Due Process Case Issues for Students With Emotional Disturbance

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Abstract
Due process hearings provide a formal resolution for disagreements that may arise within special education. The purpose of this study was to examine the types of issues that arise in due process cases for students with emotional disturbance (ED). The current study examined select due process hearings during 2014 to 2019 from four states for students with ED as the primary condition. The most frequently occurring issue for students with ED was programming related to the individualized educational program (68.3%). Collectively, both evaluations and disability identification were present in 65.8% of cases. Districts prevailed in approximately 43% of cases, with parents prevailing in approximately 36% of cases; 21% of hearing decisions were split. Limitations, future research directions, and implications are discussed.

Keywords
due process hearings, special education, emotional disturbance

The Individuals with Disabilities Education Act (IDEA, 2004) ensures a free and appropriate public education (FAPE) to all children with disabilities. IDEA specifically codifies three critical rights for students with disabilities: identification, evaluation, and educational programing/service. To ensure compliance with the statute, numerous provisions are included that ensure procedural safeguards for students with disabilities. Procedural safeguards guarantee a complaint resolution system, mediation, and an impartial due process hearing as remedies for parent/guardian challenges of local education agency (LEA) decisions. Of particular relevance to this study is the final procedure in the hierarchy of safeguards, the “due process” hearing, as a way to resolve disputes. This level of dispute resolution was selected for this study due to the accessibility of required data elements collected at the state level regarding due process hearings.

The dispute procedures begin with a complaint, which can be issued by the parent on behalf of the student or by the school district (IDEA, 2004, 34 C.F.R. §§ 300.151-153). The resolution meeting (IDEA, 2004, 34 C.F.R. §300.510) is convened by the LEA within 15 days of receiving notice of the complaint. The meeting includes school personnel who have knowledge of the facts which form the basis of the complaint and the parent. The resolution meeting is designed to discuss the complaint and the facts of the case so the LEA has the opportunity to resolve the dispute. If the resolution meeting is waived or does not achieve agreement, the next step can be mediation. Mediation (IDEA, 2004, 34 C.F.R. §300.506) is a more formal process and involves an impartial mediator appointed by the state agency who considers information from both the parent and school district. If mediation resolves the dispute, the parties execute a legally binding agreement. Mediation, like resolution, is designed to resolve issues under dispute.

If no agreement can be reached or mediation is not chosen as a dispute resolution process, the next step is a due process hearing (IDEA, 2004, 34 C.F.R. §300.511). This is a legal proceeding where evidence is presented by both parties and a hearing officer has the sole authority to make the decision about the case. The actual due process hearing can occur in one or multiple days. Typically, there are hundreds to thousands of pages of documents or exhibits. Testimony is provided by numerous individuals including parents, school personnel, private service providers, expert witnesses, and on some occasions, the student. The process is extensive, arduous, and adversarial.

The School Superintendent’s Association (AASA) reports “there is no evidence demonstrating that successful challenges to an [individualized education program] IEP in a due

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process hearing lead to marked improvements in the academic performance of students with disabilities or improvements to what the district was providing students originally” (Pudelski, 2016, p. 7). AASA’s survey of 200 school superintendents found that the average legal fees for a due process hearing was $10,512.50. The average district expenditure for a due process hearing was approximately $16,000. Additionally, superintendents described the stress level for teachers participating in this adversarial process as “high” or “very high.” In the AASA survey conducted in 2013 (Pudelski, 2013), 95% of superintendents noted that due process hearings resulted in high levels of stress, and about a quarter of the superintendents noted that teachers involved in complaint resolution procedures requested transfers out of special education or left the district 10% to 25% of the time. Parents report much dissatisfaction with the outcomes of hearings (Goldberg & Kuriloff, 1991).

By the time a case gets to a due process hearing, it is likely that there have been many attempts to resolve the issues and reach agreement. In a longitudinal analysis of hearing decisions from January 1, 1978 to December 31, 2010, Zirkel and Skidmore (2014) noted a decrease in the number of hearings from 2008 to 2012 compared with previous years. However, due process hearings remain prominent in special education and take their toll both financially and emotionally.

There have been multiple studies about due process hearings (for summaries see Blackwell & Blackwell, 2015; Blackwell et al., 2019; Mueller & Carranza, 2011; Schanding et al., 2017). These studies have investigated perceptions of hearings by parents and educators, the various issues in hearings, the prevailing party in a hearing, and the types of disabilities in hearings. Focusing on studies published from 2010 to the present, there has been consistency across most investigations regarding issues, prevailing parties, and disability categories.

In an analysis of 575 hearing decisions across 41 states, Mueller and Carranza (2011) found that the most common issues were placement (25%) and the individualized education program (IEP) and program appropriateness (24%). Cope-Kasten (2013) reviewed 210 hearings in Wisconsin and Minnesota and found that the most frequent issues in hearings were IEP (47%), service provision (42%), evaluation (38%), and placement (35%). Blackwell and Blackwell (2015) reviewed 258 hearings in Massachusetts and found the most common issues to be IEP (34.3%), placement (30.4%), procedural safeguards (10.3%), and evaluation (8.5%). In the Zirkel and Skidmore (2014) longitudinal analysis reviewing national data, the most common issues were program/placement (57%) and identification (18%). Schanding et al. (2017) reviewed 139 Texas due process hearings and found the most common issues were the IEP (62.86%), evaluation (40%), placement (37.86%), and identification (32.14%). Though the specific percentage distribution varies across states and years, the general issues identified in due process hearings are fairly consistent.

In the Mueller and Carranza (2011) analysis, the majority of hearings were initiated by parents, but school districts prevailed in the majority of hearings (district prevailed = 58.6%; parent prevailed = 30.4%; and both = 10.4%). This finding of school districts prevailing has also been found by several other researchers (Blackwell & Blackwell, 2015; Cope-Kasten, 2013; Schanding et al., 2017; Yocom, 2010). Zirkel and Skidmore (2014) found that overall case outcomes were more evenly distributed, with 52% in favor of districts and 48% in favor of parents. In a more recent investigation of hearing decisions from 2006 to 2019 in California, Itkonen et al. (2022) found that 53.5% of decisions were in favor of the school district, 32.04% were split decisions, and 14.45% of decisions were in favor of the parent.

Regarding disability categories, students in due process hearings often had multiple IDEA disability labels (comorbidity; co-occurring classifications). Although that poses some difficulty with respect to issues emanating from one disability, the most frequent disability categories represented in due process hearings have also been consistent across researchers. Autism (AU), learning disability (LD), other health impairment (OHI), and emotional disturbance (ED) are frequent student disability categories identified in hearings (Blackwell & Blackwell, 2015; Mueller & Carranza, 2011; Schanding et al., 2017; Shuran & Roblyer, 2012; Yocom, 2010).

