e.g., Golden, 2007) but also in the courts. In two separate suits, parents of children with disabilities unsuccessfully challenged the second tier in Indiana and Pennsylvania, claiming bias in favor of school districts (*J.N. v. Pittsburgh City School District*, 2008; *M.O. v. Indiana Department of Education*, 2009). As another example, first-tier hearing officers have challenged their nonrenewal or termination on substantive and procedural grounds, respectively (*Stengle v. Office of Dispute Resolution*, 2009; *Tyk v. New York State Education Department*, 2003). In light of such public attention, including revised legislation and recent litigation, up-to-date information is needed concerning the characteristics of the state-by-state hearing officer systems under IDEA.

The primary purpose of this article is to provide a current “snapshot” of the hearing officer systems in each state in terms of key features, including (a) whether the system is one-tiered or two-tiered; (b) whether the IHOs are part-time or full-time; (c) whether their legal background is primarily in law or special education; (d) which agency assigns them and its procedure for the assignment; and (e) what is the updated volume of adjudicated hearings—i.e., those conducted to completion resulting in a written decision. Policymakers at the national and state levels as well as the various stakeholders in their constituencies would benefit from such updated information, particularly in light of the limited previous research. It may also help stimulate further policy research, such as the outcomes of first and second tier administrative adjudications upon judicial review.

## Previous Research

Early research concerning IDEA due process hearings has explored such topics as the characteristics of hearing officers in North Carolina (Turnbull, Strickland, & Turnbull, 1981) and the issues of the hearings in California (Kirst & Bertken, 1983), Illinois (Kammerlohr, Henderson, & Rock, 1983), and Massachusetts (Budoff, Orenstein, & Abramson, 1981). More recently, studies have explored the costs of hearings (Chambers, Harr, & Dhanani, 2003), their outcomes in terms of wins/losses (Zirkel & D’Angelo, 2002), and their increasing legal complexity (Zirkel, Karanxha, & D’Angelo, 2007).

In the only previous survey of IDEA hearing officer systems across the states and the District of Columbia (D.C.), Katsiyannis and Klare (1991) found that, in 1988, 25 states (including D.C.) had one-tier systems; the state education agency (SEA) administered the system in 46 states (including D.C.), with the state office of administrative hearings doing so in the remaining 5 states; 18 states exclusively used lawyers as hearing officers; the number of hearing officers varied from 1 in Kansas to 300 in Arizona; and the total number of “rendered decisions” was 1,736.

More recent research has focused on two of those features. First, the longitudinal frequency of IDEA hearings has been the subject of a continuing line of research. In the most recent such study, Zirkel and Gischlar (2008) found that the total number of adjudicated hearings had a steadily upward trajectory from 1991 to 1997 followed by what they characterized as “a rather uneven plateau” (p. 25) averaging approximately 2,800 hearings through the last year of the study, 2005. Moreover, they confirmed and updated prior research (e.g., Government Accounting Office, 2003) that a handful of states, starting with the D.C., New York, and New Jersey, accounted for the vast majority of the hearings and that although the overall rankings changed considerably when the totals were adjusted in relation to special education enrollments, these three jurisdictions remained the leaders by far.

Moreover, Zirkel and Gischlar (2008) identified various limitations in the frequency data. First, they confirmed a limitation, originally observed in the underlying study (Ahearn, 2002), that the states did not follow a uniform starting and ending date for each year; some used calendar years, whereas others used fiscal or school years. Second, they identified and statistically adjusted for another limitation—missing data for some years for various states. Finally, they pointed out the differing interpretations among the states of “adjudicated hearings,” such as variance in the treatment of interim decisions, dismissal decisions, or those merely approving settlement agreements.

Second, in Ahearn’s (2002) study that focused on the longitudinal trends in the frequency of due process hearings, she reported that the number of states that had opted for a one-tier system had increased from 27 in 1991, including D.C., to 35 in 2001. The literature lacks more recent and comprehensive information concerning such key features of the IDEA’s central dispute resolution mechanism.

## Method

The purpose of this study was to obtain an updated picture of the IDEA hearing officer systems across the states and D.C. with regard to selected key features, such as their structure, IHOs, and volume. In March 2009, we emailed a survey form to the special education director of every state and D.C. asking them to either respond directly or to forward the form to their designee for this purpose. After extensive follow-up emails and telephone calls, we obtained usable responses from all 50 states and D.C.

