Introductions

1. Where in NC do you preside?
   - Mountains
   - Piedmont
   - Coastal Plain
2. Do you hear child welfare proceedings, delinquency proceedings, or both?
3. Have you ever attended an IEP meeting?
4. Have you ever attended a Section 504 meeting?
5. Do you have a personal background in K-12 education?

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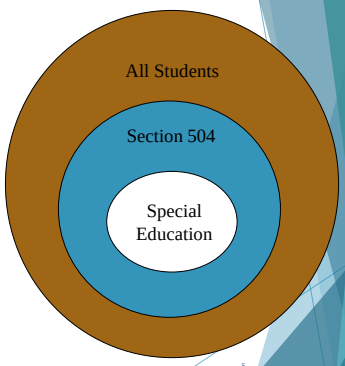
- All Students:
  - Multi-Tiered System of Support ("MTSS")
- Students with Disabilities:
  - Section 504
  - Special Education



5

Educational Outcomes: Students in Foster Care

- On average, students in foster care tend to experience worse academic performance and more behavior problems than other students.
  - More likely to:
    - Be below grade level
    - Be retained
    - Be absent from school
    - Be suspended or expelled
    - Perform poorly on standardized tests
    - Take longer to graduate from high school
    - Drop out of school

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Educational Outcomes: Students in Foster Care

Educational Experience or Outcome		Findings
		National/Multistate
School Stability	% of youth in foster care who change schools when first entering care	31%-75%[1]
	% of 17-18 year-olds who experienced 5 or more school changes	25%-34.2%[2]
School Engagement	% chronically absent from school	About twice the rate of non-foster students[3]
	% of 17-to-18 year-old youth in foster care having out-of-school suspensions	12%-23% (compared to 5-7% of all students)[4]
	% of 17-to-18 year-old youth in foster care being expelled	3-4 times that of non-foster students[5]
Reading Attainment	Reading level of 17-to-18 year-old youth in foster care	29% -33% (meet state standards)[6]
Special Education	% of youth in foster care receiving special education services	30%-50%[7] (compared to 14% for all students[8])
High School Graduation	% of youth in foster care who complete high school by age 18 (via a diploma or GED)	64% of foster youth compared to 87.3% for non-foster youth[9]
Postsecondary Education	% of 17-to-18-year-old youth in foster care who want to go to college	70%[10] - 84%[11]
	% of youth in foster care who graduated high school who enrolled in postsecondary education at some level	13%-38%[12]
	% of foster care alumni who attain a bachelor's degree	2%[13] -10.8%[14]

Source: National Datasheet 2022

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	All Children in NC Public Schools	Subgroup: Foster care	Subgroup: Children with Disabilities
Grade Level Proficiency (Levels 3-5): Math	55%	33%	20%
Grade Level Proficiency (Levels 3-5): Reading	50%	32%	16%
4- Year Graduation Rate	87%	55%	72%

Source: 2024 NC Report Card; percentages rounded to closest whole number

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Educational Obstacles: Students in Foster Care

- Common obstacles students in foster care face in accessing their education:
  - Frequent school changes
  - Enrollment delays
  - Missing credits
  - Unreliable access to appropriate support services
  - Inconsistent identification for special education services
  - Confusion over education decision-making authority

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School Mobility

- Students in foster care experience much higher levels of residential and school instability than their peers.
- Unscheduled school changes delay academic progress and make students in foster care more likely to experience academic difficulties compared to their less mobile peers.
- What students in foster care can lose when they have to change schools:
  - Academic progress
  - Class credits
  - Educational services
  - Close and meaningful relationships with friends
  - Natural supports (trusted adults like teachers, counselors, or coaches)
  - Extracurricular activity involvement

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Educational Outcomes: Juvenile Justice-Involved Students

- 65-70% of students in the juvenile justice system meet criteria for a disability.
- As many as 2/3 of students drop out of school after being involved in the juvenile justice system.
- On average, 1/3 of justice-involved youth qualify for special education, over twice the rate observed in the general population.
- The most common qualifying diagnoses for special education for youth in the juvenile justice system include learning disability (38.6%), emotional disturbance (47.7%), and intellectual disability (9.7%).

Source: Orphanages, Training Schools, Reform Schools and Now This - NDRN (2015)

Source: The School-to-Prison Pipeline for Probation Youth with Special Education Needs (2022)

11

Educational Outcomes: Juvenile Justice-Involved Students

- Poor school performance is a significant indicator of delinquency, and delinquency is a strong predictor of poor school performance.
- A majority of incarcerated youth have below grade level reading and math skills, and were suspended, expelled, or had dropped out before their confinement.
- Students who have "failed" at education are more likely to misbehave, feel detached from school, be truant, use drugs and alcohol, and drop out, increasing the likelihood of contact with the justice system.

Source: Education and Interagency Collaboration: A Lifeline for Justice-Involved Youth - Center for Juvenile Justice Reform (2016)

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Special Education

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Legal Authority

- Federal Law & Regulations
  - Individual with Disabilities Education Improvement Act of 2004 ("IDEA") – Title 20 U.S.C § 1400, *et seq.*
    - Part B: Children with disabilities, ages 3 through 21
    - Part C: Infants and toddlers with disabilities, under 3 years of age
  - IDEA 2004 Regulations – 34 C.F.R. Parts 300 (Part B) and 303 (Part C)
- State Law & Policies
  - Article 9 of Chapter 115C of the North Carolina General Statutes – G.S. 115C-106.1, *et seq.*
  - North Carolina Policies Governing Services for Children with Disabilities*

*North Carolina Policies Governing Services for Children with Disabilities has not been through the rulemaking process.

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Individuals with Disabilities Education Act ("IDEA")

IDEA is a federal law ensuring—

> "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . [and] that the rights of children with disabilities and parents of such children are protected."
>
> 20 U.S.C. § 1400(d)(1).

15

Early Intervention

- Governed by Part C of IDEA
- Requires states to provide a coordinated multidisciplinary system of early intervention services for infants and toddlers and their families. 20 U.S.C. § 1431; G.S. 143B-139.6A.
- Early intervention services are available to children under 3 years of age when the child is either:
  - Experiencing developmental delay, or
  - Has been diagnosed with a condition that has a high probability of resulting in developmental delay. 20 U.S.C. § 1432(5); 34 C.F.R. § 303.21.
- Early intervention services fall under the NC Infant-Toddler Program, which works through sixteen Children's Developmental Services Agencies ("CDSAs").
  - CDSAs are the local lead agencies responsible for early intervention services.
- Under the Child Abuse Prevention and Treatment Act ("CAPTA"), all children under the age of 3 who have been substantiated as abused or neglected are required to be referred for early intervention services. 42 U.S.C. § 5106a(b)(2)(B)(xxi).

16

Individualized Family Service Plan ("IFSP")

- Children receiving early intervention services have an IFSP. 20 U.S.C. § 1436(a).
- The IFSP is developed by the IFSP team.
  - Only the IFSP team can make decisions related to service delivery.
  - Required IFSP Team Members:
    - The IDEA Parent
    - Other family members or advocates invited by the IDEA Parent
    - The service coordinator implementing the IFSP
    - The individual(s) providing Early Intervention Services ("EIS")
    - The individual(s) conducting evaluations/assessments. 34 C.F.R. § 303.343(a)(1).
- The IFSP must be reviewed every six months after the initial plan is signed.

17

Special Education Framework

- State Educational Agency ("SEA")
  - The State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools. 20 U.S.C. § 1401(32).
- Local Educational Agency ("LEA")
  - A public board of education or other public authority legally constituted within a State for either administrative control or direction of public elementary schools or secondary schools. 20 U.S.C. § 1401(19).
  - Public school districts and individual charter schools

18

Fundamental Concepts

- Students with disabilities are entitled to—
  - A free appropriate public education ("FAPE")
  - In the least restrictive environment ("LRE").
- IDEA Parents are entitled to the opportunity to meaningfully participate in their student's education (Procedural Safeguards).
- LEAs are obligated to identify, locate, and evaluate all students with disabilities (Child Find).

19

Free Appropriate Public Education ("FAPE")

- **Special education** and **related services** that are provided at public expense, meet state standards, include an appropriate education, and are provided in conformity with an individualized education program ("IEP"). 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.
  - Free
    - Provided at no cost
  - Appropriate
    - Sufficient to achieve reasonable educational progress
    - Not "best" or to "maximize potential"
    - "Appropriately ambitious" in light of the student's circumstances
    - Supreme Court cases: *Bd. of Ed. v. Rowley*, 458 U.S 176 (1982); *Endrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. __ (2017)
  - Public Education
    - Supervised and directed by the local school system

20

Free Appropriate Public Education ("FAPE")

- *Endrew F. v. Douglas County School District*
  - "To meets its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."
  - "When all is said and done, a student offered an educational program providing 'merely more than *de minimus*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly . . . awaiting the time they were old enough to "drop out."' The IDEA demands more."

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Special Education

- Special education is defined as—
  - Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 20 U.S.C. § 1401(29).
  - Specially designed instruction means—
    - Adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction. 34 C.F.R. § 300.39(b)(3).

22

Related Services

- Developmental, corrective, and other supportive services as are **required** to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34.
- Related services include:
  - Audiology services
  - Counseling services
  - Interpreting services
  - Medical services
  - Occupational therapy
  - Orientation and mobility services
  - Parent counseling and training
  - Physical therapy
  - Speech-language pathology services
  - Transportation

23

Least Restrictive Environment ("LRE")

- Each public agency must ensure that—
  - To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
  - Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and service cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5).

24

Procedural Safeguards

- Children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE. 20 U.S.C. § 1415.
- These safeguards include the right to—
  - Access all education records
  - Participate in all IEP meetings
  - Obtain an independent educational evaluation ("IEE")
  - Receive prior written notice ("PWN")
    - Written notice, in the parents' native language, when the school proposes to initiate or change or refuses to initiate or change the identification, evaluation, or placement of the child, or the provision of FAPE

25

Hypothetical - Lisa

Lisa is a 12-year-old student who has an IEP due to a hearing impairment. Lisa is doing well in school and is able to read lips. However, she is not able to catch everything that is said in class and her grades are not as high as they could be. Her parents request a sign language interpreter as an accommodation to assist her. The school denies this request.

Was she provided a FAPE?

26

Special Education Referral, Evaluation, and Eligibility Process

27

Steps to Obtain Special Education

- 1. Referral
- 2. Evaluation
- 3. Eligibility determination
- 4. IEP development
- 5. IEP review
- 6. Reevaluation

28

Child Find

- A public agency must—
  - Identify, locate, and evaluate all children with disabilities who are in need of special education and related services, regardless of the severity of their disabilities. 20 U.S.C § 1412(a)(3).
    - Including children with disabilities who are home schooled, homeless, wards of the State, highly mobile, or attending private schools.

29

Signs Special Education Services May Be Needed

- Failing grades or test scores
- Trouble reading, writing, or doing math
- Repeated behavior problems in school
- Trouble concentrating or paying attention in school
- Trouble listening to others or expressing themselves
- Mental health or emotional issues that impact school performance

30

Multi-Tiered System of Support ("MTSS"): A Regular Education Initiative

- Tier 1
  - All students receive the same academic instruction
- Tier 2
  - Tier 1 services, plus
  - Small group intervention
  - May include increased time for assignments or more narrowly focused instruction
- Tier 3
  - Tier 1 & 2 services, plus
  - Intensive, individualized supports
  - Likely includes progress monitoring, 1:1 instruction, and "wrap-around" services

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Multi-Tiered System of Support ("MTSS")

- Key Components
  - High quality instruction (Tier 1 - all students)
  - Universal screening to identify students in need of supplemental support (Tier 1 - all students)
  - Multiple tiers of academic and behavioral support that are progressively more intensive (Tier 2)
  - Evidence-based interventions matched to student need (Tier 3)
  - On-going progress monitoring of student performance (Response to Intervention ("RTI"))
- Parent participation in this process is important to ensure the student receives the most appropriate supports possible.

32

Special Education Referral

- The special education process begins when either the IDEA Parent or LEA initiates a request for an initial evaluation to determine if the child is a child with a disability. 20 U.S.C. § 1414(a)(1)(B).
- Once the LEA receives a written request to initiate an initial evaluation, a 90-day timeline begins. NC 1503-2.2(c).
- The LEA proposing to conduct an initial evaluation must obtain informed consent from the IDEA Parent before conducting the evaluation. 20 U.S.C. § 1414(a)(1)(D).

33

90-Day Timeline

- Upon receipt, the school has **90 calendar days** to:
  - Decide whether to evaluate
  - Complete the evaluation
  - Determine if the student is eligible
  - Develop the initial IEP
  - Provide services
- This 90-day timeline includes holidays and summer vacation.
- Exceptions - The timeframe does not apply to an LEA if:
  1. The IDEA Parent repeatedly fails or refuses to produce the student for evaluation;
  2. The IDEA Parent repeatedly fails or refuses to respond to a request for consent for the evaluation; or
  3. The student enrolls in a school of another LEA after the 90-day timeline has begun, and prior to the determination by the previous LEA as to whether the child is eligible. The IDEA Parent and subsequent LEA shall agree to a specific time when the evaluation will be completed. 20 U.S.C. § 1414(a)(1)(C)(ii); 34 C.F.R. § 300.301(d); NC 1503-2.2(d)-(e).

Other Referrals

- When a referral is made by someone other than the IDEA Parent or the LEA, the 90-day timeline does not begin.
- Within 30 days of the receipt of written notification of concerns about a student, the LEA shall issue a written response to the student's parent, including:
  - An explanation of the reasons the LEA will not pursue the concerns, or
  - A date for a meeting in which the LEA and IDEA Parent will determine whether a referral for consideration of eligibility for special education is necessary. NC 1501-2.9(d).

35

Initial Referral IEP Meeting

- Purpose is to gather information about the student's strengths, areas of concern, and past assessment information to determine:
  - Whether to evaluate the student for special education, and
  - What evaluations to conduct.
- Information is documented on the Special Education Referral form.

36

Disability Eligibility Categories

1. Autism
2. Deaf-blindness
3. Deafness
4. Developmental delay*
5. Emotional disability
6. Hearing impairment
7. Intellectual disability
8. Multiple disabilities
9. Orthopedic impairment
10. Other health impairment
11. Specific learning disability
12. Speech or language impairment
13. Traumatic brain injury
14. Visual impairment

*In NC, developmental delay is limited to students ages 3-7.

37

IEP Team

- IEP team must include—
  - IDEA Parent(s);
  - Regular education teacher of the child;
  - Special education teacher;
  - LEA representative;
  - An individual who can interpret the evaluation results;
  - Other individuals, at the discretion of the IDEA Parent or LEA, who have knowledge or special expertise regarding the child; and
  - Child, when appropriate. 20 U.S.C. § 1414(d)(1)(B).

38

Invitation to Conference

- IDEA requires schools to give the IDEA Parent "reasonable notice" to participate in IEP meetings.
  - No specific number of days required by law.
- Notice must be given in writing and in IDEA Parent's native language.
- If student is 14, they are also invited to the meeting.
- The document should clearly state the purpose of the meeting.

39

Evaluation

- The LEA is responsible for conducting a comprehensive and individualized evaluation to determine—
  - Whether the child is a child with a disability, and
  - The educational needs of the child.
- Each LEA shall ensure that the child is assessed in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B).

40

Types of Evaluations

- Each disability eligibility category requires specific information for eligibility.
- The full range of appropriate evaluations may include other evaluations not explicitly required. For example:
  - A behavioral assessment when considering a Specific Learning Disability
  - Determining whether related services are necessary
- The NC Policies Governing Services for Children with Disabilities contains a list of each disability eligibility category with:
  - Required evaluations
  - Eligibility criteria. NC 1503-2.5.

41

Trauma and Special Education Eligibility

- Potential ways that trauma can impact students at school:
  - Executive functioning challenges
  - Difficulty with emotional and/or behavioral regulation
  - Trouble forming relationships with teachers
  - Hypervigilance
  - Negative thinking
- Students who have experienced trauma may be eligible under the Other Health Impairment and/or Emotional Disability eligibility categories.

