ARE THERE TOO MANY DUE PROCESS CASES?
AN EXAMINATION OF JURISDICTIONS WITH RELATIVELY HIGH RATES OF SPECIAL EDUCATION HEARINGS

Joseph B. Tulman,* Andrew A. Feinstein,** Michele Kule-Korgood***

INTRODUCTION

Congress enacted, and President Ford signed, the Education for All Handicapped Children Act (EAHCA) in 1975 to ensure that children with disabilities had access to a free appropriate public education. As the Supreme Court emphasized in Smith v. Robinson:

[T]he Act establishes an enforceable substantive right to a free appropriate public education. See Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, (1982). See also 121 Cong. Rec. 37417 (1975) (statement of Sen. Schweiker: “It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. [The bill] takes positive necessary steps to insure that the rights of children and their families are protected”). Finally, the Act establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure

---

* Professor of Law, University of District of Columbia David A. Clarke School of Law.
** Principal, Andrew A. Feinstein, Attorney at Law, LLC, Mystic, Connecticut.
that hearings conducted by the State are fair and adequate. They also effect Congress’ intent that each child’s individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415. See also S. Rep. No. 94–168, at 11–12 (emphasizing the role of parental involvement in assuring that appropriate services are provided to a handicapped child); id., at 22; Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S., at 208–209.1

Congress created the due process administrative hearing as the principal enforcement mechanism of the EAHCA and of its later, amended version, the Individuals with Disabilities Education Act (IDEA). Rather than relying primarily or exclusively on an administrative agency to safeguard the educational rights of individual children, 2 Congress established a private right of action in administrative hearings and court proceedings, deputizing parents and guardians to enforce the law and ensure that school districts provide appropriate educational services to children with disabilities.3

As demonstrated below, only a tiny percentage of parents and students exercise their IDEA rights to request a due process hearing. The assertion of the right to a due process hearing has led to excellent results for individual litigants. Through the use of due process

1 Smith v. Robinson, 468 U.S. 992, 1010–11 (1984) (At the time of this case, the federal special education law did not include a specific fee-shifting provision. The Supreme Court ruled that, because the plaintiffs’ claim under section 504 of the Rehabilitation Act was no broader than the special education claim, the plaintiffs were limited to the remedies provided by the federal special education law. Id. at 1019–20. Congress subsequently added an attorney-fee shifting provision to the IDEA. See 20 U.S.C. § 1415(i)(3)(B)(i).

2 Under the IDEA’s accountability structure, state education agencies are responsible for monitoring the compliance by local education agencies with the requirements of the act. 20 U.S.C. § 1412(a). Likewise, the United States Department of Education is responsible for monitoring compliance by the states. See, e.g., 20 U.S.C. § 1400(d)(1)(A)–(C). At each level, those affected by alleged non-compliance can request intervention. See, e.g., 34 C.F.R. §§ 300.151–153 (state-level complaints); see generally 29 U.S.C. § 794, 34 C.F.R. § 104; see also U.S. Dep’t of Educ., How to File a Discrimination Complaint With the Office for Civil Rights (Sept. 2010), http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf.

hearings, parents nationwide have compelled school districts to provide both access to education in the least restrictive environment and meaningful educational benefits for their children.

In addition, awareness of the right to due process hearings helps to keep public school administrators, as well as state and local government officials, aware of their legal obligations to educate students with disabilities and to close the chronic achievement gap between students with disabilities and their non-disabled peers. For example, the elevated rate of due process hearings in D.C. resulted in, among other things, a special education class action lawsuit, a highly publicized mayoral takeover and reform of the public school system, and, ultimately, according to D.C. officials, a much-improved public school system generally and special education system specifically. In recent years, moreover, as school system personnel in D.C. have worked, under the watchful eye of a federal court judge and a court-appointed monitor, to come into compliance with the IDEA, the rate of due process hearings in D.C. has plummeted.

The use of due process hearings can accomplish and is accomplishing precisely what Congress had intended. The tiny number of such cases throughout the country means that the current challenge is to strengthen the availability and efficacy of due process hearings.

I. ATTACK ON DUE PROCESS

Despite this limited success, or perhaps because of it, organizations representing school boards have recently launched a new attack on special education. They are now attempting to convince Congress to dilute or eliminate the right of parents to bring a due process hearing before an impartial hearing officer to challenge the appropriateness of an education program offered to a child with disabilities. In April 2013, AASA, the School Superintendents Association, issued a paper entitled “Rethinking Special Education Due Process.”

---


5 See infra Part VI.A.

6 SASHA PUDELSKI, AASA: SCH. SUPERINTENDENTS ASS’N, RETHINKING SPECIAL EDUCATION DUE PROCESS (Apr. 2013),
In support of the push to deny parents access to due process, AASA alleges that “the current due process system continues to expend considerable school district resources and impedes the ability of school personnel to provide enhanced academic experiences for all students with disabilities because it devoted the district’s precious time and resources to fighting the legal actions of a single parent.”

II. THE RATE OF HEARING REQUESTS AND DUE PROCESS HEARINGS

Data collected and disseminated by the federal government belie the claims of the AASA and some school boards’ attorneys that parents are overusing or abusing the special education due process hearing procedures or that due process hearings are, in some sense, counter-productive. The data show that due process hearing requests are rare. For every 1,000 special education students, only 2.6 due process requests are filed each year. Furthermore, most of the hearing requests are settled without the need for a fully adjudicated hearing.