## Results

There were a total number of 2,033 adjudicated hearings during the last available year (2008–2009) and the highest five jurisdictions were as follows:

**Table 1.** Distribution of Jurisdictions Into One-Tier and Two-Tier Systems

Tier	State
One tier ( $n = 41$ )	AL, AK, AR, AZ, <u>CA</u> , CT, DE, <b>DC</b> , FL, GA, HI, ID, <u>IL</u> , IA, LA, ME, <u>MD</u> , <u>MA</u> , MI, MN, MS, MO, MT, NE, NH, <b>NJ</b> , NM, ND, OR, <b>PA</b> , RI, SD, TN, <u>TX</u> , UT, VT, VA, WA, WV, WI, WY
Two tiers ( $n = 10$ )	CO, IN <sup>a</sup> , KS, KY, NV, <b>NY</b> , NC, OH, OK, SC

Note: 10 most active states (including D.C.) underlined, with top 5 in bold.  
<sup>a</sup>State plans to change to one tier.

District of Columbia: 880, New York: 550, California: 119, New Jersey: 89, and Pennsylvania: 84.

These four states and D.C. accounted for 85% of the total adjudicated hearings in the country. Adding in the hearings for the next five states—Maryland ( $n = 44$ ), Hawaii ( $n = 38$ ), Texas ( $n = 35$ ), Massachusetts ( $n = 34$ ), and Illinois ( $n = 29$ )—moved the proportion up to 91% of the total hearings.

Table 1 shows which jurisdictions have one-tier and two-tier IHO systems. The nine most active states and D.C. are underlined with the top four states and D.C. additionally set in bold font. A review of Table 1 reveals that 40 states and D.C. have a one-tier system, and that Indiana also plans to join this large majority. It additionally reveals that all of the five most active jurisdictions, with the major exception of New York, have one-tier systems.

Table 2 groups the jurisdictions in terms of whether the IHOs are part-time or full-time. Table 2 illustrates that almost two-thirds of the jurisdictions use part-time IHOs, i.e., independent contractors, although a slight majority of the most active ones use full-time IHOs. The SEA directly administers the part-time hearing officer systems with the following five notable exceptions: Kansas, New York, and South Carolina—by the local education agency (because of two-tier systems); Oklahoma—by a state university (under contract with the SEA); and Virginia—by the state supreme court (in coordination with the SEA). Similarly, an office of administrative law that provides a central panel of administrative law judges (ALJs) for various state agencies was the home of the full-time IHOs, with two notable exceptions: in Massachusetts, where the office of IHOs is a semi-autonomous bureau of the SEA; and in Pennsylvania, where an intermediate unit administers the “Office of Dispute Resolution.” In both of these cases, the IHOs exclusively specialize in special education cases. In some of the central panel states, such as California and North Carolina, a subset of ALJs handle most of the special education cases.

Table 3 shows the jurisdiction where the responding SEA representative reported that the predominant proportion, i.e., more than 50%, of the IHOs had a major background directly in the fields of law (specifically, attorneys)

**Table 2.** Distribution of Jurisdictions Into Part-Time and Full-Time IHOs

Time	State
Part-time ( $n = 33$ )	AL, AK, AR, CO, CT, <b>DC</b> , DE, ID, <u>IL</u> , IN, IA, KS <sup>a</sup> , KY, LA, ME, MS, MO, MT, NE, NV, NH, NM, <b>NY</b> <sup>b</sup> , OH, OK <sup>a</sup> , RI, SC <sup>a</sup> , <u>TX</u> , UT, VT, VA <sup>a</sup> , WV, WY
Full-time ( $n = 18$ )	AZ, <b>CA</b> , FL, GA, <u>HI</u> , <u>MD</u> , <u>MA</u> <sup>b</sup> , MI, MN, NJ, <b>NC</b> , ND, OR, <b>PA</b> <sup>b</sup> , SD, TN, WA, WI

Note: 10 most active states (including D.C.) underlined, with top 5 in bold.  
<sup>a</sup>Jurisdictions where the administering agency is not the state education department. <sup>b</sup>Jurisdictions where the administering agency is not a state office of administrative hearings.

and/or special education (designated on the survey form as “e.g., a degree and/or a teaching position”).

An examination of Table 3 reveals that a predominant proportion of the IHOs reportedly have a major legal background in the vast majority of jurisdictions. Other states supplement at the margins those specifically listed in this first category. More specifically, Delaware and Missouri each use a tripartite panel system with an attorney on every panel; and Mississippi, Nevada, and South Carolina each reported that half of its IHOs were attorneys. Conversely, this table shows that having a predominant proportion of IHOs with major special education background is the exception rather than the rule, being limited at most to the six listed states. This characterization is subject to question for all of them except Iowa. For example, Maine, South Dakota, and most notably Maryland—because it has 57 IHOs—reported that 100% of the IHOs had “major” backgrounds (with the definition above by way of example) in both special education and law. Finally, all of the most active jurisdictions, except purportedly Maryland, predominate in favor of attorney IHOs without a major background in special education.