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Required Evaluations – Other Health Impairment

- Hearing screening;
- Vision screening;
- Two scientific research-based interventions to address academic and/or behavioral skill deficiencies;
- Summary of conference(s) with parents;
- Observation across settings;
- Social/Developmental history;
- Educational evaluation; and
- Medical evaluation. NC 1503-2.5(d)(10).

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Required Evaluations – Emotional Disability

- Hearing screening;
- Vision screening;
- Two scientific research-based interventions to address behavioral/emotional skill deficiency;
- Summary of conference(s) with parents;
- Communication evaluation;
- Review of existing data;
- Social/Developmental history;
- Observation across settings;
- Educational evaluation;
- Psychological evaluation, to include an intellectual evaluation; and
- Behavioral/Emotional evaluation. NC 1503-2.5(d)(5).

44

IDEA Parent Consent

- School must obtain written, informed consent from the IDEA Parent before evaluating and again before providing special education services.
  - The IDEA Parent is the only one who can provide this consent.

45

Who Gets Special Education?

- To receive special education services, a student must:
  - Be between the ages of 3-21;
  - Meet criteria for at least one of the 14 disability eligibility categories; and
  - Have a disability that:
    - Adversely affects their educational performance, and
    - Requires specially designed instruction.

46

Eligibility Determination – Other Health Impairment

- To determine eligibility under Other Health Impairment, a student must have a chronic or acute health problem resulting in one or more of the following:
  - Limited strength;
  - Limited vitality;
  - Limited alertness, including heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.
- The disability must:
  - Have an adverse effect on educational performance, and
  - Require specially designed instruction. NC 1503-2.5(d)(10).

47

Eligibility Determination – Emotional Disability

- To determine eligibility under Emotional Disability, one of the following characteristics must be exhibited:
  - An inability to make educational progress that cannot be explained by intellectual, sensory, or health factors;
  - An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
  - Inappropriate types of behavior or feelings under normal circumstances;
  - A general pervasive mood of unhappiness or depression; or
  - A tendency to develop physical symptoms or fears associated with personal or school problems.
- The condition must be exhibited:
  - Over a long period of time; and
  - To a marked degree.
- The disability must:
  - Have an adverse effect on educational performance, and
  - Require specially designed instruction. NC 1503-2.5(d)(5).

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Eligibility Determination – Specific Learning Disability

- Exclusionary factors - The disability must not be the primary result of:
  - A visual, hearing, or motor disability;
  - Intellectual disability;
  - Emotional disturbance;
  - Cultural factors;
  - Environmental or economic influences; and/or
  - Loss of instructional time due to factors that include, but are not limited to absences, tardies, high transiency rates and suspensions. NC 1503-2.5(d)(11).

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Individualized Education Programs ("IEPs")

50

What Is an IEP?

- Individualized Education Program
- IEPs are developed, reviewed, and revised by the IEP team, which must include the IDEA Parent(s).
- The IEP document must include:
  - Student's strengths, weaknesses, and needs (present levels of academic achievement and functional performance);
  - Measurable goals for the student to achieve in the course of a year;
  - Description of how the child's progress toward the goals will be measured and reported;
  - Accommodations, modifications, related services, and specially designed instruction necessary to help the student achieve the goals; and
  - Where the services will be provided (i.e., regular education or special education) and an explanation of the extent to which the child will not participate with nondisabled children in the regular class. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.320.

51

Present Levels of Academic and Functional Performance

- These provide the basis for the annual goals in the IEP.
- They should summarize all data collected from screening tools, test scores, grade-level assessments, and observations.
- They should address each area of ongoing concern.
  - Academic performance (reading, writing, math)
  - Functional performance (communication, organization, daily living skills)
  - Behavior (following classroom norms and school rules)
  - Social/Emotional development (relationship-building, respecting others, exercising good judgement)
  - Related services
- They must be specific and objective.

52

Consideration of Special Factors

- Is the student an English learner?
- Does the student have any special communication needs?
- Does the student require assistive technology devices or services?
- Does the student require instruction in or use of Braille?
- Does the student have a documented hearing loss?
- Does the student have behaviors that impede their learning or that of others?
  - Can be addressed through behavior goals and special education time, and/or a Functional Behavioral Assessment ("FBA") and Behavioral Intervention Plan ("BIP").
- Does the student require Adapted Physical Education ("APE")?
- Is the student receiving instruction using the Extended Content Standards?

53

Secondary Transition

- Transition plans address life for a student after high school, detailing goals for:
  - Education
  - Employment
  - Independent living
- IEP must include:
  - By age 14:
    - Statement of the student's needs, preferences, interests, and course(s) of study.
  - By age 16:
    - Measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and independent living skills; and
    - Transition services needed to assist the student in reaching those goals.

54

Measurable Annual Goals

- Annual goals address concerns identified in Present Levels.
- Goals must:
  - Clearly state what a student should be able to accomplish within one year from the IEP start date, and
  - Be SPECIFIC and MEASURABLE.
- Goals should be "appropriately ambitious in light of the student's circumstances."
- The IEP must state how the goal will be measured.
  - Objective measurements are best (such as scores on assessments).

55

Placement and Least Restrictive Environment ("LRE") Statement

- The student's placement is the setting in which specially designed instruction is delivered.
  - Consultation (least restrictive) > Inclusion Classes > Resource > Separate Classes > Separate School > Home/Hospital (most restrictive)
- If a student will be removed from their non-disabled peers at any time during the day, an LRE justification statement is required.
  - Should explain why the student cannot receive the services in a setting with their non-disabled peers.

56

Extended School Year ("ESY")

- ESY is used to provide special education services during traditional school vacations.
- When considering whether ESY is necessary, the IEP team should consider whether the student:
  - Regresses during extended breaks, unable to relearn lost skills within a reasonable time;
  - Risks significantly jeopardizing gains made during the school year if not provided instruction during extended breaks; or
  - Is demonstrating an emerging critical skill that will be lost without instruction during an extended break.
- Data showing the need for ESY is required.

57

NC IEP Form

- Additional questions often relevant for court-involved students:
  - Describe any relevant medical information
  - Supports for academic, functional, personal changes or circumstances
  - Supports for school personnel (consultation and/or training for school staff to meet the unique needs of the student)

58

IEP Review and Reevaluation

- IEP review
  - IEPs must be reviewed and revised as necessary, but at least once a year.
  - An IDEA Parent or school can request an IEP meeting anytime there is a concern.
- Reevaluation
  - A child who receives special education services must be reevaluated in all areas of suspected disability every three years unless the IDEA Parent and the LEA agree that it is unnecessary.

59

Outside Evaluations

- Evaluations not conducted by the school must still be considered:
  - During the initial referral IEP meeting
  - During eligibility determination
  - Throughout the life of the IEP
    - May prompt the opening of a reevaluation
- IDEA Parent should share outside evaluations with the school when relevant to education needs (with redactions).

60

Prior Written Notice ("PWN"): "Decisions of the Local Educational Agency"

- The PWN lists what decisions were made at an IEP meeting, including:
  - A description of all actions that were proposed, refused, or rejected, and why; and
  - A list of records used as a basis for the decision.

61

Point to Ponder

- For child welfare proceedings, what (if any) IEP documentation would you want to review?

62

Section 504 of the Rehabilitation Act

63

Section 504 of the Rehabilitation Act

Section 504 provides—

> "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

64

Who Is Covered Under Section 504?

- To be protected under Section 504, a student must be determined to—
  - (1) have a physical or mental impairment that substantially limits one or more major life activities; or
  - (2) have a record of such an impairment; or
  - (3) be regarded as having such an impairment.

65

FAPE Under Section 504

- Students who qualify under Section 504 are entitled to a free appropriate public education ("FAPE").
- Under Section 504, FAPE includes the provision of regular or special education and related aids and services designed to meet the student's individual educational needs **as adequately** as the needs of non-disabled students. 34 C.F.R § 104.33(b)(1).

66

What Is a Section 504 Plan?

- A Section 504 Plan allows a student to receive accommodations modifications, assistive technology, and other related services required to meet the disability-related needs of the student.
- Accommodations
  - Change how information is presented to a student
- Modifications
  - Change what the student is expected to learn
- Accommodations and modifications are intended to provide a student equal access to their education
  - "Leveling the playing field"
- They allow students with disabilities to:
  - Manage a medical condition
  - Access their learning environment
  - Participate in class activities
  - Demonstrate their level of mastery of concepts
- These accommodations and modifications are what form the substance of the Section 504 Plan.

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Accommodations and Modifications

- Examples:
  - Extended time
  - Preferential seating
  - Allow headphones to muffle noises
  - Simplify instructions
  - Give both oral and written directions
  - Provide critical vocabulary list for content material
  - Shorten homework or classroom assignments
  - Provide pencil grips
  - Provide a visual schedule
  - Seat the student close to the teacher
  - Increase the frequency and immediacy of positive reinforcement

68

Qualifying

- Not all students covered by Section 504 require a Section 504 Plan.
- To qualify for a Section 504 Plan, the Section 504 team must determine whether:
  - A physical or mental impairment exists;
  - The impairment substantially limits a bodily function or major life activity; and
    - For example: walking, breathing, hearing, reading, learning, performing manual tasks, concentrating, or caring for oneself
  - The student needs accommodations, modifications, services, or supports to benefit from education at a level similar to non-disabled peers.
    - Mitigating measures may be considered when determining if these are needed.

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Requesting

- A Section 504 Plan request should:
  - Be made in writing
  - Include documentation of the student's disability (if available)
  - Be sent to the school's Section 504 Coordinator
- Parent/Legal guardian should keep a copy of the request for their records.
- Once received, the school will schedule an eligibility determination meeting.

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Eligibility Determination

- The Section 504 team will meet to discuss whether the student has a disability that substantially limits a major life activity or bodily function.
- If more information is needed, the Section 504 team may seek the parent/legal guardian's consent to conduct appropriate evaluations.
- If the Section 504 team determines that the student has an impairment that limits a major life activity/bodily function, the Section 504 team will discuss whether accommodations and/or modifications are necessary to meet the student's needs.

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Section 504 Teams

- The Section 504 team typically consists of—
  - Parent/Legal guardian
  - Section 504 Coordinator
  - Principal or other administrator
  - Other staff knowledgeable about the student

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Reviewing

- Section 504 Plans are generally reviewed once a year.
- If the student is being bullied, have a Section 504 meeting to discuss the bullying and any changes that need to be made to ensure a FAPE.
- Overall eligibility must be periodically reevaluated, generally every 3 years.

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Section 504 Plans vs. IEPs

- IEP
  - Each public school student who receives special education and related services must have an IEP.
  - Allows students to receive specially designed instruction with a special education teacher.
- Section 504 Plan
  - For a student with a disability who does not require specialized instruction but needs accommodations/ modifications to make sure they receive equal access to their education.
  - Broader definition of disability.
- If a student has an IEP, they do not require a Section 504 Plan.

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Hypothetical - Jill

- Jill is in 5th grade and has been in the custody of the Department of Social Services ("DSS") for 6 months. All of her reading assessments show her achieving below grade level. Her Child and Family Team ("CFT") is increasingly concerned about her school success. This school year, Jill was diagnosed with Attention-Deficit/Hyperactivity Disorder ("ADHD").
  - What are ways for the CFT to know how Jill is doing in school?
  - What possible supports are available to Jill?

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Education Decision-Making for Students in Foster Care

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General Education

Presumption is DSS assumes general education rights (unless court order delegating that decision-making) - G.S. 7B-903.1(a).

General education decisions and meetings include:

School enrollment and intake	Parent-teacher conferences	Multi-Tiered System of Supports ("MTSS")	Section 504	Disciplinary appeals	Course enrollment

Early Intervention and Special Education

Individuals with Disabilities Education Act ("IDEA") defines who serves as the "parent" and makes these decisions.

Presumption is that biological parents retain these rights.

DSS is not allowed to serve as "parent."

When no one can be identified or located, the LEA must assign a surrogate parent to make these decisions.

Rights of IDEA Parents

- Under IDEA, procedural rights flow through the student's "parent," such as:
  - Requesting an evaluation
  - Consenting to services
  - Utilizing dispute resolution strategies
- There are many different types of individuals who may be eligible to serve as the student's "parent."
  - IDEA Parent is a more descriptive term.
- IDEA Parent Flow Chart

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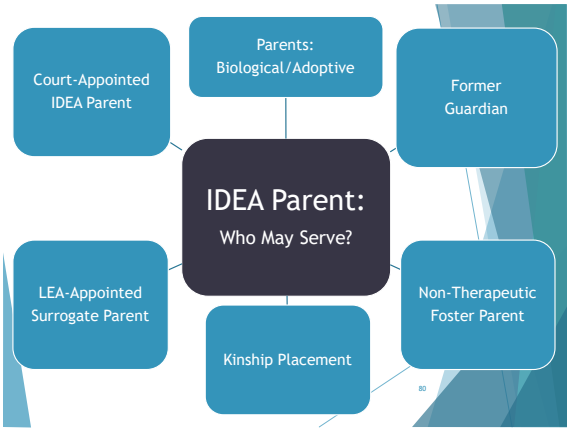

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Surrogate Parents

- CDSAs and LEAs are required to assign a surrogate parent to make early intervention or special education decisions for a child whenever an IDEA Parent cannot be identified or cannot be located. 20 U.S.C. §§ 1415(b)(2)(A), 1439(a)(5).
- Surrogate parents must meet the following qualifications:
  - Not be an employee of the Department of Public Instruction, the LEA, the N.C. Infant-Toddler Program's CDSAs, or any state agency involved in the education or care of the child, such as the Department of Health and Human Services, a group home, a therapeutic foster parent, or a person or an employee of a person providing early intervention services to the child, or to any family member of the child;
  - Have no personal or professional interests that conflict with the interests of the child; and
  - Have knowledge and skills to adequately represent the child. 34 C.F.R. §§ 300.519(d); 303.422(d).

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Who May Not Serve as the IDEA Parent?

- DSS child welfare workers
- Guardian ad Litem ("GAL") volunteers (per NC GAL Policy)
- Residential placement providers
- Therapeutic foster parents

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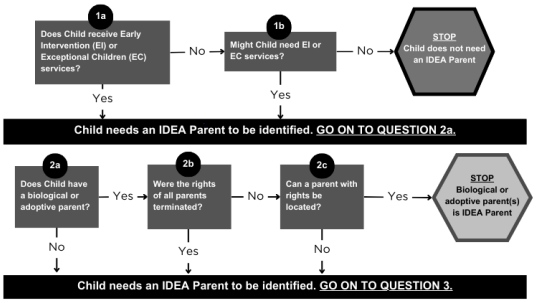
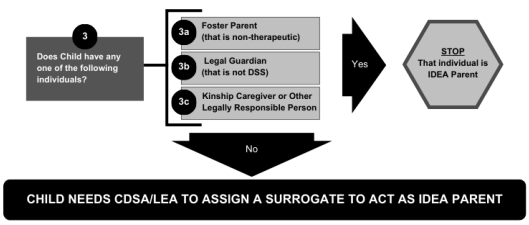
IDEA Parent Flow Chart – Absent Court Order



IDEA Parent Flow Chart – Absent Court Order



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Court-Ordered IDEA Parent

- Two possible mechanisms:
  1. A judicial decree or order can be made that identifies a specific individual (parent, non-therapeutic foster parent, guardian, kinship placement, or other individual) to serve as the "parent."
     - 20 U.S.C. § 1401; 34 C.F.R. § 300.30; 34 C.F.R. § 303.27.
  2. For a child who is considered a "ward of the state," the judge overseeing the child's case may appoint a surrogate parent.
     - The surrogate parent cannot be an employee of the Department of Public Instruction, the LEA, the N.C. Infant-Toddler Program's CDSAs, or any state agency involved in the education or care of the child, such as the Department of Health and Human Services, a group home, a therapeutic foster parent, or a person or an employee of a person providing early intervention services to the child, or to any family member of the child.
     - 20 U.S.C. § 1415; 20 U.S.C. § 1439; 34 C.F.R. § 300.519; 34 C.F.R. § 303.422.
     - Ward of the State:
       - Means a child who, as determined by the State where the child resides is
         - A foster child;
         - A ward of the State; or
         - In the custody of a public child welfare agency.
       - Exception: Ward of the State does not include a foster child who has a foster parent who meets the definition of a parent in 34 C.F.R. § 300.30 or 34 C.F.R. § 303.27.

