"ADDITIONAL EVIDENCE" UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: THE NEED FOR RIGOR

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The Individuals with Disabilities Education Act (IDEA), [1] originally passed by Congress in 1975 as the Education of All Handicapped Children Act, was enacted to "ensure that all handicapped children have available to them a free appropriate public education" (FAPE).[2] A pair of federal lower court rulings[3] contributed to Congress' formulation and design of the Act.[4] The IDEA allows states to receive federal funds to educate students with disabilities if state educational programs comply with the Act's requirements.[5] Local school districts must provide FAPE in conformity with the required elements of an individualized educational program (IEP)[6] to students who meet the eligibility requirements of the Act.[7] School officials working in conjunction with parents create the IEP for the student[8] by assessing current levels of performance, developing goals and objectives, and determining appropriate services.[9]

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1. 20 U.S.C. §§ 1400-1487 (2001).

2. *Id.* § 1400(d)(1)(A).

3. Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (issuing a "Judgment and Decree" prohibiting exclusion of children from public education and establishing the process of "constitutionally adequate" hearings); Penn. Ass'n for Retarded Children (PARC) v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971); Penn. Ass'n for Retarded Children (PARC) v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972) (approving an "Amended Stipulation/Consent agreement" that provided access to public education to mentally retarded children, with notice and the opportunity for a hearing prior to change in educational status).

4. *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 179-80 (1982) (describing legislative history and major provisions of the Act and stating that Congress was "spurred" by the decisions to increase funding and to require states to provide "full educational opportunities" to handicapped children).

5. *See* 20 U.S.C. § 1412 (2001).

6. *See id.* § 1401(8)(D).

7. *See id.* §§ 1401(3), 1401(26).

8. *See id.* § 1414(d)(1)(B).

9. *See id.* § 1414(d)(1)(A).

As its cornerstone, the IDEA provides parents with a set of procedural safeguards, including as the foundation, a due process hearing by an impartial hearing officer, followed by a right to judicial review to resolve disputes about eligibility, appropriateness, or any other issue under the IDEA.[10] Individual states can choose to implement either a one-tier system of local administrative dispute resolution, or a two-tier administrative system in which the second tier is the state-level review of the local-level hearing officer's decision.[11] If not satisfied with the final administrative decision, the losing party can bring a civil action in an appropriate state or federal court for judicial review.[12] In such cases, the IDEA specifies that the court "shall receive the records of the administrative proceedings, *shall hear additional evidence* at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."[13]

While the IDEA sets guidelines for the courts in reviewing administrative proceedings, a key issue remains unsettled. Should the phrase "additional evidence" [14] in this context be construed as establishing a relaxed standard or, instead, a standard that strictly limits the parties' ability to present additional evidence? In the absence of clear guidance in the IDEA and its legislative history concerning the appropriate construction of the phrase,[15] the courts have taken different, conflicting, and often haphazard approaches to admitting additional evidence during the IDEA judicial review.

The purpose of this Article is to canvass the approaches taken by the courts in admitting or excluding additional evidence during the IDEA judicial review[16] and to formulate a consistent, coherent, and appropriate standard for guiding the courts and, to whatever extent appropriate, Congress. The first part of this Article reviews the concepts that are

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10. *See* 20 U.S.C. §§ 1415(b)(6), 1415(f)(1), 1415(i)(2)(A). During the period of this dispute-resolution process, the Act requires the child to "stay-put" in his or her current educational placement. *Id.* § 1415(j).

11. *See id.* § 1415(f)(1); *see also* Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel*, 3 WIDENER J. PUB. L. 871, 872 (1994) (describing Pennsylvania's two-tier system). As of 2001, thirty-four states had a one-tier administrative system and seventeen states had a two-tier system. *See Due Process Hearings*: 2001 Update, QUICK TURN AROUND (Nat'l Ass'n of State Dirs. of Special Educ./Project FORUM, Alexandria, Va.), Apr. 2002, at 2.

12. *See* 20 U.S.C. § 1415(g) (2001).

13. *Id.* § 1415(i)(2)(B) (emphasis added).

14. *Id.*

15. *See, e.g.*, Town of Burlington v. Dep't of Educ., 736 F.2d 773, 790 n.20 (1st Cir. 1984) (finding no legislative history for interpretation of additional evidence), *aff'd on other grounds sub nom.* Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359 (1984).

16. This article only briefly addresses, because of its limited relationship, the admission of additional evidence by the review officer in the two-tier jurisdictions, which is governed by separate regulatory language. *See* 34 C.F.R. § 300.510(b)(2)(iii). *See infra* notes 45-46 and accompanying text.

related to, and sometimes confused with, the issue of additional evidence. The second part presents a systematic and exhaustive overview of the continuum of approaches applied by the courts in construing IDEA's additional evidence clause. Finally, the third part recommends an interpretation of "additional evidence" for adoption by the courts or Congress.

I. RELATED CONCEPTS

There are several concepts related to additional evidence that courts discuss and sometimes confuse in their justification for admitting or denying additional evidence under the IDEA.[17] While these concepts are not the main focus of this article, they are briefly described to show their relationship to and distinction from the issue of additional evidence.

First, the standard of judicial review refers to the degree of deference that courts accord to the findings and conclusions of the administrative proceedings in a case. Pointing out a widespread confusion, one commentator has correctly cautioned that the standard of judicial review "should never be mistaken for . . . evidentiary directives,"[18] such as the quantum and burden of proof or the standard for admission of additional evidence. In a landmark decision interpreting the IDEA, *Board of Education v. Rowley*,[19] the Supreme Court addressed the standard of review applicable in IDEA judicial review proceedings. The Court found that the trial courts must give "due weight" to the administrative proceedings so as not to "substitute their own notions of sound educational policy for those of the school authorities which they review."[20] The majority of lower courts have interpreted the Supreme Court's concept of "due weight" as suggesting that judicial review of IDEA cases differs from the regular judicial review of administrative proceedings, being instead an intermediate[21]

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17. *See, e.g.*, *Burlington*, 736 F.2d at 790 (considering standard of review and additional evidence questions together because they are "interrelated"); Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993) (adopting a standard for the admission of additional evidence in IDEA cases in the context of summary judgment); Metro. Bd. of Pub. Educ. v. Guest *ex rel.* Guest, 193 F.3d 457, 463 (6th Cir. 1999) (mentioning the overlap of "administrative exhaustion doctrine and of the statutory mandate to accept additional evidence").

18. *See* Martha Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 469 (1988).

19. 458 U.S. 176 (1982).

20. *Id.* at 206.

21. Courts have characterized this intermediate standard in various ways. *See, e.g.*, Colin K. *ex rel.* John K. v. Schmidt, 715 F.2d 1, 5 (1st Cir. 1983) (defining intermediate standard as "something short of a complete *de novo* review"); *Ojai*, 4 F.3d at 1472 (stating that while in reviews of regular administrative decisions courts are limited to the administrative record and are confined to a deferential standard of review, an IDEA judicial proceeding is a review with an "unusual mixture of discretion and deference").

standard of review between substantial deference and *de novo*.[22] Although conceptually separate from the standard of review, the IDEA's specific language regarding additional evidence at the judicial review stage has served as an indication of Congress's intent for this intermediate standard.[23] At least two federal circuits have described the standard of review in IDEA cases as a "sliding scale," with more searching review appropriate the greater the amount of new evidence submitted to the court.[24]

Second, burden of proof is also similarly separable from, but related to, the admission of additional evidence. Burden of proof consists of burden of production, which refers to the burden of proffering evidence, and burden of persuasion, which aids the fact finder in evaluating the evidence on both sides when in doubt as to what the facts really are.[25] Burden of persuasion interacts with, and is sometimes confused with, the concept of quantum of proof, which determines the level of evidence needed to accept one side's version of the facts over the other's.[26] Although the IDEA provides the quantum of evidentiary proof to be used at the judicial review stage,[27] it is silent about both the standard of review and the burdens of proof. Some courts have

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22. *See, e.g.*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining *de novo* as "anew," and *de novo* judicial review as "[a] court's nondeferential review of an administrative decision, usually through a review of the administrative record plus any additional evidence the parties present"). In contrast, the traditional standard of judicial review for administrative findings is based on "substantial evidence," defined as "more than a mere scintilla . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). For an empirical analysis of judicial deference in IDEA cases, see James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILDREN 469 (1999).

23. *See, e.g.*, Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988) ("the district court's authority under § 1415(e) to supplement the record below with new evidence, as well as Congress's call for a decision based on the 'preponderance of the evidence,' plainly suggest less deference than is conventional"); Town of Burlington v. Dep't of Educ., 736 F.2d 773, 791 (1st Cir. 1984) ("Congress intended courts to make bounded, independent decisions–bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court."), *aff'd on other grounds sub nom.* Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359 (1985).

24. *See* Burilovich *ex rel.* Burilovich v. Bd. of Educ., 208 F.3d 560, 566 (6th Cir. 2000) (holding that the weight due depends on whether the court is reviewing procedural or substantive matters and whether educational expertise is essential to the administrative findings); Sch. Dist. of Wis. Dells v. Littlegeorge, 295 F.3d 671, 675 (7th Cir. 2002) (noting that the applied standard is basically the clear-error or substantial-evidence standard); McLaughlin v. Holt Pub. Schs. Bd., 320 F.3d 663, 669 (6th Cir. 2003) (applying the Burilovich standard); *see also* Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873 (N.D. Ill. 2003) (applying the sliding scale standard); *cf. infra* notes 30, 32 (providing a completed record with the benefit of the hearing officer's expertise as the justification for the exhaustion doctrine).