Table 4 shows the distribution of states and D.C. in terms of each system’s method of assigning IHOs. As Table 4 reveals, the majority of states use a direct sequence, or rotational, method for assigning IHOs. In a relatively distant second place, 10 jurisdictions—including 3 of the 5 most active ones—use random assignment. Three states allow for varying extents of party participation in the selection process. More specifically, in Alaska each party has a peremptory “bump” in the otherwise random assignment; in Kansas, the parent may bump any IHOs from the list, and the district chooses the IHO from the remaining names, but if the parent disqualifies all, the SEA picks an IHO at random; and Missouri uses a tripartite panel, with the SEA assigning the chair via direct sequence and each party picking one other from the list. Finally, in the five remaining states, assignment is based on multiple factors, such as specialization, location, and availability.

**Table 3.** Jurisdictions With Predominant Proportion of IHOs Having Major Legal and/or Special Education Background

Legal Background	State
Predominant proportion with major legal background ( $n = 45$ )	AL, AK, AR, AZ, <u>CA</u> , CO, CT, <b>DC</b> , FL, GA, HI, ID, <u>IL</u> , IN, KS, KY, LA, ME, <u>MD</u> , <u>MA</u> , MI, MN, MT, NE, NH, <u>NJ</u> , NM, <u>NY</u> , NC, ND, OH, OK, OR, <u>PA</u> , RI, SD, TN, <u>TX</u> , UT, VT, VA, WA, WI, WV, WY
Predominant proportion with major special education background ( $n = 6$ )	AR, IA, ME, <u>MD</u> , NV, SD

Note 1: 10 most active states (including D.C.) underlined, with top 5 in bold.

Note 2: Because the survey responses in four states—Arkansas, Maine, Maryland, and South Dakota—were >50% for each of these two categories, they appear twice in this table. Conversely, because the survey responses were 50% or less for both categories, another four—Delaware, Mississippi, Missouri, and South Carolina—do not appear in this table at all.

The final question that the survey addressed was the number of IHOs. The jurisdictions ranged widely, from several states with 2 or 3 to, at the high end, 57 in Maryland and 119 in New York. However, without adjusting the figure to full-time equivalents, which was generally not available information, these raw numbers did not allow for meaningful comparisons especially in light of the varying part-time and full-time arrangements.

## Discussion

Although—after extensive efforts—the response rate was 100%, this study has the limitations of being a survey of SEA representatives. The offices of the state director of special education are beset by heavy workloads, requests for information, political pressures that are particularly inherent for the adversarial IHO dispute-resolution system, and related notable attrition of leadership and, in some states, staff. Thus, the results may be skewed in terms of institutional self-interest and, depending on which representative provided the information, for the interpretation of and responsiveness to the questionnaire items.

Nevertheless, this study provides more comprehensive and current information about key features of the various state hearing officer systems than was heretofore available in the professional literature. Both practitioners and policy makers can benefit from the reported information of ideas and experiences to optimize the operation of this core dispute resolution mechanism of the IDEA with customization to the culture of each state.

The finding of a total of 2,033 adjudicated hearings, even within the obvious limitations of variance as to the scope of the most current year and interpretation of adjudicated hearings, represents a notable reduction from previous years. Zirkel and Gischlar's (2008) study reported a national total

**Table 4.** Method of IHO Assignment

Sample	State
Direct sequence ( $n = 33$ )	AL, AR, AZ, CO <sup>a</sup> , CT <sup>a</sup> , DE <sup>a</sup> , FL, <u>HI</u> , IN, IA, KY, LA, ME <sup>a</sup> , <u>MD</u> , <u>MA</u> , MI, MS, MT, NE <sup>a</sup> , NV, NH, NM, <u>NY</u> , OK, RI, SD, TN, <u>TX</u> , UT, VT, VA <sup>b</sup> , WV, WY
Random ( $n = 10$ )	<u>DC</u> , <u>CA</u> , GA, <u>IL</u> , MN <sup>c</sup> , ND, OH, OR, <u>PA</u> , SC
Party participation ( $n = 3$ )	AK, KS, MO
Ad hoc ( $n = 5$ )	ID, <u>NJ</u> , NC, WA, WI

Note: 10 most active states (including D.C.) underlined, with top 5 in bold.

