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State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act IV: Expedited Hearings

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**State Laws for Due Process Hearings Under the
Individuals with Disabilities Education Act IV: Expedited Hearings**

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

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I. INTRODUCTION

Recent issues of this journal contain a triad of articles¹ canvassing state laws that add to the basic requirements of the Individuals with Disabilities Education Act (IDEA)² for “standard” due process hearings (DPHs).³ As noted in those articles, the IDEA is a model of “cooperative federalism” that allows states to add to, but not subtract from, the law’s requirements for DPHs.⁴ Focused on these additions, the triad address the three successive stages of DPHs: (1) pre-hearing stage, including complaints, pre-hearing disclosure, and discovery;⁵ (2) hearing stage, including party rights and the authority of the impartial hearing officer (HO);⁶ and (3) post-hearing stage, including decisions, judicial review, and appeals.⁷ As acknowledged in the previous articles, the boundaries between the pre-hearing, hearing, and post-hearing stages of the DPH are sometimes blurry, with certain provisions applying to more than one stage.⁸ The articles

¹ Andrew M.I. Lee & Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act III: The Pre-Hearing Stage*, 41 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2021) [hereinafter *Pre-Hearing Stage*]; 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) [hereinafter *Hearing Stage*]; Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act II: The Post-Hearing Stage*, 40 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2020) [hereinafter *Post-Hearing Stage*].

² 20 U.S.C. §§ 1400–1482 (2018). The original name of the IDEA was the Education for All Handicapped Children Act, Public Law 94-142.

³ Although the IDEA only uses the term “expedited” for differentiation, we use the term “standard” for all other due process hearings as a default. However, a few state laws use the term “regular.” *E.g.*, N.M. CODE R. § 6.31.2.13(I)(8)(c) (LexisNexis 2020) (“The hearing officer may grant such extensions in a *regular* case but may not . . . in an *expedited* case.”) (emphasis added).

⁴ 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) and *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 183 (1982)). For the connected doctrine of preemption, see *infra* text accompanying notes 27–50.

⁵ *Pre-Hearing Stage*, *supra* note 1.

⁶ *Hearing Stage*, *supra* note 1.

⁷ *Post-Hearing Stage*, *supra* note 1.

⁸ *E.g.*, *Post-Hearing Stage*, *supra* note 1, at 2 & n.4 (noting that IDEA’s “stay put” provision keeps the child in the “current educational placement” during both the hearing and post-hearing stages); *Pre-Hearing Stage*, *supra* note 1,

also specifically excluded the corresponding state law additions to expedited DPHs,⁹ which are more rapid DPH variations in the IDEA primarily for disciplinary changes in placement.¹⁰

The purpose of this article is to fill this gap by systematically tabulating state law additions to expedited DPH hearings. This article will not repeat the extensive and detailed coverage of the previous articles except to the extent where boundaries between aspects of DPHs are blurry.¹¹ Yet, in addition to following the more extensive line of research analyzing state law corollaries to the IDEA,¹² this article will also explore the largely latent issue of possible federal preemption for selected provisions arguably conflicting with, rather than complementing, the IDEA's provisions.¹³

Corresponding to the general structure and format of the previous articles, Part I delineates the foundational federal framework of the IDEA requirements for expedited DPHs. Part II addresses the issue of possible federal preemption. Part III identifies the scope and contents of the tabulation of state law provisions. Part IV discusses the results and offers recommendations for policymakers and for future research.

at 5 & n.34, 9 & n.59 (identifying several areas of overlap between pre-hearing and hearing stages including statutes of limitation and discovery).

⁹ *E.g.*, *Pre-Hearing Stage*, *supra* note 1, at 7, 24 (specifically excluding expedited hearing procedures from the state law analysis).

¹⁰ *See* sources cited *infra* note 20. The difference, to whatever extent that it is not disciplinary and not a placement, is the danger-based forty-five-day option that is similar but an alternative to a judicial injunction under *Honig v. Doe*, 484 U.S. 305 (1988). For the blurriness of any such difference, see, e.g., Letter to Huefner, 47 IDELR ¶ 228 (OSEP 2007).

¹¹ *See supra* text accompanying note 8.

¹² *Pre-Hearing Stage*, *supra* note 1, at 4 (citing previous state law surveys on the identification of students with specific learning disabilities, behavior strategies in special education, and the state complaint process).

¹³ *See infra* text accompanying notes 27–50.

II. IDEA FOUNDATIONAL REQUIREMENTS

In addition to extensive provisions for the pre-hearing, hearing, and post-hearing stages of standard DPHs, the IDEA legislation and regulations establish special rules for expedited DPHs.¹⁴ Their purpose is the speedy resolution of disputes primarily relating to the IDEA's detailed provisions for disciplinary changes in placement.¹⁵ This purpose is clear in the text of the IDEA¹⁶ and is a special application of the more general aim of rapid dispute resolution for DPHs expressed in the Act's legislative history.¹⁷ First, the IDEA provisions expressly incorporate certain procedures from standard DPHs as long as they are consistent with the customized provisions for expedited DPHs.¹⁸ Second, the expedited DPH provisions specifically permit states to establish procedural rules, except to the extent they conflict with the IDEA's

¹⁴ 20 U.S.C. § 1415(k)(3)-(4) (2018); 34 C.F.R. §§ 300.532-.533 (2019).

¹⁵ 20 U.S.C. § 1415(k) (2018); 34 C.F.R. §§ 300.530–.531 (2019). In the same way that the IDEA has procedures for disciplining students with disabilities, states also maintain systems for resolving disputes involving discipline of general education students. *See, e.g.,* Perry A. Zirkel & Mark N. Covelle, *State Laws for Student Suspension Procedures: The Other Progeny of Goss v. Lopez*, 46 SAN DIEGO L. REV. 343 (2009) (canvassing state laws for suspensions, which adjoin the provisions for student expulsions). Given our focus on state law additions for the IDEA's expedited DPHs, we do not address these state laws, although they occasionally intersect with the disciplinary procedures specific to students with disabilities. *See, e.g.,* District of Columbia v. Doe, 611 F.3d 888, 898–99 (D.C. Cir. 2010) (ruling that the HO had authority to reduce the length of a general education removal that was not a manifestation of the student's disability as a matter of FAPE).

¹⁶ *See* sources cited *infra* note 22 (describing shortened timelines in expedited versus standard DPHs).

¹⁷ Senator Harrison Williams, the principal sponsor of the Education for All Handicapped Children Act, Public Law 94-142, the predecessor for the IDEA, made clear the importance of rapid dispute resolution in the Congressional debate on the law as follows:

“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) (emphasis added).

¹⁸ 34 C.F.R. § 300.532(c)(1) (2019).

shorter timelines.¹⁹

The following framework serves as the organizing template for our analysis of state law additions to expedited DPH rules:

1. Jurisdiction²⁰
2. Complaint Requirements²¹
3. Timelines²²
4. Resolution, Mediation, and other forms of Alternate Dispute Resolution (ADR)²³
5. Disclosure and Discovery²⁴
6. Pre-Hearing Conferences²⁵

¹⁹ *Id.* § 300.532(c)(4).

²⁰ 20 U.S.C. § 1415(k)(3)-(4) (2018) (authorizing parents to use expedited DPHs to challenge disciplinary changes in placement, including manifestation determinations, and the LEA to use expedited DPHs upon seeking a forty-five day placement change based on belief that the child’s current placement is substantially likely to result in injury); 34 C.F.R. § 300.532(b)(3) (2019) (allowing the LEA to repeat this danger-based procedure).

²¹ 34 C.F.R. § 300.532(c)(1) (2019) (providing the same complaint requirements for an expedited DPH as for a standard DPH).

²² 20 U.S.C. § 1415(k)(4)(B) (2018) (specifying that an expedited hearing shall occur within twenty school days of the request, and that a decision shall occur within ten school days after the hearing). Although this timeline appears to be rather straightforward, it poses various interpretation problems, such as whether school days include summer programming, and whether the hearing may be for more than one day, and, if so, whether it can include notable periods between sessions. *E.g.*, Letter to Fletcher, 72 IDELR ¶ 275 (OSEP 2018) (stating that when an expedited due process hearing complaint is filed with less than twenty days in the school year, the due date may be in the next school year); Letter to Cox, 59 IDELR ¶ 140 (OSEP 2012) (stating that any day in which a school provides summer school for all students counts a “school day”). For the overlapping state law additions to deadlines specific to the resolution period, mediation, disclosure, and discovery, see *infra* text accompanying notes 23–24.

