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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF ONSLOW

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
24 EDC 04618

Student, by parent or guardian, Parent Petitioner, v. Onslow County Board of Education Respondent.	**REDACTED FINAL DECISION** **(For Publication Purposes Only)**

THIS MATTER came before the undersigned Administrative Law Judge Stacey Bice Bawtinhimer for an evidentiary hearing on March 24-28, 2025. Petitioners, Student and her mother Parent, filed a Petition for a Contested Case Hearing, asserting allegations against the Onslow County Schools Board of Education ("LEA," "Board," or "Respondent") pursuant to the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§ 1400 *et seq*. ("IDEA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), Title II of the Americans with Disabilities Act ("ADA"), North Carolina General Statute §§ 115C-109.6 *et seq*., and Article 3 of Chapter 150B of the North Carolina General Statutes. Respondent denied these allegations, some of which have already been dismissed, and at the beginning of the evidentiary hearing sought dismissal of the remainder of Petitioners' claims.

This Final Decision memorializes the oral rulings issued on March 24, 2025 dismissing, in part, some claims and on March 25, 2025, dismissing all Petitioners' claims with prejudice.

APPEARANCES

For Petitioners:

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Keith Lamar Pryor Howard (Co-counsel)
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For Respondent:

Rachel B. Hitch (Lead Counsel)
Rachel P. Pender (Co-counsel)
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ISSUES

1. Whether some of Petitioners' claims should be dismissed pursuant to N.C. Gen. Stat.§ 1A-1, Rule 41(b) and the doctrine of *res judicata* because Petitioners voluntarily dismissed these claims twice before and the same claims arose, or could have arisen, out of the transactions resolved by the prior adjudication on the merits under N.C. Gen. Stat.§ 1A-1, Rule 41(a)(1)?

2. Whether the entire case should be dismissed because Petitioner Parent violated the Tribunal's order to appear, failed to prosecute the case, and waived Petitioners' hearing rights?

MOTION TO DISMISS STANDARD OF REVIEW

When a court reviews the sufficiency of a complaint, before the reception of any evidence, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974). When ruling on a motion to dismiss, the court must determine "whether, as a matter of law, the allegations of the complaint ... are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. *See Hyde v. Abbott Lab., Inc.,* 123 N.C. App. 572, 473 S.E.2d 680 (1996). The court must construe the complaint liberally (*Branch Banking & Trust Co. v. Lighthouse Fin. Corp*., 2005 NCBC 3 (N.C. Super. Ct. July 13, 2005)) and in the light most favorable to the pleader (the Petitioner); *see also Scheuer,* 416 U.S. at 236, 94 S.Ct. at 1686. When the allegations in the complaint give sufficient notice of the wrong complained of, an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory. *Stanback v. Stanback,* 297 N.C. 181, 254 S.E.2d 611 (1979).

A court should dismiss an action for want of subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir.1999) *(quoting Richmond, Fredericksburg & Potomac R. Co. v. United States,* 945 F.2d 765, 768 (4th Cir.1991)). In ruling on a motion to dismiss for lack of jurisdiction, the court may consider materials beyond the bare pleadings. *Evans,* 166 F.3d at 647. The facts pertaining to the procedural backgrounds of the current case and prior petitions are undisputed.

IDEA BURDEN OF PROOF

Petitioners bear the burden of proof in North Carolina. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The standard of proof is by a preponderance of the evidence. N.C. Gen. Stat. §150B-34(a). Courts give educators "deference . . . based on the application of expertise and the exercise of judgment by school authorities." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). "By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement," and a "reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1001-1002.

FINDINGS OF FACT

BASED UPON careful consideration of the Petition, motions and responses of the Parties, all documents in the record of this matter, previous contested case petitions, oral arguments of the Parties' respective counsel, and relevant statutory authority, the Undersigned makes the following Findings of Fact.

As noted above, the procedural facts are undisputed. Also, it is undisputed that even after being ordered to do so, Parent failed to appear at the evidentiary hearing in this matter. As such, a review of all the facts underlying Petitioners' IDEA claims is unnecessary. Instead, the Findings focus on the procedural background of this case and the prior two cases.

Undisputed Stipulated Facts

In the Final Prehearing Order, the Parties stipulated to undisputed facts regarding jurisdiction, the parties, and applicable law (collectively referred to as "Stip. 1A-8A") and background facts (collectively referred to as "Stip. 1B-16B"). *See* Final Prehearing Order pp 3-4 (agreed to on March 24, 2025; filed April 4, 2025). These facts are incorporated herein by reference.

Procedural Background

Parent on behalf of herself and her minor daughter, Student ("Petitioners") has filed three contested case petitions alleging that the Onslow County Board of Education ("Respondent") denied Student a right to a free appropriate public education ("FAPE") during the 2023-2024 school year. These claims focused on the appropriateness of Student's placements, IEPs, and the manifestation review decisions during that period. All the claims in this case, except for those remaining in the Final Prehearing Order filed on April 4, 2025, arose out of the same transaction or series of transactions in the prior cases.

Prior Cases

1. Petitioners Student and Parent filed a Petition on March 21, 2024 and amended on March 22, 2024 (collectively "First Petition") against the Onslow County Board of Education in the Office of Administrative Hearings ("OAH") case file number 24 EDC 01060.

2. In that matter, in two notices of hearing issued on April 3, 2024 one for the manifestation determination review claims ("MDR claims") and the other for the free appropriate public education claims ("FAPE claims"). Petitioner Parent was notified that failure to appear at these scheduled hearings may result in:

(a) Finding that the allegations of or the issues set out in this Notice or pleading may be taken as true or deemed proved without further evidence;
(b) Dismissal of the case or allowance of the motion or petition;
(c) Suppression of a claim or defense; or
(d) Exclusion of evidence.