7 PUDELSKI, supra note 6, at 2.

8 Resources for Improving State Dispute Resolution Systems, NAT’L CTR. ON DISPUTE RESOLUTION IN SPECIAL EDUC., http://www.directionservice.org/cadre/spresources.cfm (last visited Apr. 20, 2015). This ratio has been relatively stable for the past five years, dropping from 3.1 per 1,000 special education students during the 2004–2005 school year.
Three jurisdictions accounted for 53% of all due process filings and 85% of all fully litigated hearings during the 2012–2013 school year. These three “outliers” are the District of Columbia, Puerto Rico, and New York. In New York, almost all of the state’s due process cases are from New York City.\(^9\) Removing these three jurisdictions from the national calculation, one finds that the annual rate of due process filings drops from 2.6 for every 1,000 special education students to 1.3 per 1,000. Similarly, removing the District of Columbia, Puerto Rico, and New York from the calculation lowers the annual number of fully litigated decisions from 39 per 100,000 special education students (.039%) to 6.6 per 100,000 (.0066%).

Not only are the national rates of due process complaints and hearings remarkably low, but also longitudinal data collected by the U.S. Department of Education, and analyzed by the GAO,\(^10\) show a sharp and continuing decline both in hearing requests filed and hearings adjudicated. For approximately 6.5 million special education students in the country, the number of hearing requests has fallen from over 21,000 in the 2004–2005 school year to under 17,000 in the 2012–2013 school year. The number of fully adjudicated hearings has dropped from about 7,349 to 2,543 over the same period.

---


10. Id.
Separating the three outlier jurisdictions (New York, D.C., and Puerto Rico) and reporting them individually, on the same graph with the national rate of due process complaints, reveals a surprising outcome. In regard to the number of complaints filed, New York, D.C., and Puerto Rico account for over half of the country’s complaints for each year between 2004 and 2011. In addition, the dramatic decline in hearing requests filed in D.C. between 2004 and 2011 accounts for most of the national decline in hearing requests during that period.¹¹

III. THE RATE OF FULLY ADJUDICATED DUE PROCESS CASES

Outside of New York City, the District of Columbia, and Puerto Rico, 4.8% of due process cases were fully adjudicated during the 2012–2013 school year. In D.C., about 90% of due process complaints filed during the 2004–2005 school year led to a fully adjudicated hearing; the rate in D.C. of hearings adjudicated dropped to 30% by 2012–2013. In Puerto Rico, 95% of all cases were fully adjudicated in 2004–2005, dropping to 53% in 2012–2013. The rate of fully adjudicated hearings, as a percentage of complaints filed, dropped in New York to below 10% in 2007, and then even lower to 6% in 2011

¹¹ See supra Charts 2, 3.
(closer to the national average), but then climbed back to 12.5% for the 2012–2013 school year.12

The graph showing fully adjudicated hearings nationally between 2004 and 2011 reveals an even more startling picture when one separates from the national total the hearings fully adjudicated in New York, D.C., and Puerto Rico. Specifically, in 2004, the District of Columbia, essentially a single school system, accounted for about half of the country’s due process hearings. The ensuing steep decline in adjudicated hearings in D.C. between 2004 and 2011 explains most of the decline nationally in the number of adjudicated hearings.

![Chart #4: Percentage of Due Process Cases Fully Adjudicated](image)

Although the federal and state governments have not collected nor compiled state-by-state data on parent success rates, one analyst has sampled substantial numbers of hearing officer determinations from a selected set of states, including Ohio, California, Florida, New Jersey,

12 While the national rate of complaints that proceed to adjudication has been below ten percent, when one omits New York, D.C., and Puerto Rico (from the national rate), some other states (that have relatively small numbers of due process complaints filed) have relatively high percentages of complaints that proceed to a fully adjudicated hearing. Of states with more than ten due process filings in 2011, two states—Mississippi and Louisiana—had percentages of fully adjudicated hearings in the 20–25% range. In Iowa, Hawaii, New Hampshire, West Virginia, Vermont, and Arizona, between 10–20% of complaints proceeded through a full hearing.
and the District of Columbia.¹³ Parents prevailed in 57 of 100 cases in D.C. between November 1, 2010 and March 31, 2011.¹⁴ Indeed, the relatively high levels of due process complaints in the three “outlier” jurisdictions suggest that parents are winning a substantially higher percentage of cases in these jurisdictions than in other jurisdictions and not just pursuing lost causes. A fully adjudicated hearing is clearly more expensive and diverting to a school district than is a negotiated settlement. One must assume that, on a net basis, litigating special education matters is more costly for school districts than settling. Viewed in this light, complaints by school board representatives about the costs and disruptiveness of due process hearings appear to be disingenuous or perhaps hypocritical. As will be discussed more fully below, the three outlier jurisdictions of D.C., New York, and Puerto Rico have had policies in the past that have triggered the high rates of due process complaints and deterred settlements.

IV. ALTERNATIVE DISPUTE RESOLUTION

The IDEA offers a range of dispute resolution modalities, with the due process hearing being the most formal, expensive, and final. Indeed, the statute focuses on the individualized education program (IEP) team meeting as the primary mechanism to build consensus and resolve disputes. Between the IEP team meeting and the due process hearing, two other mechanisms are specified. One is a complaint to the state education agency and the other is mediation. Comparing California to the outlier states, reveals that California is a large state that, in number of special education hearings, is much closer to the national average.