²³ 34 C.F.R. § 300.532(c)(3) (providing that a resolution session must occur within seven days of the request unless parties agree to waive it or use mediation, and that the hearing may proceed if there is no resolution within fifteen days of the request). For the treatment of the overlapping timeline additions, see *supra* text accompanying text note 22. The federal regulations for expedited DPHs do not include ADR.

²⁴ The disclosure requirements for standard due process hearings apply to expedited hearings. 34 C.F.R. §§ 300.512(a)(3), 300.532(c) (2019) (applying five-day disclosure rule to expedited hearings). The only other discovery provision in the IDEA is the parties’ right to compel the attendance of witnesses, which indirectly refers to subpoenas and applies to expedited hearings. *Id.* at § 300.512(a)(2) (2019).

²⁵ Neither the IDEA statute nor its regulations for expedited DPHs address pre-hearing conferences, but several state laws have done so. *See* sources cited *infra* notes 103–106 and accompanying text.

7. Decision²⁶

8. Miscellaneous

III. FEDERAL PREEMPTION OF STATE DUE PROCESS HEARING LAWS

The United States Constitution’s Supremacy Clause states “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁷ This clause is the basis for the longstanding doctrine of federal preemption, which holds that state laws are invalid to the extent they “interfere with, or are contrary to the laws of [at least] Congress.”²⁸ Preemption is seemingly simple in that it applies to any conflict between state and federal law,²⁹ but its application is not particularly frequent or predictable in the context of the IDEA.³⁰

For the undefined reference to “Laws of the United States” in the Supremacy Clause,³¹ the Supreme Court has held that the phrase encompasses not only federal statutes, but also “federal regulations that are properly adopted in accordance with statutory authorization.”³²

²⁶ 20 U.S.C. § 1415(k)(3)(B)(ii) (2018) (specifying two placement orders within the HO’s authority in the context of expedited DPHs). The U.S. Department of Education has interpreted this authorization as not limiting the HO’s otherwise broad equitable authority. Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019) (allowing the HO to order relief “appropriate to remedy the alleged violations based on the facts and circumstances of each individual complaint”).

²⁷ U.S. CONST. art. VI, cl. 2.

²⁸ *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

²⁹ *E.g.*, *Cipollone v. Lissett Group, Inc.*, 505 U.S. 504, 516 (1992) (“Thus, since our decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is ‘without effect.’”) (citing *Maryland v. Louisiana*, 451 U.S. 725 (1981)).

³⁰ *See, e.g.*, Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act*, 13 CONN. PUB. INT. L.J. 1, 14 (2013) (discussing possible federal preemption of state laws specifying the burden of persuasion in DPHs that differ from the Supreme Court’s ruling in *Schaffer v. Weast*, 546 U.S. 49 (2006), that this burden is on the party challenging the appropriateness of an education program).

³¹ *See supra* text accompanying note 27.

³² *City of New York v. FCC*, 486 U.S. 57, 63 (1988).

Therefore, federal regulations promulgated under the IDEA can preempt state laws.³³ Moreover, interpretations of federal law and regulations by federal courts can also preempt them.³⁴

However, it is unlikely that federal agency guidance, which does not carry the force of law, can serve alone as the preempting source.³⁵

For the analysis of preemption by federal legislation, the Supreme Court has emphasized that the most important principle of statutory interpretation is congressional intent.³⁶ Further, the intent of Congress is derived primarily from the text of the federal law in question.³⁷ However, when federal preemption is by a regulation, not a statute, the focus is on the federal agency and whether it is acting “within the scope of its congressionally delegated authority.”³⁸ This focus arguably extends indirectly to the congressional intent via the purpose of the regulation, per the Supreme Court’s conclusion that “[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes

³³ *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less preemptive effect than federal statutes.”).

³⁴ Zirkel, *supra* note 30, at 14 (discussing various authorities).

³⁵ See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 763 (2008) (“In the agency context, only agency action that has the force of law should be regarded as providing a predicate for preemption. Legislative regulations and self-executing orders have this quality; policy statements and interpretative regulations do not.”); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 n.124 (2017) (“Outside of the immigration context, commentators that have addressed the issue are generally of the view that agency policies must first undergo notice and comment, or otherwise have the force of law, before these policies may have preemptive effect.”). *But cf.* Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption More Muddle or Creeping to Clarity?*, 44 TULSA L. REV. 197, 202 (2013) (noting the continuing lack of clarity around judicial deference to agency views regarding the preemptive effect of policy interpretations and other documents without force of law).

³⁶ *E.g.*, NICOLE VANATKO, CONG. RESEARCH SERV., FEDERAL PREEMPTION: A LEGAL PRIMER 3 (2019).

³⁷ *Id.* (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)).

³⁸ *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); see generally Jonathan B. Brown, *Casting a Broad Net: The Federal Communication Commission’s Preemption of State Broadband Regulation*, 54 CREIGHTON L. REV. 41, 58–63 (2020) (providing an overview of federal preemption of state law by administrative agencies).

thereof.”³⁹

Over time, the doctrine of federal preemption has developed into three strands: (1) express preemption, referring to cases in which federal law contains explicit preemptive language prohibiting state lawmaking in some domain,⁴⁰ (2) field preemption, referring to cases in which a federal regulatory scheme is so wide-ranging or pervasive as to block any state lawmaking in the same area,⁴¹ and (3) conflict preemption, referring to cases in which there is a conflict between the demands of federal and state laws.⁴² Express preemption does not apply to DPHs because there is no preemptive language within the IDEA. Similarly, field preemption does not apply given the IDEA’s structure of cooperative federalism, which recognizes and reinforces the role states have in providing and regulating special education services.⁴³ Thus, conflict preemption is the only strand that applies to the IDEA.⁴⁴

Under conflict preemption, a federal law preempts a state law where compliance with both is an “impossibility.”⁴⁵ This situation often arises when a state law conflicts with an express

³⁹ *City of New York v. FCC*, 486 U.S. at 64.

⁴⁰ *VANATKO*, *supra* note 36, at 2.

⁴¹ *Id.* (citing *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992)).

⁴² *Id.* (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁴³ *E. Ramapo Cent. Sch. Dist. v. DeLorenzo*, No. 13-CV-1613 (CS), 2013 WL 5508392 (S.D.N.Y. Oct. 3, 2013); *see also Pre-Hearing Stage*, *supra* note 1, at 2 (“[T]he 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.”).

⁴⁴ *E.g.*, *V.D. v. State of New York*, 74 IDELR ¶ 279, at *7 (E.D.N.Y. 2019) (noting that conflict preemption is the only theory under which IDEA may preempt state law).

⁴⁵ *Id.*; *see also, e.g.*, *R.B. v. Mastery Charter Sch.*, 532 F. App’x 136, 141–42 (3rd Cir. 2013) (holding that it was impossible for a charter school to comply with both a Pennsylvania law requiring schools to dis-enroll students after ten consecutive absences and the IDEA’s stay put provision, and therefore the Pennsylvania law was preempted). For a far-reaching take on what “impossibility” means in the preemption context, *see, e.g.*, *B.H.T. v. Sumner Cnty. Bd. of Educ.*, No. 20-cv-00732 (M.D. Tenn. Aug. 27, 2020), 2020 WL 5217107, at *29–31 (arguing that the extensive discovery rules in Tennessee state law make it practically impossible for an HO to complete a DPH within

federal law provision. However, in this specific IDEA context, Congress chose to “legislate the central components of due process hearings”⁴⁶ with specific allowances for state variation.⁴⁷ Even if compliance with both federal and state law is possible, conflict preemption may still apply if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁸ As part of the IDEA’s central purpose of providing a free, appropriate public education (FAPE) to children with disabilities, the intent of the Act’s DPH procedures is to provide an efficient, speedy mechanism of dispute resolution.⁴⁹ Thus, states may add to the procedural and substantive requirements of the IDEA as long as such additions add to, rather than subtract from, the rights of disabled children.⁵⁰

We identify possible application of conflict preemption in illustrative framework categories in the next part.

the time limits specified in IDEA). Note, however, this lawsuit ended on February 1, 2021, with a voluntary dismissal with prejudice (on file with first author).