25. *See* DIXIE SNOW HUEFNER & PERRY A. ZIRKEL, BURDEN OF PROOF UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 3 (LRP Publ'ns, Special Report No. 9, 1983).

26. *Id.*

27. *See supra* text accompanying note 13.

entangled the quantum of proof and standard of review because the relevant IDEA provisions "seem to intend independent or quasi-independent fact-finding, producing the merger of both trial and appellate functions in the same review proceeding."[28] For example, the Sixth Circuit has observed that the "preponderance of the evidence" terminology in the IDEA has led to the "intermingling [of] the standard of proof with the provision for judicial review" and resulted in the "precise scope of judicial review [being] obscured."[29] In any event, this specified standard of proof should not similarly obscure the inferable standard for additional evidence.

Third, to ensure that the court system will not be burdened by IDEA cases,[30] the courts have required the parties to comply with the doctrine of exhaustion,[31] requiring a litigant to seek relief at available administrative levels before challenging the action in a court. The need for exhaustion is based on a notion that "until the administrative process is complete, it cannot be certain that the party will need judicial relief."[32]

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28. HUEFNER & ZIRKEL, *supra* note 25, at 4.

29. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 624 (6th Cir. 1990).

30. *See, e.g.*, Ass'n for Retarded Citizens, Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987) (citing the exercise of agency discretion and expertise, the full development of technical issues, the prevention of deliberate disregard and circumvention of procedures established by Congress, and avoiding unnecessary judicial decisions as the reasons for exhaustion doctrine).

31. *See, e.g.*, Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 655-56 (8th Cir. 1999) (citing other cases). There are exceptions to the exhaustion doctrine such as futility, *e.g.*, Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992); inadequacy, *e.g.*, Gaskin v. Commonwealth, 22 IDELR 702 (E.D. Pa. 1995), *available at* No. 94-4048, 1995 WL 355346 (E.D. Pa., Jun. 12, 1995); *cf.* J.G. v. Bd. of Educ., 830 F.2d 444, 447 (2d Cir. 1987); and emergency, *e.g.*, Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778-79 (3d Cir. 1994); *cf.* Kreher v. Orleans Parish Sch. Bd., 23 IDELR 810 (E.D. La. 1996), *available at* No. 95-1076, 1996 WL 715506 (E.D. La. Dec. 10, 1996). However, the courts have been relatively strict in applying these exceptions. *See, e.g.*, Radcliffe v. Sch. Bd. of Hillsborough County, 38 F. Supp. 2d 994, 998-99 (M.D. Fla. 1999); Urban *ex rel.* Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720 (10th Cir. 1996); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298 (9th Cir. 1992); Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1089 (1st Cir. 1989). The issue preclusion doctrine is also related to, but is conceptually different from, the exhaustion doctrine. The courts have required compliance with the issue preclusion doctrine by disallowing the introduction of additional evidence – despite the prescriptive mandate of 20 U.S.C. § 1415(i)(2)(B) – when allowing such evidence would have presented the court with the issues not raised at the lower level. *See, e.g.*, Bruschini v. Bd. of Educ., 911 F. Supp. 104, 107 (S.D.N.Y. 1995).

32. CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 49, at 313 (5th ed. 1994). In addition to judicial economy, other reasons for the exhaustion requirement include the need for an administrative hearing officer's expertise in developing the factual record. *See, e.g.*, McKart v. United States, 395 U.S. 185, 193-95 (1969) (holding that the courts ordinarily should not interfere with an agency until it has completed its action "where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise"); McCarthy v. Madigan, 503 U.S. 140, 145 (1992) (holding that exhaustion of prescribed administrative remedies serves the dual purposes of protecting administrative agency authority and promoting judicial efficiency); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (holding that exhaustion of the administrative process "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, and furthers development of

The exhaustion doctrine intersects with the additional evidence issue in a special way. Since the IDEA provides for at least one level, and in some states two levels, of administrative proceedings, and because these proceedings are time consuming,[33] by the time of the judicial review, parties may seek to introduce evidence that has arisen during school years subsequent to the dispute. In such cases, courts must balance the reasons for the exhaustion doctrine[34] with the advantages of "bringing [themselves] up to date on the child's progress from the time of the hearing to the trial."[35] To date, the courts have split when ruling on cases that fall in this intersection of exhaustion and additional evidence.[36]

As the fourth related but separable concept, a court may grant a summary judgment upon request of one of the parties. The moving party is entitled to judgment as a matter of law[37] upon "demonstrat[ing] the absence of a genuine issue of material fact."[38] Summary judgment and additional evidence interact in more than one way. If neither side requests the admission of additional evidence, the parties, in effect, are asking for a judgment on the record. However, some courts have confused a judgment on the record with summary judgment in the IDEA context.[39] As the Sixth Circuit pointed out, this characterization is

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a complete factual record"); Deal v. Hamilton County Dep't of Educ., 259 F. Supp. 2d 687, 692 (E.D. Tenn. 2003) (holding that the deference is due to the hearing officer's findings of fact not only because of the officer's relevant educational expertise but also because the decision is based on the complete record and is reasonable); Ass'n for Retarded Citizens, Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987) (citing the exercise of agency discretion and expertise, the full development of technical issues, the prevention of deliberate disregard and circumvention of procedures established by Congress, and avoiding unnecessary judicial decisions as the reasons for exhaustion doctrine).

33. *See, e.g.*, Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359, 370 (1985) (recognizing that IDEA proceedings are "ponderous").

34. *See supra* note 32.

35. Town of Burlington v. Dep't of Educ., 736 F.2d 773, 791 (1st Cir. 1984), *aff'd on other grounds sub nom.* Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359 (1985).

36. *Compare* Metro. Bd. of Pub. Educ. v. Guest *ex rel.* Guest, 193 F.3d 457, 463 (6th Cir. 1999) (invalidating those rulings of the trial court in which it used additional evidence to rule upon issues beyond those presented to the hearing officer), *with* DeVries *ex rel.* DeBlaay v. Spillane, 853 F.2d 264, 267 (4th Cir. 1988) (reasoning that the statutory scheme of the IDEA, including non-traditional standard of review, resolves this matter in favor of additional evidence), *and* Johnson v. Lancaster Lebanon Intermediate Unit 13, 757 F. Supp. 606, 614 n.6 (E.D. Pa. 1991).

37. FED. R. CIV. P. 56(c).

38. Celotex Corp. v. Catrett, 477 U.S. 317, 322 n.3 (1986).

39. *See* Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1472 (9th Cir. 1993) (treating summary judgment motion as bench trial based on stipulated record); Heather S. *ex rel.* Kathy S. v. Wisconsin, 125 F.3d 1045, 1052 (7th Cir. 1997) ("The motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record."); Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892 (9th Cir. 1995) ("Though the parties may call the procedure a 'motion for summary judgment' in order to obtain a calendar date from the district court's case management clerk, the procedure is in substance an appeal from an administrative determination."); *see also* Wall *ex rel.* Wall v. Mattituck Cutchogue Sch. Dist., 945 F. Supp. 501 (E.D.N.Y. 1996) (holding after admitting additional evidence that the court's inquiry in the IDEA proceedings is different from summary judgment in the traditional setting since

mistaken because different standards[40] apply to summary judgments and decisions on the closed record.[41] If, on the other hand, one or both parties request additional evidence and one or both move for summary judgment, the sequence of the court's disposition is unsettled. Some courts rule on the summary judgment motion first, limiting themselves to the administrative record below, and then, if they deny summary judgment, rule on the additional evidence motion.[42] Other courts first decide whether to allow additional evidence and then, after admission of such evidence, rule on the summary judgment motion.[43] Alternatively, some courts have taken the view that summary judgment should not be granted in the cases brought under the IDEA, particularly when there is additional evidence to be admitted.[44]

A fifth standard, similarly related to a limited extent, but not otherwise addressed in this paper, is the standard for admitting additional evidence at the second state review level in states that have a

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it does not discern whether there are disputed issues of fact, but rather, whether the administrative record and any additional evidence establish compliance with IDEA, and it does not matter who initiates the motion).

40. *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970) (holding that in summary judgment motion moving party's evidence "must be viewed in the light most favorable to the opposing party").

41. *See* Doe *ex rel.* Doe v. Metro. Nashville Pub. Sch., 133 F.3d 384, 387 n.2 (6th Cir. 1998); *see also* Moubry *ex rel.* Moubry v. Indep. Sch. Dist. No. 696, 951 F. Supp. 867, 895 (D. Minn. 1996) (agreeing that the summary judgment in the IDEA context is equivalent to the judgment on the record, but viewing the evidence in the light most favorable to the non-moving party).

42. *See, e.g.*, Norma P. v. Pelham Sch. Dist., 21 IDELR 104 (D.N.H. 1994), *available at* No. C-92-586-L, 1994 WL 605731 (D.N.H. Oct. 26, 1994). Although the court denied the summary judgment motion and later allowed additional evidence, when considering motions in this order, the court ran the risk of conflicting with the holding of Celotex, which states that because the summary judgment deprives parties of trial on the issues, the court must be careful to ensure that only those claims for which there is no need for a factual determination as to any material fact are disposed of by the grant of the motion.

