State Laws for Due Process Hearings under the Individuals with Disabilities Education Act III: The Pre-Hearing Stage

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State Laws for Due Process Hearings under the Individuals with Disabilities Education Act III: The Pre-Hearing Stage

Andrew M.I. Lee & Perry A. Zirkel*
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I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) is the primary federal law governing special education in schools. It provides “extensive procedural safeguards” for children with disabilities and their parents. One of the law’s most powerful safeguards is the right to a due process hearing (DPH) for complaints related to the “identification, evaluation, or educational placement of the child,” which ultimately includes the school district’s obligation to provide the child with a free appropriate public education (FAPE).

Since the enactment of the IDEA in 1975, the volume of litigation related to the IDEA has increased substantially. By the 2000s, the number of federally reported special education cases outnumbered the total of all other education cases. Like other federal education laws, the IDEA uses a model of “cooperative federalism”—states have the responsibility of educating children with disabilities within a federal legal framework of requirements set by Congress. This model permits states to supplement, via adding to but not subtracting from, the IDEA’s requirements for DPHs, which various states have done.

The purpose of this article is to follow up on two previous articles in this journal that canvassed state laws that have added to the basic procedural rules in the IDEA for DPHs. Those articles focused on the hearing and post-hearing stages of the DPH. In this article, we extend the examination to state law additions to the procedures for the pre-hearing stage of DPHs, using the same analytical framework and organization in the previous articles.

Part I of this article offers a review of the literature in this area. Part II lays out the current pre-hearing DPH requirements in the IDEA and its accompanying federal regulations. Part III describes the method for and the results of our analysis. Part IV concludes with a discussion of the findings and suggestions for further research.

4 Id. § 1415(b)(1)(E).
5 The original name of the IDEA is the Education for All Handicapped Children Act, Public Law 94-142.
6 Perry A. Zirkel & Brent L. Johnson, The “Explosion” in Education Litigation: An Updated Analysis, 265 EDUC. L. REP. 1 (2011) (revealing the upward trajectory of IDEA litigation within the relatively level trend of K–12 litigation within the past three decades).
8 See infra notes 63–155 and accompanying text.
II. LITERATURE OVERVIEW

The literature on DPHs tends to fit into four broad groups: (1) narrative rhetoric, (2) empirical research, (3) specific legal questions about DPHs, and (4) surveys of state law additions to the IDEA.

The first group has generally identified problems of DPHs. These problems include the high costs to schools and families,\(^\text{10}\) the damage to family-school relationships,\(^\text{11}\) and the length and complexity of the hearing process.\(^\text{12}\) The proposed solutions include the additional or alternative use of individualized education program (IEP) facilitation\(^\text{13}\) and arbitration.\(^\text{14}\)

The second group consists of empirical research that seeks to analyze the frequency and outcomes of DPH decisions.\(^\text{15}\) More specifically, the frequency


\(^{11}\) E.g., AM. ASS’N OF SCH. ADM’RS, *RETHINKING SPECIAL EDUCATION DUE PROCESS* 6–9 (2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf (citing various sources that identify parties’ perceived dissatisfaction).

\(^{12}\) E.g., Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403, 405 (1994) (identifying the cumbersome length of DPHs as one of the main problems of the process).

\(^{13}\) E.g., Reece Erlichman, Michael Gregory, & Alisia St. Florian, *The Settlement Conference as a Dispute Resolution Option in Special Education*, 29 OHIO ST. J. ON DISP. RESOL. 407 (2014) (recounting the pioneering alternatives in Massachusetts that includes not only the Spedex and advisory opinion options but also a customized settlement conference mechanism); Tracy G. Muller, *IEP Facilitation: A Promising Approach for Resolving Conflicts Between Families and Schools*, 41 TEACHING EXCEPTIONAL CHILD. 60 (Jan. 2009) (describing a process that utilizes an outside facilitator for resolving disagreements at IEP meetings); Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA’s Due Process Structure*, 66 CASE W. RES. L. REV. 143 (2015) (recommending, *inter alia*, IEP facilitation in lieu of the current pre-DPH resolution session procedure).


\(^{15}\) E.g., Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 EDUC. L. REP. 870 (2020) (analyzing the frequency of DPH filings and decisions for the most recent available six-year period); Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officers under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2015) (providing comprehensive literature review and systematic findings specific to frequency and outcomes of DPH decisions). For more recent frequency or outcomes analyses on specific issues, see, e.g., Cathy A. Skidmore & Perry A. Zirkel, *Has the Supreme Court’s Schaeffer Decision Placed a Burden on Hearing Officer Decision-Making under the IDEA*, 35 J. NAT’L ASS’N ADMIN. L. JUDICIARY 304 (2015) (finding that Schaeffer v. Weast has had a minor effect on DPH decisions); Perry A. Zirkel, *Manifestation Determinations under IDEA 2004: An Updated Legal Analysis*, 29 J. SPECIAL EDUC. LEADERSHIP 32 (2016) (finding similar frequency and outcome pattern after, as compared
analyses focus on the longitudinal trends for the volume of pertinent decisions, while the outcomes analyses examine the corresponding distribution of rulings in favor of the parents and those in favor of districts.

The third group are legal analyses of specific aspects of DPHs, like burden of proof,\textsuperscript{16} impartiality,\textsuperscript{17} and remedial authority.\textsuperscript{18}

The fourth group is the research most relevant to our current analysis. This literature has examined state laws that have added to the IDEA’s requirements for other areas, including the identification of students with specific learning disabilities,\textsuperscript{19} behavior strategies in special education,\textsuperscript{20} and the state complaint process.\textsuperscript{21} In tandem with a systematic snapshot of the current state systems for DPHs,\textsuperscript{22} the most salient to the present article are the two-aforementioned\textsuperscript{23} state-by-state analyses in this journal of state law additions to the IDEA for the other two stages of DPHs.


\textsuperscript{16} E.g., Perry A. Zirkel, \textit{Who Has the Burden of Persuasion in Impartial Hearings under the Individuals with Disabilities Education Act?}, 13 CONN PUB. INT. L.J. 1 (2013) (categorizing state laws into the three groupings after \textit{Schaffer v. Weast}; silent, default, on-district).

\textsuperscript{17} E.g., Perry A. Zirkel, \textit{The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update}, 21 PEPPERDINE DISP. RESOL. L.J. (forthcoming May 2021) (providing an updated synthesis of the most recent thirteen years of case law culminating in a proposal for an overall standard for hearing officer impartiality that is customized to the purposes of the IDEA).

\textsuperscript{18} E.g., Perry A. Zirkel, \textit{The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update}, 37 J. NAT’L ASS’N ADMIN. L. JUDICIARY 506 (2018) (canvassing the case law and related authority for the various remedies available to IDEA hearing and review officers).


\textsuperscript{21} E.g., Perry A. Zirkel, \textit{State Laws and Guidance for Complaint Procedures under the Individuals with Disabilities Education Act}, 368 EDUC. L. REP. 24 (2019) (tabulating the state laws and their related policy guidance for various aspects of the alternative decisional avenue for dispute resolution under the IDEA).

\textsuperscript{22} Jennifer Connolly, Thomas Mayes, & Perry A. Zirkel, \textit{State Due Process Hearing Systems under the IDEA: An Update}, 30 J. DISABILITY POL’Y STUD. 156 (2019) (reporting a survey of the key features of the various state systems for IDEA DPHs).