⁴⁶ *Schaffer v. Weast*, 546 U.S. 49, 51 (2005).

⁴⁷ *E.g.*, 34 C.F.R. § 300.532(c)(1) (2019) (allowing states to create expedited due process hearing rules so long as they do not conflict with timelines in the federal regulations); 20 U.S.C. §1415(f)(3)(C) (2018) (authorizing states to create different statute of limitation periods for DPHs than what is specified in IDEA).

⁴⁸ V.D., 74 IDELR at *7 (citations and internal quotations omitted).

⁴⁹ *See supra* text accompanying notes 15–17.

⁵⁰ *See* *Town of Burlington v. Dep’t of Educ. of Mass*, 736 F.2d 773, 784–85 (1st Cir. 1984), *aff’d sub nom.* *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985) (“[S]tates are free to elaborate procedural and substantive protections for the disabled child that are more stringent than those contained in the [IDEA] . . . [We] hold that states have the right to enforce their own laws and regulations at the due process hearings.”); *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 Cnty. Sch. Bd. v. Va. Bd. of Educ.*, 661 F. Supp. 889, 893–94 (E.D. Va. 1987)). Admittedly, in the case of procedural DPH rules, it is not always clear that a state law addition would conflict with the purpose of the IDEA. At the very least, state law additions that limit the rights of children with disabilities or impede the speed and efficiency of DPHs will raise preemption issues.

IV. METHOD AND RESULTS

For this article, we followed the same method of the previous triad of DPH articles to canvas state law additions to the IDEA rules for expedited DPHs.⁵¹ We began our research with the official website for the department of education in each state,⁵² limiting the search to linked special education statutes and regulations as well as policy materials that explicitly had the force of law.⁵³ Likewise, our scope did not extend to judicial decisions, federal government guidance, or commentary on regulations relating to expedited DPH procedures, though we refer to them selectively.⁵⁴ To ensure completeness and currency, our ultimate sources were the Westlaw and LexisNexis databases.⁵⁵

The boundaries were ultimately a bit blurry. Although a close call, we decided to note, but not include, the specialized variants of two states in our coverage. First, we excluded the alternative “accelerated hearing” process in the legally binding Massachusetts special education manual because it does not modify the IDEA’s rules for expedited DPHs.⁵⁶ Second, we excluded

⁵¹ See sources cited *supra* note 1.

⁵² See, e.g., *Dispute Resolution*, IDAHO ST. DEP’T OF EDUC., <https://www.sde.idaho.gov/sped/dispute/> (last visited May 22, 2021) (providing links to, inter alia, Idaho’s due process hearing regulations); see also *Pre-Hearing Stage*, *supra* note 1, at 8 (illustrating this consistent approach).

⁵³ See, e.g., Idaho State Dep’t of Educ., Idaho Special Education Manual (2018), <https://www.sde.idaho.gov/sped/files/shared/Idaho-Special-Education-Manual-2018-Final.pdf> (incorporated by reference by IDAHO ADMIN. CODE r. 08.02.03.004 (2018)). Conversely, per the triad’s template, we excluded interpretive state guidance or technical assistance that did have the force of law. See *Pre-Hearing Stage*, *supra* note 1, at n.53 and accompanying text.

⁵⁴ For a comprehensive compilation of court decisions, agency interpretations, and other legal authority specific to DPHs, see Perry A. Zirkel, *Impartial Hearings under the IDEA: Legal Issues and Answers*, 38 J. NAT’L ASS’N ADMIN. L. JUDICIARY 33 (2018).

⁵⁵ For the resulting citations, see *infra* Appendix: Citations for State Law Additions for Expedited Hearings.

⁵⁶ 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 an accelerated hearing process for health and safety concerns, inadequate services causing harm, or interruptions to student educational programs).

the process in New Jersey’s Administrative Procedures Act regulations and in its special education regulations under which parties to an expedited or standard DPH may seek a “temporary order for emergent relief” for four limited issues, including “a break in the delivery of service” (e.g., disciplinary actions).⁵⁷ Although overlapping with IDEA expedited DPHs, this procedure only results in an interim, rather than final, decision. Moreover, per the triad template,⁵⁸ our search extended to other states with Administrative Procedures Acts (APA), but none appeared to have provisions specifically applicable to expedited DPHs.⁵⁹

The next step was to review the identified state laws in relation to the aforementioned⁶⁰ expedited DPH framework. We limited our focus to state law provisions containing more detailed requirements for expedited DPHs than the IDEA provisions.⁶¹ If the difference was insignificant, then we did not include it in our state-by-state tabulation.⁶² Moreover, we did not

⁵⁷ N.J. ADMIN. CODE § 1:6A:14-2.7(r), (s) (2018) (describing emergent relief procedure for IDEA students); *see also id.* § 1:1-12.6 (providing the same procedure more generally beyond the IDEA context with the same TRO-like criteria but without the four specified issues).

⁵⁸ *E.g.*, *Pre-Hearing Stage*, *supra* note 1, at nn.55–56 and accompanying text (describing the approach to Administrative Procedures Act provisions for state law additions to pre-hearing rules for DPHs).

⁵⁹ Some of the state APA laws provided for expedited hearings, but not sufficiently connected to the IDEA context. *E.g.*, ARIZ. REV. STAT. ANN. § 41-1092.05.E (2021) (APA) (stating that a general administrative hearing shall be expedited upon showing of "extraordinary circumstances" or the "possibility or irreparable harm"); ARIZ. ADMIN. CODE §§ R7-19-106, -110 (2018) (APA) (allowing motions to expedite an administrative hearing, along with factors to consider when granting such motion); COLO. CODE REGS. § 104-1-10E (2020) (APA) (describing the process for the expedited hearing on a motion); FLA. ADMIN. CODE ANN. r. 28-106-501 (2018) (APA) (describing the administrative process for an emergency action); GA. COMP. R. & REGS. 616-1-2-.31 (2018) (authorizing emergency or expedited procedures as necessary to protect interests of the parties or public health, safety, or welfare); MD. CODE. REGS. 28.02.01.06 (2020) (APA) (authorizing expedited hearings for good cause).

⁶⁰ *See supra* text accompanying notes 20-26.

⁶¹ Our state law additions analysis does not include placement or manifestation determinations, as these are not sufficiently specific as to the requirements for expedited DPHs. *See* 34 C.F.R. § 300.532(a) (2019).

⁶² *E.g.*, ALASKA ADMIN. CODE tit. 4 §52.550(l) (2019) (requiring HO to mail a copy of the decision within 10 school days after the hearing, as compared with the IDEA requirements in 34 C.F.R. §§ 300.514(b)(2)(iv), 300.532(c)(2) (2019) for the HO to render a decision within 10 days after the hearing and provide it to parties); N.Y. COMP. CODES R. & REGS. tit. 8, § 201.8(c) (2021) (providing that “[a] school district shall not be required to commence disciplinary action against a student with a disability as a prerequisite for initiating an expedited due process hearing

include any state law provisions that import the standard DPH rules into expedited DPHs,⁶³ because (1) our framework already accounts for this incorporation of standard DPH rules,⁶⁴ and (2) the previous triad of articles already tabulated any correspondingly incorporated state law additions.⁶⁵

As the final step, following the well-trodden path of the previous triad of articles, we developed a table showing the state law additions to the IDEA provisions for expedited DPHs. The columns in Table 1 correspond to the categories and subcategories of the Part I framework. The entries in these columns 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 column. Moreover, an asterisk designates items in the comments column that are most likely subject to preemption. Finally, per the model of the previous triad of articles, the source citations for the state law provisions identified in the table are in the Appendix.

to obtain an order of an impartial hearing officer pursuant to this section,” whereas the IDEA regulations do not require a disciplinary action before initiation of an expedited hearing, 34 C.F.R. § 300.532(a) (2019)).

