

**MEMORANDUM OF UNDERSTANDING**

**By and between the  
NORTH CAROLINA STATE BOARD OF EDUCATION (BOARD), through the  
DEPARTMENT OF PUBLIC INSTRUCTION (DPI), OFFICE OF EXCEPTIONAL  
CHILDREN (OEC)  
and the  
NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS (OAH)**

**I. Introduction**

In accordance with the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”), and its implementing regulations, 34 C.F.R. § 300.511(b), an impartial special education due process hearing shall be conducted as determined by State law. The North Carolina General Assembly has assigned the responsibility for conducting impartial due process hearings to the North Carolina Office of Administrative Hearings (“OAH”) by amending Article 9 of Chapter 115C of the North Carolina General Statutes. In accordance with State law, N.C. Gen. Stat. § 115C-109.6(j), “the State Board, through the Office of Exceptional Children (“OEC”) of the Department of Public Instruction (“DPI”), and the State Office of Administrative Hearings shall develop and enter into a binding memorandum of understanding to ensure compliance with the statutory and regulatory procedures and timelines applicable under IDEA to due process hearings and to hearing officers’ [Administrative Law Judges’ (“ALJ”)] decisions, and to ensure the parties’ due process rights to a fair and impartial hearing. This memorandum of understanding shall be amended if subsequent changes to IDEA are made.” Additional State requirements for special education due process hearings are governed by N.C. Gen. Stat. §§ 115C-109.8 and 150B-22.1; 16 NCAC 06H .0110; and any future revisions or additions to the North Carolina General Statutes and the North Carolina Administrative Code (“NCAC”) regarding special education due process hearings.

This Memorandum sets forth particulars regarding the duties of the parties to this Memorandum, and as provided in N.C. Gen. Stat. § 115C-109.6, the right for any party to a special education due process hearing who is aggrieved by the findings and decision of an ALJ to institute a civil action in State court within thirty (30) days after receipt of the notice of the decision or in federal court within ninety (90) days as provided in 20 U.S.C. § 1415.

**II. Purpose**

State and federal special education laws create certain due process rights for parents, which permit them to challenge a school system’s decision relating to the identification, evaluation, educational placement, provision of a free appropriate public education (“FAPE”), or a manifestation determination regarding disciplinary issues, including requesting an administrative hearing. With the exception of consent for the initial provision of special education, local educational agencies, including state operated programs and charter schools, are permitted to request an administrative hearing on these issues if they are unable to obtain parental consent to carry out proposed actions. The local educational agency may also request an expedited hearing if

it believes that maintaining the student's current placement is substantially likely to result in injury to the student or others.

In accordance with State law, the DPI and the OAH agree that the OAH shall conduct all "Special Education" due process hearings arising under 20 U.S.C. § 1415 and 34 C.F.R. § 300.507 or § 300.532, on behalf of the public agency directly responsible for the education of the child; and shall conduct the due process hearings according to the State's hearing procedures, as required by 34 C.F.R. §§ 300.511 through 300.516 and §§ 300.530 through 300.536, and to implement the terms outlined in this agreement.

In accordance with N.C. Gen. Stat. § 115C-109.6(j), this Memorandum is entered into by the Board, through the DPI, Office of Exceptional Children and the OAH. As required by the above referenced statutes, this Memorandum shall establish procedures and timelines that are efficient and meet the criteria of the IDEA so that impartial hearings between Public School Units and parents of children with disabilities are expeditiously handled. In particular, this Memorandum addresses (1) the reasons, number of days, and means for providing notice to parties; (2) when a petition is initiated, for the purpose of determining when a decision is reached (specifically, when appropriate mediation is begun before and after a petition is filed and when no mediation is filed); (3) whether the parties have alternative or additional dispute resolution options to the mediation process described in 34 C.F.R. § 300.506; (4) whether an ALJ can grant specific extensions of time beyond the periods set out in 34 C.F.R. § 300.515(a) and (b); and (5) whether an aggrieved party may appeal a due process decision, and if so, the timeline for filing a civil action.

### **III. Responsibilities**

A. The Board, through the DPI and the Office of Exceptional Children, is the designated State Education Agency ("SEA"), as provided by Article IX of the North Carolina Constitution; and pursuant to N.C. Gen. Stat. § 115C-107.2, must ensure that the State establishes, maintains, and implements procedural safeguards that meet the requirements of IDEA and its implementing regulations. The DPI's responsibilities as the State agency responsible for ensuring that the requirements of the IDEA are met and a due process hearing system is available to parents and "local educational agencies" are set forth in 20 U.S.C. § 1415(f)(1)(A), and 34 C.F.R. §§ 300.511(b), through 300.518. Under State law, "local educational agencies" are defined and referred to as "Public School Units" ("PSU").<sup>1</sup> In accordance with federal and State requirements, impartial due process hearings held pursuant to IDEA must be conducted by a hearing officer (Administrative Law Judge in the OAH) who is not an employee of the SEA or the PSU that is involved in the education or care of the exceptional child.