Of particular relevance to this investigation are due process hearings for students identified with Emotional Disturbance (ED). According to current statistics, 5.45% of students who are IDEA eligible and receiving special education services are classified with an ED (Office of Special Education Programs [OSEP], 2020). Zirkel (2011) noted a decrease in ED eligibility for the period 1992 to 2008 from 8.7% to 7.1% of the total special education enrollment. This trend has continued and is reflected in the recent OSEP (2020) Fast Facts showing a decrease from 7.1% in 2008 to the current 5.45% in 2018. Zirkel (2011) also noted that although the actual number of students identified as ED declined, the trend (although fluctuating across years) was toward an overrepresentation of litigation in proportion to classification percentage. In the Mueller and Carranza (2011) analysis, ED accounted for 13.2 % of hearings. In 2017, Schanding et al. found that students with ED accounted for 20% of the sample and noted that the majority of due process hearings in Texas during the period from 2011 to 2015 involved the categories of AU, ED, and OHI. These categories accounted for 65% of hearings, although in Texas the categories cumulatively accounted for approximately 29% of the students eligible for special education.

Most recently, Blackwell et al. (2019) analyzed 101 due process hearings conducted over a 3-year period (July 1,
2014–June 30, 2017) in five states (California, Illinois, Massachusetts, Pennsylvania, and Washington). These researchers indicated that 12.7% of the 793 hearings in these states involved students with emotional and behavioral disorders. The authors conclude: “One way of contextualizing these data is to compare the percentage of due process hearings involving students with emotional and behavioral disorders (EBD) to the percentage of students with EBD in the overall special education population in the sample states. For all five states included in this sample, students with EBD were represented at much higher rates in due process hearings than in the overall special education population” (p. 145).

The most common disputes for the condition of ED in the Mueller and Carranza (2011) analysis were placement (36%), IEP and appropriateness of program (17%), behavior (16%), and eligibility (11%). Blackwell et al. (2019) listed the following issues in order of frequency for the “EBD” population: the content and implementation of the IEP (27.3%), placement in which the district sought a less (13%) or a more restrictive (9.5%) setting (cumulative percentage in this general category was 22.5%), evaluation/assessment including eligibility determination and/or independent educational evaluations (19.5%) and procedural safeguards (14.3%). Recently, Blackwell et al. (2019) found that, overall, parents prevailed at a slightly higher rate than districts (46.8%–45.5%). Given the issues involved in hearings, there has been much speculation about why ED students are overrepresented in due process hearings. The current authors believe the factors potentially contributing to overrepresentation include an ambiguous and vague definition, exclusionary discipline factors, serious behavioral and emotional problems which may be difficult to address educationally, and mental health conditions and needs.

Emotional Disturbance (ED) is 1 of 13 special education disability conditions listed in the Individuals with Disabilities Education Act (IDEA, 2004). The IDEA definition of ED (§300.8(c)(4)(i)(ii)) is as follows:

Emotional Disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, that adversely affects a child’s educational performance:

- An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- Inappropriate types of behavior or feelings under normal circumstances.
- A general pervasive mood of unhappiness or depression.
- A tendency to develop physical symptoms or fears associated with personal or school problems.

Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

ED appeared in the initial special education law, the Education for all Handicapped Children Act, Public Law 94-142, enacted by Congress in 1975. Although the law has been reauthorized several times since its original enactment, the definition of ED has remained unchanged despite numerous criticisms of the definition, including that it is outdated and vague (Gresham, 2005; Olympia et al., 2004). It is important to note that the federal definition of ED is based on a study conducted in 1957. Bower and associates developed a protocol for identifying students in California who were in need of receiving services due to severe emotional and behavioral problems (as cited in Bower, 1982). The original definition was first proposed in 1957 and adopted within PL 94-142 about 20 years later. The federal definition altered Bower’s (1982) original definition with additions in wording by including the concept of adverse impact on educational performance and identifying types of conditions that could be included (e.g., schizophrenia) and may be excluded (e.g., social maladjustment).

Given the five characteristics listed as indicators of ED, the identified group of students eligible under this condition is heterogeneous, ranging from students who display internalizing behaviors (e.g., anxious and depressed) to those who exhibit externalizing behaviors (e.g., aggression and conduct problems). Blackwell et al. (2019) identified the most common diagnoses within their sample to be “attention-deficit hyperactivity disorder (48.5%), disruptive/oppositional/conduct disorders (45.5%), depression/mood disorders (42.6%), and anxiety disorders (40.6%)” (p.138).

ED is a controversial disability category and according to Kauffman et al. (2004), it is a difficult determination to make due to several factors: personal philosophy (e.g., some people do not like this classification), definitional imprecision (e.g., vague and ambiguous), and pragmatic concerns (e.g., discipline issues and placement). Kauffman et al. (2004) note that ED is a collection of problems involving behaviors, emotions, and thoughts that all people experience to some extent and is an extreme form of ordinary behavior; it is a severe condition, atypical, and not expected based on age, cultural, or ethnic norms. In addition to these diagnostic factors, research and federal policy provide vague ED identification guidance (Hanchon & Allen, 2013).

Adding to the confusion is the fact that state regulations differ on the inclusion of socially maladjusted (SM) as an emotional disturbance. Federal regulations state that ED “does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance” (IDEA, 2004; 34 C.F.R. § 300.7(a)(9)). Sullivan and Sadeh (2014) found that four states, Indiana, Iowa, Minnesota, and Wisconsin, do not exclude SM from the criteria for ED, while the other 46 states and the District of Columbia exclude SM. The disparity in state regulations leads to inconsistent
disability identification from school districts, states, due process hearing officer decisions, and district courts.

The New York City Department of Education suffered the financial ramifications of identifying a student as socially maladjusted and not emotionally disturbed (Eschenasy ex rel. A.E. v. New York City Department of Education, 2009) by having to reimburse the parent for private school tuition. The Eighth Circuit found in favor for emotional disturbance eligibility in Larry Hansen v. Republic R-III School District (2011). At issue was a fifth grader, J.H., who was diagnosed with attention deficit hyperactivity disorder (ADHD), conduct disorder, and bipolar disorder. J.H. made threats to students and staff and made suicidal comments. Republic R-III School District and the Due Process Panel found that J.H. did not meet the criteria for the disability conditions of emotional disturbance and/or other health impairment. The district court reversed the previous decisions, asserting that J.H. met the statutory definition of emotional disturbance under IDEA, citing numerous disciplinary referrals, fighting with other students, threats to teachers, students, and the school-based mental health clinician, and consistent academic struggles.

While there are many investigations of due process hearings, only the Mueller and Carranza (2011) and Blackwell et al. (2019) studies directly identify issues related to ED. Only the Blackwell et al. (2019) study focused on students identified as ED, with or without co-occurring conditions. All students in the sample were identified for special education services under the IDEA disability category of emotional disturbance, but cases that involved students with multiple IDEA disability labels were included if one of the categories was emotional disturbance. The sample consisted of 40.6% of the students with the diagnosis of ED as the only identified IDEA disability category and 50.5% had one additional IDEA disability category. Approximately 9% had two additional IDEA disability categories identified. Concomitant categories with ED were other health impairment, specific learning disability, autism spectrum disorder, speech/language impairment, intellectual disability, and hearing impairment. Given the comorbidity of eligibilities in the Blackwell et al. study, some of the identified issues in the case may be related to factors other than emotional or behavioral difficulties.