43. *See* Justin G. v. Bd. of Educ., 148 F. Supp. 2d 576, 582 (D. Md. 2001) (holding that the genuine dispute of material fact exists after reviewing the record and admitting additional evidence); Jones v. Bd. of Educ., 15 F. Supp. 2d 783, 786 (D. Md. 1998) (holding that in opposing the motion a party needed to identify any admissible additional evidence it might have to demonstrate that there exists a genuine issue of material fact) *accord* Smith v. Parham, 72 F. Supp. 2d 570, 571-72 (D. Md. 1999); King v. Bd. of Educ. of Allegany County, 999 F. Supp. 750, 754 (D. Md. 1998) (deciding the summary judgment motion after admitting additional evidence); Moye *ex rel.* Moye v. Special Sch. Dist. No. 6, 23 IDELR 229, *available at* No. 4-94-919, 1995 WL 682742 (D. Minn. Sept. 29, 1995) (holding that a motion for ruling on the record is premature since the subsequent motion to present additional evidence was granted); Zakary M. *ex rel.* Donna M. v. Chester County Intermediate Unit, 23 IDELR 629 (E.D. Pa. 1995), *available at* No. 95-CV-1842, 1995 U.S. Dist. Lexis 18381, at *11-13 (E.D. Pa. Dec. 6, 1995) (granting summary judgment after hearing additional evidence), *opinion withdrawn due to settlement*, 23 IDELR 809 (E.D. Pa. 1996).

44. *See* Barwacz v. Mich. Dep't of Educ., 674 F. Supp. 1296 (W.D. Mich. 1987), *further proceedings in* Barwacz v. Mich. Dep't of Educ., 681 F. Supp. 427 (W.D. Mich. 1988) (holding that summary judgment should not be granted in EHA (predecessor to IDEA) cases especially when additional evidence is presented); Wiesenberg v. Bd. of Educ., 181 F. Supp. 2d 1307 (D. Utah 2002) (holding that, because the record is not sufficient to decide whether the additional evidence is supplemental in nature, the summary judgment is inappropriate).

two-tier system.[45] Occasionally, the decision about admitting evidence at the review officer level may interact with that of admitting evidence at the judicial level. For example, one court ruled, as supported by state law, that additional evidence should be introduced and "developed" before the administrative agency rather than the court.[46]

Finally, the issue of additional evidence intersects to a limited extent with the issue of discovery at the judicial review stage. Although the majority of courts have followed the non-IDEA case law to allow discovery at the judicial level as a matter of federal procedure,[47] some courts have held that discovery at this level must be limited to the boundaries for admission of additional evidence in IDEA cases.[48]

II. CURRENT SITUATION

The court decisions construing the IDEA's additional evidence clause[49] are not uniform, but comprise a continuum of approaches taken by the judiciary in admitting or excluding evidence additional to that considered by the hearing officer. The court-applied standards for additional evidence tend to fall into one of three relative and inexact categories: strict, intermediate, or lax. The table in appendix A chronologically canvasses the judicial decisions by federal circuit according to this continuum-based categorization since the first major

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45. *See supra* notes 11 and 16 and accompanying text. The courts, if requested by one or both parties, subject the reviewing officer's decisions to the deferential abuse of discretion standard to either allow or deny the admission of additional evidence. *See, e.g.*, Moye *ex rel.* Moye v. Special Sch. Dist., 23 IDELR 229 (D. Minn. 1995), *available at* No. 4-94-919, 1995 WL 682742 (D. Minn. Sept. 29, 1995) (holding that the lack of any rules or procedures for determining whether additional evidence is necessary at the administrative appeal level does not violate IDEA's procedural requirements); Judith S. v. Bd. of Educ., 28 IDELR 728 (N.D. Ill. 1998), *available at* No. 97C2899, 1998 U.S. Dist. LEXIS 11072, at *9-10 (N.D. Ill. July 15, 1998) (holding that such issues are a matter of state law). One second-tier review panel held that the meaning of "additional evidence" in 34 C.F.R. § 300.510, applicable to administrative review, is similar to the meaning in 20 U.S.C. § 1415(i)(2)(B), applicable to judicial review, because Congress could not have "intended to apply a lesser and duplicative ridden [sic] standard to administrative appeals." *See Troy Area Sch. Dist.*, 30 IDELR 551, 554 (Feb. 12, 1999).

46. Carrington v. Comm'r of Educ., 404 Mass. 290, 294 (1989). For another example, see Kruelle v. Biggs, 489 F. Supp. 169, 171 (D. Del. 1980) (holding that state reviewing officer's denial to reopen the record for an additional hearing was not an abuse of discretion and then allowing additional evidence at the judicial review level), *aff'd on other grounds sub nom.* Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 690 n.5 (3rd Cir. 1981).

47. *See, e.g.*, Patricia P. v. Bd. of Educ., 8 F. Supp. 2d 801 (N.D. Ill. 1998) (applying a regular standard for permitting discovery to the IDEA case); Cook v. District of Columbia, 21 IDELR 839 (D.D.C. 1994), *available at* No. 93-D172-LFO, 1994 U.S. Dist. LEXIS 10318, at *1 (D.D.C. July 19, 1994) (finding no case law on discovery at the IDEA judicial review stage and thus allowing discovery).

48. *See* Roe v. Westford, 110 F.R.D. 380, 381 (D. Mass. 1986). *See generally* Beth B. v. Van Clay, No. OOC4771, 2001 U.S. Dist. LEXIS 1391 (N.D. Ill. 2001) (holding that the standards for discovery and for accepting new evidence cannot be separated easily).

49. 20 U.S.C. §1415(i)(2)(B) (2001).

decision. The limited number of state court decisions that address the issue of additional evidence are listed separately. The table also includes an additional category for the cases that did not identifiably fit into the continuum or in which the written opinion was insufficient to determine the court's standard for additional evidence. Preceding each abbreviated case name, a "+", "–", or "±" sign denotes that the court admitted, excluded, or partially excluded and partially admitted additional evidence respectively. Further, the sign preceding the case name is enclosed in parenthesis if the reviewing court left it to the discretion of the lower court or deferred to its judgment to either admit or exclude additional evidence. Case names in bold signify the federal appeals courts' decisions, and those in regular typeface are district court and state cases. Finally, the year of the decision follows each case name, and the cases are listed in chronological order within each category.

The categorization and resulting placement of each case in the table provides an illustration of the unsettlingly ad hoc current state of law[50] regarding the standard for admission of additional evidence in IDEA cases in each circuit and in state courts.[51]

More specifically, the tabular overview of the continuum of approaches applied by the courts in construing the IDEA's additional evidence clause reveals that the INTERMEDIATE category contains the most cases, reflecting the prevalent, yet unsettled, standard for additional evidence. However, the cases in this category do not reveal an identifiable pattern in terms of "+", "–", or "±" signs. The STRICT category has the fewest cases and appears to represent the infrequent outbursts of judicial conservatism rather than the systematic, reasoned attempts to conserve judicial and parties' resources.[52] This category unsurprisingly consists of decisions identified by a "–", denoting the exclusion of the additional evidence. The LAX category, representing the relaxed approach to the admission of additional evidence, contains a comparatively large number of cases. The placement of a case in this

50. Because the table reveals considerable variation in the additional evidence standard as applied by different courts and exemplified in their decisions, it is difficult to identify either a persisting state of the law in this area or a pattern of its incremental development. *See also* discussion *infra* Part IV.

51. The resulting illustration of the current state of the law is not without problems and limitations. The cases considered are only those that are reported either in printed (Federal Reporters and Individuals with Disabilities Law Reporter) or electronic (Lexis and Westlaw) sources. The searches of the additional evidence cases, although intended to be exhaustive, may be underinclusive. Additionally, the written opinions tend to omit the tangential or uncontentious issues, thus potentially creating a selection bias towards the judicial decisions that are vocal about their additional evidence issue. The selection bias could be safely disregarded if the way the additional evidence issue was decided in the published opinions is reflective of how it was decided in all cases.

52. *See infra* app. A, col. STRICT and accompanying cases.

category results from one of a number of factors, such as the confusion of the additional evidence standard with the unusual intermediate standard for judicial review,[53] the unnecessarily relaxed reading of the intermediate approach, [54] or ignorance about the judicial gloss surrounding the interpretation of the term "additional."[55] Regardless of the particular description of the intermediate standard, most of the cases are preceded by a "+" sign, denoting admission of additional evidence. Finally, the "?" is a catchall category, which includes an alarmingly sizeable number of cases that do not apply or create any readily identifiable and inferable additional evidence standard.[56] Most of the decisions in this category are denoted by the "+" sign.

A more specific analysis of each category shows the perplexing evolution and confirms the unsettled and unsettling state of the pertinent case law across the country. The following sections include a more detailed description of the case law that fits into each category, a substantive description of the contents of each category, and an outline of each category's definitional boundaries.

A. INTERMEDIATE CATEGORY

Although the INTERMEDIATE category contains the largest number of decisions, the multitude of approaches and reasoning reflect a failed judicial attempt at convergence to a single standard. The intermediate standard for additional evidence was first introduced and is therefore best exemplified by the reasoning of First Circuit Court of Appeals, in *Town of Burlington v. Department of Education.*[57] This was the first court decision that thoughtfully and seriously interpreted the additional evidence provision of the IDEA. The court construed "additional" in the ordinary sense by interpreting it to mean "supplemental."[58] Guided by the Supreme Court decision requiring the courts to give "due weight" to the administrative proceedings, [59] the appeals court reasoned that repeating or embellishing a witness's prior administrative hearing

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53. *See supra* notes 19-21 and accompanying text.

54. *See, e.g.*, Mavis *ex rel.* Mavis v. Sobol, 839 F. Supp. 968 (N.D.N.Y 1993) (providing a relaxed reading of the Burlington factors).