⁶³ *E.g.*, 19 TEX. ADMIN. CODE § 89.1191 (2020) (“An expedited due process hearing will be governed by the same procedural rules as are applicable to due process hearings generally”); *see also* COLO. CODE REGS. § 301-8:2220-R-6.02(7.5)(i)(iii) (2017); 14 DEL. ADMIN. CODE §§ 926.13.1, 33.1 (2017); HAW. CODE REG. § 8-60-77(c) (2019); LA. ADMIN. CODE tit. 28, § 532.C.1 (2017); MONT. ADMIN. R. 10.16.3530(5) (2017); NEV. ADMIN. CODE § 388.308.3 (2020); N.M. Code R. § 6.31.2.13(I)(18) (LexisNexis 2020); N.Y. COMP. CODES R. & REGS. tit. 8, § 201.11(b) (2021); OHIO ADMIN. CODE 3301-51-05(K)(22)(c)(i), (iv) (2019); 7-1 VT. CODE R. § 5:2365.1.6.17(b) (2017).

⁶⁴ 34 C.F.R. § 300.532(c)(1) (2019) (applying selected standard DPH procedural rules to expedited DPHs). One example is applying the same complaint requirements to both standard and expedited DPHs. *Id.*

⁶⁵ For state law additions to standard DPHs, *see* sources cited *supra* note 1.

Table 1: State Law Additions to the IDEA Provisions for Expedited DPHs

State	A	B	C	D	E	F	G	H	Comments
	Jurisdiction	Complaint Requirements	Timelines	Resolution, Mediation, & ADR	Disclosure & Discovery	Pre-Hearing Conference	Decision	Miscellaneous	
AL									No significant expedited hearing procedures that differ from IDEA.
AK									No significant expedited hearing procedures that differ from IDEA.
AZ									No significant expedited hearing procedures that differ from IDEA.
AR		X	X		X		X		B-mandatory expedited hearing request form*; C-authorizes HO, upon party's written motion with specific justification, to extend time for decision from 20 to 35 school days via a written order*; E-requires disclosure at least 2 business days prior to hearing; G-permits oral decision at end of hearing followed by written decision.
CA									No significant expedited hearing procedures that differ from IDEA.
CO			X						C-prohibits extensions.
CT									No significant expedited hearing procedures that differ from IDEA.
DE								X	H-provides single HO for expedited DPH versus tripartite panel for standard DPH.
FL	X								A-parent may request expedited hearing to appeal denial of extraordinary exemption from standardized testing.*
GA									No significant expedited hearing procedures that differ from IDEA.
HI									No significant expedited hearing procedures that differ from IDEA.
ID		(x)	X				X		B-requires signed request form (or document with same information); C-requires HO assignment within 5 business days of request + written HO decision within 20 calendar days of filing + extension of decision timeline up to 25 calendar days allowed if parties agree and granted by HO*; G-specifies "substantial evidence" standard for <i>Honig</i> type (i.e., danger-based) cases.
IL	X	X	X		X	X	X	X	A-requires separate, standard DPH for non-disciplinary issues; B-requires all supporting documentation, matters in dispute, relief sought, and witness names + makes written response optional; C-requires LEA to notify SEA within 1 day of complaint + hearing no earlier than 15 calendar days after request, unless resolution process completed + 2-day limit on hearing length unless good cause; E-requires exchange of documents and witness lists at least 2 days before hearing + allows HO or requesting party to seek enforcement of witness and document subpoenas in court; F-pre-hearing conferences not applicable to expedited hearings; G-specifies "substantial evidence" standard for <i>Honig</i> type (i.e., danger-based) cases; H-prohibits ex parte communications.
IN	X		X						A-allows parties to waive expedited hearing in favor of non-expedited hearing*; C-prohibits extensions.
IA								X	H-HO may allow evidence in verified written form if not prejudicial to parties.
KS			X		X				C-requires HO appointment within 3 school days of hearing request + prohibits extensions; E-parties may exclude evidence not disclosed at least 2 business days before hearing.
	A	B	C	D	E	F	G	H	
KY									No significant expedited hearing procedures that differ from IDEA.
LA					X				E-requires exclusion of evidence not disclosed to the other party 3 business days before the hearing.
ME	X		X						A-only available for students who have been removed from school for disciplinary purposes*; C-authorizes HO to limit hearing to one day.
MD	X								A-mandatory if child not enrolled in and attending an approved educational program due to code of conduct violation, or if DPH complaint relates to placement of manifestation.
MA	X		X	x	X	X		X	A-excludes non-disciplinary issues within expedited hearing, and requires them to be heard in standard hearing; C-specifies 15 calendar day limit from request to hearing + prohibits extensions; D-12 calendar day limit for resolution process; E-requires copies of documents and witness list 2 business days before hearing; F-optional conference call; H-authorizes decision based solely on documents if parties agree in writing.
MI									No significant expedited hearing procedures that differ from IDEA.

MN	X	x	X		X	X			A-no waiver of issues not raised; B-requires parent complainant to describe problem relating to manifestation determination or placement, and LEA complainant to describe the behavior at issue and interim placement; C-requires HO appointment within 2 business days of hearing request + authorizes 5-day extension of deadline for HO decision for good cause*; E-requires disclosure at least 3 days prior to hearing + authorizes HO to order parties to exchange or submit witness lists, evidence, and information; F-required for scheduling and evidentiary matters within 2 days of HO appointment.
MS									No significant expedited hearing procedures that differ from IDEA.
MO			X		X				C-prohibits extensions; E-requires parties to exchange lists of exhibits and witnesses at least 2 business days before expedited hearing + provides other party with right to prohibit evidence not disclosed.
MT		X	X		X	X		X	B-must be signed and include date of manifestation determination and evidence of the FBA, as well as tentative date for hearing agreed to by parties; C-permits 5-day extension for HO decision*; E-parties must disclose evidence 2 days before hearing + authorizes HO to compel or limit discovery; F-mandatory + HO must prepare order identifying issues and matters to be decided; H-HO is appointed without party input and have completed at least one non-expedited hearing to be appointed.
NE			X		X				C-prohibits extensions; E-requires disclosure at least 2 business days prior to hearing.
NV								X	H-SEA appoints HO, rather than complainant preference process for non-expedited hearings.
NH		x	X		X	X		X	B-requires statement of disciplinary grounds supporting request; C-requires parties to provide HO with mutually agreeable hearing dates within 5 business days of request + hearing not to exceed 2 days and be held from 9 am to 4 pm + allows additional hearing time for testimony for a "full and fair disclosure of the facts" + prohibits extensions; E-requires disclosure of evaluations and evidence at least 2 business days before hearing + authorizes HO to prohibit evidence not so disclosed; F-mandatory at least 2 business days before hearing, and at conference parties must exchange lists of witnesses and exhibits; H-authorizes HO waivers for "full and fair" hearing.
NJ			(x)		X				C-expedited hearing must be completed, not just started, within 20 days of complaint; E-requires disclosure at least 2 business days prior to expedited hearing.
NM		x	X	X	X	X		X	B-requires statement of facts justifying entitlement to expedited DPH; C-prohibits extensions; D-joint option of facilitated IEP meeting; E-requires disclosure at least 2 business days prior to the hearing if HO so directs; F-mandatory as soon as practicable + extensive HO authority for various specified procedures + HO must send summary of conference to parties; H-requires joint stipulation of facts on shortened HO-determined timeline.
NY			X						C-requires HO appointment upon LEA receipt of complaint + prohibits extensions.
NC									No significant expedited hearing procedures that differ from IDEA.
ND									No significant expedited hearing procedures that differ from IDEA.
OH			X						C-requires parent complainant to contact SEA the next business day after request and LEA complainant to contact SEA same day as request + requires HO appointment within one business day of notice + prohibits extensions.
OK									No significant expedited hearing procedures that differ from IDEA.
OR					X				E-requires disclosure at least 2 business days prior to hearing.
PA	X		(x)						A-expedited hearing for an extended school year services dispute; C-HO must mail the decision within 30 days of complaint.
RI			(x)						C-expedited hearing must be completed, not just started, within 20 days of complaint.
SC									No significant expedited hearing procedures that differ from IDEA.
SD									No significant expedited hearing procedures that differ from IDEA.
TN									No significant expedited hearing procedures that differ from IDEA.
TX			X						C-prohibits extensions.
UT									No significant expedited hearing procedures that differ from IDEA.
VT			X			X		X	C-limits hearing to 2 days + permits HO to shorten timelines if parties agree; F-mandatory; H-permits HO to waive any procedures (except timelines) for "full and fair hearing."*
VA			X					X	C-requires HO assignment within 3 business days of request + requires HO to document and notify parties and SEA within 5 business days of any changes in hearing dates; G-authorizes HO to issue oral decision at end of hearing followed up by written decision.
WA					X				E-requires disclosure at least 2 business days before hearing.
WV									No significant expedited hearing procedures that differ from IDEA.
WI					(x)				E-states that 5-day disclosure is inapplicable.*
WY									No significant expedited hearing procedures that differ from IDEA.
Totals	8	7	22	2	15	7	4	9	

Overall, a limited majority (n=31) of state laws provide one or more additions to the IDEA’s expedited DPH rules. Conversely, the gray-shaded rows identify the nineteen states with no change from the IDEA. The summary for the entries in each successive column follows, with the focus, per the triad’s model, on the frequency per category, overall themes, and any unusual variations.