¹⁴ Id. at 211. The rate at which parents prevailed in D.C. was more than four times the rate in other jurisdictions.
Clearly, parents and other advocates for children in California use state complaints at a relatively high rate, and this reliance on state complaints may divert disputes from the due process hearing process. This factor alone does not explain the data, however, because the rate of state complaints in the District of Columbia is even higher than the rate in California.15

---

15 See infra Chart 6.
On the other hand, successful mediations, leading to signed agreements, appear to be a significant factor. Indeed, in 2012–2013, each of the outlier jurisdictions had a lower ratio of mediations leading to agreements than the national average. While nationally there were 37% as many mediations held as due process cases filed, the figures were 2% and 3% respectively in D.C. and New York. Taking mediations out of the mix appears to be a substantial contributing factor to the large number of due process cases in those two jurisdictions.

V. GLOBAL EXPLANATIONS FOR THE OUTLIERS

No demographic factor readily distinguishes the outlier jurisdictions. Although D.C., New York City, and Puerto Rico have high minority populations, the same is true in states like Louisiana and South Carolina that have low rates of special education due process hearings. Likewise, although the three outlier jurisdictions are highly urban, other highly urban states like Nevada, New Jersey, California, Florida, and Massachusetts do not have relatively high rates of due process hearings. On the other hand, the percentage of students designated as eligible for special education correlates slightly with the number of disputes. Similarly, a comparison of levels of public expenditure per student correlates modestly with the rate of disputes.

One factor that does seem clear is that, in the outlier jurisdictions, a relatively higher proportion of cases are fully adjudicated. Indeed,
while 6.1% of due process cases filed over the last decade were fully litigated in jurisdictions other than the three outliers, the proportions in D.C., New York, and Puerto Rico were 48%, 10.9%, and 57% respectively. In California, only 3.5% of due process cases filed were fully litigated.

California is not an outlier in terms of number of cases filed or number of cases fully adjudicated. California is somewhat above average in cases filed—4.3 cases per thousand students, compared to the national average of 2.6 cases per thousand. But, fewer cases are fully litigated in California, averaging 3.5% over the past decade, as opposed to 17.6% nationally.

Perhaps California’s reverse exceptionality is informative. California has twice the rate of state complaints than the national average. Comparing the number of mediation agreements to the number of fully adjudicated due process complaints demonstrates that the rate in California is six times the national average.

No readily available global theory explains the data pertaining to the variable rate, between jurisdictions, of due process complaints and hearings. The single most remarkable factor in the rate of special education disputes is simply that most states have very low rates. Thus, exploring the relatively higher rates of the three principal outlier jurisdictions—D.C., Puerto Rico, and New York—is more likely to generate useful hypotheses and to explain variability in rates of special education disputes.

VI. JURISDICTION-SPECIFIC EXPLANATIONS FOR THE OUTLIERS

A. District of Columbia

Over the past twenty-five years, the District of Columbia has experienced a unique rise and fall in the number of due process complaints and hearings. The rise began with an intentional and intensive program of training and mobilizing court-appointed delinquency and child welfare attorneys. The basic idea was to reverse the school-to-prison pipeline by training a cadre of attorneys who would affirmatively assert the special education rights of parents of children in the delinquency system (and child welfare system), turning defendants into plaintiffs. See Joseph B. Tulman, The Best Defense is a Good
faculty members in the Juvenile and Special Education Law Clinic of the public law school\footnote{The District of Columbia School of Law, successor to Antioch School of Law, merged into the University of the District of Columbia (UDC) in the mid-1990s and became the David A. Clarke School of Law.} conducted bi-annual training sessions to teach delinquency and child welfare attorneys special education law and advocacy. In total, about 100 attorneys participated, and the clinic faculty members have estimated that about half of those attorneys subsequently altered their practice by adding special education advocacy.

As a consequence of the training and mobilizing effort, the District of Columbia became perhaps the only jurisdiction in the country in which a substantial percentage of low-income parents had access to counsel willing and able to provide special education representation.

\[T\]he District is also one of the rare jurisdictions in which indigent and low income families have had access to private counsel to enforce the provisions of the IDEA in a school system which has repeatedly been determined by the [U.S. Department of Education’s Office of Special Education Programs] to be a “high risk” grantee and which has had increasingly severe sanctions and special conditions imposed in an attempt to rectify long-standing noncompliance with basic requirements of special education law. The availability of counsel to these parents has also enabled them to prevail in the majority of due process complaints filed, an experience that stands in contrast to that in most other jurisdictions where success with the filing of due process complaints is much less prevalent.\footnote{Report of the Blackman/Jones Monitor for the 2012–2013 School Year at 37–38 (Nov. 3, 2014), Blackman v. District of Columbia (Nos. 97-1629, 97-2402) [hereinafter Blackman/Jones Monitor 2012–2013].}

Through the middle to late 1990s, the rate of special education complaints and hearings in the District of Columbia began to rise steadily and dramatically. In the early 2000s, the rates continued to climb and reached what might be described as astronomical levels.\footnote{See generally Piper Rudnick LL.P. et al., A Time for Action: The Need to Repair the System for Resolving Special Education Disputes in the District of Columbia 16–17 (2004), available at http://www.dcappleseed.com/wp-content/uploads/2013/08/Special_Ed_Rprt.pdf [hereinafter A TIME FOR ACTION].} Indeed, between about 2002 and 2004, the District of Columbia, a jurisdiction with about 11,700 children in special education,\footnote{See Report of the Blackman/Jones Monitor for the 2013–2014 School Year at 5 (Nov. 17, 2014), Blackman v. District of Columbia (Nos. 97-1629, 97-2402) [hereinafter Blackman/Jones Monitor 2013–2014].} had fully half of the country’s adjudicated special education hearings.\footnote{See supra Chart 4.} At the peak, D.C. was scheduling twenty-four hearings per day, more than most large cities and many states have in a year. In addition, hearing officers were ordering large numbers of children into private special education placements.\footnote{See Blackman/Jones Monitor 2013–2014, supra note 21, at 14; see generally A TIME FOR ACTION, supra note 20, at 14.} Indeed, as demonstrated in Graph 6 below, the District of Columbia was, for a period of years, an outlier even from the other two outlier jurisdictions of New York and Puerto Rico.

