PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 40 | Issue 1 Article 1

5-30-2020

State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act II: The Post-Hearing Stage

Perry A. Zirkel

State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act II: The Post-Hearing Stage

By Perry A. Zirkel*

I. IDEA FOUNDATIONAL REQUIREMENTS 3
II. METHOD AND RESULTS 6
A. *Decision* 13
B. *Appeal* 16
C. *Other* 17
III. DISCUSSION AND RECOMMENDATIONS 19
IV. APPENDIX: CITATIONS FOR THE STATE LAW ADDITIONS TO DPH POST-HEARING STAGE 26

A recent issue of this journal contained an article that canvassed state laws that added to the basic requirements of the Individuals with Disabilities Education Act (IDEA)[1] for due process hearings (DPHs).[2] The specific focus of that article was the hearing stage, including the rights of the parties and the authority of the impartial hearing officer (IHO)[3] at the hearing. Although the boundaries for the hearing stage are more blurry than bright,[4] the article excluded and recommended for subsequent analyses the prehearing and post-hearing stages.[5]

The purpose of this follow-up analysis is to supplement the earlier article by canvassing state law provisions specific to the post-hearing stage of IDEA DPHs. The length is relatively brief because (1) the springboard article on the hearing stage provided the detailed foundation, (2) the scope of the post-hearing stage is much more limited, and (3) the previous literature has largely unexplored this stage.[6] Otherwise in accordance with the format of the original

---

* Perry A. Zirkel is University Professor Emeritus of Education and Law at Lehigh University.

[1] 20 U.S.C. §§ 1400–1419 (2017). The IDEA regulations provide the remainder of the requirements for due process hearings as the federal foundation subject to state elaboration. 34 C.F.R. §§ 300.507–300.515 (2018).

[2] Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2018).

[3] This article uses the generic label of IHO, although an increasing proportion of states have moved to using administrative law judges (ALJs) for this role, a more than negligible number continue to use part-time contractors who are either attorneys or, less frequently, special education specialists. *E.g.*, Jennifer F. Collins, Perry A. Zirkel & Thomas A. Mayes, *State Due Process Hearing Systems: An Update*, 30 J. DISABILITY POL'Y STUD. 156 (2019) (reporting that twenty states used central panel ALJs compared to twelve states a decade earlier).

[4] For an example of the overlap between the hearing and post-hearing stages, the IDEA's "stay put" provision requires keeping the child in the "current educational placement" starting with the filing for the hearing until the completion of the proceedings, including any judicial appeals. 20 U.S.C. § 1415(j) (2017); 34 C.F.R. § 300.518 (2018). Exemplifying the other, porous end of the post-hearing stage, the scope extends on a limited, transitional basis to the right to judicial appeal, for which the parties have the option of either state or federal court, including detailed provisions for attorneys' fees. 20 U.S.C. § 1415(i) (2017); 34 C.F.R. §§ 300.516–300.517 (2018).

[5] Zirkel, *supra* note 2, at 28.

[6] The occasional scholarly commentary has been limited to the case law for specific substeps of the post-hearing stage of DPHs, such as the standard of review

article, Part I provides the template of IDEA requirements for the post-hearing stage. Part II tabulates the state law provisions that supplement the federal template. Part III provides a discussion of the results along with recommendations for future policymaking and scholarship.

I. IDEA FOUNDATIONAL REQUIREMENTS

The IDEA contains specific provisions for the successive stages before, during, and after DPHs.[7] The specific focus here is the after, or the post-hearing stage. As a prefatory matter, two features of this stage illustrate the IDEA's model of "cooperative federalism."[8] First, for appeals of DPH decisions, the IDEA provides states with the option to have a second, review officer tier prior to judicial review.[9] Second, for judicial appeals, the IDEA expressly provides for concurrent state and federal court jurisdiction,[10] with states having the option for a different limitations period than the otherwise specified ninety-day period.[11] For the remaining state variations, the

---

for the second tier or for the courts. *E.g.*, Daniel W. Morton-Bentley, *The Rowley Enigma: How Much Weight Is Due to IDEA Administrative Proceedings in Federal Court?*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 428 (2016) (proposing judicial deference to substantive, not procedural, findings of IHOs); Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel*, 3 WIDENER J. PUB. L. 871 (1994) (proposing a three-part paradigm for the review standard for the review officer tier under the IDEA).

[7] For the basic IDEA substeps of each stage as the introduction for an analysis of the state law provisions at the middle stage, see Zirkel, *supra* note 2, at 7–8.

[8] Schaffer *ex rel*. Schaffer v. Weast, 546 U.S. 49, 52 (2005) (citing Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (9th Cir. 1999)).

[9] 20 U.S.C. § 1415(g) (2017). The number of states opting for a review officer tier has decreased from twenty-six in 1991 to eight in 2019. Jennifer F. Connolly et al., *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. DISABILITY POL'Y STUD. 156, 157–58 (2019) (identifying Kansas, Kentucky, Nevada, New York, North Carolina, Ohio, and South Carolina); *see also* Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. VA. L. REV. 735, 745 n.38 (2016) (identifying Oklahoma as an additional with a review officer tier). In such states, the IHO is at the local level. 20 U.S.C. § 1415(g)(1) (2017).

[10] 20 U.S.C. § 1415(i)(2)(A) (2017); 34 C.F.R. § 300.516(a) (2018) (providing right of appeal to state or federal court).

[11] 20 U.S.C. § 1415(i)(2)(B) (2017); 34 C.F.R. § 300.516(b) (2018). The starting point for this period is the date of the DPH decision or, in two-tier states, the review officer decision. *Id*.

understanding is that they may add to, not subtract from, the requirements for state and local education agencies.[12]

Although not demarcated by clear pre-established boundaries,[13] the following provisions of the IDEA legislation, with the limited supplementation of its regulations,[14] set forth the foundational template of the analysis of the state law additions[15]:

1. Decision

   a. FAPE Limitations:

      • Substantive Grounds[16]

      • Two-Part Test for Procedural FAPE[17]

      • Authority for Procedural Compliance Order[18]

   b. Factual Findings[19]

---

[12] *E.g.*, Evans v. Evans, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993) ("IDEA does not preempt state law if the state standards meet the minimum federal guidelines . . . [but it] 'does preempt state law if the state standards are below the federal minimum'" (citing Amelia Cty. Sch. Bd. v. Va. Bd. of Educ., 661 F. Supp. 889, 893–94 (E.D. Va. 1987)).

[13] *Supra* note 4 and accompanying text.

[14] The citations of the regulations are limited to those that provide specifications beyond those of the legislation.

[15] Similar to the predecessor analysis, this taxonomy is only an ad hoc approximation. For example, the odd language for the contents of the IHO's decision led to a tentative interpretation that the document must include, at a minimum, factual findings. *Infra* note 19. As a result, the template provides for an accompanying subcategory for other contents that state laws may require. Similarly, the bulleted items only exemplify rather than exhaust the subcategories; the state law additions may be either to or beyond these examples.

[16] 20 U.S.C. § 1415(f)(3)(E)(i) (2017) (requiring that IHO decisions that determine FAPE be based "on substantive grounds").

[17] 20 U.S.C. § 1415(f)(3)(E)(ii) (2017) (requiring for procedural violations three alternative options for denial of FAPE, such as "deprivation of educational benefits").

[18] 20 U.S.C. § 1415(f)(3)(E)(iii) (2017) (permitting the IHO to order procedural compliance).

[19] 20 U.S.C. § 1415(h)(4) (2017) (parties' and public's, including SEA advisory committees, right to "findings of fact and decision"); *cf*. 20 U.S.C. §§ 1415(g)(1), 1415(i)(2)(A) (2017) (right to appeal "findings and decision").

c. Other Required Contents

d. Specific Transmittals[20]

e. Publicly Available[21]

f. Final, Subject to Specified Appeal[22]

2. Appeal

a. To Second Tier[23]

• Impartial Review and Independent Decision[24]

• Procedures and Standards[25]

• Timeline[26]

• Transmitted to Advisory Committee and Publicly Available[27]

• Final, Subject to Judicial Review[28]

b. To Court[29]

• Limitations Period[30]

---

[20] 20 U.S.C. § 1415(h)(4) (2017) (to the parties); *see also* 20 U.S.C. § 1415(h)(4)(B) (2017) (from SEA, after redaction, to state advisory panel).