A. Jurisdiction.

Some states (n=8) appear to restrict or expand the subject matter of disputes that can be heard in expedited DPHs, raising potential federal preemption issues.⁶⁶ One subset of these states requires hearing officers to resolve non-disciplinary matters through the standard DPH process and disciplinary matters through the expedited process.⁶⁷ These state law additions draw a brighter line between expedited and standard DPHs, and don’t appear to conflict with IDEA.

However, two states have made changes that appear to run contrary to the jurisdictional requirements of federal law. Indiana, for example, allows parties to waive an expedited DPH for subjects specified in the IDEA in favor of a standard DPH.⁶⁸ This change raises a serious preemption challenge because it reallocates the IDEA-established subject matter between expedited and standard DPHs.⁶⁹ Similarly, Maine appears to limit expedited DPHs to students

⁶⁶ *Supra* Table 1.

⁶⁷ See 105 ILL. COMP. STAT. 5 § 14-8.02b(1) (2018) (stating that the HO “hear[s] only that issue or issues identified by IDEA as proper for expedited hearings, leaving all other issues to be heard under” standard DPH procedures); Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 7 (Mar. 2019) (requiring HO to hear only issues that meet expedited DPH jurisdiction on expedited track, while processing remaining issues on a standard DPH track, and noting that the same HO should hear both cases); MD. CODE ANN., EDUC. § 8-413(i) (West 2018) (stating that if a child who is the subject of a DPH complaint is not enrolled in an education program due to a code of conduct violation, the matter shall be heard within an expedited DPH hearing). In a similar spirit, Minnesota law notes that issues not raised in an expedited DPH are not waived in other proceedings, presumably to preserve matters more appropriate for standard DPHs. MINN. R. 3525.4750.6 (2018).

⁶⁸ 511 IND. ADMIN. CODE 7-45-10(e) (2020).

⁶⁹ 34 C.F.R. §§ 300.507(a)(1), 300.532(a)(1) (2019) (describing jurisdiction for both standard and expedited DPHs).

who are subjected to disciplinary changes in placement,⁷⁰ removing the additional subject of the danger-based forty-five day interim alternate educational setting.⁷¹ As such, this Maine provision conflicts with the IDEA’s jurisdictional requirements and is likely subject to conflict preemption.⁷²

Conversely, Florida allows the parents to use the expedited DPH process to appeal the denial of an exemption of a student with disabilities from standardized testing,⁷³ thus expanding rather than reducing the subject matter for this more rapid process. The change is likely not subject to preemption because it is not “impossible” to comply with both the IDEA and Florida’s addition, and the change appears to expand the rights for students with disabilities.⁷⁴

B. Complaint Requirements

A similar minority of states (n=7) add “Complaint Requirements” to the IDEA provisions.⁷⁵ Some require parties to sign their complaints,⁷⁶ while others require parties to submit documentation or specified information in support of their claims.⁷⁷ Potentially more

⁷⁰ 05-71-101 ME. CODE R. §§ XVI.21(C)(4) (LexisNexis 2018).

⁷¹ See sources cited *supra* notes 10, 20.

⁷² See *supra* text accompanying notes 45–50 for discussion of conflict preemption.

⁷³ FL. STAT. § 1008.212(5) (2020); FL. ADMIN. CODE ANN. r. 6A-03311(9)(a) (2021).

⁷⁴ See sources cited *supra* note 50. Another example is Pennsylvania, which uses the expedited DPH process when parents disagree with a school district’s recommendation on extended school year services. 22 PA. CODE § 14.132(e) (2021). This expansion of parental rights is also likely not subject to preemption.

⁷⁵ *Supra* Table 1.

⁷⁶ Idaho State Dep’t of Educ., Idaho Special Education Manual 245 (2018).

⁷⁷ 105 ILL. COMP. STAT. 5 § 14-8.02b(e), (f) (2018) (requiring complainant to submit documentation that substantiates its position, including name of legal counsel, matters in dispute, relief sought, and names of testifying witnesses); MINN. R. 3525.4750.1, .2 (2018) (requiring complainant to submit a description of the nature of the problem relating to manifestation determination or placement, along with supporting facts); MONT. ADMIN. R. 10.16.3528 (2017) (requiring that written request for expedited hearing include date of manifestation determination, evidence of behavioral assessment plan, and tentative date parties agree to hold the expedited hearing); N.H. CODE ADMIN. R. ANN. EDUC. 1123.04(b)(7) (2021) (requires complainant to submit a statement of the disciplinary

problematic in terms of preemption are Arkansas' requirement to use an expedited DPH request form, and Illinois' provision permitting the respondent not to submit a written response.⁷⁸ Both of these state law provisions appear to conflict with the applicable federal requirements of the IDEA for standard DPHs.⁷⁹ However, the IDEA regulations exclude these requirements from application to expedited hearings.⁸⁰

C. Timelines

Within the "Timelines" category, a larger minority of states (n=22) have added to IDEA's deadlines for conducting an expedited DPH.⁸¹ Most conspicuously, several states purport to allow extensions for the holding of the expedited hearing and issuance of the decision, beyond IDEA's twenty school-day timeline to hold a hearing after the complaint and its ten school-day timeline from the hearing to issue a decision.⁸² The IDEA's silence about extensions for expedited DHPs, especially given the express allowance for extensions of standard DHPs,

grounds that support an expedited DPH request); N.M. CODE R. § 6.31.2.13(I)(4)(h) (LexisNexis 2020) (requires complainant to include a statement of facts sufficient to show they are entitled to an expedited DPH).

⁷⁸ 005 ARK. CODE R. § 10.01.5.1.A, 10.01.7.1 (LexisNexis 2008); 005 ARK. CODE R. § 18.31-5 (LexisNexis 2021) (Appendix with expedited hearing request forms); 105 ILL. COMP. STAT. 5 § 14-8.02b(h) (2018). Arkansas has a corresponding provision for standard DPHs, as discussed in a previous article. *Pre-Hearing Stage*, *supra* note 1, at 89–92 and accompanying text.

⁷⁹ 34 C.F.R. §§ 300.509(a) (stating that a model form may not be required), 300.508(e)-(f) (2019) (requiring a written response addressing various specified issues).

⁸⁰ *Id.* § 300.532(c)(1).

⁸¹ *Supra* Table 1.

⁸² 005 ARK. CODE R. § 10.01.20.1-3 (LexisNexis 2008) (authorizing the HO to extend the twenty school-day timeline for an expedited DPH decision up to thirty-five school days upon written request); MINN. R. 3525.4770.8 (2018) (stating that an extension of up to five calendar days for the expedited DPH decision may be granted for good cause); MONT. ADMIN. R. 10.16.3531 (2017) (allowing five-day extension for an expedited DPH decision); IDAHO ADMIN. CODE r. 08.02.03.005.f (2018) (authorizing HO to extend the timeline for decision for up to twenty-five additional days if both parties agree). Unusually, Idaho shortens the thirty school-day time for an expedited DPH decision to twenty school days, but ultimately allows extensions that would exceed the total federal timeline. IDAHO ADMIN. CODE r. 08.02.03.005.f.

suggests a prohibition—a conclusion supported by agency policy interpretations.⁸³ Compared to an explicit prohibition, the preemption question is more complex when there is silence. On balance, however, it’s impossible to both have state law extensions *and* meet the federal timeline, therefore indicating likely preemption.⁸⁴ Conversely, approximately eleven states have laws explicitly prohibit extensions for expedited DPHs,⁸⁵ which avoids this possible preemption problem.