According to federal and State law, either a parent or a PSU may file with the OAH a petition to request an impartial hearing with respect to any matter relating to the identification,

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<sup>1</sup> N.C. Gen. Stat. § 115C-5. Definitions. *Public school unit.* – Any of the following: a. A local school administrative unit. b. A charter school. c. A regional school. d. A school providing elementary or secondary instruction operated by one of the following: 1. The State Board of Education, including schools operated under Article 7A and Article 9C of this Chapter. 2. The University of North Carolina under Article 29A of Chapter 116 of the General Statutes.

evaluation, or educational placement of a child, or the provision of a free appropriate public education of a child, or a manifestation determination. The party filing the petition must notify the other party and the person designated under N.C. Gen. Stat. § 115C-107.2(b)(9), by simultaneously serving them with a copy of the petition. At the time of the execution of this Memorandum, the person designated by the Board, and the DPI, to receive electronic copies of petitions, motions, and notices and to communicate with the OAH on issues related to due process hearings, is the Office of Exceptional Children's Due Process Hearing Coordinator.

B. The OAH is an independent, quasi-judicial agency that was established to provide a source of independent Administrative Law Judges ("ALJs") to preside in administrative law contested cases. It was created to ensure that the functions of rulemaking, investigation, advocacy, and adjudication are not combined in the administrative process.

In accordance with N.C. Gen. Stat. § 7A-750:

There is created an Office of Administrative Hearings. The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it is created. The Office of Administrative Hearings is established to ensure that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges to conduct administrative hearings in contested cases in accordance with Chapter 150B of the General Statutes and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process. It shall also maintain dockets and records of contested cases and shall codify and publish all administrative rules.

Among other powers of administrative law judges prescribed by statute, rule and regulation, the administrative law judge shall regulate the course of the hearing, including discovery, hear and rule on motions, issue orders regarding prehearing matters, and make preliminary, interlocutory, or other orders as deemed appropriate. Pursuant to 26 NCAC 03 .0101, and to the extent that they do not conflict with IDEA, the implementing federal regulations, North Carolina General Statutes (not in conflict with IDEA or its regulations), current and future rules adopted by the Board and codified in the NCAC, and the provisions of this Memorandum, the Rules of Civil Procedure as contained in N.C. Gen. Stat. §§ 1A-1 *et seq.*; the Rules of Evidence as contained in N.C. Gen. Stat. §§ 8C-1 *et seq.*, and the General Rules of Practice for the Superior and District Courts as authorized by N.C. Gen. Stat. § 7A-34 and found in the Rules Volume of the General Statutes shall apply in special education contested cases in the OAH.

C. This Memorandum is not intended to diminish or abrogate the duties, responsibilities or powers vested in and to any of the parties to this agreement and as such nothing in this writing shall be construed to do so. Further, nothing in this Memorandum shall be construed to have the

effect of restricting or limiting the rights and procedures available under the State or Federal Constitutions or any other federal or State laws that yield protection of the rights of children with disabilities.

#### **IV. Service Standards**

##### **A. Department of Public Instruction – Office of Exceptional Children**

1. Reference Materials. The DPI will provide the OAH’s ALJs, paralegals, and law clerks identified for special education due process hearings, as determined by the Chief ALJ, with electronic access to: (1) the IDEA Amendments of 2004 and all regulations related to the IDEA, including any new, amended, or repealed statutes or regulations; (2) Article 9 of Chapter 115C of the General Statutes; (3) rules adopted by the Board and codified in the North Carolina Administrative Code (“NCAC”); and (4) Federal and State, Exceptional Children Policy Letters related to IDEA. The DPI shall pay for a subscription to the “specialedconnection.com”, an online research subscription with LRP Publications, Inc., for the OAH’s ALJs, paralegals, and law clerks identified for special education due process hearings, as determined by the Chief ALJ.

2. Training. The DPI will review with the Chief ALJ or designee, on a yearly basis, the ongoing special education training needs of ALJs. In accordance with N.C. Gen. Stat. § 115C-107.2(g), the Board, through the DPI, shall make available annual training related to IDEA and its legal interpretations in order to facilitate hearings under N.C. Gen. Stat. § 115C-109.6, to the OAH’s ALJs, paralegals, and law clerks identified for special education due process hearings, as determined by the Chief ALJ. ALJs assigned to hear special education cases, including those ALJs that may serve as temporary ALJs for special education hearings, as determined by the Chief ALJ, will be required to participate in no less than one annual IDEA training approved by or conducted by DPI. Training topics may include federal and State special education laws and regulations, administrative rules, administrative interpretations, relevant case law, special education issues, specific disabilities, evaluation and assessment procedures, development of individual educational programs, techniques for conducting effective and impartial hearings, and drafting clear and substantiated orders and decisions.