[21] 20 U.S.C. § 1415(h)(4)(A) (2017).

[22] 20 U.S.C. § 1415(i)(1)(A) (2017). The further detail in IDEA regulations include a length limit from filing to decision. *Infra* note 93 and accompanying text.

[23] 20 U.S.C. § 1415(g)(1) (2017). This tier is optional, with a dwindling minority of states having selected it. *See supra* note 9 and accompanying text.

[24] 20 U.S.C. § 1415(g)(2) (2017).

[25] 34 C.F.R. § 300.514(b)(2)(i)–(vi) (2018) (examine entire record, assure procedural compliance, seek additional evidence if necessary, offer opportunity for oral or written arguments, and copy to parties); *see also* 34 C.F.R. § 300.515(d) (2018) (if oral arguments, at a time and place reasonably convenient to parents and child).

[26] 34 C.F.R. § 300.515(b) (2018) (thirty-days plus extensions after filing date).

[27] 20 U.S.C. § 1415(h)(4) (2017).

[28] 20 U.S.C. § 1415(i)(1)(B) (2017).

[29] 20 U.S.C. § 1415(i)(2)(A) (2017). This provision provides for both state and federal court jurisdiction. 20 U.S.C. § 1415(i)(2)(A) (2017); 34 C.F.R. § 300.516(a) (2018) (providing right of appeal to state or federal court).

• Procedures/Standards (e.g., records, additional evidence, quantum of proof, remedies)[31]

• Attorneys' Fees[32]

3. Miscellaneous[33]

a. Stay Put[34]

b. Other[35]

II. METHOD AND RESULTS

The three sources were the same as in the predecessor analysis, with the focus here being the provisions adding to the foregoing[36] federal template: (1) state special education legislation and regulations corollary to the IDEA; (2) state Administrative Procedures Act (APA) legislation and regulations that appeared applicable to IDEA DPHs;[37] and (3) relevant state policy manuals

---

[30] 20 U.S.C. § 1415(i)(2)(B) (2017) (ninety-days unless state law specifies otherwise).

[31] 20 U.S.C. § 1415(i)(2)(C) (2017).

[32] 20 U.S.C. § 1415(i)(3) (2017).

[33] The original draft of this category contained a subcategory for the exhaustion provision. 20 U.S.C. § 1415(l) (2017). However, it is not in this final version because (1) it seems to be more a matter of prehearing due to its prerequisite nature and, in any event, (2) none of the state laws provided any specific addition to it.

[34] 20 U.S.C. § 1415(j) (2017) (except for limited specified circumstances, "the child shall remain in the then-current educational placement" during the proceedings); *see also* 34 C.F.R. § 300.518 (2018) (adding provisions for transition from Part C to Part B and effect of decision agreeing with parents by the IHO or, in two-tier states, by the review officer).

[35] This catch-all is for various post-hearing stage additions in state laws that do not fit in the previous two broad categories.

[36] *Supra* notes 16–35 and accompanying text.

[37] As with the predecessor analysis, the boundary was blurry for some of these states and did not entirely coincide with the use of ALJs as IHOs. Zirkel, *supra* note 2, at 11. In Virginia, for example, the state Supreme Court is the "home" for the Virginia IHOs, who are contractual private attorneys. *See* HEARING OFFICER SYSTEM RULES OF ADMIN. 1 (2016), http://www.courts.state.va.us/programs/ho/rules_of_admin_1.pdf. The state's special education regulations expressly incorporate this court's rules of

that appeared to have the force of law.[38] The Appendix lists the citations of the post-hearing provisions of these state laws in two columns, differentiating those state law specific to special education from the generic APA provisions applicable to IDEA IHOs.[39]

Conversely,[40] the contents do not extend to other, more clearly distinguishable related areas.[41]

---

administration, which were revised in light of the state's APA "hearing officer" provision. *See* HEARING OFFICER DESKBOOK; A REFERENCE FOR VA. HEARING OFFICERS 1 (2016), http://www.courts.state.va.us/programs/ho/deskbook.pdf. However, I have excluded the related provisions of the APA based on the SEA's interpretation that they are inapplicable. E-mail from Patricia Haymes, Dir., Dispute Resolution & Admin. Servs., Va. Dep't of Educ., to Perry A. Zirkel, Univ. Professor Emeritus of Educ. & Law, Lehigh Univ. (Mar. 3, 2020, 12:54 EST) ("due process hearings are not subject to the APA") (on file with author).

[38] IDAHO ADMIN. CODE r. 08.02.03.004 (2019) (incorporating by reference DEP'T OF SPECIAL EDUC.: IDAHO SPECIAL EDUC. (2018), https://www.sde.idaho.gov/sped/files/shared/Idaho-Special-Education-Manual-2018-Final.pdf)); HEARING RULES FOR SPECIAL EDUC. APPEALS (2019), www.mass.gov/anf/docs/dala/bsea/hearing-rules.doc. The basis for this determination is MASS. GEN. LAWS ch. 71B, § 2A(a) (2018) (authorizing the director of the HOs unit, with specified consultation, to issue necessary procedural rules consistent with applicable law); W. VA. CODE R. § 126-16-3 (2020) (incorporating by reference W. VA. PROCEDURES MANUAL FOR THE EDUC. OF STUDENTS WITH EXCEPTIONALITIES (2017), http://wvde.state.wv.us/osp/Policy2419_2017.pdf); 7 WYO. CODE R. § 7 (2019) (requiring the SEA to adopt "dispute resolution policies and/or procedures" detailed in NOTICE OF PROCEDURAL SAFEGUARDS INDIVIDUALS WITH DISABILITIES EDUC. ACT (2015), https://edu.wyoming.gov/downloads/special-programs/2016/procedural-safeguards.pdf). As also explained in the predecessor analysis, this determination was not without close calls, and it is not clear that such policy manuals comply with the IDEA regulation that requires an APA-type rulemaking process in such cases. Zirkel, *supra* note 2, at 11 nn.53–56 (citing 34 C.F.R. § 300.165 (2018)).

[39] The state's row for either column or both is blank if the state's legislation and regulations lack a provision that adds to the post-hearing stage requirements of the IDEA. For example, several states, including Colorado, Maryland, and Missouri, have applicable APA laws that do not contain post-hearing provisions that add to the federal template. *See* COLO. CODE REGS. § 301-8:2220-R.6.02(7.5)(h) (2013); MD. CODE ANN., EDUC. § 8-413 (2018); MO. REV. STAT. §§ 162.961 & 621.253 (2018).

[40] I arrived at this framework for utility of the resulting information primarily for IHOs, DPH participants, and policymakers.

[41] These specific exclusions are: (1) the exhaustion provision; (2) the expedited hearing provisions for disciplinary changes in placement; and (3) the standards for

The Comments column contains supplemental information that clarifies entries identified with letters cross-referencing their column. Similar to the predecessor article,[42] the Appendix provides two citation columns that separate the state's special education laws from the applicable APA laws. However, the new table italicizes the APA laws to distinguish them from the state's special education laws.

Based on an examination of the aforementioned[43] sources, the table contains entries that represent additions to the federal template, with the rows being for each state and the columns corresponding to the above mentioned template.[44] Each entry is within the following sequence: (x) = partial or indirect; x = without particular detail; **x** = without particular detail but unusual; X = relatively detailed; and **X** = relatively detailed and unusual.[45] The Comments column contains supplemental information that clarifies entries identified with letters cross-referencing their column. Like the predecessor article,[46] the Appendix provides two citation columns that separate the state's special education laws from the applicable APA laws. However, the new table italicizes the APA laws to distinguish them from the states special education laws.