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Hypothetical – Jill, Cont.

- The CFT believes Jill should be evaluated for special education services. Jill is in a non-therapeutic foster placement. No one knows where her mother is. Her father is currently in jail.
  - Who is the appropriate IDEA Parent for Jill?

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School Transitions

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Transitions between LEAs

- Transitions between LEAs within the same school year: The new LEA shall provide a FAPE, including services comparable to those described in the IEP, in consultation with the IDEA parent(s).
  - Transition between LEAs in NC
    - Comparable services provided until the new LEA either adopts the previously held IEP, or develops, adopts, and implements a new IEP
  - Transition from outside NC
    - Comparable services provided until the LEA conducts an evaluation, if determined necessary, and develops a new IEP, if appropriate. 20 U.S.C. § 1414(d)(2)(C); 34 C.F.R. § 300.323(e)-(f).
- Transitions between LEAs over the summer: The new LEA must have the IEP in effect by the beginning of the school year. 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).

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Hospitals

- Each LEA must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education, including instruction in hospitals and institutions. 34 C.F.R. § 300.115.
- Students continue to have a right to a FAPE.
- For students in foster care, their current LEA continues to be responsible.

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Day Treatment

- Coordinates educational activities and intensive treatment while allowing the individual to live at home or in the community.
  - The client's educational activities may be provided in this facility or in another educational setting, such as regular classes or special education programs within a typical school setting. 10A NCAC 27G.1401.
- Provider implements therapeutic interventions coordinated with the individual's academic or vocational services available through enrollment in an educational setting.
  - A Memorandum of Agreement ("MOA") between the Day Treatment provider, the Managed Care Organization ("MCO"), and the LEA is highly encouraged.
  - During the school year, the Day Treatment Program must operate each day that the schools are in operation, and the Day Treatment operating hours shall cover at least the range of hours that the LEAs, private or charter schools operate. NC Medicaid Clinical Coverage Policy No: 8A (January 1, 2025).
- An interagency agreement or other mechanism for interagency coordination between each noneducational public agency and the State Educational Agency ("SEA") is required to ensure that all services that are needed to ensure a FAPE are provided. 34 C.F.R. § 300.154.

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Psychiatric Residential Treatment Facilities ("PRTFs")

- As a requirement of licensure, PRTFs must have a facility-based school that must:
  - Meet requirements for non-public schools, and
  - Meet requirements of a Nonpublic Exceptional Children's Program. G.S. 122C-23.1.
- PRTFs are required to ensure that educational services are provided to any child admitted in the facility, including special education and related services to students with disabilities. G.S. 115C-12(44).
- School district where the PRTF is located must conduct any initial EC evaluations or reevaluations in coordination with the PRTF.

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Incarceration

- Juvenile Facilities
  - The Juvenile Justice section of the Department of Public Safety operates as the LEA.
  - All IDEA protections apply to students with disabilities in juvenile facilities and their IDEA Parent(s).
- Adult Facilities
  - Adult jail: Each LEA must ensure that a FAPE is available to students with disabilities incarcerated in local jail who were eligible prior to their incarceration. 34 C.F.R. § 300.102(a)(2); NC 1501-1.1(d).
  - Adult prisons: In addition, with respect to eligible students with disabilities who have been convicted as adults and incarcerated in adult prisons—
    - The requirements relating to transition planning and transition services do not apply with respect to students whose eligibility will end, because of their age, before they will be eligible to be released; and
    - The IEP team may modify the student's IEP or placement if the State has a bona fide security reason. 34 C.F.R. § 300.324(d); NC 1503-5.1(d).

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Avenues for Dispute Resolution

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Section 504 Grievance Procedures

- If a student's rights under Section 504 are violated, the parent/legal guardian has two options:
  - The school system's internal process, or
  - The Office for Civil Rights ("OCR") in Washington, D.C.

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Office for Civil Rights Complaint

- The Office for Civil Rights ("OCR"), a division of the U.S. Department of Education, is responsible for enforcing Section 504 and Title II of the Americans with Disabilities Act and has jurisdiction to process complaints that fall under both statutes. 28 C.F.R § 35.171(a)(3)(i).
- A complaint must be filed within 180 calendar days of the date of the alleged discrimination, unless the complainant is granted a waiver. OCR Case Processing Manual, Section 106.
- You cannot file a complaint if you are in the process of addressing the issue with another agency or through a school's grievance procedure.
  - Can refile with OCR after the other complaint process has completed (within 60 days), but OCR will determine whether or not to defer to the prior adjudication.

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Avenues for Dispute Resolution

- IEP Meetings
- Independent Educational Evaluations
- Facilitated IEP Meetings
- Mediation
- State Complaints
- Due Process Hearings

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Dispute Resolution: Independent Educational Evaluations

- An Independent Educational Evaluation ("IEE") is performed by a qualified professional not employed by the local educational agency ("LEA").
- The LEA will pay for the IEE or file a due process claim.
- The IDEA Parent has the right to an IEE if they disagree with the LEA's evaluation.
- The IDEA Parent is not required to explain why they disagree with the evaluation.
- Important times to consider an IEE:
  - The LEA's evaluation does not accurately reflect the student's skills and deficits
  - The LEA's evaluation is incomplete
  - The LEA refuses to perform a requested evaluation

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Dispute Resolution: Facilitated IEP Meetings

- Provided through the North Carolina Department of Public Instruction ("DPI").
- Will be conducted by an impartial facilitator at no cost to the IDEA Parent or the LEA.
- Purpose is to help guide effective communication between team members.
- The facilitator does not take a side and does not make any decisions.
- Most useful in these situations:
  - When the IDEA Parent is not feeling understood by other members of the IEP team
  - IEP meetings have been unproductive because of strained relationships
  - There is a need for meaningful discussion about changes to the IEP, such as different goals, additional accommodations or modifications, or a change in special education services

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Dispute Resolution: Facilitated IEP Meetings

- Can be requested by:
  - IDEA Parent
  - Adult student with a disability
  - School representative
- Requested by filling out the Facilitated IEP Meeting Request form.
- Must be requested at least 10 days before the meeting.
- Both the IDEA Parent and the LEA must agree to having a Facilitated IEP Meeting.

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Dispute Resolution: Mediation

- Process where a trained, neutral mediator helps resolve a dispute between the IDEA Parent and the LEA.
- Good option if the IEP team is unable to reach consensus regarding the identification, evaluation, educational program, or placement of a student.
- Helps parties express views and understand position of the other party.
- May be initiated by the IDEA Parent or the LEA.
  - Voluntary process to avoid litigation – neither party can be forced to mediate.
- May be requested any time there is a dispute between the IDEA Parent and the school.

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Dispute Resolution: State Complaint

- An administrative complaint process with the state educational agency, NC Department of Public Instruction ("DPI"), to allege that the LEA violated a requirement of the IDEA.
  - A state complaint can be filed to challenge systemic failures.
- DPI will not investigate alleged violations that occurred more than one year prior to the date that DPI received the complaint. 34 C.F.R. § 300.153(c).

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Dispute Resolution: State Complaint

- DPI must issue a written decision on the complaint within 60 days of the date on which it received the complaint. The decision must include findings of facts and conclusions as well as reasons for the final decision. 34 C.F.R. § 300.152(a)(5).
- When DPI finds a violation, it issues a corrective action plan as part of the decision. 34 C.F.R. § 300.151(b).
  - DPI is responsible for tracking and ensuring that the final written decision is enforced. 34 C.F.R. § 300.600(e).
- State complaint decisions are not appealable in NC.

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Dispute Resolution: State Complaint

- The complaint must include:
  - A statement that public agency violated a requirement of Part B of the IDEA;
  - The facts supporting this statement;
  - The signature and contact information for the complainant; and
  - If alleging violations regarding a specific child:
    - Name and address of the child;
    - Name of the school the child attends;
    - Description of the problem, including facts; and
    - Proposed resolution to the problem. 34 C.F.R. § 300.153(b).
- A signed, written complaint can be mailed, emailed, or faxed to DPI.
  - A copy of it must be forwarded to the LEA responsible for serving the child at the same time the party files the complaint. 34 C.F.R. § 300.153(d).

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Remedies

- Examples
  - Remediation
  - Compensatory education
  - Monetary reimbursement
  - Appropriate future provision of services
  - Professional development/training
  - Policy changes

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Dispute Resolution: Due Process

- Formal, legal process for resolving disputes about special education issues.
- Can address matters related to the identification, evaluation, or educational placement of a student with a disability; provision of FAPE; or appealing a Manifestation Determination Review.
- Filing a contested case petition starts a proceeding against the LEA.
  - Can result in a settlement agreement or a decision by an administrative law judge.
- Handled by the Office of Administrative Hearings ("OAH").

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Dispute Resolution: Due Process

- Petition must allege a violation that occurred not more than one year before the date the IDEA Parent or the LEA knew or should have known about the alleged action.
- Student will "stay put" in their current educational placement during the proceedings.
- Resolution session:
  - Within 15 days of receiving the IDEA Parent's petition, the LEA must convene a resolution meeting.
  - The IDEA Parent and the LEA may agree in writing to waive the meeting, and they may choose to use the mediation process.
  - Legally binding agreement

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Dispute Resolution: Due Process

- At the hearing:
  - The IDEA Parent can be represented by an attorney, but not by a non-attorney.
  - Both sides present evidence and confront, cross-examine, and compel the attendance of witnesses.
  - An independent administrative law judge will determine the facts and conclusions of law.
- Either party may appeal the hearing decision in state or federal court.

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Thank you!

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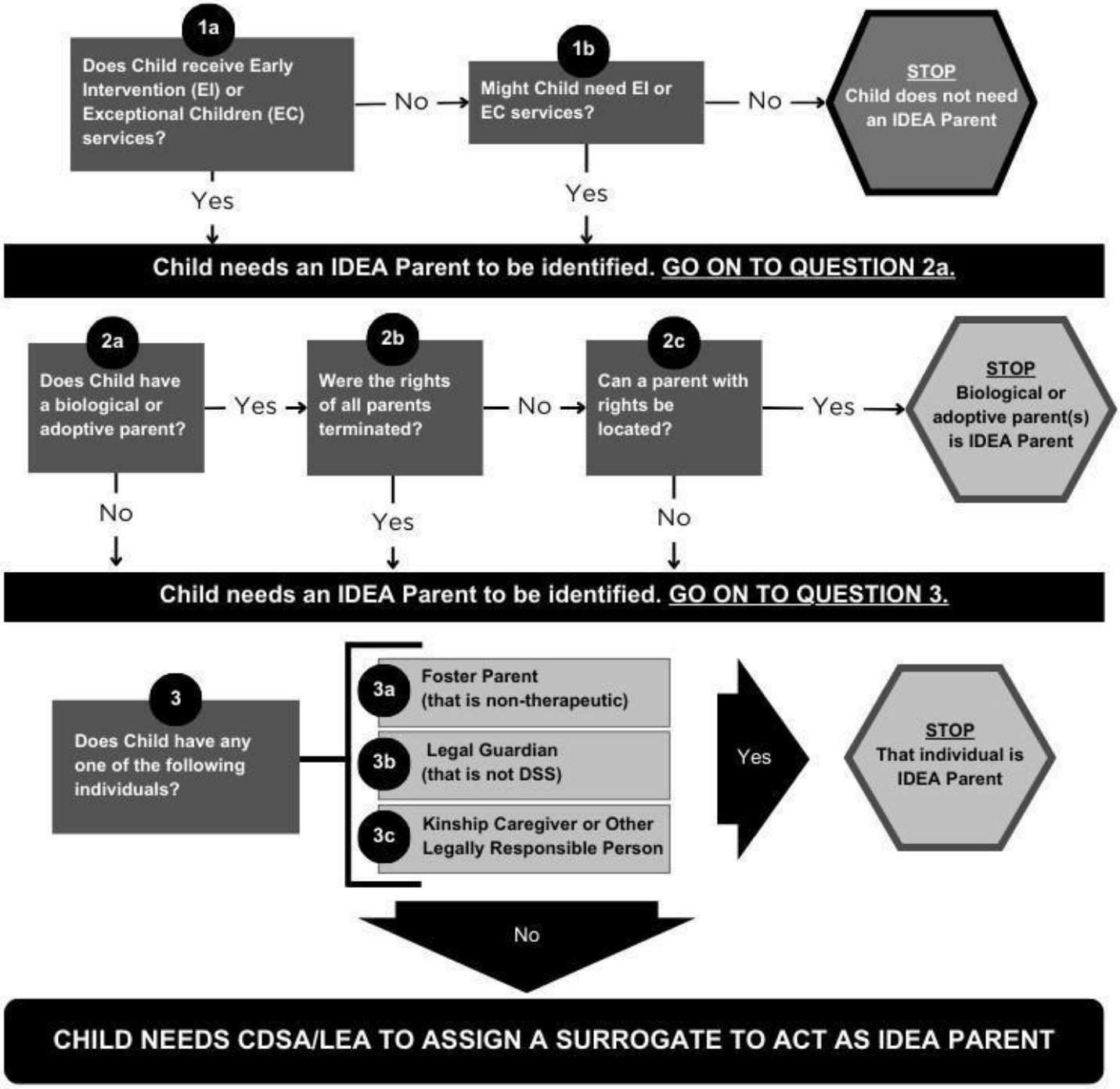
Identifying the IDEA* Parent



*****The Individuals with Disabilities Education Act (IDEA) is the federal law that defines and regulates early intervention and special education services. In North Carolina, special education services are often referred to as Exceptional Children (EC) services. See additional information on next page.

Prepared by Council for Children's Rights - August 2024

1a–b. Children's Developmental Services Agencies (CDSAs) and Local Educational Agencies (LEAs) must ensure that every child with a disability has a "parent" who can make early intervention and special education decisions for them, referred to herein as IDEA Parent. 20 U.S.C. § 1401(23).

2a. Biological or adoptive parents are the presumed IDEA Parent as long as they have legal authority to make early intervention and special education decisions and are attempting to exercise their rights. 34 C.F.R. §§ 300.30(b)(1), 303.27(b)(1); N.C. Policies 1500-27(b)(1). Biological or adoptive parents may attempt to exercise their early intervention and special education rights in many different ways, such as contacting the student's teachers for updates, communicating about an evaluation, or attending an Individualized Family Service Plan (IFSP) or Individualized Education Program (IEP) meeting or other school meeting. Attempting to exercise rights includes a biological or adoptive parent who is unwilling to consent to an evaluation or services.
2b. If a biological or adoptive parent's rights are terminated, relinquished, or suspended through court order, they are unable to serve as IDEA Parent. Additionally, if there is a court order identifying another person as having educational decision-making rights, then that person is IDEA Parent. 34 C.F.R. §§ 300.30(b)(2), 303.27(b)(2); N.C. Policies 1500-2.27(b)(2).
2c. The LEA or CDSA shall make reasonable efforts to locate and engage the parent, consistent with 34 CFR § 300.522. Parents who are incarcerated may still be able to serve as IDEA Parent; being incarcerated does not meet the criteria of "unable to locate."

3. If the biological or adoptive parents are not attempting to exercise their early intervention and special education rights, another individual may be eligible to act as IDEA Parent. 34 C.F.R. §§ 300.30, 303.27; N.C. Policies 1500-27.
3a. A therapeutic foster parent cannot serve as IDEA Parent. N.C. Policies 1500-2.27(a)(2).
3b. The Department of Social Services (DSS) child welfare worker cannot act as IDEA Parent for a child in its custody. 20 U.S.C. § 1401(23)(B); N.C. Policies 1500-2.27(a)(3).
3c. "Kinship Caregiver" refers to "an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives," and an "Other Legally Responsible Person" is "an individual who is legally responsible for the child's welfare." 20 U.S.C. § 1401(23)(C); N.C. Policies 1500-2.27(a)(4).