55. *See, e.g.*, Briggs v. Bd. of Educ., 882 F.2d 688, 691 (2d Cir. 1989) (dictum) ("The parties declined to present any additional evidence that had not been presented to the hearing officer, although they could have done so pursuant to 20 U.S.C. § 1415(e)(2).").

56. *See also infra* notes 97-98 and accompanying text.

57. 736 F.2d 773 (1st Cir. 1984), *aff'd on other grounds sub nom.* Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359 (1985).

58. *See id.* at 790; *see also id.* n.20 (finding no legislative history to guide it on the construction of the additional evidence provision).

59. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

testimony "would be entirely inconsistent with the usual meaning of 'additional.'"[60] The court held it appropriate to use the administrative record as the main source of evidence with limited supplementation at trial.[61] Expressly rejecting a rigid rule that would "unduly limit"[62] the reviewing court's discretion and "disallow testimony from all who did, or could have, testified before the administrative hearing,"[63] the First Circuit instead suggested, as a "practicable approach," a rebuttable presumption in favor of foreclosing additional evidence.[64] The intermediate approach does not implement the full-blown acceptance of additional evidence under the textual mandate of § 1415(g). Rather, the approach is a product of balancing the unavailability of a witness at the administrative level and the desire of the parties to update the court on a student's current condition with undermining the statutory role of administrative expertise and providing an incentive for the unfair advantage gained when one party reserves the best evidence for trial.[65]

Although it is an often cited case in additional evidence IDEA cases, *Burlington* did not serve as a trend-setting decision in its circuit. The First Circuit IDEA decisions that followed did not adhere to a consistent standard for additional evidence. Some courts failed to provide reasoning for admitting additional evidence,[66] while others did not follow the clear appellate authority in that jurisdiction by misreading or not acknowledging it.[67]

Roland M. v. Concord School Commission[68] applied the intermediate standard enunciated in *Burlington* to refuse the introduction of additional evidence. Additionally, the court reiterated that, within the *Burlington* balancing framework, the deliberate withholding of witnesses until trial weighs heavily against their later introduction, unless special circumstances warrant the belated production of additional testimony.[69] *Roland M.* exemplifies the strict application of the intermediate standard, thus illustrating the strictness boundary of the INTERMEDIATE category. The unusual record of the lower level proceedings, which included

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60. *Burlington*, 736 F.2d at 790.

61. *Id.* The court also provided a non-exhaustive list of reasons for the supplementation of the record: "gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing." *Id.*

62. *Id.*

63. *Id.*

64. *See id.* at 791 (dictum).

65. *See Burlington*, 736 F.2d at 791.

66. *See supra* app. A, row 1st, col. ?.

67. *See* David D. v. Dartmouth Sch. Comm., 615 F. Supp. 639 (D. Mass. 1984), *aff'd*, 775 F.2d 411 (1st Cir. 1985) (claiming to follow *Burlington* standard, while summarily accepting additional evidence – an approach that was accepted by the appellate court on review).

68. 910 F.2d 983 (1st Cir. 1990).

69. *See id.* at 996-97.

warnings made by the state review officer to prevent the unwilling parties' withholding of the witnesses until trial, allowed the reviewing court to justify the disallowance of additional evidence by suggesting that doing otherwise would turn the lower level proceedings into mere "dress rehearsals."[70]

The courts in the other circuits have also described and applied the intermediate additional evidence standard in different and inconsistent ways. For example, the approval of the "cumulative and improper" additional evidence standard by the federal district court in *Bernardsville Board of Education v. J.H.*[71] similarly reflects, albeit by means of a different judicial rhetoric, an intermediate approach. Some decisions are classified here as applying the intermediate standard not because of the language of the judicial opinion but because of the role they played as precedents. For example, *Monticello School District No. 25 v. George L.*[72] textually emphasized the standard of judicial review rather than the appropriate standard for additional evidence,[73] which is unsurprising in light of the unusual intermediate standard of review in IDEA cases.[74] However, the vocal declaration by the court in *Monticello* that it accepted the standard enunciated in *Burlington*[75] coupled with the resulting (mis)perception by the courts that followed this decision[76] suggest that the *Monticello* decision represents an intermediate standard for additional evidence despite the dictum to the contrary.[77] Conversely, some cases similarly classified here as exemplifying the intermediate approach to additional evidence textually claim to follow decisions from the LAX category.[78]

An illustration of textual acceptance of the *Burlington* standard

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70. *See id.* at 997. Most decisions in the intermediate category refer to and apply the *Burlington/Roland M.* standard as one, while reiterating the availability of, but decision not to present the testimony of a witness at the lower administrative level. *See, e.g.*, Springer *ex rel.* Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 662, 666-67 (4th Cir. 1998) (adopting the *Burlington* intermediate approach and noting that despite the good faith effort to reserve the "expense" and "impact" of live testimony, the additional evidence was properly not admitted).

71. 42 F.3d 149, 155, 161 (3d Cir. 1994) (finding no abuse of discretion in district judge's refusal to admit evidence that is "cumulative" and would "improperly embellish" the existing record).

72. 102 F.3d 895 (7th Cir. 1996).

73. *Id.* at 901 (quoting the cautionary language from *Burlington* about ensuring that the additional evidence does not change the trial from one of review to *de novo*).

74. *See supra* notes 18-24 and accompanying text.

75. *See Monticello*, 102 F.3d at 901-02.

76. *See, e.g.*, Patricia P. v. Bd. of Educ., 8 F. Supp. 2d 801 (N.D. Ill. 1998). *See also* cases cited *infra* app. A, row 7th, col. INTERMEDIATE.

77. *See Monticello*, 102 F.3d at 902 (finding no abuse of discretion in district court's disallowance of the additional evidence based on the lack of "procedural infirmaries in the administrative proceedings").

78. *See, e.g.*, Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001) (claiming to follow Metro. Gov't of Nashville v. Cook, while excluding additional evidence).

and conceptual departure from it in terms of allowing additional evidence occurred in *Ojai Unified School District v. Jackson*,[79] where the Ninth Circuit announced its acceptance of the *Burlington* intermediate standard.[80] The court deferred to the lower court determination to accept additional evidence relating to events that occurred subsequent to the State Reviewing Officer's IEP decision, thus enunciating a more relaxed version of the intermediate standard.[81] Although the Ninth Circuit accepted the *Burlington*-type balancing,[82] it left to the discretion of the lower level judge the determination of whether acceptance of additional evidence that has been gathered, collected, and accrued since the last decision is appropriate.[83]

The strictness of the application of the *Burlington* intermediate standard also varies within the federal circuits. For example, in *Doe v. Berkeley Unified School District*,[84] decided in the same year as *Ojai*, the court refused both proffers of additional evidence,[85] thus marking the strict application of the *Burlington* intermediate standard. Some decisions fit the intermediate category based on their acceptance or denial of additional evidence, i.e., the application of the standard, rather than their explications and explanations about the existing law in this area. For example, although the court in *Murray v. Montrose County School District*[86] summarized both the intermediate and relaxed approaches to additional evidence while discussing the appropriate standard of review, it did not categorically identify either approach as appropriate.[87] Its refusal of the proffered evidence implies the intermediate approach to additional evidence.

B. STRICT CATEGORY

The STRICT category has the fewest number of cases in general and Federal Appeals cases, which are denoted in the table in bold, in particular. Most cases from the Eighth Circuit are good illustrations of the strict approach to additional evidence. For example, *Independent School District No. 283 v. S.D.*[88] reiterated and focused on the "some

79. 4 F.3d 1467 (9th Cir. 1993).
80. *See id.* at 1473.
81. *Id.*
82. *See supra* text accompanying note 65.
83. *Ojai*, 4 F.3d at 1473.
84. No. 85-0155-CV-W-5, 1993 U.S. Dist. LEXIS 4641 (N.D. Cal. Mar. 31, 1993).
85. *See id.*
86. Murray *ex rel.* Murray v. Montrose County Sch. Dist., 51 F.3d 921 (10th Cir. 1995).
87. *See id.* at 927.
88. 948 F. Supp. 860 (D. Minn. 1995), *aff'd*, 88 F.3d 556 (8th Cir. 1996).

solid justification" language in *Roland M.*,[89] and the courts in the Eighth Circuit eventually adopted a similarly strict approach to additional evidence.[90]

C. LAX CATEGORY

The LAX category contains the second largest number of cases. Not surprisingly, in the majority of decisions in this category the courts accept the additional evidence. Some judges summarily state that they received the additional evidence or testimony,[91] while others provide updating on the child's progress since the last administrative hearing as their justification.[92] Moreover, several courts acknowledge admitting additional evidence and mistakenly justify the expansion of the administrative record by claiming that, per the Supreme Court's mandate, such evidence did not change the judicial review in IDEA cases to a *de novo* trial.[93]

Additionally, *Susan N. v. Wilson School District*[94] not only exemplifies a relaxed approach to admission of additional evidence, but also provides an additional judicial gloss to this vague and controverted area of law. While directing the lower federal district court to utilize a broader and more relaxed approach to additional evidence, the court instructed Third Circuit courts to "exercise particularized discretion" in admitting additional evidence, that is, only to admit evidence that is "relevant, non-cumulative and useful in determining whether Congress' goal has been reached for the child involved."[95] Although imprecise, the standard enunciated in *Susan N.* represents the border of the relaxed category on the intermediate side.[96]

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89. *Id.* at 88 ("[A] party seeking to introduce additional evidence at the district court level must provide some solid justification for doing so," quoting Roland M., 910 F.2d at 996 (1st Cir. 1990)).