All training costs must be approved in advance by the Office of Exceptional Children’s Director, and by the Superintendent of the DPI. Subject to approval by the North Carolina State Bar (“State Bar”), the DPI shall make available a minimum of one annual training that meets the requirements of 27 NCAC 1D, Rules .1519 and .1602, for qualifying continuing legal education (“CLE”) credit. The DPI shall pay the tuition, costs, and State Bar CLE credit fees for the training identified in this section. Prior to the training, the DPI will initiate the request for CLE, as required by the State Bar, no less than sixty (60) days prior to the scheduled training. DPI is responsible for completing the State Bar CLE requirements, including submitting the CLE Sponsor’s Application to request approval for CLE credits from the State Bar for all trainings offered to the OAH’s ALJs. Within thirty (30) days after the training, the DPI will provide the State Bar with all required documentation to complete the sponsorship requirements, including submitting the total payment of fees for CLE credit with an attendance report. The attendance report shall be completed for each training, and the report must contain participants’ State Bar Number to ensure CLE credits are recorded for all participating ALJs. The names of participating paralegals and law clerks will be

included on the attendance sheet, but OAH shall be responsible for payment of paralegals' and law clerks' CLE fees, if applicable.

In addition to the annual training described above, subject to certain conditions and preapproval by the Office of Exceptional Children's Director, and the Superintendent of the DPI, the OAH's Chief ALJ may identify a maximum of three ALJs per calendar year, for consideration to attend national trainings on legal issues regarding the education of students with disabilities for ALJs as determined by the DPI and the OAH.

3. Support Services. In accordance with 34 C.F.R. § 300.512, any party to a hearing conducted pursuant to 34 C.F.R. §§ 300.507 through 300.513 or §§ 300.530 through 300.534, among other rights, "has the right to obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and a written, or at the option of the parents, electronic findings of fact and decisions." The DPI is required to provide the parent with one verbatim record for each due process hearing, at no cost to the parent. The parent is permitted to select either a written, or an electronic verbatim record of each due process hearing.

4. Notification and Selection. Within 30 business days of the execution of this Memorandum, the DPI shall develop a written notification form to be provided to the parent by the OAH, within ten (10) business days of receiving the petition. The purpose of this notification is to ensure that parents are informed in writing of their right to request from the LEA/PSU, access to educational records regarding the student; a single verbatim record of the hearing, in a format of their choosing, either written or electronic format; and to inform parents of their right to request and obtain an electronic record of the ALJ's findings of fact and decision. The form will include whether an interpreter will be required for the hearing. The form shall include instructions for the parent to complete the form, and to return the form to the OAH.

5. Scheduling the Vendor: It shall be the joint responsibility of the parties to the dispute to obtain mutually agreeable court reporter services using OAH forms and DPI vendors. If Petitioner is *pro se*, the responsibility for obtaining a court reporter is the LEAs/PSUs. The parties to the dispute shall coordinate the scheduling for the services required, securing the services for each date of the hearing, including court reporting services, and an interpreter, if needed.

6. Financial Responsibility and Contracts with Vendors. Within 30 business days of the execution of this Memorandum, the DPI shall initiate the process required by the Board to identify, secure, and maintain service contracts with court reporting services for recording and transcribing verbatim transcripts for all special education due process hearings in each region where the OAH conducts hearings. The DPI shall provide the OAH with updated lists, as new vendors are secured.

a. The vendor contracts shall include:

i. The court reporting service shall verify that all transcripts will be completed within fifteen (15) days of any motion hearing and the last hearing date for an evidentiary hearing.

ii. Court Reporter requirements shall be specified in the contract between DPI and vendors, to include those requirements provided to DPI by OAH, including formatting requirements, and any future requirements determined by OAH.

iii. The DPI shall prepare a list of vendors to include only those court reporters from the Administrative Office of the Courts (AOC), approved list; and also, in consultation with the OAH, the DPI list of vendors will include those court reporters having experience with verbatim transcription and special education contested hearings.

iv. DPI shall pay court reporter invoices including, but not limited to, one original transcript for the ALJ, one copy of the transcript for the parent, and court reporters' billable hours for hearings, travel, and appearance fees. The DPI shall pay for interpreter services when needed. The DPI will not pay for copies (neither written nor electronic) of transcripts for the PSU, for cancellation fees, or for expedited transcripts.

v. Upon completion of services, that the vendor provides the DPI's Due Process Hearing Coordinator with written confirmation of the dates of service, a description of the services provided, along with an invoice for services rendered.

## **B. Office of Administrative Hearings**

1. Selection of Administrative Law Judges. OAH, acting through the Chief ALJ or designee, will assign ALJs to preside over hearings required by IDEA and State law. The OAH will provide to DPI a list of those ALJs in its employ who are qualified to conduct special education hearings with verification from the OAH that any ALJ assigned to conduct such hearing is qualified as required by 20 U.S.C. § 1415(f)(3)(A); 34 C.F.R. § 300.511(c); and N.C. Gen. Stat. § 150B-22.1. The OAH agrees not to appoint a temporary ALJ to conduct special education hearings unless:

a. No current ALJ is available; and,

b. The temporary ALJ selected meets all qualifications set forth in B(2) of this section, including that the ALJ possesses knowledge of and the ability to understand, the provisions of federal and State law governing special education.