Surrogate Parents. CDSAs and LEAs are required to assign a surrogate parent to make early intervention or special education decisions for a child whenever an IDEA Parent cannot be identified or cannot be located. 20 U.S.C. §§ 1415(b)(2)(A), 1439(a)(5). Surrogate parents must meet the following qualifications:

1. Not be an employee of the Department of Public Instruction, the LEA, the N.C. Infant-Toddler Program's CDSAs, or any state agency involved in the education or care of the child, such as the Department of Health and Human Services, a group home, a therapeutic foster parent, or a person or an employee of a person providing early intervention services to the child, or to any family member of the child;
2. Have no personal or professional interests that conflict with the interests of the child; and
3. Have knowledge and skills to adequately represent the child. 34 CFR §§ 300.519(d); 303.422(d).

Special Education Series

Special Education Decision Making
Role of the Judge

Between a third and half of school-age children in the foster care system receive special education services, compared to only 11% of all school-age children.[2] Research shows that the earlier a child with a disability is identified and served, the better the child's school and life outcomes. But service delays and other problems will be avoided only if children's attorneys and others working on behalf of children in the child welfare system understand and use the Individuals with Disabilities Education Act (IDEA) to ensure children have legally authorized decision makers.

Research shows that the earlier a child with a disability is identified and served, the better the child's school and life outcomes.

Remember, many children, including children in foster care, who have learning difficulties and need extra help do not have disabilities or require special education. And children of color are especially at risk of inappropriate placement in special education programs and are consistently overrepresented in such programs. This fact sheet is intended to address special education identification and services for only those children who truly warrant this intervention.

Why should a judge make sure children under the court's jurisdiction have someone to make special education decisions for them?

✔ **To ensure IDEA's requirements are followed.** The Individuals with Disabilities Education Act (IDEA) is a federal law that requires school districts to provide a "free appropriate public education" (FAPE) to children with a qualifying disability.[1] FAPE means an individualized program of special education and related services (including, for example, physical, speech, or occupational therapy; school health services; and psychological counseling). The special education and related services a child needs must be listed in an Individualized Education Program (IEP), and must offer the child the opportunity to make meaningful academic and behavioral progress in school. Whenever possible, children with disabilities should be taught what all students are learning in regular classrooms—with the extra help they need. Every state has adopted laws to implement the IDEA's requirements.

- **To ensure a qualified person is in place to consent to and make decisions about special education services.** Determining who can make decisions for a child who needs special education begins with the IDEA's complex definition of "parent." A child cannot be evaluated or begin to receive special education services until an IDEA Parent has given written permission. In most cases it is the IDEA Parent who consents to the first evaluation. It is the IDEA Parent who consents to services beginning under the Individualized Education Program (IEP), or disagrees with the IEP that the school district is proposing and uses the special education hearing and appeal system to get the services the child needs. Making sure that each child in the care of a child welfare agency has an effective IDEA Parent is the best way to ensure that children with disabilities in out-of-home care get special help to achieve their learning potential.

What is an "IDEA Parent"?

The following people can serve as the "IDEA Parent:"

- **A birth or adoptive parent.** In the absence of judicial intervention, a birth or adoptive parent who is participating in IEP meetings and is otherwise actively involved in the special education or early intervention process is the child's IDEA Parent. This is true even when the child is living in a foster home or a group setting.

- **Another qualified person.** If the birth or adoptive parent is not "attempting to act," any of the following individuals can be the IDEA Parent:
  - a foster parent unless barred by state law from serving as an IDEA parent
  - a guardian (both a general guardian or a guardian specifically authorized to make education decisions)
  - a person acting in the place of the parent with whom the child lives
  - a person legally responsible for the child's welfare
  - a surrogate parent (more on this below)

- **A person designated by the judge.** As detailed below, new federal rules give a judge broad power to designate a specific person to function as the IDEA Parent and to make special education decisions for a child in the custody of a child welfare agency.

What obligations does a school district have to involve the IDEA Parent in the special education process?

School districts must take steps to ensure that the IDEA Parent is involved in the special education process, such as including them in IEP

meetings and notifying them of proposed changes. Therefore, school districts must know who the IDEA Parent is for each child who is attending their schools. This could be a person who meets the IDEA's definition of parent, a person the court has determined is the IDEA Guardian, or a court or school district-appointed Surrogate Parent.

What obligations does a school district have to ensure that a Surrogate Parent is assigned to serve as the child's IDEA Parent?

- ✔ **Determining if a Surrogate Parent is needed.** School districts must determine whether a surrogate parent is needed when: 1) a child does not have anyone who meets the definition of an IDEA Parent (for example, there is no birth or adoptive parent, there is no foster parent, or the foster parent is barred by state law from serving as an IDEA Parent); 2) the school district cannot locate an IDEA Parent after reasonable efforts; 3) the child is a ward of the state under the laws of the state;[3] or 4) the child qualifies as an "unaccompanied homeless youth."[4] For children in out-of-home care, a Surrogate Parent must always be appointed in situations 1 and 2.[5]

- ✔ **Appointing a Surrogate Parent for a child who is a ward of the state under the laws of the state.** Whether an education agency is required to appoint a Surrogate Parent for a child who is a "ward of the state under the laws of that state" depends on: 1) how a state defines "wards of the state" (e.g., all children upon entering the custody of the child welfare agency, or all children post-termination of parental rights) ; and 2) the extent to which those states interpret federal law to permit or even require the appointment of a Surrogate Parent for state "wards of the state" who still have an IDEA Parent such as an active birth or adoptive parent.

  For example, some states read the IDEA to require that *all* children who are state "wards of the state" must have a surrogate parent appointed. Other states with similar rules only appoint Surrogate Parents for children who are state "wards of the state" when there is no IDEA Parent. So, to determine which children qualify for Surrogate Parents in your state, it's important to know how your state defines "wards of the state" — and to know how it interprets the federal rules on appointing Surrogate Parents for these children.

- ✔ **Making reasonable efforts to appoint a Surrogate Parent.** When a school district determines that a Surrogate Parent is needed, it must make reasonable efforts to appoint a Surrogate Parent within 30 days. The best option is a surrogate parent (a family member or friend, a former foster parent) who knows the child well and has her confidence. If no one else is available, the school district must recruit a volunteer, perhaps a local CASA member. A Surrogate Parent cannot

Learn More

For more special education resources visit:
www.abanet.org/child/education/publications

be a person who is an employee of an education or child welfare agency providing education or care for the child—so a school official or child's caseworker cannot be a child's Surrogate Parent. A school district must also ensure that the Surrogate Parent has no personal or professional conflict with the child and that the person has the skills to represent the child competently.

What powers do judges have to appoint a special education decision maker for a child in out-of-home care?

Judges have 3 options under the IDEA:

- ✔ **Initial evaluations:** If the child is in the custody of the child welfare agency and is not living with the birth or adoptive parent or a foster parent who can serve as the IDEA Parent, a judge can suspend the birth or adoptive parent's right to make education decisions for the child and can appoint another person to consent to the child's first special education evaluation. But remember, only an IDEA Parent (which can include a Surrogate Parent or a Guardian, discussed below) can consent to special education services starting—so it's good practice to move forward at the same time to ensure an effective IDEA Parent is in the picture.

- ✔ **Surrogate Parent:** A judge can appoint a person to be a Surrogate Parent—and thus an IDEA Parent—whenever a child meets the IDEA's definition of "ward of the state." This standard is met when the child is in the custody of a child welfare agency AND the child does not have a foster parent who can serve as the IDEA Parent. A Surrogate Parent cannot be a person employed by an agency who provides child welfare or education services to the child.

- ✔ **IDEA Guardian:** The limits on a judge's authority to appoint a Surrogate Parent do not apply when a judge appoints an IDEA Guardian to make special education decisions on behalf of a child. To the extent permitted under state law (usually whenever the appointment of an IDEA Guardian is in the child's best interests), a judge can appoint a person to serve as an IDEA Guardian to make special education decisions for a child. A judge can appoint an IDEA Guardian for a dependent child even when the child remains in the physical custody of the birth parent. Under federal law, an IDEA Guardian appointed by the court is an IDEA Parent who preempts any other possible IDEA Parent, including the birth or adoptive parent or a foster parent. An IDEA Guardian cannot be the child's caseworker.

About this Series

This is one of six fact sheets geared to different audiences:

- children's attorneys
- judges
- caseworkers
- foster parents
- youth in foster care
- educators

View all fact sheets at: **www.abanet.org/child/education/publications**

Tips for Judges:

- ✔ **Keep the birth or adoptive parent in mind.** Most children in care return to their birth or adoptive families. So, when possible and in the child's best interests, keep parents involved and empowered to make education decisions for their children. If the birth parents are the appropriate people to make education decisions, it may be wise to clarify this in the court order.

- ✔ **Consider both permanent and temporary options for alternate decision makers.** For some children, it is in the child's best interest for the judge to appoint an alternate decision maker only for a limited period (for example, when the parent is in the hospital), and to return decision-making power to the birth or adoptive parent as soon as possible. Other children require a more permanent solution. Birth and adoptive parents whose rights have not been permanently terminated should be encouraged to petition the court for reinstatement of decision-making authority whenever they are able to resume these responsibilities.

- ✔ **When appointing a Surrogate Parent or a Guardian, consult all involved parties.** When possible, ask the child whom she would prefer? Or, seek out someone known to the child. Consult the child's attorney, social worker, or the school district about family or friends who are invested in the child's well-being and may be available to serve as the Surrogate Parent. Is a church member, a court appointed special advocate (CASA), or the attorney herself willing to volunteer?[6]

- ✔ **Be sure orders appointing Surrogate Parents or Guardians specifically reference the individual's power to make education decisions.** A Surrogate Parent or Guardian has all special education decision-making rights. An order appointing a Surrogate Parent or Guardian should name a specific person and state the individual is appointed "to make all special education decisions for the child."

- ✔ **Encourage developing Surrogate Parent pools, either through local or state education or child welfare agencies.** Maintaining a trained pool of qualified surrogates can help ensure timely appointments and appropriate advocacy by the individuals appointed.

Endnotes

[1] The IDEA covers children with disabilities from birth until graduation or the maximum age of eligibility under state law. The rules described in this Fact Sheet apply to school-aged children and preschoolers (children from their third birthday until school-age), but do not address the separate rules for children birth through age three. Younger children under age three are entitled to appropriate "early intervention" services, which must be set out in an "Individualized Family Service Plan." Another federal law, §504 of the Rehabilitation Act of 1973, also requires public school districts to provide a "free appropriate public education" to students with disabilities, and to make reasonable accommodations to permit these children to benefit from all aspects of the school program. Some students with disabilities who are not eligible under the IDEA may still be entitled to the protections of §504.

[2] Terry L. Jackson & Eve Müller, *Foster Care and Children with Disabilities* (National Association of State Directors of Special Education, Inc., Forum, February 2005), available at http://www.nasdse.org/publications/foster_care.pdf

[3] A ward of the state under the laws of the state is different from an IDEA ward of the state. An IDEA ward of the state is defined in the IDEA as a child in the custody of a child welfare agency who does not have a foster parent who can serve as an IDEA parent.

[4] For more information about unaccompanied homeless youth, visit the National Law Center on Homelessness and Poverty website, under Education, at www.nlchp.org/FA%5FEducation/, and the National Center on Homeless Education website at www.serve.org/nche/.

[5] An unaccompanied homeless youth under McKinney-Vento can have an active birth or adoptive parent, or can be living with a person who is acting as the child's parent—in which case no other IDEA parent is required. However, the IDEA also provides that appropriate staff from shelters, independent living programs, and street outreach programs may be appointed as a "temporary surrogate parent" even if the staff person is involved in the care or education of the child until a permanent surrogate parent is assigned by the court or the school district.

[6] The judge could appoint the child's attorney or other child advocate (for example, a CASA) as the education decision maker for the child, but much will depend on state law and regulations whether this is appropriate in your state. For attorneys who represent children, the issue may be affected by the standard of representation used in your state or jurisdiction. Federal law is clear that the person appointed cannot be the child's caseworker or any employee of the state if the child is a ward of the state.

This sample is intended for reference and training purposes only. By clicking on the 7 you can navigate to a "Tip Sheet" with references, resources and reminders for specific components of the IEP.

ECATS Training Site
IEP Document

Student: Henry Test | **Student UID #:** 112245 | **DOB:** 05/13/2009
School: DPI Test School | **Grade:** Third Grade | **Age:** 10
Primary Eligibility: LD | **Secondary Eligibility:**

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Meeting Purpose: Annual Review
Meeting Date: 10/08/2019
From: 10/15/2019 **To:** 10/07/2020 1

Student Profile

Student's overall strengths that contribute to success in the educational environment: 2

Positive attitude and relationships with others: Henry is a friendly and cooperative student who wants to do well in school. He gets along well with his peers and teachers. Typically, Henry puts forth his best efforts on assignments.

Ability to self-monitor: Agendas and/or task lists help Henry stay on track and not only complete but turn in his assignments.

High interest in Science and Math: He is curious, enjoys science, particularly learning about the environment, animals and conducting experiments. In addition to science, Henry enjoys math and he demonstrates academic strengths in rote counting and skip counting.

Grade level comprehension of high interest texts: Henry enjoys listening to books read aloud, and is able to comprehend at grade level, when it is a high interest topic such as when books are related to science.

Decoding skills: Henry is making progress with his phonics skills and now is able to decode CVC (consonant-vowel-consonant) words.

Parental concerns, if any, about their child's academic and functional performance in school:
Mr. and Mrs. Test want to see Henry continue not only to work hard but also to continue to increase his basic reading and math skills. They are concerned that if his reading does not significantly improve that he will get so far behind that he can't catch up. They want to see him performing at grade level.

Parent /student's vision for the future: (Include, specifically, vision for after high school, if appropriate.)
Mr. and Mrs. Test want Henry to do well in school, graduate with his friends, and pursue post-secondary education. Since Henry regularly checks out science books from the local library and also loves to conduct science experiments at home, they think he might look into a course of study in the sciences.

Present Level(s) of Academic and Functional Performance 3

Complete the current descriptive information by using norm-referenced, criterion-referenced, or any other valid data sources, as well as descriptive information for each of the relevant areas. Include current academic and functional performance, behaviors, social/emotional development, transition and other pertinent information. All areas assessed should be addressed and a determination made as to whether the data indicates an area is in need of specially designed instruction.

AREA(S) IN NEED OF SPECIALLY DESIGNED INSTRUCTION (SDI) must be addressed within the IEP (e.g. annual goals, accommodations, specially-designed instruction, behavior intervention plan, etc.)

Area Assessed:	Source(s) of Relevant Information:	Area in Need of SDI:
Math	Progress Monitoring-Math (10/08/2019) Progress Monitoring-Math (10/11/2019)	Yes

Present Level of Performance:

Henry is able to solve one-step math problems involving addition and subtraction independently but is unable to to consistently solve problems with more than one step being able to answer only 1 or 2 problems out of 5. He is unable to compare and order two three-digit numbers but can order numbers through 100 consistently with 95% accuracy. He confuses composing and decomposing numbers above 50 (he is less than 50% accurate on 5 samples). and he cannot work with all addition and subtraction problem types if unknowns are placed in any position other than the final position, which is a second-grade level skill. When trying to solve these problems, he will add or subtract the numbers that are available in any order and will visually misrepresent the equation. His strengths lie in rote counting, skip counting, and concepts such as bigger and smaller. He continues to depend on his fingers to add and subtract bigger values but has mastered most adding and subtracting facts.

Area Assessed:	Source(s) of Relevant Information:	Area in Need of SDI:
Reading	Other - Review of Existing Data (Educational)	Yes

Present Level of Performance:

Henry is able to accurately read 9/10 closed syllable words containing consonants blends and digraphs. He can decode CVC words with blends (ie: sp-, br-). Henry does not decode words with long vowel patterns (CVCe) or vowel team syllables. He is unable to apply phonics and word analysis skills to decode unfamiliar words in 2nd grade levels passages with accuracy and automaticity. Henry currently reads abut 75 words per minute which is in the lower 25th percentile for his age group.

Area Assessed:	Source(s) of Relevant Information:	Area in Need of SDI:
Behavior	Other - Structured Student Interview (07/17/2019	Yes

Present Level of Performance:

Henry has progressed from not being able to actively engage with a set agenda and schedule to being able to complete all tasks, in order, within an appropriate time frame, and checking them off his list when given a 3-task check list with picture clues. When not provided the task list, Henry has begun to respond to visual prompts from the teacher to encourage him to reengage in the activity. When Henry does not have the task list, he requires up to 10 verbal cues from adults to remain on task for more than 2 minutes.

