DUE PROCESS HEARINGS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: JUSTICE DELAYED . . .

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INTRODUCTION

The Individuals with Disabilities Education Act (IDEA)[1] is the foundational federal legislation for special education via its core requirement for providing each individual eligible child a "free appropriate public education" (FAPE), as documented in the child's individualized education program (IEP).[2] Borrowed from the pair of federal court consent decrees in its legislative history,[3] one of this law's fundamental features is an administrative adjudication called a "due process hearing" (DPH).[4]

A primary purpose of the DPH is to ensure prompt dispute resolution.[5] In an oft-quoted[6] part of the legislative history, Senator Harrison

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1. 20 U.S.C. §§ 1400–82. Initially enacted in 1975 as funding legislation under the broad title of Education of the Handicapped Act and a specific part called the Education for All Handicapped Children Act, this law has undergone major amendments during the reauthorizations in 1986, 1990, 1997, and 2004. *See* DIXIE S. HUEFNER & CYNTHIA M. HERR, NAVIGATING SPECIAL EDUCATION LAW AND POLICY 43–49 (2012).

2. *See* Sytsema v. Acad. Sch. Dist., 538 F.3d 1306, 1311–12 (10th Cir. 2008) (characterizing a free appropriate public education (FAPE) as the "central pillar of the IDEA"); Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 923 n.3 (10th Cir. 1995) (referring to the individualized education program (IEP) as the "cornerstone" of this central pillar).

3. Mills v. Bd. of Educ. of District of Columbia, 348 F. Supp. 866, 880–81 (D.D.C. 1972) (including a seventy-five-day period for completion); Pa. Ass'n for Retarded Child. v. Pennsylvania., 343 F. Supp. 279, 304–05 (E.D. Pa. 1972) (including a fifty-day period, with extensions for good cause).

4. The full designation is "[i]mpartial due process hearing" (DPH). 20 U.S.C. § 1415(f). However, the legislation alternatively uses the more concise "due process hearing." *E.g.*, *id.* § 1415(b)(7)(B), 1415(c)(2)(E), 1415(e)(2)(A), 1415(f)(1)(B)(ii), 1415(f)(3)(B). The Individuals with Disabilities Education Act (IDEA) provides that either the local education agency or the state agency is responsible for conducting this hearing, depending on state law. *Id.* § 1415(f)(1)(A). Moreover, by adding a state education agency appeal if the state law provides for the local education agency to conduct the hearing, the IDEA gives states the option of a second, administrative tier. *Id.* § 1415(g)(1). The number of states with a two-tier system has dwindled from twenty-six in 1991 to eight in 2019. Jennifer F. Connolly, et al., *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. DISABILITY POL'Y STUD. 156, 158 (2019) (identifying Kansas, Kentucky, Nevada, New York, North Carolina, Ohio, and South Carolina); *see also* Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W.VA. L. REV. 735, 745 n.38 (2016) (identifying Oklahoma as an additional state with a review officer tier).

5. *See* Muth *ex rel.* Muth v. Cent. Bucks Sch. Dist., 839 F.2d 113, 124–25 (3d Cir. 1988), *rev'd on other grounds sub nom.* Dellmuth v. Muth, 491 U.S. 223 (1989) (reasoning, based on its "stringent" regulatory timeline for DPH decisions, that the IDEA "reflect[s] the importance . . . of prompt resolution of disputes over the proper education of a [child with a disability]").

6. *See* Cory D. *ex rel.* Diane D. v. Burke Cnty. Sch. Dist., 285 F.3d 1294, 1299 (11th Cir. 2002) ("The most effective means of ensuring disabled children receive an education tailored

Williams, who was the principal sponsor of the legislation now known as the IDEA, asserted:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his 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 . . . conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with a fair consideration of the issues involved.[7]

Prompt completion of DPHs is also in the interest of the school system where time-based transaction costs are mounting and only build with longer adjudication processes. These costs include the fees for attorneys representing the district and, if the parent prevails, the attorneys' fees of the parents and the ultimate remedies.[8] Moreover, the time-based costs of the hearing process, including costs relating to the hiring of the impartial hearing officers (IHOs) and transcripts, rest on either the local education agency (LEA) or, in the many one-tier states, the state education agency (SEA).

This Article provides an empirically styled analysis of DPH timeliness. The first Part provides a contextual review, including the regulatory timeline, the previous empirical findings, and the leading controversies. The second Part recounts the specific methodology for this analysis, including the database compilation, research questions, and selection procedures. The third Part provides the findings for each of the research questions. The

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to meet their specific needs is to provide prompt resolution of disputes over a child's IEP."); C.M. *ex rel.* J.M. v. Bd. of Educ. of Henderson Cnty., 241 F.3d 374, 380 (4th Cir. 2001) (reasoning quick dispute resolution ensures the central purpose of the IDEA); Livingston Sch. Dist. Nos. 4 & 1 v. Keenan, 82 F.3d 912, 916–17 (9th Cir. 1996) ("[A]pplying a relatively short judicial review limitations period is consistent with the IDEA's policy of prompt resolution of questions resolving a disabled student's education."); Spiegler v. District of Columbia, 866 F.2d 461, 467 (D.C. Cir. 1989); Adler v. Educ. Dep't of N.Y., 760 F.2d 454, 460 (2d Cir. 1985).

7. 121 CONG. REC. 37,416 (1975). Protracted DPHs also add to the attendant emotional and financial costs of the child's family. On the financial side, for example, even if the parents prevail and obtain recovery of their attorneys' fees, the costs of expert witnesses are not recoverable under the IDEA. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 293–94 (2006) (holding that the fee-shifting provision does not authorize prevailing parents to recover fees for services rendered by experts in IDEA actions).

8. *E.g.*, Sch. Dist. of Phila. v. Kirsch, 722 F. App'x 215, 231 (3d Cir. 2018) (ruling that the parents were entitled to not only a half-year of tuition reimbursement but also approximately $330,000 under stay-put and $185,000 for attorneys' fees). The remedy of compensatory education often includes not only the period of the original dispute but also its extension during the hearing process and any appeals. *E.g.*, Heather D. v. Northampton Sch. Dist., 511 F. Supp. 2d 549, 552 (E.D. Pa. 2007) (recounting hearing officer compensatory education relief that included the two years during the hearing process).

concluding Part consists of an interpretive discussion of these findings that includes policymaking and practical recommendations.

II. FRAMEWORK REVIEW

A. Regulatory Timeline

As a result of the foundational concern with timeliness, the IDEA regulations have long provided for a 45-day period for DPHs from the date of filing to the date of decision.[9] However, as of the addition of a resolution phase in the 2004 Amendments of the IDEA,[10] this period commences upon completion of this prehearing phase, which generally approximates thirty days.[11] Moreover, the 45-day maximum is subject to extensions,[12] including state law refinements.[13] Pursuant to the legislation's limited variation in specified situations of disciplinary changes in placement,[14] the regulations also provide for "expedited" hearings that are for a shorter period that appears to approximate thirty school days.[15] For the purpose of this analysis,

9. 34 C.F.R. § 300.515(a).

10. 20 U.S.C. § 1415(f)(1)(B).

11. *Id.* § 1415(f)(1)(B)(ii). For the various fine-tuning adjustments resulting in shorter or longer periods, see 34 C.F.R. §§ 300.515(a), 300.510(b)–(c). For the strict agency interpretation of the initial fifteen-day segment of this period, see Letter from Melody Musgrove, Director, Office of Special Educ. Programs, to David Anderson, Texas Education Agency (Nov. 10, 2010), https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/letters/2010-4/anderson111010dph4q2010.pdf.

12. 34 C.F.R. § 300.515(c) (providing for an impartial hearing officer's (IHO's) discretionary authority and requiring request of either party). According to agency guidance, the IHO must specify a definite time limit for the extension. *See* Memorandum from Melody Musgrove, Director, Office of Special Educ. Programs, to Chief State School Officers, State Directors of Special Educ., *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act*, at 50 (July 23, 2013), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf [hereinafter *Dispute Resolution Procedures*]; *see also* Letter to Kerr, 22 IDELR 364 (OSEP 1994) (clarifying that the IHO may deny the request of either or both parties and may not pressure a party to make an extension request or unilaterally provide for an extension).

13. Several states specify limitations for length, notice, and reasons. 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, 21–22 (2018).

14. 20 U.S.C. § 1415(k)(3)–(4).

15. 34 C.F.R. § 300.532(c)(2) (providing for an expedited DPH time limit of twenty school days from filing to hearing plus ten school days from hearing to decision). The imprecision of this period results from the difference between school and calendar days and the seemingly implicit but questionable assumption that the hearing will be limited to one day.

the approximated frame of reference for the outer limit for the period from filing to decision will be as follows for the two types of hearings:

(a) "standard" hearings[16] – Seventy-five calendar days.[17]

(b) expedited hearings – Thirty-five calendar days.[18]

B. Overall DPH Trends

Considerable research has examined the longitudinal trends of other significant characteristics of DPHs, such as frequency and outcomes. For example, frequency studies reveal (1) a fluctuating pattern that most recently appears to represent a modest declining plateau;[19] (2) a continuing

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In contrast, the outer limit of fifteen calendar days for the resolution period of an expedited DPH, which is specified in the legislation, does not seem to pose a problem because it is subsumed within the initial twenty school day period. 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.532(c)(3)(ii). For the agency guidance regarding the interpretation of school days and the ultimate outer limit during the summer, see Letter from Ruth E. Ryder, Acting Director, Office of Special Educ. Programs, to Devin Fletcher, Assoc. Att'y (Aug. 23, 2018) [hereinafter Letter to Fletcher]; Letter from Melody Musgrove, Director, Office of Special Educ. Programs, to H. Douglas Cox, Assistant Superintendent, Va. Dep't of Educ. (June 22, 2012); *see also Dispute Resolution Procedures*, *supra* note 12, at 3–5. Finally, the timeline for expedited hearings does not allow extensions. *E.g.*, Letter from Ruth E. Ryder, Acting Director, Office of Special Educ. Programs, to Perry Zirkel, Professor of Educ. And L., Lehigh Univ. (Aug. 22, 2016); Letter from Melody Musgrove, Director, Office of Special Educ. Programs, to Colleen A. Snyder, Ruderman & Knox LLP (Dec. 13, 2015).

16. "Standard" hearings here is simply a shorthand way to distinguish the much more limited and special situation of "expedited" hearings. Neither the legislation nor the regulations provide differentiating terminology for this general default for hearings that are not in the limited "expedited" category.

17. In recognition of this approximate limit, some courts have referred to the "75-day rule." *E.g.*, Oskowis v. Ariz. Dep't of Educ., No. CV-17-08215-PCT-JJT, 2020 U.S. Dist. LEXIS 108179, at *7 (D. Ariz. June 19, 2020). This approximation includes expansion due to mediation extensions at the resolution phase and IHO extensions at the post-resolution phase but also reduction due to waiver of the resolution phase and its inapplicability to district-initiated DPH complaints. *Dispute Resolution Procedures*, *supra* note 12, at 50. As an indication of the extent of limited use of the resolution phase, during the eleven-year period starting in 2008–2009 resolution meetings were held in only about half of the DPH filings. CENTER FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION (CADRE), IDEA DISPUTE RESOLUTION SUMMARY FOR: U.S. AND OUTLYING AREAS 2008–09 TO 2018–19 9 (2019), https://www.cadreworks.org/resources/cadre-materials/2018-19-dr-data-summary-national.

18. This approximation accords an extra five calendar days, taking into consideration not only the addition for non-school days, such as weekends and non-instructional summer days, but the reduction from the shorter prescribed resolution period and the non-allowance of extensions. *See* Letter to Fletcher, *supra* note 15.