The purpose and uniqueness of this study was to focus on issues related to students with ED in a sample of students where ED was the primary disability category. Blackwell et al. (2019) examined cases involving students identified with ED as part of their eligibility, but the sample was not limited to ED as the primary disability condition. To date, there are no due process investigative studies that focus on ED as the primary disability condition. The following were the research questions that guided the current study: (1) What are the major issues in due process hearings across four states regarding students whose primary disability classification is ED? and (2) Who were the prevailing parties in due process hearings involving students with ED?

Method

Data Set

The data set used for this study was drawn from four states: California, Texas, Pennsylvania, and Illinois. State selection for the data set was guided by Zirkel and Skidmore’s (2014) identification of states with the highest number of due process cases and rulings, the top six of which were California, New York, Massachusetts, Pennsylvania, Texas, and Illinois. These states were selected as representative of four regions of the United States and due to their relative high numbers of due process cases filed yearly. All published cases (N=1,378) from January 1, 2014 through December 31, 2019 were reviewed. All hearings were available from their respective state’s websites related to due process hearings and all cases during that timeframe were downloaded to a shared online platform (Dropbox) for the team to review. To provide a narrower focus on issues related to ED, only cases involving students with a primary eligibility of ED were included in the data set. Cases involving students with secondary and/or tertiary eligibilities of Other Health Impairment (OHI) and Specific Learning Disability, Traumatic Brain Injury, etc. were excluded from the database. A total of 126 cases met the selection criteria and were included. Inclusion of these cases was based on the primary reviewer’s selection of a case as having ED as a primary eligibility; therefore, this is a limitation as cases were not verified by a second rater.

Coding and Analysis

The authors utilized coding procedures similar to those from Blackwell and Blackwell (2015) and Schanding et al. (2017). An initial set of codes was outlined by the research team and refined through discussion prior to coding and establishment of interrater reliability. All issues identified within the case to be decided by the hearing officer were recorded for each case. A total of 19 coding categories were created, with 11 issue categories identified, based on modified criteria as outlined by Blackwell and Blackwell (2015) and Schanding et al. (2017). The following coding categories were used (see Table 1):

- The data set was recorded and analyzed in an Excel database. A total of 36 cases (29% of cases) was selected for interrater reliability comparison related to the 11 issues identified and prevailing party. Interrater reliability was determined by dividing the number of agreements by the total number of agreements and disagreements based on frequency counts. The interrater reliability was 92% for the overall coding of data.
| Code                  | Operational definition                                                                                                                                 |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| State                 | The state from which the case was selected.                                                                                                            |
| Case number           | The assigned number by the state agency.                                                                                                               |
| Year of case          | The calendar year (January–December) in which the case was decided.                                                                                  |
| District              | The name of the district involved in the case.                                                                                                          |
| Grade level           | When available, the grade level of the student was recorded.                                                                                            |
| Student age           | When available, the age of the student was recorded.                                                                                                  |
| Disability eligibility| The primary, secondary, and tertiary disabilities of students were recorded. As noted, only those students with a primary eligibility of ED were included (with OHI for ADHD and Speech Impairment being the only allowable secondary/tertiary eligibilities). |
| Issue 1 challenge to disability identification | This category included any dispute regarding the identified eligibility (ED v. Autism, OHI, etc.) or issues related to Child Find. |
| Issue 2 evaluation    | Challenges in this category related to the various processes or procedures utilized during the evaluation by the school district. This includes, but not limited to, evaluations related to functional behavior assessment, transition assessments, related service evaluations; however, this category did not include requests for or results related to Independent Educational Evaluations. |
| Issue 3 discipline    | This category included any issues challenging a discipline referral or consequence received by the student. This also included issues related to suspension or expulsion. |
| Issue 4 individualized education program | This area included any challenges to the components and/or development of the student’s plan related to the provision of a free, appropriate public education (FAPE), and serving the student in the least restrictive environment (LRE). Goals, objectives, accommodations, and modifications were included in this issue. |
| Issue 5 in-district placement for services | This category included any issue related to the location of the provision of special education services pertaining to a service or program within the school district. This includes general education settings and/or special education settings staffed and operated by district personnel. |
| Issue 6 out-of-district placement for services | This category included any issue related to the location of the provision of special education services that were proposed or delivered by an external agency. This includes programs such as day treatments or residential programs. |
| Issue 7 manifestation determination review | This issue included challenges to the decision made within a Manifestation Determination Review. If this issue was selected, the “Discipline” category was also selected; however, not all discipline issues involved a Manifestation Determination Review. |
| Issue 8 related services | These included developmental, rehabilitative, corrective, and support services that allow access to and benefit from educational services. These may include transportation, counseling/psychological services, orientation/mobility services, occupational therapy, and/or physical therapy. |
| Issue 9 procedural safeguards violation | These included the various rules and regulations pertaining to special education services as outlined by federal and state law. This includes, but is not limited to, issues such as timelines for evaluations/meetings, consent, written notice. |
| Issue 10 transition    | Issues identified in this category related to any practice or procedure related to preparing students for post-secondary education, employment, or independent living. Issues may include, but are not limited to, job coaching/training, daily living skills, and community experiences. |
| Issue 11 independent educational evaluation | This category included any parental request for or school district refusal of an independent educational evaluation. |
| Prevailing party       | Cases were coded with regard to who prevailed in the hearing. Three options were available: (1) all issues in hearing held for district; (2) all issues in hearing held for student/family; or (3) split decision with various issues held for student/family and district. |

**Results**

**Predominant Issues in Due Process Hearings**

Table 2 presents the total number of cases and the percentage of cases in which each issue appeared, by state. Hearings ranged in the number of issues addressed within each case (range = 1–7; mean = 2.6). Overall, the three most frequently occurring issues involved disputes regarding the IEP (68.3%), evaluation (33.3%), and eligibility/identification (32.5%). Disputes regarding out-of-district placements were a close fourth (31.7%). Across states, the IEP was consistently the most frequently occurring issue while transition was the least frequently occurring. Other issues varied in their predominance within each state subset. Eligibility/identification was consistently among the top four issues in all state subsets, and evaluation was among the top four issues in three of the
four states. Manifestation determination review (MDR) and discipline were consistently in the bottom four across all states. Disputes regarding out-of-district placements were consistently more prevalent than disputes over in-district placements.