Area Assessed:	Source(s) of Relevant Information:	Area in Need of SDI:
Writing	Other - Review of Existing Data (Educational)	Yes

Present Level of Performance:

Based on informal writing assessments, Henry is able to write complete sentences with correct beginning capitalization and ending punctuation with 80% accuracy when given assistance. Using a graphic organizer/model, he can generate sentences featuring supporting details that he is able to brainstorm independently. However, Henry has demonstrated an inability to write introductory or concluding sentences to allow his thoughts to transition smoothly between paragraphs. When writing assignments require a multiple paragraph response, this lack of transition makes it difficult to follow Henry's train of thought and reasoning. On the last three essay responses of 3 paragraphs or more, Henry's earned an average of 63% accuracy, as measured by a writing rubric.

Area Assessed:	Source(s) of Relevant Information:	Area in Need of SDI:
Expressive Language	Speech Language - Receptive One-Word Picture Vocabulary Test, 4th Edition (ROWPVT-4)	Yes

Present Level of Performance:

Henry is able to use age level vocabulary to describe events. He is able to produce all /l/ and /s/ blends with carryover into conversational skills. Henry was given the Quick Articulation Screener which shows continued errors on /r/, r- blends and r-controlled vowels which is usually developed at his age . Henry demonstrates continued errors with regular verb tense markers; however, in therapy he is over 75% accurate when completing regular verb tense activities. Henry is over 85% intelligible to a familiar listener. When he tries to pronounce multi-syllabic words more errors are heard in his articulation with less than 50% accuracy vs. 85% accuracy for single syllable words.

Describe any relevant medical information:

Mrs. Test indicates that there are no current changes to Henry's medical history. He continues to be seen by his family doctor for attention deficit disorder and takes Ritalin in a time-released form daily. His medication is given at home.

Describe how the disability impacts involvement and progress in the general curriculum: 4

Henry's disability affects his comprehension of materials he reads independently because he must stop frequently when encountering unfamiliar words. He is unable to accurately respond to comprehension questions after reading grade level passages. He struggles to complete tasks consistently and independently. Because of this, he is performing significantly below grade level and does not progress at a rate sufficient to keep up with his peers or grade level expectations.

Consideration of Special Factors: 5	YES / NO	If Yes, Location in the IEP
Is the student an English Learner?	No	
Additional Information:		
Does the student have any special communication needs?	Yes	Goals, Services
Additional Information: Henry is currently receiving speech language services.		
Does the student require assistive technology devices or services?	No	
Additional Information:		
Does the student require the instruction in or use of Braille?	No	
Additional Information:		
Does the student have a documented hearing loss?	No	
Additional Information:		
For the student who is deaf or hard of hearing, the following have been considered: • The student's language and communication needs • Opportunities for direct communications with peers and professional personnel in the student's language and communication mode • Academic level • Full range of needs, including opportunities for direct instruction in the student's language Communication mode	No	6

Additional Information:		
Does the student have behavior(s) that impede his/her learning or that of others? If yes, how is behavior being addressed? Behavior Intervention Plan (BIP) Behavior Goal(s) Supplemental Aids/Supports	Yes	Goals
Additional Information:		
Does the student require Adapted Physical Education (APE) ?	No	
Additional Information:		
Is the student receiving instruction using the Extended Content Standards?	No	
Additional Information		
Are there additional parent concerns?	No	

Supports for academic, functional, personal changes or circumstances (if applicable):
What information is known about the student that will assist in developing an individualized education program?
Not applicable at this time

Secondary Transition

TT 1

The student is 14 years or older or will be during the duration of the IEP: ☐ Yes ☑ No

The following people provided information about the student's needs, strengths, preferences and interests and course of study selection:

☐ Student
☐ Parent(s), Guardian(s) and Family Member(s)
☐ Adult Service Agency Representatives School
☐ Staff
☐ Other

TT 2

Course(s) of Study:

Beginning at age 14 (or 8th grade) and updated annually:

Complete beginning at age 16 (or earlier, as appropriate) and updated annually.

TT 3

Postsecondary Goals and Supports:

Postsecondary goals are based upon age appropriate transition assessments as described in the present level of academic and functional performance. Indicate any activities and/or supports needed to assist student in making progress towards postsecondary goals (after high school) during the span of this IEP and the person (people) responsible for assuring these activities and/or supports are achieved.

Postsecondary Goals	
Education/Training	After high school, Henry Test will:
Employment	After high school, Henry Test will:
Independent Living (if appropriate)	Not Applicable

TT 4

Postsecondary Supports			
Transition Services	**Transition Activities**	**Responsible Person(s)**	**Responsible Agency**
Adult Living Skills			
Employment Development			
Functional Vocat-ional Evaluation (if appropriate)			
Instruction			
Related Services			
Community Exper-iences			
Daily Living Skills (if appropriate)			

TT 5

If the student is age 17 or younger during the life of this IEP, has the parent/guardian(s) and student have been informed of his/her rights will transfer to the child upon reaching age 18? ☐ Yes ☐ No

TT 6

If the student is age 18 or older during the life of this IEP, the parent/guardian(s) and student have been notified that the rights have transferred. ☐ Yes ☐ No TT 7

Measurable Annual Goals

Academic and/or functional goals designed to meet the student's needs. Goals should be clearly defined and measurable. For students who take alternative assessments aligned to alternative achievement standards, include a description of benchmarks or objectives.

Specific Area of Need	Math			
Observable Skill / Behavior	**Criterion for Mastery**	**Method of Measuring Progress**	**Assistive Technology**	**Related to Transition Goals**
Henry will increase his mastery of math skills from a mid-second grade level to at least a beginning third grade with at least 80% accuracy. • Henry will solve two step problems involving adding and subtracting with at least 80% accuracy. • Henry will compose and decompose numbers using various groupings of hundreds, tens, and ones with at least 80% accuracy.	80 8	Informal assessments; Work portfolio	No	No

Supplemental Aids and/or Services:		Supplemental Aids and/or Services for ESY:	

Specific Area of Need	Reading			
Observable Skill / Behavior	**Criterion for Mastery**	**Method of Measuring Progress**	**Assistive Technology**	**Related to Transition Goals**
Given a reading passage at his instructional level, Henry will read 105 words or more per minute in 4 out of 5 trials with 100% accuracy.	100	Running records, Data sheets, Anecdotal records	No	No
Henry will decode two syllable words with long vowels, diagraphs, prefixes and suffixes on a Curriculum Based Measure at a beginning 3rd grade level in 3 consecutive curriculum-based measurements.	100	Data sheets, Informal assessments	No	No

Supplemental Aids and/or Services:	tracker for text 9	Supplemental Aids and/or Services for ESY:	

Specific Area of Need	Writing			
Observable Skill / Behavior	**Criterion for Mastery**	**Method of Measuring Progress**	**Assistive Technology**	**Related to Transition Goals**
Given a writing prompt, Henry will use writing strategies taught to him to plan out and write a rough draft of at least three paragraphs that include introductory sentence, a minimum of three supporting details and a closing sentence with 80% accuracy.	80	Work portfolio	No	No
Given a writing prompt, Henry will plan out and write a rough draft of at least three paragraphs that use correct verb tense with 80% accuracy.	80	Work portfolio	No	No

Supplemental Aids and/or Services:		Supplemental Aids and/or Services for ESY:	

Specific Area of Need	Behavior			
Observable Skill / Behavior	**Criterion for Mastery**	**Method of Measuring Progress**	**Assistive Technology**	**Related to Transition Goals**
Given daily assignments, Henry will use his class agenda in order to independently complete classroom assignments and tasks 9 out of 10 days.	90	Anecdotal records, Therapy notes	No	No
Supplemental Aids and/or Services:		Supplemental Aids and/or Services for ESY:		

Specific Area of Need	Speech			
Observable Skill / Behavior	**Criterion for Mastery**	**Method of Measuring Progress**	**Assistive Technology**	**Related to Transition Goals**
Henry will correctly produce all age appropriate sounds in multi-syllabic vocabulary with 100% accuracy in 4 of 5 trials. After having a story read to him, Henry will recall story details regarding setting, main character, and actions, events with 90% accuracy over 5 consecutive trials.	100	Therapy Notes	No	No
Supplemental Aids and/or Services:		Supplemental Aids and/or Services for ESY:		Supplemental Aids and/or Services:

Least Restrictive Environment

10

Description of Specially Designed Instruction and Related Services

Indicate the least restrictive environment in which the student can achieve the goal(s).

Specially Designed Instruction:

Service	Amount of Time in Minutes	Frequency	Location	Duration
Reading	30 minute(s)	5 per week	Special Education	10/15/2019 to 10/07/2020
Math	30 minute(s)	3 per week	Special Education	10/15/2019 to 10/07/2020
Writing	20 minute(s)	3 per week	General Education	10/15/2019 to 10/07/2020
Behavior	20 minute(s)	1 per day	General Education	10/15/2019 to 12/30/2019

Related Services:

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Service	Amount of Time in Minutes	Frequency	Location	Duration	Service Type
Speech/Language	30 minute(s)	1 per week	Special Education	10/15/2019 to 10/07/2020	☒ Goal ☐ Supplemental Aids / Services / Accommodations / Modifications

Transportation is not required as a related service.

Supplemental Aids/Services/Accommodations/Modifications:

In the space provided, list the subject/activity area in which the student will participate and the supplemental aids, supports, modification, and/or accommodations required (if applicable) to access the **general curriculum** and make progress toward meeting annual goals. If supplemental aids/services, modifications/accommodations and/or assistive technology will be provided in **special education** classes, include in the table below.

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Classroom Activities	
Art - All: Participating in Regular Class/Activity	**Location:** General Ed
Assemblies - All: Participating in Regular Class/Activity	**Location:** General Ed
Lunch - All: Participating in Regular Class/Activity	**Location:** General Ed
Career Technical Education Class: Not Participating	**Location:**
Computer Skills: Not Participating	**Location:**
Math - All: Participating with Accommodations	**Location:** Both

Supplemental Aids/Services/ Accommodations/Modifications	Implementation Specifications
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.
Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments
Testing in a Separate Room - Small Group	Test in small group of no more than 10 students

Physical Education - All: Participating in Regular Class/Activity	**Location:** General Ed
Reading - Elementary: Participating with Accommodations	**Location:** Both

Supplemental Aids/Services/ Accommodations/Modifications	Implementation Specifications
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.
Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments
Testing in a Separate Room - Small Group	Test in small group of no more than 10 students
Student Reads Test Aloud to Self	

Science - All: Participating with Accommodations **Location:** General Ed	

Supplemental Aids/Services/ Accommodations/Modifications	Implementation Specifications
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.
Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments
Testing in a Separate Room - Small Group	Test in small group of no more than 10 students
Student Reads Test Aloud to Self	

Social Studies - Elementary/Middle: Participating with Accommodations	**Location:** General Ed

Supplemental Aids/Services/ Accommodations/Modifications	Implementation Specifications
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.
Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments
Testing in a Separate Room - Small Group	Test in small group of no more than 10 students
Student Reads Test Aloud to Self	

Writing: Participating with Accommodations	**Location:** General Ed
Supplemental Aids/Services/ Accommodations/Modifications	**Implementation Specifications**
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.
Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments

If the student is in preschool, describe how the student is involved in the general education program.
Not applicable at this time

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Supports for school personnel:
Describe consultation and/or training for school staff to meet the unique needs of the student.
Not applicable at this time

State and District-wide Testing:

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For each subject tested in the child's grade, choose the method of assessment below. If "with accommodations" is chosen for any subject, provide description of the accommodations for each subject in the right columns. Alternate Assessment, if chosen, must apply to all tests taken.

District Tests	
District Assessment: Participating with Accommodations	
Accommodations	**Implementation Specifications**
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.
Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments
Student Reads Test Aloud to Self	Student Reads Test Aloud to Self
Testing in a Separate Room - Small Group	Test in small group of no more than 10 students
State Tests	
End-of-Grade Mathematics: Participating with Accommodations	
Accommodations	**Implementation Specifications**
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.
Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments
Testing in a Separate Room - Small Group	Test in small group of no more than 10 students
End-of-Grade Reading: Participating with Accommodations	
Accommodations	**Implementation Specifications**
Scheduled Extended Time - Approximately _____minutes	Henry will receive an additional 60 minutes of extended time.

Test Read Aloud (in English) (Requires specifics)	Computer reads aloud everything for online assessments and Read aloud everything by teacher for paper/pencils assessments
Student Reads Test Aloud to Self	
Testing in a Separate Room - Small Group	Test in small group of no more than 10 students

Alternate Assessment Justification 15

If the student is participation in any alternate assessment(s), explain why the regular testing method, standard administration or with accommodations, is not appropriate, and why the selected is appropriate:
Not applicable at this time

Least Restrictive Environment Justification 16

If the student will be removed from nondisabled peers for any part of the day, explain why the services cannot be delivered with nondisabled peers with the use of supplemental aids and services.

Henry will be removed from his nondisabled peers for specially designed instruction in reading and speech. He needs instruction that is several grade levels-below what is taught in his current grade level. He can be easily distracted at times. In order for Henry to receive meaningful benefit and make educational progress instruction must be provided in a quiet setting with minimal distractions.

Progress Reports:

Progress Reports on IEP goals will be issued in accordance with school report card schedule.
(If the IEP team determines that more frequent progress reports are needed, indicate the schedule below:)
A more frequent progress report is not needed at this time

Extended School Year Status: 17

ESY worksheet must be completed.

Eligibility is under consideration and will be determined by: 05/31/2020

IEP TEAM PARTICIPANTS 18

The following individuals were present and participated in the IEP Team decision. (A Request to Excuse Required IEP Team Member(s) has been obtained if any of the below participants are identified as excused. Note with an * any team member who used alternative means to participate.)

Name	Position	Date
Barbara EC Admin Test	LEA Representative	10/08/2019
Jerri SpecialEd Test	Special Education Teacher	10/08/2019
Elise Reg Ed Test	Regular Education Teacher	10/08/2019
Jerri SpecialEd Test	Interpreter of Instructional Implications of Evaluation Results	10/08/2019
Shamari Zambrano-Arias	Other Team Member	10/08/2019
Sally Test	Mother 19	10/08/2019

Explanation of team participants/absence of participants (if needed):

Mr. Test participated by phone. 20

Student: Henry Test | **Student UID #:** 112245 | **DOB:** 05/13/2009
School: DPI Test School | **Grade:** Third Grade | **Age:** 10
Primary Eligibility: DD | **Secondary Eligibility:**

ELIGIBILITY WORKSHEET – EXTENDED SCHOOL YEAR (ESY)

I. ESY Eligibility Determination

After the consideration of applicable data, the IEP Team has determined:

Yes	No	Cannot be Determined at this Time	Factors for Consideration
○	○	●	The student regresses or may regress during extended breaks from instruction and cannot relearn the lost skills within a reasonable time; or
○	○	●	The benefits a student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during extended breaks from instruction; or
○	○	●	The student is demonstrating emerging skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction.

Based on the information above:

Yes	No	Determination
○	○	The student is eligible to receive Extended School Year services.
○	○	The student is not eligible to receive Extended School Year services.
●	○	Eligibility cannot be determined at this time. The IEP Team will determine eligibility by 05/31/2019.

II. ESY Program Description

Describe the ESY program for this student by indicating the type(s) of service (special education and/or related service) and the number/length/location of session(s).

Type of Service	ESY Sessions		
	Number	Length	Location

ESY Start Date:	
ESY End Date:	

Student: Henry Test | **Student UID #:** 112245 | **DOB:** 05/13/2009
School: DPI Test School | **Grade:** Third Grade | **Age:** 10
IEP Start Date 10/15/2019 | **IEP End Date** 10/07/2020

Confidential One-Time Permission to Release Information for Medicaid Billing

The federal special education law, the Individuals with Disabilities Education Improvement Act 2004 (IDEA), permits school districts to seek payment from public insurance programs for some services provided at school. Under the Family Education Rights and Privacy Act (FERPA), your consent is required for the school system to release information about Henry Test to the North Carolina Division of Medical Assistance Medicaid program in order to access you or Henry Test's public benefits. You are entitled to a copy of any information the school system releases to the state Medicaid program. You may inquire about this program or revoke your consent at any time by contacting _____at_____. Your decision to allow the school district to release this information and access you or Henry Test's public benefits will not affect Henry Test's special education program. This consent form is completed for each child receiving special education evaluations and/or services.