Graph 6: Rates of Complaints and Hearings per 10,000 Students in Selected Jurisdictions


\footnotesize{\textsuperscript{22}} See supra Chart 4.

\footnotesize{\textsuperscript{23}} See Blackman/Jones Monitor 2013–2014, supra note 21, at 14; see generally A TIME FOR ACTION, supra note 20, at 14.
A team from Piper Rudnick LLP (now DLA Piper) and D.C. Appleseed undertook a large-scale study to determine why the District of Columbia’s special education system had devolved into having so many special education due process complaints and hearings. The team found that the “special education system is broken” in myriad, fundamental respects.

The large-scale effort to train court-appointed attorneys to provide special education representation for parents of children in the delinquency and child welfare systems led to other results, as well. In 1999, Congress imposed a cap on attorneys’ fees—both as to the hourly rate and to the limit per case—for special education lawyers in D.C. in an effort to reduce legal costs and, one might presume, to chill efforts to file due process complaints. The cap continued to apply for several years until Congress modified it. Finally, in 2009, Congress removed the cap completely. During the period in which Congress imposed the cap on attorneys’ fees, judges appointed and compensated special education attorneys to represent low-income parents of children in delinquency and child welfare cases. One can surmise that these judges, presiding in delinquency and child welfare cases, had observed and recognized the collateral positive effects of the special education advocacy by the attorneys for parents. In effect, the judges were actively supporting the effort to enforce special education rights for children of low-income and indigent parents and the overarching effort to reverse the school-to-prison pipeline. The judges formalized a panel of special education attorneys and continue through the present (in the context of delinquency and child welfare cases) to appoint and pay special education attorneys through the court. D.C. may be the only jurisdiction in the country in which judges routinely appoint and pay special education attorneys in delinquency and child welfare cases.

Special education attorneys representing parents filed two class actions addressing, respectively, the failure of the District of Columbia

\[24\] A TIME FOR ACTION, supra note 20.

\[25\] Id. at 14.


\[27\] Since 1993, the District of Columbia has replaced three fairly large juvenile incarceration institutions with two smaller facilities, reducing the number of incarceration beds from over 500 to 148. The number of delinquency cases, similarly, has declined in D.C. by about two-thirds since the 1980s. Clinic faculty hypothesize that the mass advocacy to enforce special education rights has affected the rate both of delinquency prosecution and of juvenile incarceration.
to provide timely due process hearings (*Blackman v. District of Columbia*) and, more notably, the failure of the District of Columbia Public Schools to comply with special education hearing officers’ orders (HODs) and to comply with special education settlement agreements (SAs) in individual cases (*Jones v. District of Columbia*). The federal district court judge consolidated the two classes, and, in August of 2006, signed a consent order: “The goal of the Blackman/Jones Consent Decree is, in part, for Defendants to achieve and maintain ‘timely implementation of HODs and SAs in all instances . . .’ (Consent Decree, § 1.C, Docket #1856).” Remarkably, in establishing a goal of full compliance with HODs and SAs by June 30, 2010, the court in August of 2006 agreed to order sixty percent compliance in the first year, with ten percent improvement each year (i.e., seventy percent compliance in the second year, etc.), until the District of Columbia reached “full compliance” of timely implementing hearing officers’ orders and implementing settlement agreements in ninety percent of the cases. The District of Columbia was not successful in meeting the June 2010 target. In his November 17, 2014 report, the Blackman/Jones monitor found the District of Columbia finally to be in compliance with the ninety percent target and recommended closing the case. The monitor concluded his final report with these cautions:

> Although the District has been asserting its compliance with the *Jones* requirements as early as the 2009-10 [school year], when the Consent Decree required them to meet the 90% timely implementation standard, this is the first time that the Monitor’s independent review has confirmed the claim . . . These are accomplishments of which the District can justly be proud, as they reflect a sustained effort to meet the compliance standards of the Consent Decree.

---

28 Blackman and Jones were not the only special education class actions in the District of Columbia during this period. Petties v. District of Columbia, 881 F. Supp. 63 (D.D.C. 1995), challenged the failure of DCPS to pay for private school placements and private related services, including transportation, for which DCPS was legally obligated to pay. See, e.g., *A Time for Action*, *supra* note 20, at 65 n.44.


30 *Id.* at 8–22.