2. ALJ Qualifications. The special education due process hearings under N.C. Gen. Stat. § 115C-109.6, must be conducted by ALJs meeting minimum qualifications identified in 34 C.F.R. § 300.511(c), and N.C. Gen. Stat. § 150B-22.1. The ALJ who conducts a special education due process hearing under N.C. Gen. Stat. § 115C-109.6 shall not be a person who has a personal or professional interest that conflicts with the judge's objectivity in the hearing. No ALJ employed by or contracted by the OAH will be appointed as a special education ALJ unless the ALJ meets the qualifications under IDEA 2004, and 34 C.F.R. § 300.511(c). To conduct such special education hearings, all administrative law judges shall:

- a. Possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to IDEA, and legal interpretations of IDEA by federal and state courts;
- b. Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice;
- c. Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice;
- d. Not be an employee of the SEA or the PSU that is involved in the education or care of the child; and
- e. Not be a person having a personal or professional interest that conflicts with the person's objectivity in the hearing.

3. Hearing Tasks and Support Services. The OAH agrees to conduct due process hearings for special education disputes between parents of students with disabilities and local educational agencies, charter schools, and State operated programs in accordance with federal and State laws and regulations, including IDEA, as amended in 2004; 34 C.F.R. §§ 300 and 301; Article 9 of Chapter 115C of the North Carolina General Statutes; Board/DPI rules as codified in the NCAC, including future amendments and additions to the authorities stated above; and controlling case law. The OAH shall provide the necessary clerical support, hearing space, equipment, material, and other related services necessary or incidental to the performance of the impartial due process hearing. This support service includes: assigning the presiding ALJs, conducting prehearing conferences, deciding motions regarding the sufficiency of due process petitions, conducting the impartial due process hearing, reporting the due process final decision, providing contract forms for the parties to obtain court reporters and transcript services, securing interpreters when necessary, and providing the Office of Exceptional Children's Due Process Hearing Coordinator with a copy of the pleadings, agreements, motions, orders, and decisions as filed with the OAH's Chief Hearings Clerk through the OAH's electronic case management system ("CMS"). The OAH shall also serve a copy of all orders and decisions issued by the presiding ALJ with the parties or the attorneys representing the parties in the impartial due process hearing.

a. Prehearing Conference. After the filing of the petition, the ALJ appointed to conduct the impartial due process hearing has the discretion to schedule a prehearing conference with the parties. Should the ALJ determine a prehearing conference is needed, the timing for this conference is at the ALJ's discretion.

b. Extensions. Subject to and as may be limited by the authority granted by federal law and regulations, the ALJ may grant specific extensions of time beyond the 45-day timeline at the request of either party. Extensions shall be granted for good cause shown and not for purposes of delaying or denying the rights of either party. If such an extension is granted, the ALJ shall provide written notice to the parties and the DPI and include the party or parties requesting the extension, the reason for granting the

extension, the length of the extension, and the date by which the written decision will be reached and mailed to the parties.

c. Delegation of Authority. The ALJ shall have the authority to:

- i. Determine the timeliness and adequacy of the hearing request, as provided in N.C. Gen. Stat. § 115C-109.6;
- ii. Determine the sufficiency of the petition, and any other filings, based upon 34 C.F.R. §§ 300.507(a) and 300.508(d), and N.C. Gen. Stat. § 115C-109.6;
- iii. Request an independent educational evaluation, at public expense, as part of a due process hearing;
- iv. Bar any party, who fails to disclose to all other parties at least five business days prior to a hearing, all evaluations and recommendations based on the evaluations completed by that date, from introducing the evaluations or recommendations at the hearing without the consent of the other party;
- v. Grant extensions for cause at the request of either party, for a specified period of time, and as long as the extension does not result in the denial of the child's access to a free appropriate public education;
- vi. Begin the 45-day timeline for the due process hearing as required by 34 C.F.R. § 300.515(a), the day after a qualifying event as provided in 34 C.F.R. § 300.510(c);
- vii. Interpret any federal or State laws that are implicated in a parent's due process petition.
- viii. Determine procedural matters not specifically outlined in the IDEA, as long as they are consistent with the party's rights under the IDEA;
- ix. Set time limits on due process hearings in accordance with State guidelines, consistent with N.C. Gen. Stat. § 150B-33, and on the condition that both parties are given an adequate opportunity to present evidence and cross-examine witnesses;
- x. Issue an independent final administrative decision that is binding on the parties on behalf of the SEA on all hearings conducted under IDEA 2004;
- xi. Determine the prevailing party;
- xii. Exercise the powers granted to ALJs in N.C. Gen. Stat. § 150B-33, excepting subsections (a); and (b)(6), (7), (8), and (11); and



xiii. Impose monetary sanctions only for discovery violations, as permitted by NCGS § 150B-33(b)(10), imposed in the form of attorneys' fees and or costs.

d. The OAH agrees that the ALJs will not utilize the following practices in special education due process hearings:

- i. Permit parties to raise issues at the hearing that were not raised in the due process petition (or amended petition), unless the other party agrees otherwise;
- ii. Stay the contested case action, except for the purpose of granting one or more extensions at the request of one or both of the parties;
- iii. Impose monetary sanctions, except monetary sanctions permitted for discovery violations, as provided in this MOU subsection (IV)(B)(3)(c)(xiii) above; and
- iv. Award attorneys' fees to prevailing party.