Notice of Hearing (FAPE), 4/3/24, Hearing Information ¶ 6; Notice of Hearing (MDR), 4/3/24 ¶ 6. All subsequent Notices of Hearing contained the same language.

3. In addition, all Notices of Hearing advised the Parties that:

> Unless otherwise determined by the administrative law judge, the hearing will proceed in the following sequence:
>
> (a) Call of the case
> (b) Motions and other preliminary matters
> (c) Stipulations, agreements, or consent orders entered into the record
> (d) Opening statements
> (e) Presentation of evidence and cross-examination
> (f) Final arguments
>
> All parties are hereby notified to bring to the hearing all documents, records, and witnesses needed to present their case.

Notice of Hearing (FAPE), 4/3/24, Hearing Information ¶¶ 2 & 3; Notice of Hearing (MDR), 4/3/24 ¶¶ 2 & 3. All subsequent Notices of Hearing contained the same sequence of events.

4. The Parties consented to a settlement conference for the MDR claims which was held on April 4, 2024 at OAH's offices in Raleigh, North Carolina with the Honorable Administrative Law Judge Robin A. Anderson. Parent attended in-person. There, the Parties settled the MDR claims only.

5. On April 8, 2024, Petitioners voluntarily dismissed without prejudice their FAPE claims.

6. After ratification of the Settlement Agreement by the Onslow County Schools Board on May 8, 2024 Petitioner voluntarily dismissed with prejudice all claims arising from the MDR claims. Immediately afterwards, the First Petition case was closed.

7. Approximately two months later, on July 22, 2024 Petitioners filed a second Petition ("Second Petition") which pertained to the same parties and transactions in the First Petition including the dismissed FAPE claims and some matters concerning the MDR claims for the 2023-24 school year. The Second Petition was docketed as case file number 24 EDC 02791.

8. On August 5, 2024, a Notice of Hearing was issued in the Second Petition case. The Notice informed Parent that failure to appear at a scheduled hearing may result in sanctions including dismissal of the case. Notice of Hearing, 8/5/24, Hearing Information ¶ 6.

9. On August 20, 2024, another Notice of Hearing was issued in the Second Petition case again informing Petitioner Parent that failure to appear at a scheduled hearing may result in sanctions including Dismissal of the case. Notice of Hearing, 8/20/24, Hearing Information ¶ 6.

10. During the Resolution Period of the Second Petition, Respondent sought the appointment of a Guardian ad Litem ("GAL") because, allegedly, Parent had demanded "significant monetary damages" for her lost wages at the Resolution Meeting.[1] *See* Resp't Brief p 3. Since compensation for lost wages cannot be remedied though an IDEA case, Respondent asserted Parent's sole interest was more monetary damages rather than Student's educational interests. As such, Respondent contended that a GAL was required to protect Student's rights.

11. Petitioners opposed the appointment of a GAL. Specifically, in response, Petitioners stated the following:

> With its motion, Respondent fashions a frivolous and baseless motion that burdens an already busy tribunal and distracts it from the serious issues at stake. In substitute for regard, facts and legal support, Respondent provides bluster and empty aspersions to set a precedent that will wreak havoc on court systems, this family and every family seeking appropriate relief—a precedent that would allow the divorce of a parent from her child as a consequence of seeking relief determined appropriate by the IDEA and courts of law. Respondent thus aims to not only break the law but to literally break families for seeking proper relief from Respondent when it breaks the law. Such abuses of power in this country went the way of monarchy 248 years ago.

Pet'r Response in Opposition to Appointment of a GAL dated October 18, 2024 pp 8-9 (24 EDC 02791). Petitioners further asserted that "**Student's interests and her mother's are one and the same.**" *Id.* p 7 (emphasis in original).

12. The Motion for Appointment of a GAL was denied but it is mentioned here because the need for a GAL was revisited in the current case.

13. Five (5) school days before the hearing scheduled for November 18, 2024, Parent voluntarily dismissed without prejudice the Second Petition on November 7, 2024 and the second case was closed. This second dismissal constituted an adjudication on the merits for Petitioners' FAPE clams and MDR claims which arose or could have arisen during the same transactions alleged in the First and Second Petitions.

Instant Case

14. On November 26, 2024, Petitioners filed another Petition (the "Third Petition") against Respondent which was assigned case file number 24 EDC 04618. This Third Petition alleged identical FAPE and MDR violations which were contained in the Second Petition and claims from the First Petition related to implementation, appropriateness, and placement during the 2023-24 school year. However, not all of the Third Petition's claims overlapped the previously

[1] A Resolution Meeting is an informal dispute resolution process and, unlike mediation, discussions during this meeting are not confidential. *Compare* 20 U.S.C. §§ 1415(f)(1)(B) (mediation) *to* 1415(e)(2)(F)(i) (resolution meeting).

dismissed petitions. Respondent was served with the Third Petition on December 2, 2024. Like its predecessors, the Third Petition was assigned to the Undersigned.

Facts Regarding the Dismissal of Claims

15. On February 21, 2025, Respondent filed a Motion to Dismiss this the Third Petition pursuant to Rules 12(b)(1), 12(b)(6), and 12(h)(3), requesting that the Tribunal dismiss all claims that Petitioners have already voluntarily dismissed twice, all claims that are outside the Tribunal's subject matter jurisdiction, all claims that fail to state a claim for which relief may be granted, and all claims governed by the April 22, 2024 Settlement Agreement for lack of jurisdiction. Petitioners opposed this motion.