\textsuperscript{23} \textit{See supra} note 9.
III. IDEA FOUNDATIONAL REQUIREMENTS

The IDEA’s DPH process encompasses three overlapping stages: pre-hearing, hearing, and post-hearing. The main actors in the DPH are the parties— with the parent and local educational agency (LEA) taking the roles of either complainant and respondent—and the hearing officer (HO), with a limited supporting role for the state educational agency (SEA).

The IDEA sets forth specific provisions that are largely separable for each stage. For the last stage—post-hearing—the IDEA has provisions for (1) the hearing decision, (2) its appeal, and (3) attorneys’ fees. For the middle stage—during the hearing—the IDEA has provisions for (1) HO impartiality, (2) HO qualifications, (3) party rights to representation, witnesses, and the hearing record, (4) HO authority, and (5) timelines.

The focus here is on the first stage—pre-hearing. Although the lines between pre-hearing and the hearing stage are inevitably blurry, this division provided us with a focal framework for this third analysis of state laws that supplement the IDEA provisions for DPHs. For the pre-hearing stages, the following outline identifies the areas in which state law potentially adds to the relevant requirements in the IDEA’s legislation and regulations:

24 20 U.S.C. § 1415(f)(3)(E) (stating that a decision shall be made based on whether a child with a disability received a free appropriate public education), 1415(i)(1)(A) (2018) (providing for the finality of the decision). The only addition from the regulations for the IDEA is a requirement for written or electronic “findings of fact.” 34 C.F.R. § 300.512(a)(5) (2019).
25 20 U.S.C. § 1415(g) (allowing an appeal of a DPH decision to the SEA), 1415(i)(2) (2018) (providing for the right to bring a civil action).
26 Id. § 1415(i)(3) (describing awards of attorneys’ fees to the prevailing party).
27 Id. § 1415(f)(3)(A)(i) (stating that the HO may not be “an employee of the SEA or the LEA that is involved in the education or care of the child” and may not have “a personal or professional interest that conflicts with the person’s objectivity in the hearing”). The regulations clarify that “[a] person who otherwise qualifies to conduct a hearing . . . is not an employee of the agency solely because he or she is paid by the agency to serve as a [HO].” 34 C.F.R. § 300.511(c)(2) (2019).
28 20 U.S.C. § 1415(f)(3)(A)(ii)–(iv) (2018) (requiring the HO to have knowledge of the law, how to conduct hearings, and how to write and render decisions). The regulations additionally require the relevant public agency to maintain a list of the HOs with a statement of their qualifications. 34 C.F.R. § 300.511(c)(3) (2019).
30 Id. § 1415(h)(2) (giving parties the right to present evidence and confront, cross-examine, and compel the attendance of witnesses).
31 Id. § 1415(h)(3) (giving parties the right to a record of the hearing, as well as findings of fact and decisions). The regulations state that this record is provided “at no cost to parents.” 34 C.F.R. § 300.512(c) (2019).
32 E.g., 20 U.S.C. § 1415(f)(3)(B) (2018) (limiting the issues raised at a due process hearing to those in the original complaint, with an exception if the other party agrees).
33 E.g., 34 C.F.R. § 300.515(a) (2019) (providing 45-day period from completion of pre-hearing resolution phase to completion of the hearing process with a decision).
34 In the absence of a specific sequential framework in the IDEA of headings and subheadings, this choice for the organizing framework has the advantage of practical coherence. Although providing for clearer boundaries than the role-based organizing framework of the other two analyses (Zirkel, supra note 9), some overlap and imprecision is inevitable.
1. Complaint
   - Model Form
   - Parent Information
   - Content and Confidentiality
   - Notice
   - Amendments
   - Filing Deadline, or Statute of Limitations (SOL)
   - Response

2. Party Resolution
   - Resolution Session
   - Mediation

35 20 U.S.C. § 1415(b)(8) (2018) (requiring SEA to develop a model form “to assist parents in filing a complaint and due process complaint notice”); 34 C.F.R. § 300.509 (2019) (clarifying that the SEA or LEA “may not require the use of the model forms”).
36 34 C.F.R. § 300.507(b) (2019) (requiring the public agency to inform parents of “any free or low-cost legal and other relevant services available in the area,” if requested or upon receiving complaint for hearing).
37 20 U.S.C. § 1415(b)(6)(A) (offering the opportunity to present a complaint related to “identification, evaluation or placement” of a child with a disability, or the “provision of a [FAPE]” to the child), 1415(b)(7)(A)(i) (stating that the complaint “shall remain confidential”), 1415(b)(7)(A)(ii) (2018) (requiring the complaint to include the name and address of the child, the name of the school, a description of the problem, and a proposed resolution).
38 Id. § 1415(b)(7)(A–B) (requiring the filing party to provide notice to the other party and forward a copy of the notice to the SEA); 34 C.F.R. § 300.508(a)(2) (2019) (clarifying that the filing party must “forward a copy of the due process complaint to the SEA”).
39 20 U.S.C. § 1415(c)(2)(E) (2018) (requiring for amending the complaint either the other party’s written consent and opportunity for a resolution meeting, or the HO’s permission at least 5 days before the hearing).
40 Id. § 1415(b)(6)(B), (f)(3)(C–D) (requiring filing within two years of the date that the parent “knew or should have known” (KOSHK) unless state law specifies otherwise, with two exceptions).
41 Id. § 1415(c)(2)(A) (requiring written objection to both complainant and HO within 15 days), 1415(c)(2)(C–D) (requiring HO to issue a sufficiency determination within 5 days after receiving the objection); see also id. § 1415(c)(2)(B)(i) (requiring the LEA to either provide prior written notice or, within 10 days of the complaint, four parallel, specified contents regarding the issues raised in a complaint), 1415(c)(2)(B)(ii) (requiring, within 10 days, parents to specifically address the issues in a complaint filed by the LEA).
42 Id. § 1415(f)(1)(B)(i) (requiring, within 15 days of notice, the LEA to convene a resolution meeting between parents and a school official with decision-making authority, without attorneys unless parents decide to bring one; allowing parties to agree to waive the meeting or use mediation instead; stating that if complaint is not resolved to parents’ satisfaction within 30 days of filing, the due process hearing “may” occur), 1415(f)(1)(B)(iii–iv) (specifying requirements for a resolution settlement agreement, including 3-day review period); 34 C.F.R. § 300.510(a)(2) (clarifying that the purpose of the resolution meeting is for the parent to discuss the complaint and underlying facts, so the LEA has an opportunity to resolve the complaint), 300.510(a)(4) (stating that parent and LEA determine the relevant members of the IEP team to attend the resolution meeting), 300.510(b)(4) (2019) (allowing LEA to seek dismissal of the complaint for parent non-participation in the resolution meeting).
43 20 U.S.C. § 1415(e)(1)–(2)(A), (D)–(E), (G) (requiring states to create a free, voluntary and confidential mediation process that does not deny or delay a due process hearing and that is offered in a timely and convenient manner), 1415(e)(2)(C) (requiring state to maintain a list of mediators who are knowledgeable of laws and regulations for special education), 1415(e)(2)(F)
• Alternative Dispute Resolution (ADR)

3. Hearing Preparation
  • Recusal
  • Disclosure
  • Pre-Hearing Conference
  • Additional Case Management
  • Motion Practice
  • Discovery

Making clear the scope of our analysis depends not just the specification of the contents but also the identification of the exclusions. This article is limited to Part B of the IDEA, which covers children with disabilities above age 3, thus not extending to Part C of IDEA, which applies to eligible children aged 0 to 3. Additionally, our analysis excludes the IDEA’s expedited due process procedures, which are limited to the special situation of disciplinary changes in placement.