31 *Id.* at 22 (citation omitted).
As significant as this accomplishment is, its limits must also be kept in mind. As previous reports of the Monitor and the Evaluation Team have demonstrated, this case which began with an ambitious agenda to reform special education in the District of Columbia . . has devolved into a narrower focus on protocols, templates and documentation, and a series of shortcuts to get to the finish line. Now that the case is at that point, as a result of the efforts of the Defendants, the constant pressure of the Consent Decree and the oversight of the Court, the question is how does the District and the whole range of stakeholders sustain the momentum that has brought us here, once judicial oversight ends. While this may no longer be a legal obligation in this action, it remains very much a central challenge for the students who rely on access to special education and related services to equip them to navigate life as productive citizens.32

Many of the special education hearings during the “bubble years” between 1995 and 2004 were, without a doubt, repeat actions for the same child as to follow-up services, as well as to violations that re-occurred each year. One might also conclude that some attorneys filed multiple hearings regarding the same child in order to circumvent, as it were, the congressional attorney-fee cap that was in effect during those years. Primarily, however, the rate of due process hearings was a function of wholesale non-compliance by school officials and administrators with the requirements of the IDEA and the unparalleled availability (with the open support of the local court judges) of attorneys willing to represent low-income and indigent parents with regard to the special education rights of their children. Another massive compounding factor was the incapacity of school administrators to promote collaborative problem-solving during IEP meetings, at resolution sessions, and through mediations.33

As school system personnel started to comply with the Blackman/Jones consent order, the rate of due process complaints and hearings fell precipitously from 1,518 complaints in 2010–2011 to 636

32 Id. at 21.
33 See A TIME FOR ACTION, supra note 20, at 8–9.
complaints in 2013–2014. 34 Similarly, the combined number of hearing officer determinations (HODs) and settlement agreements (SAs) declined by about seventy-five percent between 2007 and 2014. 35

The court monitor opined on the impact of attorneys’ fees on the rate and efficacy of special education due process hearings, citing and addressing the AASA report (Rethinking Special Education Due Process) of April 2013. 36 The monitor concluded with the following:

To the extent that attorney fee payment practices are having an impact in diminishing the availability of private counsel to low income families in the District of Columbia, they remove one source of pressure for compliance with the special education law at a student specific level. This is a matter of concern as one considers the durability of the progress made by the District towards compliance with the Blackman Jones Consent Decree while under court supervision. 37

From the vantage point of school officials in the District of Columbia, the massive decline since 2004 in the number of due process hearings is a result of a much-improved special education system. The monitor largely accepts the conclusion, and he identifies a number of systemic problems that contributed to the rise in the number of due process hearings. 38 Among those factors cited is the substantive core of the IDEA: in response to what was previously “a pervasive lack of capacity to deliver the required special education and related services[,]”39 “DCPS has . . . worked to expand and improve the range and quality of the special education programs and resources in its schools.”40 Unquestionably, in the single jurisdiction that has had a history of private parental enforcement of the IDEA, the use of due

36 Blackman/Jones Monitor 2012–2013, supra note 19, at 38.
37 Id.
38 Id. at 10–12.
39 Id. at 10.
40 Id. at 9.
process hearings has forced major improvements in the school system and in the lives of many individual students.  

B. New York  

New York is an outlier jurisdiction in terms of the rate of due process cases filed, and it is also now the jurisdiction with the largest number of due process complaints filed annually. As seen on Graph 2 above, since at least 2006, New York has had approximately 6,000 due process complaints filed annually. The outlier, however, is not New York State, but rather New York City. New York City accounts for 92–95% of the state’s due process complaints, depending on which data set or school year one is utilizing. According to data provided by the New York State Education Department, about 92% of the approximately 6,025 due process complaints filed in 2012–2013 were from New York City. Because New York City (and not New York State) is actually the outlier jurisdiction, New York City is the focus of the analysis in this section.  

The New York City Department of Education is the largest school district in the country, by a significant margin. With over 1.1 million schoolchildren, over 1,700 schools, and approximately 130,000 staff (school and district) personnel, New York City is close to twice the size of the next largest school system in the country. Given the enormity of the city’s school system, one might expect that officials and administrators could marshal concomitantly large resources to meet the needs of students with disabilities. Unfortunately, those responsible for IDEA compliance consistently fail in this basic mission, and the system is fraught with enormous organizational obstacles to effective and efficient change. In addition, the classification rate of students with disabilities in New York City is quite high and rising, when compared to the national average of 13%. In 2012, NYC had approximately 1,041,500 students, of whom approximately 221,700—21.3%—were enrolled in a special education

———

41 For a summary of former systemic failures and recent improvements, see id. at 9–12.
42 New York has more students in special education than every other state except California. For the 2011–2012 school year, New York State had 450,794 students with a special education program. California had 688,346.
43 See, e.g., McMahon, supra note 9 (reporting a rate of 94.8%).
44 Los Angeles is the second largest, with approximately 640,000 students in over 900 schools.
program. The following graph illustrates the rising rate of students in special education in NYC.

Graph 7: The Percentage of Students in Special Education in NYC

![Graph showing the percentage of students in special education from 2007 to 2013]

New York State has between 2.7 and 2.8 million students, of whom about 450,000 are in special education. The number of due process requests per year (about 6,000, with almost all in NYC) is remarkably high in comparison to other states that have more school children. For example, although California has approximately 6.7 million students (of which approximately 680,000 are in special education), only about 2,700 due process requests are filed each year. Similarly, in Texas, with close to 5 million schoolchildren, only about 300 due process requests per year are filed.

Despite what appears to be a large actual number of due process complaints in New York State, the rate is low when compared to the number of students receiving special education services. For example, in New York State in 2010, out of 452,319 students in the special education population, only approximately 1.3% requested a due process hearing.
These data reveal that only a small percentage of the due process requests filed in New York are adjudicated to a final decision. For the 2010–2011 school year, the total hearings requested were 6,147, but a final decision was issued in only 381, or 6% of the cases filed. In the following year, however, the hearings adjudicated almost doubled (693 final decisions for 6,116 cases filed), resulting in an 11% adjudication rate.