ECATS Training Site uses the money it collects to provide valuable and necessary additional staffing to meet therapy needs of students, education for staff to learn new therapeutic techniques, assistive technology equipment, and materials for individual student needs.

Please mark the appropriate statement, sign, and date at the bottom:

_____**I give my consent** for ECATS Training Site to access my or Henry Test's North Carolina Medicaid benefits for services provided through Henry Test's individualized education program (IEP). My signature does not give consent to bill my private insurance company. The school system may release the following information to access these public benefits:

- Henry Test's name;
- Henry Test date of birth;
- Henry Test's IEP documentation including evaluations;
- The dates and times services are provided to Henry Test at school;
- Reports of Henry Test's progress, including therapist notes, progress notes and report cards.

I understand:

- Henry Test will continue to receive IEP services at no cost to me.
- I can revoke my consent at any time and withdrawing my consent does not relieve the school district of its responsibility to ensure that all required services are provided at no cost to me.

_____**I do not give my consent** for this information to be released. I understand refusing to consent or revoking consent does not change the school district's responsibility to provide IEP services at no cost to me.

Child's full name: Henry Test
School: DPI Test School
Service: Speech/Language - 1 sessions/wk of 30 min

Parent/guardian's name (print): _____

Parent/guardian's signature: _____

Signature Date: _____

IEP Tip Sheet: References, Resources and Reminders

The NC Policies Governing Services for Students With Disabilities can be found at:

https://ec.ncpublicschools.gov/conferences-profdev/march-institute/2018-march-institute-handouts/policy-updates-legal-trends/amendedmarch2018policy.pdf

IEP Item	References and Resources	Reminders:
	NC 1503-5.1(b)1(i) When IEPs Must be in Effect	▏At the beginning of each school year, an IEP must be in effect for each child with a disability. ▏IEP Teams must review each child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revise the IEP, as appropriate, to address any lack of expected progress. ▏For each student found eligible for special education, an IEP must be developed and placement completed within 90 days of the initial referral. *To promote compliance with this requirement, in ECATS the IEP end date must be no more than 364 days from the meeting date. Other compliance indicators will alert the case manager of approaching due dates.*
	NC 1503-5.1 Development, Review, and Revision of IEP	The IEP Team must consider: ▏the **child's strengths**, ▏Parent concerns **for enhancing their child's education,** ▏the **results of the initial/most recent evaluation,** and ▏the child's **academic, developmental, and functional n**eeds.
	Present Levels of Academic and Functional Performance NC 1503-4.1 through NC 1503-5.1 Definition of an Individualized Education Program https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/4apallfp.pdf	IEPs must include a statement of the child's present levels of academic achievement and functional performance. *The PLAAFP should:* ï *contain skill strengths and skill deficits* ï *be relevant and based on the data referenced in the review of existing data* ï *provide the baseline data to identify the gaps and guide the development of goals aligned with state standards* ï *lead to annual goals, targeting what the student cannot do but needs to learn; in other words, the critical skills needed to make progress* ï *lead to ambitious annual goals **which should be sufficiently ambitious** to help close the gap* ï *be written in language that is parent friendly and free of jargon. Anyone should be able to read the present level and know where the student is functioning.*

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4	Present Levels of Academic and Functional Performance NC 1503-4.1 through NC 1503-5.1 Definition of an Individualized Education Program https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/4apallfp.pdf	An IEP must include a statement of the child's present levels of academic achievement and functional performance, including: (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); (ii) or (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities *The impact statement must clearly state how the student's disability limits their access to or progress in the general curriculum currently rather than forecasting how the disability might impact the student later on. It should not restate that the student needs special education services (eligibility decision) or what specific services the student needs – but clearly state how the disability affects the student on a daily basis in the school setting.*
5	Special Factors NC 1503-5.1 Development, Review, and Revision of IEP NC 1501-2.3 Assistive Technology; and NC 1501-14.3 Access to Instructional Materials https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/4apallfp.pdf	The IEP Team must consider and address, as necessary, the special factors described in policy: Behavior, Limited English Proficiency, Blind or Visually Impaired, Communication needs, Assistive Technology needs. *If "Yes" is indicated for any factor, then it must be addressed within the IEP. Possible ways to address Limited English Proficiency as a special factor include, but are not limited to: inviting the ESL teacher to the meeting to discuss language learning progress and needs, WAPT testing, etc.* *Behavior, if marked "yes" is addressed through either a behavioral goal or behavior intervention plan.* *If the student has any documented hearing loss a communication plan is required. The Communication Plan Worksheet guides the IEP team in a discussion that reviews the current data of a student with a documented hearing loss to determine if the student has the communication, language, and literacy skills necessary to acquire grade-level academic skills and concepts in the general education curriculum.*
6	Adaptive PE NC 1501-2.6 Physical Education https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/4apallfp.pdf	Physical education services must be made available to every child with a disability. Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless-- (1) The child is enrolled full time in a separate facility; or (2) The child needs specially designed physical education, as prescribed in the child's IEP.

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7	Extended Content Standards NC 1501-12.4 Participation in Assessments https://ec.ncpublicschools.gov/disability-resources/significant-cognitive-disabilities/extended-content-standards-support-tools	IEP teams must ensure that parents of students selected to be assessed (thus instructed on the extended content standards) using an alternate assessment aligned with alternate academic achievement standards are informed that their child's achievement will be measured based on alternate academic standards, and of how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma.
8	Measurable Annual Goals NC 1503-4.1(a)(2) Definition of an Individualized Education Plan https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4c.pdf	2) (i) A statement of measurable annual goals, including academic and functional goals designed to – (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) Meet each of the child's other educational needs that result from the child's disability. For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives. *Goals are developed so that students should be able to successfully accomplish them within the life of the current IEP. Goals must be observable and measurable with a clear criterion for mastery to which the goal will be accomplished. If goals use "improve" or "increase", they must include a baseline measurement (ie. improve from 75% to 85%, etc.). Goals should also include the conditions under which the student will demonstrate the ability to accomplish the goal.*
9	Supplementary Aids and Services NC 1503-4.1(a)(4) Definition of an Individualized Education Plan	Supplementary Aids and Services are defined as aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extra-curricular and non-academic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with the least restrictive environment requirements. *Supplemental Aids and/or Services is one place to record those elements previously recorded on the Related Services Support Plan.*

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10	Description of Specially Designed Instruction and Related Services NC 1500-2.32 Special Education	A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child— (i) To advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section; *The frequency and duration of services should be reasonably calculated to allow the student the opportunity to achieve the measurable annual goals outlined in the IEP. Frequency and duration of services should not be calculated based upon administrative convenience or student course schedules. However, the team may anticipate that the student will achieve some goals sooner than others. In this case, flexibility in the frequency and duration of services can be documented by entering the area of specially designed instruction with different duration dates.*
11	NC 1500-2.27 Related Services	Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. Related services include, but are not limited to, speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools and parent counseling and training.
12	NC 1501-2.5 Nonacademic Services	(a) The LEA must take steps to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team. (b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

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13	Preschool NC 1501-3.2 Continuum of Alternative Placements	For preschool children, the continuum required in paragraph (a) of this section includes: (1) Regular early childhood program; (2) Special education program provided in a separate class, separate school, residential facility; (3) Service provider location; or (4) Home instruction.
14	NC 1503-4.1(6) Definition of Individualized Education Program	The IEP must include: (i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the IDEA
15	NC 1503-4.1(6) Definition of Individualized Education Program	If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why— (A) The child cannot participate in the regular assessment; and (B) The particular alternate assessment selected is appropriate for the child
16	NC 1500-2.20 Least Restrictive Environment https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4d.pdf	Least restrictive environment means that, to the maximum extent appropriate, children with disabilities shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (2) Each LEA must ensure that— (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *The LRE statement must answer the question **"why"** the student's specially designed instruction and/or related services cannot be achieved in the regular education environment, even with supports and services.*

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17	NC 1501- 2.4 Extended School Year Services https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4d.pdf	Each public agency must ensure that extended school year services are available as necessary to provide FAPE. (b) Definition. As used in this section, the term extended school year services means special education and related services that— (1) Are provided to a child with a disability— (i) Beyond the normal school year of the public agency; (ii) In accordance with the child's IEP; and (iii) At no cost to the parents of the child; and (2) The IEP Team must determine that extended school year services are necessary for the provision of FAPE to an individual child by considering: (i) Whether the student regresses or may regress during extended breaks from instruction and cannot relearn the lost skills within a reasonable time; or (ii) Whether the benefits a student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during extended breaks from instruction; or (iii) Whether the student is demonstrating emerging critical skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction.
18	NC 1503-4.3 Parent Participation https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-1.pdf	Each LEA must take steps to ensure that one or both of the: parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including-- ï Notifying the parent(s) of the meeting early enough to ensure that they will have an opportunity to attend; and ï Scheduling the meeting at a mutually agreed on time and place *The team should explore alternate ways to ensure parental participation (phone conferences, alternate locations, etc) before deciding to meet without a parent.*
19	NC 1503-4.3(c) Parent Participation https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-1.pdf https://ec.ncpublicschools.gov/policies/special-education-surrogate-parents/special-education-surrogate-parents-1	If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls. Before adding an alternate individual to serve as parent, check the policy manual to ensure that the individual can serve as parent. The NCDPI Surrogate Parent's Handbook can be a great resource as well.

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20	NC 1503-4.3(d) Parent Participation https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-1.pdf https://ec.ncpublicschools.gov/policies/special-education-surrogate-parents/special-education-surrogate-parents-1	A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parent(s) that they should attend. In this case, the LEA must keep a record of its attempts to arrange a mutually agreed on time and place, such as- (1) Detailed records of telephone calls made or attempted and the results of those calls; (2) Copies of correspondence sent to the parent(s) and any responses received; and (3) Detailed records of visits made to the parent's home or place of employment, if appropriate, and the results of those visits. *If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls. Before adding an alternate individual to serve as parent, check the policy manual pages 15-16 to ensure that the individual can serve as parent. The NCDPI Surrogate Parent's Handbook can be a great resource as well.*

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Transition Tip Sheet: References, Resources and Reminders

The NC Policies Governing Services for Students With Disabilities can be found at:

https://ec.ncpublicschools.gov/conferences-profdev/march-institute/2018-march-institute-handouts/policy-updates-legal-trends/amendedmarch2018policy.pdf

In addition to the NC Policies Governing Services for Students With Disabilities, the following resource may be helpful:

A Transition Guide To Postsecondary Education And Employment For Students And Youth With Disabilities from the Office Of Special Education And Rehabilitative Services/ United States Department Of Education https://www2.ed.gov/about/offices/list/osers/transition/products/postsecondary-transition-guide-may-2017.pdf

IEP Item	References and Resources:	Reminders:
TT 1	Transition NC 1503-4.1(b) Definition of an Individualized Education Plan https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4b.pdf	Beginning at age 14 (or younger if determined appropriate by the IEP Team) the meeting notice must also indicate: • that the development of a statement of the student's transition services needs will be discussed; and, • that the student will be invited to the IEP meeting. The IEP must include a statement of initial transition components including the child's needs, preferences and interests. Beginning at age 16 (not later than the first IEP to be in effect when the child turns 16) , the notice also must indicate that a purpose of the meeting will be the consideration of the student's postsecondary goals and transition services; and that the student will be invited to the IEP meeting. Identify any other agency that will be invited to send a representative with prior parental consent. *Remember you must have parent permission prior to inviting someone from an outside agency. Hint: Get the permission to invite prior to issuing the invitations. (Think about confirming the guest list in advance)*

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TT 2	Transition Participants NC 1503-4.2(b) IEP Team Members https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4b.pdf https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-1.pdf	(3) To the extent appropriate, with the consent of the parent(s) or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the LEA must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services. *Remember you must have parent permission prior to inviting someone from an outside agency. Hint: Get the permission to invite prior to issuing the invitations. (Think about confirming the guest list in advance)*
TT 3	Transition Assessments NC 1503-4.1(b) Definition of an Individualized Education Plan	Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include – (i) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; *Select and administer varied transition assessments based on individual student need. LEAs, along with the student and family should determine the most appropriate types of transition assessments based upon a student's needs.*
TT 4	Transition Goals NC 1503-4.1(b) Definition of an Individualized Education Plan https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4b.pdf	The LEA must invite a child with a disability to attend the IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under NC 1503-4.1(b). *Transition goals must clearly indicate what the student will do after high school. They must be measurable. "Hope to", "Plans to", "Would like to" are not measurable. While is understandable that younger students will typically alter their post-secondary transition goals as they age, at each annual transition IEP meeting, the IEP team must help students analyze their individual areas ofstrengths, needs and interests to determine measurable post-secondary educational, employment and (as needed) independent livinggoals.*

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TT 5	Transition Services NC 1503-4.1(b) Definition of an Individualized Education Plan https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4b.pdf	The IEP team must specify the transition services needed to help the student reach his/her post-secondary goals. (a) Transition services means a coordinated set of activities for a child with a disability that— (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (2) Is based on the individual child's needs, taking into account the child's strengths, preferences and interests; and includes (i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school adult living objectives; and (v) If appropriate, acquisition of daily living skills (b) Transition services for children with disabilities may be special education, if provided as specially designed instruction; or a related service, if required to assist a child with a disability to benefit from special education. (3) To the extent appropriate, with the consent of the parent(s) or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the LEA must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.
TT 6	Transfer of Rights NC 1504-1.21 Transfer of Parental Rights at Age of Majority https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4b.pdf	Beginning not later than one year before the child reaches the age of majority (BEFORE the child's 17 birthday) which under State law is 18, the IEP must include a statement that both the child and their parent have been informed of the rights under Part B of the IDEA, that will transfer to the child upon reaching age 18.
TT 7	Transfer of Rights NC 1504-1.21 Transfer of Parental Rights at Ae of Majority https://ec.ncpublicschools.gov/conferences-profdev/training-materials/2018/module-4b.pdf	When a child with a disability reaches the age of 18 (except for a child with a disability who has been determined to be incompetent under State law): • The LEA must provide any notice required by these Policies to both the individual and the parents, • All other rights accorded to parents under Part B of the IDEA transfer to the child, The LEA must notify both the (student) individual and the parents of the transfer of rights.