---

tuition reimbursement. 20 U.S.C. §§ 1412(a)(10)(C)(ii), 1415(l), 1415(k)(4) (2017).

[42] Zirkel, *supra* note 2, at 29–33.

[43] *Supra* notes 37–38 and accompanying text.

[44] *Supra* notes 16–35 and accompanying text.

[45] This scale was a bit more differentiated that the model in the predecessor analysis to make the unusual provisions more evident. Zirkel, *supra* note 2, at 14.

[46] *Id*. at 29–33.

	B	C	D	E	F	G	H	I	J	K	
	Decision						Appeal		Misc.		Comments
	FAPE Limitations	Factual Findings	Other Required Contents	Specific Transmittals	Public Availability	Finality Subject to Appeal	To Second, Optional Tier	To State or Federal Court	Stay Put	Other	capital letter=column heading for referenced entry; **bold font= unusual provisions**; *italics=APA provision*s
Alabama			**X**	x				x		x	D-7 add'l items, incl. issues, discussion of issues, conclusions, exhibits list; E-decision and entire record to SEA; I-30 days; K-SEA pays
Alaska			**x**	x				(x)	(x)	x	D+E5-->advisory panel: I-state superior ct.; J-extends to period for appeal for evaluation, services, placement or transfer; K-LEA pays
Arizona*		x	X	x				x		x	C-*with cited support*; D-*separate legal conclusions w. authority*+rt. to appeal; E-to party representatives+decision *and entire record to SEA*; I-35 days; K-LEA pays OAH
Arkansas		x	x			(x)				x	C-supported by evidence+relied upon in the decision; D-specifications for orders; G-no retention of jurisdiction or reopening; K-IHO option of posthearing brief within 7 days
California*	**x**		**x**			x				x	B-**cost is one mandatory factor in placement cases**; **D-prevailing party per issue;** G-*correction procedure for minor errors*; K-permits decision by settlement+clarifies nonprecedential effect
Colorado*			x	x							D-rt. to appeal; E-to parties: not personally identifiable for child or parent+certified mail; to SEA-decision and entire record
Connecticut**			**X**					x		x	D-legal conclusions+order+**may include a comment on conduct of the hearing and indicate prevailing party per issue**; I-*45 days for state ct*.; K-only allows settlement agreements to be read into the record+authorizes IHO to prescribe alternate special education program for the child+ SEA pays
Delaware				**x**	x					**x**	D-legal conclusions+order+**may include a comment on conduct of the hearing and indicate prevailing party per issue**; K-only allows settlement agreements to be read into the record+**authorizes IHO to prescribe alternate special education program for the child**+SEA pays
Florida*			(x)					(x)		(x)	D-specifications for

	B	C	D	E	F	G	H	I	J	K	
	Decision						Appeal		Misc.		Comments
											recommended order; I-state circuit ct.; K-exceptions in response to recommended order+ party-proposed findings, conclusions, and orders
Georgia*			x								D-*legal conclusions*
Hawaii*			x			x					D-*legal conclusions*; G-*motion for reconsideration*
Idaho*						x		x		x	G-*motions for reconsideration or clarification*; I-*28 days (w. variations for reconsideration)*+order implemented by 14th day unless specified otherwise or appealed; K-LEA pays and SEA sets IHO rates
Illinois			X	**x**		x		**x**	**x**		D-legal conclusions+ specifications for order; E-to parties-**translated into parents' primary language if not English**+to their representatives, SEA, and LEA sp. ed. director; G-clarification procedure; I-120 days+ **attorneys' fees for parents if detrimental willful disregard by LEA**; J-**60-day nonliability?**
Indiana*		x	X			x		x			C-solely on *and with substantial and reliable* evidence; D-legal conclusions+order/*remedy*+ notice of appeal and for attorneys' fees within 30 days; G-*correction procedure for minor errors*; I-30 days
Iowa*	x		x								B-basis limitation extends to "policies of the department"; D-separate legal conclusions
Kansas			x	x			x	x		x	D-legal conclusions; E-to parties within 24 hrs+to SEA; H-30-day filing period+20 days for decision+transmittal to state bd. of ed.; I-30 days; K-LEA pays (both tiers)
Kentucky*			(x)				(x)	x			D-separate legal conclusions if different from recommended order, which requires conclusions+order+rt. to appeal; H-no express extension provision; I-30 days for state ct.
Louisiana*										x	K-SEA enforcement
Maine		(x)				(x)				x	C-sufficient to convey basis for the decision; G-authorizes IHO to reopen the record upon notice to the parties before issuing decision; K-SEA pays and enforces+specifications for IHO record
Maryland*								x			J-120 days
Massachusetts*			X	x		(x)				x	D-*issue-by-issue determination, with reasons+rt. to appeal*; E-to parties' representatives; G-authorizes IHO to reconvene hearing before decision but no reopening or reconsideration after decision; K-authorizes IHO enforcement proceeding+ IHO

	B	C	D	E	F	G	H	I	J	K	
	Decision						Appeal		Misc.		Comments
											discretion for closing arguments and, if written, length limit+**APA w. preemption**
Michigan		x	x			x		(x)		x	C-*solely on and with supporting evidence*; D-*separate legal conclusions with supporting authority or reasoning*; G-*request for reconsideration+ IHO authority for rehearing before decision*; I-*state ct.*; L-***APA w. preemption***
Minnesota*	(x)		X	x		x		x		x	B-comp. ed. if loss of benefit; D-"or order" w. legal conclusions within specified scope of legal basis+rt. to appeal; E-record to SEA within one week; G-IHO authority to correct clerical or mathematical errors; I-60 days; K-**consent order if labelled as such**+SEA enforcement
Mississippi										**X**	K-rates and **detailed scope of IHO compensation**
Missouri*		x	x	x						x	C-*separate+aligned with orde*r; D-legal conclusions; E-to SEA; K-**IDEA preemption**+*special state fund for ALJ hearings in IDEA* cases
Montana										**X**	K-**authorizes SEA to replace IHO if decision not issued within 90 days**+authorizes IHO remedial authority for reimbursement+SEA pays administrative costs, incl. IHO
Nebraska		x	**X**	x				**X**		x	C-defined as conclusions for each issue of fact; **D-3 cover items+jurisdictional statement+legal conclusions+ orde**r; E-to SEA with record; I-**2 years for state ct.**; K-enforcement via state court within 1 year
Nevada		(x)					x			**X**	C-decision based solely on evidence at the hearing; H-30 days for filing w. 10 days for any cross-appeal; K-LEA pays **via impartial method**
New Hampshire**		x	x					**X**		x	C-including concise support; D-separate legal conclusions; I-provision for expert witness fees+120 days for attorneys' fees or expert witness fees; K-full implementation within 30 days unless appealed
New Jersey*			**X**		x						D-***12 add'l items, including jurisdictional statement, which need not be separate*****;** F-via SEA website database
New Mexico						**X**				x	G-**corrections of clerical errors or omissions at any time until judicial appeal**; K-LEA pays

	B	C	D	E	F	G	H	I	J	K	
	Decision						Appeal		Misc.		Comments
New York		x	X	x			X	x		x	C-with citations to the record; D-identification of items of the record, including specified exhibit list+rt. of appeal; E-record to LEA; H-40 days for filing+detailed procedures; I-4 months; K-SEA must establish maximum rates for IHO compensation+ authorizes consent order unless based on other issues
North Carolina*			**X**				x	x			D-**legal conclusions+rt. of appeal with deadline *(+more detailed list with conflicting notice re rt. of appeal)***; H-30 days for filing; I-30 days if state ct.
North Dakota*			(x)			(x)				x	D-*legal conclusions indirectly (final v. proposed)*; G-*limited rt. for reopening before issuance of decision*; K- *authorizes IHO to direct parties to submit proposed factual findings, legal conclusions, and briefs*
Ohio							x			**x**	H-in 45 days; K-LEA pays within SEA-established max. rate and 50-hour hearing limit unless IHO written rationale for exceeding it
Oklahoma										x	
Oregon*			**X**			x				**x**	D-***9 add'l items, including caption and issues***; G-*reconsideration*; L-**specific reference to customizing preemption in applying APA**
Pennsylvania		(x)	x								C-decision based solely on "substantial evidence" at the hearing; D-legal conclusions+ discussion
Rhode Island											[no relevant additions to IDEA regs]
South Carolina											[no relevant additions to IDEA regs in state law, although deadline for judicial appeal in state guidelines]
South Dakota*		x	x					x			C-*with supporting evidence*; D-*separate legal conclusions*; I-*30 days for state ct.*
Tennessee*		**x**	**X**		x	x				**x**	C-including determination re meaningful parent participation+supporting evidence; D-legal conclusions +prevailing party per issue+ reasons+remedy+procedure for reconsideration+rt.of appeal; F-published via SEA website; G-reconsideration; K-authorizes IHO to allow parties to propose factual findings, legal conclusions, and order+LEA pays except for IHO

