

Working Towards Resolution: A Legal Guide to Managing State Complaints, Mediation, and Due Process Complaints

NCCASE Annual Fall Conference

October 2, 2023

Kristopher L. Caudle

**CAMPBELL
SHATLEY** PLLC

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Working Towards Resolution

- The goal of due process is resolution.
- Managing litigation can lead to stress, anxiety, and fatigue.
- As humans we all fear the unknown.
- Understanding the whole process is key.
- Today's Goal → Know what to expect

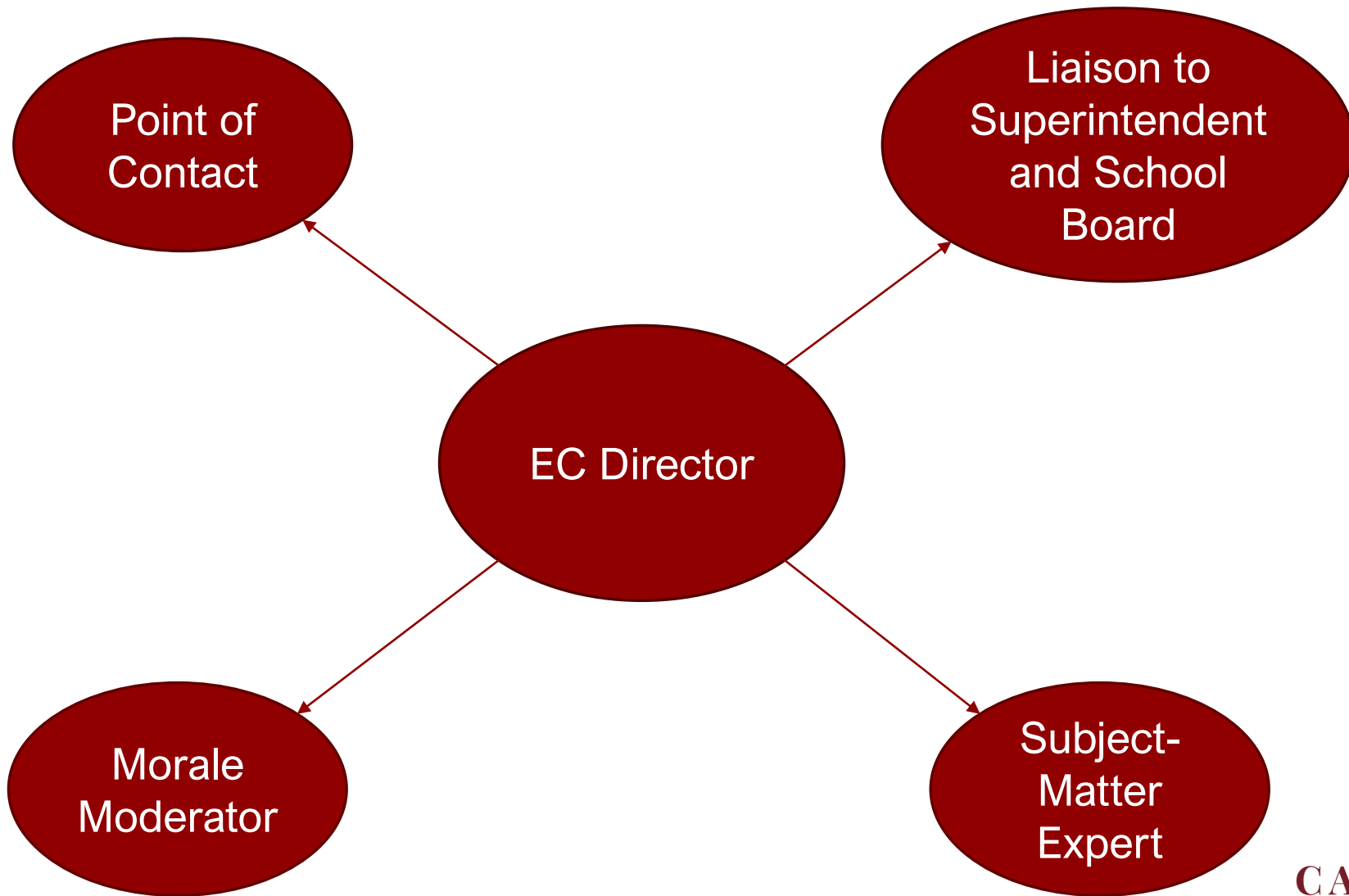


Roadmap

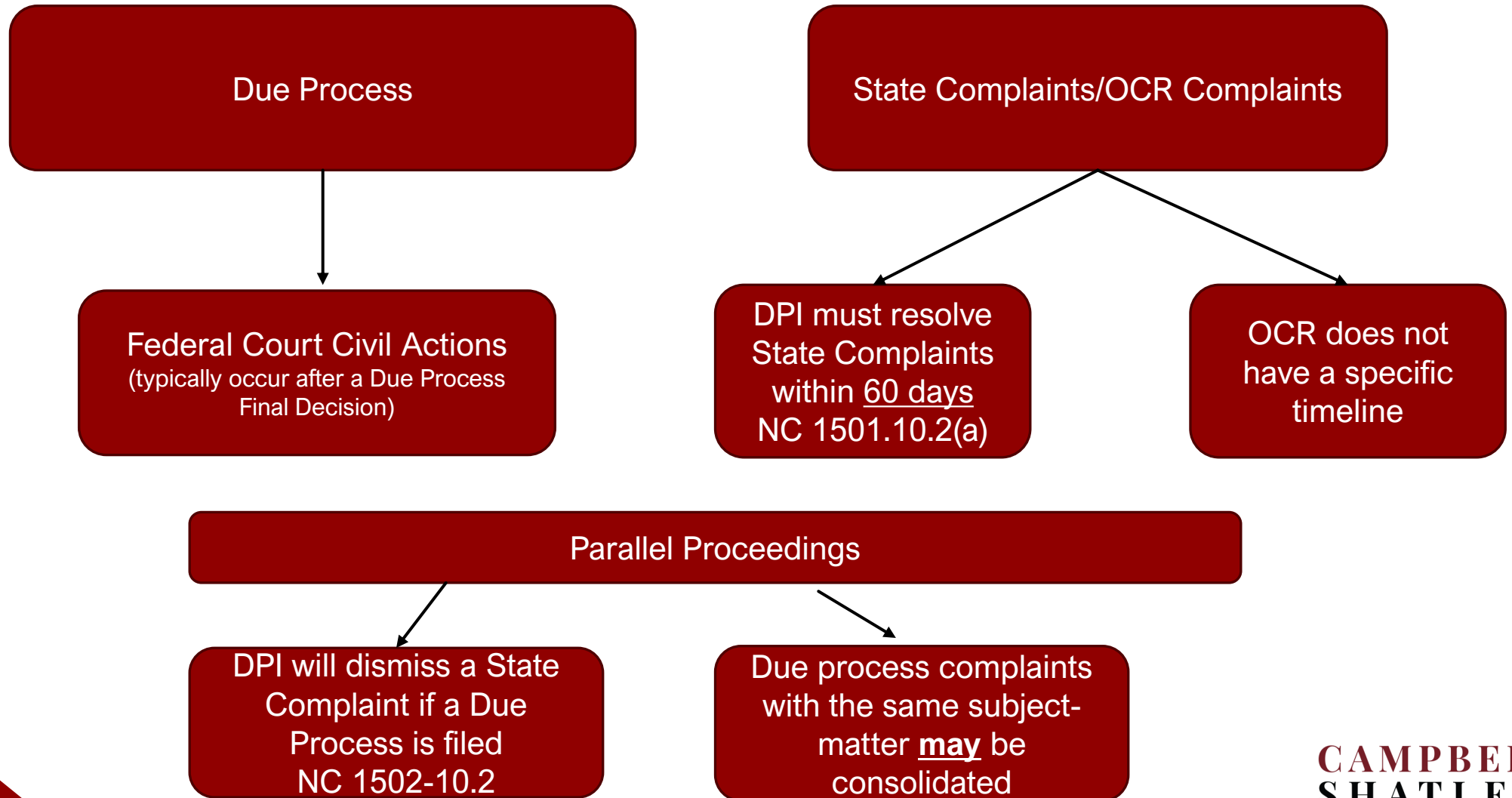


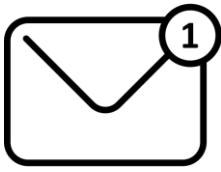
- Overview
- Pre-Litigation Phase: Avoiding a Due Process
- Litigation Phase
 - Resolution Phase
 - Hearing Phase
- Post-Litigation Issues: Repairing the Parent Relationship
- Key Takeaways & Best Practices
- Questions

Overview: Role of the EC Director



Overview: Major Categories of Disputes





To:	EC Director
From:	Parent
Subject:	Greetings! New to the District

Dear EC Director,

My family just moved to Mountain County from Colorado over the summer. My son was diagnosed with Autism about 4 years ago. His last school district did a horrible job implementing his IEP. I'm hoping Mountain County can do better. Attached is his most recent IEP and several articles about inclusion of students with Autism that are really helpful. He has also been receiving ABA services over the summer with a therapist in the home that has been very successful.