(2018) (providing for a confidential mediation settlement agreement that is enforceable in court.); 34 C.F.R. § 300.506(b)(1)(iii) (requiring mediators to be “trained in effective mediation techniques”), 300.506(c) (stating that mediators may not be an employee of SEA or LEA, or have a conflict of interest), 300.506(b)(3)(ii) (2019) (requiring mediators to be chosen on an impartial, such as random or rotational, basis).


45 34 C.F.R. § 300.511(c)(i)–(B) (2019) (stating that the HO must not be an LEA or SEA employee or have a “personal or professional interest that conflicts with [their] objectivity in the hearing”).

46 20 U.S.C. § 1415(f)(2) (2018) (requiring disclosure of evaluations and evaluation recommendations at least five days before hearing, and allowing HO to bar evidence if not disclosed); 34 C.F.R. § 300.512(a)(3) (2019) (giving both parties the right to prohibit any evidence not disclosed by the other party at least five business days before the hearing). This disclosure subcategory overlaps with the discovery subcategory (infra text accompanying note 48), but they are sufficiently distinct to treat separately. C.F. B.H. v. Joliet Sch. Dist., 54 IDELR 21, 2010 U.S. Dist. LEXIS 28658, at 7 (N.D. Ill. March 19, 2010) (distinguishing between IDEA 5-day disclosure and “the sort of extensive discovery that occurs in litigation”).

47 The IDEA legislation or regulations do not address these three procedural areas—pre-hearing conference, additional case management, and motion practice. However, they are frequent subjects of state law additions to pre-hearing DPH procedures, thus clearly warranted for this overall analysis.

48 The IDEA discovery provisions are limited to the parties’ right to compel the attendance of witnesses, which indirectly refer to subpoenas and which are not specific to the pre-hearing stage. See 34 C.F.R. § 300.512(a)(2) (2019).

49 20 U.S.C. §§ 1431–1444 (2018). The dispute resolution procedures under Part C of IDEA include Mediation, State Complaint, and Due Process. See id. § 1439(a); 34 C.F.R. § 303.430 (2019). For disputes involving infants and toddlers, states may choose to use the dispute resolution procedures under Part B or Part C. 34 C.F.R. § 303.430(d) (2019).

50 20 U.S.C. § 1415(k)(3)(A) (stating that the parent of a child may request a hearing to dispute a placement or manifestation decision and that the school may request a hearing if “the current placement of the child is substantially likely to result in injury to the child or to others”), 1415(k)(4)(A) (2018) (requiring an expedited hearing for these types of appeals); see, e.g., Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 8–9 (Mar. 2019), https://www.mass.gov/service-details/bsea-issues-revised-hearing-rules-for-special-education-appeals (specifying rules for a 30-day hearing process).
IV. METHOD AND RESULTS

Our search for state law additions to the IDEA’s pre-hearing procedures sifted through three overlapping sources. The first source is the official website for the department of education in each state. The selection from these websites was limited to linked special education statutes and regulations for the state and policy manuals that appeared to have the force of law, as compared with interpretive guidance and technical assistance.

The second source was the official website, if any, for laws and regulations in each state. Several states have passed an Administrative Procedures Act (APA) that is a customized variation of the federal model, and our selection was limited to provisions for general hearing procedures that appeared applicable to IDEA DPHs.

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54 E.g., WIS. STAT. §§ 115.001 et seq. (2017), http://docs.legis.wisconsin.gov/statutes/statutes/115.

55 For footnoted citations to statutes and regulations, we have added “APA” in parenthesis to indicate those that fit within our applicable boundaries but are in this broader category beyond the state’s special education laws.

56 E.g., IDAHO ADMIN. CODE R. 04.11.01.417–04.11.01.600 (2018) (APA). Some states only apply their APA to DPHs when state special education law specifically references it. See Email from Mark Ward, Spec. Educ. and Title Serv’s, Kansas Dep’t of Educ., to Perry A. Zirkel (Jan. 27,
The third and culminating source for our search was the Westlaw database, from which we checked for the latest version of the applicable statutory and applicable provisions as of September 1, 2020. Thus, our analysis is based on provisions within our aforementioned scope in (1) state special education law and regulations, (2) state APAs, and (3) legally binding state policy manuals as of this date. Given our focus on state laws, the analysis did not extend to court decisions applicable to DPH procedures.

Reviewing these sources through the lens of the foregoing framework, the first step was to determine the fit of the various state law provisions. Given the overlap at the blurry boundaries between stages, we chose to include provisions within the pre-hearing scope even if it also appeared in either of the two previous DPH state law analyses. For example, the content here includes SOL provisions but with a closer examination than its treatment in the previous, hearing stage analysis.

The second step, based on a customization of the model in the preceding pair of articles, was the development of a chart showing the extent of state law additions to the IDEA provisions for the pre-hearing stage. The columns correspond to the categories and subcategories of the foregoing template. For each subcategory, the coded entries represent four approximate, Likert-type levels: (x) = partial; x = without any specific limitation or detail; X = relatively detailed or forceful; and X = unusual. The comments column provides clarifying and additional information for the entries, cross-referenced to the letter of the applicable subcategory. The following table provides this chart, which for manageable size, reserves the listing of the source-citations to the Appendix.
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<th>Model Form</th>
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**Table 1: State Law Additions to the IDEA Pre-hearing Provisions for DPHs**

- **Complaint**: Various types of complaints, including due process complaints, administrative reviews, and appeals.
- **Party Res.**: Parties involved in the process, typically including the student, parent, and school district.
- **Hearing Preparations**: Pre-hearing activities such as mediation, settlement meetings, and discovery.
- **Comments**: Additional notes or conditions on the provisions.

*Note: The table contains a comprehensive list of state-specific provisions, each with a unique description of the requirements, procedures, and timelines for pre-hearing activities, ensuring a clear understanding of the IDEA's pre-hearing stage across different states.*
This section provides a narrative synthesis of the entries for each of the successive categories, focusing on overall frequency per subcategory, without differential weighting for the entries, and illustrations of the unusual variations. Whenever salient or illuminating, we note how state law additions impact the responsibility or authority of various DPH actors, including the SEA, LEA, HO, and parties.
A. Complaint
For the complaint, the limited state law additions, in descending order of frequency, address content and confidentiality (n=10), filing deadline (SOL) (n=9), required notice to SEAs (n=8), parent information (n=6), amendments (n=5), model forms (n=2), and responses (n=2).

For the broad “content” component of the first subcategory, 62 two states grant explicit authority to HOs to consolidate related complaints. 63 More unusually, Minnesota law has a detailed addition when an LEA files a complaint. 64 Nebraska specifies an additional requirement for the parent complainant. 65 Finally, a few states expand the jurisdiction of the DPH to complaints related to Section 504 66 or gifted education services. 67 In contrast, no state law appeared to have a notable addition to the IDEA’s accompanying confidentiality requirement 68 for DPH complaints.