Various state laws add other timeline specifications for expedited DPHs that do appear to raise major preemption issues, including a deadline for the notice⁸⁶ and an HO appointment⁸⁷ or

⁸³ The U.S. Department of Education’s Office of Special Education Programs (OSEP) has concluded that IDEA does not allow extensions of time for expedited DPHs. IDEA Part B Dispute Resolution Procedures, at Item Q-7 (OSEP 2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-dispute-resolution-procedures-procedures-part-b.pdf> (“IDEA makes no . . . provision for extending relevant timelines for hearings or reviews in the context of expedited due process complaints.”); *see also* Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act, 61 IDELR ¶ 232, at item E-7 (OSEP 2013), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf> (“May a hearing officer extend the timeline for making a determination in an expedited due process hearing? Answer: No.”).

⁸⁴ *See supra* text accompanying notes 36-50 for discussion of federal preemption.

⁸⁵ COLO. CODE REGS. § 301-8:2220-R-6.02(7.5)(i)(ii)(B)(III) (2017); 511 IND. ADMIN. CODE 7-45-10(b)(4) (2020); KAN. ADMIN. REGS. § 91-40-30(b) (2017); Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 7 (Mar. 2019); MO. ANN. STAT. § 162.961.3 (West 2021); 92 NEB. ADMIN. CODE § 55-006.03 (2017); N.H. CODE ADMIN. R. ANN. EDUC. 1123.25(j)(11) (2021); N.M. CODE R. § 6.31.2.13(I)(8)(c) (LexisNexis 2020); N.Y. COMP. CODES R. & REGS. tit. 8, § 201.11(b)(4) (2021); OHIO ADMIN. CODE 3301-51-05(K)(22)(d) (2019); 19 TEX. ADMIN. CODE § 89.1185(a) (2020) (allowing extensions for standard, but not expedited, DPHs).

⁸⁶ 105 ILL. COMP. STAT. 5 § 14-8.02b(h) (2018) (requiring the expedited DPH complaint to be made to the superintendent of the school district in which the student resides and forwarded to the State Board of Education within one business day of receipt); OHIO ADMIN. CODE 3301-51-05(K)(22)(d)(i), (ii) (2019) (requiring one-day notice by LEA to SEA for expedited DPH complaint filed by parent and same-day notice if filed by LEA).

⁸⁷ N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.5(j)(3), 201.11(b)(1) (2021) (requiring appointment of HO upon filing or receipt of expedited DPH complaint, as compared with two-day deadline for standard DPHs); IDAHO ADMIN. CODE r. 08.02.03.005.f (2018) (requiring appointment of HO within five business days of written request for expedited DPH); KAN. STAT. ANN. § 72-3435(b) (2019) (requires appointment within three school days of hearing request); MINN. R. 3525.4770.3 (2018) (requiring the appointment of HO within two business days of procedural rights notice for parent complainant, or LEA complaint); 8 VA. ADMIN. CODE § 20-81-210.H.1 (2017) (requiring that the LEA, within three business days of receipt of expedited DPH request, contact the Supreme Court of Virginia to appoint an HO).

additional details for the scheduling of the hearing⁸⁸ and its length.⁸⁹ Unusually, three states have tighter timelines, requiring hearing officers to not only begin expedited DPHs within twenty days of the complaint—as provided for by IDEA⁹⁰—but complete them within that period.⁹¹

D. Resolution, Mediation, and ADR

Just two state laws (n=2) add to “Resolution, Mediation, and ADR” rules for expedited DPHs.⁹² One of them addresses the resolution period,⁹³ while the other offers parties the option of a facilitated IEP meeting before the commencement of the expedited DPH.⁹⁴

⁸⁸ 105 ILL. COMP. STAT. 5 § 14-8.02b(h) (2018) (requiring HO to contact parties within five days of appointment and to set a hearing date no earlier than fifteen calendar days following complaint or upon completion of resolution period); Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 7 (Mar. 2019) (requiring the expedited hearing to be held within fifteen calendar days after the opposing party receives the complaint); N.H. CODE ADMIN. R. ANN. EDUC. 1123.25(e) (2021) (requiring the parties, within five business days of the complaint, to provide the HO with mutually agreeable hearing dates); 8 VA. ADMIN. CODE § 20-81-210.R.3 (2017) (requiring the HO to document in writing any changes to expedited DPH dates and send documentation to the parties and the SEA).

⁸⁹ 05-71-101 ME. CODE R. §§ XVI.21(C)(4)(a) (LexisNexis 2018) (authorizing HO to limit the expedited hearing to a single day); N.H. CODE ADMIN. R. ANN. EDUC. 1123.25(c) (2021); 7-1 VT. CODE R. § 5:2365.1.6.17(c) (2017) (limiting expedited hearing to two days); 105 ILL. COMP. STAT. 5 § 14-8.02b(h) (2018) (providing that the hearing shall not exceed two days unless good cause is shown). New Hampshire has an unusual provision that authorizes the HO, after witness testimony or conclusion of the hearing, to allow additional time for evidence if needed for a “full and fair disclosure of the facts,” with a seeming corresponding allowance to excuse the prohibition of extensions. N.H. CODE ADMIN. R. ANN. EDUC. 1123.01(j)(1) (2021); *see also id.* 1123.01(j)(8) (authorizing the HO to waive any of the state’s specified procedures for expedited DPHs “to the extent necessary to preserve the full and fair nature of the [expedited DPH]”).

⁹⁰ For possibly intersecting interpretive problems with the IDEA timeline, *see* sources cited *supra* note 22.

⁹¹ N.J. ADMIN. CODE § 1:6A:14-2.7(o)(2)(ii) (2018) (requiring the expedited DPH to be “conducted and completed” within twenty school days of the complaint); 200 R.I. CODE R. § 20-30-6.8.2.C.1 (LexisNexis 2019) (providing the expedited DPH must “conclude” within twenty school days of the complaint). The possible leeway is in interpreting whether the generic reference applies to the decision or just the hearing itself. Pennsylvania requires the HO to mail the decision within thirty school days of the complaint, effectively requiring completion of the hearing within twenty school days. 22 PA. CODE § 14.162(q)(4) (2021).

⁹² *Supra* Table 1.

⁹³ Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 7 (Mar. 2019) (shortening the resolution period from fifteen to twelve calendar days after the receipt of the complaint).

⁹⁴ N.M. CODE R. § 6.31.2.13(I)(18)(c) (LexisNexis 2020).

E. Disclosure and Discovery

For “Disclosure and Discovery,” a larger minority of states (n=15) add to IDEA’s relatively sparse rules.⁹⁵ A common state law addition is to shorten the time for disclosure of a varying scope of evidence to two or three business days before the expedited hearing, often allowing or requiring exclusion of evidence that is not timely disclosed.⁹⁶ The Wisconsin provision more directly conflicts with the IDEA because it appears to contradict the IDEA’s disclosure requirement for expedited DPHs, at least for evaluation information and recommendations.⁹⁷ There is a significant preemption possibility for the Wisconsin disclosure provision in light of the IDEA’s regulatory language and purpose.⁹⁸ Other notable state law

⁹⁵ *Supra* Table 1.