I'm looking forward to working with you and the Mountain County family this year!

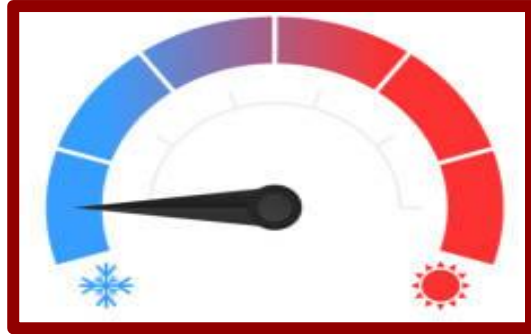
Sincerely,
Parent

Hypo #1

- 3 minute discussion at your table.
- What are the top 5 steps the EC Director should take?
- What is your temperature?



Temperature Check

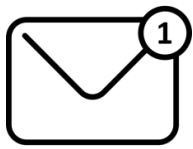




Pre-Litigation Phase: Avoiding Due Process

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To:	EC Director; Principal; Mr. Mable; Ms. Benson
From:	Parent
Subject:	Parent Concern

Dear EC Director,

I'm writing to let you know about the horrible day my son had in Mr. Mable's class today. Another student was bullying him (again) during recess and when he returned to class he was so escalated that he was sent to the office and I was called to pick him up. This is the 3rd time this week!! Part of the problem is that he is spending too much of his day in the self-contained room and not enough time with his non-disabled peers. I'd like to schedule an IEP meeting to discuss his BIP and having his ABA therapist work with him at school. I'd also like Ms. Benson to attend this meeting as my advocate. She has requested to see a copy of his education record via email.

Sincerely,
Parent

Responding to Parent Records Requests

- Parents have a right to "review and inspect" education records under FERPA and IDEA.
- FERPA – 45 days to respond to parent request.
- IDEA & NC Law – Parents entitled to a copy of records prior to the next scheduled IEP meeting. N.C.G.S. 115C-109.3(b)
- Redaction may be needed to protect PII of other students.
- If submitted by an attorney, contact your Board Attorney immediately.

Parent Advocates at IEP Meetings

- The IEP team can include "[a]t the discretion of the parent(s) or the LEA, other individuals who have knowledge or special expertise regarding the child..." N.C.G.S. 1504-4.2
- Parent advocates typically fit this category.
- Parent advocates can attend IEP meetings and should be welcomed by team members.
- Get ahead of the issue before the start of the IEP meeting (if you can).

Parent Advocates at IEP Meetings

1. Is the advocate an attorney?
 2. Is the advocate affiliated with a law firm?
 3. Does the advocate work under the direction of an attorney?
- **If you don't know, ASK!**
 - If yes, the school district should have the **opportunity** to have its attorney attend the meeting.



Recording IEP Meetings

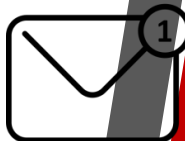
- **Can the parent record an IEP meeting?**
 - Yes. North Carolina is a "one-party" consent state for recording.
 - No permission of the other party or notification is legally required.
- **Should the school district record an IEP meeting?**
 - It depends. Ask the parent at the start of the meeting if they are recording the meeting.
 - If the parent records, the school district should also record the meeting and maintain as part of the education record.



Prior Written Notice

- The Prior Written Notice is the most important document in special education litigation.
- Make sure all proposals and refusals in the PWN are identified and that there is a "clear and cogent" explanation for the proposal or refusal. (*Endrew F*)
- "Written notice...must be given to the parent of a child with a disability a reasonable time before the LEA...implements the IEP." NC 1504-1.4
- There is no requirement that the PWN be drafted or completed at the end of the meeting.
- What about meeting minutes?





