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**AN ANALYSIS OF EXPEDITED DUE PROCESS HEARING DECISIONS UNDER THE IDEA<sup>a1</sup>**

The adjudicative avenue of decisional dispute resolution under the Individuals with Disabilities Education Act (IDEA) starts with an impartial administrative proceeding referred to as a due process hearing (DPH).<sup>1</sup> A small specialized subset of DPHs, those within the context of disciplinary changes in placement, must be “expedited.”<sup>2</sup>

Almost all of the extensive scholarly literature specific to IDEA DPHs either subsumes or excludes the expedited decisions.<sup>3</sup> One reason for this is their relative infrequency. According to the governmental data reported by the Center on Appropriate Dispute Resolution in Special Education (CADRE), during the past ten years, expedited DPH decisions have accounted for only 2.6% of all DPH decisions.<sup>4</sup> Yet, their specialized subject matter represents high stakes for both students with disabilities and school districts. Indeed, one of the hallmarks of the most recent amendments to the IDEA was the complex compromise specific to disciplinary changes in placement.<sup>5</sup>

**\*764** This short article provides a singular focus on expedited DPH decisions. The first part provides a definitional framework based on the distinctive features of expedited DPHs. As the follow-up to a recent empirical analysis of the outcomes of a nationally representative sample of fully adjudicated standard DPH decisions,<sup>6</sup> the second part provides a corresponding analysis of the expedited DPH decisions.

**I. Legal Boundaries of Expedited DPHs**

Expedited DPHs differ from the general model in two major respects--timing and subject matter. For timing, the IDEA regulations require a shorter length, amounting basically to thirty school days for expedited DPH decisions<sup>7</sup> as compared with seventy-five calendar days plus extensions for standard DPH decisions.<sup>8</sup> Moreover, as inferred from their absence in the applicable IDEA regulations for expedited, as compared with standard, DPHs, and as made explicit in some state laws, extensions are prohibited.<sup>9</sup>

For subject matter, the DPH must be expedited for either a parent challenge to any aspect of a disciplinary change in placement, including the manifestation determination (M-D) and interim alternative education setting (IAES), or a school district filing for an IAES based on dangerousness.<sup>10</sup> According to agency policy interpretation, for any of these issues, neither the hearing officer nor the parties may waive the expedited DPH obligation, although the hearing officer has the discretion to bifurcate or otherwise treat on a non-expedited basis other issues within the broader subject matter jurisdiction.<sup>11</sup>

**II. Analysis of National Sample of Expedited DPHs**

## A. Method

\*765 As a follow-up to the aforementioned analysis of a nationally representative sample of standard DPHs,<sup>12</sup> the present more focused analysis examines the issues and outcomes of expedited DPHs. Using the same assembled national database of fully adjudicated DPHs for the six-year period 2013-2018, the first step was to eliminate the surprising proportion, approximating 15% of the decisions that incidentally referred in their introduction as arising from the filing party's request for an "expedited" hearing but, upon closer examination, did not contain any of the definitional subject matter issues.

The second step was to formulate the following taxonomy of issue categories for coding:

- threshold issues of (a) "deemed to know"<sup>13</sup> and (b) disciplinary "change in placement" (CIP)<sup>14</sup>
  
- core issues: (a) M-D;<sup>15</sup> (b) the three unilateral exceptions, or "special circumstances", for an IAES;<sup>16</sup> (c) the dangerousness exception;<sup>17</sup> and (d) appropriate IAES.<sup>18</sup>
  
- ancillary issues: (a) parental notices;<sup>19</sup> (b) functional behavioral assessment (FBA) and behavior intervention plan (BIP);<sup>20</sup> and (c) other FAPE.<sup>21</sup>

The third step was the author's review and coding for each decision specific to the foregoing issue categorization and outcome.<sup>22</sup>

The final step was compiling the results in response to the following two research questions:

- (1) Which were the most frequent issues of expedited DPH decisions?
  
- (2) What was the overall outcomes distribution of the issues rulings and decisions?

## B. Findings

The final number of expedited DPH decisions was 79, which in turn accounted for 96 issues rulings. The 59 decisions represented 25 states and the District of Columbia.<sup>23</sup>

In response to research question #1, the most frequent issue categories were as follows in descending order: M-D (n=35), dangerousness (n=22), disciplinary CIP (n=14), and IAES FAPE (n=9).<sup>24</sup>

\*766 In response to research question #2, the outcomes distribution was as follows for the issue rulings and, after conflation, for the decisions.