⁹⁶ 005 ARK. CODE R. §§ 10.01.14.2, 10.01.35.2(B) (LexisNexis 2008) (requiring disclosure of documentary evidence at least two days prior to expedited hearing with mandatory exclusion for noncompliance); 105 ILL. COMP. STAT. 5 § 14-8.02b(h) (2018) (requiring HO to set a date no less than two business day prior to expedited hearing for parties to exchange documentation and witness lists); KAN. ADMIN. REGS. § 91-40-30(b) (2017) (providing that either party has the right to prohibit the presentation of any evidence at the expedited hearing not disclosed at least two business days prior); LA. ADMIN. CODE tit. 28, § 532(C)(4) (2017) (requiring exclusion of evidence not disclosed to the other party three business days before the expedited hearing); Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 8 (Mar. 2019) (requiring disclosure of all documents to be introduced as evidence and a list of witnesses two business days prior to expedited hearing); Mo. Dep’t of Elementary & Secondary Educ., Missouri State Plan for Special Education, Regulation V, at 81 (2020), <https://dese.mo.gov/media/pdf/full-version-state-plan-special-education-part-b-2020> (incorporated by reference by MO. CODE REGS. ANN. Tit. 5, § 20-300.110(2) (2021)); MONT. ADMIN. R. 10.16.3530(4) (2017) (requiring the parties to exchange lists of exhibits and witnesses at least two days before an expedited hearing and authorizing HO to exclude evidence not disclosed within this timeline); 92 NEB. ADMIN. CODE § 55-007.11A (2017); OR. REV. STAT. § 343.165 (2019) (requiring disclosure at least two days in advance of expedited hearing); N.H. CODE ADMIN. R. ANN. EDUC. 1123.25(h) (2021) (providing that parties shall disclose all evaluations and recommendations to be introduced at least two business days prior to hearing, and that either party may request exclusion of evidence not to be disclosed); N.J. ADMIN. CODE § 6A:14-2.7(o)(3) (2018) (requiring parties to exchange relevant records and information at least two business days prior to expedited hearing); N.M. CODE R. § 6.31.2.13(I)(11)(h) (LexisNexis 2020) (specifying that HO may direct parties to disclose evaluations and recommendations based on evaluations two days prior to expedited hearing and may bar evidence not disclosed); WASH. ADMIN. CODE § 392-172A-05100 (2018) (allowing parties to prohibit any evidence introduced at hearing not disclosed at least two business days prior to expedited hearing).

⁹⁷ WIS. STAT. § 115.80(4) (2017) (“At least 5 business days before a hearing is conducted under this section, other than an expedited hearing . . . each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.”).

⁹⁸ 34 C.F.R. §§ 300.512(a)(3), 300.532(c) (2019) (applying five-day disclosure rule to expedited hearings); *see also* 20 U.S.C. § 1415(f)(2) (2018) (providing the five-day disclosure rule for standard DPHs). The proposed regulations included a provision allowing states to shorten the time for disclosure to two days, but in removing this provision

additions include limited allowances for formal discovery procedures.⁹⁹

F. Pre-Hearing Conferences

Although the IDEA does not specifically address pre-hearing conferences, a small group of state laws (n=7) do so as a requirement for expedited DPHs.¹⁰⁰ The most common addition in this limited group is the requirement for a pre-hearing conference.¹⁰¹ Conversely, Illinois explicitly excludes expedited DPHs from the pre-hearing conference provision for standard DPHs.¹⁰² Additionally, a few of these state laws specify related duties or powers of HOs in connection with pre-hearing conferences.¹⁰³

from the final version, the U.S. Department of Education explained in the accompanying commentary “that limiting the disclosure time to two days would significantly impair the ability of the parties to prepare for the hearing, since one purpose of the expedited hearing is to provide protection to the child.” Assistance to State for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,539, 46,726 (Aug. 14, 2006).

⁹⁹ 105 ILL. COMP. STAT. 5 § 14-8.02b(h) (2018) (allowing HO to order witness or document subpoenas); MONT. ADMIN. R. 10.16.3530(4) (2017) (noting that the HO may compel or limit discovery). IDEA is silent on the use of discovery in DPHs. It is not clear that any one discovery rule would be contrary to the purpose of IDEA. At the same time, there may be an argument that extensive discovery provisions, leading to delay in expedited DPHs, would be contrary to the statute’s objectives.

¹⁰⁰ *Supra* Table 1.

¹⁰¹ MINN. R. 3525.4770 (2018) (requiring the HO to hold a pre-hearing conference within two days of appointment); MONT. ADMIN. R. 10.16.3530(1)(a) (2017) (requiring the HO, upon appointment, to schedule a pre-hearing conference); N.H. CODE ADMIN. R. ANN. EDUC. 1123.25(f) (2021) (requiring a pre-hearing conference at least two business days before the hearing); N.M. CODE R. § 6.31.2.13(I)(9)(b) (LexisNexis 2020) (requiring the HO to schedule a pre-hearing conference as soon as reasonably practicable); 7-1 VT. CODE R. § 5:2365.1.6.17(d) (2017) (requiring the HO to schedule a pre-hearing conference prior to an expedited hearing); *cf.* Mass. Dep’t of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 7 (Mar. 2019) (authorizing the HO to schedule a conference call at the request of either party or the HO’s discretion).

¹⁰² ILL. ADMIN. CODE tit. 23, § 226.640 (2018).

¹⁰³ MINN. R. 3525.4770(6) (2018) (authorizing the HO during the pre-hearing conference to take appropriate action for scheduling, jurisdiction, and witnesses as well as to order either party to submit records or information for review); MONT. ADMIN. R. 10.16.3530(3) (2017) (requiring the HO to prepare an order identifying the issues and matters to be decided); N.H. CODE ADMIN. R. ANN. EDUC. 1123.25(f) (2021) (providing for exchange of witness and exhibit lists at pre-hearing conference); N.M. CODE R. § 6.31.2.13(I)(11) (LexisNexis 2020) (requiring the HO at the pre-hearing conference to determine jurisdiction, identify issues, and address scheduling, evidence, and other matters).

G. HO Decision

Only four state laws (n=4) add to the limited IDEA specification for the HO's decision in the context of expedited DPHs.¹⁰⁴ However, these states only address the procedures, not the scope, for the HO's decision and then to a relatively limited extent. Without changing the requirement for a ten-day written decision, Arkansas requires oral decisions while Virginia allows the option.¹⁰⁵ Also tangential, a pair of state laws specify the evidentiary standard for LEAs in danger-based cases, requiring "substantial evidence" of the requisite likelihood of injury.¹⁰⁶

H. Miscellaneous

Finally, the catchall "Miscellaneous" category consists of nine state law provisions (n=9) that variously add to the IDEA's template for expedited DPHs in relatively minor ways.¹⁰⁷ A pair of states provide for the option of written evidence,¹⁰⁸ while another requires a joint stipulation of facts by the parties.¹⁰⁹ A few other states add specific differentiations from their HO provisions for standard DPHs.¹¹⁰ The remaining additions are barring *ex parte* communications

¹⁰⁴ *Supra* Table 1.

¹⁰⁵ 005 ARK. CODE R. § 10.01.40 (LexisNexis 2008) (requiring HO to rule orally on all issues at the end of the expedited hearing); 8 VA. ADMIN. CODE § 20-81-210.O.14 (2017) (allowing HO the option to issue an oral decision at the conclusion of the expedited hearing).

¹⁰⁶ Idaho State Dep't of Educ., Idaho Special Education Manual 39, 214 (2018); ILL. ADMIN. CODE tit. 23, § 226.655(b) (2018) (including definition of substantial evidence as beyond a preponderance of the evidence).

¹⁰⁷ *Supra* Table 1.

¹⁰⁸ IOWA ADMIN. CODE r. 281-41.1010(2) (2021) (allowing verified written evidence "when the interests of the parties are not prejudiced substantially"); Mass. Dep't of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 8 (Mar. 2019) (requiring parties to inform HO, in writing, of their agreement to have the matter decided on the basis of documents only).

¹⁰⁹ N.M. CODE R. § 6.31.2.13(I)(13), (18)(e) (LexisNexis 2020) (requiring parties to exchange proposed stipulated facts and to submit a resulting joint stipulation of facts for expedited DPHs).

¹¹⁰ 14 DEL. ADMIN. CODE § 926.32.2 (2017) (providing for a single HO rather than the three-person HO panel for the state's standard DPHs); MONT. ADMIN. R. 10.16.3529 (2017) (requiring the SEA to maintain a list of HOs who

and, more unusually, allowing for equitable waiver of procedures except for timelines.¹¹¹ Such waivers are contrary to U.S. Department of Education guidance,¹¹² but preemption appears to apply to conflicts with the statute or regulations as compared with agency policy interpretation.¹¹³

V. DISCUSSION AND RECOMMENDATIONS

This article completes the successive analyses of state law additions to the IDEA provisions for DPHs, focusing on the specialized expedited variation.¹¹⁴ As with the previous triad, this latest analysis reflects the cooperative federalism pattern of “variety and complexity.”¹¹⁵ It also reinforces the delicate balance between customized benefits and burdensome legalism.¹¹⁶

The structure and entries in Table 1 reflect less numerous column and row totals for this expedited variant, reflecting its much more limited scope of subject matter and rules in the IDEA. Moreover, unlike the three analyses of standard DPHs, state APAs did not play a

have successfully completed at least one standard DPH under the IDEA and are willing to conduct an expedited DPH and to select a HO from that list without party involvement); NEV. REV. STAT. § 388.463.4 (2019) (requiring the SEA to select an HO from its list on a random or rotation basis in contrast with the parties’ opportunity to rank preference HOs for standard DPHs).