Variability in frequency of issues across states also was apparent in several categories. For example, related services were an issue of dispute in one-fourth of the cases in California and Illinois, while appearing more infrequently as an issue in Texas cases and not at all in Pennsylvania cases. Out-of-district placement disputes were notably more predominant in Illinois than the other states, while procedural safeguards were more frequently an issue in Texas than the other states. IEEs were a more common issue in Pennsylvania than the other states. These observed differences across states, however, should be considered as broadly descriptive in light of differences in the total number of cases decided in each state. As Texas and Illinois had markedly fewer hearings than California and Pennsylvania (approximately one-fourth of the number of cases), any minor change in decision frequency would have a differentially larger impact on the prevalence percentage.

**Prevaling Parties in Due Process Hearings**

Overall, an examination of individual hearings indicated that the district was the sole prevailing party approximately 43% of the time, student/parent was the sole prevailing party approximately 36% of the time, and decisions were split approximately 21% of the time (Table 3). Patterns of prevailing parties, however, varied widely across states. Texas was the state in which districts most often prevailed while Pennsylvania districts prevailed least often. Texas was the state least likely to have split decisions. The student/family most often prevailed in Pennsylvania and Illinois. Of the states surveyed, Texas had the largest difference between rates of prevailing parties. As noted above, these observed prevalence differences across states should be considered given differences in the total number of cases decided in each state.

**Discussion**

The current study examined due process case issues involved for students with an ED and who was the prevailing party. This is the first study to focus exclusively on those students whose primary eligibility is ED, including only secondary eligibilities of either Other Health Impairment for ADHD and/or a Speech Impairment. Thus, we can have some confidence that the issues brought forth within this study stem primarily from social, emotional, and/or behavioral difficulties.

**IEP**

Categorically, the most frequently occurring issue across hearings was concern regarding the content or implementation of the IEP, which was present in a clear majority (68.3%) of the cases. A review of the specific content of these cases

| Table 2. Number of Due Process Hearings and Issues Addressed for Students With ED as Primary Eligibility. |
|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|
| Issue                                           | CA                                               | PA                                               | TX                                               | IL                                               | Total                                           |
| Total hearings                                  | 50                                               | 50                                               | 14                                               | 12                                              | 126                                             |
| Issue                                           | n                                              | % of Cases                                      | n                                              | % of cases                                    | n                                              | % of total cases     |
| IEP                                             | 27                                              | 54.0                                            | 38                                              | 76.0                                            | 12                                              | 85.7                | 9                                              | 75.0                                            | 86                                              | 68.3                |
| Evaluation                                      | 24                                              | 48.0                                            | 9                                               | 18.0                                            | 6                                               | 42.9                | 3                                              | 25.0                                            | 42                                              | 33.3                |
| Identification                                  | 14                                              | 28.0                                            | 17                                              | 34.0                                            | 6                                               | 42.9                | 4                                              | 33.3                                            | 41                                              | 32.5                |
| Placement: out of-district                      | 18                                              | 36.0                                            | 10                                              | 20.0                                            | 4                                               | 28.6                | 8                                              | 66.7                                            | 40                                              | 31.7                |
| Procedural safeguards                            | 10                                              | 20.0                                            | 10                                              | 20.0                                            | 5                                               | 35.7                | 1                                              | 8.3                                             | 26                                              | 20.6                |
| Placement: in-district                          | 7                                               | 14.0                                            | 10                                              | 20.0                                            | 2                                               | 14.3                | 3                                              | 25.0                                            | 22                                              | 17.4                |
| IEE                                             | 6                                               | 12.0                                            | 12                                              | 24.0                                            | 1                                               | 7.1                 | 2                                              | 16.7                                            | 21                                              | 16.7                |
| Related services                                | 12                                              | 24.0                                            | 0                                               | 0                                               | 2                                               | 14.3                | 3                                              | 25.0                                            | 17                                              | 13.5                |
| Discipline                                      | 3                                               | 6.0                                             | 8                                               | 16.0                                            | 1                                               | 7.1                 | 2                                              | 16.7                                            | 14                                              | 11.1                |
| MDR                                             | 4                                               | 8.0                                             | 7                                               | 14.0                                            | 1                                               | 7.1                 | 2                                              | 16.7                                            | 14                                              | 11.1                |
| Transition                                      | 3                                               | 6.0                                             | 0                                               | 0                                               | 0                                               | 0                   | 1                                              | 8.3                                             | 4                                               | 3.2                 |
| Total number of issues                          | 128                                             | 121                                             | 40                                              | 38                                              | 327                                             | 100                 |

| Table 3. Prevailing Parties in Due Process Hearings for Students With ED as Primary Eligibility. |
|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|
| District                                        | District                                        | Family                                         | Split                                          | Total                                           |
| n                                               | %                                              | n                                              | %                                              | n                                              | %                                              |
| CA                                              | 27                                              | 54.0                                            | 13                                              | 26.0                                            | 10                                              | 20.0                                            | 50                                              | 100                                             |
| PA                                              | 13                                              | 26.0                                            | 24                                              | 48.0                                            | 13                                              | 26.0                                            | 50                                              | 100                                             |
| TX                                              | 9                                               | 18.0                                            | 4                                               | 28.6                                            | 1                                               | 7.1                                             | 14                                              | 100                                             |
| IL                                              | 5                                               | 10.0                                            | 5                                               | 10.0                                            | 2                                               | 16.7                                            | 12                                              | 100                                             |
| Total                                           | 34                                              | 54.0                                            | 38                                              | 58.0                                            | 36                                              | 55.0                                            | 126                                             | 100                                             |
suggests that, when the IEP is in dispute, hearing officers are regularly being asked to examine the appropriateness of the student’s programming/services and placement, primarily in the context of the social-emotional-behavioral domain.

Case discussions regarding appropriate programming/services ran the gamut in terms of the specific form those services should take, though a commonality was the concern that the IEP should clearly address social-emotional-behavioral needs specific to the school setting in a targeted and individualized manner. In the case of Student v. Castro Valley Unified School District (CA, 2015), both goals and services came under scrutiny and the hearing officer offered specific commentary on both. Parents asserted that the IEP lacked appropriate goals to address emotional needs, failed to provide appropriate individual therapy, and failed to provide appropriate support to help the student establish a close relationship with a teacher or mentor to address emotional needs. The court agreed with the parents, noting that the “basis for the student’s eligibility as emotionally disturbed stemmed from social-emotional needs rooted in anxiety” (p. 10), and that the IEP failed to address these needs with enough specificity. The hearing officer was particularly critical of the goals. Although the IEP included a counseling goal that addressed manifestations of the student’s anxiety (i.e., organizational and work completion issues), the district was found lacking by failing to offer goals and services that directly targeted the student’s anxiety (individual counseling time was used to help the student develop an organizational system) and thus leaving “the root cause unaddressed” (p. 25). An additional social-emotional goal, designed to help the student develop and utilize a relationship with a “trusted adult” on campus as an emotional support, was found to be unmeasurable and impossible to progress monitor as written (i.e., student would seek out the adult for support “with 90% accuracy” in “3 out of 4 opportunities”). Moreover, the inadequacies of the goal were compounded by inadequacies in service delivery to support the goal. The hearing officer noted that the student should have been offered some choice in selecting the trusted adult, who was instead assigned by the school, and that frequency and duration of meetings with this adult should have been specified in the IEP rather than leaving initiation of contact in the student’s hands.