19. *E.g.*, Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A*

concentration in relatively few jurisdictions;[20] and (3) imprecision regarding the unit of analysis of "adjudications."[21] Similarly, outcome studies tend to show a continuing skew in favor of school districts but substantial variation in the categorization of outcomes[22] and the variance among states.[23]

Comparative Update, 376 EDUC. L. REP. 870, 871 (2020) (finding a dampened decline in decisions from 2012 to 2017); Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings under the IDEA*, 302 EDUC. L. REP. 1, 6–7 (2014) (finding downward trend in decisions from 2006 to 2011); Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 21, 25 (2008) (finding upward trend in decisions from 1991 to 1996 followed by an uneven plateau from 1997 to 2005); Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731, 733–34 (2002) (finding an upward trend from 1977 to 1997 but limited to Individuals with Disabilities Education Law Reporter (IDELR)-published decisions).

20. Not counting Puerto Rico, which has a high number of decisions emanating from the continuing enforcement of a consent decree and from persistent and severe systemic economic difficulties (*e.g.*, Joseph B. Tulman et al., *Are There Too Many Due Process Cases?* 18 U. D.C. L. REV. 249, 271–73 (2015)), the five leading jurisdictions for the cumulative period from 2006 to 2017 have been at three successive levels of adjudications:

averaging roughly 1,000 per year: New York and the District of Columbia (with D.C. having dropped dramatically for the second half of this period)

averaging approximately 100 per year: California

averaging approximately 50 per year: New Jersey and Pennsylvania

Zirkel & Gullo, *supra* note 19, at 873. However, the volume of filings and, thus, the filings-to-adjudications ratio ranges from approximately 3-to-1 for D.C. to approximately 30-to-1 for California. *Id.*

21. *E.g.*, *id.* at 870 n.3. The unit of analysis of "adjudications" is one of the short ways of referring to "fully adjudicated hearings." *Id.* As discussed further *infra* in the text discussing timeliness data, pp. 106–09, the specific contours of this term are not automatically clear-cut, likely leading to lack of uniformity in the state submission and subsequent analyses of these numbers. *Id.* at 874–75.

22. *E.g.*, Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525, 533, 547, 555 (2014) (finding predominant balance of "issue category rulings" in favor of districts but varying pattern for five-year intervals from 1978 to 2012 and overall limited balance in favor of districts upon conflation to cases based on whether parents "prevailed"); Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131, 137 (2011) (finding outcomes distribution for sample of forty-one states in 2005–2006 of 59% for school districts, 10% for both, and 30% for parents); Zirkel & D'Angelo, *supra* note 19, at 740, 746 (finding outcomes distribution for IDELR-published decisions in 1989–2000 of 56% for school districts, 9% mixed, and 35% for parents).

23. *E.g.*, Zirkel & Skidmore, *supra* note 22, at 533–38 (canvassing the varying measures and results of outcomes in analyses limited to one or two states).

C. Timeliness Data

Despite cumulative evidence of a gradual judicialization of DPHs,[24] the empirical analysis of their timeliness in relation to the abovementioned regulatory outer limits has been negligible thus far. An unpublished report from the federally funded Center for Appropriate Dispute Resolution in Special Education (CADRE) revealed 76% of all of the fully adjudicated hearings[25] for the fifty states for the fifteen-year period from 2004–2005 to 2018–19 were beyond the regulatory timeline[26] based on the annual data

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24. *E.g.*, Perry A. Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 29–30, 44–45 (2007) (finding various indicators of increasing judicialization in an empirical analysis of IHO decisions in Iowa). Another indicator, which is evident across the states, is the gradual shift from attorneys constituting a minority of IHOs to attorneys being the vast majority of IHOs. *Compare* Thomas Smith, *Status of Due Process Hearings*, 48 EXCEPTIONAL CHILD. 232, 233 (1981) (finding that 55% of the IHOs were non-lawyers with inferable expertise in special education), *with* Connolly et al., *supra* note 4, at 159 (finding that in forty-one states and D.C. 100% of the IHOs were lawyers, and the only state where less than a majority were lawyers was Delaware, which uses a tripartite panel with the attorney in the central position). Moreover, the early prevailing model of part-time IHOs had changed to full-time IHOs in approximately nineteen states. *See* Connolly et al., *supra* note 4, at 158. As a result, the competence criteria for IHOs, established for the first time in the 2004 amendments of the IDEA, focused on legal rather than special education practice. *See* 20 U.S.C. §§ 1415(f)(3)(A)(ii)–(iv) (detailing knowledge and ability for IDEA legal interpretations, conducting hearings, and writing decisions). The 2004 amendments also introduced sufficiency procedures that have contributed to lengthier hearings. *See* Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495, 512 (2014) ("The pleading requirements put in place in 2004 increase paperwork and promote delay."). Finally, along with the expanded applicability of state administrative procedure acts (APAs), which correlates with the increased use of central panel administrative law judges (ALJs) for IDEA DPHs from six states in 1991 to twenty states in 2018, the state laws that supplement the IDEA have added various adjudicative formalities including discovery and motion practice that tend, on a net basis, to lengthen the period for completion of the hearing process. *See* Connolly et al., *supra* note 4, at 157–58; *see generally* Andrew M.I. Lee & Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act: The Pre-Hearing* Stage, 40 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2021).

25. The Department of Education's instructions for its annual survey continue to define "fully adjudicated" as a hearing in which the "[the IHO] conducted a due process hearing, reached a final decision regarding matters of law and fact and issued a written decision to the parties." U.S. DEP'T OF EDUC., E*MAPS* USER GUIDE: IDEA PART B DISPUTE RESOLUTION SURVEY 32 (2020).

The instructions include a parallel definition for expedited hearings. *Id.* They also include a contrasting definition that effectively indicates various exclusions, specifying "dismissed" complaints as "those determined by the [IHO] to be insufficient or without cause, and those not fully adjudicated for other reasons." *Id.* at 31–32.

26. The Department's instructions define "within timeline" differentially between

collection of the U.S. Department of Education's Office of Special Education Programs (OSEP).[27] As the U.S. Government Accountability Office (GAO) observed, the Department of Education "assesses states' performance on dispute resolution using several different measures . . . but lacks key information about the timeliness of due process hearing decisions, which reduces its ability to monitor dispute resolution effectively."[28] Specifically, policymakers and stakeholders lack specific information on the length of DPHs, including extensions, with due differentiation and elaboration of the contours and criteria of "fully adjudicated."[29]

Based largely on anecdotal evidence and partisan perceptions, proposals to reform the administrative adjudication process of the IDEA have focused on structural streamlining by replacing the DPH or reducing the stages

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standard hearings (for which the written decision "was provided to the parties in the due process hearing not later than 45 days after the expiration of the resolution period") and expedited hearings (for which the written decision was "provided no later than 10 school days after the due process hearing, which must occur within 20 school days of the date the expedited due process complaint is filed"). *Id.* at 31.

27. E-mail from Diana Cruz, Data Analyst, CADRE, to Perry A. Zirkel (Mar. 22, 2021, 12:47 EST). This overall percentage includes those fully adjudicated hearings in which the IHO had granted extensions. Moreover, during this period, the longitudinal trajectory fluctuated between 67% and 82% without a clear upward or downward trend. Finally, the proportion of fully adjudicated hearings that were beyond extensions fluctuated between 6% and 16%. *Id.* The source data, which are from the state education agency (SEA) annual reports to the U.S. Department of Education's Office of Special Education Programs (OSEP), remain problematic despite published guidance that "as part of the State's general supervisory responsibility, the SEA must ensure that due process hearing decision timelines are properly calculated and enforced," including a mechanism to track when the resolution period has concluded, and the forty-five-day period starts. Memorandum from Melody Musgrove, Director of Office of Special Educ. Programs, to Chief State School Officers, State Directors of Special Educ., *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, at 55 (July 23, 2013), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf.

28. GAO, SPECIAL EDUCATION: IMPROVED PERFORMANCE MEASURES COULD ENHANCE OVERSIGHT OF DISPUTE RESOLUTION 23 (2014), https://www.gao.gov/products/GAO-14-390; *see also id.* at 31 (The U.S. Department of "Education's measure does not provide clear, complete information about *the duration of this process*, information which is useful for ensuring effective program monitoring and targeted technical assistance.") (emphasis added).

29. *See, e.g.*, U.S DEP'T OF EDUC., *supra* note 25, at 4, 6–7, 23–24 (failing to differentiate expedited hearings from those that are not expedited and failing to clarify the fit of written decisions that are summary dispositions). For example, the data need to differentiate expedited hearings from those that are not expedited. Similarly, the definition does not make sufficiently clear the fit of written decisions that are summary dispositions.

before and after it.[30] At most, these proposals merely mention the lack of timeliness rather than addressing it with specific empirical data and efficiency measures for careful assessment.[31]

D. Timeliness Controversies

Major systemic concerns specific to the timeliness of DPHs have been limited to two of the most DPH-active states—New York and New Jersey.[32] In New York, the media has revealed a mounting crisis of backlogged DPHs, particularly in New York City, which accounts for most of the DPH activity.[33] Although both the completeness of the data and whether the analyses included expedited and other not fully adjudicated hearings are unclear, related reports recounted that the average length of DPHs in New York was 110 days for the nine-year period starting in 2002[34] and 178 days for the five-year period starting in 2014–2015.[35] In February 2020, citing concerns about both backlog and timeliness, parents of students with disabilities filed a class action lawsuit against the New York City Department

30. *E.g.*, SASHA PUDELSKI, AM. ASS'N OF SCH. ADM'RS, RETHINKING SPECIAL EDUCATION DUE PROCESS 9–18 (2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf (proposing, based on a survey of school superintendents, to replace the DPH with a special education facilitation and consultancy model); Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 CASE W. RES. L. REV. 143, 205 (2015) (proposing, based on a survey of special education attorneys, to reduce the "layer[s]" before and after the DPH).

31. PUDELSKI, *supra* note 30, at 15–16.

32. *Id.* at 10.

33. *E.g.*, Reema Amin, *New York State Changes Course on Plan to Address Backlog of Special Education Cases*, CHALKBEAT (Oct. 20, 2020), https://ny.chalkbeat.org/2020/10/19/21524233/new-york-state-changes-course-on-plan-to-address-backlog-of-special-education-cases (reporting lack of substantial steps to resolve the continued delays in completing DPHs in New York City); Alex Zimmerman & Yoav Gonen, *Small Set of Hearing Officers Deluged with Special Education Complaints*, THE CITY (Dec. 5, 2019, 4:10 AM EST), https://www.thecity.nyc/education/2019/12/5/21210658/small-set-of-city-hearing-officers-deluged-with-special-ed-complaints (reporting that twelve IHOs in New York City have almost 5,000 unresolved DPH filings); *cf.* Gilbert K. McMahon, *NYS Special Education Impartial Hearing Outcomes*, at 1–3 (last visited Nov. 1, 2021), available at http://www.specialedlawadvocacy.com/news.html (finding that New York City accounted for 95% of the state's DPHs during the eight year period starting in 2002–2003, with its suburbs accounting for the majority of the rest); Deusdedi Merced, *External Review of New York City Impartial Hearing Office*, at 17 (Feb. 22, 2019), https://www.politico.com/states/f/?id=00000170-9867-d855-a3f7-d8ff5cdb0000 (reporting that New York City accounted for 96% of the state's DPHs for the five-year period starting in 2014–2015).

34. McMahon, *supra* note 33, at 6–7.

35. Merced, *supra* note 33, at 19.

of Education.[36] In June 2020, the United States District Court for the Eastern District of New York approved class certification,[37] and the parties are currently engaged in settlement discussions.[38] Additionally, the New York State Department of Education recently issued a Request for Information, seeking public input for possible solutions of this pressing problem, including a new DPH system in New York City.[39]

In New Jersey, a report from a group of parent attorneys found—based on acknowledged incomplete case data—that the average length of adjudicated DPHs for the three-year period 2014–2017 was 212 days, but exclusion of expedited and emergent-relief hearings extended the average length to 312 days.[40] In January 2020, responding to the same group's class action lawsuit and a U.S. Department of Education order, which were both in May 2019,[41] the New Jersey Department of Education proposed guidelines for the state's DPH system to provide more efficient and effective completion of DPHs.[42] However, as part of the ongoing lawsuit, the plaintiffs

36. Class Action Complaint for Declaratory and Injunctive Relief at ¶¶ 4, 7, J.S.M. v. New York City Dep't of Educ., No. 20-cv-705 (E.D.N.Y. Feb. 7, 2020) (citing a backlog of more than 10,000 cases and an average case length of 259 days).