**V. Notice, Due Process Petitions, Mediation, Resolution Periods, Extensions, and Alternative Dispute Resolution Options**

A. Prehearing Procedures:

Notices and Forms: DPI and OAH shall develop internal operating procedures for the timely dissemination of notices and documents to and from the parties and the exchange of documents and records between OAH and DPI. The OAH and DPI shall collaborate to develop forms and notices that are specific to special education due process hearings and contain language that is easily understood by parents. These forms and notices shall be reviewed annually by DPI and OAH representatives.

B. Filing of Petitions:

1. A parent or a public agency may file a due process petition on any of the matters described in 34 C.F.R. § 300.503(a)(1) and (2) relating to the identification, evaluation, or educational placement of a child with a disability, the provision of a FAPE to the child, or manifestation determination consistent with the procedures in 34 C.F.R. §§ 300.507, 300.508, and 300.510.

2. The party requesting a due process hearing must submit a petition or a request for a hearing (which must remain confidential) to the OAH within one year of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process petition, except if the parent was prevented from filing a due process petition due to the exceptions stated in 34 C.F.R. § 300.511(f), including prevention as a result of specific misrepresentations by the PSU that it had resolved the problem forming the basis of the complaint/petition; or the PSU's withholding of information from the parent that was required by the IDEA to be provided.

3. The petition must include:

- a. The name of the child;
- b. The address of the residence of the child;
- c. The name of the school the child is attending;
- d. In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a (2))), available contact information for the child, and the name of the school the child is attending;
- e. A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
- f. A proposed resolution of the problem to the extent known and available to the party at the time.

4. A party may not have a hearing on a due process petition until the party, or the attorney representing the party, files a due process petition that meets the requirements of paragraph 3 of this section. The due process petition must be deemed sufficient unless the party receiving the due process petition (“Respondent”) notifies the ALJ and the other party in writing, within 15 days of receipt of the due process petition, that the Respondent believes the due process petition does not meet the requirements in paragraph 3 of this section.

5. The petition must be submitted to not only the OAH, but also to the local Superintendent or Exceptional Children Director when a parent files a petition. Other than Notices of Appeal, which must be served separately from the OAH’s Case Management System (“CMS”) to the Due Process Hearings Coordinator, the parties to the dispute and the parties to this MOU, may serve all other documents electronically, through mail, or the OAH’s CMS to the Due Process Hearings Coordinator. A copy of any petition or request for a hearing, regardless of the party filing, must be served electronically via email or by mail on the Office of Exceptional Children’s Due Process Hearing Coordinator by the Petitioning party. OAH will use the CMS when it is required to send documents to the Due Process Hearings Coordinator. Within no more than two (2) business days of receipt of the petition, the OAH will send an electronic copy via the Case Management System (CMS) of the petition to the Office of Exceptional Children. Within one (1) business day of receipt of the petition from the petitioner, the PSU must send an electronic, date-stamped copy of the petition to the OAH and to the Office of Exceptional Children. The hearing timelines begin on the date the party receives the petition from the petitioner.

6. Within five (5) business days of receipt of a copy of the PSU’s date-stamped petition or request for a hearing, the OAH will appoint an ALJ and send a Notice of Contested Case and Assignment to the petitioner and to the school superintendent or individual designated by the PSU to receive such notices, with electronic copies to the Office of Exceptional Children. The OAH will assign a hearing date for all special education cases within applicable statutory and regulatory

timelines. The Office of Exceptional Children will make available forms and documents explaining the Petitioner's right to access educational records, resolution sessions, mediation, hearing rights, and timelines to the Exceptional Children Program Director and to the party filing the petition.

7. If the Respondent notifies the ALJ and the Petitioner in writing within 15 days of receipt of the due process petition, that the receiving party believes that the due process petition does not meet the statutory requirements for a request for a hearing, the ALJ must decide on the face of the request/petition of whether it meets the requirements of paragraph (3) of this section. Within five (5) days of receipt of notification, the ALJ must immediately notify the parties in writing whether the petition meets the requirements of paragraph (3) of this section and either: (i) determine that the petition is sufficient, (ii) determine that the petition is not sufficient and dismiss the action without prejudice, or (iii) determine that the petition is not sufficient but permit amendment consistent with 34 C.F.R. § 300.508(d)(3).

8. A party may amend its due process petition only if:

a. The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to 34 C.F.R. § 300.510; or,

b. The ALJ grants permission, except that the ALJ may only grant permission to amend at any time not later than five (5) days before the due process hearing begins.

### C. Resolution Period

1. The parties shall be provided with thirty (30) days from the receipt of the petition to resolve the issues in the petition prior to the initiation of an impartial due process hearing, as specified in 34 C.F.R. § 300.510. Within two (2) business days after the conclusion of a resolution session or mediation or after the conclusion of the 30-day resolution period if resolution is continuing, the PSU will notify the OAH and the DPI's Office of Exceptional Children's Due Process Hearing Coordinator of the status of any resolution session, mediation, or settlement process. If resolution has been waived or the party refused to participate in a resolution session or mediation, the PSU must notify the OAH and the DPI within two (2) business days. The DPI will notify the OAH if the status of resolution, mediation and/or settlement resolving the issues in the contested case hearing no later than two (2) business days from receiving notice of the status from the PSU.