90. *See also* E.S. v. Indep. Sch. Dist. No. 196, 135 F.3d 566 (8th Cir. 1998); Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027 (8th Cir. 2000). *See generally infra* app. A, row 8th, col. STRICT.

91. *See, e.g.*, Oberti v. Bd. of Educ., 801 F. Supp. 1392, 1395 (D.N.J. 1992), *aff'd*, 995 F.2d 1204 (3d Cir. 1993).

92. *See, e.g.*, A.S. *ex rel.* S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 538-39 (D. Conn. 2002).

93. *See, e.g.*, David D. v. Dartmouth Sch. Comm., 615 F. Supp. 639, 641 (D. Mass. 1984), *aff'd*, 775 F.2d 411 (1st Cir. 1985) (citing Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)); *see also supra* notes 19-22 and accompanying text.

94. 70 F.3d 751 (3d Cir. 1995).

95. *Id.* at 760.

96. Such increased discretion had, in fact, been exercised in the Third Circuit. *See infra* app. A, row 3d.

D. "?" CATEGORY

The "?" is a catch-all category that contains an alarmingly large number of cases. The category contains the decisions where the courts lacked clarity or certainty in their reasoning with respect to the interpretation and application of the additional evidence in the IDEA. On the other hand, it does not include decisions where the courts omitted or cryptically mentioned the issue of additional evidence in their discussion of other related matters.[97] The reasons for the included cases' inscrutable treatment of the issue are manifold, including the tangential nature of the issue compared to other matters addressed, the lack of attention to or awareness of the additional evidence issue by the parties or the court, and a lower level, unpublished decision that discussed the additional evidence issue to the extent deemed sufficient to warrant negligible discussion by the reviewing judge. Because of the inherent limitations in attempting to distill the mode and the contents of judicial reasoning from the published judicial opinions, we decided not to differentiate between the lack of clarity about strictness of the additional evidence standard, the minimal discussion of it, and the summary acquiescence to the lower level judge's evidentiary findings. Despite the inevitable imprecision of the categories and the placement of the cases, the cases in this category defied even approximate classification. The relatively large number of cases in the "?" category provides additional evidence of the lack of clarify, consistency, and care in this important aspect of IDEA dispute resolution.[98]

III. PROPOSAL

As this systematic and comprehensive canvassing amply reveals, when faced with the IDEA's standardless command for admission of additional evidence,[99] the courts have created a broad spectrum of opinions that reflect and advance confusion about the appropriate standard. Thus, the current state of the law concerning additional evidence is indeterminate, inconsistent, and lacking in rigor in terms of

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97. *See supra* Part I; *see, e.g.*, Fritschle v. Andes, 25 F. Supp. 2d 699, 703 (D. Md. 1998) (dictum) (alluding to the issue of additional evidence in the statute of limitations context); Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380 (4th Cir. 2000) (dictum). Courts also discuss the additional evidence issue in dictum. *See, e.g.*, Hall v. Shawnee Mission Sch. Dist., 856 F. Supp. 1521 (D. Kan. 1994) (dictum) (mentioning that the parties had the opportunity to submit additional evidence but not intimating any position on additional evidence standard); Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2d Cir. 1997); Bd. of Educ. v. Ill. Bd. of Educ., 184 F.3d 912 (7th Cir. 1999).

98. *See also* discussion *infra* Part IV.

99. 20 U.S.C. §1415(i)(2)(B) (2001).

formulation and application.[100] The landmark decision in *Burlington* failed to establish a clear and easily discernible standard either in the First Circuit or elsewhere.[101] Uncertainty about whether *Burlington* announced an identifiable standard, and what that standard was, as well as the undirected exercises of judicial discretion, led to unpredictable particular results and a relatively relaxed attitude towards the standard for admission of additional evidence generally.[102]

The uncertain mapping of the pertinent judicial decisions further reflects the current problem – the law of additional evidence needs, but lacks, rigor.[103] More specifically, the cause of the inconsistency, vagueness, and ambiguity in the legal doctrine is a result of courts' lack of careful consideration of the additional evidence issue. The courts often admit evidence and announce a standard without providing any reasoned analysis, or contradict themselves by announcing a rule and reaching an opposing result. The legislative scheme as currently promulgated, and as interpreted by the judiciary, allows too much latitude to the courts resulting in a review system that is procedurally lax, cumbersome, and inefficient.

The reasons for Congress to provide clearer and more informed guidance or, absent such special attention, for the courts to achieve a more rigorous, predictable and defensible standard are multiple and compelling. All of them relate to the efficient allocation of resources to the schools and to the courts to achieve the primary statutory purpose of providing FAPE to the individual child with disabilities. Moreover, developing a more rigorous standard for additional evidence should be one part of a larger pattern for legislative and judicial fine-tuning of the IDEA to achieve this purpose. Additional important changes include a shorter statute of limitations, particularly at the judicial stage of the increasingly ponderous dispute-resolution proceedings,[104] a narrower standard for judicial review,[105] and improvement of the selection and

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100. *See infra* app. A and Part II.

101. *See supra* notes 66-67 and accompanying text. The only apparent trend in the area of additional evidence is that of persisting ambiguity.

102. *See infra* app. A, col. LAX, "?".

103. The inconsistencies are present across and within both the categories and the circuits. Because of these inconsistencies, it is likely that another commentator would make a somewhat different classification of the cases reviewed in this article.

104. For a description of the present crazy-quilt and undisciplined state of the current law, see Perry A. Zirkel & Peter J. Maher, *The Statute of Limitations under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. 1 (West 2003).

105. The traditional standard for administrative review is likely the appropriate formulation, although there is some authority for a qualified version of the judicial review standard that applies to labor arbitration. *See, e.g.*, Perry A. Zirkel, *Transaction Costs and the IDEA*, EDUC. WK., May 21, 2003, at 44 (citing H.R. 1350, 108th Cong. (2003)); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994) [hereinafter Zirkel, *Over-Due Process Revisions*]; Spencer Salend & Perry A. Zirkel, *Special*

training of hearing officers for more efficient proceedings[106] in line with the regulatory standard of 45 calendar days from date of filing to date of decision.[107]

First is the IDEA concept of "finality," which over-arches the hearing/review process for dispute resolution.[108] As the Eleventh Circuit recently and astutely observed in deciding the appropriate limitations period applicable to challenges of lower level determination, "[t]he most effective means of ensuring disabled children receive an education tailored to meet their specific needs is to provide prompt resolution of disputes over a child's IEP."[109] Appropriate remedies that are delayed by "potentially protracted litigation" may become placement decisions that are obsolete even before implementation.[110]

When courts provide justifications for applying a relaxed additional evidence standard, they often cite the need to update cases protracted by prolonged hearings, the relaxed statute of limitations for judicial review, and congested court dockets. Such reasoning is circular. By reinforcing the penchant for inefficient hearings, contributing to court congestion, adding issues not considered below, and generally by

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Education Hearings: Prevailing Problems and Practical Proposals, 19 EDUC. & TRAINING MENTALLY RETARDED 29 (1984).

106. *See supra* note 105. Other, related recommendations include further strengthening of mediation and other prehearing processes for dispute resolution under the IDEA. *Id.* A number of courts in IDEA-related decisions barred parents from proceeding pro se at the judicial review level. Although such decisions may be warranted logistically to ensure that professionals familiar with federal procedure represent the parties in front of the judge, disallowance of informal procedures is an unwarranted step towards legalization of the process. *See, e.g.*, Collingsru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998); Shevtsov v. Los Angeles Unified Sch. Dist., 134 F.3d 379 (9th Cir. 1998); Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123 (2d Cir. 1998); Devine v. Indian River County Sch. Bd., 121 F.3d 576 (11th Cir. 1997). In addition, a major special education treatise claims that because many parties proceed pro se at the hearing level (for which the author provides no empirical evidence as to the percentage of cases), the special education cases may be missing important evidence. *See* MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 20 n.59 (2d ed. 2002) (citing Everett *ex rel.* Everett v. Santa Barbara High Sch. Dist., 28 Fed. Appx. 683, *available at* No. 00-55647, 2002 WL 44264 (9th Cir. Jan. 11, 2000). However, in the majority of the jurisdictions, the district bears the burden of proof at the hearing level, which mitigates the omission of important evidence, and lay advocates sometimes represent parents competently, similarly mitigating the problem. *See, e.g.*, Kay Seven & Perry Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow*, 9 GEO. J. ON POVERTY L. & POL'Y 193 (2002). Both parties assume the risk when they proceed at the hearing level without an attorney, and a lax approach, as illustrated by *Everett*, adds evidence at both the parents' and, as rebuttal, the district's side without meaningful limits, thus inviting the costly problems of inefficient dispute resolution.

107. 34 C.F.R. § 300.511(a) (2004).

108. *See, e.g.*, Muth v. Central Bucks Sch. Dist., 839 F.2d 113, 124-25 (3d Cir. 1988), *rev'd on other grounds sub nom.* Dellmuth v. Muth, 491 U.S. 223 (1989) (stressing the importance of providing a final decision at the lower level within the prescribed statutory limits and holding that the secretary's numerous "remands" violated the finality requirement).

109. Cory D. *ex rel.* Diane D. v. Burke County Sch. Dist., 285 F.3d 1294, 1299 (11th Cir. 2002).

110. *Id.*

trying to catch a moving target, the courts further protract the case.