16. An Order was issued on March 20, 2025 dismissing all claims with prejudice prior to March 22, 2024 based on the prior adjudication by Rule 41(a)(1). *See* Order Granting Respondent's Mot. to Dismiss (docketed 03/20/25). In addition, Petitioners' Section 504 of the Rehabilitation Act ("Section 504") claims and Title II of the Americans with Disabilities Act ("ADA") claims were dismissed without prejudice due to lack of subject matter jurisdiction. *Id.* pp 2-3.

17. As a result of the March 20th Order, the issues in this case were narrowed to:

1. Whether Respondent denied Student a free appropriate public education from March 22, 2024 through June 11, 2024 during the 2023 - 2024 school year?

2. Whether Respondent failed to implement the November 28, 2023 IEP while Student was at the Onslow Virtual School ("OVS") from March 22, 2024 through April 21, 2024, and the Onslow County Learning Canter ("OCLC") from April 22, 2024 through June 11, 2024?

3. Whether Respondent failed to revise the November 28, 2023 IEP while Student was at the *Onslow Virtual School ("OVS") from March 22, 2024 through April 21, 2024,* and Onslow County Learning Canter ("OCLC") from April 22, 2024 through June 11, 2024?

4. *Excluding the placement at OCLC, whether Respondent violated the IDEA by failing to provide Student access to a free appropriate public education in the least restrictive environment while she was at OVS from March 22, 2024 through April 21, 2024*?

18. Prior to the evidentiary hearing on March 24, 2025, Respondent moved to dismiss the additional claims indicated in italics above based on the assertion that these claims arose or could have arisen out of the same transactions alleged in the First and Second Petitions. These claims pertained to Respondent's alleged failure to review and revise Petitioner Student's IEP

while enrolled at Onslow Virtual School and whether Onslow Virtual School was the least restrictive environment for placement. On March 24, 2025, the Undersigned verbally ordered dismissal of those claims. The Parties were instructed to draft proposed orders of dismissal and to revise the issues in the Final Prehearing Order.

19. In lieu of issuing a separate order of dismissal as to the remaining claims, this Final Decision memorializes the verbal order issued on March 24, 2025. Alternatively, these claims are also subject to dismissal as sanctions. *See infra.*

20. Based on the March 24th Order, Petitioners' claims were modified in the Final Prehearing Order as:

> 1. Whether Respondent denied Student a free appropriate public education from March 22, 2024 through June 11, 2024[2] during the 2023–2024 school year?
>
> 2. Whether Respondent failed to implement the November 28, 2023 IEP while Student was at the Onslow Virtual School ("OVS") from March 22, 2024 through April 21, 2024, and the Onslow County Learning Canter ("OCLC") from April 22, 2024 through June 11, 2024?
>
> 3. Whether Respondent failed to revise the November 28, 2023 IEP while Student was at the Onslow County Learning Center ("OCLC") from April 22, 2024 through June 11, 2024?

Final Preh. Order Schedule G. The Parties stipulated that these matters were the sole issues designated for the evidentiary hearing.

Facts Pertaining to Parent's Availability for Proceedings

21. Now, the Tribunal turns its attention back to procedural facts pertinent to the March 24, 2025 hearing.

22. On December 17, 2024, the Parties submitted a Due Process Resolution Meeting Form, indicating that the Parties had agreed to waive the Resolution Meeting in favor of proceeding to mediation. To facilitate mediation, on January 2, 2025, the Parties filed a Joint Motion to Continue to allow the Parties the opportunity to finalize a mediation date and participate in mediation. This Joint Motion to Continue was granted by the Undersigned on January 3, 2025 and the hearing was continued from January 13-17, 2025 to March 24-28, 2025. The Parties unsuccessfully met for mediation on February 20, 2025.

[2] The compensatory education period encompasses forty-four (44) school days. T vol 1 p 47:6-17. Student's attendance during that period is disputed. T vol 1 p 47:17-20.

Petitioner Parent's Failure to Appear at Noticed Deposition

23. On February 25, 2025, Respondent's counsel noticed the deposition of Parent for March 11, 2025, twelve (12) days before the hearing. Two days after its receipt, on February 27, 2025, Petitioners' counsel confirmed Parent would appear in-person at her scheduled deposition.

24. Petitioners, on March 3, 2025, filed a Motion to Continue the hearing scheduled for March 24-28, 2025 which was opposed by Respondent and subsequently denied on March 12, 2025.

25. At 6:30 p.m., the day before her deposition (March 10, 2025), Petitioners' counsel emailed Respondent's counsel that Petitioner Parent fell ill and would not attend the deposition scheduled for March 11, 2025.

26. In response to Petitioner Parent's sudden inability to appear for her deposition, on March 11, 2025, Respondent filed a Motion to Compel Parent's attendance and Request for Expedited Decision to order Parent to appear in-person for a deposition at an alternative date.

27. Due to the motion's emergent nature, a phone conference was held with the Parties, during which potential dates for Parent's deposition were discussed, including March 24, the first day of the hearing. Although not optimal, no other alternative dates were available due to Parent's conflicting work schedule and the imminent hearing date.

28. In its motion, Respondent also requested the Tribunal require a representation from Petitioner Parent regarding her availability for the hearing scheduled in this matter before additional time and expense were incurred preparing for hearing. *See* Resp't Mot. to Compel at 2 (03/11/25).

29. Assurances from Petitioners' counsel that Petitioner Parent would appear in-person at the hearing satisfied Respondent that its defense would not be penalized by B.M's inability to attend the deposition because it would have an opportunity to question Parent in-person.