In C.M. v. Lakeland School District (PA, 2015), goals and services related to social-emotional needs were similarly scrutinized as part of determining the appropriateness of the IEP, and the case highlights the importance of the IEP being clearly and specifically aligned with the student’s identified needs. The hearing officer noted that evaluation data plainly identified the need for development of social skills and skills for self-monitoring, controlling, and managing emotions and behaviors (including anger management), but the IEP contained “only two goals without baselines” (p. 19) addressing these areas. Additionally, while the IEP contained a behavior plan that included instruction in social skills and self-calming strategies, the actual teaching of those specific skills was not included in the IEP (weekly group social skills instruction was limited to feelings-recognition). The hearing officer went on to point out deficits in progress monitoring, as well, stating that the method of data collection utilized (i.e., daily tallies of instances of off-task behavior or emotional dysregulation) did not adequately allow for tracking progress related to the student’s IEP goals of staying on-task and using coping skills. In sum, though the school was actively engaged in providing interventions and services designed to provide social-emotional-behavioral support (e.g., student completed a self-monitoring checklist once a week; daily check-ins with the emotional support teacher; weekly social skills group) and staff were collecting related data, these efforts were not adequately aligned with the student’s specific needs as identified in her evaluations, and data collection methods were not adequately designed to provide information that would allow progress monitoring of IEP-targeted skills. The resulting decision was against the district.

When cases were decided in favor of the district, the degree to which the IEP was individualized to meet social-emotional-behavioral needs specific to the school setting was still the focus of consideration. In Student v. North East Independent School District (TX, 2017), parents alleged their son’s IEP was ineffective in meeting his behavioral needs, in significant part due the BIP’s failure to appropriately address severe home behaviors despite notable behavioral improvements at school. The district argued that the IEP/BIP were effective, as evidenced by the student’s lack of problematic behavior at school. The hearing officer agreed, noting that the record indicated the student “displayed admirable behavior at school” (p. 14) which, when compared with his prior disciplinary history, indicated clear progress. This progress was attributed to the district having “designed and implemented an educational program based on Student’s unique circumstances” (p. 14), which included a BIP that addressed the function of the single behavior of current concern at school (off-task behavior) and included replacement behaviors, specific behavior management techniques, and positive behavioral interventions and supports that addressed the behavior impeding learning. The scope of the district’s responsibility was noted to be limited to behaviors that impeded the student’s education, and the hearing officer determined that the absence of interventions designed to address the severe home behaviors was not a violation of IDEA.

The second recurring theme within the IEP category was concern related to appropriate placement, as an integral part of the overall IEP. Although “IEP” and “Placement” (coded separately for out-of-district and in-district) were designated as separate categorical issues in the current study, when IEP was coded for a case, Placement was often coded as well (i.e., out of the 86 cases coded for IEP, 37 were also coded for Placement). Review of these cases indicated that the two issues were often intertwined, with the predominant concern (predominant concern was determined by the discussion
noted in the hearing officer decision) being the degree to which the placement was conducive to the provision of appropriate supports and/or specialized instruction individualized to the child’s needs, and whether the placement met the IDEA least restrictive environment (LRE) requirement. Specific parent issues with placement varied, with some parents seeking a placement conducive to providing more intensive instruction and supports, and some seeking a less restrictive setting. In Student v. Kern County Superintendent of Schools (CA, 2016), the district lost a case in which it contended that a charter school home-school program placement, which required 4 to 6 hours of daily home-based instruction facilitated by the parents, was appropriate because parents had agreed to it, even after becoming aware that the parents were “ineffective teachers” due to the extreme emotional-behavioral needs of the student. The decision centered on the issue that the student’s needs were not met in the placement and held the district—not the parent—responsible for remediating the situation by identifying and providing an appropriate placement. As part of the remedy, placement in a residential treatment center was ordered.

In an Illinois case (Student v. [redacted] School District; IL, 2015), parents sought the opposite remedy—a fully mainstreamed general education placement with a one-to-one aide in place of the public therapeutic day school placement the district recommended. The decision for the district hinged on a review of the student’s prior educational history in a general education classroom setting, in which ample evidence documented extreme behavioral needs, repeated discipline incidents, and a lack of educational progress even with intensive behavioral supports and interventions including two adults (teacher and aide) in the classroom at all times. The hearing officer determined that the parents’ proposed placement had been tried, without success, and that the district’s more restrictive placement was the appropriate one to “provide the Student with all of the services, supports, accommodations, and modifications necessary” (p. 37).

At times, parents sought a different (though similarly restrictive) school or setting due to concerns about safety/climate (e.g., Student v. Glendale Unified School District; CA, 2015), preference of location (e.g., Student v. Los Angeles Unified School District; CA, 2015), or perceived superiority of the facility (e.g., Student v. Santa Monica-Malibu Unified School District; CA, 2018). In the case of Student v. Santa Monica-Malibu, a high-school student transitioning from an out-of-state residential treatment center was offered a placement at a district-contracted, non-public school with on-site therapeutic mental health services. Parents asserted the placement was insufficiently academically rigorous and too restrictive, in that its exclusively special education student population limited opportunity to interact with typically developing peers. Parents proposed an alternate private school placement, but the district felt it was inappropriate due to a lack of onsite therapeutic services. The district also stated that its proposed placement would allow the student to attend some classes at a nearby community college, thus reducing restrictiveness and increasing access to typical peers. The hearing officer noted that the district had considered and discussed a range of placements along the LRE continuum, and that the offered placement provided social-emotional and academic supports appropriate to the student’s individual needs in the LRE. In the finding for the district, the hearing officer made it clear that the issue of which placement was “more appropriate” was irrelevant, stating that “the decision turns on whether the placement offered by the District was appropriate, not whether Parents’ preferred school of placement maximized Student’s potential” (p. 13).

An additional IEP-related concern that appeared in multiple cases was the district’s failure to implement the IEP as written. In these cases, the burden of proof was on the parent and in some cases insufficient evidence resulted in a finding for the district (e.g., Student v. West Orange-Cove Consolidated ISD; TX, 2015). Most often, however, when failure to implement the IEP was an issue, findings were for the student. E.H. v. Methacton School District (PA, 2015) found a general failure to design and provide an appropriate program for a student with behavioral challenges, which included failing to provide the social skills instruction and counseling services required by the IEP. In other cases, a lack of school personnel qualified to deliver services did not relieve the district of the requirement to implement the IEP as written (A.A. v. Harambee Institute Charter School; PA, 2014), nor did the enrollment of the student in a cyber school setting (A.W. v. Middletown Area School District; PA, 2016).