Moreover, the courts' inconsistency and unpredictability in the formulation and application of the standard for additional evidence have become part of the problem rather than remedy. Purposely insular when compared to the IDEA hearing officers, the courts, i.e., the federal judiciary and the state reviewing courts, are generally removed from the vagaries of everyday life and especially from the specialized areas such as special education of children with disabilities. Armed with almost unbounded judicial discretion, in light of an unclear statutory guidance and a vague set of precedents, the judiciary has tended to apply a norm that does not fit the child's crucial need for FAPE.[111] Even if a judge is better equipped to determine what is FAPE for a specific eligible child, a proposition which is doubtful in this soft and specialized field, what is the net benefit of the judicial expertise to the child? If she has been in an inappropriate stay-put placement for a prolonged period of time and the child's development and needs have changed in the interim, has the judicial determination of FAPE made a difference?[112]

The related and underlying consideration is procedural due process. This is the heart of the IDEA's overall scheme for FAPE,[113] including its dispute-resolution process keyed to an impartial due process hearing.[114] In the original 1975 enactment, Congress effectively codified PARC and Mills[115] consent decrees, which used the deprivation of property and liberty rationale to imply the appropriate procedural safeguards. At that time in our history, when some states still had blanket exceptions to compulsory education for students with disabilities, the threshold purpose was to remedy the widespread exclusion of individuals with disabilities from access to appropriate – and in many cases any – public education.[116] The initial statute served its role of providing access admirably well.[117] Today, it is almost unheard of to find a child who is eligible under the IDEA without access to special

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111. Senator Williams, one the IDEA's principal authors, recognized the detriments of the potentially protracted legal proceedings in the final Senate debate, stating that "delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development." 121 CONG. REC. 37, 416 (1975).

112. *See supra* note 10.

113. *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 194 (1982).

114. *See supra* text accompanying note 10.

115. *See supra* notes 1-4 and accompanying text.

116. *See, e.g.*, *Rowley*, 458 U.S. at 179.

117. The almost concomitant civil rights legislation, Section 504 of the Rehabilitation Act, enacted two years earlier, reinforced the progress by curbing exclusionary practices and combating disability discrimination. 20 U.S.C. § 794. *See generally* PERRY A. ZIRKEL & STEVEN R. ALEMAN, SECTION 504, THE ADA AND THE SCHOOLS (2000).

education services, much less to schooling at public expense.[118] Thus, the child's property and liberty interest is significantly reduced. On the other side of the due process balance,[119] however, are enduring, even expanding, governmental interests in terms of limited availability and efficient use of resources.

One such governmental interest is judicial economy. At a time when the volume of special education litigation continues to increase dramatically while overall education litigation has leveled off, [120] prolonging judicial proceedings by allowing additional evidence without rigorous justification is contrary to the child's interest in FAPE and society's interest in judicial economy. Moreover, it is a waste of scarce judicial resources to use judges to accept evidence liberally and make decisions about FAPE because 1) they lack the requisite expertise,[121] and 2) the IDEA, by its very nature, is individualized, thus putting the focus on particular factual nuances rather than generalizable legal precedents.[122]

A second, interrelated interest is administrative efficiency – not to be confused with the lesser interest of administrative convenience – in terms of the cornerstone of the IDEA's dispute-resolution process. Liberally and unpredictably allowing additional evidence at the judicial review stage works against the mission of due process hearings – developing a complete factual record[123] and reaching a prompt, expert

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118. *See, e.g.*, U.S. DEPARTMENT OF EDUCATION, 24TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2003), *available at* http://www.ed.gov/about/reports/annual/osep/2002/index.html.

119. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 583-84 (1975).

120. *See, e.g.*, Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002); Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341 (1997).

121. The IDEA, according to the Supreme Court's landmark decision, leaves the primary responsibility for teaching children and formulating educational policy to state and local education authorities because the "courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Rowley*, 458 U.S. at 208 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

122. As a result, FAPE cases, including those under the interrelated least restrictive environment presumption, continue to be the main source of IDEA litigation, and the results have varied based on the individual case without any detectable overall trend. *See, e.g.*, Perry A. Zirkel, *Special Education Update VII*, 160 EDUC. L. REP. 1 (West 2002) (citing also the six previous IDEA case compilations). The conclusion of almost a decade ago still rings true that for the most part these cases apply rather than refine the standard for FAPE. Zirkel, *Over-Due Process Revisions*, *supra* note 105, at 406.

123. *See, e.g.*, Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 790 (2d Cir. 2002); Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 779 (3d Cir. 1994); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir.1992); *see also* cases cited *supra* note 32. Similarly, the antecedent steps in the statutory scheme are designed to lead to a development of complete factual record at the hearing stage in relation to the child and the IEP. *See supra* note 10, 12, and 13 and accompanying text. For example, parents have the right to participate in developing their child's IEP and to examine all relevant records with respect to the identification, evaluation and educational placement of their child. *See generally* 20 U.S.C. §§ 1415(b)(1)(D)-(E) (2001).

decision.[124] A relaxed approach to admitting additional evidence at the judicial review stage runs contrary to these purposes. Why would either side do all its homework for and use all of its evidence, including costly expert witnesses, at the due process hearing if the court's open-ended additional evidence standard may provide a private tactical or economical advantage? For example, if the party wins at the first tier hearing level without an outside expert, either because the other side's evidence at that level is not countervailing, or because the hearing officer's own expertise might effectively negate the persuasiveness of the witness, it may well be advantageous to save this evidence to present it if necessary at the judicial level. If, on the other hand, the party loses, there is the interrelated advantage of minimizing deference to the hearing officer's decision, due to the lack of her fact finding,[125] thus further undermining the finality of the factual stage of the process.

An interrelated efficiency interest, which benefits not only the government but also the child, is applying the expertise of the hearing officer. Establishing a record by a hearing officer who is an impartial expert improves not only the prospect of resolution at the pre-judicial stage, but also – as the IDEA exhaustion case law makes clear[126] – the efficiency upon judicial review.

A third major state, or societal, interest – also shared by the individual disabled child – is the limited availability of resources for education generally and special education specifically. At a time when our country is emphasizing accountability via the No Child Left Behind Act [127] and schools' education budgets are dwindling, [128] unduly expending resources for protracted proceedings under the IDEA's hearing/review process diverts funding from education to funding for litigation. Moreover, inasmuch as the cost of educating a child with a disability is, on average, approximately twice that of educating a child without a disability[129] and the federal government only funds ten to

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124. *See, e.g.*, Cory D. *ex rel.* Diane D. v. Burke County Sch. Dist., 285 F.3d 1294, 1299 (11th Cir. 2002) (stressing the need for and Congressional intent of prompt resolution in the context of IDEA related statute of limitations issue); Livingston Sch. Dist. v. Keenan, 82 F.3d 912, 917 (9th Cir. 1996); *see also supra* note 113.

125. *See supra* note 24 and accompanying text.

126. *See supra* notes 31-32 and accompanying text.

127. 20 U.S.C. §§ 6301 *et seq.* (2002).

128. *See, e.g.*, Joetta L. Sack, "No Child" Law Vies for Scarce State Resources, EDUC. WK., Jan. 8, 2003, at 16-17.

129. *See, e.g.*, JAY G. CHAMBERS ET AL., WHAT ARE WE SPENDING ON SPECIAL EDUCATION SERVICES IN THE UNITED STATES, 1999-2000? 17 (2002). Earlier estimates where even higher. *See, e.g.*, MARY MOORE ET AL., PATTERNS IN SPECIAL EDUCATION DELIVERY AND COSTS IV (1988) (ratio of 2.3 to 1). Moreover, none of these estimates include the transaction costs of the IDEA's dispute resolution system.

twenty percent of the excess costs of special education,[130] the need for an efficient dispute-resolution system is an even stronger interest in terms of the utilization of special education budgets. Such a system consists of expert and prompt due process hearings, with judicial review focused to the maximum extent on new legal issues rather than additional fact-finding.

Compared to other areas of litigation that have significant implications in the areas of law on top of the national agenda, such as the 2000 Presidential election cases, the First Amendment cases about cross burning, or the Fourteenth Amendment cases about affirmative action, the IDEA-related disputes often involve only the tailoring of an individual child's education, not discrimination or the civil rights of a group of similarly situated individuals. The individual decisions are not unimportant, but "appropriate" justice in the routine case should be expedited and economical, keeping the focus of resources, including time, on meeting the needs of the child and restoring, rather than destroying, the partnership relationship envisioned by the Act. Protracted litigation, fueled by laxity in terms of additional evidence, contributes instead to "needless adversariness," [131] with undue contributions from, and benefits to, overly litigious lawyers[132] and "the special education bureaucracy."[133]

Thus, on balance, now is the time for Congress[134] and the courts to

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130. *See, e.g.*, CHAMBERS ET AL., *supra* note 129, at 18 (ten percent). We have adjusted the figure upward in light of the Bush administration's proposed increases in IDEA funding. In any event, the effects are amply evident at the state and local level. *See, e.g.*, Debra Nussbaum, *Reining in Special Education*, N.Y. TIMES, Aug. 31, 2003, at NJ-1 (discussing the budgetary effects in New Jersey); Andrew J. Rotherham, *The Politics of IDEA Funding*, EDUC. WK., Oct. 9, 2002, at 34, 36 ("Special education is expensive, frightfully so, and . . . chronic underfunding adversely affects school district budgets."); Kate Zernike, *Special Education Debate Shifts from Money to Ideas*, N.Y. TIMES, May 13, 2001, at 27 (discussing the budgetary effects in Connecticut).

131. Howey v. Tippecanoe Sch. Corp., 734 F. Supp. 1485, 1491 (N.D. Ind. 1990) (quoting Rossi v. Gosling, 696 F. Supp. 1079, 1085 (1988)). *See also* Perry Zirkel, *Special Education: Needless Adversariness*, 74 PHI DELTA KAPPAN 809 (1993).