37. Stipulation and Order for Class Certification at ¶¶ 4–7, J.S.M. v. New York City Dep't of Educ., No. 20-cv-705 (E.D.N.Y. June 18, 2020).

38. Minute Entry for Settlement Conference, J.S.M. v. New York City Dep't of Educ., No. 20-cv-705 (E.D.N.Y. Sep. 27, 2021) (setting, in the wake of approximately ten previous extensions for settlement discussions, an October 1 deadline for (a) a joint report advising whether there is an agreement in principle for a negotiated settlement and (b) a school district proposal for expediting the resolution of backlogged cases).

39. New York City Dep't of Educ., Request for Information #21-003 (last visited Nov. 1, 2021), http://www.p12.nysed.gov/compcontracts/nysed-rfi-21-003-iho-nyc/home.html.

40. LISA M. QUARTAROLO, N.J. SPECIAL EDUC. PRACTITIONERS, REPORT OF NEW JERSEY SPECIAL EDUCATION PRACTITIONERS TO HONORABLE PHIL MURPHY, GOVERNOR 9–10 (2018), available at https://edlawcenter.org/news/archives/special-education/report-special-education-hearing-delays-gross-denial-of-justice.html.

41. For a brief overview, see *Proposed Fix for Delays in New Jersey Special Education Hearings Restricts Student Rights*, EDUC. L. CTR. (Mar. 10, 2020), https://edlawcenter.org/news/archives/special-education/proposed-fix-for-delays-in-new-jersey-special-education-hearings-restricts-student-rights.html (last visited Nov. 1, 2021). For the class action, see *C.P. v. N.J. Dep't. of Educ.*, (D.N.J. May 22, 2019), available at https://drive.google.com/file/d/18gX7c4eDZgJMFOszjFwZ998l9bwTlT8G/view?usp=sharing. For the full SEA documents, see N.J. DEP'T OF EDUC., PROPOSED SPECIAL EDUCATION DUE PROCESS GUIDELINES (2020), available at https://www.nj.gov/education/specialed/disputes.shtml. For a companion case, which thus far has amounted to a procedural tangle, see J.A. v. Monroe Twp. Bd. of Educ., No. 18-cv-09580, 2019 WL 1760583 (D.N.J. Apr. 22, 2019), *further proceedings*, No. 18-cv-14838, 2020 WL 3496876 at *3 (D.N.J. June 29, 2020) (directing the plaintiffs to notify the court how they want to proceed in this case and C.P. v. N.J. Department of Education).

42. *See* N.J. DEP'T OF EDUC., *supra* note 41, at 1–2.

quickly responded with a motion for a preliminary injunction against implementation of the guidelines.[43] On May 22, 2020, the Federal District Court in New Jersey, without yet deciding the class certification and the preliminary injunction motions, addressed the defendants' motion to dismiss the second amended complaint on the grounds of standing and mootness.[44] For standing, the court denied dismissal for ten of the eleven named plaintiffs based on significant delays in the "45-Day Rule."[45] The exception was the child for whom the parents had not filed a due process complaint.[46] For mootness, the court concluded that the remaining ten children fit in the exception for cases capable of repetition yet escaping review.[47] The overall ruling, which was within the standing analysis,[48] was that "Plaintiffs have asserted a plausible claim that the delays experienced by the [ten children] crossed the line from minor, non-actionable delays to delays so significant that they deprived [these children] and their parents of the substantive rights guaranteed to them by the IDEA."[49]

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43. Application for Order to Show Cause without Temporary Restraints, C.P. v. N.J. Dep't of Educ., No. 19-cv-12807 (D.N.J. Jan. 29, 2020), available at https://drive.google.com/file/d/1oaGgIGwabVeYqtNp9AgcU1ThievmmAb5/view?usp=sharing.

44. C.P. v. N.J. Dep't of Educ., 76 IDELR ¶ 214, at 3, 15 (D.N.J. 2020). For the most recent procedural decision in this case, see C.P. v. N.J. Dep't of Educ., 77 IDELR ¶ 288, at 6 (D.N.J. 2020) (consolidating the expedited trial and plaintiffs' preliminary injunction motion, and denying class certification without prejudice pending streamlined discovery).

45. The court used the "45 Day Rule" as a short-hand way to refer to the net number of days from completion or waiver of the resolution period to the decision after deduction for specific extensions that the IHO had granted in request to a party request. *C.P.*, 76 IDELR ¶ 214, at 5. Based on the allegations in the complaint, the court listed violations of the 45-Day Rule for the remaining ten plaintiff students ranging from 30+ to 791 days. *Id.* at 10. However, the endpoint of three of the ten cases was a settlement rather than a decision, another had yet not had a hearing, and the court did not make clear whether the decision in all of the other six cases was in favor of their parents (i.e., a denial of FAPE). *Id.* at 5–6.

46. The parents of this child had filed for the sibling, who was one of the eleven named plaintiffs, but claimed that the delay for the sibling discouraged them for filing for this child. *Id.* at 9.

47. *Id.* at 13–14.

48. Additionally, intervening between standing and mootness analyses, the court rejected the defendants' failure-to-exhaust argument for the child who had not yet had a hearing after 200 days, concluding that the violation in this case was systemic and thus within at least the futility exception to the exhaustion requirement. *Id.* at 12.

49. *Id.* at 10. In ringing dicta at the end of the opinion, after pointing out the pandemic's reminder as to the preciousness of time for students with disabilities and for all students, the court intoned:

> Plaintiffs have made out plausible claims that the system for the [administrative] adjudication of IDEA disputes . . . in New Jersey is profoundly broken and routinely violates the federal laws designed to insure that our most vulnerable children remain the priority we all should agree they are, not only in these times, but at all times.

Id. at 15.

E. Related Case Law

For the 2020 New Jersey ruling, which merely preserved the matter for further proceedings, the court relied on a rather thin line of court decisions starting with an early ruling in a long-standing class action in *Blackman v. District of Columbia*.[50] The court in *Blackman* conducted its analysis in the context of more extensive systemic deficiencies and in reliance on two cases from other jurisdictions that combined flagrant DPH timeliness violations with other serious procedural deficiencies, ruling:

> While a slight delay in the provision of a hearing after a request has been made or a slight delay in rendering a decision may be an excusable procedural infirmity in some cases, the failure to offer the parents and their children a timely hearing for months after the expiration of the 45[-]day period, as was the case here, crosses the line from process to substance.[51]

The rest of the abbreviated line of decisions cited in the New Jersey case consisted of two cases with rather remote dicta[52] and two other cases that represented more solid, although still qualified, support.[53]

Although not cited in the preliminary New Jersey ruling, an alternate and more substantive line of case law presents more lenient rulings on the lack of timeliness in DPHs.[54] More specifically, the prevailing weight of judicial

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50. *Id.* at 9 (citing Blackman v. District of Columbia, 277 F. Supp. 2d 71 (D.D.C. 2003) (Blackman I) and Blackman v. District of Columbia, 382 F. Supp. 2d 3 (D.D.C. 2005) (Blackman II)). In the most recent decision in the *Blackman* litigation, the court extended the enforcement of the consent decree for another twelve years. Blackman v. District of Columbia, 239 F. Supp. 3d 22, 24 (D.D.C. 2017).

51. *Blackman I*, at 79 (citing Walker v. District of Columbia, 157 F. Supp. 2d 31 (D.D.C. 2001) and Evans v. Bd. of Educ. of Rhineback Cent. Sch. Dist., 930 F. Supp. 83 (S.D.N.Y. 1996)). In the follow-up decision, reciting this language, the court ruled that this delay qualified for the irreparable harm criterion for a preliminary injunction. *Blackman II*, at 9.

52. M.M. v. Paterson Bd. of Educ., 736 F. App'x 317, 322 n.10 (3d Cir. 2018) (noting, upon denying the parent's request for a preliminary injunction because the parent had not exhausted the DPH process, that further delays might qualify as an exception for exhaustion in the future); E.M. v. Pajaro Valley Unified Sch. Dist., No. C 06-04694, 2006 WL 3507926, at *6 (N.D. Cal. Dec. 5, 2006) (concluding that the four-month total DPH period from filing to decision, without more specific allegations, did not constitute an injury in fact).

53. Miller v. Monroe Sch. Dist., 131 F. Supp. 3d 1107, 1113, 1117 (W.D. Wash. 2015) (issuing a preliminary injunction limited to the 142-day violation of the 45-day rule during which it was unclear whether the district provided the child with FAPE); Dep't of Educ. Haw. v. T.G., 56 IDELR ¶ 97, at 8–9 (D. Haw. 2011) (ruled that outright denial of a timely hearing was a per se denial of FAPE in terms of the parents' right to meaningful participation, but rather than order the requested relief of reimbursement remanded to the IHO the remaining issue of whether the unilateral placement was appropriate).

54. *E.g.*, Pangerl v. Peoria Unified Sch. Dist., 780 F. App'x 505, 507 (9th Cir. 2019)

authority is that a significant delay in issuing the DPH decision in relation to the regulatory timeline is not a per se denial of FAPE but, instead, is a procedural violation that additionally requires proof of a resulting loss to the

(ruling that approximately 350-day lateness was procedural violation that lacked the requisite second-step loss); C.W. v. Rose Tree Media Sch. Dist., 395 F. App'x 824, 827–28 (3d Cir. 2010) (denying reimbursement or compensatory education for seventeen-month delay in holding DPH upon no denial of FAPE); J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69–70 (2d Cir. 2000) (ruling that "plainly untimely" 33-day lateness of decision, after extension, was harmless procedural violation in light of decision against the child's eligibility); Heather S. v. Wis., 125 F.3d 1045, 1059 (7th Cir. 1995) (ruling that at least 4.5-month lateness of decision, after waiver, did not result in requisite loss of educational opportunity); Amann v. Stow Sch. Sys., 982 F.2d 644, 653 (1st Cir. 1992) (ruling that approximately 150-day lateness of decision resulted in no remediable harm); Oskowis v. Ariz. Dep't of Educ., 76 IDELR 292, at 3–4 (D. Ariz. 2020) (ruling that the procedural violation of at least a year of the 75-day rule did not result in cognizable loss to student or parent); Wilkins v. District of Columbia, 571 F. Supp. 2d 163, 172–73 (D.D.C. 2008) (ruling that 4.5-month delay of expedited DPH decision did not result in substantive loss to the child); E.M. v. Pajaro Valley Sch. Dist., 48 IDELR 39, at 4 (E.D. Cal. 2007) (concluding, in further proceedings in this case cited *supra* note 52, that the 49-day delay did not amount to a cognizable injury in light of the DPH decision that the district had not denied the child a FAPE); G.W. v. New Haven Unified Sch. Dist., 46 IDELR 103, at 6 (N.D. Cal. 2006) (ruling that 40-day delay did not result in harm to the child); Grant v. Indep. Sch. Dist. No. 11, 43 IDELR 219, at 15 (D. Minn. 2005) (ruling that 4.5-month delay as at least half attributable to the plaintiff-parent and 10-day unrequested IHO extension did not harm child or parent); Renollett v. Minn. Dep't of Educ., 41 IDELR 179, at 5–6 (D. Minn. 2004) (ruling that plaintiff lacked standing to challenge the 4.5-month delay because his requested relief was not likely to remedy the alleged harm); CM *ex rel.* JM v. Bd. of Educ. of Henderson Cnty., 85 F. Supp. 2d 574, 591–92 (W.D.N.C. 1999), *partially rev'd on other grounds*, 241 F.3d 374, 388 (4th Cir. 2001) (assuming arguendo that seventh-month delay was, with extensions, untimely, and it did not interfere with child's FAPE); *cf.* K.K.M. v. Gloucester City Sch. Dist., 77 IDELR ¶ 74, at 6 (D.N.J. 2020) (rejecting for lack of standing parent's claim that decision was 317 days late, because the delays were fairly traceable to the IHO, not the defendant district). Moreover, in the absence of a direct remedy, attorneys' fees are only a limited possibility, which may go in the reverse direction if the court determines the suit to be frivolous. *See, e.g.*, Scorah v. District of Columbia, 322 F. Supp. 2d 12, 21–22 (D.D.C. 2004) (awarding attorneys' fees but unclear to what extent, if any, they were attributable to the 30-day lateness in comparison to reimbursement rulings); Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236, 251 (S.D.N.Y. 2000) (awarding attorneys' fees for lack of a decision almost a year after extension expired); Green Local Sch. Dist. Bd. of Educ. v. Redovian, 18 IDELR 1092, at 1, 11–12 (N.D. Ohio 1992) (ruling that district's five-month delay in setting up the DPH was "inexcusable neglect" entitling the plaintiff-parents only with the option to raise their otherwise reversed "prevailing party" status); *cf.* Caroline T. v. Hudson Sch. Dist., 915 F.2d 752, 757–759 (1st Cir. 1990) (awarding attorneys' fees to school district for parents' egregious prolongation of the DPH process).

child or parent.[55] The cases that have specifically or effectively found such a loss are rare.[56]

Yet, individual FAPE cases and class action litigation are not the only avenues for enforcement of the timeliness standards of the IDEA. OSEP, the administering agency of the IDEA, is responsible for IDEA regulations, funding, and overall supervision. OSEP includes the timeliness component in its compliance activities. As illustrated by its report of noncompliance and issuance of corrective actions in New Jersey,[57] OSEP continues to enforce timeliness of DPHs according to its own standards for SEAs.