	FOR PARENTS	MIXED	FOR SCHOOL DISTRICTS
<b>Issue Rulings</b>	42%	3%	55%
(n=96)	(n=40)	(n=3)	(n=53)
<b>Decisions</b>	39%	9%	52%
(n=79)	(n=31)	(n=7)	(n=41)

Among the most frequent issue categories, the most favorable distribution for parents was for disciplinary CIPs (50% in favor of each side, with no mixed rulings).

Incidental findings included the following: (1) hearing officers were not particularly strict about enforcing the aforementioned prohibition of extensions;<sup>25</sup> (2) approximately 15% of the cases presented non-expedited issues, with hearing officers varying widely as to whether to exclude them for separate proceedings;<sup>26</sup> and (3) parents proceeded pro se in approximately one-third of the cases.

### III. Discussion

The relatively low overall frequency of expedited DPH decisions does not square with the complex and high-stakes nature of the IDEA provisions for disciplinary changes in placement. This may be attributable to the relative lack of resources of students with disabilities who are most vulnerable to disproportional discipline, or those from low-income and minority backgrounds.<sup>27</sup>

At any rate, expedited DPH decisions merit more attention than the relative lack of research to date. This exploratory analysis reveals that the most frequent issue in these decisions are M-D and dangerousness. The primacy of M-D is not surprising in light of its core and pivotal position. Moreover, unlike the other issues within this limited context, previous research has examined this topic more extensively, including the applicable procedural and substantive aspects and judicial rulings.<sup>28</sup> The second-place position of the dangerousness exception is less expected, especially in comparison to the three other special exceptions of weapons, illegal drugs, and serious bodily injury. It may well be a reflection of the priority on school safety extending from school shootings to student bullying, especially in cases that do not include the enumerated other three special circumstances.

The outcomes distribution of the expedited DPH decisions, as compared to the corresponding standard decisions nationally (without the outlier New York City cases), tends toward a shifting from the mixed to the pro-parent category with the pro-district category \*767 remaining relatively stable at approximately half of the decisions.<sup>29</sup> This moderate difference may be attributable to the more uniform issues within the limited subject matter of disciplinary changes in placement and the more likely kneejerk reaction of school officials in this safety-related context.

This initial exploratory analysis will hopefully stimulate more in-depth research specific to expedited DPH decisions, extending to those cases that are either resolved prior to a hearing officer decision or upon appeal to court. Moreover, the corresponding state complaint decisions in the disciplinary context merit comparative attention.

## Footnotes

a1 *Education Law Into Practice* is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 421 Educ. L. Rep. 763 (May 23, 2024).

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20 U.S.C. § 1415(f). The corresponding IDEA regulations are at 34 C.F.R. §§ 300.507-300.515.

1 20 U.S.C. § 1415(k)(4). The corresponding IDEA regulation is at 34 C.F.R. §§ 300.532(c).

2 A limited exception is a recent analysis based on a national database of “fully adjudicated” DPHs that separately analyzed the average time from filing to decision of expedited and, for lack of an official label, “standard” DPH decisions. Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed ...*, 73 Admin. L. Rev. 833, 853-54 (2021) (finding the average length to be 200.1 days for standard and 50.3 for expedited DPH decisions). For the definitional criteria of “fully adjudicated,” see *id.* at 849-52 (specifying the application of “evidentiary hearing,” “written decision,” and “final”). For the guiding source, see U.S. Dep’t of Educ., *EMAPS User Guide: IDEA Part B Dispute Resolution Survey* (Sept. 2022), <https://www2.ed.gov/about/inits/ed/edfacts/emapsidea-part-b-dispute-resolution-user-guide.pdf>

3 See, e.g., CADRE, IDEA Dispute Resolution Data Summary for U.S. and Outlying Areas: 2011-12 to 2021-22 (2023), <https://www.cadeworks.org/resources/cadre-materials/2021-22-dr-data-summary-national>.

4 See, e.g., U.S. Department of Education, IDEA Reauthorized Statute: Discipline (2006), [https://sites.ed.gov/idea/files/Discipline\\_8-23-06\\_Final.pdf](https://sites.ed.gov/idea/files/Discipline_8-23-06_Final.pdf). For a brief comparison of these features of the 2004 amendments of the IDEA with those of the 1997 amendments, see Perry A. Zirkel, “Stay-Put” under the IDEA Discipline Provisions: What Is New? 214 Educ. L. Rep. 467 (2007); cf. Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 Educ. L. Rep. 445 (2007) (providing corresponding brief comparison between the discipline provisions in the 2004 amendments and the 2006 regulations). For agency guidance on disciplinary changes in placement, see Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions (OSERS 2022), <https://sites.ed.gov/idea/idea-files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions/>.