In sum, when parents of students with ED initiate due process, the appropriateness of the IEP is likely to be on the list of concerns. Courts are attuned to whether the IEP is individualized and clearly targets social-emotional-behavioral needs in the educational setting. The specific nature of the ED, as described in the evaluation, should be considered and clearly addressed in development of goals and design of services. Districts should be aware that hearing officers may scrutinize the design of the IEP, including the specificity of the intervention as written in the plan and the efficacy of the planned progress monitoring methods. Additionally, in some cases, courts have found that addressing behavioral manifestations of the ED was not enough and held school districts responsible for ensuring that services addressed the underlying condition, as well. IEPs that fail to include goals targeting reduction of ED symptomatology may not pass muster in a hearing. Finally, while placements are not required to be the most optimal available, they must be “appropriate” for the provision of planned supports and must consider the LRE.

**Evaluation**

Evaluation was the second most commonly occurring categorical issue in the data set. The category of evaluation can
be complex and in the current study, several themes emerged from this categorical issue in terms of the primary areas of concern regarding evaluation. These included comprehensiveness, consent for evaluation, and independent educational evaluations (IEE). As reviewed in Etscheidt (2003), school-based evaluations are judged based on their adequacy, scope, and utility. In the area of comprehensiveness of the evaluation, failing to assess in all areas of suspected disability(ies) was alleged in the majority (~70%) of cases. In this data set, the parent/guardian typically filed for due process alleging that the school district did not comprehensively assess their child in all areas (e.g., failing to include a functional behavioral assessment, mental health assessment, occupational therapy assessment, etc.) and for all eligibility categories (e.g., other health impairment, speech impairment, learning disability). Decisions were issued evenly for students and school districts. For example, in Parents on behalf of Student v. William S. Hart Union High School District (CA, 2016), the independent hearing officer (IHO) found that an FBA was not appropriate for the student, as he was on home study and not in contact with peers. On the other hand, in Student v. Abilene Independent School District (TX, 2017), the district’s “significant evaluation failure” was not conducting an FBA earlier when the student’s behavior issues escalated. This failure to conduct an FBA gave rise to an inappropriate BIP and, later, a denial of FAPE.

The comprehensiveness of an evaluation report extends to the degree of parent participation in the assessment process. In Parent v. Greater Johnstown School District (PA, 2015), it was found that the district’s insufficient effort to obtain reevaluation consent resulted in limited parent input and no updated cognitive and achievement testing in the reevaluation report. This report largely consisted of a review of previous evaluation results and academic performance information from the approved private school. In Parent on behalf of Student v. Pasadena Unified School District (CA, 2014), the district successfully defended its evaluation report, which did not include a functional behavior assessment, for a student with an emotional disturbance. The district addressed and assessed the student’s emotional and behavioral needs, using this information for a proposed behavior intervention plan. Ultimately, an FBA was not required to provide an offer of FAPE.

Several cases involved the school district requesting the consent to reassess the student without parental consent. This consent override (34 C.F.R. § 300.300 (c)(i)(iii)) procedure requires a school district to document the need to conduct the triennial assessment and their efforts to obtain parental consent. Grossmont Union High School District v. Parent on Behalf of Student (CA, 2015) and Colton Joint Unified School District v. Parent on Behalf of Student (CA, 2018) successfully obtained permission to reassess a high school student without parent consent after the student’s behaviors escalated to the point that disciplinary responses from the school district were needed and attendance issues ensued, respectively. Additionally, Fremont Unified School District v. Parent on Behalf of Student (CA, 2017) was entitled to assess a high school student without parent consent because it demonstrated the need for reassessment results to provide a FAPE and to increase the student’s chances of graduating with her peers.

While, in the current study, an independent educational evaluation was coded separately, it was also considered, as appropriate, as an evaluation issue. An independent educational evaluation (IEE) is a right provided to parents if they disagree with the school district’s evaluation report (34 C.F.R. § 300.502 (b)(1)). When an Illinois school district (Student v. [name redacted] School District; IL, 2014) found it difficult to assess a student due to behavioral issues, the evaluation report detailed, “that the results may not be completely reflective of his true ability due to his emotional state.” Despite the impediment to accurate results, the school district did not follow up with further attempts to test. Interestingly, the independent evaluators were able to successfully assess and write detailed reports, including findings and recommendations. There is no surprise the school district was required to reimburse the outside evaluators for their evaluations and their time “helping develop the new IEP.”

On the other hand, Clear Creek Independent School District v. Student (TX, 2015) demonstrated the appropriateness of their evaluation report, including parent information, an FBA, intellectual function, academic achievement, emotional and behavioral functioning, and information regarding the need for related services from multiple data sources. Despite “a few minor errors mis-stating some parental information the errors were not substantial enough to affect the integrity of the [Full and Individual Evaluation] FIE.”

Two evaluation themes are inextricably intertwined, comprehensiveness and IEEs. If the FIE is comprehensive, in both depth (e.g., FBA, mental health evaluation) and breadth (e.g., evaluation for all suspected disabilities), the request for an IEE will likely be declined by the hearing officer. This is evidenced in the Clear Creek Independent School District v. Student (TX, 2015) and the Parent on Behalf of Student v. Pasadena Unified School District (CA, 2014) cases. Clearly communicating the collaborative assessment outcomes in an understandable manner increases parental comprehension, satisfaction with the report (Miller & Watkins, 2010), and legal defensibility.

**Identification**

Identification was the third most frequently occurring issue across hearings in the current study. Of the cases coded for the issue of identification, three trends emerged. First, several cases were related to a challenge regarding the identified disability condition. For example, in Student v. North East ISD (TX, 2017), the parent wanted the student identified as a student with autism (AU), but the district identified the
student as ED. The hearing officer agreed that the district correctly identified the student and used not only the evaluation results but also the testimony of teachers and the principal regarding the student’s social interactions. In *Oakland Unified School District v. Parent on Behalf of Student* (CA, 2017), the student was evaluated and found to be ED and not AU despite disagreement. In this case, there was a very comprehensive evaluation conducted by a multidisciplinary team of school-based professionals. In these cases and in several others where the challenge was about the actual condition (e.g., ED vs. AU), there was an external evaluation obtained by the parent and conducted by a private practitioner who had diagnosed an additional or a different condition.

Second, several identification issues involved determination of eligibility. The IDEA (2004) has a two-pronged definition of a “student with a disability.” This requires that the student be evaluated and identified with 1 of the 13 classifications listed and “by reason thereof” the student “needs special education and related services” (34 CFR 300.8(a)(1)). In these cases (e.g., *B.C. v. Camp Hill School District* (PA, 2014); *Student v. Dallas Independent School District* (TX, 2015), the school district evaluated the student and determined that he/she met the criteria for the classification of ED, but it was determined that the student did not require special education. This second prong is often referred to as educational need or need for specially designed instruction. In both the *Dallas* and *Camp Hill School District* cases, the findings for the student noted that the district should have determined the student was eligible for special education. In these cases, two different reasons were used. In the *Dallas* case, the student was attending a private school with a highly structured program, and the determination of lack of educational need was based on the conclusion that he/she was doing well in a mainstreamed setting. The hearing officer decided that the description of the placement as a mainstreamed setting was “wholly inaccurate,” and that the evaluation failed “to describe the environment at *** and understand the impact of that environment on Student’s ability to be successful” (p.10). In the *Camp Hill School District* case, the reason for the determination was due to increasing behavior problems in school. In both cases, the students had a history of psychiatric hospitalization and were identified and served under a Section 504 plan.