F. Needed Information

In sum, whether specific to current controversies in New Jersey and New York or to the more general implementation of the regulatory timelines nationally, more systematic and objective information about the length of DPHs is needed.[58] The information should be for a defined period of sufficient duration and recency. It should also specify clearly demarcated criteria for the

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55. *See, e.g.*, *Pangerl*, 780 F. App'x at 507. For codification of this two-step test for procedural violations, which alternatively includes at the second step the student's right to substantive FAPE and the parents' right to meaningful participation, see 20 U.S.C. § 1415(f)(3)(E)(ii) (requiring finding of one or more procedural violations that resulted in either deprivation of educational benefit to the student or significant interference with the parental opportunity for participation in the FAPE decisionmaking process).

56. Burr v. Ambach, 863 F.2d 1071, 1076 (2d Cir. 1988), *reaffirmed*, Burr v. Sobol, 888 F.2d 258, 259 (2d Cir. 1989) (relying on not only more than a year between filing and decision and an extra three-month delay at the second tier but also no prior placement during stay-put period because the school had closed); Rose v. Chester Cnty. Intermediate Unit, No. A. 95–239, 1196 WL 238699, at *4–5 (E.D. Pa. May 7, 1996), *aff'd mem.*, 114 F.3d 1173 (3d Cir. 1997) (relying on not only more than a ten-month delay but also an eight-month delay in holding the hearing despite no allowance for extensions to do so in the context of an ultimate determination that the proposed IEP was inappropriate).

57. For the May 5, 2019 notice of noncompliance, including the two identified issues with timeliness of DPH decisions, see Letter from Laurie VanderPloeg, Dir. of the Off. of Special Educ. Programs, U.S. Dep't of Educ., to Lamont Repollet, N.J. Comm'r of Educ. (May 6, 2019), https://www.nj.gov/education/specialed/fmr/NJ-B-RDAOnsiteVisitCoverLetter.pdf; OFFICE OF SPECIAL EDUC. PROGRAMS, DISPUTE RESOLUTION MONITORING OF THE NEW JERSEY DEPARTMENT OF EDUCATION. For the New Jersey Department of Education's August 6, 2019 response that identifies its corrective action steps, see Letter from Carolyn Marano, N.J. Assistant Comm'r of Educ., to Laurie VanderPloeg, Dir. of the Off. of Special Educ. Programs, U.S. Dep't of Educ. (Aug. 6, 2019) https://www.nj.gov/education/specialed/fmr/NJDOE USOSEPFindingsNoncompliance.pdf.

58. *Supra* note 25 and accompanying text. *See also* OFF. OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., IDEA PART B DISPUTE RESOLUTION PROCEDURES (2020).

unit of analysis—fully adjudicated hearings.[59] Finally, to provide the requisite usefulness,[60] the data should focus on standard DPHs, with due differentiation from and limited attention to the specialized expedited variation,[61] and with coverage across all fifty states and the District of Columbia.

III. SPECIFIC METHODOLOGY

The purpose of this study was to determine the extent to which fully adjudicated DPHs under the IDEA for a recent six-year period adhered to the applicable timelines.[62] Specifically, the research questions were as follows:

1. What is the average number of days from filing to decision for standard decisions and, secondarily, for expedited decisions (a) for the entire period, and (b) by year?
2. For standard decisions, what is the percentage distribution for the approximate categories of major delay, minor delay, and within timelines (a) for the entire period and (b) by year?
3. For standard decisions for the entire period, which are the states with the highest average length from filing to decision, along with their distribution according to the approximate categories of major delay, minor delay, and within timelines?
4. For standard decisions for the entire period, which are the states with the shortest average length from filing to decision, along with their distribution for the same approximate categories of major delay, minor delay, and within timelines?

A. Designated Population and Period

The establishment of the target population of fully adjudicated DPHs, including the designation of the applicable period, was a multi-step process. Due to the absence of an available national database of DPH decisions,[63] the first major step was assembling a national pool of DPH decisions. The IDEA regulations require each SEA to make the decisions "available to the public"

59. *Supra* note 25 and accompanying text.

60. *Supra* note 28 and accompanying text.

61. *Supra* notes 14–15 and accompanying text.

62. *Supra* notes 16–18 and accompanying text.

63. A commercial database, LRP Publications' SpecialEdConnection®, includes DPH decisions nationally. However, its coverage is far from complete, because it is dependent on SEA responses to its ongoing Freedom of Information Act (FOIA) requests and its own proprietary selection procedures. *See, e.g.*, Anastasia D'Angelo et al., *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL'Y STUD. 241, 241, 243, 249 (2004) (finding in an exploratory analysis limited evidence of representativeness).

without further specifications.[64] Finding that most states complied with the regulatory requirement for public availability via posting on their SEA website and that the most common set of recent years was the six-year period from January 1, 2013, to December 31, 2018,[65] we downloaded the decisions for this period and filled in any gaps in the posted decisions by contacting the SEA's dispute resolution coordinator.[66] This process yielded a national pool of 11,348 DPH decisions representing all fifty states and the District of Columbia.

The next major step was screening out those decisions in the pool that did not meet specified selection standards for overall subject matter and for specific "fully adjudicated" status. As a preliminary or transitional sub-step, we used a random sampling procedure to obtain a representative but workable number of decisions for the four jurisdictions with particularly high frequencies of DPH decisions.[67] The resulting pool, which was subject to the selection process and eventual re-weighting,[68] consisted of 3,037 DPH decisions.

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64. 34 C.F.R. § 300.514(c)(2). First, this requirement is not specifically limited to fully adjudicated decisions. Second, while opining that a state FOIA is not sufficient to fulfill this requirement, the means of providing the required access is left to the discretion of each state so long as the state protects confidentiality. *See* Letter to Von Ruden, Office of Special Educ. Programs, 30 IDELR 402 (OSEP 1998). Third, OSEP has interpreted the regulations as requiring retention for at least 5.5 years. *See* Letter from Ruth E. Ryder, Acting Director, Office of Special Education Programs, to Anonymous (Feb. 27, 2017).

65. The availability for prior years was very uneven due to varying retention practices, and that for the years 2019 and 2020 was similarly limited due to wide variance in the uploading of the most recent decisions.

66. As a result, nine states filled gaps in decision postings within our six-year period: Alaska, Idaho (with FOIA request), Maryland, Minnesota, Nevada, New York, North Carolina, North Dakota, and South Carolina (with FOIA request). The twenty-four states that filled in the missing data for the filing and/or decision dates were Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Hawaii, Kentucky, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, and Virginia.

67. Accounting for approximately 85% of all the decisions in the pool, these states in order of frequency of decisions were as follows: New York – 7,224; District of Columbia – 990; Pennsylvania – 614; and California – 584. In accordance with an established source for requisite levels for representativeness, their respective resulting numbers of decisions after random selection were as follows: New York – 360; District of Columbia – 277; Pennsylvania – 238; and California – 230. *See* Robert V. Krejcie & Daryle W. Morgan, *Determining Sample Size for Research Activities*, 30 EDUC. & PSYCH. MEASUREMENT 607, 608 (1970)). For the random selection, we assigned all cases a sequentially numbered case identification (e.g., NY20 being the twentieth case from New York) and then used the random number generator in Microsoft Excel to select the requisite number of cases for each state. Finally, to maintain the requisite number for the data analysis, we used the same process to replace any initially selected cases that were exclusions upon application of the criteria for fully adjudicated DPHs.

68. The re-weighting process, as reported *infra* note 109 and accompanying text, adjusted

For overall subject matter, we eliminated the relatively few decisions in the pool that were (a) based solely on either Section 504/Americans with Disabilities Act claims[69] or state laws that were separate from, rather than corollary to, the IDEA,[70] and (b) state complaint procedures decisions[71] or second-tier, review officer decisions.[72]

Next, for the selection criteria, we used the OSEP instructions to SEAs for their mandated annual reporting[73] as the basic template for "fully adjudicated" status. We found it necessary to further refine this definitional template for more reliable specificity in assembling our final database of fully adjudicated DPHs. Starting with the three critical elements in the OSEP definition, we used the following combination of specific selection criteria:

(1) the IHO held an evidentiary hearing.

The OSEP instructions' definition of fully adjudicated included but did not separately define "a due process hearing."[74] In light of the IDEA regulations' specification of the parties' "hearing" rights,[75] we interpreted this criterion as requiring that the decision indicate that the IHO provided both parties with the opportunity to present and cross-examine witnesses. Referring to this refinement for brevity as an evidentiary hearing, we disqualified what some IHOs referred to

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the calculation for these four states' finally selected decisions on a proportional basis in arriving at the national findings for the four research questions.

69. *E.g.*, Abington Heights Sch. Dist., ODR Dkt. No. 13355-1213AS (Pa. SEA Apr. 6, 2013) (deciding denial of FAPE claim under Section 504).

70. *E.g.*, Randolph Pub. Sch., BSEA Dkt. No. 1402607 (Mass. SEA Mar. 6, 2014) (upholding public agency determination of student's residency).

71. *E.g.*, Wyo. Dep't of Educ., Dkt. No. C-0128-13 (Wyo. SEA Nov. 8, 2013) (sustaining parent allegation of denial of FAPE). For this separate decisional dispute resolution avenue under the IDEA, which is investigative rather than adjudicative, see 34 C.F.R. §§ 300.151–300.153. Among the differences from DPHs is a shorter timeline from filing to decision. *Id.* § 300.152(a) (specifying the period as 60 calendar days).

72. *E.g.*, Appeal of DPH Decision No. 2116 (Okla. SEA Jul. 28, 2017) (affirming the IHO's decision in response to parental appeal). For the relatively few two-tier states, *see supra* note 5. Among the differences for the second tier is a shorter timeline from request to decision. *See* 34 C.F.R. § 300.515(b) (specifying the period as 30 calendar days).

73. *Supra* U.S. DEP'T OF EDUC., note 25. The full version of the relevant instruction was to exclude "due process complaints resolved through a mediation agreement or through a written settlement agreement, those settled by some other agreement between the parties . . . , those withdrawn by the filing party, those determined by the [IHO] to be insufficient or without cause, and those not fully adjudicated for other reasons." *Id.* at 32–33.

74. *Supra* note 24.