	B	C	D	E	F	G	H	I	J	K	
	Decision						Appeal		Misc.		Comments
Texas		**X**	x						**X**	**X**	C-based solely on evidence at the hearing+at party's request, whether opposing party unreasonably protracted the proceedings or whether parent's attorney provided sufficient complaint; D-separate legal conclusions; J-exception for IHO-ordered reimbursement for past expenses; K-IHO option of bench decision followed later within the prescribed period by written decision+IHO option of posthearing briefs
Utah								x			I-30 days
Vermont											[no relevant additions to IDEA regs]
Virginia* **			(x)			x		x		**X**	D-*"conclusions" only indirectly (via removal provision)*; G-**reissuance for specified areas of correction;** I-180 days in state ct.; K-**recertification provision re timely decisions, appeal rts. & "controlling case or statutory authority to support the findings"**+*same timely decision criterion for removal*
Washington*		**X**	X			(x)					C-numbered+separately identifying credibility findings; D-5 add'l items incl. numbered legal conclusions with citations to leg. and regs; G-no reconsideration (expressly overriding APA)
West Virginia											[no relevant additions to IDEA regs other than referring to "findings **of fact** and decisions"]
Wisconsin		x	x					x		**X**	C-based solely on the evidence at the hearing; D-legal conclusions; I-45 days for state ct.; K-exclusion of APA
Wyoming			x							x	D-legal conclusions+order (incl. any remedy); K-IHO discretion to request briefs and proposed factual findings and conclusions
	FAPE Limitations	Factual Findings	Other Required Contents	Specific Transmittals	Public Availability	Finality Subject to Appeal	To Second, Optional Tier	To State or Federal Court	Stay Put	Other	
Totals	**3**	**16**	**33**	**10**	**3**	**17**	**6**	**21**	**3**	**32**	

* Designates states that have APA legislation or regulations that, in addition to special education-specific laws, apply to IDEA due process hearings; however, the row for such states is blank when the APA provisions do not account for any additions to the post-hearing stage.

** Designates the converse situation in which the state's APA does not apply to IDEA due process hearings generally, but a particular APA provision for the post-hearing stage is incorporated by cross-referencing in the state's special education law.

*** Designates special situation of incorporation of Supreme Court rules of administration, which the SEA interprets as not incorporating the rest of the state's APA.

A. *Decision*

In this category, the most frequent state law additions, without differential weighting for the Likert-type level of the entries, were the combined specifications for factual findings (n=16) and other required contents (n=33). For factual findings,[47] as the entries in the Comments column show, the prevalent addition concerned supporting evidence. The unusual provisions included Tennessee's requirement to include a determination "regarding meaningful participation by the parent in the development of the . . . IEP."[48] Another was Texas' provision for including, at the request of either party, a determination of whether the other party unreasonably protracted the proceedings, per the IDEA criteria for attorneys' fees.[49] Unusual too were Washington's APA formalities, including numbering the findings and identifying those based on credibility.[50] For other required contents, the prevalent addition was for legal conclusions (n=25). The unusual provisions consisted of either highly detailed specifications (e.g., Alabama, New Jersey, and Oregon) or peculiar particularities, such as consolidation with Section 504 issues[51] or designation of prevailing party status for attorneys' fees.[52]

Another relatively frequent subcategory (n=17) was for state law additions to the finality of the decision subject to its judicial appeal.[53] A few state laws (e.g., Arkansas and Massachusetts) merely reinforce the IDEA requirement by expressly prohibiting reconsideration

---

[47] 20 U.S.C. § 1415(h)(4) (2017) (parties' and public's, including SEA advisory committees, right to "findings of fact and decision"); *cf.* 20 U.S.C. §§ 1415(g)(1), 1415(i)(2)(A) (2017) (right to appeal "findings and decision").

[48] TENN. CODE ANN. § 49-10-606(d) (2019). "IEP" refers to the eligible child's individualized education program.

[49] 19 TEX. ADMIN. CODE § 89.1185(m) (2012). Although not cited in this Texas regulation, the language corresponds to that in 34 C.F.R. §§ 300.517(c)(4)(i), 300.517(c)(5) (2019).

[50] WASH. REV. CODE § 34.05.461(3) (2013); WASH. ADMIN. CODE § 10-08-210 (2020).

[51] ALASKA ADMIN. CODE tit. 4, § 52.550(o) (2019).

[52] CAL. EDUC. CODE § 56507(d) (2019); TENN. CODE ANN. § 49-10-606(e) (2019) (mandatory); *see also* CONN. AGENCIES REGS. §§ 10-76h-16(b) (2015) (permissive).

[53] 20 U.S.C. § 1415(i)(1)(A) (2017).

and/or reopening. However, several others provide procedures for clarification, correction, or reconsideration of the decision that seem to be in tension with IDEA finality.[54] Although some of these provisions are within special education laws,[55] the majority, especially among those for reconsideration, are in APA laws, posing the additional possible conflict with the state's special education law.[56]

The next most frequent feature within the Decision category was transmittal requirements (n=10).[57] The prevalent addition required transmittal to the state education agency (SEA), and some state laws (e.g., Alabama and Colorado) required the transmission to include the hearing record.[58] Much more distinctive for this subcategory, Delaware law mandates transmittal to the members of the district's school board,[59] and Illinois law requires translation of the decision into the parents' primary language if it is other than English.[60]

The two remaining features of the Decision category have infrequent entries. Most notably, the state law additions for the

---

[54] *E.g.*, C.C. v. Beaumont Indep. Sch. Dist., 65 IDELR ¶ 109 (E.D. Tex. 2015) (agreeing with the agency interpretation in Letter to Weiner, 57 IDELR ¶ 79 (OSEP 2011) that the IDEA does not allow reconsideration unless within the forty-five-day period for the final decision). For the IDEA's finality requirement, see 20 U.S.C. § 1415(i)(1)(A) (2017); *see also* Perry A. Zirkel, *"Finality" under the Individuals with Disabilities Education Act: Its Meaning and Applications*, 289 EDUC. L. REP. 27 (2013).

[55] *E.g.*, 105 ILL. COMP. STAT. 5/14-802a (2018) (authorizing IHO retention of jurisdiction for clarification, not reconsideration, within a maximum of fifteen-days after the decision); N.M. CODE R. §§ 6.31.2.12(I)(22) (2009) (authorizing IHO to correct errors that are clerical or "arising from oversight or omission" until judicial appeal, which must be within ninety-days).

[56] For an exception, see WASH. ADMIN. CODE § 392-172A-05110 (2016) (expressly overriding the APA provision for reconsideration).

[57] 20 U.S.C. § 1415(h)(4) (2017) (to the parties); 20 U.S.C. § 1415(h)(4)(B) (2017) (from SEA, after redaction, to state advisory panel).

[58] *See* COLO. CODE REGS. § 301-8:2220-R.6.02 (2013). ALA. ADMIN. CODE rr. §§ 290-8-9-.08(9) (2019).