To:	EC Director; Principal; Mr. Mable; Ms. Benson
From:	Parent
Subject:	Parent Concern

Dear EC Director,

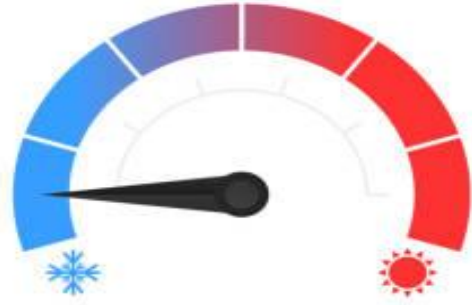
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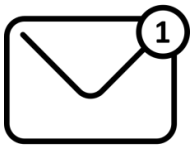
Sincerely,
Parent

Hypo #2

- 3-minute discussion at your table.
- What are the top 3-5 steps the EC Director should take?
- What is your temperature?

Temperature Check





To:	EC Director; Principal; Ms. Benson; Parents Attorney; Board Member; Board Member; Board Member; Board Member
From:	Parent
Subject:	Denial of FAPE; 10-Day Notice of Withdrawal

Dear EC Director,

This message follows several unsuccessful IEP meetings. Mountain County Schools continues to deny my son FAPE. My son was recently suspended for behavior that was clearly part of his disability. The aggressor in this incident was the same student who has been bullying him all year. Both you and the Principal disregarded everything my advocate at the MDR meeting. He has made zero progress on his IEP and needs ABA services during the school day to be successful. Please take this email as notice I intend to withdrawal my son from MCS and place him at a private boarding school in Virginia that can meet his needs and seek tuition reimbursement from the school district.

Sincerely,
Parent



CALL YOUR BOARD ATTORNEY!!

(Potential) Off-Ramp #1



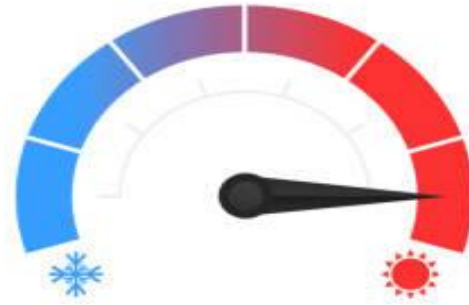
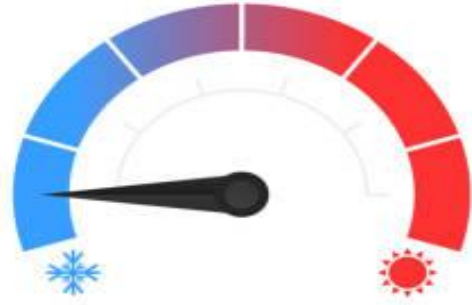
Responding to "10-Day Letters"

- Tuition reimbursement = most litigious area of special education.
- "If the parents of a child with a disability...enroll the child in private preschool, elementary school, or secondary school without the consent of or referral by the LEA, a court or hearing officer may require the LEA to reimburse the parents for the cost of the enrollment if the court or hearing officer finds that the LEA had not made FAPE available to the child in a timely manner..." NC 1501-8.1(c)
- Prior to a removal, parents must inform the district that they are rejecting the placement and state their concerns.
- Tuition may be reduced or denied by a court if "At least ten (10) business days...prior to the removal of the child from the public school, the parents did not give written notice to the public agency." NC 1501-.1(d)
- Notice can also be given by the parent at the most recent IEP meeting.

Responding to "10-Day Letters" – Off-Ramp #1

- Use the 10 days prudently.
- Respond to parent or attorney's "10-Day Letter" with a formal letter.
- Clarify key facts and request information about the private placement or any documentation that you think the team would need to consider regarding parent concerns.
- Offer an IEP meeting **before** the expiration of 10 days.
- Address the parent's concerns and consider the child's placement, including the private placement.
- Make the best offer of FAPE that you can – last chance before a Due Process!
- Resolve any FAPE issues that you can.

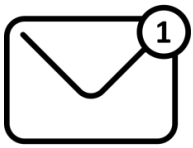
Temperature Check



Litigation Phase



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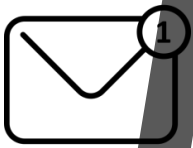
To:	EC Director; Superintendent; Parent's Attorney
From:	Parent
Subject:	Due Process Complaint

Dear EC Director,

Please see attached the Due Process Complaint for my son against the Mountain County Schools.