Petitioner Parent's failure to appear on the first day of the hearing - March 24, 2025

30. Based on the two Notices of Hearing issued before the March 24th hearing date, Petitioner Parent was aware that dismissal of Petitioners' case was a potential sanction for failure to appear. *See* Notice of Hearing, 12/13/24, Hearing Information ¶ 6.; and Notice of Hearing, 1/10/25, Hearing Information ¶ 6.

31. In preparation for the hearing, a Prehearing Conference was held on March 17, 2025 with counsel and the Undersigned. In light of Respondent's concerns regarding Parent's attendance, Petitioners' counsel was asked again whether Parent would appear in-person at the evidentiary hearing. Petitioners' counsel confirmed that she would attend in-person.

32. The Parties also agreed to time constraints for presenting their cases in chief (Petitioner – 14 hours; Respondent -7 hours) and changing the hearing location to the Onslow County Schools' administrative complex.

33. Prior to the Prehearing Conference, Petitioners could have requested Parent attend the hearing virtually. Petitioners knew this was an option because they moved for permission to allow an expert witness to testify virtually due to health reasons and, at the Prehearing Conference, requested permission for co-counsel to attend virtually due to work conflicts. Notably, Petitioners did not seek permission for Parent to attend virtually. Accordingly, at the Prehearing Conference, the Tribunal instructed Petitioners' counsel that Parent was required to attend the hearing in-person.

34. On March 18, 2025, an Amended Notice of Hearing was served by this Tribunal on counsel for Petitioners. That Notice informed the Parties that the hearing would be held beginning on March 24, 2025, at 9:00 a.m. (continuing until completion) at the new location. That Notice also specifically informed Petitioner Parent that her failure to appear at a scheduled hearing may result in the dismissal of the petition. Notice of Hearing, 3/18/25, Hearing Information ¶ 6.

35. During this time, Parent spoke with Petitioners' counsel about her appearance in multiple substantive communications, including a 45-minute conversation on March 17, a 35-minute conversation on March 18, and an additional conversation on March 20. During each of these communications, Parent unequivocally assured her own counsel that she would attend the hearing in-person. *See* T vol 2 p 56:2–7. Petitioners' counsel reasonably relied upon these repeated and unambiguous assurances and, accordingly, represented to the Tribunal and opposing counsel that Parent would be present.

36. Despite these assurances, at the eve of the hearing, on Sunday March 23rd at 4:42 p.m., Petitioners' counsel emailed opposing counsel and the Tribunal advising that Parent cannot appear at the hearing because she "cannot afford the financial losses that would come" due to her missing work. *See* Pet'r Notice of Unavailability dated March 23, 2025 (filed 03/26/25).

37. Instead, he indicated that Student would attend accompanied by her father. *Id.* Although Student's father could have been added as a party to the action and sat in place of Parent, Petitioners did not move for his joinder.[3] Nor did Petitioners ask for a surrogate parent[4] substitution.

Petitioner Parent's Failure to Comply with Order to Appear on March 25, 2025

38. On March 24, 2025, at 9:00 a.m., Petitioners' counsel appeared for the scheduled hearing accompanied by the disabled minor child, Student, and her minor sister. However, neither Parent nor any other parent, legal guardian, or responsible adult was present to accompany or supervise Student and her sister. The minor children chose to sit outside the hearing facility without adult supervision for approximately two (2) hours while preliminary motions were being heard.

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[3] N.C. Gen. Stat. § 1A-1, Rule 17(a).

[4] 20 U.S.C. § 1401(23).

Student purportedly said the hearing room was "too stuffy." Although the hearing was held on the administrative campus of Onslow County Schools, the Undersigned noted on the record concern regarding the minor children being left unsupervised outside the building. T vol 1 p 36:10-11.

39. After hearing oral arguments on the motions, the Tribunal ordered Petitioner Parent to appear for the hearing on March 25, 2025, at 9:00 a.m., with the express warning that failure to appear would result in dismissal of Petitioners' case. *See* T vol 1 p 49:6. The Tribunal made clear that this constituted Petitioner Parent's final opportunity to proceed with her claims. The motion hearing concluded and was adjourned at 11:04 a.m.

40. Despite this directive and after multiple notices of the consequences for her failure to appear, Petitioner Parent did not appear on March 25, 2025.

41. Petitioners' counsel gave multiple reasons why she could not appear such as she was a traveling nurse and could not miss work for the hearing, and she was indigent due to being the responsible sole provider for four (4) children. However, no supporting documentation for these assertions or evidence was proffered other than the fact Petitioners qualified for representation by Legal Aid of North Carolina. Notably, Petitioners did not request to proceed in *forma pauperis*[5] in any of their three contested cases.

42. Petitioners' lead counsel alternatively argued Petitioner Parent was not actually a party to the case and that her attorneys could prosecute this case on behalf of Student without Parent present.

43. However, Parent is a Petitioner and the Petition references rights and remedies that clearly belong to Parent Petitioners' counsel's assertion that Parent is not a Petitioner belies Petitioners' own filings in this matter. *See* Petition, p 1, form caption (citing student and parent as "Petitioners"); *see also*, Petition, Conclusion, ¶ 4, (seeking to have "Petitioners" declared as prevailing party); Petition p 10 (seeking reimbursement for attorney's fees and private services paid by parent); Petitioner's Memorandum of Law in Opposition to Respondent's Motion to Dismiss, p 16 ("Petitioners are seeking relief that is available under the IDEA" and "Petitioners have no other forum to file those claims."); Petitioner's Memorandum of Law in Opposition to Respondent's Motion to Dismiss, p 17 where Mr. Powell and Mr. Howard signed the document as "Attorney for Petitioners"; Petitioner's Reply in Opposition to Respondent's Objection to Petitioner's Motion to Continue, p 1 ("Come now Petitioners..."); Motion to Allow Witnesses to Testify Virtually, filed by Petitioners, p 1 ("In support, Petitioners present the following:") Motion to Allow Witnesses to Testify Virtually, filed by Petitioners, p 2 ("Wherefore, Petitioners respectfully request..."); and, post-hearing Notice filed by Petitioners' counsel entitled "Notice of Petitioners' Unavailability."