75. 34 C.F.R. § 300.512(a)(2) ("Present evidence and confront, cross-examine, and compel the attendance of witnesses . . . ."); *see also id.* § 300.512(a)(4) ("Obtain a written, or, at the option of the parents, electronic, verbatim *record of the hearing*") (emphasis added).

as a "motions hearing."[76] We added as designated "marginal inclusions" the relatively few decisions where, as a de facto equivalent to witness testimony, both parties affirmatively agreed to decline an evidentiary hearing by (a) jointly stipulating all the facts[77] or otherwise (b) mutually agreeing upon specified evidence in lieu of testimony.[78] Conversely, this marginal inclusion did not extend to an inference of passive acquiescence rather than affirmative agreement by one party, such as failure to file an opposition motion.[79] As a result and in line with the broad OSEP exclusion,[80] we eliminated from the pool most dismissals or other summary dispositions, which included but were not limited to those confirming abandonment or withdrawal;[81] those based on settlements,[82] including consent agreements;[83] those determining insufficiency[84] or otherwise to be without cause.[85] The limited exceptions were for summary dispositions, regardless of the jurisdiction's particular terminology, that were after an evidentiary hearing[86] or for which both parties affirmatively waived the hearing.[87]

(2) the IHO issued a written decision regarding issues of law and fact.

For the cases that qualified under the first criterion, we included all cases for which the written decision contained both findings of fact and conclusions of law,[88] including those with extensive redactions.[89] On the "marginal" side, we

76. *E.g.*, Dep't of Juv. Serv., No. MSDE-DJS-OT 14-41126, at *3 (Md. SEA Jan. 13, 2015).

77. *E.g.*, Orange Cnty. Sch. Bd., No. 14-0293E (Fla. SEA Feb. 7, 2014).

78. *E.g.*, Mansfield Pub. Sch., No. 1507326 (Mass. SEA July 28, 2015).

79. *E.g.*, [Redacted] Sch. Dist., No. LEA-18-0015, at *2 (Wis. SEA Jan. 22, 2018).

80. U.S. DEP'T OF EDUC., *supra* note 25; *see also supra* text accompanying note 73.

81. *E.g.*, Kyrene Unified Sch. Dist., No. 12C-DP-039-ADE (Ariz. SEA Mar. 21, 2013).

82. *E.g.*, Newington Bd. of Educ., No. 15-0131 (Conn. SEA Nov. 18, 2014).

83. *E.g.*, Albuquerque Pub. Sch., No. DPH 1314-06 (N.M. SEA Nov. 12, 2013).

84. *E.g.*, Parish Sch. Bd., No. 2015-9696-IDEA (La. SEA Aug. 6, 2015).

85. *E.g.*, D.B. v. Freehold Reg'l High Sch. Bd. of Educ., EDS 03468-17 (N.J. SEA July 9, 2018) (dismissal for lack of subject matter jurisdiction); Reynoldsburg City Sch. Dist., No. 3531-2017, at *3–4 (Ohio SEA Apr. 10, 2018) (dismissal for lack of residency and failure to participate in resolution session); B.S. v. Westwood Reg'l Bd. of Educ., No. EDS 00003-16 (N.J. SEA Aug. 3, 2016) (dismissal for mootness); [Redacted] Pub. Sch., No. [redacted] (Va. SEA Feb. 12, 2016) (dismissal for lack of standing).

86. *E.g.*, DeKalb Cnty. Sch. Dist., No. 1827027, at *8 (Ga. SEA May 3, 2018).

87. *E.g.*, Broward Cnty. Bd. of Educ., No. 13-0577E, at *11–12 (Fla. SEA Mar. 29, 2013) (joint stipulation in lieu of hearing).

88. U.S. DEP'T OF EDUC., *supra* note 25. Incorporating the IDEA's statutory language, the regulations refer only to "findings of fact and decisions." 34 C.F.R. § 300.512(c)(3); *see also id.* §§ 300.513(d)(1)–(2), 300.514(c)(1) ("findings and decisions"). However, the OSEP definition's reference to "matters of law" in addition to those of fact is inferable in the regulatory language of "and decisions" and reinforced in at least twenty-five corollary state laws that are more precise in requiring legal conclusions. *See* Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act II: The Post-Hearing Stage*, 41 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 14 (2020).

89. *E.g.*, N.Y.C. Dep't of Educ., No. 147857 (N.Y. SEA Feb. 25, 2014).

included the relatively few decisions that contained factual findings and general statements from which specific conclusions of law were reasonably inferable.[90] Conversely, the resulting exclusions were for decisions, which were largely in New York City, that lacked any factual findings or legal conclusions.[91]

(3) the decision was final.

In line with the regulations,[92] we interpreted the OSEP reference to "a final decision"—in contrast with an interim decision—as not subject to further IHO proceedings before appeal to a court or, in two-tier states, the review officer level.[93] As a result, we excluded all of the remaining[94] New Jersey "emergent relief" decisions[95] with the exception of three that not only met criteria one and two but also resolved all issues in the underlying due process complaint.[96] Similarly, overlapping with the second criterion, decisions based on partial summary judgment, even if with affirmative joint agreement, did not qualify as final where subject to a hearing for the remaining claims.[97] Yet, further illustrating this third criterion, decisions limited to stay-put did not qualify—even if they met the first two criteria—except when the stay-put request was the only issue in the case.[98]

For the selection process, the first author consulted with the second author for successive small random samples of the aforementioned[99] pool of 3,037 decisions to arrive at these final versions of each criterion. Next, the first author trained a

90. *E.g.*, N.Y.C. Dep't of Educ., No. 166011 (N.Y. SEA Nov. 2, 2017).

91. *E.g.*, N.Y.C. Dep't of Educ., No. 171503 (N.Y. SEA Aug. 16, 2018).

92. 34 C.F.R. § 300.515(a)(1) (2020) ("A *final* decision is reached in the hearing.") (emphasis added). For reinforcing case law for the IDEA's finality requirement, see Perry A. Zirkel, *"Finality" under the Individuals with Disabilities Education Act: Its Meanings and Applications*, 289 EDUC. L. REP. 27, 28–31 (2013).

93. 34 C.F.R §§ 300.515–300.516 (2020).

94. Several were subject to exclusion under the successive criteria one and two.

95. Borrowed and customized from the APA rules of the Office of Administrative Law, which is New Jersey's central panel of ALJs, the state's special education regulations unusually provide for a "temporary order of emergent relief" for four limited issues, including stay-put and participation in graduation ceremonies. N.J. ADMIN. CODE §§ 1:1-12.6, 6A:14-2.7(r)–(s). The standards are similar to those for temporary restraining orders or preliminary injunctions in court.

96. Clifton Bd. of Educ. v. I.Y., OAL Dkt. No. EDS 07235-16 (N.J. SEA May 25, 2016); Clifton Bd. of Educ. v. K.M., OAL Dkt. No. EDS 18260-15 (N.J. SEA Nov. 23, 2015); V.E. v. Totowa Bd. of Educ., OAL Dkt. No. EDS 7823-14 (N.J. SEA July 3, 2014). The determination was ultimately based on the New Jersey SEA representatives' review of the case records. *See* E-mail from Catherine Anthony, Admin. Analyst II, N.J. Dep't of Educ., to Diane Holben (Mar. 2, 2021) (on file with first author).

97. *E.g.*, Dep't of Educ., Haw., Dkt. No. DOE-SY1415-040-A (Haw. SEA Apr. 24, 2015).

98. *E.g.*, Parents v. York Sch. Dep't, Dkt. No. 17-041H (Me. SEA Oct. 11, 2016).

99. *Supra* text accompanying note 68.

graduate student[100] in applying these criteria on further subsamples until they exceeded an interrater reliability level of 90% agreement. Finally, they reviewed each decision in the pool, consulting with the second author for resolution of the relatively few decisions that were subject to question.

As a result, we excluded 402 decisions,[101] leaving an unweighted and thus transitional population of 2,635 fully adjudicated decisions,[102] including the representative sampling of the four high-frequency states.[103] The two DPH categories were 2,512 standard decisions,[104] including thirty (1.1%) designated as "marginal,"[105] and 123 expedited decisions.[106]

B. Coding and Analysis

For each of the 2,635 decisions, we coded with the Statistical Program for the Social Sciences (SPSS) software[107] the following variables: (a) the issuing state and the identifying citation information, (b) the filing date, and (c) the decision date. If the decision did not specify the filing or decision date, we contacted the appropriate SEA representative and obtained this information.[108]

After entering these data, we used the "Weight Cases" feature in SPSS to re-proportion the cases for the four randomly sampled high-volume states so that their representation in the calculations would be proportional to their

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100. Gabryella Wilder, graduate student in the Professional and Secondary Education Department, East Stroudsburg University.

101. Thus, when these excluded cases were proportionally weighted to reflect the frequency distribution of cases among states, the cumulative exclusions amounted to 11.4% of the original pool of 11,384 decisions. *See infra* note 109.

102. In light of the definitional criteria, which include both "hearings" and "decisions," these terms are used herein interchangeably with the "fully adjudicated" qualifier. Moreover, subsequent references here use the abbreviated term "decisions" alone when the context provides sufficient clarity.

103. We randomly replaced any exclusions in these four states and applied the selection criteria to maintain the requisite representative n's, as identified *supra* note 67.

104. *Supra* note 19.

105. *Supra* text accompanying notes 77–87, 90, 96.

106. *Supra* text accompanying notes 14–15. Thus, expedited hearings were a limited category, accounting for only 4.7% of the 2,635 fully adjudicated decisions and only 2.0% after rebalancing of the results for the four high-frequency states.

107. *See* IBM Statistical Program for the Social Sciences Software, https://www.ibm.com/analytics/spss-statistics-software.

108. We express our appreciation to the various SEA representatives who were notably responsive in filling these gaps, which were most often for the filing dates. We particularly acknowledge the extensive assistance of Dominic Rota and Catherine Anthony of the New Jersey Department of Education, Kerry Smith of the Pennsylvania Office for Dispute Resolution, and Louise DeCandia and Cathryn Tisenchek of the New York State Education Department.

frequency in the total national data set.[109] We then used the "Date Time Wizard" function in SPSS to calculate the number of calendar days from the filing date to the decision date. Using these results, we coded each standard decision for the following approximated categories of timeliness: (a) within timelines—within the 75-day timeline;[110] (b) minor delay—76 to 100 days; and (c) major delay—more than 100 days.

For the analysis for research question 1, we computed the average number of days between the filing and decision dates, both overall and by year. For research question 2, we computed the percentage distribution into the three approximate timeliness categories for the standard decisions for both the entire period and by year.[111] For research questions 3 and 4, we first computed the corresponding averages and percentage distributions for each jurisdiction, as displayed in the Appendix.[112] Then, limiting the analysis to states with at least ten cases,[113] we determined the highest and lowest ten states for average length of time from filing to decision date, also adding their percentage distributions into the three approximate timeliness categories.

IV. RESULTING FINDINGS

The findings represent 10,063 fully adjudicated decisions, after applying the re-weighting factor to the 2,635 analyzed decisions.[114] This re-balanced total consisted of 9,858 (98.0%) standard and 205 (2.0%) expedited decisions.

In response to the first part of research question 1, the average filing-to-decision period was 200.1 days for standard decisions,[115] with the

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109. We determined the weighting factor for each randomly sampled state by calculating the percentage of cases excluded from the sample decisions analyzed and used that percentage to adjust the total number of cases for that state. We then determined the ratio of included cases in the sample to the adjusted total number of cases to calculate the weighting factor used for the re-balancing calculation.

110. *Supra* note 17 and accompanying text.

111. This research question and those that follow it do not extend to the expedited category because (1) the frequency of expedited cases was limited on a percentage basis and (2) disaggregation by jurisdiction and by timeliness category resulted in very small n's not conducive to meaningful analysis. *See supra* text accompanying notes 14–15.

112. *See infra* Appendix, pp. 866–68.