Sincerely,

Parent



To:	EC Director; Superintendent
From:	News Paper
Subject:	Public Records Request

Dear EC Director,

I am a reporter from Mountain County News. I am writing a story on incidents of bullying and harassment in Mountain County Schools and the suspension rates of students with disabilities. Do you have 15-20 minutes to speak with me for the story? I am also requesting any records that the district has on suspension rates for students with disabilities during the 2021-22 and 2022-23 school year.

Sincerely,

Newspaper

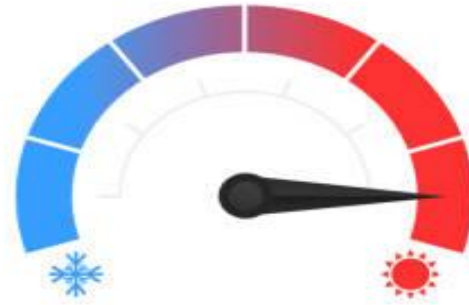
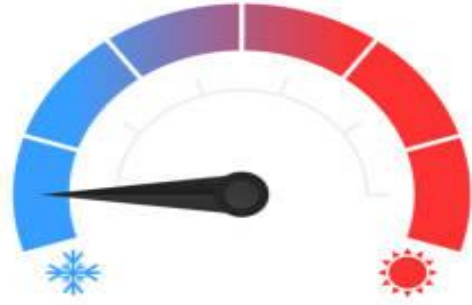
Hypo #3

- What are the top 3-5 steps you think the EC Director should take?
- What is your temperature?



Break 10:00-10:15

Temperature Check



Due Process Petition

- Parent can file a due process petition to challenge the “identification, evaluation, placement, or *provision of FAPE*” offered to a child **within the last year**.
- A petition for a due process hearing must be filed with the other party and the Office of Administrative Hearings.
- **Expect:** New issues beyond the ones you were dealing with in the IEP process; issues going beyond the 1 year statute of limitations



Due Process Petition

- The due process hearing timelines begin upon the other party's receipt of the petition. NC 1504-1.9(a)(1)(i)
- Forward a copy of the due process petition as soon as you receive it (likely will come via certified mail).
- The school district only has 10 days "from receiving the petition" to submit a response.

URGENT

Notify Your Insurance Carrier

- Your district is likely either self-insured, has a general liability insurance policy, or they are members of the North Carolina School Boards Trust.
- Your district's insurance policy or non-insurance risk pool may or may not cover special education administrative proceedings.
- **Expect to:** Notify your Finance Director to file a Notice of Claim with your insurance company upon receipt of a Due Process & answer questions.



Litigation Hold Memorandum

- Directs employees to search for and preserve documents that could be relevant to the litigation.
- You will have to work with the Board Attorney to create and distribute Memo to impacted employees.
- Avoid "Spoilation of Evidence" claim
- **Expect to:** answer employee questions and manage employee concerns, work with IT.



Response/Answer

- The school district has 10 days "from receiving the petition" to submit a response. NC 1504-1.9(e)
- Petitions come in all shapes and sizes...and so do responses.
- **Expect to:** create a detailed timeline, answer factual questions, draft a preliminary narrative, and review a final draft with the Board attorney.



Preliminary Motions

- **Motions to Dismiss/Insufficiency Notice** may be filed.
- **Motions for Extension of Time**
 - May be granted (extends time to file Response).
- **Motions to Continue the Hearing**
 - With the exception of Expedited hearings, most cases are not heard on their original first assigned hearing date.
- **Expect to:** Work with the Board Attorney right away to navigate key scheduling conflicts for you and employees.



Resolution Meeting/Mediation – Off-Ramp #2

- The parent is entitled to a Resolution Meeting within 15 days of receipt of the Petition. NC 1504-1.11
- Resolution meeting can be waived by the parties by agreement or if a mediation is agreed upon.



Resolution Meeting/Mediation – Off-Ramp #2

Resolution Meeting

- Not confidential.
- Board's attorney cannot participate unless the parent has an attorney who will participate.
- Consult with legal counsel if parent is demanding Resolution Meeting.

Mediation

- Confidential process
- Licensed mediator appointed by DPI that is neutral and impartial.
- Attorneys can participate.

Mediation: What to Expect – Off-Ramp #2

- In-person vs. virtual meetings.
- Opening statements and caucuses.
- Expect:
 - To block your calendar for a full day.
 - Most movement will happen in the last hour.
 - Superintendent and/or designated Board Member should be available for phone conferencing.