132. *See, e.g.*, Troy Sch. Dist. v. Boutsikaris, 250 F. Supp. 2d 720, 737 (E.D. Mich. 2003). The court stated,.

> Regrettably, the attorneys entered the picture and the focus changed dramatically . . . . Under this record, it appears that the lawyers became immersed in the "battle," and perhaps failed to counsel their clients at the outset to weigh their fairly narrow differences against the potentially enormous cost of obtaining a slightly more favorable outcome through lengthy and contentious administrative and judicial proceedings.

Id.

133. David O. Krantz, *Funded into Perpetuity*, EDUC. WK., Jan. 29, 1997, at 30.

134. Inasmuch as the IDEA is a funding, rather than civil rights, statute, Congress periodically amends it under a reauthorization process. The previous amendments, including the provision for attorneys' fees in 1986 and the expansion of the eligibility classifications in 1990, have further fueled disputes but missed the opportunity for more efficient, final resolution at the due process hearing level. Currently, Congress is engaged in the reauthorization process, which thus far has only addressed the limitations-period part of the problem. *See, e.g.*, Perry Zirkel, *A Birds'-Eye*

fill the gap with a strict standard for admission of additional evidence at the judicial review stage of IDEA proceedings. Such a standard would contribute to the conservation and utilization of increasingly scarce judicial[135] educational resources,[136] while simultaneously protecting the child's interest in timely FAPE.[137]

Both the judicial consideration and the scholarly commentary to date [138] have failed to accord carefully reasoned attention to the admission of additional evidence. For commentators, the reason may be the general trend toward "political correctness," particularly where constructive criticism of a piece of the IDEA may be perceived as an ad hominem criticism of individuals with disabilities.[139] For the courts, the reason may be the proclivity to preserve discretion where Congress has not specifically mandated otherwise. [140] Neither reason is in the overlapping interests of the government and the child. As part of a larger reform for efficiency in IDEA cases,[141] which must include the impartial hearing process,[142] courts need to adopt and enforce[143] a strict

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View of the IDEA Reauthorization, COMMUNIQUE (Nat'l Ass'n of Sch. Psychologists, Bethesda, MD), Sept. 2003, at 26.

135. *See supra* note 120 and accompanying text.

136. *See, e.g.*, Kate Zernike, *Special Education Debate Shifts from Money to Ideas*, N.Y. TIMES, May 13, 2001, at 27 (discussing the increasing costs of special education). *See also supra* notes 127-30 and accompanying text.

137. *See supra* note 111 and accompanying text.

138. *See, e.g.*, BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW § 14, at 34-36 (1st ed. 1991) (providing a routine examination of cases in the area of additional evidence, but failing to question the lack of uniformity of the law in this area or the increasing legalization); MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 22:1-22:2 (2d ed. 2002) (mixing description of and prescription for a broad, discretionary approach, without pointing out the wide dis-uniformity and the arguments for a different, strict approach).

139. For rare examples of more broad-based criticism, see, Clint Bolick, *A Bad IDEA Is Disabling Public Schools: 'Perverse Incentives' in an Unfunded Mandate*, EDUC. WK., Sept. 5, 2001, at 56 (stating that "IDEA's monomaniacal focus on process – abetted by a battery of lawyers who tie school districts in knots – rather than academic progress" created a system that is "systemically dysfunctional and damaging to public schooling as a whole."); Raymon Keen, *The Mandated Empire of Special Education*, COMMMUNIQUE, Oct. 30, 2001, at 14 (Nat'l Ass'n of Sch. Psychologists, Bethesda, MD); DISABILITY AND DEMOCRACY, RECONSTRUCTING (SPECIAL) EDUCATION FOR POSTMODERNITY (Thomas M. Skrtic ed., 1995); Lisa Gubernick & Michelle Conlin, *The Special Education Scandal*, FORBES, Feb. 10, 1997, at 66.

140. The amorphous standard of judicial review is only one example. *See supra* notes 21-22 and accompanying text.

141. *See supra* notes 104-107 and accompanying text.

142. *See, e.g.*, Kevin J. Lanigan et. al., *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 213 (Chester E. Finn, Jr. et. al. eds., 2001), *available at* http://www.edexcellence.net/library/special_ed/special_ed_final.pdf; W. Chester Area Sch. Dist. v. Collegium Charter Sch., 812 A.2d 1172, 1179-80, 1186-87 (Pa. 2002) (reiterating a refrain against unduly prolonged hearings, which are contrary to both parties' interests). In addition to better selection and training, the courts may help by holding state and local authorities accountable. *See, e.g.*, Rose v. Chester County Intermediate Unit, No. CIV. A. 95-239, 1996 WL 238699 (E.D.Pa. 1996), *aff'd mem.*, 114 F.3d 1173 (3d Cir. 1997). A recent governmental report is based on

standard[144] for admission of additional evidence under the IDEA.[145]

In light of the limited judicial authority in the appropriate category,[146] formulating language that properly balances the competing interests is not without difficulty. Generally, courts should adopt and enforce a strong presumption against additional evidence. More specifically, the suggested standard is as follows:

> The court should deny a motion to admit additional evidence to the administrative record unless the movant provides a solid, particularized, and compelling justification for such admission. Examples of reasons that merit consideration are significant gaps in the administrative transcript owing to mechanical failure, the not possibly avoidable unavailability of a key witness, and a not only improper but also prejudicial exclusion of evidence by the administrative agency after due deference to its ample discretion.[147]

Conversely, the appropriate construction of § 1415(i)(2)(B) is to disallow testimony from all who did, or could have, testified before the administrative hearing. Such a rule would neither unduly limit a court's discretion nor constrict its ability to form an independent judgment as Congress expressly directed. In ruling on the motion, a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in

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admittedly flawed data, too short a time period, and a scope that did not include the duration of hearings. GOVERNMENT ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICT (Sept. 9, 2003), *available at* http://www.gao.gov/new.items/d03897.pdf.

143. The inconsistency between what the court says and what it does in such matters is not uncommon. *See, e.g., supra* notes 72-78 and accompanying text. It obviously undermines predictability of and trust in the judicial process.

144. *See, e.g., supra* notes 88-90 and accompanying text for the "solid justification" standard. *See also* O'Toole *ex rel.* O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 223, 963 F. Supp. 1000, 1015 (D. Kan. 1997) (stating that additional evidence at the judicial level dilutes the evidence before the hearing officer, thus allowing parties to undercut the statutory role of administrative expertise), *aff'd*, 144 F.3d 692 (1998); Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 667 (4th Cir. 1998) (holding that a "lenient standard for additional evidence" makes the process time consuming because it allows "scrambling" parties to use the federal court proceeding to "patch up holes in their administrative case," and finding it "doubtful at best" that the "lengthy process would serve students.")

145. Yet, on the other extreme, an excessive reliance on an efficient system by the parties because of the system's benefits such as speed and reduced costs may lead to codependency that would compromise the system's beneficial effects. The goal of the suggested change is not to cause such result, but rather to recommend a system that would allow factual determinations to be made and conflicts to be resolved at the lower level by an independent and expert third party.

146. *See supra* note 144.

147. This formulation represents the author's clarification and tightening of the First Circuit's generally well reasoned but ambiguous *Burlington* standard. *See* Town of Burlington v. Dep't of Educ., 736 F.2d 773, 791 (1st Cir. 1984); *supra* notes 57-65 and accompanying text.

one party's reserving its best evidence for trial, the conservation of judicial resources, the importance of meeting the eligible child's needs promptly, and educational system efficiency concerns.[148] The court would look with a critical eye on a claim that additional evidence should be admitted. Such an approach followed by a pretrial order that identifies who may testify and limits the scope of the testimony will enable the court to avoid a trial *de novo*.

In adopting the additional evidence rule, Congress intended the provision of a FAPE for every child, while ensuring that it is done in the most efficient manner possible, and therefore intended to limit time-consuming expert testimony to the administrative hearing. Although in many instances the district court may find expert testimony helpful in illuminating the nature of the controversy, the expert testimony should be presented and developed at the lower level. Such a rule prevents parties from attempting to use expert testimony as a way of updating the court on the child's progress during the time between the hearing and the trial. It spares the courts from having to draw a line between what had or could have been testified to at the administrative hearing and the trial, because the testimony is precluded in all but a few exceptional circumstances.

148. *See Burlington*, 736 F.2d at 791.