Recently, Zirkel (2020) addressed the second prong of eligibility for special education. He noted that decisions regarding the “need prong” had “proliferated in recent years” (p. 157). Consistent with the illustrative cases above, Zirkel noted that there is no single criterion to establish the need prong.

The third issue is related to the timely identification of a student with a disability. This is often referred to as Child Find, which is the legal obligation of the school district to locate, identify, and evaluate all students suspected of a disability (34 CFR §300.111). The Child Find duty is triggered when the district has reason to suspect that the student has a disability coupled with reason to suspect that special education services may be needed to address that disability. The typical analysis regarding Child Find is when did the district suspect that the student was a student with a disability who may need special education services. When this suspicion arises, the district must evaluate within a timely manner. In an Illinois case (*Student v. [name redacted] School District*; IL, 2019), the hearing officer found for the district in a case where the evaluation was not requested until behavioral incidents rose to a level that warranted the evaluation. In this case, there had been behavioral concerns, even hospitalizations over the summer, but the district prevailed and it was noted that until certain behavioral incidents occurred (i.e., theft and threats), the district had no reason to suspect the presence of a disability warranting special education services. In *Student v. Killeen Independent School District* (TX, 2017), the hearing officer found that the district had no reason to suspect the student was a student with an ED until receiving the report of a clinical psychologist; upon receipt, the district acted in a timely manner seeking consent and completing the evaluation; however, in another Texas case, the hearing officer found for the student because the district failed to evaluate in all areas of suspected disability (*Student v. Pearland Independent School District* (TX, 2017)). In this case, the student was already eligible for services, but additional evaluation was not conducted in a separate disability area. In *Escondido Union School District* (CA, 2017), there was no Child Find violation though there was a 4-month delay in evaluating a student for suspected AU following an external evaluation with that diagnosis. In *Student v. Los Angeles Unified* (CA, 2017), the district was found in violation of Child Find for not timely assessing the student and for not determining him eligible for special education.

There are many interrelated sub-issues within the broad identification category. One single case may involve multiple issues such as failure to identify a specific condition, failure to identify in a timely manner, and failure to determine eligibility for services. These issues are very case specific as illustrated by the differing opinions of hearing officers. It is not uncommon for professionals to disagree on the most appropriate classification for a student, highlighting the often difficult nature of differential diagnosis and comorbidity. In addition, some districts provide significant assistance and intervention prior to identification under special education and other districts do not. Child Find is dependent on a set of circumstances unique to the individual student.

Though the issue of identification is very dependent on the specific facts related to the individual student, there are several consistencies across these decisions. It was apparent that hearing officer decisions were, to a large degree, based on the multidisciplinary team’s ability to adequately defend its findings in contrast to a private evaluation. In addition, hearing officers relied on evidence of escalating behavior, declining academic performance and/or the existence of an external evaluation diagnosing a student with a condition, as
a critical catalyst for the district to conduct an evaluation in a timely manner.

A major factor in the area of Identification is the determination of the appropriate label or classification. In many cases, when the eligibility category is in dispute, districts identify ED but parents believe a different label is appropriate. Thus, there is ambiguity in the Identification realm, especially in rulings where the label, although the focus of the complaint, is found to not be determinative. One example is a Fifth Circuit case, Z.H. v. Lewisville Independent School District (2015). In this case, the student was initially identified by the district as ED and ADHD, although parents reported concerns of autism from the time of the initial evaluation. Upon later re-evaluation, the student was identified as AU, and the parent filed a hearing due to failure to identify that condition. This is a very complex case with multiple classifications and issues, but relevant to this discussion is the resulting decision that the district’s failure to initially diagnose autism did not constitute a denial of FAPE. Ultimately, the ruling indicated that the federal law focuses on whether or not the student receives appropriate education services, not a student’s diagnostic label (classification). Specifically noted is that professionals may disagree on the classification or diagnosis, but the IDEA charges the LEA with developing an appropriate program for the student. When a student continues to qualify for special education, the label under which he/she qualifies may not be as important as the services provided, if such services meet all student needs. The court noted that the student’s IEP was appropriate and the student demonstrated progress both academically and behaviorally. While school-based evaluators strive to conduct comprehensive evaluations that lead to the proper disability classification, this ruling emphasizes the IEP programming over the identification. Should states potentially opt to do a non-categorical eligibility system such as that of Iowa? What might be the impact in special education of a shift away from specific eligibilities to more focus on the IEP/programming?

**Future Directions**

**Manifestation determination reviews and discipline.** Previous research has indicated that students identified as ED are disproportionately represented in due process hearings (Mueller & Carranza, 2011; Schanding et al., 2017; Zirkel, 2011). As behavioral challenges are a common, if not ubiquitous, concern for students with ED, and as students with an emotional disturbance are among those at highest risk for suspension among students with disabilities (Losen et al., 2014), we conjectured that this disproportional representation in hearings may be linked to behavior-related issues such as discipline and MDRs. Consequently, we expected that these issues would rise to greater prominence in due process hearings for this subset of special education students; however, this was not supported. In fact, the issues addressed in the hearings reviewed for the current study mirrored those addressed in hearings for the overall special education population. As it is for other special education students, the appropriateness of the IEP and related programming/placement was a central concern for parents of students with ED eligibility. Disputes focused on discipline issues ranked near the bottom of the list of issues examined in this study (i.e., out of 11 total categorical issues, discipline and MDR tied for the second to last position). This unexpected finding suggests that parents of students with ED eligibility are perhaps not so concerned with disputing outcomes of specific disciplinary decisions but are instead focused on obtaining supports, services, and placements for their children that better address their emotional-behavioral-social needs. Future studies may want to investigate only those cases where discipline and MDR issues are present to determine trends.

**Prevailing party differences.** The overall finding of school districts prevailing more frequently than parents was consistent with previous findings in this area. However, the trend is for more evenly distributed decisions between parents and districts. Disparities across states in rates for prevailing parties were interesting. Of the states surveyed, Texas is by far the least likely place for parents to prevail. Future studies may wish to investigate the reasons for state differences in prevailing parties. Connolly et al. (2019) conducted a survey of special education directors in 50 states to investigate variations in state hearing and review officer systems. All but seven states used one-tier systems, and the four states in this investigation had one-tier systems. Thus, the differences in decisions in this study would not be attributable to the type of state hearing system. In addition, independent hearing officers in states are attorneys, however, Pennsylvania does allow for non-attorneys to be IHOS. The results of this study indicated that Pennsylvania was the state where school districts prevailed least often. A future investigation could be done on whether decisions of IHOS are different based on whether the IHO is an attorney.