2. The timelines for due process hearings described in 34 C.F.R. § 300.515, may only be extended if an ALJ exercises the authority to grant a specific extension of time at the request of a party to the hearing. Absent extraordinary circumstances, such as a national or State emergency, an ALJ may not unilaterally extend the 45-day due process hearing timeline. If an extension is granted, the ALJ may not extend the hearing decision timeline for an unspecified time period, even if a party to the hearing requests an extension but does not specify a time period for the extension.

3. If either or both parties wish to continue any mediation at the end of the 30-day period, a party, or parties, depending on whether the request is made by both parties, must file a motion for an extension of the timelines with the OAH and send a copy to the DPI. Unless the parties agree to an extension in writing, the use of mediation may not affect the 30-day resolution period timeline, or the 45-day due process hearing timeline established in 34 C.F.R. §§ 300.510 and 300.515.

4. If the PSU has not resolved the due process petition to the satisfaction of the parent within thirty (30) days of the receipt of the due process petition, the due process hearing may occur.

5. The OAH may adjust the 30-day resolution period according to 34 C.F.R. § 300.510(c).

#### D. Mediation

1. In accordance with 34 C.F.R. § 300.506, and N.C. Gen. Stat. § 115C-109.4, the parties may participate in mediation to resolve special education disputes, including matters arising before or after the filing of a due process petition.

2. As provided in 34 C.F.R. § 300.506, and N.C. Gen. Stat. § 115C-109.4, the following are required:

a. The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

b. The mediation must be voluntary on the part of both parties;

c. The mediation shall not be used to deny or delay a parent's right to an impartial hearing under 34 C.F.R. § 300.511, or N.C. Gen. Stat. § 115C-109.6, or to deny any other rights afforded under the IDEA, or State law;

d. The mediation shall be conducted by a qualified and impartial mediator who is trained in effective mediation techniques and is knowledgeable in laws and regulations relating to the provision of special education and related services. Mediators shall be required to have eight (8) hours annually of training in special education law which shall be approved by DPI or conducted by DPI;

e. If mediation is occurring after the filing of a due process petition, the DPI shall file a copy of all documents regarding the designation of a mediator and the time limitation for completion of the mediation with OAH within two (2) business days after forwarding any document to the parties.

f. Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute; and

g. If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that meets the requirements of 34 C.F.R. § 300.506 (b)(6), and N.C. Gen. Stat. § 115C-109.4 (h); which includes a statement that a written, signed mediation agreement under this provision is enforceable in any State court of competent jurisdiction or in the federal district court of the United States. The State Board has elected not to enforce mediation agreements through the formal state complaint process.

3. As provided in 34 C.F.R. § 300.506(b)(4), and N.C. Gen. Stat. § 115C-109.4(e), the State shall bear the cost of the mediation process, unless, as indicated in N.C. Gen. Stat. § 115C-109.4(e), the parties opt to select a mediator other than the mediator assigned under N.C. Gen. Stat. § 115C-109.4(d), or if the parties opt to use an alternative method of dispute resolution.

4. In accordance with N.C. Gen. Stat. § 115C-109.4(i), in addition to mediation as provided by this section pursuant to 34 C.F.R. § 300.506, the parties may participate in a mediated settlement conference as provided by N.C. Gen. Stat. § 150B-23.1; and the parties may agree to use other dispute resolution methods or to use mediation in other circumstances, to the extent permitted under federal and State law.

5. If the parties to the dispute have already participated in the DPI's mediation process pursuant to 34 C.F.R. § 300.506, the parties may request, or the ALJ may suggest that the parties voluntarily participate in a settlement conference pursuant to 26 NCAC 03 .0107, with an ALJ appointed by the Chief ALJ during the hearing period after conclusion of the Resolution period. The DPI shall not be responsible for any costs associated with the parties' use of settlement conferences described in this section.

6. As provided in N.C. Gen. Stat. § 115C-109.4(e), if the parties opt to select an alternative method of dispute resolution, such as a mediated settlement conference provided by N.C. Gen. Stat. § 150B-23.1, the DPI shall not be responsible for any costs associated with the parties' selection.