[59] DEL. CODE ANN. tit. 14, § 3110(d) (2014). Moreover, this provision extends to requiring the school board to formally notify the parents of its receipt of the decision, with corresponding formal notification requirements if the parents appeal the decision. *Id*.

[60] ILL. ADMIN. CODE tit. 23, § 226.670 (2007).

IDEA's FAPE limitations[61] (n=3) include California's provision for cost as a required factor in placement cases,[62] and those for public availability (n=3) include Delaware's requirement for "legal notice annually in newspapers of sufficient circulation in each of the [state's] three . . . counties" of the decision's posting on the SEA website.[63]

B. *Appeal*

In line with the IDEA's optional review officer tier and uniform right of appeal to state or federal court,[64] the most frequent state law addition is for judicial appeals (n=21). The vast majority of these provisions are for the option of a limitations, or filing, period other than the IDEA ninety-day period.[65] The variations range widely from thirty-days in a handful of states,[66] with some limited to APA provisions specific only for appeals to state courts,[67] to Virginia's 180-days and Nebraska's two-years for appeals to state court.[68]

---

[61] 20 U.S.C. § 1415(f)(3)(E)(i) (2017) (requiring that IHO decisions that determine FAPE be based "on substantive grounds"); 20 U.S.C. § 1415(f)(3)(E)(ii) (2017) (requiring for procedural violations three alternative options for denial of FAPE, such as "deprivation of educational benefits"); 20 U.S.C. § 1415(f)(3)(E)(iii) (2017) (permitting the IHO to order procedural compliance).

[62] CAL. EDUC. CODE § 56505(i) (2019).

[63] 14 DEL. ADMIN. CODE § 926(13.6) (2019).

[64] *See* 20 U.S.C. §§ 1415(g)(1), 1415(i)(2)(A) (2017).

[65] 20 U.S.C. § 1415(i)(2)(B) (2017) (ninety-days unless state law specifies otherwise). For the default states, which do not clearly provide an alternative period, the litigation has been rather extensive as to the purported substitution or application of the ninety-day deadline. *E.g.*, Richardson v. Omaha Sch. Dist., No. 3:17-CV-03111, 2019 WL 1930129, at *1 (8th Cir. 2020) (discussion of varying approaches, including citations of applicable federal appellate decisions).

[66] In a recent decision arising in New Mexico, which is one of the states that has a 30-day provision in its special education regulations, the Tenth Circuit ruled that this limitation applies equally to school district requests for attorneys' fees as it does for parent requests. Bd. of Educ. of Gallup-McKinley Cty. Sch. v. Native Am. Disability Law Ctr., Inc., __ F.3d __ (10th Cir. 2020).

[67] *E.g.*, KY. REV. STAT. ANN. § 13B.140 (2020); S.D. CODIFIED LAWS § 1-26-31 (2004); *cf.* IDAHO ADMIN. CODE r. 04.11.01.740 (2019) (providing for twenty-eight-day period, but with varying starting points due to reconsideration procedure).

[68] NEB. REV. STAT. § 79-1167(2) (2017); 8 VA. ADMIN. CODE § 20-81-210(T) (2015). Both are special education, not APA, laws, with Nebraska's provision not

Among the minority of additions to the appeals subcategory, one unusual provision is Illinois' extension of school district liability for attorneys' fees when the district "willfully disregards applicable regulations or statutes regarding a child [with a disability], and which disregard has been detrimental to the child."[69] Another is New Hampshire's extension to liability for expert witness fees when the parent is the prevailing party and the court also determines that the district "has not acted in good faith in developing or implementing a child's [IEP]."[70]

The additions to other appeals subcategory are limited to seven of the eight states that currently have a second review officer level.[71] Unusually, the remaining state, South Carolina, does not mention this level in its legislation or regulations, instead addressing it in the SEA's guidelines, which do not have the force of law.[72] The special education laws in the other six states have relatively limited additions for the second tier, largely focusing on one or more steps in the overall timeline. New York is the only state with detailed procedures for the review officer level, including, for example, provisions for prehearing conferences, answers and cross appeals, and even the form of pleadings and legal memoranda.[73]

C. *Other*

---

mentioning appeals to federal court and Virginia's provision citing the ninety-day IDEA provision for the federal court alternative. *Id*.

[69] 105 ILL. COMP. STAT. 5/14-802a(i) (2018).

[70] N.H. REV. STAT. ANN. §186-C:16-b (2020).

[71] 20 U.S.C. § 1415(g) (2017). The number of states opting for a review officer tier has decreased from twenty-six in 1991 to eight in 2019. *Supra* note 9. However, the addition in the Oklahoma regulations is limited to the Miscellaneous other column. Oklahoma's few other additions, particularly a thirty-day deadline for filing an appeal to the second tier, are within an SEA guidelines document. DUE PROCESS IN SPECIAL EDUC. GUIDELINES FOR PARENTS AND SCHOOL ADMINISTRATORS (2010), https://sde.ok.gov/due-process.

[72] S.C. ST. DEP'T OF EDUC., SPECIAL EDUC. PROCESS GUIDE 182 (2013), https://ed.sc.gov/districts-schools/special-education-services/state-regulations/; S.C. ST. DEP'T OF EDUC., POLICIES AND PROCEDURES IN ACCORDANCE WITH THE INDIVIDUALS WITH DISABILITIES EDUC. IMPROVEMENT ACT 13 (2011), https://ed.sc.gov/districts-schools/special-education-services/fiscal-and-grants-management-fgm/grants/sc-policies-and-procedures-for-special-education/.

[73] N.Y. COMP. CODES R. & REGS. tit. 8, §§ 279.1–279.14 (2020).

The other state law additions consist of a few entries for the stay put subcategory[74] and a catch-all for the wide variety of miscellaneous post-hearing items that did not fit in the subcategories of the federal template. The only notable additions to the IDEA's stay put provision, which applies to not only the DPH, but also the post-hearing proceedings,[75] are (1) Illinois' difficult to decipher provision that seems to limit district liability in cases of an adverse IHO decision[76] and (2) Texas' similarly questionable[77] exception for districts to "withhold reimbursement for past expenses ordered by the [IHO]."[78]

The final catch-all subcategory commonly addresses organizational issues, such as payment or enforcement, or specific IHO authority, such as for post-hearing briefs (e.g., Arkansas and Massachusetts) or particular remedies (e.g., Delaware and Montana).[79] The unusual payment provisions include the detailed

---

[74] 20 U.S.C. § 1415(j) (2017) (except for limited specified circumstances, "the child shall remain in the then-current educational placement" during the proceedings); *see also* 34 C.F.R. § 300.518 (2018) (adding provisions for transition from Part C to Part B and effect of decision agreeing with parents by the IHO or, in two-tier states, by the review officer). For a snapshot of the extensive related case law, see Perry A. Zirkel, *"Stay-Put" under the IDEA: An Updated Overvie*w, 330 EDUC. L. REP. 8 (2016).

[75] *Id.*

[76] 105 ILL. COMP. STAT. 5/14-802a(j) (2018):

> The costs for any special education and related services or placement incurred following [sixty] school days after the initial request for evaluation shall be borne by the school district if the services or placement is in accordance with the final determination as to the special education and related services or placement that must be provided to the child, provided that during that [sixty]-day period there have been no delays caused by the child's parent.

[77] The reason that any such limitations are questionable is the preemptive effect of the well-settled understanding that an IHO's decision for the plaintiff-parents in a tuition reimbursement case in a one-tier state, such as Illinois and Texas, serves as the stay put that triggers the tuition reimbursement remedy. 34 C.F.R. § 300.518(d) (2018) (codifying a long line of case law cited in Zirkel, *supra* note 74, at 15 n.60).

[78] 19 TEX. ADMIN. CODE § 89.1185(o) (2012).