44. In addition, until Student reaches the age of majority, Parent, her mother and legal guardian, is responsible for protecting Student's procedural and substantive rights under IDEA. *See* 20 U.S.C. § 1415(m).

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[5] N.C. Gen. Stat. § 150B-23.2 and 26 NCAC 03 .0103.

45. Based on Parent's actions in this and prior cases, there is a recurring pattern where Parent becomes unavailable under circumstances that coincide with scheduled in-person legal proceedings, such as a deposition or hearings. The Undersigned agrees with Respondent that this pattern raises legitimate concerns regarding Parent's possible evasion or noncompliance with procedural obligations.

46. Parent was duly placed on notice as early as December 13, 2024 in this case, that her appearance would be required in the present matter in which the necessity of her participation was made clear. She received formal notice of the rescheduled hearing date on January 3, 2025. *See* Order Continuing Hearing for Date Certain (issued 01/03/25).

47. Notwithstanding this extended notice, Parent failed to appear at the scheduled hearing. The reason she later provided—work obligations in Pennsylvania and financial concerns—is not only insufficient, but also entirely foreseeable. It is evident that her work commitment was known to her well in advance and could have been disclosed earlier.

48. Compounding this, Parent waited until Sunday afternoon—the day before the hearing—to notify her attorneys that she would not attend, severely limiting their ability to take corrective action or seek relief.

49. Most egregiously, Parent made this decision in the face of a specific and unequivocal warning that failure to appear would result in dismissal of the Petitioners' case. Her failure to appear, therefore, was not due to inadvertence or unavoidable conflict, but was a deliberate and informed decision to disregard a clear directive from the Tribunal.

50. Under these circumstances, dismissal is fully warranted as a sanction for willful noncompliance and failure to prosecute.

Significant Prejudice to Respondent

51. Respondent has been significantly prejudiced by Petitioner Parent's failure to prosecute this case. Despite repeated notice and the clear requirement that she appear, Parent failed to take the necessary steps to advance her claims or participate meaningfully in the proceedings. Her conduct has resulted in unnecessary delay, wasted resources, and ongoing uncertainty. Moreover, Respondent has been forced to defend against substantially the same claims in three separate actions brought by Parent within the span of a single year. This pattern of repetitive litigation, coupled with Parent's failure to comply with basic procedural obligations in the present action, has imposed an undue and unjust burden on Respondent.

52. Parent's past recalcitrant behavior does demonstrate a disturbing pattern of inattention to her legal responsibilities as a party and disregard of Respondent's and the Tribunal's resources.

53. In both this matter and the Second Petition case, Respondent expended time and financial resources preparing for hearings that were cancelled due to Petitioner Parent's actions.

54. In addition, after assurances Parent would appear in-person, Respondent's legal counsel and staff expended significant time and expense in preparation for this hearing during the interim period between the Prehearing Conference on Monday March 17th and Parent's unavailability notice on the afternoon of Sunday March 23rd.

55. The diversion of Respondent's time and resources to defend this action diminished the school system's capacity to serve its students, particularly other exceptional children.

56. Although the allegations in this Petition appear meritorious, it is regrettable that the conduct of Petitioner Parent—represented at no personal cost by legal aid counsel—resulted in a disproportionate and avoidable expenditure of public resources by Onslow County School System. The way the proceedings were pursued reflected a troubling indifference to the financial implications borne by a publicly funded institution. While access to justice is a vital right, it must be exercised with due regard for the economic impact on others, particularly when those costs are ultimately absorbed by taxpayers and detract from the core educational mission of Onslow County School System.

Appropriateness of Sanction

57. After Respondent moved to dismiss the case for Parent's failures to appear and prosecute, the Undersigned inquired about the appropriateness of lesser sanctions.

58. In response to the potential imposition of a lesser sanction, Petitioners suggested the appointment of a guardian ad litem ("GAL"). However, the Undersigned noted that Petitioners had previously opposed the appointment of a GAL, and that lead counsel, Mr. Powell, continued to object to such an appointment at the time of the hearing. Moreover, the appointment of a GAL does not constitute a sanction—let alone an appropriate substitute for dismissal—particularly in light of Petitioners' repeated noncompliance, failure to appear, and disregard of explicit warnings. Under these circumstances, the proposed alternative fails to address the seriousness of Petitioners' conduct or to remedy the resulting prejudice to Respondent.

59. Alternatively, Petitioners contended that a continuance was warranted. However, granting a continuance would not have constituted a lesser sanction, but rather a reward—particularly in light of Petitioners' prior, unsuccessful motion to continue the hearing. Moreover, there was no indication that a delay would have produced a different outcome; specifically, there was no evidence that postponing the hearing would have had any bearing on Parent's financial or employment circumstances.

60. Petitioners' counsel failed to propose any lesser sanction that would adequately remedy the prejudice caused by Petitioner Parent's willful failure to appear and prosecute this action. The Undersigned is likewise unable to identify any alternative sanction that would sufficiently address the severity of the conduct, the repeated disregard of procedural obligations, and the resulting burden imposed on Respondent and the Tribunal. In light of the totality of the circumstances—including the prior warnings, the inadequacy of lesser measures, and the pattern of duplicative litigation—dismissal of Petitioners' case is the appropriate and necessary sanction.