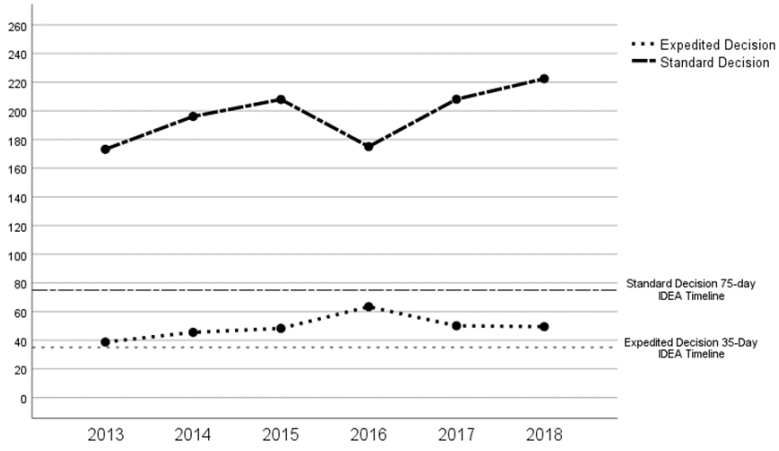
113. We selected ten cases as the lower limit based, by analogy, on studies of small sample size comparisons of means via a t-test so as to obtain accuracy. *See* J.C.F. de Winter, *Using the Student's T-Test with Extremely Small Sample Sizes*, PRACTICAL ASSESSMENT, RESEARCH, AND EVALUATION, at 1, 2 (2013). This criterion eliminated fifteen states, as identifiable in the Appendix. *Infra* Appendix at pp. 866–68.

114. *Supra* notes 77–87, 90, 96, 109 and accompanying text. As noted, the re-balanced exclusions amounted to 11.4% in relation to the original pool of 11,348 decisions.

115. Removal of the relatively small "marginal" subcategory, which was limited to the

corresponding figure for expedited decisions being 50.3 days. For the second part of research question 1, Figure 1 shows the longitudinal trend for the six-year period as compared to the aforementioned[116] seventy-five-day and thirty-five-day benchmarks for the respective categories.

Figure 1: Longitudinal Trend of Average Length of Standard and Expedited Decisions



Review of Figure 1 reveals that the disparity from the regulatory benchmark remained particularly pronounced for the standard decisions during the entire period, with a gradual upward trajectory in their trend line except for the downturn in 2016. The net growth in the average length of the standard decisions was forty-nine days, representing a 28% increase from the 173-day baseline in 2013. In contrast, the average length for the relatively few expedited decisions largely remained level and much closer to their benchmark, with the exception of the upswing in 2016.

In response to the first part of research question 2, the overall distribution of the standard decisions for the approximate timeliness categories in relation to the seventy-five-day benchmark were as follows: within timelines—15.1%; minor delay—9.2%; and major delay—75.7%.

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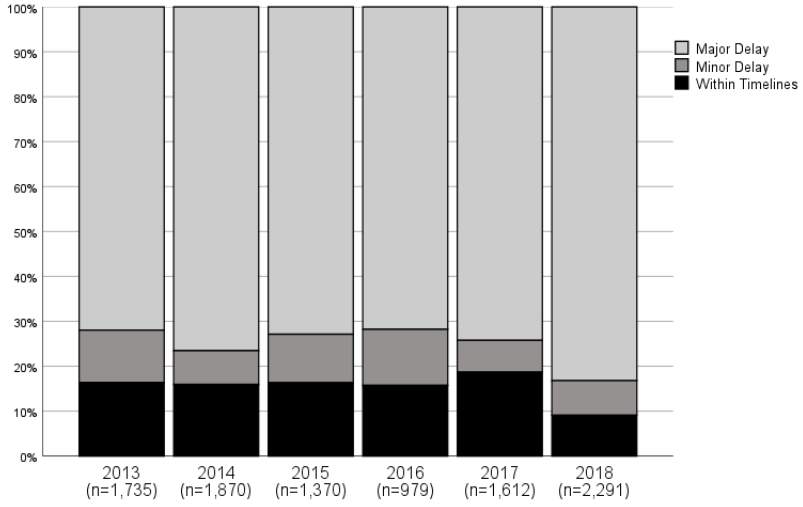
standard decisions, changed the average very slightly to 200.2 days. *See supra* text accompanying note 105. Moreover, as shown in the bottom line of the Appendix, the standard deviation, or average distance from the mean, showed a wide dispersion rather than rather close clustering around the 200.1-day average.

116. *Supra* notes 17–18 and accompanying text.

For the second part of research question 2, Figure 2 displays the longitudinal trend. Figure 2 shows that the proportion of standard decisions within the seventy-five-day benchmark remained at an almost constant 15% level until the last two years, which successively represented a modest increase and a more marked decrease. The longitudinal pattern of the other two categories was more oscillating but within a continuing predominance in the major-delay category, which was most pronounced in the most recent year. Finally, Figure 2 does not correlate consistently with Figure 1 due to the contributing effect of not only the interaction of the three categories but also the extreme outlier entries in the open-ended major delay category.

Figure 2: Longitudinal Frequency Distribution in Timeliness Categories for Standard Decisions



In response to research question 3, Table 1 reports, in descending order, the ten states, among those with at least ten decisions,[117] that have the highest average length of fully adjudicated standard DPHs.

117. *Supra* note 113 and accompanying text. For the corresponding results for all fifty-one jurisdictions in alphabetical order, see *infra* the Appendix, pp. 135–37.

Table 1: States with the Highest Average Duration for Standard Decisions[118]

State	Average Length	Major Delay	Minor Delay	Within Timeline
TN (n=11)	391	100%	0%	0%
NJ (n=124)	376	83%	2%	15%
AZ (n=24)	323	92%	0%	8%
KY (n=15)	311	100%	0%	0%
NC (n=16)	262	88%	6%	6%
RI (n=11)	248	82%	18%	0%
OR (n=10)	240	90%	10%	0%
AL (n=43)	241	79%	14%	7%
NY (n=6,388)*	223	85%	6%	9%
MA (n=97)	216	75%	12%	12%

* re-weighted n

A review of Table 1 reveals that states with the longest average filing-to-decision periods, each extending beyond a year, were Tennessee and the much higher-frequency state of New Jersey. The two other states in this top group that had relatively high frequencies of decisions were New York and Massachusetts, which ranked ninth and tenth, respectively. The accompanying distributions revealed that all ten states had at least three-quarters of their decisions in the major delay category, whereas eight of the ten states had less than one-tenth of their decisions within the benchmark timeline. Indeed, four of them had none of their fully adjudicated decisions within the regulatory benchmark.

In response to research question 4, Table 2 reports the corresponding states, among those with at least ten decisions, that had the lowest average filing-to-decision periods.

Table 2: States with the Lowest Average Duration for Standard DPHs

State	Average Length	Major Delays	Minor Delays	Within Timeline
NH (n=16)	81	25%	13%	63%
DC (n=937)*	82	13%	26%	61%
VA (n=47)	102	36%	31%	33%
IN (n=14)	109	43%	50%	7%
MD (n=109)	114	56%	15%	30%
NV (n=17)	121	53%	24%	24%
MN (n=16)	130	56%	19%	25%
GA (n=42)	137	70%	12%	19%
MO (n=22)	140	59%	23%	18%
ME (n=31)	141	81%	10%	10%

* re-weighted n

118. *See supra* text accompanying notes 77–87, 90, 96.

Within this group, New Hampshire and the high-volume jurisdiction of the District of Columbia had the lowest averages, both being slightly higher than the seventy-five-day timeline and both having almost two-thirds of their decisions within that benchmark. The rest of the states in this low group had no more than one-third of their decisions within the regulatory benchmark.

V. DISCUSSION

A. Overall Trends

The first overall finding was that the average duration of fully adjudicated hearings was much longer than the regulatory timeline for the standard category than was the corresponding disparity for the relatively infrequent expedited category.[119]

More specifically, the average length of 200 days for standard decisions was approximately 2.7 times the seventy-five-day benchmark.[120] Moreover, although not without substantial overall variance during the entire period and a vacillating trend line from year to year, the average length increased from 173 days in 2013 to 223 days in 2018.[121] Even if the longitudinal trend is interpreted as relatively stable due to its limited period and uneven pattern, the disparity from the regulatory benchmark for standard decisions, which account for 98% of the fully adjudicated DPHs, is undeniably pronounced.

The second and overlapping overall finding was that only 15% of the standard decisions for the six-year period were completed within the seventy-five-day timeline. On a longitudinal basis, this minority remained below one-sixth of the decisions, with an oscillating but continuing predominance in the major-delay category and the particularly pronounced disparity of the within-timeline and major-delay in the most recent year. Thus, despite differences in the calculations, the government reports of the within-timeline proportion tended to understate the prevailing lack of timeliness.[122]

In sum, this objective key information helps fill the gap that the GAO identified.[123] It provides the foundation for determining whether the timeliness of fully adjudicated standard decisions is significantly problematic both nationally and, as discussed *infra* based on Tables 1 and 2 and the Appendix, for particular jurisdictions.[124]

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119. *Supra* note 115 and accompanying text. For the respective regulatory benchmarks, see *supra* notes 15–17 and accompanying text.

120. *See supra* note 115 and accompanying text. See *supra* notes 15–17 and accompanying text, for the respective regulatory benchmarks.

121. *See supra* text accompanying note 112 and Figure 1.

122. *See supra* notes 25–27 and accompanying text.

123. *See supra* note 29 and accompanying text.

124. For instance, the much more complete, careful, and objective data in the Appendix

Assessing the practical significance of these overall findings and their state-by-state counterparts warrants consideration of various factors. These factors tend to overlap and interact, such that no single one is alone controlling. Moreover, the mix varies among the jurisdictions.

B. Contextual Considerations

First, the numerical indicators in this analysis are largely a matter of reasonable approximation rather than absolute precision. The leading example is the seventy-five-day benchmark, which is both an outer limit and, depending on the specific timing details of the case, a guideline goal. Similarly, with the negligible exception of sufficiency rulings, IHOs have no role in the first, thirty-day component of the seventy-five-day period.[125] Even the numbers of fully adjudicated hearings inevitably are estimates despite the careful selection standards and procedure, as the marginal subcategory of standard decisions illustrates.[126]

Second, for the segment of the seventy-five-day timeline beyond the resolution period, the IDEA regulations provide the IHO with the discretionary authority to grant "specific extensions of time" at the request of either party.[127] However, the administering agency's policy interpretations emphasize the limits of this authority,[128] and some state laws further restrict its scope.[129]

Third, the distribution of fully adjudicated standard decisions is markedly skewed for relatively few jurisdictions. The four with the highest frequencies,

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reveal that the previous estimates for New York and New Jersey were under-estimates. *See* Merced, *supra* note 33, at 19; QUARTAROLO, *supra* note 40.

125. 34 C.F.R. § 300.508(d).

126. *See supra* notes 77–87, 90, 96 and accompanying text.

127. *See supra* notes 77–87, 90, 96 and accompanying text.

128. *See Dispute Resolution Procedures*, *supra* note 12.

129. *See supra* note 13. *E.g.*, CONN. AGENCIES REGS. § 10-76h-9 (2017) (prohibiting extensions for school or attorney vacations or, with the limited exception for one discretionary 30-day postponement, settlement discussions "[a]bsent compelling reason or a specific showing of substantial hardship"); MINN. R. 1400.7500 (2018); 26 N.C. ADMIN. CODE 3.0118 (2018) (specifying examples of justifiable reasons and excluding within specified limits unavailability of counsel or witnesses); N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.5(j)(5)(iii) (2019) (prohibiting extensions for school vacations, parties' or their representatives' scheduling conflicts, or avoidable witness scheduling conflicts "[a]bsent a compelling reason or a specific showing of substantial hardship"). Conversely, the occasional state law that seems to liberalize extensions raises a possible federal preemption issue. *But see* ILL. ADMIN. CODE tit. 23, § 226.640(b)(1) (2017) (requiring postponement of the prehearing conference or the hearing upon joint party request); WASH. ADMIN. CODE § 10-08-090(1) (2017) (authorizing unilateral IHO extensions).

leading to our limited sampling procedure,[130] account for 85% of our final total.[131] The distribution is so skewed that New York, in particular New York City, alone accounts for about 60% percent of the total.[132] Thus, the accuracy of the reporting for this state—especially in light of the problematic IHO system in New York City—[133] may, along with any other effective DPH reforms in this SEA and LEA, be of particular import. Indeed, the overall national average may be an underestimation to the extent that the cases in which New York City (a) did not present any evidence at all accounted for almost one sixth of the cases in New York state, thus providing an abridged meaning to fully adjudicated hearings,[134] and (b) the reported dysfunctional DPH system in New York City and oddities in the frequency trend for New York state raise reasonable suspicion that the long, backlogged cases may be unrepresented in the data for this most active state.[135] Fourth, the widely varying ratios of filings to decisions across the jurisdictions is an indirect or partial indicator of the generally acceptable alternative of settlement.[136] For example, a high ratio would suggest that many filings ended in settlement, at least in part due to mediation and other facilitative dispute resolution mechanisms—however, a varying but presumably more limited number of filings resulted in withdrawal, abandonment, or summary dispositions. Although not empirically available, the correlation between the length of fully adjudicated hearings and the extent of settlements may be favorable albeit far from complete.[137]

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130. *See supra* note 7 and accompanying text.