5 Perry A. Zirkel & Diane M. Holben, *The Outcomes of Fully Adjudicated Impartial Hearings under the IDEA: A Nationally Representative Analysis with and without New York*, 44 J. Nat’l Ass’n Admin. L. Judiciary 126, 135-36 (2023) (finding that New York, almost entirely attributable to New York City, was an outlier accounting for more standard DPH decisions than the 49 other states and the District of Columbia and an outcomes pattern strongly skewed to parents, whereas the overall outcomes distribution in these other jurisdictions was as follows: for parents - 26%, mixed - 26%, and for districts - 48%).

6 34 C.F.R. § 300.532(c)(2)-(3) (specifying twenty school days between filing and hearing (including fifteen-calendar day resolution period) plus ten school days between hearing and decision).

7 *Id.* § 300.515(a) (specifying thirty calendar days for the resolution period plus forty-five calendar days for the hearing and decision).

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- 9 Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act, 61 IDELR ¶ 232, at item E-4 (OSEP 2013), <https://sites.ed.gov/idea/idea-files/osep-memo-and-qa-on-dispute-resolution/>; Andrew M.I. Lee & Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act IV: Expedited Hearings*, 42 J. Nat'l Ass'n Admin. L. Judiciary 57, 73 (2022) (identifying approximately eleven state laws that prohibit extensions in expedited cases).
- 10 34 C.F.R. § 300.532(c). For the specific wording as to the dangerousness exception, *see id.* § 300.532(a) (“[if the district] believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others”).
- 11 Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016), <https://sites.ed.gov/idea/idea-files/policy-letter-august-22-2016-to-perry-zirkel/> (non-waivability); Letter to Snyder, 67 IDELR ¶ 96 (OSEP 2015), <https://sites.ed.gov/idea/idea-files/policy-letter-december-13-2015-to-colleen-a-snyder/> (bifurcation option).
- 12 *Supra* note 6. This sample is much more systematically representative than the only commercially available database that includes DPH decisions.
- 13 34 C.F.R. § 300.534 (extending the applicable disciplinary protections to students not previously identified as eligible for special education services for whom the school district has reason to suspect possible eligibility on three alternative bases of knowledge).
- 14 *Id.* § 300.536 (more than ten consecutive days of removal or equivalent pattern of cumulative days within a school year).
- 15 *Id.* § 300.530(e)-(f)
- 16 *Id.* § 300.530(g).
- 17 *Supra* note 10.
- 18 34 C.F.R. §§ 300.530(d) and 300.531.
- 19 *Id.* § 300.530(h).
- 20 *Id.* §§ 300.530(d)(1)(ii) and 300.530(f).
- 21 *Id.* §§ 300.530(d)(1)(i) and 300.530(d)(4).
- 22 Paralleling the preceding article (*supra* note 6), the three-category outcome scale was for parents, mixed, and for school district. However, unlike the standard decisions, the limited number and jurisdictional distribution of expedited decisions did not warrant the need for weighting of particular states. Similarly, because expedited decisions were not at all frequent for New York, it did not warrant differentiated outlier status.
- 23 The only jurisdictions accounting for more than a handful were the District of Columbia (n=7), Pennsylvania (n=10), and Texas (n=7).
- 24 The remaining issue categories each accounted for five or less rulings.
- 25 *Supra* note 9.

26 *Supra* note 11.

27 *See, e.g.*, Kevin P. Brady & Suzanne Kucharzyk, *Racial Disproportionality and the Special Education Paradox: The Divide between Legal Compliance and Best Practice(s)*, 384 Educ. L. Rep. 585, 607 (2021) (recognizing inherent limitations of federal legal compliance); Claire Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. Rev. 860, 917 (2018) (pointing out asymmetries of expertise and power).

28 *See, e.g.*, Raj, *supra* note 27, at 883-89; Perry A. Zirkel, *The Substantive “Yes” and “No” Manifestation Determinations under the IDEA: An Updated Case Law Analysis*, 48 Communiqué, 26 (Jan./Feb. 2020); Perry A. Zirkel, *Manifestation Determinations under IDEA 2004: A Legal Analysis*, 29 J. Special Educ. Leadership 32 (2016); Perry A. Zirkel, *Manifestation Determinations under the new Individuals with Disabilities Education Act: An Update*, 31 Remedial & Special Educ. 378 (2010).

29 *Supra* note 6.

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