¹¹¹ N.H. CODE ADMIN. R. ANN. EDUC. 1123.25(j)(8) (2021) (authorizing the HO to waive any of the state’s specified procedures for expedited DPHs “to the extent necessary to preserve the full and fair nature of the [expedited DPH]”); 7-1 VT. CODE R. § 5:2365.1.6.17(f) (2017) (providing for equitable waiver of procedures except for timelines).

¹¹² Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016).

¹¹³ See sources cited *supra* notes 35 and accompanying text.

¹¹⁴ *Pre-Hearing Stage*, *supra* note 1 and accompanying text.

¹¹⁵ *Pre-Hearing Stage*, *supra* note 1, at 22 (summarizing the conclusions of the first three articles).

¹¹⁶ *Id.*; see also *Hearing Stage*, *supra* note 1, at 24–25 (citing David Neal & David L. Kirp, *The Allure of Legalization: The Case of Special Education Reconsidered*, 48 L. & CONTEMP. PROBS. 63, 82 (1985) and Perry A. Zirkel, Zorka Karanxha, & Anastasia D’Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2007)).

cognizable role,¹¹⁷ probably indicating the IDEA's expedited DPH process is too specialized for procedural provisions of general applicability to impact.

More specifically, we found a total of 66 state law additions for the combined stages of expedited DPHs¹¹⁸ compared to 254 for the pre-hearing stage,¹¹⁹ 281 for the hearing stage,¹²⁰ and 152 for the post-hearing stage¹²¹ of standard DPHs. This difference is attributable not only to the narrow scope of expedited DPHs under the IDEA¹²² but also to the exclusion of state provisions within the blanket importation from standard DPHs.¹²³

Conversely, one area that state law additions to expedited DPHs raised more acutely than the corresponding analyses of standard DPHs was the issue of potential federal preemption, especially, but not exclusively, for the entries in the Timelines category. For example, the several state laws permitting extensions appear to conflict with the inferable intent of the IDEA and its regulations.¹²⁴ Surprisingly, opposing parties have not yet challenged the enforcement of these provisions. Both state policy makers and attorneys who represent parties in DPHs should give more attention to questions of preemption. Moreover, HOs' narrow interpretation and

¹¹⁷ See sources cited *supra* note 59 and accompanying text; *see also infra* Appendix.

¹¹⁸ *Supra* Table 1.

¹¹⁹ *Pre-Hearing Stage*, *supra* note 1, at 10 (Table).

¹²⁰ *Hearing Stage*, *supra* note 1, at 14 (Table).

¹²¹ *Post-Hearing Stage*, *supra* note 1, at 9 (Table).

¹²² *Supra* text accompanying notes 20–26.

¹²³ *Supra* text accompanying note 63.

¹²⁴ *Supra* text accompanying notes 85–87.

implementation of such additional authority would not only minimize challenges but also improve the length of IDEA DPHs— whether expedited or standard.¹²⁵

Recommendations for further research include systematic analyses of related sources— such as state guidance and court decisions specific to expedited DPHs. Such scholarship, due to the limited scope of expedited DPHs, would be most productive side-by-side with standard DPHs where the distinctions between APA and non-APA jurisdictions and between the various models of HO systems are richer and riper for analysis.¹²⁶ Similarly, such combined attention for a model code for state DPHs would benefit both policy makers and practitioners.¹²⁷

VI. Appendix: Citations for State Law Additions for Expedited Hearings

	Special Education Laws
AR	005 ARK. CODE R. § 10.01.5–40 (LexisNexis 2008); 005 ARK. CODE. R. § 18.31-5 (LexisNexis 2021).
CO	COLO. CODE REGS. § 301-8:2220-R-6.02(7.5)(i)(ii)(B)(III) (2017).
DE	14 DEL. ADMIN. CODE §§ 926.13–33 (2017).
FL	FL. STAT. § 1008.212(5) (2020); FL. ADMIN. CODE ANN. r. 6A-03311(9)(a) (2021).
ID	IDAHO ADMIN. CODE r. 08.02.03.005.f (2018); Idaho State Dep’t of Educ., Idaho Special Education Manual 39–245 (2018), https://www.sde.idaho.gov/sped/files/shared/Idaho-Special-Education-Manual-2018-Final.pdf (incorporated by reference by IDAHO ADMIN. CODE r. 08.02.03.004 (2018)).
IL	05 Ill. Comp. Stat. 5 § 14-8.02b (2018); Ill. Admin. Code tit. 23, § 226.640–655 (2018).
IN	511 IND. ADMIN. CODE 7-45-10(b)(4), 7-45-10(e) (2020).
IA	IOWA ADMIN. CODE r. 281-41.1010(2) (2021).
KS	KAN. STAT. ANN. § 72-3435(b) (2019); KAN. ADMIN. REGS. § 91-40-30(b) (2017).

¹²⁵ See Diane M. Holben & Perry A. Zirkel, *Due Process Hearings Under the Individuals with Disabilities Education Act: Justice Delayed . . .*, ADMIN. L. REV. (forthcoming Winter 2022).

¹²⁶ See sources cited *supra* note 1 for more background.

¹²⁷ *Pre-Hearing Stage, supra*, note 1 at 24 & n.172 (discussing the prospect of developing a customized model code for DPH hearings); see also Jane R. Wettach & Bailey K. Sanders, *Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys*, 20 CONN. PUB. INT. L.J. 239, 280 (2021) (recommending that states review their DPH rules for clarity and comprehensiveness).

LA	LA. ADMIN. CODE tit. 28, § 532.C.4 (2017).
ME	05-71-101 ME. CODE R. §§ XVI.21(C)(4) (LexisNexis 2018).
MD	MD. CODE ANN., EDUC. § 8-413(i) (West 2018).
MA	Mass. Dep't of Elementary & Secondary Educ., Hearing Rules for Special Education Appeals 7–9 (Mar. 2019), https://www.mass.gov/service-details/bsea-issues-revised-hearing-rules-for-special-education-appeals .
MN	MINN. R. 3525.4750.1–6, 4770.3–8 (2018).
MO	MO. ANN. STAT. § 162.961.3 (West 2021); Mo. Dep't of Elementary & Secondary Educ., Missouri State Plan for Education, Regulation V, at 81 (2020), https://dese.mo.gov/media/pdf/full-version-state-plan-special-education-part-b-2020 (incorporated by reference by MO. CODE REGS. ANN. Tit. 5, § 20-300.110(2) (2021)).
MT	MONT. ADMIN. R. 10.16.3528–3531 (2017).
NE	92 NEB. ADMIN. CODE §§ 55-006.03, 55-007 (2017).
NV	NEV. REV. STAT. § 388.463.4 (2019); NEV. ADMIN. CODE § 388.308.3 (2020).
NH	N.H. CODE ADMIN. R. ANN. EDUC. 1123.04, .25 (2021).
NJ	N.J. ADMIN. CODE § 1:6A:14-2.7(o)(2)–(3) (2018).
NM	N.M. CODE R. § 6.31.2.13(I)(4)–(19) (LexisNexis 2020).
NY	N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.5(j)(3), 201.11 (2021).
OH	OHIO ADMIN. CODE 3301-51-05(K)(22) (2019).
OR	OR. REV. STAT. § 343.165 (2019).
PA	22 PA. CODE §§ 14.132(e), 14.162(q)(4) (2021).
RI	200 R.I. CODE R. § 20-30-6.8.2.C.1 (LexisNexis 2019).
TX	19 TEX. ADMIN. CODE § 89.1185(a) (2020).
VT	7-1 VT. CODE R. § 5:2365.1.6.17 (2017).
VA	8 VA. ADMIN. CODE § 20-81-210.H–R (2017).
WA	WASH. ADMIN. CODE § 392-172A-05100 (2018).
WI	WIS. STAT. § 115.80(4) (2017).