For the IDEA’s SOL, which is two years from the KOSHK date unless state law specifies otherwise, 69 seven states have opted for shorter deadlines, with the most common being one year. 70 The remaining states in this shortened group have even more reduced filing periods but only for specified situations. Specifically, Alaska has a 60-day period for LEA filings; 71 and two New England states—New Hampshire and Vermont—have a 90-day SOL for tuition reimbursement cases. 72 Moreover, further evidencing policy interaction, these two states, for all other cases, share a variation for the IDEA KOSHK language—“the date on which the alleged violation was or reasonably should have been discovered.” 73 Only one state—Kentucky—has opted for a longer, three-year

62 See supra note 37 and accompanying text.
64 MINN. R. 3525.3900.3.H (2018) (requiring the LEA to provide the parent with the IEP, evaluation plan, and any progress information).
65 92 NEB. ADMIN. CODE § 55-004.06A (2017) (requiring the parent to include material factual allegations in the complaint).
68 See supra note 37.
69 See supra note 40.
70 ALASKA STAT. § 14.30.193(a) (2017); WIS. STAT. § 115.780 (2017) (providing that filing deadline is 12 months after written notice); LA. ADMIN. CODE tit. 28, §§ 507.A.2., 511.F (2017) (specifying that filing deadline is one year after party KOSHK); N.C. GEN. STAT. § 115C-109.6(b) (2017) (stating that filing deadline is one year after KOSHK date); 19 TEX. ADMIN. CODE § 89.1151(c)-(e) (2020) (stating that filing deadline is one year after party KOSHK, with a tolling exception for military service).
71 ALASKA ADMIN. CODE tit. 4, § 52.550(a) (2019) (stating that “a district must file a complaint for a due process hearing within 60 days after a parent takes the action or inaction that is the subject of the complaint”)
72 N.H. REV. STAT. ANN. § 186-C:16-b2 (2016); VT. STAT. ANN. tit. 16, § 2957(b) (2017). The triggering date for these two states is the time of unilateral placement.
SOL.\textsuperscript{74} Beyond variations in the length of the period, other additions include an approach different from the KOSHK triggering date, such as a look-back period based on notice of filing.\textsuperscript{75} Notably, Massachusetts goes out of its way to note that the SOL for issues raised in an amended complaint runs from the date of amendment.\textsuperscript{76}

With respect to notice to the SEA,\textsuperscript{77} seven states have added time and service requirements for complaints.\textsuperscript{78} Alone in this subcategory, Delaware law provides that when parents file a due process complaint they must additionally provide notice to the LEA school board, and the board president must verify receipt in writing to the parent.\textsuperscript{79}

For the parent information subcategory, the more numerous entries to notification of free or low-cost legal services in the area\textsuperscript{80} come in two basic flavors. First, states must provide more detailed information to parents about low-cost legal services and DPHs.\textsuperscript{81} Second, states empower the SEA or HO to actively help certain parents file a complaint. Specifically, West Virginia and Louisiana authorize the SEA to assist parents who are unable to file a written DPH complaint;\textsuperscript{82} and New York authorizes HOs to provide information related to the DPH process to unrepresented parents at all stages of the hearing.\textsuperscript{83}

For the amendments subcategory, the additions to the IDEA requirement\textsuperscript{84} are rather infrequent, varied, and minor. For example, two states give the HO

\textsuperscript{74} KY. REV. STAT. ANN. § 157.224(6) (West 2017) (authorizing an SOL of three years with some exceptions, but without limiting the introduction of evidence).
\textsuperscript{75} ALASKA. STAT. § 14.30.193(a) (2017); WIS. STAT. § 115.780 (2017).
\textsuperscript{76} Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 5 (Mar. 2019).
\textsuperscript{77} See supra note 38.
\textsuperscript{78} See ILL. ADMIN. CODE tit. 23, § 226.615 (2018); KAN. ADMIN. REGS. § 91-40-28(e) (2017) (requiring notice to the state within five days); MICH. ADMIN. CODE r. 340.1724f(3) (2020) (describing service requirements for the complaint when delivered to the state); MINN. R. 3525.3900 (2018); MONT. ADMIN. R. 10.16.3508(5) (2017) (requiring that the complaint be filed with the state and served both electronically and by mail); 92 NEB. ADMIN. CODE § 55-004.07 (2017) (requiring the complaint be filed with the state in person or by mail and served by mail with return receipt); N.H. CODE R. ANN. EDUC. 1123.06(b) (2020) (requiring notice to the state within two days).
\textsuperscript{79} Del. Code Ann. tit. 14, § 3130 (2017). Interestingly, this is the only state law addition that Delaware has made to the IDEA’s pre-hearing procedural rules for DPHs.
\textsuperscript{80} See supra note 36.
\textsuperscript{81} See CAL. EDUC. CODE § 56502(h) (West 2017) (stating that SEA must provide parents with a list of reduced or low-cost services along with a description of how to qualify); MINN. R. § 3525.3900.4.J (2018) (requiring that the notice of a due process hearing include name and phone numbers of free or low-cost legal services, as well as an explanation of the burden of proof for parents); N.M. CODE R. § 6.31.2.13.I.(7)(d) (LexisNexis 2020) (requiring the SEA to inform parents of the availability of attorneys’ fees for a prevailing party in a civil action).
\textsuperscript{82} See W. Va. Dep’t of Educ., West Virginia Procedures Manual for the Education of Students with Exceptionalities 111 (2017) (authorizing the SEA to assist in “alternative means of submitting due process Complaints” if parents are unable to file a written request); LA. ADMIN. CODE tit. 28, § 507.B.3 (2017) (stating that a parent who is illiterate or unable to communicate in writing shall be “afforded the opportunity for assistance”).
\textsuperscript{84} See supra note 39.
discretion to allow amendments in specified situations. Single states account for the few other variations.

For the model form subcategory, there are two limited state law additions to the IDEA provisions regarding SEA obligations. Specifically, as a minor addition to the aforementioned IDEA requirement, Nevada requires the State Board of Education to post the model form on its official website, along with other information relating to DPHs. Arkansas, on the other hand, has an unusual provision that requires the party filing for a DPH to complete an SEA “hearing request form.” Although the Arkansas SEA makes available on its website a form labeled “Required,” the applicable IDEA regulation makes clear that the public agency may not mandate the use of the model form. In what appears to be an awkward attempt at compliance, Arkansas’ regulations state that parents must “not be denied or delayed receipt of any hearing when the hearing request form is not completed.”

Finally, state law additions to IDEA’s limited specifications for the response to the complaint are not extensive, with one of the two state law additions only amounting to a minor clarification regarding sufficiency. Unusually, Ohio’s law provides that if the HO determines the complaint to be insufficient, the HO must explain the reasons and clarify that the case has not been dismissed. The HO also may not proceed until the insufficiency is corrected and must offer resources to assist pro se parents with correcting the insufficiency.

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87 See supra note 35.
91 34 C.F.R. § 300.509 (2019) (clarifying that the SEA or LEA “may not require the use of the model forms”).
93 See supra note 41. For the overlapping provisions for dismissal or other such summary dispositions, see “Pre-Hearing Motions” subcategory, infra notes 146–51 and accompanying text.
94 511 Ind. Admin. Code 7.45-4(b)(2) (2020) (requiring the respondent to “identify how the request is insufficient”).
**B. Party Resolution**

For the rights and obligations that apply to both the complainant and respondent in efforts to resolve the matter after the complaint, the frequency order of the subcategories from high to low state law additions are: mediation (n=23), ADR (n=12), and resolution session (n=3).