The New York data reveal also that parents prevail in most of the due process hearings. According to one study, parents win 72% of due process hearings outright, with partially favorable decisions in another 11%. These figures demonstrate that, as to New York at least, the AASA report is incorrect in claiming that “districts prevailed in the majority of cases.” On the contrary, New York’s statistics reflect a realization of Congress’s vision of parents as private attorneys general, ensuring enforcement of the IDEA.

It would seem natural that many of the due process complaints would be resolved early in the process, through the resolution session mechanism mandated by Congress in 2004. In fact, resolution sessions have proven to be an ineffective mechanism for resolving due process complaints in New York City. From 2005 through 2010, 35% of cases filed proceeded to an impartial hearing because no resolution session was scheduled in thirty days, and in another 41% of the cases, the parties waived the resolution session. Stated more simply, resolution sessions were formally waived, or just not scheduled, in more than 75% of due process cases in New York City. For that same time period, the resolution period culminated in a written settlement agreement only 10% of the time. Resolution sessions are waived at a markedly higher frequency in New York than in other states. The explanation for this high waiver rate is quite simple. While the IDEA provides for this resolution session as an option before litigation and requires that a district include a representative with settlement authority at the resolution session, frequently the district
representatives in New York City at these sessions have no authority to agree to meaningful relief.

Parents in New York City request due process hearings at a relatively high rate for a number of inter-related reasons. A critical factor is the city’s long-time lack of compliance with IDEA, which led to the consent decree in the *Jose P. v. Ambach*\(^{45}\) class action. Widespread failures to evaluate, recommend, and provide special education classes and services (including related services) in a timely manner led to the creation of various mechanisms by which parents could secure private evaluations, special education services (including related services) by private providers, and placements in state-approved nonpublic schools when the district failed to provide a free appropriate public education in a timely manner. Though these authorizations for private services were required by the *Jose P.* consent decree to be provided automatically by the district as soon as they failed to comply in a timely manner, many due process requests were filed for lack of compliance, resulting in an order that New York City provide these authorizations. In addition, although the *Jose P.* class action was filed in 1979, more than three and a half decades later, oversight and monitoring persist due to continued noncompliance.

Another contributing factor in the number of due process requests is the increased emphasis on policy-based and bureaucratic decision-making by school representatives at IEP meetings. Over time, the leadership in the behemoth New York City school system has sharply curtailed the discretion of IEP teams to individualize a program based on a child’s needs. Instead, IEP teams must choose from a strict and limited menu of programs and services, when developing the “individualized” education programs. IEP teams cannot recommend special education services based upon peer-reviewed research, such as Applied Behavioral Analysis or Orton-Gillingham reading instruction, regardless of whether the child needs these services, the child is currently benefiting from these services, or experts recommend these services. Even if there is no clinical disagreement about what a child needs, district representatives at the IEP meeting are deprived of the authority to recommend the services. Parents have no choice but to exercise their due process rights when school district representatives are not authorized, at IEP meetings, to recommend individualized services for a student.

In addition, beginning a few years ago, the New York State Education Department implemented a policy that if a child is in a state-approved nonpublic school, that school, in order to be appropriate, must meet all of the student’s related service needs in-house. Thus, if a school is an appropriate setting in every way (i.e., class size, peer group, curriculum, social milieu), but cannot provide a particular related service (e.g., physical therapy) as recommended, the parent must either voluntarily request that the service be removed from the IEP, or the school administrators must contact the district to begin the process of having the child removed from the school. Aside from driving up the numbers of due process requests, this policy results in the Hobson’s choice for a parent to choose between a school that is an excellent fit for the child, and a service that all agree the child needs.

New York City’s historical refusal to enter into multi-year settlements is another factor that has artificially inflated the number of due process requests per year. A significant proportion of the due process complaints are filed for students attending a non-approved private school. From 2002 to 2010, a total of 41,780 complaints were filed, of which 23,022 dealt with students in a non-approved private school in a special education setting. New York City implemented a policy limiting stipulations of settlement to one year; the policy essentially forced parents to file a due process complaint every year in order to continue placement at an appropriate nonpublic school.

The process is the same for the cases that are the result of policy-based decision making. Even after a parent has prevailed at a due process hearing, the New York City Department of Education will not recommend services which are not on the approved list for the following year. School system representatives routinely inform parents during IEP and placement meetings that if the parents want a certain service or placement to continue, they will have to request a due process hearing. Thus, unlike many other jurisdictions, New York City encourages the use of due process complaints year after year to address the same issues for the same child.

Recent changes in policy at the mayoral level have had a significant impact on the number of due process requests filed. Prior to mid-August 2014, a parent was required to file a due process complaint each year in order for the case to be considered for settlement. In June 2014, Mayor DeBlasio announced new policies to reduce the costs of contentious litigation, in reference to students in nonpublic schools whose parents had pursued due process to challenge the district’s failure to provide a free appropriate public education for
their child. The policies contain, most significantly, a procedure through which the district’s counsel would review a parent’s concerns as reflected in “10-Day” notice letters, and, if the parent had successfully litigated or settled with the City the prior year and the district recommended the same program for the child, the City would propose a settlement, without the need for a new due process filing. Though the policies are new, they appear to be reducing the amount of litigation. Time will reveal the effect on the rate of due process complaints.