61. While the conduct of Petitioner Parent warrants dismissal of the case, the Undersigned finds no basis for imposing sanctions against Petitioners' counsel. The record reflects that counsel consistently attempted to communicate with their client, prepared for the hearing in good faith, and took reasonable steps to comply with the Tribunal's directives.

62. Although the failure to appear ultimately prejudiced Respondent and disrupted the proceedings, there is no evidence that Petitioners' counsel engaged in bad faith, willful disobedience, or conduct warranting disciplinary action. Accordingly, in this forum, sanctions shall be limited to Petitioners.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, relevant laws, and legal precedent, and by a preponderance of the credible evidence, the Undersigned concludes as follows:

1. To the extent that the foregoing Conclusions of Law contain findings of fact, or that the Findings of Fact are conclusions of law, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012).

General Legal Framework

2. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*. and implementing regulations, 34 C.F.R. Part 300. Stip. 5A.

3. This Final Decision incorporates and reaffirms the conclusions of the law contained in the previous Orders entered into this litigation.

Jurisdiction

4. The Petitioner Student and her mother Parent reside and are domiciled within the boundaries of Onslow County, North Carolina. Stip. 1A. Student is an identified child with a disability in need of specially designed instruction. Stips. 1B, 3B, &12B; 20 U.S.C. § 1401(3).

5. Respondent, Onslow County Board of Education, is a public school district ("the district") located in Jacksonville, North Carolina, Onslow County. Stip. 2A; 20 U.S.C. § 1401(19)(A). Respondent receives monies pursuant to the IDEA and is required to provide Student a free appropriate public education. Stip. 7A

6. The Parties named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them. Stip. 3A

7. As the Party seeking relief, the burden of proof for this action lies with Petitioners. Stip. 4A; s*ee Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

Partial Dismissal of Claims Based on the Doctrine of *Res Judicata*

8. Two of Petitioners' claims arose from transactions alleged in the previous petitions. These claims are: 1. whether Respondent should have revised the November 28, 2023 IEP while Student was at the Onslow Virtual School ("OVS") from March 22, 2024 through April 21, 2024; and, 2. whether placement at the OVS from March 24, 2025 through April 21, 2024 was the least restrictive environment?

9. These claims are subject to dismissal based on the doctrine of *res judicata*. The doctrine of *res judicata*, or claim preclusion, "serves the dual purposes of protecting litigants from having to relitigate previously decided matters and promoting judicial economy." *Northwestern Financial Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 693 (1993). The doctrine provides that "a final judgment on the merits precludes a second suit based on the same cause of action between the same parties." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 107, 834 S.E.2d 404, 417 (quoting *Whitacre P'ship v. Biosignia, Inc*., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)).

10. For Petitioner's claim to be barred, Respondent must demonstrate: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits. *Caswell Realty Associates I, L.P. v. Andrews Co., Inc*., 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998).

11. A defendant may meet its burden of proving the elements by offering into evidence the final judgment from the prior litigation and documentation from that litigation sufficient to demonstrate that the causes of action and parties in the two lawsuits are the same. *Eagle v. Johnson*, 159 N.C. App. 701, 703, 583 S.E.2d 346, 347 (2003) (quoting *Caswell Realty Assoc. v. Andrews Co*., 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998)); *see also Lombroia v. Peek*, 107 N.C. App. 745, 748, 421 S.E.2d 784, 786 (1992) (a judgment or finding of another court is admissible to establish *res judicata*).

12. While the doctrine covers matters actually determined by a competent court, it also extends to matters that could have been presented to the court for determination in the prior action, in the exercise of due diligence. *Gaither Corp. v. Skinner*, 241 N.C. 532, 535-536, 85 S.E.2d 909, 911 (1955) (citing *Bruton v. Carolina Power & Light Co*., 217 N.C. 1, 6 S.E.2d 822 (1940)).

1. *Final Adjudication On The Merits.*

13. As to the first element, i.e., a final judgment on the merits in the previous suit, a judgment is deemed "on the merits" when the judgment was "based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form." *Barrow v. D.A.N. Joint Venture Properties of North Carolina, LLC,* 232 N.C. App. 528, 534, 755 S.E.2d 641, 646 (2014) (quoting *In re Gilson*, 250 B.R. 226, 236 (Bankr. E.D.Va. 2000)). The Court of Appeals has found that a

final judgment is on the merits when all parties have appeared before the court, "where they could raise issues and make legal arguments." *Id*.

14. Per N.C. Gen. Stat. § 1A-1, Rule 41(a), Petitioners' twice dismissal of the claims alleged in the First (24 EDC 01060) and Second (24 EDC 02791) Petitions constituted a final adjudication on the merits.

15. Petitioners had the opportunity to raise issues, present witnesses, and make legal arguments before the Tribunal but chose twice to forego that opportunity by voluntary dismissal. Therefore, the first element of *res judicata* has been met as those claims cannot be raised a third time.

2. *Claims in Both Petitions*

16. In determining whether the causes of action in both the earlier and the later suit share an identity, the North Carolina Court of Appeals has looked to whether the claims asserted, or which could have been asserted in each case, arise from a "common nucleus of operative facts." *Barrow*, 232 N.C. App. at 535, 755 S.E.2d at 647.