For the mediation subcategory, the IDEA provides a rather detailed foundation, and only a few of the many states with additions address it with similar breadth. The rest of the state laws provide a variety of limited additions, such as steps to reinforce the IDEA’s requirement of mediation confidentiality, specification of time limits; identification of who may or may not participate in mediation; listing of training or other qualifications for mediators; requirements for the mediation request; and authorizing use of the state

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96 See supra note 43.


102 05-71-101 Me. Code R. § XVI.2.A (LexisNexis 2018) (requiring a written request for a mediation only when there is no pending due process or other complaint); N.M. Code R. § 6.31.2.13.G.(2)(b) (LexisNexis 2020) (requiring the request for mediation to be in writing and to include a statement of the nature of the dispute and attempts to resolve it); N.H. Rev. Stat. Ann. § 186-C:24 (2016) (requiring that the request for mediation must be in writing).
complaint process to enforce mediation agreements.\footnote{05-71-101 ME. CODE R. § XVI.3.B(8) (LexisNexis 2018); 511 IND. ADMIN. CODE 7-45-2(i) (2020).}

For the ADR subcategory, the state law additions to the IDEA’s brief and generic authorization to alternatives to mediation,\footnote{See supra note 44.} range from a brief listing of various ADR options, such as IEP facilitation, settlement conferences, advisory opinion procedures, and neutral fact finding or case evaluation\footnote{Md. CODE REGS. 28.02.01.18 (2020) (APA); Minn. Stat. § 125A.091 (2019); Or. Admin. R. 137-003-0510(2) (2019) (APA); cf. Mass. Gen. Laws ch. 71B, § 2A (2017) (listing options with HO participation, including settlement conferences and advisory opinion procedure); N.M. Code R. § 6.31.2.13.I.(3)(b) (LexisNexis 2020) (authorizing facilitated IEP meeting or mediation to serve in the place of the resolution session).} to the additional or alternative brief authorization of a single procedure.\footnote{Cal. Educ. Code § 56502(g) (West 2017) (providing for an “informal meeting” at the request of the parent and conducted by an LEA administrator with authority to resolve the issue); 603 Mass. Code Regs. 28.08(1) (2018) (encouraging local school districts to create “problem resolution procedures”).} A few state laws provide detailed descriptions, usually focused on IEP facilitation.\footnote{Idaho State Dep’t of Educ., Idaho Special Education Manual, 232 (2018); 19 Tex. Admin. Code §§ 89.1196–1197 (2020); W. Va. Dep’t of Educ., West Virginia Procedures Manual for the Education of Students with Exceptionalities, 103-04 (2017); cf. Minn. Stat. § 125A.091.7 (2019) (describing “conciliation meetings”).} More novel, three state laws include detailed provisions for an advisory process in which a neutral hears from the parties and gives an opinion on what the outcome might be.\footnote{See supra note 42.} Finally, the various state law ADR provisions require confidentiality.

For the resolution session subcategory, perhaps because the IDEA specifies this stage of the pre-hearing process in detail,\footnote{Conn. Agencies Regs. § 10-76b-6 (2018) (setting forth a detailed process for a simulated due process hearing with an HO that leads to a nonbinding advisory opinion); N.H. Rev. Stat. Ann. § 186-C:23 (2016) (describing a “neutral conference” in which the parties present facts to a neutral party who offers a recommendation); 26 N.C. Admin. Code 03.0201 (2016) (describing a mediated settlement conference with the HO presiding).} the number and nature of state law additions is negligible.\footnote{See supra note 42.} For example, New Jersey’s minor additions include a clarification that parents may bring an advocate to the resolution session without triggering the LEA’s right to bring an attorney,\footnote{N.J. Admin. Code § 6A:14-2.7(h) (2018).} which is conditional upon the parent doing so.\footnote{20 U.S.C. § 1415(f)(1)(B)(i) (2018).}
C. Hearing Preparations

Although the IDEA does not address hearing preparations beyond HO objectivity, overall disclosure, and indirect subpoena provisions,\(^{113}\) this category has been subject to the most numerous state law additions. The subcategories in descending order of frequency are discovery (n=40), pre-hearing conferences (n=37), additional case management (n=34), recusal (n=27), pre-hearing motions (n=27), and disclosure (n=18).

For the discovery subcategory, several states provide the HO with more direct subpoena authority or the more limited authority for discovery of documents,\(^{114}\) and others extend further to varying degrees.\(^{115}\) At the most extensive end, some state laws provide for what may be regarded as full discovery by using state rules of civil procedure or civil law more generally as the frame of reference.\(^{116}\) In contrast, a few state laws merely encourage discovery on a voluntary basis.\(^{117}\)

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\(^{113}\) See supra notes 45, 46, and 48.


\(^{117}\) N.H. CODE R. EDUC. 1123.14(a) (LexisNexis 2020) (encouraging voluntary good faith production); N.J. ADMIN. CODE § 1:6A-10.1(d) (2018) (noting that discovery shall, to the greatest
For the similarly frequent pre-hearing conference subcategory, one of the major distinctions between states is between mandatory\textsuperscript{118} and optional\textsuperscript{119} provisions. Within both types of provisions, the level of specificity for the subjects and, much less frequently, the timing of the pre-hearing conference varies widely.\textsuperscript{120} The majority of these provisions include a culminating requirement of an HO summary or order.\textsuperscript{121} Overlapping with the response subcategory,\textsuperscript{122} Arizona has an unusual provision requiring the HO at the pre-hearing conference to determine whether the complaint is a “legitimate due process Complaint.”\textsuperscript{123}

\textsuperscript{118} ALA. ADMIN. CODE r. 290-8-9-.08(9)(c)12(i)(VII) (2013); ARIZ. ADMIN. CODE § R7-2-405H.1 (2018); ARIZ. REV. STAT. ANN.§ 41-1092.05 (2020) (APA); COLO. CODE REGS. § 301-8 (2016) (Rules for the Administration of the Exceptional Children's Educational Act 6.02 (7.5)(f)(iv)(C)); CONN. AGENCIES REGS. § 10-76h-7 (2018); HAW. CODE. R. § 8-60-65(e) (2019); 105 ILL. COMP. STAT. 5 § 14-8.02a(g-40) (2018); ILL. ADMIN. CODE tit. 23, § 226.640 (2018); 4 IND. ADMIN. CODE 21.5-3-18 (2019) (APA); LA. ADMIN. CODE tit. 28, § 511.1 (2017); 05-71-101 ME. CODE R. § XVI.6.G (LexisNexis 2018); MINN. STAT. § 125.019.15 (2019); MINN. R. 3525.4110 (2018); MONT. ADMIN. R. 10.16.3510(1), R. 10.16.3512 (2017); N.H. CODE R. EDUC. 1123.02(e) (LexisNexis 2020); N.M. CODE R. § 6.31.2.13.I(10)(b) (LexisNexis 2020); OR. ADMIN. R. 581-015-2360(3) (2019); 19 TEX. ADMIN. CODE § 89.1180(b)-(d) (2020); 22 000 006 VT. CODE R. § 2365.1.6.4, 11 (2020); cf. Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 9–11 (Mar. 2019) (requiring scheduling and discovery conference but leaving a full pre-hearing conference as optional); 8 VA. ADMIN. CODE § 20-81-210.03-4 (2017) (reserving exception if HO provides written explanation to parties).


\textsuperscript{120} At the most limited extent, Ohio’s provision is limited to the exchange of evidence, thus overlapping with the disclosure subcategory. See infra note 153–54 and accompanying text.