C. Puerto Rico

Puerto Rico has both a comparatively high rate of due process hearings requested (13.68 per 1,000 students in special education, or 1.3%), and a very high percentage of cases that are fully adjudicated. The proportion of cases that are fully adjudicated has dropped dramatically, from 95% in 2004 to 53% in 2011. However, the rate is still significantly higher than the national average (omitting the three outlier jurisdictions) of 6.1%.

The classification rate (percentage of overall students classified with a disability under the IDEA) is markedly higher in Puerto Rico than the rest of the country, at 27.5% for the 2011–2012 school year, compared with 13% nationally. States with the next highest rates of classification are the District of Columbia at 18.5%, and Massachusetts, Maine, Rhode Island, and New Jersey in the 17% range.

The following factors appear to be relevant to explaining the relatively elevated rate of due process enforcement in Puerto Rico:

1. Special Education Consent Decree

The Government Accounting Office’s report noted the possibility that Puerto Rico’s rate of due process hearings requested may be driven in part by the consent decree in the Rosa Lydia Vélez v. Department of Education. This class action may have increased

---

46 Rosa Lydia Vélez et al. v. Dep’t of Educ. of P.R. Case # KPE1980–1738 (804) (San Juan Super. Ct. 2002). The case was filed in 1980. A consent decree was entered in 2002. The court monitor’s report of August 2014 was, in the words of the federal district court, jaw dropping, in that the level of compliance with judgments was between 50% and 70%. Colon-Vazquez v. Dep’t of Educ. of P.R., 46 F. Supp. 3d 132 135 (D.P.R. 2014). The court said, “Thirty-four years of paper pushing and
parental awareness of rights and interest in filing due process complaints. Similarly, awareness of the class action may have contributed to the development of a bar of attorneys and a group of advocates to enforce the educational rights of Puerto Rico’s children with disabilities. Interestingly, despite the relatively high number of due process requests and fully adjudicated hearings, Puerto Rico has produced very few IDEA federal court decisions.

2. Expansive Judicial Authority

Judges in Puerto Rico appear to have more jurisdiction in delinquency and child welfare case than on the mainland, and, thus, judges can bypass the special education exhaustion requirement and order relief.

3. Pervasive Problems in School System

Federal judge José Fusté wrote in Colon-Vazquez v. Department of Education,47 “It is no secret that the quality level of education in public schools in Puerto Rico is poor, broken, embarrassing, negligent, disgraceful, pitiful and dishonorable.” Indeed, the court concluded by saying:

Thirty-four years of ball-bouncing convinces the court that no fine, demand, instruction, order, requirement or plea will work as a remedy. Only court intervention, with its raw power of contempt authority, appears strong enough to ensure that the harm to [the Student] will come to an end . . . No one should doubt that incarceration will take place for any non-cooperating and/or noncompliant individual. No extensions will be granted. The terms set here are written in stone because this court is not going to be a party to the thirty-four year debacle discussed in . . . this order.48

excuses. Thirty-four years of inefficiency and mediocrity where the victim is the child whose parents cannot afford private education—the only acceptable recourse to this tragedy these days.” Colon-Vazquez, 46 F. Supp. 3d at 136.

47 Colon-Vazquez, 46 F. Supp. 3d at 135.
48 Id. at 149, 151.
5. Lack of Funds

The Puerto Rico Department of Education has a budget of $500 million to educate 475,000 children, 27.5% of whom are in special education. Nevertheless, Puerto Rico’s per pupil expenditure of $7,500 is higher than the per pupil spending in the states of Idaho and Utah and roughly equal to the per pupil spending in Arizona and Oklahoma.

6. Extensive Failure of Implementation Claims

Many of the requests for due process hearings in Puerto Rico are the simple result of the district’s failure to implement special education services mandated on a student’s IEP. In addition, as the Colon-Vazquez decision makes clear, the district does not comply with IEPs, due process hearing decisions, or court decisions. Parents and guardians utilize due process to get prior orders enforced.

7. Lack of Personnel

Due to the lack of qualified personnel, the Commonwealth needs to transport children to get the services they need.

8. Centralized Bureaucracy

Puerto Rico is a single school district, centrally managed by the Department of Education.

VII. GENERAL HYPOTHESES

A. Particularly bad education drives due process filings.

Undeniably, the quality of special education services and administration is bad in New York City, the District of Columbia, and Puerto Rico. One could speculate, however, that the quality of special education is not any better in New Orleans, Detroit, Camden, or any number of other American cities. Unquestionably, the number of due process filings in each of those jurisdictions (and in every other city) is far lower than the rates in the three jurisdictions examined in this article. However, New York City, the District of Columbia, and Puerto Rico have been under consent decrees to correct long-standing and widespread failures to comply with the IDEA. Still, the fact that a
school system performs poorly does not appear to be a good predictor of a high number of due process cases.

B. Some districts prefer to litigate.

Due process hearings, if fully litigated, are time-consuming and expensive. If there is a legitimate complaint about the due process system, it relates to the transactional costs of litigation. The IDEA provides a number of alternatives to full litigation, including IEP team meetings, resolution sessions, state complaints, and mediation. Most jurisdictions make good use of these other dispute-resolution devices. The three outlier jurisdictions do not. It is not the students, their parents, or their attorneys who are deciding to fully litigate cases. It is the local school board (i.e., local education agency). New York City, Puerto Rico, and the District of Columbia are all single school board jurisdictions. They have made the decision to stonewall, to force parents to litigate their cases.