131. *See infra* Appendix, pp. 866–68.

132. *See infra* Appendix (shows New York state accounts for 6,406 (sixty-four percent) of the total decisions). *See also supra* note 33 and accompanying text *(*states that New York City accounts for more than ninety percent of the state's decisions and according to New York's representative, the specific proportion for the six-year period of our analysis was ninety-six percent); *see also* E-mail from Cathryn Tisenchek, Supervisor of Due Process Unit, N.Y. State Educ. Dep't, to Diane Holben (Aug. 24, 2020, 14:14 EST) (on file with first author).

133. *See* Merced, *supra* note 33 (identifying major problems with physical space, compensation, and procedures of the New York City Impartial Hearing Office).

134. *See e.g.*, Student with a Disability, Dkt. No. 172268 (July 9, 2018); Student with a Disability, Dkt. No. [redacted] (Feb. 23, 2015); Student with a Disability, Dkt. No. [redacted] (Mar. 4, 2013) (on file with first author).

135. *See supra* note 33 and accompanying text. The particularly questionable year is 2016, which had an unexplained low total in comparison to CADRE data.

136. Zirkel & Gullo, *supra* note 19, at 878–80 (revealing a range of average filings/decisions ratios for the period 2012–2017 from a low of 3.2 for the District of Columbia and Idaho to a high of 93.5 for Tennessee); *see also infra* note 144.

137. From the length side, extensions for settlements and, more generally, long costly hearings may foster settlements during the post-resolution phase—yet a much stricter position on extensions and generally more efficient hearing management may foster settlements during the resolution phase. Conversely, from the settlement side, more frequent settlements may facilitate more timely

Fifth, as the aforementioned New York City backlog illustrates,[138] an overlapping factor is the supply-demand ratio of IHO resources and filing levels. A lower ratio, meaning supply being outpaced by demand, may result in lengthier hearings, although it may also foster more efficient hearing management.

Various other factors may come into play—depending on the jurisdiction—including the litigiousness of the jurisdiction,[139] the nature of its IHO system,[140] and—as discussed *infra*—the posture and practices of its IHOs.

C. State Findings

The ten states with the highest average filing-to-decision periods included the leaders of Tennessee (391 days) and New Jersey (376 days), whereas New Hampshire (eighty-one days) and the District of Columbia (eighty-two days) led the corresponding ten lowest-length states. For examples of the various relevant considerations, the top ten and bottom ten jurisdictions for average length of DPHs had similar proportions of laws strictly restricting extensions;[141] high-volume of decisions;[142] and full-time IHOs.[143] In limited contrast, the top, or longest average duration group tended to skew toward high filings-to-decisions ratios and the bottom group toward lower ratios.[144] Finally,

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completion of hearings, but those that are unsuccessful will have the opposite effect.

138. *See supra* note 33 and accompanying text.

139. For the IDEA context, the availability of specialized attorneys on the parent side and their relationship with school districts and their legal counsel is a correlating factor. The result is a skew in the volume of DPHs to relatively few jurisdictions. *Supra* note 20. For re-examination of the skew on a per capita basis in relation to the special education student population, see also Gina L. Gullo & Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Comparative Enrollments-Based Analysis*, 382 EDUC. L. REP. 454 (2020).

140. *See supra* note 24.

141. Of the small cluster of states with such restrictive provisions (*supra* note 128), New York is in the top group (*supra* Table 1), and Minnesota is in the bottom group (*supra* Table 2).

142. The top group included New York, and the bottom group included the District of Columbia. Given New York's predominance, the other two high-volume jurisdictions were both below the overall average, with California being at 173 days and Pennsylvania at 169 days. *Supra* Tables 1 and 2 and *infra* Appendix A, p. 866–68.

143. The top group included four central panels (Arizona, New Jersey, North Carolina, and Oregon) and one specialized, semi-autonomous panel (Massachusetts). The bottom group had three central panels (Maryland, Minnesota, Missouri) and one specialized autonomous panel (District of Columbia). *Id.*

144. The top group included four jurisdictions with relatively high ratios, in comparison to the overall ratio of 19.3 (Tennessee – 93.5, Massachusetts – 50.4, Arizona – 45.1, and Alabama – 44.0) and only one with a notably low ratio (Rhode Island – 10.0). The bottom group included only one jurisdiction with a relatively high ratio (Nevada – 57.2) and five with relatively low ratios (District of Columbia – 3.2, New Hampshire – 6.6., Virginia – 9.2,

the top state, Tennessee, temporarily faced litigation similar to the aforementioned[145] lawsuit against the second-place state and led by a New Jersey attorney identifiably connected with the plaintiff attorneys in that case.[146]

D. Overall Recommendations

Although the other considerations merit careful concomitant attention, the forty-five-day phase from the end of the resolution period to the issuance of the decision[147] is a particular priority in reducing the length of DPHs.[148] More specifically, recommendations for this period concern the selection, support, accountability, and culture of the jurisdiction's IHOs.

Selection should include not only the broad criteria in the IDEA[149] and corollary state laws,[150] but also efficacy in conducting efficient DPHs, including closer approximation to the regulatory timeline. Support here generically refers not only to compensation but also other resource allocation, including training, that reinforce this efficiency criterion.[151] Predictably, the arguments that a priority on "efficiency" will contradict the rubric of "fairness" come from both the party attorneys, who may have an incentive for longer hearings,[152] and the IHOs, who are not only likely to

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Missouri – 10.0, and Minnesota – 12.9). *Id.*; the ratios are for the CADRE data for 2012–2017. *See* Zirkel & Gullo, *supra* note 19, at 878–80.

145. *Supra* notes 41–49 and accompanying text.

146. However, the systemic timeliness claim in this case was part of the appeal of an individual student's due process case rather than a putative class action. The parent ended the case, asserting health reasons. *See* B.H.T. v. Sumner Cnty. Bd. of Educ., No. 20-cv-00732, 2020 WL 5217107 (M.D. Tenn. Aug. 27, 2020) (trial pleading), voluntarily dismissed with prejudice (Feb. 1, 2021) (on file with first author); for the attorney connection, see SCHOOL KIDS LAWYER, http://schoolkidslawyer.com/ (last visited Nov. 8, 2021).

147. *Supra* notes 44, 124, and accompanying text (distinguishing IHO 45-day phase within overall 75-day timeline).

148. *E.g.*, Connolly et al., *supra* note 4, at 159–61 (finding, in a survey of SEA dispute resolution representatives, that the length of DPHs was the most frequently identified problem and, yet, their reported actions in progress for systemic improvement did not specifically address this problem).

149. 20 U.S.C. § 1415(f)(3)(A)(ii)–(iv) (specifying knowledge and ability in the areas of special education law, conducting hearings, and writing decisions, with the last two areas "in accordance with appropriate, standard legal practice").

150. *See* Zirkel, *supra* note 13, at 18 (identifying the limited additions, which largely reinforced the IDEA criteria).

151. Thus, for example, compensation needs to be not only ample to attract IHOs with high qualifications and commitment but also, depending on whether they are full-time employees or part-time contractors, formulated to incentivize balanced efficiency.

152. Diversity between and within both parent-side and district-side attorneys warns against over-generalization. For many but far from all IHOs, scheduling pressures or

resist change but also increasingly follow the legal norms of judicialization.[153] However, efficiency in terms of timeliness includes rather than precludes fairness.[154] An effectively managed hearing, which keeps the focus on the essential evidence, the minimum necessary transaction costs, and timely completion is fair to the child, the school system, and the taxpayers.

For those in opposition who ultimately rely on the fundamental fairness of Fourteenth Amendment Procedural Due Process, a review of the IDEA and its DPH mechanism reveals that (a) the origin was a pair of consent decrees that started with but did not decide Fourteenth Amendment claims;[155] (b) as confirmed in the founding version of the Act, the primary focus was on students with disabilities who, on a relatively permanent basis, did not have access to any education or special education;[156] (c) the contrasting primary focus today is on children with disabilities who are in school and who have special education services but challenge whether these services meet the

convenience may favor longer hearings. Similarly, for those for whom billable hours are an inevitable, although not exclusive, incentive, more frequent and more lengthy hearing sessions and longer periods before and after sessions not only increase these monetizing hours for preparation and implementation but also provide more flexibility for maximizing them among the attorney's clients and cases. Yet for other IHOs, financial competition or ethical commitment to clients may favor quicker completion of DPHs.

153. Here too, exceptions apply. Some IHOs may lead or welcome reform for efficiency and other systemic improvements. Similarly, the judicialization trend is notable while not being uniform. *See* Perry A. Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 44 (2007) (finding various indicators of increased judicialization in an exploratory examination of a single state); Connolly et al., *supra* note 4, at 161 (finding increasing trend in state systems under the IDEA of attorney IHOs, full-time IHOs, and central panel ALJs); Zirkel, *supra* note 13, at 25–27 (observing the increasing formalization without IDEA customization of the APA laws that often accompany central panels).

154. Indeed, in some jurisdictions, particularly those that are congested in terms of either IDEA hearings or, for states with central panels, other administrative hearings, efficiency may lead to summary dispositions. In such situations, the effects may well be (a) longer average periods for DPHs that meet the criteria for being fully adjudicated and (b) questions about fairness of not fulfilling the IDEA's specified rights for a hearing as well as the cathartic benefits of direct participation in a hearing. Consider the fairness issue, for example, of the right to "confront [and] cross-examine . . . witnesses" in states like Vermont; twelve of its fifteen posted decisions for this six-year period were summary dispositions. *See* 34 C.F.R. §§ 300.512(a)(2), 300.512(a)(4).

155. *See generally* Mills v. Bd. of Educ. of District of Columbia, 348 F. Supp. 866, 880–81 (D.D.C. 1972); Pa. Ass'n for Retarded Child. v. Pennsylvania., 343 F. Supp. 279, 304–05 (E.D. Pa. 1972).

156. *See, e.g.*, Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., 458 U.S. 176, 181 (1982) (quoting a foundational provision of the IDEA as establishing the first priority on "'handicapped children who are not receiving an education'"); *see also id.* at 192 ("By passing the Act, Congress sought primarily to make public education available to handicapped children").

standards of appropriateness for a limited period;[157] and (d) the Fourteenth Amendment Procedural Due Process represents a flexible balance of the student's property or liberty interest, which now is much more limited than at the origin of the IDEA, and the institutional interest, which is at least as much now as it was fifty years ago in light of the expanded obligations yet limited resources of school systems.[158] As a result, a claim that IHO practices that reduce the length of the DPH to approximate the regulatory timeline, with limited exceptions for compelling circumstances, violates Fourteenth Amendment Due Process is untenable.[159]

Instead, the focus for attaining efficiency that includes fairness is ultimately on the IDEA requirements for DPHs[160] and the related case law. In applying the IDEA standards for DPHs, as in applying those for IHO impartiality,[161] the courts have generally accorded wide, deferential latitude for management of the hearing process.[162] Indeed, the same broad boundaries that have made relief difficult for lengthy hearings provide ample discretion for shorter hearings.[163] For example, courts have accorded IDEA IHOs such discretion

157. *See, e.g.*, Zirkel & Skidmore, *supra* note 22, at 552–53 (finding most rulings in DPHs were based on FAPE and its remedies with limited partial exceptions, such as child find and adjudicative dispositions). Moreover, the vast majority of these cases focused on one or two years of IEPs although the outer boundaries of the limitations period are not that narrowly and clearly limited. *See, e.g.*, Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations Impartial Hearings under the Individuals with Disabilities Education Act*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 305 (2015) (reviewing the ongoing judicial interpretation of the limitations period for filing for a DPH in the 2004 amendments of the IDEA).