\textsuperscript{122} See supra notes 93–95 and accompanying text.

\textsuperscript{123} ARIZ. ADMIN. CODE § R7-2-405H.1 (2018).
In the residual subcategory of additional case management, several states provide broad grants or passing mention of HO authority, while a few others set forth lengthy lists of HO responsibilities. As another variation, some states focus on specific pre-hearing areas of authority, such as timelines, continuances or adjournments, pre-hearing party briefs, orders, and notifications.

Recusal here refers generically to the procedures for disqualifying the HO, extending beyond the narrower meaning of the HO initiating or deciding the disqualification. The IDEA does not address the procedures to the extent differentiable from the criteria for recusal. Instead, the foundational provisions are limited to very basic prohibitions of conflict of interest, which the hearing-stage article already canvassed. Although the boundary is far from a bright line, the

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124 In some cases, the case management authority that an HO has under state law may blend into the authority that the HO has during a pre-hearing conference. Nevertheless, they are sufficiently distinct to warrant a separate subcategory of state law additions.


126 ALASKA ADMIN. CODE tit. 4, § 52.550(g) (2019); OHIO ADMIN. CODE 3301-51-05(K)(12) (2019); WIS. STAT. § 115.780(5)(a) (2017).

127 ALA. ADMIN. CODE r. 290-8-9-.08(9)(c)12(i) (2013); ARIZ. REV. STAT ANN. § 41-1092.05 (2020) (APA); N.M. CODE R. § 6.31.2.13.I(9), (10) (LexisNexis 2020); 8 VA. ADMIN. CODE § 20-81-210.O.3-4 (2017).


130 E.g., 005 ARK. CODE R. § 18.10.01.28.1 (2017) (authorizing the HO to require submission three days before the hearing of briefs on issues and arguments).

131 E.g., FLA. ADMIN. CODE ANN. r. 28-106-211 (2018) (APA) (empowering the HO to issue orders as necessary to manage the proceeding).

132 E.g., ALASKA ADMIN. CODE tit. 4, § 52.550(g) (2019) (requiring the HO to provide notice to the parent 10 days before the hearing); 4 INDIANA ADMIN. CODE 21.5-3-18(c) (2019) (requiring the HO to provide notice of pre-hearing conference); OR. ADMIN. R. 581-015-2360(4) (2019); TENN. CODE ANN. § 4-5-307 (2020) (APA) (specifying the hearing notice that the HO must give to the parties).

133 See supra note 45. Although not the focus here, some state laws specify other or overlapping grounds for disqualification. E.g., 4 INDIANA ADMIN. CODE 21.5-3-10, 21.5-3-12 (2019) (APA); IOWA ADMIN. CODE r. 281-41.1004(1)(a) (2018); MD. CODE REGS. 28-02.01.07.E (2020) (APA) (applying judicial standard of impartiality); see also MO. REV. STAT. § 162.961.1 (2017) (elaborating on prohibited conflicts of interest); S.D. CODEFIED LAWS § 1-26-26 (2019) (APA) (requiring disqualification only where the HO participated in the investigation of the case). For systematic analysis of the related case law, see generally Zirkel, supra note 17.

134 Hearing Stage, supra note 9, at 17.
focus here is on the recusal procedures that extend notably to the pre-hearing phase rather than those focused on the hearing stage.\(^{135}\)

Many of the state law recusal additions relate to actual or potential conflicts of interest. One group provides for disclosure.\(^{136}\) Another group goes a step further by providing for mandatory recusal of an HO in the event of a conflict.\(^{137}\) Other procedural additions focus on the format or timing of a party’s request for recusal of the HO. For example, several states require the request to be a motion for recusal, typically in writing and supported by specific grounds.\(^{138}\) Other states address the timing of such a request either generally\(^{139}\) or specifically.\(^{140}\)

\(^{135}\) Similarly, within the hearing-stage exclusion are state laws that address removal of HOS for matters that appear to be more a matter of competency than impartiality, such as for failure to fulfill their responsibilities. E.g., Sup. Ct. of Va., Hearing Officer Systems Rules of Administration, Rule 4.A (2019).

\(^{136}\) 005 ARK. CODE R. § 18.10.01.23.1 (2017) (stating that HO “shall disclose all personal or professional activities or relationships involving any party to the hearing”); CAL. CODE REGS tit. 5, § 3099(a)-(b) (2018) (requiring HO to disclose actual and potential conflicts that could raise a question about impartiality); COLO. CODE REGS. § 104-2-3 (2020) (APA) (noting in the commentary that the HO must disclose the basis for possible disqualification); GA. COMP. R. & REGS. 160-4-7.12(3)(l)(5) (2018) (providing the HO may disclose when any factor impairs or appears to impair HO’s impartiality); 105 ILL. COMP. STAT. § 14-8.02a(f-5) (2018) (requiring HO to disclose certain conflicts); IOWA ADMIN. CODE r. 481-10.9(2) (2020) (APA) (requiring HO to disclose any conflicts); see also MICH. ADMIN. CODE r. 792.10106(4) (2020) (APA) (allowing the HO to disclose possible conflicts and parties may agree that the HO not be disqualified); 22 PA. CODE § 14.162 (2017) (requiring the HO to inform parties if there is a prior relationship with either party). But cf. N.J. ADMIN. CODE § 1:1-14.12(c) (2018) (APA) (stating that an HO may not avoid disqualification by disclosing a conflict).

\(^{137}\) CAL. CODE REGS tit. 5, § 3099(d) (2018) (noting that if there is an actual or potential conflict, the HO must recuse); COLO. CODE REGS., § 104-2-3 (2020) (APA) (stating that the HO shall recuse if impartiality might reasonably be questioned); GA. COMP. R. & REGS. 616-1-2-32(6) (2018) (APA) (stating that HO shall be recused if impartiality may reasonably be questioned); 105 ILL. COMP. STAT. § 14-8.02a(f-5) (2018) (requiring the HO to recuse for certain conflicts); IOWA ADMIN. CODE r. 481-10.9(1) (2020) (APA) (requiring the HO to withdraw for lack of impartiality); LA. ADMIN CODE tit. 28, § 511 (2017) (requiring disqualification if “doubt exists” as to impartiality); MD. CODE REGS. 28-02.01.11.C (2020) (APA) (requiring the HO to withdraw for any bias or lack of impartiality, or appearance of impropriety); N.J. ADMIN. CODE § 1:1-14.12(a) (2018) (requiring the HO to withdraw in certain conflict circumstances); S.D. CODIFIED LAWS § 1-26-26 (2019) (APA) (requiring disqualification in limited circumstances).


\(^{139}\) E.g., HAW. CODE. R. § 16-201-20(b) (2020) (APA) (requiring the disqualification motion to be filed before the evidentiary portion of the DPH); 105 ILL. COMP. STAT. § 14-8.02a(f-5) (2018) (permitting a motion for recusal at any time before or during DPH).