[79] *See* ARK. ADMIN. CODE R. § 005.18.10–10.01 (2005); MASS., HEARING RULES FOR SPECIAL EDUC. APPS. (2019),

scope for IHO billing in Mississippi,[80] the impartial method in Nevada,[81] and the cap for hearing hours in Ohio.[82]

Within the remaining variety of miscellaneous provisions, a cluster of states (California, Delaware, Minnesota, and New York) explicitly address the extent to which consent decisions are permissible.[83] Even more unusual are the Montana and Virginia laws providing for IHO accountability during the post-hearing stage,[84] and the relative paucity of provisions clarifying the interrelationship between state special education and APA laws.[85]

III. DISCUSSION AND RECOMMENDATIONS

As an overarching matter, the purpose and structure of the IDEA provide two important and intersecting considerations for assessing the extent of procedural prescriptiveness in the state laws for the

---

www.mass.gov/anf/docs/dala/bsea/hearing-rules.doc; MONT. ADMIN. R. 10.16.3523 (2015); 14 DEL. ADMIN. CODE § 926 (2019).

[80] 7-74 MISS. CODE R. § 74.5 (2017) (enumerating billable hours and expenses as well as warning of unallowable items).

[81] NEV. ADMIN. CODE § 388.310(14) (2019) (requiring "a method that avoids a conflict of interest or the appearance thereof").

[82] OHIO ADMIN. CODE 3301-51-05(K)(16)(d) (2019) (specifying rebuttable maximum of fifty-hours at a rate "not higher than that established for special counsel for the state of Ohio").

[83] At least part of the underlying significance is the extent that the IHO's imprimatur is a necessary ingredient of prevailing party status to recover attorneys' fees. *E.g.*, V.G. v. Auburn Enlarged Cent. Sch. Dist., 349 F. App'x 582 (2d Cir. 2009).

[84] MONT. ADMIN. R. 10.16.3523(2) (2015) (authorizing replacement of IHO upon failure to issue the decision within ninety-days of the filing date); 8 VA. ADMIN. CODE § 20-81-210(D)(3) (2015) (identifying among the factors for IHO recertification "failing to render decision within regulatory time frames" and "issuing a decision that contains: (a) [i]naccurate appeal rights of the parents; or (b) [n]o controlling case or statutory authority to support the findings").

[85] *E.g.*, 603 MASS. CODE REGS. 28.08(5) (2020) (applying the APA adjudicatory regulations "[e]xcept as provided otherwise under federal law or in the administrative rules adopted by [the office of the special education ALJs]"); MICH. ADMIN. CODE R. 792.1010 (2018) (excepting "[i]f a statute prescribes a procedure that conflicts with these [APA] rules"); MO. REV. STAT. § 162.961 (2018) (establishing preemptive effect of "requirements of the [IDEA]"); OR. ADMIN. R. 581-15-2340(2) (2017) (incorporating the APA adjudicatory provisions "to the extent consistent with federal law"); WIS. STAT. § 115.80(10) (2017) (exempting ALJs in IDEA DPHs from the APA adjudicatory provisions).

impartial hearing process, here focused on the post-hearing stage. First, the IDEA follows the aforementioned model of "cooperative federalism."[86] Specifically, for the post-hearing process, the Act and its regulations provide a rather minimalistic skeletal structure[87] that expressly includes state variation[88] and that clearly leaves wide latitude for either codified additions or purposeful flexibility. For the codified alternative, the prescriptions could be the judicialized general model of the APA or a less formal procedural approach customized to the IDEA.

Second, specific to its provision for an administrative hearing prior to any judicial action, the IDEA evidences a purpose of prompt dispute resolution.[89] The legislative history of the Act supports this inference in light of the individual interest of the student with disabilities for timely identification and services.[90] This intent also aligns with the societal interest in judicial economy and the school

---

[86] Schaffer v. Weast, 546 U.S. 49, 52 (2005) (citing Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (9th Cir. 1999)).

[87] This structure serves as the template for this analysis. 20 U.S.C. § 1415 (2017); 34 C.F.R. §§ 300.514(b)(2)(i)–(vi), 300.515(b), 300.518 (2018); *supra* notes 16–35 and accompanying text.

[88] The two features within this template are the options for a second, review tier and for a shorter or longer limitations period for judicial appeal. 20 U.S.C. §§ 1415(g), 1415(i)(2)(B) (2017).

[89] *E.g.*, Amann v. Stow, 991 F.2d 929, 932 (1st Cir. 1993) (citing Spiegler v. D.C., 866 F.2d 461 (D.C. Cir. 1989); Adler v. Educ. Dep't of N.Y., 760 F.2d 454 (2d Cir. 1985); Bow Sch. Dist. v. Quentin W., 750 F. Supp. 546 (D.N.H. 1990) ("The legislative history, statutory terms, and regulatory framework of the IDEA [that] all emphasize promptness as an indispensable element of the statutory scheme").

[90] *E.g.*, The principal sponsor of the legislation stated the following:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved.

121 CONG. REC. 37, 416 (1975) (statements of Sen. Harrison Williams).

district's interest in focusing its limited resources, including the time of personnel as well as the allocations of its budget, on educational outcomes rather than transaction costs. The courts are congested and slow such that the IDEA provision for judicial review, after the required exhaustion,[91] still amounts to a ponderous process,[92] even without additional fact finding being necessary in most cases.[93] The regulatory timeline of forty-five-days recognizes and reinforces this interest in prompt adjudication.[94]

Examination of the entries in the Appendix in relation to these two intersecting considerations reveals less prescriptiveness for the post-hearing stage than for the hearing stage. More specifically, the Table here consists of nine specific features, with an average of twelve entries for each of these columns, whereas the corresponding Table for the hearing stage[95] consisted of twelve specific features, with an average of twenty entries per column. This moderate difference is likely attributable to the central priority at the hearing stage.

---

[91] *E.g.*, Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009).

[92] Honig v. Doe, 484 U.S. 305, 322 (1985); Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359, 370 (1985) (observing that "administrative and judicial review under the [IDEA] is often "ponderous"); *see also* Perry A. Zirkel, *Autism Litigation under the IDEA: A New Meaning of "Disproportionality"?*, 24 J. SPECIAL EDUC. LEADERSHIP 92, 94 (2011) (finding the average duration from the date of filing for the hearing to the date of the final judicial decision for appealed cases to be 2.8 years for a sample of 201 autism decisions under the IDEA).

[93] *See, e.g.*, Andriy Krahmal et al., *"Additional Evidence" under the Individuals with Disabilities Education Act: The Need for Rigor,* 9 TEX. J. CIV. RTS. & CIV. LIBERTIES 201 (2004) (identifying the benefits of a uniform and rigorous approach to IDEA option for courts to take additional evidence upon judicial review).

[94] 34 C.F.R. § 300.515(a) (2018). This time period may be extended by (1) a thirty-day prior period for the resolution process for parental filings (34 C.F.R. § 300.510 (2018)), (2) a thirty-day period for the states with a second tier (34 C.F.R. § 300.515(b) (2018)), and (2) specific extensions granted by the hearing or review officer (34 C.F.R. § 300.515(c) (2018)).

[95] Zirkel, *supra* note 2, at 13–16.

Nevertheless, the entries for the post-hearing stage reflect a similar "proceduralization"[96] that tends to be the result of the gradual trend of judicialization of the overall IDEA hearing process.[97] This trend correlates significantly (but not at all entirely) with the overlay of APA laws, which now apply to IDEA hearings in almost half of the states,[98] and which generally are associated with the use of central panel ALJs.[99] The application of APA laws presents the problem of generic proceduralism[100] that contributes to the belated completion of

---

[96] *E.g.*, David Kirp, William Buss, & Peter Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 154 (1974) (providing a qualifying caution about "proceduralization" during the formulation of the IDEA model).