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Educational Issues for Systems Involved Youth

SCHOOL DISCIPLINE

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School Discipline in North Carolina

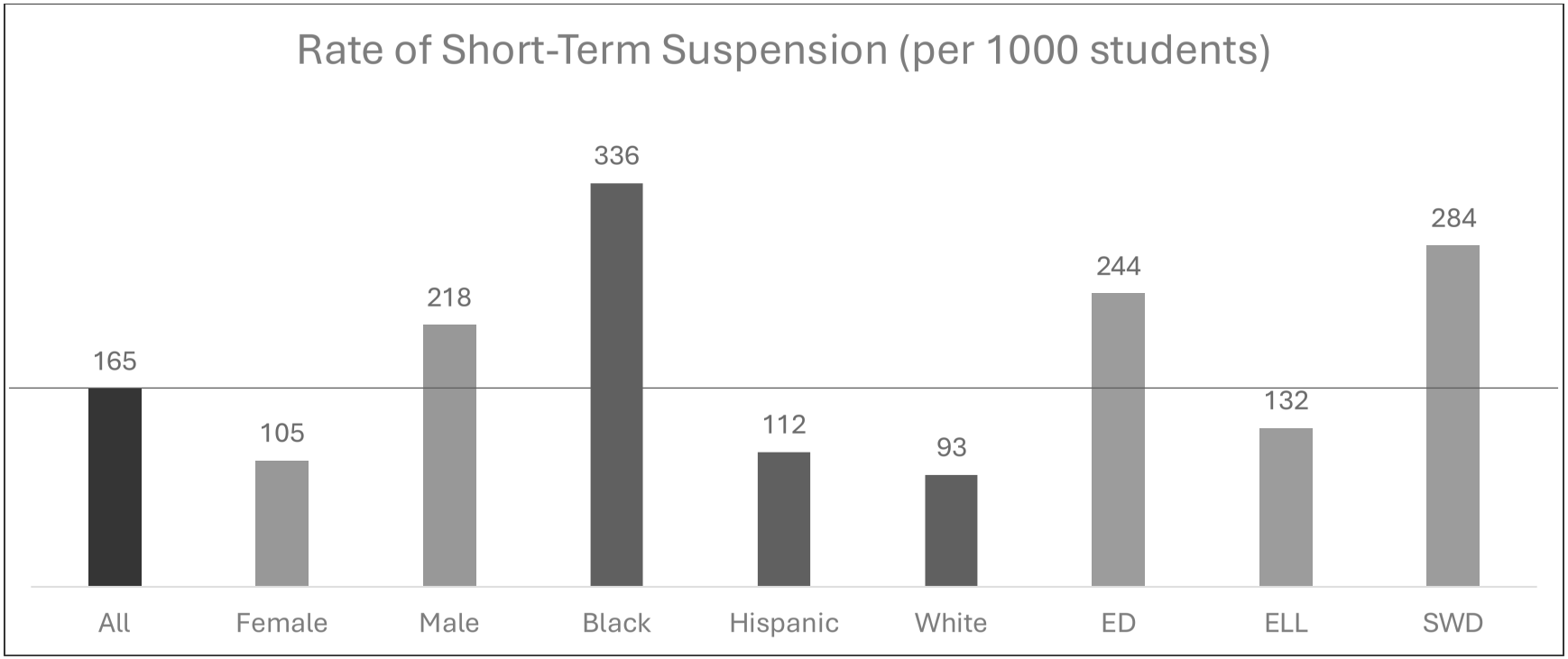
Disciplinary Action	Due Process Protections*	2023-24 Data**
Bus suspension- Student can attend school but cannot ride the school bus to or from school.	No formal due process rights.	*not reported*
In-school suspension- Student can attend school but must be in a separate classroom during the school day.	No formal due process rights.	264,510
Short-term suspension- Student is disciplinarily removed from school for 10 school days or less.	Right to notice, informal hearing, and opportunity to make up work. *§ 115C-390.5; § 115C-390.6*	244,836
Long-term suspension- Student is disciplinarily removed from school for more than 10 school days.	Right to notice, formal hearing, appeals, and alternative education. *§ 115C-390.7; § 115C-390.8*	730
365-day suspension- Student is disciplinarily removed from school for 365 calendar days as a result of possessing a firearm or explosive on campus.	Right to notice, formal hearing, appeals, and alternative education. Can petition for readmission after 180 days. *§ 115C-390.10; § 115C-390.12*	
Disciplinary reassignment- Student is reassigned to an alternative school or program as a disciplinary consequence.	Process varies by district. *§ 115C-390.7(e)*	3,781
Expulsion- Student is disciplinarily removed from school for an indefinite period time.	Right to notice, formal hearing, appeals, and alternative education. Can petition for readmission after 180 days. *§ 115C-390.11; § 115C-390.12*	30

*In addition to state law and constitutional due process protections, students with disabilities retain unique protections related to school discipline under federal disability laws. Local board policies may also afford additional due process rights.

**Source for data: NC DPI Discipline, ALP and Dropout Annual Report (2023-24), *available at* https://www.dpi.nc.gov/discipline-alp-and-dropout-annual-reports

Suspension Disparities in North Carolina (2023-24)

Across the state, male students, African-American students, economically disadvantaged students, and students with disabilities are more likely to be suspended from school than their peers.



ED = Economically Disadvantaged; ELL = English Language Learner; SWD = Students with Disabilities
Source: NCDPI Report Cards, *available at* *https://ncreports.ondemand.sas.com/src/state?year=2024*

N.C. School Discipline Statutes

N.C.G.S. § 115C, Article 27

Article 27.

Discipline.

§ 115C-390: Repealed by Session Laws 2011-282, s. 1, effective June 23, 2011, and applicable beginning with the 2011-2012 school year.

§ 115C-390.1. State policy and definitions.

(a) In order to create and maintain a safe and orderly school environment conducive to learning, school officials and teachers need adequate tools to maintain good discipline in schools. However, the General Assembly also recognizes that removal of students from school, while sometimes necessary, can exacerbate behavioral problems, diminish academic achievement, and hasten school dropout. School discipline must balance these interests to provide a safe and productive learning environment, to continually teach students to respect themselves, others, and property, and to conduct themselves in a manner that fosters their own learning and the learning of those around them.

(b) The following definitions apply in this Article:

(1) Alternative education services. – Part or full-time programs, wherever situated, providing direct or computer-based instruction that allow a student to progress in one or more core academic courses. Alternative education services include programs established by the local board of education in conformity with G.S. 115C-105.47A and policies of the governing body of a public school unit.

(2) Corporal punishment. – The intentional infliction of physical pain upon the body of a student as a disciplinary measure.

(3) Destructive device. – An explosive, incendiary, or poison gas:

a. Bomb.
b. Grenade.
c. Rocket having a propellant charge of more than four ounces.
d. Missile having an explosive or incendiary charge of more than one-quarter ounce.
e. Mine.
f. Device similar to any of the devices listed in this subdivision.

(4) Educational property. – Any school building or bus, school campus, grounds, recreational area, athletic field, or other property under the control of any public school unit.

(5) Expulsion. – The indefinite exclusion of a student from school enrollment for disciplinary purposes.

(6) Firearm. – Any of the following:

a. A weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.
b. The frame or receiver of any such weapon.
c. Any firearm muffler or firearm silencer.

The term shall not include an inoperable antique firearm, a BB gun, stun gun, air rifle, or air pistol.

(7) Long-term suspension. – The exclusion for more than 10 school days of a student from school attendance for disciplinary purposes from the school to which the student was assigned at the time of the disciplinary action. If the offense leading to the long-term suspension occurs before the final quarter of

the school year, the exclusion shall be no longer than the remainder of the school year in which the offense was committed. If the offense leading to the long-term suspension occurs during the final quarter of the school year, the exclusion may include a period up to the remainder of the school year in which the offense was committed and the first semester of the following school year.

(8) Parent. – Includes a parent, legal guardian, legal custodian, or other caregiver adult who is acting in the place of a parent and is entitled to enroll the student in school under Article 25 of this Chapter.

(9) Principal. – Includes the principal and the principal's designee, or if there is no designated principal, the staff member designated by the governing body of the public school unit with the highest decision-making authority at an individual school.

(10) School official. – A superintendent or any other central office administrator to whom the superintendent has delegated duties under this Article and any principal or assistant principal.

(11) School personnel. – Any of the following:

a. An employee of a governing body of a public school unit.

b. Any person working on school grounds or at a school function under a contract or written agreement with the public school unit to provide educational or related services to students.

c. Any person working on school grounds or at a school function for another agency providing educational or related services to students.

(12) Short-term suspension. – The exclusion of a student from school attendance for disciplinary purposes for up to 10 school days from the school to which the student was assigned at the time of the disciplinary action.

(13) Substantial evidence. – Such relevant evidence as a reasonable person might accept as adequate to support a conclusion; it is more than a scintilla or permissible inference.

(14) Superintendent. – Includes the superintendent and the superintendent's designee, or if there is no superintendent, the staff member with the highest decision-making authority and that staff member's designee.

(c) Notwithstanding the provisions of this Article, the policies and procedures for the discipline of students shall be consistent with the requirements of the Gun Free Schools Act, 20 U.S.C. § 7151, the Individuals with Disabilities Education Act (IDEA), 29 U.S.C. § 1400, et seq., section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq., and with other federal laws and regulations. (2011-270, s. 1; 2011-282, s. 16; 2011-282, s. 2; 2022-74, s. 7.7(a).)

§ 115C-390.2. Discipline policies.

(a) Governing bodies of public school units, in consultation with teachers, school-based administrators, parents, and local law enforcement agencies, shall adopt policies to govern the conduct of students and establish procedures to be followed by school officials in disciplining students. These policies must be consistent with the provisions of this Article and the constitutions, statutes, and regulations of the United States and the State of North Carolina. In adopting these policies, governing bodies of public school units shall consider any existing federal guidance for the discipline of students with disabilities as well as other guidance on school discipline practices issued by the United States Department of Education.

(b) Governing body policies shall include or provide for the development of a Code of Student Conduct that notifies students of the standards of behavior expected of them, conduct that may subject them to discipline, and the range of disciplinary measures that may be used by school officials.

(b1) No later than September 1 of each year, each governing body of a public school unit shall provide the Department of Public Instruction with a copy of its most up-to-date student discipline policies and Code of Student Conduct.

(c) Governing body policies may authorize suspension for conduct not occurring on educational property, but only if the student's conduct otherwise violates the Code of Student Conduct and the conduct has or is reasonably expected to have a direct and immediate impact on the orderly and efficient operation of the schools or the safety of individuals in the school environment.

(d) Governing body policies shall not allow students to be long-term suspended or expelled from school solely for truancy or tardiness offenses and shall not allow short-term suspension of more than two days for such offenses.

(e) Governing body policies shall not impose mandatory long-term suspensions or expulsions for specific violations unless otherwise provided in State or federal law.

(f) Governing body policies shall minimize the use of long-term suspension and expulsion by restricting the availability of long-term suspension or expulsion to those violations deemed to be serious violations of the governing body's Code of Student Conduct that either threaten the safety of students, staff, or school visitors or threaten to substantially disrupt the educational environment. Examples of conduct that would not be deemed to be a serious violation include the use of inappropriate or disrespectful language, noncompliance with a staff directive, dress code violations, and minor physical altercations that do not involve weapons or injury. The principal may, however, in his or her discretion, determine that aggravating circumstances justify treating a minor violation as a serious violation.

(g) Governing body policies shall not prohibit the superintendent and principals from considering the student's intent, disciplinary and academic history, the potential benefits to the student of alternatives to suspension, and other mitigating or aggravating factors when deciding whether to recommend or impose long-term suspension.

(h) Governing body policies shall include the procedures to be followed by school officials in suspending, expelling, or administering corporal punishment to any student, which shall be consistent with this Article.

(i) Each governing body of a public school unit shall publish all policies, administrative procedures, or school rules mandated by this section and make them available to each student and his or her parent at the beginning of each school year and upon request. This information shall include the full range of responses to violations of disciplinary rules, including responses that do not remove a student from the classroom or school building. Governing bodies may require students and parents or guardians to sign an acknowledgement that they have received a copy of such policies, procedures, or rules.

(j) Governing bodies of public school units are encouraged to include in their safe schools plans, adopted pursuant to G.S. 115C-105.47, research-based behavior management programs that take positive approaches to improving student behaviors.

(k) School officials are encouraged to use a full range of responses to violations of disciplinary rules, such as conferences, counseling, peer mediation, behavior contracts, instruction

in conflict resolution and anger management, detention, academic interventions, community service, and other similar tools that do not remove a student from the classroom or school building.

(*l*) Governing body policies shall state that absences under G.S. 130A-440 shall not be suspensions. A student subject to an absence under G.S. 130A-440 shall be provided the following:

(1) The opportunity to take textbooks and school-furnished digital devices home for the duration of the absence.

(2) Upon request, the right to receive all missed assignments and, to the extent practicable, the materials distributed to students in connection with the assignment.

(3) The opportunity to take any quarterly, semester, or grading period examinations missed during the absence period.

(m) Nothing in this section or any section of this Chapter shall be construed as regulating the discretion of a governing body of a public school unit to devise, impose, and enforce personal appearance codes. (2011-282, s. 2; 2015-222, s. 4.5; 2022-74, s. 7.7(b).)

§ 115C-390.3. Reasonable force.

(a) School personnel may use physical restraint only in accordance with G.S. 115C-391.1.

(b) School personnel may use reasonable force to control behavior or to remove a person from the scene in those situations when necessary for any of the following reasons:

(1) To correct students.

(2) To quell a disturbance threatening injury to others.

(3) To obtain possession of weapons or other dangerous objects on the person, or within the control, of a student.

(4) For self-defense.

(5) For the protection of persons or property.

(6) To maintain order on educational property, in the classroom, or at a school-related activity on or off educational property.

(c) Notwithstanding any other law, no officer, member, or employee of the State Board of Education, the Superintendent of Public Instruction, or of a governing body of a public school unit, individually or collectively, shall be civilly liable for using reasonable force in conformity with State law, State or local rules, or State or local policies regarding the control, discipline, suspension, and expulsion of students. Furthermore, the burden of proof is on the claimant to show that the amount of force used was not reasonable.

(d) No school employee shall be reprimanded or dismissed for acting or failing to act to stop or intervene in an altercation between students if the employee's actions are consistent with governing body policies. Governing bodies of public school units shall adopt policies, pursuant to their authority under G.S. 115C-47(18), or as otherwise provided by law, which provide guidelines for an employee's response if the employee has personal knowledge or actual notice of an altercation between students. (2011-282, s. 2; 2012-149, s. 10; 2016-126, 4th Ex. Sess., s. 23; 2022-74, s. 7.7(c).)

§ 115C-390.4. Corporal punishment.

(a) Each governing body of a public school unit shall determine whether corporal punishment will be permitted in its public school unit. Notwithstanding a governing body's prohibition on the use of corporal punishment, school personnel may use physical restraint in

accordance with federal law and G.S. 115C-391.1 and reasonable force pursuant to G.S. 115C-390.3.

(b) To the extent that corporal punishment is permitted, the policies adopted for the administration of corporal punishment shall include at a minimum the following:

(1) Corporal punishment shall not be administered in a classroom with other students present.

(2) Only a teacher, principal, or assistant principal may administer corporal punishment and may do so only in the presence of a principal, assistant principal, or teacher who shall be informed beforehand and in the student's presence of the reason for the punishment.

(3) A school person shall provide the student's parent with notification that corporal punishment has been administered, and the person who administered the corporal punishment shall provide the student's parent a written explanation of the reasons and the name of the second person who was present.

(4) The school shall maintain records of each administration of corporal punishment and the reasons for its administration.

(5) In no event shall excessive force be used in the administration of corporal punishment. Excessive force includes force that results in injury to the child that requires medical attention beyond simple first aid.

(6) Corporal punishment shall not be administered on a student whose parent or guardian has stated in writing that corporal punishment shall not be administered to that student. Parents and guardians shall be given a form to make such an election at the beginning of the school year or when the student first enters the school during the year. The form shall advise the parent or guardian that the student may be subject to suspension, among other possible punishments, for offenses that would otherwise not require suspension if corporal punishment were available. If the parent or guardian does not return the form, corporal punishment may be administered on the student.

(c) Each governing body of a public school unit shall report annually to the State Board of Education, in a manner prescribed by the State Board of Education, on the number of times that corporal punishment was administered. The report shall be in compliance with the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and shall include the following:

(1) The number of students who received corporal punishment.

(2) The number of students who received corporal punishment who were also students with disabilities and were eligible to receive special education and related services under the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq.

(3) The grade level of the students who received corporal punishment.

(4) The race, gender, and ethnicity of the students who received corporal punishment.

(5) The reason for the administration of the corporal punishment for each student who received corporal punishment. (2011-282, s. 2; 2022-74, s. 7.7(d).)

§ 115C-390.5. Short-term suspension.

(a) The principal shall have authority to impose short-term suspension on a student who willfully engages in conduct that violates a provision of the Code of Student Conduct authorizing short-term suspension.

(b) If a student's short-term suspensions accumulate to more than 10 days in a semester, to the extent the principal has not already done so, he or she shall invoke the mechanisms provided for in the applicable safe schools plan adopted pursuant to G.S. 115C-105.47(b)(5) and (b)(6).

(c) A student subject to short-term suspension shall be provided the following:

(1) The opportunity to take textbooks home for the duration of the suspension.

(2) Upon request, the right to receive all missed assignments and, to the extent practicable, the materials distributed to students in connection with the assignment.

(3) The opportunity to take any quarterly, semester, or grading period examinations missed during the suspension period. (2011-282, s. 2.)

§ 115C-390.6. Short-term suspension procedures.