Mediation: What to Expect – Off-Ramp #2

- Successful mediations end with a Settlement Agreement.
- May include – compensatory education, new evaluations, certain evaluators, IEE's, placement compromise, tuition reimbursement, transportation, equipment purchases, and reasonable attorneys' fees.
- Release of Claims and Voluntary Dismissal of Due Process.



Offers of Settlement

- "Attorneys' fees may not be awarded...for services performed **subsequent** to the time of a written offer of settlement to a parent if—
 - The offer is made at least 10 days before the proceeding begins;
 - The offer is not accepted within 10 days; and
 - The court determines that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement." 34 C.F.R. 300.517(c)(2)
- Formal offer to settle the case that is "served" on opposing counsel.
- If the parent continues the case & doesn't do better than your Offer at the end of the hearing, the parent's attorneys' fees are cut off (from the point of the offer)

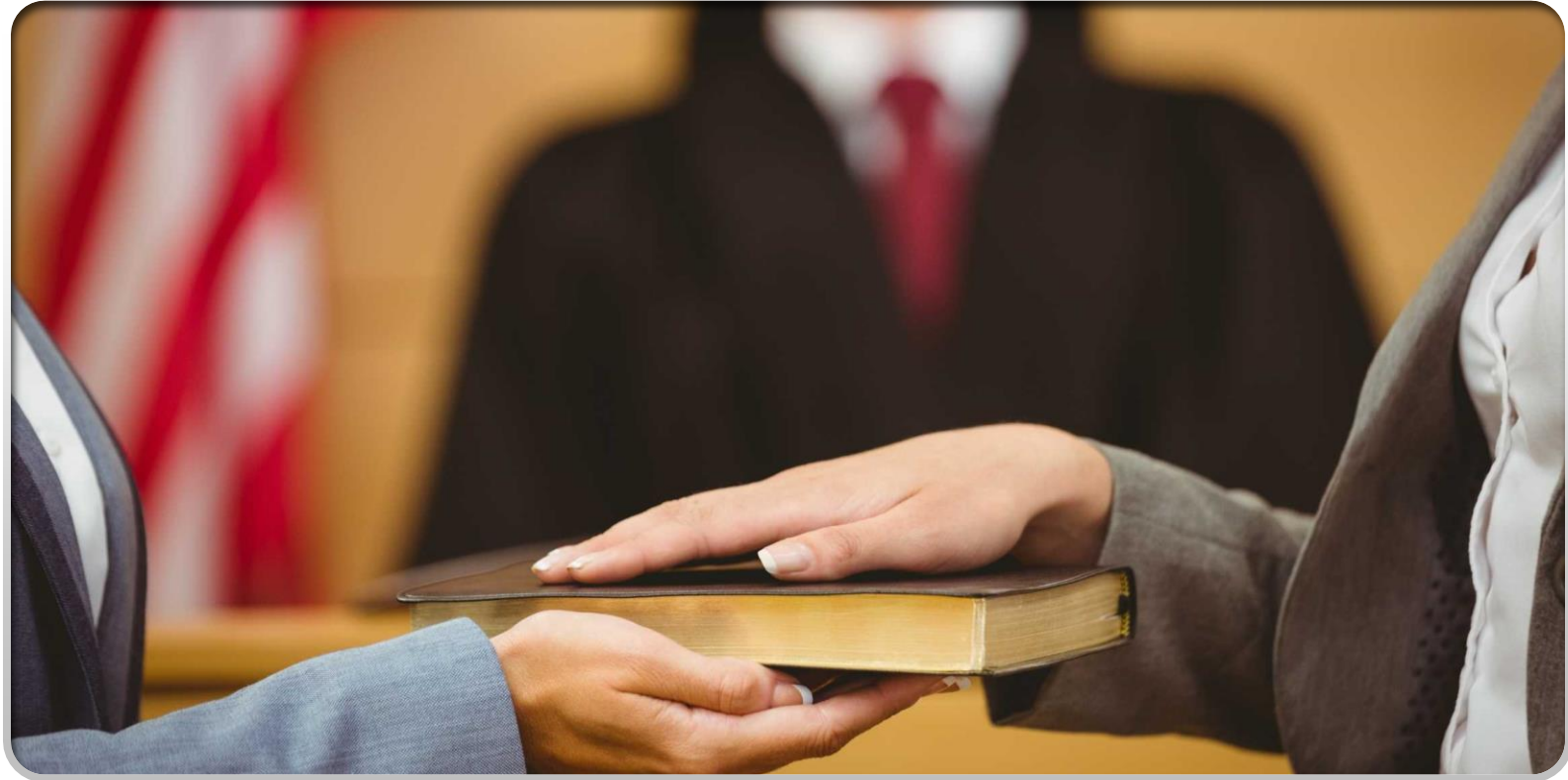


IEP Meetings While Due Process Pending

- Just a few reasons you might have to meet while a Due Process is pending:
 - Parent requests an IEP meeting;
 - Completion of an IEE;
 - New Behavior;
 - New Diagnosis;
 - MDR;
 - 3 year re-evaluation; and/or
 - Annual Review.

IEP Meetings While Due Process Pending

- **Expect to:** Navigate some unknowns
- Do the best you can!
 - Resolve any issues you can (this may moot a claim – **Potential Off-ramp**).
 - Determine whether attorneys are attending and whether meetings are being recorded.
 - Remember that the PWN's, meeting minutes, or recordings could be used against the district as part of the Due Process litigation.
 - Separate Due Process issues from any new issues that the team is addressing.



Hearing Phase

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Discovery

- "Informal Discovery" in OAH.
- Interrogatories, Document Requests, Requests for Admission – 15 Days.
- Depositions – Sworn Testimony Under Oath – By Scheduling Order.
- **Expect to:** organize and compile more documentation; be asked to analyze medical and educational information from parents



Witness Preparation

- Each employee expected to testify will likely need to meet with the Board Attorney at least 2 times one-on-one.
- Expert Witnesses:
 - Both parties will tender "expert witnesses."
 - Some school staff may be tendered as experts.
 - Parent's expert & independent evaluator
- **Expect to:** Manage practical considerations:
 - Class coverage;
 - Work overflow; and
 - Employee morale.

Due Process Hearing

- Hearing held at OAH, the local courthouse, or sometimes in the Board room with a transcriptionist and an ALJ.