[97] *E.g.*, Perry A. Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study,* 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2007) (finding various indicators of increasing judicialization in an empirical analysis of IHO decisions in Iowa). Another indicator, which is evident across the states, is the gradual shift from attorneys being a minority of IHOs to attorneys being the vast majority of IHOs. *Compare* Thomas Smith, *Status of Due Process Hearings*, 48 EXCEPTIONAL CHILD. 232, 233 (1981) (finding that 55% of the IHOs were non-lawyers with inferable expertise in special education), *with* Connolly et al., *supra* note 9, at 159 (finding that in forty-one states and D.C. 100% of the IHOs were lawyers, and the only state where less than a majority were lawyers was Delaware, which uses a tripartite panel with the attorney in the central position). Moreover, early models of part-time IHOs had changed to full-time IHOs in approximately nineteen states. *Id.* at 158. As a result, the competence criteria for IHOs, established for the first time in the 2004 amendments of the IDEA, focused on legal rather than special education practice. 20 U.S.C. §§ 1415(f)(3)(A)(ii)–(iv) (2017) (detailing knowledge and ability for IDEA legal interpretations, conducting hearings, and writing decisions).

[98] *Supra* Table and *infra* Appendix. As indicated by the asterisked notes, a few states have distinct variations with regard to the incorporation of APA laws. Conversely and unusually, Wisconsin uses full-time ALJs but expressly excludes applying its APA. WIS. STAT. § 115.80(10) (2017).

[99] Connolly et al., *supra* note 9, at 158 (found increase to use of central panels in twenty states). However, the intersecting finding for "full-time" IHOs was imprecise because the central panel ALJs are full-time, but in most of these states not specifically for IDEA cases. *Id.* at 96. In contrast, Massachusetts has a subunit specific to IDEA (and Section 504) cases. MASS. GEN. LAWS ch. 71B, § 2A (2020).

[100] *E.g.*, Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. L. REP. 35, 35 (2005) (pointing out the reduced basis for procedural due process after the implementation of the IDEA); Perry A. Zirkel, *Over-Due Process*

DPHs[101] and that causes confusion or conflict when not customized for the IDEA. For example, consider within the most frequent column in the Decision category of the Table ("other required contents") the overly prescriptive entries for both New Jersey and Oregon and the conflicting entry for North Carolina.[102] For other examples, see the APA-based entries for a recommended decision stage in Florida, Kentucky and North Dakota.[103] For a reconsideration step, see the states including Hawaii, Oregon, and Tennessee[104] that, if not customized,[105] all represent potential conflict with the aforementioned[106] finality requirement of the IDEA. The resulting confusion, particularly upon losing sight of the expedited purpose of IDEA hearings,[107] can lead to costly litigation. For example, the Second Circuit rejected the plaintiff-parents' contention that the state's incorporated APA forty-five-day filing deadline for appeals to state court did not apply to IDEA appeals to federal court, concluding that this generic application conflicted with Congress's intent for "expedient resolution of [IDEA] claims."[108]

Revisions for the Individuals with Disabilities Education Act, 55 MONT. L. REV. 403, 404 (1994) (observing the undue proceduralism of DPHs under the IDEA).

[101] Although the average length of time of DPHs from filing to decision is not nationally available, the data that the U.S. Department of Education collects annually shows that the vast majority of IHO decisions were not within the forty-five-day timeline. E-mail from Diana Cruz, Data Analyst, Nat'l Center for Appropriate Dispute Resolution in Special Educ., to Perry A. Zirkel, Univ. Professor Emeritus of Educ. & Law, Lehigh Univ. (Nov. 12, 2019 10:50 EST) (67% in 2004-05, 78% in 2005-06, 76% in 2006-07, 73% in 2007-08, 76% in 2008-09, 71% in 2009-10, 76% in 2010-11, 79% in 2011-12, 80% in 2012-13, 82% in 2013-14, 74% in 2014-15, 74% in 2015-16, 77% in 2016-17, and 80% in 2017-18).

[102] *Supra* Table, at column D. Yet, this procedural problem is not limited to APA laws, as the corresponding entries for the special education laws in Alabama and Nebraska illustrate.

[103] *Id.* at column D.

[104] *Id.* at column G.

[105] WASH. ADMIN. CODE § 392-172A-05110 (2016). For clarifying preemption more generally, see the entries for Massachusetts, Michigan, Missouri, and Oregon in column K. *Supra* Table, at column K.

[106] *Supra* note 54 and accompanying text. Again, the problem is not exclusive to APA laws, as the New Mexico entry for column G illustrates.

[107] *Supra* notes 89–94 and accompanying text.

[108] P.M.B. v. Ridgefield Bd. of Educ., 944 F.3d 473, 477 (2d Cir. 2019).

The problems of ill-fitting, undue due process are not entirely limited to APA laws,[109] which for some states do not provide any post-hearing additions to the federal template.[110] Conversely, other states with pertinent APA laws clarify the superseding effect of the state's special education laws.[111] Moreover, the state special education laws that provide customized applicable entries fostering prompt final decisions merit special attention.[112] Similarly, in line with the experimentation benefit of federalism,[113] states should consider the potential value of state law provisions at the post-hearing stage for IHO accountability,[114] expert witness fees awards,[115] translated decisions,[116] and impartial payment procedures.[117]

As an overall matter, this snapshot of the post-hearing stage, like the recent one of the hearing stage,[118] reflects the Janus-like trade-off between the benefits of "legalization" and the costs of "the arid formality of legalism."[119] More specifically, in assessing the results

---

[109] The states cited by way of contrast serve as the relatively limited examples. *Supra* notes 102 and 106.

[110] *Supra* Table – Colorado, Louisiana, Maryland, and Minnesota.

[111] *Supra* Table, at column G.

[112] 19 TEX. ADMIN. CODE § 89.1185(m) (2012), OHIO ADMIN. CODE 3301-51-05(K)(16)(d) (2019), and, less specifically, 105 ILL. COMP. STAT. 5/14-802a(i) (2018).

[113] *E.g.*, McDonald v. City of Chi., 561 U.S. 742, 783 (2010) ("the values of federalism and state experimentation"); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 418 (1999) ("'experimentation' long thought a strength of our federal system"); EEOC v. Wyo., 460 U.S. 226, 264–65 (1983) ("Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest") (J. Burger, dissenting).

[114] MONT. ADMIN. R. 10.16.3523(2) (2015); 8 VA. ADMIN. CODE § 20-81-210(D)(3) (2015).

[115] N.H. REV. STAT. ANN. §186-C:16-b (2020).

[116] ILL. ADMIN. CODE tit. 23, § 226.670 (2020).

[117] NEV. ADMIN. CODE § 388.310(14) (2019) (requiring "a method that avoids a conflict of interest or the appearance thereof").

[118] Zirkel, *supra* note 2, at 26–27.

[119] David Neal & David L. Kirp, *The Allure of Legalization: The Case of Special Education Reconsidered*, 48 L. & CONTEMP. PROBS. 63, 82 (1985) (observing that "this [Janus-like] duality of the legal model plays out in the special education area").

of this systematic analysis, the key is to retain the benefits of the judicialization of DPHs,[120] but with careful customization of the structure and purpose of the IDEA.

Finally, given the "two worlds" of DPHs under the IDEA,[121] the handful of states, led by New York, that account for the vast majority of the adjudicated hearings,[122] should lead the way in reviewing these results and refining their laws for appropriate efficiency.[123] This review and revision process should simultaneously consider the recent analysis of the hearing stage[124] and the upcoming analysis of the prehearing stage.[125]

---

[120] *Supra* note 97 and accompanying text.

[121] Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA*, 302 EDUC. L. REP. 1, 2 (2014).

[122] *Id.* (finding for the period, 2006–2011, that five of the fifty states—New York, New Jersey, Pennsylvania, California, and Maryland—accounted for 80% of the adjudicated hearings); *see also* Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Follow-Up Analysis*, 303 EDUC. L. REP. 1, 10–12 (2014) (finding that for the same period New York accounted for more adjudicated hearings than all of the other states, thus not counting the District of Columbia and Puerto Rico).

[123] Accompanied by the adjective "appropriate," which is the hallmark of the IDEA "efficiency" here is specialized or customized rather than the generic benefits of a centralized system of administrative adjudication. *E.g.*, Endrew F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 999 (2017); Malcolm C. Rich & Alison C. Goldstein, *The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 24–25 (2019).