APPENDIX A

	STANDARD FOR ADDITIONAL EVIDENCE			
CIR.	STRICT	INTERMEDIATE	LAX	?
1st	− Roe[1] (1986) ± Hopkinton[2] (1996) − Ms. M.[3] (2002)	(±) **Burlington**[4] (1984) (−) **Roland M.**[5] (1990)	+ David D.[6] (1984) + Norton[7] (1991) + Doe I[8] (1998) − Hawkins[9] (2000)	(+) **Hampton**[10] (1992) + Brougham[11] (1993) (+) **Lenn**[12] (1993) + Norma P.[13] (1994)
2d	(−) Lillbask[14] (2002)	+ Jean N.[15] (1991)	− **Briggs**[16] (1989) + Mavis[17] (1993) + Wall[18] (1996) + Phillips[19] (1997) + Mr. X[20] (1997) + J.B. I[21] (1997) + St. Johnsbury[22] (1998) + A.S.[23] (2002)	+ Malkentzos[24] (1996) + Mather[25] (1996) + Brier[26] (1996) + Warton[27] (2002)
3d		± Martin K.[28] (1993) (−) **Bernardsville**[29] (1994)	(+) **Oberti**[30] (1992) ± **Susan N.**[31] (1995) (±) Bruce C.[32] (2002)	(+) **Kruelle**[33] (1981) (+) **Wexler**[34] (1985) + Johnson I[35] (1991) + Zakary M.[36] (1995) + Christen G.[37] (1996)

4th	– Jacobsen[38] (1999)	– **Springer**[39] (1998) – Jones[40] (1998) ± King II[41] (1998) – Smith[42] (1999) + Justin G.[43] (2001) – J.B. II[44] (2001)	+ Hartmann[45] (1996) + King I[46] (1997)	+ **DeVries**[47] (1988) + **Burke**[48] (1990) + DeLullo[49] (1998) + Carter[50] (1998) + **D.M.**[51] (2002) + Alexis[52] (2003)
5th		± Burks[53] (1999) – Eric H.[54] (2002)		+ **Teague**[55] (1993) + **Cypress**[56] (1997)
6th		(–) **Knable**[57] (2001) – Kuszewski[58] (2001)	+ Barwacz[59] (1988) (+) **Cook**[60] (1990) + **Carroll**[61] (1992) – Hudson[62] (1995) (±) **Guest**[63] (1999) + Johnson II[64] (2000) + Deal[65] (2003)	– Brimmer[66] (1994) + **Doe II**[67] (1998)

7th		(±) Clifford L.[68] (1985) (–) **Rheinstrom**[69] (1995) (–) **Monticello**[70] (1996) – Roy A.[71] (1996) – Patricia P.[72] (1998) (–) **P.J.**[73] (1999) – Reed[74] (2000) – Richland[75] (2000) ± Beth B.[76] (2001) – Arlington[77] (2001) – Jeff S.[78] (2002) ± Krista P.[79] (2003) ± Tammy S.[80] (2003)	+ Anderson[81] (1980) + D.F.[82] (1996) ± Hernandez[83] (2001) ± Peter G.[84] (2002)	+ William S.[85] (1984) + Murphysboro[86] (1994) ± Z.S.[87] (2001)
8th	– S.D.[88] (1995) – Breen[89] (1997) (–) **E.S.**[90] (1998) (–) **Gill**[91] (2000) – Reese[92] (2002) + **Wachlarowicz**[93] (2004)	+ Moye[94] (1995) ± Moubry[95] (1996) + Larson[96] (2004)		+ Yankton[97] (1995) – Malehorn[98] (1997)

9th		(+) **Ojai**[99] (1993) – Doe III[100] (1993) (–) **Harris**[101] (1995) – Monterey[102] (1995) (–) **Scanlon**[103] (1995) – Maniscalco[104] (1996) – Brandon H.[105] (2000) + Everett[106] (2000) ± **P.M.**[107] (2000) + Cari Rae S.[108] (2001) + Gellerman[109] (2002)	+ Russell[110] (1985) ± Ash[111] (1991)	+ Holland[112] (1992) (+) **Capistrano**[113] (1995) ± Katherine G.[114] (2003)
10th		– **Murray**[115] (1995) – O'Toole[116] (1997) ± L.B.[117] (2002) + Johnson III[118] (2003)	± Wiesenberg[119] (2002)	
11th		± **Walker**[120] (2000) + Maricus W.[121] (2001) (±) **Collier**[122] (2002)		+ **Jefferson**[123] (1988) (+) **Martinez**[124] (1988)
DC			+ Andersen[125] (1988)	
State Courts			(+) Cremeans[126] (1993)	(±) Pascagoula[127] (1985) (–) Franklin[128] (1985) + Tanya[129] (1995)

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90. E.S. v. Indep. Sch. Dist. No. 196, 135 F.3d 566 (8th Cir. 1998).
91. Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027 (8th Cir. 2000).
92. Reese *ex rel.* Reese v. Bd. of Educ., 225 F. Supp. 2d 1149 (E.D. Mo. 2002).
93. Wachlarowicz v. Sch. Bd. of Indep. Sch. Dist. No. 832, 40 IDELR ¶ 231 (D. Minn. 2004).
94. Moye *ex rel.* Moye v. Special Sch. Dist. No. 6, 22 IDELR 852 (D. Minn. 1995).
95. Moubry *ex rel.* Moubry v. Indep. Sch. Dist. No. 696, 951 F. Supp. 867 (D. Minn. 1996).
96. Larson v. Indep. Sch. Dist. No. 361, No. 02-3611, U.S. Dist. LEXIS 3322 (D. Minn. Mar. 2, 2004).
97. Yankton Sch. Dist. v. Schramm, 900 F. Supp. 1182 (D.S.D. 1995).
98. Malehorn *ex rel.* Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772 (D.S.D. 1997).
99. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993).
100. Doe v. Berkeley Unified Sch. Dist., No. C-91-2863 MHP, 1993 U.S. Dist. LEXIS 4641 (N.D. Cal. Mar. 31, 1993).
101. Harris v. Nenana City Pub. Sch., 22 IDELR 352 (9th Cir. 1995).
102. Monterey Peninsula Unified Sch. Dist. v. Giammanco, No. C-94-20782 JN, 1995 WL 476610 (N.D. Cal. Aug. 8, 1995).
103. Scanlon *ex rel.* Birkner v. San Francisco Unified Sch. Dist., 20 IDELR 1383 (N.D. Cal. 1994), *aff'd*, 23 IDELR 332 (9th Cir. 1995).
104. Maniscalco *ex rel.* Rebelo v. Salinas Union High Sch. Dist., No. C-95-20314-JN, 1996 WL 266153 (N.D. Cal. May 15, 1996).
105. Brandon H. *ex rel.* Richard H. v. Kennewick Sch. Dist. No. 17, 82 F. Supp. 2d 1174 (E.D. Wash. 2000) *further proceedings in* No. CT-98-5029-EFS, 2001 U.S. Dist. LEXIS 3606 (E.D. Wash. Feb. 28, 2001).
106. Everett *ex rel.* Everett v. Santa Barbara High Sch. Dist., 32 IDELR 175 (C.D. Cal. 2000).
107. P.M. *ex rel.* N.L. v. Lake Wash. Sch. Dist. 414, No. 99-35263, 2000 U.S. App. LEXIS 4872 (9th Cir. Mar. 21, 2000).
108. Dep't of Educ. v. Cari Rae S., Civ. No. 00-00212SPK/KSC, 2001 U.S. Dist. LEXIS 11376 (D. Haw. Aug. 3, 2001).
109. Gellerman *ex rel.* Gellerman v. Calaveras Unified Sch. Dist., 43 Fed. Appx. 28 (9th Cir. 2002).
110. Russell v. Jefferson Sch. Dist., 609 F. Supp. 605 (N.D. Cal. 1985).
111. Ash v. Lake Oswego Sch. Dist. No. 7J, Civ. No. 90-746-FR, 1991 U.S. Dist. LEXIS 1270 (D. Or. Jan. 31, 1991), *further proceedings in* 766 F. Supp. 852 (D. Or. 1991), *aff'd*, 980 F.2d 585 (9th Cir. 1992).
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113. Capistrano Unified Sch. Dist. v. Wartenberg *ex rel.* Wartenberg, 59 F.3d 884 (9th Cir. 1995).
114. Katherine G. v. Kentfield Sch. Dist., 261 F. Supp. 2d 1159 (N.D. Cal. 2003).
115. Murray *ex rel.* Murray v. Montrose County Sch. Dist., 51 F.3d 921 (10th Cir. 1995) (dictum).
116. O'Toole *ex rel.* O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 223, 963 F. Supp. 1000 (D. Kan. 1997), *aff'd*, 144 F.3d 692 (1998).
117. L.B. v. Nebo School Dist., 214 F. Supp. 2d 1172 (D. Utah 2002).
118. Johnson *ex rel.* Johnson v. Olathe Dist. Schools, 212 F.R.D. 582 (D. Kan. 2003).
119. Wiesenberg v. Bd. of Educ., 181 F. Supp. 2d 1307 (D. Utah 2002).
120. Walker County Sch. Dist. v. Bennett, 203 F.3d 1293 (11th Cir. 2000).
121. Maricus W. v. Lanett City Bd. of Educ., 141 F. Supp. 2d 1064 (M.D. Ala. 2001).
122. Sch. Bd. of Collier County v. K.C., 285 F.3d 977 (11th Cir. 2002).
123. Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988).
124. Martinez *ex rel.* Martinez v. Sch. Bd. of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988), *vacating on other grounds*, 692 F. Supp. 1293 (M.D. Fla. 1988), *remanded to* 711 F. Supp. 1066 (M.D. Fla. 1989).
125. Andersen v. District of Columbia, No. 87-0297, 1988 U.S. Dist. LEXIS 18527 (D.D.C. Mar. 30, 1988), *aff'd*, 877 F.2d 1018 (D.C. Cir. 1989).

126. Cremeans v. Fairland Local Sch. Dist. Bd. of Educ., 633 N.E.2d 570 (Ohio Ct. App. 1993).
127. Bd. of Trs. v. Doe, 508 So. 2d 1081 (Miss. 1987).
128. Sch. Comm. v. Comm'r of Educ., 482 N.E.2d 796 (Mass. 1985) (determining that the Federal standards and procedures of 20 U.S.C. § 1415(e)(2) preempt State law standards and procedures).
129. Tanya *ex rel.* Mrs. "X" v. Cincinnati Bd. of Educ., 651 N.E.2d 1373 (Ohio Ct. App. 1995).