17. In *Gaither Corp. v. Skinner*, the plaintiff entered into a contract with the defendant where the defendant promised to build a store building on plaintiff's property. 241 N.C. 532, 533, 85 S.E.2d 909 (1955). After the defendant finished building, the defendant filed suit against the plaintiff seeking the balance due on the contract and for payment in relation to the additional work performed. *Id*. at 534, 910. In response, the plaintiff filed an answer and a counterclaim against the defendant. *Id*. The court resolved the action by entering a consent judgment. *Id*. at 536, 912.

18. Subsequent to the court's resolution, the plaintiff filed a complaint against the defendant alleging that the defendant failed to construct the store building to the plaintiff's requests. *Id*. at 534, 910. Ultimately, the Supreme Court held that the doctrine of *res judicata*, or claim preclusion barred plaintiff's second action because the plaintiff had knowledge of the defective roof prior to the judgment being entered in the first action. *Id*. at 536-537, 912-13.

19. As in *Gaither*, here, Petitioners had knowledge of those potential claims when the prior petitions were filed. Even if Petitioners denied such knowledge, the doctrine of *res judicata* applies to bar claims that were not actually asserted, but which could have been asserted had Petitioners exercised due diligence. *Skinner*, at 535-536, 85 S.E.2d at 911.

3. *Same Parties in Three Petitions*

20. Regarding the third element (i.e., an identity of parties or their privies in the two suits), it is undisputed that Student and her mother Parent, were the Petitioners and Onslow County Board of Education the Respondent in all three cases.

21. Ultimately, since all three elements of claim preclusion have been met under North Carolina law, the doctrine of *res judicata* is applicable to these claims asserted in this the Third Petition, 24 EDC 04618, and has the effect of an absolute bar to these particular claims.

22. However, even if the doctrine of *res judicata* was not applicable, these claims and all other claims in this case are subject to dismissal because of Petitioner Parent's conduct.

Dismissal for Parent's Failure to Appear, Failure to Prosecute, and Waiver of Hearing Rights

23. The claims barred by *res judicata*, along with Petitioners' remaining claims are subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), N.C. Gen. Stat. § 150B-33(b)(10), 26 NCAC 03 .0101(a), 26 NCAC 03 .0105(6) and (8), and 26 NCAC 03 .0114(a)(2).

24. An Administrative Law Judge has the express authority to "[i]mpose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules[,]" N.C. Gen. Stat. § 150B-33(b)(10), and to "[a]pply sanctions in accordance with Rule [26 NCAC 03 .0114] . . . ." 26 NCAC 03 .0105(8). "If a party fails to . . . comply with an interlocutory order of an administrative law judge, the administrative law judge may . . . dismiss . . . the petition." 26 NCAC 03 .0114(a)(2).

25. Rule 41(b) of the North Carolina Rules of Civil Procedure indicates that involuntary dismissal of an action is permissible "[f]or *failure of the [petitioner] to prosecute or to comply with these rules or any order of a court* . . . ." and that "[respondent] may move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b) (emphasis added).

26. Additionally, a judge has the authority to dismiss a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) in the absence of a motion to do so depending on the facts and circumstances surrounding a particular case. *Blackwelder Furniture Co. of Statesville, Inc. v. Harris*, 75 N.C. App. 625, 627, 331 S.E.2d 274, 275 (1985).

27. Petitioner Parent failed to prosecute this contested case in furtherance of her own interests and those of her minor daughter, Student Her failure to comply with the Tribunal's interlocutory order to appear, as well as the instructions in the hearing notices, reflects an intent to obstruct the progress of these proceedings. *See Lee v. Roses*, 162 N.C. App. 129, 132, 590 S.E.2d 404, 407 (2004) (citation omitted).

Petitioner Parent's Waiver of Her Interests and Student's Rights

28. As Student is a minor child with a disability, her mother, Parent, bore the legal responsibility for challenging the adequacy of the special education services and programming provided by Onslow County Schools. By filing three contested case petitions against Onslow County Schools, Parent demonstrated her understanding of this responsibility.

29. Petitioners argued that their legal counsel could appear in lieu of Student's mother. The right to a hearing under the IDEA is afforded to the parent in this situation. 20 U.S.C.

1415(f)(1)(A), 1415(f)(B)(ii).[6] In that context, the right to present evidence at a hearing and cross-examine witnesses is the parent's not legal counsel's. 20 U.S.C. 1415(h)(2); 34 U.S.C. 300.512(a)(2). While Parent has the right to be accompanied and represented by legal counsel at an evidentiary special education hearing, as provided under 34 C.F.R. § 300.512(a)(1), the procedural safeguards guaranteed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, are personal rights that belong to her as the parent of a child with a disability. These rights cannot be fully exercised or waived by legal counsel alone.

30. IDEA places significant emphasis on meaningful parental participation at all stages of the special education process, including during due process hearings. *See* 34 C.F.R. § 300.501. Parental participation ensures that the parent's firsthand knowledge of the child's strengths, needs, and educational history is conveyed directly to the hearing officer. Courts have consistently recognized that active parental involvement is essential to fulfilling the IDEA's purpose: to ensure that children with disabilities receive a free appropriate public education tailored to their unique needs. *See Winkelman v. Parma City School District*, 550 U.S. 516 (2007).

31. Petitioners assert that Parent's attendance at the evidentiary hearing is not required and cite case law purportedly in support of this position. However, the authority they rely upon, including the Supreme Court decision in *Hamlin v. Hamlin*, is inapposite. *Hamlin v. Hamlin*, 302 N.C. 478, 484, 276 S.E.2d 381, 386 (1981) (stating that the presiding judge should require the presence of parents so that the court can gauge the best disposition for the child). Those cases do not address, nor support, the proposition that a parent may wholly abdicate personal participation in a special education due process hearing where the procedural safeguards under the IDEA belong specifically to the parent.