#### E. Procedures after Due Process Complaint is Filed, Timelines and PSU Instructions

1. The following procedures will be used by the Parties and incorporated into the forms that the DPI provides to PSUs for handling due process complaints:

a. A copy of any petition or request for a hearing, regardless of the party filing, must be sent to the DPI Office of Exceptional Children's Due Process Hearing Coordinator.

b. Within no more than two (2) business days of receipt of the petition, the OAH shall serve electronically via the CMS, a copy of the petition to the Office of Exceptional Children. Within one (1) business day of receipt of the petition from the petitioner, the PSU or agency's legal representative must electronically transmit a date-stamped copy of the petition to OAH and to the DPI Office of Exceptional Children's Due Process Hearing Coordinator.

c. The hearing timelines begin on the date the opposing party receives the petition from the petitioner or the Clerk's office per subparagraph (d).

d. If the PSU fails to electronically transmit a date-stamped copy of the petition to OAH within seven (7) business days of the filing of the petition, the Clerk's office shall file a Notice of Contested Case Petition and with the petition attached and serve a copy on the PSU. Within five (5) business days of the issuance of the Notice of Contested Case Petition, the timelines shall commence.

e. Within five (5) business days of receipt of a copy of the PSU's date-stamped petition or request for a hearing or after the Notice of Contested Case Petition issued by the Clerk's office, the OAH shall appoint an ALJ and send a Notice of Contested Case and Assignment to the petitioner and to the school superintendent or individual designated by the PSU to receive such notices, with electronic copies to the Office of Exceptional Children's Due Process Hearing Coordinator or designee.

f. OAH shall assign a hearing date for all due process petitions within applicable statutory and regulatory timelines.

g. OAH and the Office of Exceptional Children shall make available for all parties on their respective websites, forms and documents explaining the resolution sessions, mediation, and timelines. The substance and content of such forms shall be reviewed and approved by DPI and OAH.

h. The Office of Exceptional Children shall post a copy of the notice of procedural safeguards on its website.

i. The SBE and the OAH have identified the minimum disclosure requirements for educational records<sup>2</sup> which are required to be provided to the Petitioner, pursuant to 34 C.F.R. § 300.613, and N.C. Gen. Stat. § 115C-109.3, including a requirement that the access to educational records is triggered by Petitioner's written request for access to educational records made to the LEA/PSU. Upon Petitioner's request, the educational records must be provided to the Petitioner prior to any meeting or hearing, as described in 34 C.F.R. § 300.613, and N.C. Gen. Stat. §115C-109.3.

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<sup>2</sup> Upon request of a petitioner, the LEA/PSU shall provide the petitioner a copy (electronic or hard copy) of all records within the meaning of educational records under FERPA, and such records must include: special education file; cumulative folder; written correspondence, including emails to/from school staff, parents, and others regarding the educational needs/services for the student; report cards and transcripts; progress monitoring of IEP goals and related services; documentation of service delivery including related service providers logs, documentation of work samples used for progress monitoring; documentation of implementation of accommodations; and any information provided by the parents to the school, including independent evaluations obtained by the parents.

j. The Parties to this Memorandum shall work together to develop proposed rules of these procedures, in accordance with the rule making requirement in N.C. Gen. Stat. §§ 150B-21.1 *et seq.*, for publication in the North Carolina Register.

#### F. Hearings and Timelines

1. The hearing shall be scheduled as set forth in the notice of hearing unless an extension has been granted per 34 C.F.R. § 300.515(c). The hearing shall be conducted at a time and in a location that is reasonably convenient to the parents and child involved and, in the county, where the child attends school or is entitled to enroll under N.C. Gen. Stat. § 115C-366, unless the parties mutually agree to a different venue, or other extenuating circumstances prevent a hearing at the desired location.

2. The hearing shall be closed to the public unless the parent requests in writing that the hearing be open to the public. The hearing shall not be open to television cameras, radio broadcasts, or other media.

3. The hearing shall be scheduled so that a final decision can be entered and mailed to the parties, or provided electronically at the parent's request, not later than forty-five (45) days after the timeline began, unless an extension(s) is granted.

4. Unless an extension has been granted, the 45-day timeline for the due process hearing starts the day after one of the following events:

a. Both parties agree in writing to waive the resolution meeting;

b. After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or

c. After the parent or PSU withdraws from the mediation process when both parties agreed in writing to continue the mediation at the end of the 30-day resolution period.

5. The OAH will follow the timelines and regulations set forth in 34 C.F.R. § 300.532 for conducting an expedited due process hearing for a change in placement for a child with a disability who violates a code of student conduct. Extensions are not permitted under the IDEA for expedited due process hearings even if requested by the parties.

#### G. Final Decisions

1. Following the hearing, the ALJ shall issue a written final decision regarding the issues that were the subject matter of the hearing.

2. The ALJ's decision shall contain findings of fact and conclusions of law, based upon the federal and State laws that are implicated in a parent's due process petition, including the IDEA law and regulations, Article 9 of Chapter 115C of the General Statutes, the NCAC, and applicable case law. The ALJ's decision shall contain a statement informing the parties of the process for

submitting an appeal, as provided in N.C. Gen. Stat. § 115C-109.6(h2), which permits any party to a special education due process hearing, “who is aggrieved by the findings and decision of an [ALJ], may institute a civil action in State court within thirty (30) days after receipt of the notice of the decision or in federal court as provided in 20 U.S.C. § 1415,” including the ninety-day (90-day) statute of limitations to appeal the decision to federal court; and the procedure for enforcement of the ALJ’s decision in accordance with the IDEA, federal regulations, and State law.