[124] Zirkel, *supra* note 2.

[125] Andrew Lee & Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act III: The Prehearing Stage*, J. NAT'L ASS'N ADMIN. L. JUDICIARY (forthcoming).

	Special Education Laws	General Administrative Hearing Laws
AL	ALA. ADMIN. CODE rr. §§ 290-8-9-.08(9)(c)(12)(iv), 290-8-9-.08(9)(c)(16) (2019).	
AK	ALASKA STAT. § 14.30.193(f) (2008); ALASKA ADMIN. CODE tit. 4, § 52.550(m)–(p) (2019).	
AZ*	ARIZ. REV. STAT. § 15-766(F) (2017); ARIZ. ADMIN. CODE § R7-2-405(H)(6)–(8) (2010).	ARIZ. REV. STAT. §§ 41-1092.07(F)(6)–(7), 41-1092.08(A) (2017).
AR	ARK. ADMIN. CODE R. §§ 005.18.10–10.01.22.9, -10.01.33.2., -10.01.39.2 – .39.5 (2005).	
CA*	CAL. EDUC. CODE §§ 56505(i), 56507(d) (2019); CAL. CODE REGS. tit. 5, §§ 3085, 3087 (2014).	CAL. CODE REGS. tit. 1, § 1048 (2014).
CO*	COLO. CODE REGS. § 301-8:2220-R.6.02(7.5)(h) (2013).	
CT**	CONN. GEN. STAT. § 10-76h(d)–(e) (2012); CONN. AGENCIES REGS. §§ 10-76h-16 (2015).	CONN. GEN. STAT. § 4-183 (2012).**
DE	DEL. CODE ANN. tit. 14, § 3110 (2014); 14 DEL. ADMIN. CODE § 926(13.6) (2019).	
FL*	FLA. STAT. § 1003.57(1)(c) (2017); FLA. ADMIN. CODE r. 6A-6.03311(9)(v) (2014).	FLA. ADMIN. CODE rr. 28-106.215 – 28-106.217 (2014).
GA*		GA. COMP. R. & REGS. 616-1-2-.27 (2010).
HI*		HAW. CODE R. §§ 16-201-22 – 16-201-23 (2008).
ID*	IDAHO ADMIN. CODE r. 08.02.03.004 (2019) ; DEP'T OF SPECIAL EDUC.: SPECIAL EDUC. MANUEL	IDAHO ADMIN. CODE rr.

	(2018), http://www.sde.idaho.gov/sped/files/shared/Idaho-Special-Education-Manual-2018-Final.pdf.	04.11.01.740 & 04.11.01.770 (2019).
IL	105 ILL. COMP. STAT. 5/14-802a (2018); ILL. ADMIN. CODE tit. 23, § 226.670 (2020).	
IN*	511 IND. ADMIN. CODE 7-45-7 (2018).	IND. CODE §§ 4-21.5-3-27 & 4-21.5-3-31 (2011).
IA*	IOWA ADMIN. CODE r. 281.41.1013 (2018).	IOWA ADMIN. CODE r. 481.10.24 (2018).
KS	KAN. STAT. ANN. §§ 72-3416, 72-3418, 72-3419 (2017).	
KY*	KY. REV. STAT. ANN. § 157.224 (2020); 707 KY. ADMIN. REGS. 1:340 (2018).	KY. REV. STAT. ANN. §§ 13B.110 – 13B.140 (2020).
LA*	LA. ADMIN. CODE tit. 28, Pt. XLIII, § 514 (2017).	
ME	05-071-101 ME. CODE R. § XVI(7)–(14) (2017).	
MD*	MD. CODE ANN., EDUC. § 8-413 (2018).	
MA*	603 MASS. CODE REGS. 28.08(5) (2020); MASS., HEARING RULES FOR SPECIAL EDUC. APPS. (2019), www.mass.gov/anf/docs/dala/bsea/hearing-rules.doc.	MASS. GEN. LAWS ch. 30A, § 11 (2018).
MI*	MICH. ADMIN. CODE r. 340.1724f (2018).	MICH. ADMIN. CODE rr. 792.1010 & 2792.10133 – 792.10137 (2018).
MN*	MINN. STAT. § 125A.091 (2019); MINN. R. 3525.4420, 3525.4700 (2018).	
MS	7-74 MISS. CODE Pt. 3, R. § 74.5 (2017).	
MO*	MO. REV. STAT. §§ 162.961 & 621.253 (2018).	MO. REV. STAT. §§ 621.135,

		621.255 & 536.090 (2018).
MT	MONT. ADMIN. R. 10.16.3523 (2015).	
NE	NEB. REV. STAT. § 79-1167 (2017); 92 NEB. ADMIN. CODE §§ 55-.008 – 55-.009 (2017).	
NV	NEV. ADMIN. CODE §§ 388.310, 388.315 (2019).	
NH*	N.H. REV. STAT. ANN. §186-C:16-b (2020); N.H. CODE ADMIN R. EDUC. §§ 1123.18, 1123.22 (2020).	N.H. REV. STAT. ANN. § 541-A:35 (2020).**
NJ*	N.J. REV. STAT. § 18A:36-1.2 (2014); N.J. ADMIN. CODE § 6A:14-2.7 (2020).	N.J. ADMIN. CODE § 1:1-18.3 (2009).
NM	N.M. CODE R. § 6.31.2.12(I)(22)-(23) (2009).	
NY	N.Y. EDUC. LAW § 4404 (2007); N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.5(j) – 200.5(k), 279.1 – 279.14 (2020).	
NC*	N.C. GEN. STAT. §§ 115C-109.6(f), 115C-109.9 (2019).	26 N.C. ADMIN. CODE 3.0127 (2020).
ND*	N.D. ADMIN. CODE 67-23-05-02 (2016).	N.D. ADMIN. CODE 98-02-04-01, 98-02-04-06 – 98-02-04-07 (2016).
OH	OHIO ADMIN. CODE 3301-51-05(K)(14)–(16) (2019).	
OK	OKLA. ADMIN. CODE § 210:05-13.5 (2020).	
OR*	OR. ADMIN. R. 581-15-2340 (2017).	OR. ADMIN. R. 137-003-0645 – 137-003-0675 (2017).
PA	PA. CODE § 14.162(f) (1990).	
RI		
SC		
SD*		S.D. CODIFIED LAWS §§ 1-26-

		25, 1-26-31 (2019).
TN*	TENN. CODE ANN. § 49-10-606 (2019); TENN. COMP. R. & REGS. 0520-01-09-18 (2008).	TENN. CODE ANN. §§ 4-5-314, 4-5-317 (2019).
TX	19 TEX. ADMIN. CODE § 89.1185 (2012).	
UT	UTAH CODE ANN. § 53E-7-208 (2019).	
VT		
VA* **	VA. CODE ANN. § 22.1-214 (2019); 8 VA. CODE ADMIN. § 20-81-210 (2015).	www.courts.state.va.us/programs/ho/rules_of_admin_1.pdf***
WA*	WASH. ADMIN. CODE §§ 392-172A-05095 & 392-172A-05110.	WASH. REV. CODE §§ 34.05.461, 34.05.470 (2013); WASH. ADMIN. CODE §§ 10-08-210, 10-08-215 (2020).
WV	W. VA. CODE R. § 126-16-3 (2020); http://wvde.state.wv.us/osp/Policy2419_2017.pdf.	
WI	WIS. STAT. § 115.80 (2017).	
WY	7 WYO. CODE R. § 7 (2019).	

* Designates states that have APA legislation or regulations that, in addition to special education-specific laws, apply to IDEA DPHs; however, the row for such states is blank when the APA provisions do not account for any additions to the post-hearing stage.

** Designates the converse situation in which the state's APA does not apply to IDEA DPHs generally, but a particular APA provision for the post-hearing stage is incorporated by cross-referencing in the state's special education law.

*** Designates special situation of incorporation of Supreme Court rules of administration, which the SEA interprets as not importing the rest of the APA.