32. Unlike the context in *Hamlin*, which did not involve the enforcement of parental rights under the IDEA, the due process hearing at issue here directly implicates the parent's legal responsibilities and rights under 20 U.S.C. § 1415 and 34 C.F.R. § 300.501.

33. The Undersigned is mindful of the financial hardship articulated by Parent, including the potential loss of wages occasioned by her and other parents whose attendance is required at due process hearings. Such considerations are acknowledged and accorded appropriate weight. However, hardship alone does not excuse a party from fulfilling the obligations attendant to proceedings that she herself initiated. Where a parent elects to pursue a due process complaint, her presence at the evidentiary hearing is not merely beneficial, but essential, to the integrity of the adjudicative process and the protection of Student's procedural rights afforded under the IDEA.

34. Accordingly, while the financial burden on Parent is a matter of genuine concern, it does not constitute good cause for her failure to appear and prosecute the claim. The due process

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[6] *See e.g.* 34 C.F.R. 300.511 (stating "Whenever a due process complaint is received . . . the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing . . . .") (emphasis added); 34 C.F.R. § 300.512(c) (referring to the rights of parents at hearing); 25 C.F.R. 43.2(d) (noting that "the rights given to the parents of the student" transfer when the student turns 18 years of age or attends a post-secondary education institution.); N.C. Gen. Stat. 115C-109.6 (referring to the right of the parent throughout); N.C. Gen. Stat. 115C-109.2 (referring to the transfer of rights from the parent to the child when the child "reaches the age of majority"); N.C. Gen. Stat. 115C-109.5(b)(3) (requiring a prior written notice to contain "[a] statement that the parent of a child with a disability has protection under the procedural safeguards of this Article and IDEA").

hearing must proceed in a manner that ensures a complete and reliable evidentiary record, a result that cannot be achieved absent the participation of the complainant.

Appropriateness of Dismissal Sanction

35. However, dismissal under Rule 41(b) is a severe sanction and should be employed only when the plaintiff's conduct demonstrates a clear record of delay or contumacious conduct. *Goss v. Battle*, 111 N.C. App. 173, 432 S.E.2d 156 (1993).

36. When a parent deliberately neglects their responsibilities in the special education due process context—particularly by failing to appear or participate in proceedings despite notice and opportunity—a dismissal for failure to prosecute may be warranted. North Carolina courts have recognized that dismissal is appropriate when a party's conduct reflects a deliberate or unreasonable delay, causes prejudice to the opposing party, and where lesser sanctions would be ineffective. *See Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001), the Court of Appeals set forth the relevant factors to consider: (1) whether the plaintiff acted in a manner that deliberately or unreasonably delayed the matter; (2) the degree of prejudice, if any, to the defendant; and (3) whether any reason exists why sanctions short of dismissal would be inadequate. In this case, Parent's failure to personally participate in the hearing—despite clear notice of her central role under the IDEA—has caused significant delay and obstructed the resolution of her child's educational rights.

37. Given the fact that Parent's obligations under the IDEA are nondelegable and she violated a direct order, dismissal for failure to prosecute is not only appropriate but necessary to preserve the integrity of the due process framework and prevent further prejudice to the school district.

38. Applying these principles to the current context, Parent's deliberate neglect of her obligations—specifically, her failure to attend and participate in the evidentiary hearing—constituted an unreasonable delay in the proceedings. Using Petitioners' own words, Parent's inaction "burden[ed] an already busy tribunal and distract[ed] it from the serious issues at stake…".

39. More significantly, Parent's inaction not only hinder resolution concerning Student's educational rights but also prejudiced Respondent by prolonging the dispute and consuming additional resources. Given the lack of justification for her nonparticipation and the ineffectiveness of lesser sanctions, dismissal of all claims for failure to prosecute is appropriate.

FINAL DECISION

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above, and it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows.

1. Petitioners' claims that: a. Respondent failed to revise the November 28, 2023 IEP while Student was at the Onslow Virtual School ("OVS") from March 22, 2024 through April 21, 2024; and, b. Respondent violated the IDEA by failing to provide Student access to a free

appropriate public education in the least restrictive environment while she was at OVS from March 22, 2024 through April 21, 2024, are **DISMISSED WITH PREJUDICE** based on the doctrine of *res judicata*. Order issued *nunc pro tunc* on March 24, 2025.

2. These claims and the remainder of Petitioners' claims are also **DISMISSED WITH PREJUDICE** as sanction for Parent's failure to prosecute, failure to appear, and waiver of Petitioners' hearing rights. Order issued *nunc pro tunc* on March 25, 2025.

3. All other pending motions not otherwise ruled upon are **DENIED** as **MOOT**.

4. Respondent is the prevailing party.

5. All personally identifiable information shall be redacted in the published Final Decision.

NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Any party aggrieved by the findings and decision of a hearing officer may under N.C. Gen. Stat. § 115C-109.6 institute a civil action in State court within thirty (30) days after receipt of the notice of the decision or under 20 U.S.C. § 1415 a civil action in federal court within ninety (90) days after receipt of the notice of the decision.

Because the Office of Administrative Hearings may be required to file the official record in the contested case with the State or federal court, a copy of the Petition for Judicial Review or Federal Complaint must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely preparation of the record.

Unless appealed to State or federal court, the State Board shall enforce the Final Decision of the administrative law judge.

IT IS SO ORDERED.

This the 2nd day of May, 2025.

Stacey Bice Bawtinhimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 N.C. Admin. Code 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center which will subsequently place the foregoing document into an official depository of the United States Postal Service.

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This the 2nd day of May, 2025.

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