The Notice shall advise the Party appealing the final decision to file copy of the Petition for Judicial Review or Federal Complaint with OAH at the time the appeal is initiated in order to ensure the timely preparation of the record.

#### H. Record of the Hearing

1. After rendering a final decision and issuing a final order, OAH’s Chief Hearings Clerk or designee shall prepare a copy of record of the hearing per N.C. Gen. Stat. § 150B-37, including all admitted exhibits, orders, motions, proposed and supplemental proposed final decisions, ALJ final decision, and other pleadings filed in the proceeding, an original written verbatim record of the hearing, and the final decision of the Administrative Law Judge. The Chief Hearings Clerk or designee shall become the custodian of the records for appeals and public records regarding filings related to special education contested cases. In the event the DPI requires access to the records as part of an audit by the U.S. Department of Education, Office of Special Programs, regarding its Part B Grant, the OEC will coordinate access of the required information with the OAH. The record maintained by the OAH, for a minimum of three years, shall include the due process petition, any amended petition, all pleadings, orders, exhibits admitted in evidence, transcript of the evidentiary hearing, and final decision. Briefs, memoranda, proposed exhibits, and proposed orders shall not be forwarded. The Chief Hearings Clerk or designee shall provide a copy of the final decision to the OEC’s Due Process Hearing Coordinator, or designee, within thirty (30) days of filing the final decision.

2. OAH shall simultaneously serve a copy of all orders and decisions under this Part with the parties or the attorneys representing the parties and with the person designated by the Board under N.C. Gen. Stat. § 115C-107.2(b)(9).

3. Upon appeal of the final decision and per request of the appealing party or court, OAH shall forward to the designated federal district or State court a copy of the official record as defined by N.C. Gen. Stat. § 150B-37 along with other documents in the docket that are requested by either party, but which are not part of the official record.

4. Notwithstanding the DPI’s obligation under the IDEA to provide access to final decisions to the public, which it will post on the DPI website, OAH will also post redacted versions of the final decisions on the OAH website. Prior to posting on their respective websites, OAH and DPI shall coordinate preparation of the redactions of a final decision so that it conforms with 34 C.F.R. § 300.32 and 34 C.F.R. § 99.3 (FERPA).



## **VI. Disputes between the parties of this Memorandum**

A. In the event that a dispute over this Memorandum arises after it has been signed, both Parties agree to use their best efforts and good faith to negotiate and resolve disputes. Any disagreements shall not affect or diminish the procedural safeguards available to parents of children with disabilities under IDEA and State law. Should a dispute arise under this Memorandum which the OAH and the DPI cannot ultimately resolve within sixty (60) days, it shall be determined in the following manner. The OAH and the Office of Exceptional Children shall select a mutually agreeable attorney knowledgeable about special education law to serve as an arbitrator. The arbitrator shall review the facts and applicable statutes and rules and make a determination of the dispute. The determination of the arbitrator shall be final and binding on the Parties hereto. The costs of the arbitration shall be borne by both Parties equally.

B. In the event of an inconsistency in the terms of this Memorandum, or between its terms and any applicable statute or rule, the inconsistency shall be resolved by giving precedence in the following order:

1. Applicable federal statutes and regulations;
2. State statutes, and rules; and
3. Any other provisions of the Memorandum, including materials incorporated by reference.

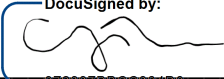
## **VII. Meetings between the DPI and the OAH**

A. At least two representatives from the Office of Exceptional Children and OAH will meet as frequently as necessary, but at least annually, to review training needs, issues raised in due process petitions, interpretation of IDEA through the Office of Special Education Programs (“OSEP”), interpretation of IDEA through the DPI, revisions of forms, and other relevant topics. Either party to this Memorandum may request a meeting of the other party to discuss any matter that might facilitate or clarify their respective responsibilities under this Memorandum; propose an amendment to the Memorandum; discuss specific matters related to special education law to ensure compliance with federal and State statutes, rules, and regulations; or otherwise support the SEA’s obligations under the IDEA with respect to this Memorandum.

**[signature page to follow]**

**IN WITNESS WHEREOF**, the parties state and affirm that they are duly authorized to bind the respective entities designated below as of the day and year indicated. This Memorandum shall be effective upon execution by both parties' representatives.

**STATE BOARD OF EDUCATION OF THE STATE OF NORTH CAROLINA for the DEPARTMENT OF PUBLIC INSTRUCTION:**

DocuSigned by:  
  
972337BBCC384D9...  
Catherine Truitt  
State Superintendent of Public Instruction  
Office of the State Superintendent  
NC Education Building  
6301 Mail Service Center  
Raleigh, North Carolina 27699-6301  
Phone: 984-236-2308

2/22/2023 | 11:47:29 AM EST

Date

**NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS for the OFFICE OF ADMINISTRATIVE HEARINGS:**

DocuSigned by:  
  
40242FD083B7407  
Donald R. van der Vaart  
Chief Administrative Law Judge  
Director, Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, North Carolina 27699-6714  
Phone: 984-236-1850

2/24/2023 | 9:27:50 AM EST

Date