- **Expect:** 5-7 Days for the hearing (may not be consecutive) for:
 - Court reporter
 - Testimony of Witnesses;
 - Parent's Case;
 - School Board's Case; and
 - Closing Arguments (sometimes submitted in writing).
- Proposed Decision

Pro Se Parents in Due Process Hearings

- *Pro Se* = Parent filing & handling their case with no attorney
- **Expect:**
 - Confusion (i.e. court filings, service of documents, discovery)
 - Miscommunication
 - Significant deference (especially on procedures) by the ALJ to the parent at OAH
- District should still raise any arguments or procedural issues to the court for the record

Parent Advocate Participation in Hearing

- Parent has a right to “be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.”
- However, NC law prohibits a non-attorney from representing a party at a due process hearing.
- NC 1504-1.13
- Expect: Participation to largely be within the discretion of the judge

Final Decision – Off-Ramp #3

- ALJ will render a written Final Decision within 45 days.
- This is a Final Administrative Decision.





Post-Litigation



After Mediation: Repairing the Relationship

- Board approval of settlement agreement, as needed.
- Voluntary Dismissal at OAH (ends the case).
- Payment of Settlement proceeds (W-9 Form; time).
- Implementation of terms (IEP meeting, agreed upon IEE's, service changes).



HARMONY

After Final Decision: Into the Abyss

- Federal Court Litigation
 - "Aggrieved party" has **90 days** to file a Civil Complaint
 - Notify your insurance carrier if a lawsuit filed against the district!
 - Case decided by a Federal District Court Judge on the Admin Record.
 - Cases can be appealed to the 4th Circuit (and potentially the US Supreme Court).
- **Expect:** 2-3 years for complete finality of case! Parent may raise new claims
- Keep track of "changed circumstances" (i.e., child graduates, parents leave the district, child's needs change).



Key Takeaways & Best Practices

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Key Takeaways & Best Practices

- Continue to work the IEP process.
- Keep Board Attorney updated throughout the process.
- Document, Document, Document! Especially the PWNs!
- Consider hiring an independent consultant before due process, particularly if placement is at issue.
- Give the Parents Rights Handbook to the Parent
- Avoid Black and White/ All-or-Nothing Thinking!
- Don't make it personal!
- Take care of yourself & avoid burnout (for you and staff)!



STAY TUNED!

Stay Tuned! OAH is developing proposed Administrative Rules that may revamp due process proceedings. **No changes are expected to be effective for this school year at this time.**

QUESTIONS