\(^{140}\) E.g., LA. ADMIN CODE tit. 28, § 511.D (2017) (requiring parties to request disqualification within three days of HO appointment); MINN. R. 1400.6400 (2018) (APA) (requiring an affidavit of prejudice to be filed no later than five days before the DPH); MONT. ADMIN. R. 10.16.3509(3) (2017) (requiring motion be made within ten days of HO appointment); WASH. ADMIN. CODE § 10-08-050 (2017) (APA) (requiring parties to file motion of prejudice 3 days before first discretionary ruling by HO); cf. MICH. ADMIN. CODE r. 792.10106(4) (2020) (APA) (requiring a
Finally, various state law additions in the recusal subcategory address who has the authority to make the recusal decision. Several states make explicit what is otherwise presumed—that the HO has this authority at least as an initial matter.\textsuperscript{141} For such HO decisions, a few state laws add an appellate step.\textsuperscript{142} Alternatively, other states provide for the initial recusal decision by a person or entity other than HO.\textsuperscript{143} Finally, overlapping with the criteria for recusal, a few states provide procedures for limited peremptory recusal either indirectly\textsuperscript{144} or directly.\textsuperscript{145}

In the similarly frequent subcategory of pre-hearing motions, which overlaps with the discovery subcategory,\textsuperscript{146} some state laws focus on a particular type of motion.\textsuperscript{147} Others grant HOs blanket motion authority, either with detailed

\textsuperscript{141} ALASKA ADMIN. CODE tit. 4, § 52.560(c) (2019); 005 ARK. CODE R. § 18.10.01.23.3 (2017); KAN. STAT. ANN. § 72-3416(f)(2) (2019); N.D. CENT. CODE § 28-32-27.4 (2020) (APA); TENN. CODE ANN. § 4-5-302(c) (2020); cf. IDAHO ADMIN. CODE r. 04.11.01.412 (2018) (APA); 4 IND. ADMIN. CODE 21.5-3-9(d) (2019) (APA) (adding requirement for facts and reasons for decision); NEV. ADMIN. CODE § 388.310.18 (2020); 19 TEX. ADMIN. CODE § 89.1170(g) (2020) (adding requirement for written order).

\textsuperscript{142} 4 IND. ADMIN. CODE 21.5-3-9(e) (2019) (APA) (providing for agency review); MICH. ADMIN. CODE r. 792.10106(6) (2020) (APA) (allocating this step to a supervising administrative law judge); N.D. ADMIN. CODE 98-02-02-15 (2019) (APA) (similarly according this authority to the director or head of the administrative agency); 19 TEX. ADMIN. CODE § 89.1170(g) (2020) (allocating the appellate authority to a second HO); Sup. Ct. of Va., Hearing Officer Systems Rules of Administration, Rule 4.B (2019) (providing this authority to executive secretary of the state supreme court, which administers the HO system).


\textsuperscript{144} MONT. ADMIN. R. 10.16.3509(1)(b) (2017) (allowing parties to rank proposed HOs in order of preference before appointment); REV. NEV. STAT. § 388.469 (2019) (providing for the assignment of the HO according to the complainant’s ranking of the proposed HOs).

\textsuperscript{145} IDAHO ADMIN. CODE r. 04.11.01.412 (2018) (APA) (providing for one disqualification without cause for any party); 105 ILL. COMP. STAT. 5 § 14-8.02a(f-55) (2018) (allowing each party one substitution of an HO as a matter of right); KAN. ADMIN. REGS. § 91-40-28(d) (2017) (granting parents the right to disqualify proposed HOs before appointment); OR. ADMIN. R. 471-060-005(3) (2019) (APA) (providing for automatic granting of either party’s first recusal request).

\textsuperscript{146} See infra notes 152–54 and accompanying text.

procedures \(^{148}\) or limited formalities. \(^{149}\) Others are limited only to passing mention. \(^{150}\) Finally, providing full discovery authority, one state treats motions within DPHs the same as in other civil proceedings. \(^{151}\)

For the disclosure subcategory, various state laws add to the IDEA’s five-day rule. \(^{152}\) Most of these additions are limited to making more specific the nature or form of the disclosure, such as requiring the exchange of the witness list with descriptions and labeled documentary evidence. \(^{153}\) More unusually, Ohio requires a “disclosure conference” five days prior to the hearing. \(^{154}\)

V. DISCUSSION AND RECOMMENDATIONS

Insofar as this article is the third in the triad of the analyses of state law additions to the IDEA provisions for the successive stages of DPHs, \(^{155}\) the conclusions of the two previous articles provides a starting point for this discussion. More specifically, a primary conclusion of the hearing-stage analysis was that “state law additions to the IDEA’s foundational requirements for DPHs form a pattern characterized by variety and complexity.” \(^{156}\) On an overlapping basis, the over-arching conclusion of the post-hearing analysis was that in applying “the Janus-like trade-off between the benefits of ‘legalization’ and the costs of ‘the arid formality of legalism,’ …. the key is to retain the benefits of the judicialization of DPHs, but with careful customization of the structure and purpose of the IDEA.” \(^{157}\)

The findings for the state law additions to the pre-hearing stage not only intensify and illustrate but also supplement this interpretation. First, consistent

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\(^{149}\) IDAHO ADMIN. CODE r. 04.11.01.565 (2018) (APA); HAW. CODE R. § 16-201-17 (2020) (APA) (requiring that motions be in writing with supporting memoranda if a question of law at issue and supporting affidavits if facts not in record); IOWA ADMIN. CODE r. 481-10.15 (2020) (APA); LA. ADMIN. CODE tit. 1, § 517 (2020) (APA); 05-71-101 ME. CODE R. § XVI.8 (LexisNexis 2018); MINN. R. 1400.6600 (2018) (APA) (requiring that motions be in writing); cf. MONT. ADMIN. R. 10.16.3512(3) (2017) (providing timeline for objections to evidence).

\(^{150}\) E.g., N.M. CODE R. § 6.31.2.13.I(12)(k) (LexisNexis 2020); 19 TEX. ADMIN. CODE § 89.1170(e) (2020).

\(^{151}\) N.C. GEN. STAT. § 150B-33(b)(3a) (2017).

\(^{152}\) See supra note 46. The wording of the statutory and regulatory versions differs significantly in scope and strength. Id.

\(^{153}\) N.H. CODE R. EDUC. 1123.15(b) (LexisNexis 2020).

\(^{154}\) OHIO ADMIN. CODE 3301-51-05(K)(12)(b) (2019).

\(^{155}\) See supra note 9 and accompanying text.

\(^{156}\) Hearing Stage, supra note 9, at 25.

with the experimentation objective of federalism, the entries in and explanation following Table 1 display the variety that state laws opt to fill gaps among and beyond the IDEA’s skeletal lattice for the pre-hearing stage.

Second, state law additions to for the pre-hearing stage suggest a conclusion not identified in the earlier analyses. The frequency of additions appears to correlate inversely with the level of detail and directly with the express allowance for variation in the federal foundation. The prime examples of the inverse relationship is for the subcategories in which the IDEA provides no or negligible pre-hearing requirements, specifically for pre-hearing conferences, case management, motions, and discovery. These subcategories are subject to extensive state law additions. The major example for the direct correlation is for the SOL subcategory, in which several states have opted under the IDEA’s express allowance to “specify otherwise” instead of the two-year KOSHK period. However, both of these correlations are far from complete, suggesting that various other factors, including the policy priorities of the stakeholders, which include and extend significantly beyond HOs, come into play.