C. The rate of due process hearings correlates with access to informed advocacy in delinquency and child welfare cases.

In D.C. and Puerto Rico, delinquency defense and child welfare lawyers have actively enforced the rights of children and their parents to secure appropriate educational services. New York City, as well, has a number of child advocacy organizations, some of which focus on enforcement of special education rights. Low-income parents lack the means to retain private counsel to litigate on behalf of their children. The relatively high level of cases in the outlier jurisdictions is, to some extent, explained by the availability of no-cost or low-cost representation to families in poverty. The availability of attorneys’ fees to prevailing parties in special education cases should mean that no-cost representation would be available in other jurisdictions, as well.

49 The District of Columbia Public Schools is the local education agency for approximately fifty-six percent of the public school students in the District of Columbia. The rest of the public school students are in charter schools, most of which operate as separate local education agencies. See Blackman/Jones Monitor 2013–2014, supra note 21, at 5–6.
D. The rate of due process hearings is, in part, a function of officials in centralized bureaucracies limiting the authority of IEP team representatives to include individualized services in IEPs.

The IDEA mandates an individualized education program based upon the nature of the child’s disabilities and what services are appropriate to enable the child to progress educationally and socially. Many states and districts establish and follow bureaucratic policies, attempting to funnel children into pre-ordained programs and services, usually to control costs or to ensure uniformity. These rigid approaches typically preclude the exercise of individualized considerations and decision-making by members of IEP teams. Thus, children do not receive appropriate, effective placements and services, and the result can be an elevated rate of due process requests. Indeed, the three outlier jurisdictions are all large, unified school districts, which have intricate rule-books setting forth what can be provided to each child by category. These districts fail to provide individualized education programs, meaning that the programs offered to individual children are often not appropriate.

E. The lack of federal or state law enforcement is likely a contributing factor to elevated rates of hearings.

Federal enforcement of the IDEA is inadequate. The statutory provision threatening states with the loss of federal funds has never been exercised. Similarly, state departments of education fail to exercise their oversight responsibilities over local school districts. Furthermore, state departments of education are usually staffed with former local school district officials, leading to a less than arms’ length relationship. Federal or state enforcement of the IDEA would obviate the need for a number of due process cases. Still, no clear evidence suggests that enforcement is any weaker in the outlier jurisdictions than elsewhere.

F. Chicken or Egg: The size of the special education bar—the availability of legal aid and legal services and protection and advocacy attorneys—likely contributes to the rate of due process hearings.

The large number of filings in D.C. resulted as a consequence of a concerted and sustained effort to expand the size of the special
education bar. New York City has a relatively large number of special education lawyers. Does a large number of lawyers drive a large number of cases, or does a large number of cases create a large bar? The resources and procedures of local legal aid societies and Offices of Protection and Advocacy vary widely across the country. In some jurisdictions, they are quite active; in others, not. There can be no question that the large-scale training of special education lawyers by the University of the District of Columbia led to the steep increase in the number of due process cases there. Further, it appears clear that the active involvement of child welfare lawyers in Puerto Rico in the special education process results in a large number of filings there. Whether the large number of New York City special education lawyers is the cause or an effect of the large number of due process cases there is impossible to say.

G. The availability of multi-year settlement agreements likely contributes to lower rates of due process hearings.

The availability of multi-year settlement agreements (or the renewal of earlier agreements for a new year) reduces the number of due process filings. Local procedures forbidding or limiting multi-year agreements have certainly been a factor in the number of New York City cases.

H. School system use of in-house counsel may lead to higher rates of due process hearings.

Some school districts retain outside counsel; others use salaried government attorneys as counsel. Outside counsel is clearly a visible expense for a school district. Use of government attorneys appears to encourage educational administrators to litigate more cases, because they are not separately burdened with the cost of counsel.

I. State approval of appropriate private special education placements obviates the need for due process hearings, and state categorical and unnecessary disapproval of certain private placements likely increases the rate of hearings.

Many states have systems for approval of private special education placements. To qualify, the private placements need to comply with state regulations, provide a program consistent with state educational
requirements, comply with an IEP written by the school district’s IEP team, and have certified staff members. These requirements may be inconsistent with the needs of a specific child, resulting in a placement to a non-approved school and a filing of a request for due process.

J. Non-compliance with hearing officers’ decisions raises the rate of due process hearings.

Failure to comply with prior decisions encourages more litigation. This factor certainly explains, in part, the elevated rates of due process complaints and hearings in D.C., New York City, and Puerto Rico. Whether the level of non-compliance is higher in the three outlier jurisdictions is not a matter for which documentation and solid evidence currently exists.

CONCLUSION

The foregoing analysis of the three outlier jurisdictions establishes that the rate of due process complaints and hearings across the country is uniformly low. The low national rate of about 2.6 complaints per 1,000 special education students lowers by half without the three outlier jurisdictions. Although New York City and Puerto Rico have relatively elevated rates, the only jurisdiction in the country that has had a high rate of due process complaints and hearings for an extended period is the District of Columbia. The rate in D.C., however, has plummeted in recent years as government officials and school administrators have addressed some of the systemic problems that led to the special education individual and class litigation. In New York and in Puerto Rico, as well as in D.C., pervasive and clear systemic problems have resulted in precisely the kind of advocacy that Congress desired and designed.

---

50 In New York City, a class action lawsuit was brought (and subsequently settled) to address widespread failure to comply with favorable Impartial Hearing Officer decisions. L.V. v. N.Y.C. Dept. of Educ., 700 F. Supp. 2d 510 (S.D.N.Y. 2010).