<sup>a</sup>Within limits of availability. <sup>b</sup>Among regions of the state. <sup>c</sup>Among those with IDEA training.

number—without D.C.—of 2,845 for 2005, which approximated the average for the previous 8 years. In a federally funded study, Zeller (2009) reported a total of 4,591 hearings for 2005–06, including 2,331 decisions from D.C., with due caveats about the various limitations of the data despite extensive efforts between the Consortium for Appropriate Dispute Resolution in Special Education (CADRE) and the U.S. Office of Special Education Programs (OSEP) for verification and correction. The CADRE-OSPEP total for 2006–07 of 2,950 hearings would seem to support the downward direction of the total in this study, which provides an estimate for the following year, even with the reference to “last available year” in our survey amounting to an approximation due to differences in interpretation or practice. It may be that the IDEA's statutory initiation of “resolution meetings,” effective in July 2005, and the IDEA regulations' operational specifications for this prehearing measure, effective October 2006, may have contributed to this reduction, but, as Zeller (2009) warned, that conclusion is premature in the absence of more complete implementation (e.g., Henderson & Moses, 2008) and definitive research.

The related finding that D.C. and a small number of states account for an overwhelming proportion of the adjudicated hearings confirms that special education litigation is a matter of two different worlds: one part of the United States that is highly litigious in special education disputes and a much larger part of the country that resolves these issues in considerably less formal and legalistic ways. Previous research (Ahearn, 2002; Government Accounting Office, 2003; Zirkel & Gischlar, 2008) also reveals that other variables, such as the number of hearings requested and the per capita numbers for adjudicated hearings, also warrant careful consideration. Moreover, although not subject to specific research to date, it would appear that even within the leading states, such as New York, New Jersey, and California, the rate of special education litigation, starting with the IHO process, varies considerably from one region to another.

The finding that 41 jurisdictions, including D.C., have opted for a one-tier system shows the continuing trend revealed by Ahearn's previous tallies of 27 states including D.C. in 1991 and 35 in 2002. The costs of a two-tier system,

including not only the personnel but also—and likely more significantly—the time, have contributed to this trend. The increasing length and complexity of hearings are overlapping contributing factors.

However, the most notable trend that cumulatively considers not only one-tiered versus two-tiered systems, but also the other characteristics of part-time versus full-time, institutional homes (or administering agency), and IHO backgrounds, appears to be a gradual but notable movement toward a “judicialization” (Zirkel et al., 2007) of special education hearings, i.e., having them become more like full, formal court proceedings. More specifically, in comparison to Underwood’s (1999) survey results, we found that an increasing proportion of the states—including the most active jurisdictions, as illustrated by Pennsylvania’s shift in July 2008—have opted for a one-tier system of full-time, attorney IHOs. With very few exceptions, such as Massachusetts and Pennsylvania, the institutional home of full-time IHOs is a generic governmental office of administrative law judges, i.e., a central panel.

The overlapping trend that extends beyond the full-time ALJ phenomenon is the lack of special education expertise. Some states mitigate this skew by providing extensive training, specialized institutional homes (i.e., Massachusetts and Pennsylvania) or subsets thereof (e.g., California and New Jersey), and other such measures, but the specialization in these states tends to be more in special education law than special education practice. One possible consequence, as illustrated in a recent case law concerning the qualified “peer-reviewed research” requirement for FAPE (Zirkel, 2008b), is a trend toward district-deferential decisions, per the prevailing court decisions in general and special education, rather than decisions oriented to special education best practices. Another possible consequence is reinforcement of the movement in recent case law to adjudicative issues such as burden of proof, exhaustion, statute of limitations, and expert witness fees.

Finally, the exceptions may be the most noteworthy of the results. For example, New York still maintains a two-tier system, with many part-time IHOs. Although the primacy is on legal backgrounds, the high number of IHOs and the relative supply of specialized personnel might contribute to more balance in terms of special education expertise; yet the small full-time second tier provides the structural check for legal specialization and uniformity. Similarly, D.C. maintains a part-time system, although, like New York, the IHOs have been subject to ongoing political controversy and judicial challenges. Oklahoma has an interesting arrangement of using a university for their part-time IHOs’ home, and Massachusetts (Chester, 2009) is exploring such an institutional home for their full-time IHOs. Perhaps the most significant of the exceptions are the three states—Alaska, Kansas, and Missouri—that represent experiments with party participation into the

selection/assignment process. Borrowing and adapting a fundamental feature of labor arbitration (Salend & Zirkel, 1984), such participation may mitigate the dissatisfaction with the IDEA’s IHO process, which is often the scapegoat in the adversarial world of special education law (Zirkel, 2008a).

Additional research is needed to provide more in-depth analysis and assessment of the features of this cornerstone of dispute resolution under the IDEA. Such examination should extend beyond previously examined issues such as IHO impartiality (Maher & Zirkel, 2007) to quality control issues such as effective operationalization of the IDEA 2004 requirements for IHO competence. For example, what is the appropriate amount and nature of IHO training for effective and balanced decision making under the IDEA? Particularly in light of the next IDEA reauthorization, such questions merit (a) open and objective research, (b) parent and practitioner participation, and (c) informed and collaborative policy making.

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### Authors’ Note

A table showing the response entries for all of the states is available from Dr. Scala upon request.

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