Third and most significantly, the state law additions at the pre-hearing stage make particularly prominent the role of state APA laws in assessing whether the procedural provisions for DPHs are sufficiently aligned with and customized to the nature and purposes of the IDEA. As by the parenthetical designations of “APA” in the footnotes, these laws have accounted for many of the frequent additions to the pre-hearing subcategories of recusal, discovery, motions, and mandatory—as compared with discretionary—prehearing conferences. The recusal additions generally import the judicial standard of appearance of bias, whereas the IDEA arguably warrants an actual bias standard akin to labor arbitration. The other additions, especially discovery and motion practice pose the potential problems of (a) extending the time well beyond the expedient forty-

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158 See, e.g., McDonald v. City of Chi., 561 US. 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 though a strength of our federal system”). Many credit the dissenting opinion by Justice Brandeis in New State Ice Co. v. Liebmann for the notion that states can be laboratories of experimentation. 285 U.S. 262, 310–11 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Indeed, the structure of federal education laws, such as not only the IDEA but also the Elementary and Secondary Education Act, require states to take certain actions within the ample boundaries of a federal foundational framework.

159 See supra notes 62–154 and accompanying text.

160 See supra notes 114–32, 146–51 and accompanying text.

161 See id.

162 See supra note 40.

163 For example, for the inverse correlation, the high frequency of additions to the IDEA’s detailed provisions for the mediation subcategories does not fit this pattern, and for the direct correlation, the express allowance is limited to the SOL subcategory, and its frequency is not close to the most extensive areas of state law additions.

164 See generally Zirkel, supra note 17.
five day period in the IDEA regulations;\textsuperscript{165} (b) increasing the transaction costs to the parties, which include not only the limited resources of parents for legal representation but also the collective priority for school district expenditures for education;\textsuperscript{166} (c) engendering an overlapping increase in the technical issues of adjudication at the expense of the substantive issue of special education;\textsuperscript{167} and (d) using a generalized model of administrative adjudication instead of a customized model specifically aligned with the IDEA.\textsuperscript{168}

For follow-up research, our recommendations extend to applying the same state law analysis to expedited hearings\textsuperscript{169} and adding a corresponding set of analyses for the applicable agency policy interpretations and court decisions. The previous recommendation for a differentiation in these state law analyses between the small minority that account for most of the DPHs and the vast majority of low activity states\textsuperscript{170} extends to systematic comparisons of not only state laws but empirical results (a) among states with central panels, those with specialized panels, and those with non-ALJs\textsuperscript{171} and (b) between APA and non-APA states.

Finally, this completion of the full set of successive state law analyses ripens the prospect of developing a customized model code for DPH hearings, like the model rules developed in other areas of the law,\textsuperscript{172} that is subject to further refinement at the state level. Such efforts at achieving effective and efficient administrative adjudication under the IDEA will be beneficial to students with disabilities and the school districts that serve them.

\textsuperscript{165}34 C.F.R. § 300.515(a) (2019) (specifying 45 days from end of resolution period, which is when the HO comes to the fore, until the decision). This deadline is the aim, with extensions arguably allowed as the limited exception to the rule. Id. § 300.515(c).

\textsuperscript{166}Some states allow full-blown discovery in DPHs with depositions and other vehicles. See \textit{supra} note 116 and accompanying text.

\textsuperscript{167}In Arizona, the pre-hearing conference provision in the state’s special education law is supplemented by two APA provisions that add confusion. Compare \textit{ARIZ. ADMIN. CODE} § R7-2-405(H)(1) (2018) (mandating that the HO “shall” hold a pre-hearing conference to clarify issues and schedule the hearing), \textit{with ARIZ. ADMIN. CODE} § R2-19-112 (2018) (APA) (noting that the HO “may” hold a pre-hearing conference and may issue a prehearing order); \textit{cf. ARIZ. REV. STAT. ANN.} § 41-1092 (2020) (APA) (authorizing the HO to hold a pre-hearing conference to, among other things, obtain stipulations and consider amendments to pleadings).

\textsuperscript{168}See \textit{supra} note 97 (observing that the North Carolina APA’s provision for requiring mediation conflicts with IDEA’s requirement that mediation be voluntary).

\textsuperscript{169}20 U.S.C. § 1415(k)(3)(A) (stating that the parent of a child may request a hearing to dispute a placement or manifestation decision and that the school may request a hearing if “the current placement of the child is substantially likely to result in injury to the child or to others”), 1415(k)(4)(A) (2018) (requiring an expedited hearing for these types of appeals).

\textsuperscript{170}\textit{Post-Hearing Stage, supra} note 9, at 25; \textit{Hearing Stage, supra} note 9, at 27.

\textsuperscript{171}See Connolly et al., \textit{supra} note 23.

\textsuperscript{172}See, \textit{e.g.}, \textit{MODEL RULES OF PROF’L RESPONSIBILITY} (AM. BAR ASS’N 2020); U.C.C. Art. 2 (AM. LAW INST. & UNIF. LAW COMM’N 1951).
## Appendix: Citations for State Law Provisions Specific to Pre-Hearing Stage

<table>
<thead>
<tr>
<th>State</th>
<th>Special Education Laws</th>
<th>More General Hearing Laws (e.g., APAs)</th>
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</thead>
<tbody>
<tr>
<td>AL</td>
<td>ALA. ADMIN. CODE 720-8, 9-9(c) (2013)</td>
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<td>AK</td>
<td>ALASKA STAT. § 14.30.193 (2017); ALASKA ADMIN. CODE tit 4, §§ 52.490, 52.550, 52.560 (2019)</td>
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<td>005 ARK. CODE R. §§ 18.10.017 et seq. (2017)</td>
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<tr>
<td>CA</td>
<td>CAL. EDUC. CODE §§ 56500, 56502 (West 2017); CAL. CODE REGS. tit 5, §§ 3019, 3082, 3099 (2018)</td>
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<td>CT</td>
<td>CONN. AGENCIES REGS. §§ 10-76-h6 to 10-76-h18 (2018)</td>
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<td>DE</td>
<td>DEL. CODE ANN. tit 14, § 3130 (2017)</td>
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<tr>
<td>IL</td>
<td>105 ILL. COMP. STAT. § 14-8-02a (2018); ILL. ADMIN. CODE tit 23, §§ 226.615, 226.640, 226.660 (2018)</td>
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<tr>
<td>IN*</td>
<td>511 IND. ADMIN. CODE 7-45.2, 7-45.4, 7-45-7 (2019)</td>
<td>4 IND. ADMIN. CODE 21.5-3-9 to 21.5-3-24 (2019)</td>
</tr>
<tr>
<td>MD*</td>
<td>MD. CODE ANN., EDUC. § 8-413 (West 2018)</td>
<td>MD. CODE REGS. 28.02.01.11–18 (2020)</td>
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<td>MO</td>
<td>MO. REV. STAT. §§ 162.959, 162.961, 162.963 (2017)</td>
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<td>MONT. ADMIN. RR. 10.16.3506–3512 (2017)</td>
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<td>NE</td>
<td>92 NEB. ADMIN. CODE §§ 55-004, 55-006 (2017)</td>
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<td>NV</td>
<td>NEV. REV. STAT. §§ 388.465, 388.469 (2019); NEV. ADMIN. CODE § 388.310 (2020)</td>
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<tr>
<td>SD*</td>
<td>S.D. Codified Laws §§ 1-26-18, 1-26-26 (2019)</td>
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<tr>
<td>TX</td>
<td>19 Tex. Admin. Code §§ 89.1151(c)–(e), 89.1170(g), 89.1180(b)–(d), 89.1196-1197 (2020)</td>
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<tr>
<td>UT</td>
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* Designates states that have APA legislation or regulations that, in addition to special education-specific laws, apply to IDEA DPHs; however, the cell for such states is blank when the APA provisions do not account for any additions to the prehearing stage.

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