158. By analogy, consider the application of Fourteenth Amendment Due process to the expulsion of public-school students, which generally does not require full-blown witness and cross examination rights and for which the school board, rather than an impartial third party, is the adjudicator. *E.g.*, C.Y. v. Lakeview Sch. Dist., 557 F. App'x 426, 430–34 (6th Cir. 2014).

159. In addition to the already more than constitutionally required hearing process of the IDEA, including the third-party neutral as the adjudicator, the parent faces a high threshold hurdle for having this constitutional issue addressed. *See, e.g.*, M.G. v. Williamson Cnty. Schs., 720 F. App'x 280, 284 n.3 (6th Cir. 2018) (rejecting constitutional claim based on late decision as without case law support); Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236, 250–51 (S.D.N.Y. 2000) ("[A] a plaintiff cannot prevail on a § 1983 claim for violation of procedural due process under the Fourteenth Amendment if the violations for which she seeks redress are actionable under the IDEA.").

160. *See* 34 C.F.R. §§ 300.511–13 (outlining hearing requirements and the rights of parties).

161. *See* Perry A. Zirkel, *The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update*, 21 PEPPERDINE DISP. RESOL. L.J. 257, 270–72 (2021) (finding continuing case law trend of steep uphill slope for plaintiffs challenging hearing officer impartiality).

162. *See*, Perry A. Zirkel, *Impartial Hearings under the IDEA: Legal Issues and Answers*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 32, 71–86 (2018) (detailing the extent of latitude granted).

163. *Supra* note 54.

in denying a party's requests for extensions.[164] Similarly, courts have generally deferred to IHOs' other practices to reduce the length of hearings.[165] Likewise, agency policy interpretations support IHOs' authority to engage in such efficiency measures with a firm but not absolutist approach.[166]

A careful reading of IDEA IHO decisions, as well as those at the review officer and court levels, reveals that in most cases, the decisive facts are relatively limited and not at the off-issue detailed level of much of the proffered testimony. Moreover, the longer the period between the filing and the testimony, the more likely that not only the witnesses will have memory losses but also the original issues, such as the appropriateness of the most recent one or two IEPs, will no longer be timely for the child and the district. Moving the case to prompt completion, after the oft-abbreviated resolution phase,[167] can lead to more focused evidence, a more legally defensible decision, and greater mutual acceptance in terms of less expense and a timelier effect.

Upon the aforementioned solid systemic support, including selection, compensation, and accountability, the practices that can reduce the length of the IHO's forty-five-day phase of the regulatory timeline without prejudicing the parties' rights to a fair hearing potentially include efficiencies in the successive steps of (a) assignment; (b) pre-hearing preparations; (c) scheduling, including session and testimony limits; (d) extensions; (e) closing arguments; and (f) decision

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164. *E.g.*, P.J. v. Pomona Unified Sch. Dist. 248 F. App'x 774 (9th Cir. 2007); J.S. *ex rel.* John S. v. N.Y.C. Dep't of Educ., 69 IDELR ¶ 153 (S.D.N.Y. 2017); A.S. v. William Penn Sch. Dist., 63 IDELR ¶ 62 (E.D. Pa. 2014); J.D. *ex rel.* Davis v. Kanawha Cnty. Bd. of Educ., 53 IDELR ¶ 225 (S.D. W. Va. 2009), *aff'd mem.*, 357 F. App'x 515 (4th Cir. 2009); J.R. v. Sylvan Union Sch. Dist., 49 IDELR ¶ 253 (C.D. Cal. 2008); D.Z v. Bethlehem Area Sch. Dist., 2 A.3d 712, 735–36 (Pa. Commw. Ct. 2010); O'Neil v. Shamokin Area Sch. Dist., 41 IDELR ¶ 154 (Pa. Commw. Ct. 2004).

165. *E.g.*, B.S. *ex rel.* K.S. v. Anoka Hennepin Pub. Sch., 799 F.3d 1217, 1221–22 (8th Cir. 2015) (upholding pre-hearing order limiting each party to nine hours based on circumstances of the case, including state law); M.V. v. Conroe Indep. Sch. Dist., 75 IDELR ¶ 134 (S.D. Tex. 2019) (upholding IHO non-absolute allocation of four hours to each side in absence of prejudice); T.M. v. District of Columbia, 75 F. Supp. 3d 233, 246–47 (D.D.C. 2014) (concluding that limitation on cross-examination was reasonable in the context of hearing specified in prehearing order as maximum of four days); A.M. v. District of Columbia, 933 F. Supp. 2d 193, 207 (D.D.C. 2013) (viewing the IHO's reduction of repetitive testimony and sua sponte questions in completing hearing in one day as efficiency rather than incompetence or bias); *cf.* L.S. v. Bd. of Educ. of Lansing Sch. Dist. 158, 65 IDELR ¶ 225 (N.D. Ill. 2015); Sch. Bd. of Norfolk v. Brown, 769 F. Supp. 2d 928, 938 (E.D. Va. 2010) (upholding IHO's enforcement of time limits set with parties' agreement).

166. *E.g.*, Letter to Kane, Office of Special Education Programs, 65 IDELR ¶ 20 (OSEP 2015) (advising that a state best-practice guideline limiting a hearing to three sessions of six hours per session does not violate the IDEA as long as it allows the IHO to make an exception).

167. *See, e.g.*, *Dispute Resolution Procedures*, *supra* note 12, at 50.

writing. As an example, IHOs could develop a uniform practice of extensions being the exception rather than the rule.[168]

The particular procedures and practices will be customized to the jurisdiction. For jurisdictions with above-average numbers of fully adjudicated hearings, increasing the timeliness of decisions is not only particularly worthwhile in terms of its broad impact but also particularly warranting a concerted effort. As an example, Pennsylvania's specialized full-time IHO cadre has developed guidelines that include limits on hearing sessions and testimony.[169] As illustrated in the introduction and confirmed in Table 1, New Jersey merits more concerted and effective efforts.[170] Yet, as illustrated in Table 2, the District of Columbia has made significant advances since the systematic delays that were at issue years ago in *Blackman*.[171]

In closing, the well-considered words of a federal judge bear repetition for those who equate fairness for IDEA hearings with an adjudicative approach closer to that of the courts:

> Detailed rules of procedure are no panacea against lengthy, contentious, wasteful, divisive, or delay-causing arguments. Indeed, highly formalized systems of legal procedure can be fodder for delay. Due process is not always served by bringing every dispute into a mini-courtroom where only lawyers can navigate the myriad rules. A formalized system could serve to disenfranchise and exclude the very people meant to be served, namely the parents and the educators.[172]

168. The rare exception would be any state law that clearly and specifically limits the hearing officer's discretion to do so. *See id.* at 44.

169. PA. OFF. FOR DISP. RESOL., UNIFORM PRE-HEARING DIRECTIONS 6 (2020), https://odr-pa.org/due-process/procedures/ (providing guidelines of two hearing sessions and one hour limit for each party's questioning of each witness, with discretion for exceptions).

170. Such efforts were already underway in New Jersey. *Supra* text accompanying note 42. The plaintiff's motion and court's action to stop these efforts, at least temporarily, is clearly questionable. *Supra* text accompanying note 43.

171. *Supra* notes 48–51 and accompanying text.

172. Lillbask *ex rel.* Mauclaire v. Sergi, 117 F. Supp. 2d 182, 192 (D. Conn. 2000).

APPENDIX: AVERAGE LENGTH OF AND TIMELINESS DISTRIBUTION OF STANDARD DPHS PER JURISDICTION

State (no. of decisions)	**Rank**[173]	**Average (std. deviation)**	**Major Delay**	**Minor Delay**	**Within Timeline**
AK (n=4)	16	136 (44.7)	75%	25%	0%
AL (n=43)	42	241 (187.8)	79%	14%	7%
AR (n=38)	24	161 (84.8)	71%	16%	13%
AZ (n=24)	48	323 (299.0)	92%	0%	8%
CA (n=555)*	28	174 (85.9)	82%	7%	11%
CO (n=32)	22	146 (61.9)	78%	6%	16%
CT (n=63)	31	189 (101.0)	77%	13%	11%
DC (n=937)*	4	82 (28.1)	13%	26%	61%
DE (n=7)	10	105 (14.2)	57%	43%	0%
FL(n=86)	29	176 (119.1)	70%	14%	16%
GA (n=42)	18	137 (69.3)	70%	12%	19%
HI (n=58)	36	210 (117.9)	95%	2%	3%
IA (n=8)	45	268 (128.6)	89%	0%	11%
ID (n=4)	14	124 (15.4)	100%	0%	0%
IL (n=87)	35	207 (127.2)	93%	3%	3%
IN (n=14)	11	109 (39.6)	43%	50%	7%
KS (n=8)	32	190 (124.0)	75%	13%	13%

173. The rank is from the shortest to the longest duration among the fifty-one jurisdictions.

State (no. of decisions)	**Rank**[173]	**Average (std. deviation)**	**Major Delay**	**Minor Delay**	**Within Timeline**
KY (n=15)	47	311 (133.9)	100%	0%	0%
LA (n=9)	5	90 (45.2)	44%	22%	33%
MA (n=97)	38	216 (141.5)	75%	12%	12%
MD (n=109)	12	114 (46.8)	56%	15%	30%
ME (n=31)	20	141 (48.7)	81%	10%	10%
MI (n=36)	25	163 (79.1)	75%	11%	14%
MN (n=16)	15	130 (77.9)	56%	19%	25%
MO (n=22)	19	140 (79.5)	59%	23%	18%
MS (n=5)	30	186 (176.4)	60%	20%	20%
MT (n=4)	46	273 (166.4)	75%	0%	25%
NC (n=16)	44	262 (152.1)	88%	6%	6%
ND (n=0)	NA	NA	NA	NA	NA
NE (n=1)	17	136 (NA)	100%	NA	NA
NH (n=16)	3	81 (62.2)	25%	13%	63%
NJ (n=124)	49	376 (267.5)	83%	2%	15%
NM (n=25)	23	146 (49.7)	88%	8%	4%
NV (n=17)	13	121 (56.7)	53%	24%	24%
NY (n=6,388)*	39	223 (129.2)	85%	6%	9%
OH (n=38)	37	211 (126.0)	82%	13%	5%
OK (n=4)	40	240 (140.4)	100%	0%	0%

State (no. of decisions)	**Rank**[173]	**Average (std. deviation)**	**Major Delay**	**Minor Delay**	**Within Timeline**
OR (n=10)	41	240 (145.5)	90%	10%	0%
PA (n=538)*	27	169 (100.7)	76%	9%	16%
RI (n=11)	43	248 (201.3)	82%	18%	0%
SC (n=9)	2	77 (18.0)	11%	33%	56%
SD (n=2)	7	97 (7.1)	50%	50%	0%
TN (n=11)	50	391 (236.5)	100%	0%	0%
TX (n=147)	33	198 (121.1)	84%	9%	8%
UT (n=3)	9	103 (19.4)	33%	67%	0%
VA (n=36)	8	102 (59.0)	36%	31%	33%
VT (n=3)	6	91 (20.3)	33%	33%	33%
WA (n=81)	34	206 (122.6)	86%	7%	6%
WI (n=16)	25	161 (79.1)	81%	13%	6%
WV (n=6)	21	145 (52.1)	67%	33%	0%
WY (n=2)	1	68 (2)	0%	50%	50%
National Average (n=2510)		186 (139.2)	71%	12%	18%