The terminology cited in these decisions is “educational benefit” (Board of Education v. Rowley, 1982; Endrew F. v. Douglas County School District, 2017) and whether the IEP was “reasonably calculated” to provide such benefit. In California, hearing officers also frequently cited legal precedents for examining the adequacy of the school district’s proposed program, as opposed to comparing the relative superiority of the parent’s vs. district’s proposed program/placements (Gregory K. v. Longview School District, 1987), and the requirement for the IEP to address not just academics, but also social and emotional needs that affect academic progress, behavior, and social functioning (County of San Diego v. California Special Education Hearing Office, 1996). The state differences may be attributable to U.S. Circuit Court precedents, as each state in this study is in a different U.S. Circuit (CA-9th Circuit, TX-5th Circuit, IL-7th Circuit, PA-3rd Circuit).
State differences. Out-of-district placement disputes were notably more predominant in Illinois (66.7%) than the other states (CA = 36%; PA = 20%; TX = 28.6%). Issues related to procedural safeguards were notably more predominant in Texas (35.7%) than the other states (CA = 20%; PA = 20%; IL = 8.3%). Related services were an issue in California and Illinois in 25% of cases, while not occurring as an issue in a single case in Pennsylvania. The difference between California and Pennsylvania is particularly striking considering that both states had the same total number of hearings (n = 50). IEEs, however, are a relatively frequently occurring issue in Pennsylvania (PA = 24%) compared to the other states (CA = 12%; IL = 16.7%; TX = 7.1%). It is unclear why there may be such a discrepancy related to the types of issues brought in a due process proceeding amongst states. It is possible that some differences may reflect differential parental awareness or knowledge levels regarding certain issues, or that states are comparatively doing a better or worse job at addressing specific categorical issues related to FAPE. Future studies may want to include more states in the analysis and more systematically examine some of these differences.

District and circuit courts. One limitation of the current study is that only school district level due process hearings were examined. These cases may be appealed by the losing party. Possible future research may focus on the outcomes of district and circuit court cases as compared to the original decision at the district level. Zirkel and Skidmore (2018) investigated changes in decisions from the IHO to the court level. They reviewed 116 decisions involving 183 issues and noted that 70% of the decisions remained unchanged or slightly changed. Future investigations could focus on which specific eligibilities, such as ED, do have changes and the nature and extent of those changes.

Implications

The results of this study have several implications for district and evaluation personnel in three specific areas of practice: initial identification, evaluation, and service delivery. First and perhaps foremost, when do we evaluate for ED? When do we suspect the presence of ED? Based on the cases reviewed, there are several triggers that should lead to the consideration for evaluation. These include external/private evaluations and diagnoses, psychiatric hospitalization, poor progress while in behavioral interventions, patterns of misbehavior and discipline referrals, a significant/extreme behavioral incident, private services/therapy, and poor grades/below average grade level performance and attendance. These "red flags" need to put the district personnel on alert that an evaluation should be carefully considered. If behavior escalates, academic performance declines or there is an external evaluation diagnosing a student with a condition, it is best for the district to conduct the evaluation in a timely manner. Not doing so puts the district at risk for a Child Find violation. Based on the cases reviewed, delays in evaluations ranged from months to years depending on the case, and while the time was a deciding factor, it was not the sole decision point. Another critical point was addressing students’ needs during the delay. It is clear that Section 504 accommodations and Response-to-Intervention or Multi-tiered Systems of Support (RtI/MTSS) services without concomitant progress in behavior and academic performance will not be sufficient to ward off the Child Find violation. Educators and evaluation personnel are generally trained to intervene first, with the understanding that the intervention may take some time to produce results and that this is the preferred approach for determining if an evaluation is needed. Unfortunately, in a due process hearing, this approach may not be prudent. As IDEA is currently interpreted in due process hearings, the decisions often support intervention and evaluation occurring simultaneously.

Evaluation personnel are attuned to the difficulties with the actual ED classification and understand that the IDEA criteria are vague. A comprehensive evaluation conducted by a multidisciplinary team with supporting data from teachers regarding daily functioning in behavioral and social areas lead to a clearer diagnostic determination. Although the diagnostic determination may be clear, eligibility requires the need for specialized instruction. Determination of eligibility on the basis of ED is complex and cannot be based on academic functioning alone. School psychologists and other assessment professionals understand that diagnosis is not equal to eligibility for special education. Condition is only the first element of the two-pronged test for special education eligibility, with need for specially designed instruction being the second element. Many factors should be considered in determining eligibility, and academic performance is only one of those factors. Students who maintain acceptable academic progress may not maintain acceptable behavioral or emotional functioning. In several cases, the district had previously evaluated the student and found him/her to be ineligible. At issue here is the concept of change of circumstances. A student may begin to display more severe behaviors, or more frequent behavioral incidents and these should trigger the need for reevaluation.

Within hearings, it is highly likely that the multidisciplinary team will have to defend its findings in contrast to a private evaluation. The team is not only defending the evaluation they conducted, but also must withstand the comparing and contrasting of their evaluation to another evaluation that may have different results. In many cases, the comprehensiveness of the evaluation comes under scrutiny, and in several instances, although the evaluation was complete enough to determine eligibility, the absence of a functional behavioral assessment was cited as a violation. The major point is that the evaluation must be sufficiently comprehensive to address all needs. In those cases where an FBA was not done and the district prevailed, the hearing officer determined that the district had addressed and assessed the student’s needs to develop a behavior intervention plan.

Within the general domain of IEP, the direct services provided by school psychologists and other intervention personnel
that come under dispute primarily involve counseling/therapy, social skills training, and training in self-regulation. The actual programing and placement issues in the cases reviewed often involve the degree to which such services can be provided at a level of intensity that results in student progress. The question, “Does the placement of the student provide adequate supports and instruction?” is answered based on the degree of improvement or progress made by the student. Progress is the key issue in considering this question, and the services must have associated data collection methods to demonstrate their efficacy. These data cannot only involve progress in the actual intervention (e.g., the student improved his ability to engage in a problem-solving approach to a situation), but must also reflect ecological validity (e.g., the student’s actual use of the skill in a conflict situation, the decrease in frequency, intensity, or duration of the inappropriate behavior).

Remedies for violations based on the hearings range from granting IEE’s to adding services, changing placement, or reimbursement for private services and schools, including residential facilities. The evaluation and programing for students with ED is very complicated, and the educational system may, at times, be quite challenged due to the behaviors and mental health needs of this population. So what is the best practice for such a heterogeneous group? This is a hard question to answer, but the following practices were prominent in the current study: an evaluation is needed that clearly delineates the student’s condition and the educational needs of that student; a program is designed to meet academic, social, emotional, and behavioral needs of the student and includes support services of the school psychologist and additional multidisciplinary team members; and, ongoing data collection and program revisions are implemented that lead to the ultimate outcome of the student making progress in school.

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