(a) Except as authorized in this section, no short-term suspension shall be imposed upon a student without first providing the student an opportunity for an informal hearing with the principal. The notice to the student of the charges may be oral or written, and the hearing may be held immediately after the notice is given. The student has the right to be present, to be informed of the charges and the basis for the accusations, and to make statements in defense or mitigation of the charges.

(b) The principal may impose a short-term suspension without providing the student an opportunity for a hearing if the presence of the student creates a direct and immediate threat to the safety of other students or staff, or substantially disrupts or interferes with the education of other students or the maintenance of discipline at the school. In such cases, the notice of the charges and informal hearing described in subsection (a) of this section shall occur as soon as practicable.

(c) The principal shall provide notice to the student's parent of any short-term suspension, including the reason for the suspension and a description of the alleged student conduct upon which the suspension is based. The notice shall be given by the end of the workday during which the suspension is imposed when reasonably possible, but in no event more than two days after the suspension is imposed. The notice shall be given by certified mail, telephone, facsimile, e-mail, or any other method reasonably designed to achieve actual notice.

(d) If English is the second language of the parent, the notice shall be provided in the parent's primary language, when the appropriate foreign language resources are readily available, and in English, and both versions shall be in plain language and shall be easily understandable.

(e) A student is not entitled to appeal the principal's decision to impose a short-term suspension to the superintendent or governing body of the public school unit. Further, such a decision is not subject to judicial review. Notwithstanding this subsection, the governing body, in its discretion, may provide students an opportunity for a review or appeal of a short-term suspension to the superintendent or governing body. (2011-282, s. 2; 2022-74, s. 7.7(e).)

§ 115C-390.7. Long-term suspension.

(a) A principal may recommend to the superintendent the long-term suspension of any student who willfully engages in conduct that violates a provision of the Code of Student Conduct that authorizes long-term suspension. Only the superintendent has the authority to long-term suspend a student.

(b) Before the superintendent's imposition of a long-term suspension, the student must be provided an opportunity for a hearing consistent with G.S. 115C-390.8.

(c) If the student recommended for long-term suspension declines the opportunity for a hearing, the superintendent shall review the circumstances of the recommended long-term suspension. Following such review, the superintendent (i) may impose the suspension if is it consistent with board policies and appropriate under the circumstances, (ii) may impose another appropriate penalty authorized by board policy, or (iii) may decline to impose any penalty.

(d) If a teacher is assaulted or injured by a student and as a result the student is long-term suspended or reassigned to alternative education services, the student shall not be returned to that teacher's classroom unless the teacher consents.

(e) Disciplinary reassignment of a student to a full-time educational program that meets the academic requirements of the standard course of study established by the State Board of Education as provided in G.S. 115C-12 and provides the student with the opportunity to make timely progress towards graduation and grade promotion is not a long-term suspension requiring the due process procedures described in G.S. 115C-390.8. (2011-282, s. 2.)

§ 115C-390.8. Long-term suspension procedures.

(a) When a student is recommended by the principal for long-term suspension, the principal shall give written notice to the student's parent. The notice shall be provided to the student's parent by the end of the workday during which the suspension was recommended when reasonably possible or as soon thereafter as practicable. The written notice shall provide at least the following information:

(1) A description of the incident and the student's conduct that led to the long-term suspension recommendation.

(2) A reference to the provisions of the Code of Student Conduct that the student is alleged to have violated.

(3) The specific process by which the parent may request a hearing to contest the decision, including the number of days within which the hearing must be requested.

(4) The process by which a hearing will be held, including, at a minimum, the procedures described in subsection (e) of this section.

(5) Notice that the parent is permitted to retain an attorney to represent the student in the hearing process.

(6) The extent to which the governing body policy permits the parent to have an advocate, instead of an attorney, accompany the student to assist in the presentation of his or her appeal.

(7) Notice that the parent has the right to review and obtain copies of the student's educational records before the hearing.

(8) A reference to the governing body policy on the expungement of discipline records as required by G.S. 115C-402.

(b) Written notice may be provided by certified mail, fax, e-mail, or any other written method reasonably designed to achieve actual notice of the recommendation for long-term suspension. When school personnel are aware that English is not the primary language of the parent or guardian, the notice shall be written in both English and in the primary language of the parent or guardian when the appropriate foreign language resources are readily available. All notices described in this section shall be written in plain English, and shall include the following

information translated into the dominant non-English language used by residents within the public school unit:

(1) The nature of the document, i.e., that it is a long-term suspension notice.

(2) The process by which the parent may request a hearing to contest the long-term suspension.

(3) The identity and phone number of a school employee that the parent may call to obtain assistance in understanding the English language information included in the document.

(c) No long-term suspension shall be imposed on a student until an opportunity for a formal hearing is provided to the student. If a hearing is timely requested, it shall be held and a decision issued before a long-term suspension is imposed, except as otherwise provided in this subsection. The student and parent shall be given reasonable notice of the time and place of the hearing.

(1) If no hearing is timely requested, the superintendent shall follow the procedures described in G.S. 115C-390.7(c).

(2) If the student or parent requests a postponement of the hearing, or if the hearing is requested beyond the time set for such request, the hearing shall be scheduled, but the student shall not have the right to return to school pending the hearing.

(3) If neither the student nor parent appears for the scheduled hearing, after having been given reasonable notice of the time and place of the hearing, the parent and student are deemed to have waived the right to a hearing and the superintendent shall conduct the review required by G.S. 115C-390.7(c).

(d) The formal hearing may be conducted by the governing body of the public school unit, by the superintendent, or by a person or group of persons appointed by the governing body or superintendent to serve as a hearing officer or hearing panel. Neither the governing body nor the superintendent shall appoint any individual to serve as a hearing officer or on a hearing panel who is under the direct supervision of the principal recommending suspension. If the hearing is conducted by an appointed hearing officer or hearing panel, such officer or panel shall determine the relevant facts and credibility of witnesses based on the evidence presented at the hearing. Following the hearing, the superintendent or governing body shall make a final decision regarding the suspension. The superintendent or governing body shall adopt the hearing officer's or panel's factual determinations unless they are not supported by substantial evidence in the record.

(e) Long-term suspension hearings shall be conducted in accordance with policies adopted by the governing body of the public school unit. Such policies shall offer the student procedural due process including, but not limited to, the following:

(1) The right to be represented at the hearing by counsel or, in the discretion of the local board, a non-attorney advocate.

(2) The right to be present at the hearing, accompanied by his or her parents.

(3) The right of the student, parent, and the student's representative to review before the hearing any audio or video recordings of the incident and, consistent with federal and State student records laws and regulations, the information supporting the suspension that may be presented as evidence at the hearing, including statements made by witnesses related to the charges consistent with subsection (h) of this section.

(4) The right of the student, parent, or the student's representative to question witnesses appearing at the hearing.

(5) The right to present evidence on his or her own behalf, which may include written statements or oral testimony, relating to the incident leading to the suspension, as well as any of the factors listed in G.S. 115C-390.2(g).
(6) The right to have a record made of the hearing.
(7) The right to make his or her own audio recording of the hearing.
(8) The right to a written decision, based on substantial evidence presented at the hearing, either upholding, modifying, or rejecting the principal's recommendation of suspension and containing at least the following information:
a. The basis for the decision, including a reference to any policy or rule that the student is determined to have violated.
b. Notice of what information will be included in the student's official record pursuant to G.S. 115C-402.
c. The student's right to appeal the decision and notice of the procedures for such appeal.

(f) Following the issuance of the decision, the superintendent shall implement the decision by authorizing the student's return to school or by imposing the suspension reflected in the decision.

(g) Unless the decision was made by the governing body, the student may appeal the decision to a local board of education in accordance with G.S. 115C-45(c) and policies adopted by the governing body of the public school unit. Notwithstanding the provisions of G.S. 115C-45(c), a student's appeal to the governing body of a decision upholding a long-term suspension shall be heard and a final written decision issued in not more than 30 calendar days following the request for such appeal.

(h) Nothing in this section shall compel school officials to release names or other information that could allow the student or his or her representative to identify witnesses when such identification could create a safety risk for the witness.

(i) A decision of the governing body of the public school unit to uphold the long-term suspension of a student is subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes. The action must be brought within 30 days of the governing body's decision. A person seeking judicial review shall file a petition in the superior court of the county where the governing body made its decision. Local rules notwithstanding, petitions for judicial review of a long-term suspension shall be set for hearing in the first succeeding term of superior court in the county following the filing of the certified copy of the official record. (2011-282, s. 2; 2022-74, s. 7.7(f).)

§ 115C-390.9. Alternative education services.

(a) Students who are long-term suspended shall be offered alternative education services unless the superintendent provides a significant or important reason for declining to offer such services. The following may be significant or important reasons, depending on the circumstances and the nature and setting of the alternative education services:

(1) The student exhibits violent behavior.
(2) The student poses a threat to staff or other students.
(3) The student substantially disrupts the learning process.
(4) The student otherwise engaged in serious misconduct that makes the provision of alternative educational services not feasible.

(5) Educationally appropriate alternative education services are not available in the public school unit due to limited resources.

(6) The student failed to comply with reasonable conditions for admittance into an alternative education program.

(b) If the superintendent declines to provide alternative education services to the suspended student, the student may seek review of such decision by the governing body of the public school unit as permitted by G.S. 115C-45(c)(2). If the student seeks such review, the superintendent shall provide to the student and the governing body, in advance of the governing body's review, a written explanation for the denial of services together with any documents or other information supporting the decision. (2011-282, s. 2; 2022-74, s. 7.7(g).)

§ 115C-390.10. 365-day suspension for gun possession.

(a) All governing bodies of public school units shall develop and implement written policies and procedures, as required by the federal Gun Free Schools Act, 20 U.SC. § 7151, requiring suspension for 365 calendar days of any student who is determined to have brought or been in possession of a firearm or destructive device on educational property, or to a school-sponsored event off of educational property. A principal shall recommend to the superintendent the 365-day suspension of any student believed to have violated governing body policies regarding weapons. The superintendent has the authority to suspend for 365 days a student who has been recommended for such suspension by the principal when such recommendation is consistent with governing body policies. Notwithstanding the foregoing, the superintendent may modify, in writing, the required 365-day suspension for an individual student on a case-by-case basis. The superintendent shall not impose a 365-day suspension if the superintendent determines that the student took or received the firearm or destructive device from another person at school or found the firearm or destructive device at school, provided that the student delivered or reported the firearm or destructive device as soon as practicable to a law enforcement officer or a school employee and had no intent to use such firearm or destructive device in a harmful or threatening way.

(b) The principal must report all incidents of firearms or destructive devices on educational property or at a school-sponsored event as required by G.S. 115C-288(g) and State Board of Education policy.

(c) Nothing in this provision shall apply to a firearm that was brought onto educational property for activities approved and authorized by the governing body of the public school unit, provided that the governing body has adopted appropriate safeguards to protect student safety.

(d) At the time the student and parent receive notice that the student is suspended for 365 days under this section, the superintendent shall provide notice to the student and the student's parent of the right to petition the governing body of the public school unit for readmission pursuant to G.S. 115C-390.12.

(e) The procedures described in G.S. 115C-390.8 apply to students facing a 365-day suspension pursuant to this section.

(f) Students who are suspended for 365 days pursuant to this section shall be considered for alternative educational services consistent with the provisions of G.S. 115C-390.9. (2011-282, s. 2; 2022-74, s. 7.7(h).)

§ 115C-390.11. Expulsion.

(a) Upon recommendation of the superintendent, a governing body of a public school unit may expel any student 14 years of age or older whose continued presence in school constitutes a clear threat to the safety of other students or school staff. Prior to the expulsion of any student, the governing body shall conduct a hearing to determine whether the student's continued presence in school constitutes a clear threat to the safety of other students or school staff. The student shall be given reasonable notice of the recommendation in accordance with G.S. 115C-390.8(a) and (b), as well as reasonable notice of the time and place of the scheduled hearing. [The following provisions apply:]

(1) The procedures described in G.S. 115C-390.8(e)(1)-(8) apply to students facing expulsion pursuant to this section, except that the decision to expel a student by the governing body of the public school unit shall be based on clear and convincing evidence that the student's continued presence in school constitutes a clear threat to the safety of other students and school staff.

(2) A governing body of a public school unit may expel any student subject to G.S. 14-208.18 in accordance with the procedures of this section. Prior to ordering the expulsion of a student, the governing body shall consider whether there are alternative education services that may be offered to the student. As provided by G.S. 14-208.18(f), if the governing body determines that the student shall be provided educational services on school property, the student shall be under the supervision of school personnel at all times.

(3) At the time a student is expelled under this section, the student shall be provided notice of the right to petition for readmission pursuant to G.S. 115C-390.12.

(b) During the expulsion, the student is not entitled to be present on any property of the public school unit and is not considered a student of the governing body of the public school unit. Nothing in this section shall prevent a governing body from offering access to some type of alternative educational services that can be provided to the student in a manner that does not create safety risks to other students and school staff. (2011-282, s. 2; 2022-74, s. 7.7(i).)

§ 115C-390.12. Request for readmission.

(a) All students suspended for 365 days or expelled may, after 180 calendar days from the date of the beginning of the student's suspension or expulsion, request in writing readmission to the public school unit. The governing body of the public school unit shall develop and publish written policies and procedures for the readmission of all students who have been expelled or suspended for 365 days, which shall provide, at a minimum, the following process:

(1) The process for 365-day suspended students:

a. At the governing body's discretion, either the superintendent or the governing body itself shall consider and decide on petitions for readmission. If the decision maker is the superintendent, the superintendent shall offer the student an opportunity for an in-person meeting. If the decision maker is the governing body of the public school unit, the governing body may offer the student an in-person meeting or may make a determination based on the records submitted by the student and the superintendent.

b. The student shall be readmitted if the student demonstrates to the satisfaction of the board or superintendent that the student's presence in

school no longer constitutes a threat to the safety of other students or staff.

c. A superintendent's decision not to readmit the student may be appealed to the governing body of the public school unit pursuant to G.S. 115C-45(c). The superintendent shall notify the parents of the right to appeal.

d. There is no right to judicial review of the board's decision not to readmit a 365-day suspended student.

e. A decision on readmission under this subsection shall be issued within 30 days of the petition.

(2) The process for expelled students:

a. The governing body of the public school unit shall consider all petitions for readmission of expelled students, together with the recommendation of the superintendent on the matter, and shall rule on the request for readmission. The governing body shall consider the petition based on the records submitted by the student and the response by the administration and shall allow the parties to be heard in the same manner as provided by G.S. 115C-45(c).

b. The student shall be readmitted if the student demonstrates to the satisfaction of the board or superintendent that his or her presence in a school no longer constitutes a clear threat to the safety of other students or staff.

c. A decision by a governing body of a public school unit to deny readmission of an expelled student is not subject to judicial review.

d. An expelled student may subsequently request readmission not more often than every six months. The governing body of the public school unit is not required to consider subsequent readmission petitions filed sooner than six months after the previous petition was filed.

e. A decision on readmission under this section shall be issued within 30 days of the petition.

(b) If a student is readmitted under this section, the governing body and the superintendent have the right to assign the student to any program within the public school unit and to place reasonable conditions on the readmission.

(c) If a teacher was assaulted or injured by a student, and as a result the student was expelled, the student shall not be returned to that teacher's classroom following readmission unless the teacher consents. (2011-282, s. 2; 2022-74, s. 7.7(j).)

§ 115C-391: Repealed by Session Laws 2011-282, s. 1, effective June 23, 2011, and applicable beginning with the 2011-2012 school year.

§ 115C-391.1. Permissible use of seclusion and restraint.

(a) It is the policy of the State of North Carolina to:

(1) Promote safety and prevent harm to all students, staff, and visitors in the public schools.

(2) Treat all public school students with dignity and respect in the delivery of discipline, use of physical restraints or seclusion, and use of reasonable force as permitted by law.
(3) Provide school staff with clear guidelines about what constitutes use of reasonable force permissible in North Carolina public schools.
(4) Improve student achievement, attendance, promotion, and graduation rates by employing positive behavioral interventions to address student behavior in a positive and safe manner.
(5) Promote retention of valuable teachers and other school personnel by providing appropriate training in prescribed procedures, which address student behavior in a positive and safe manner.

(b) The following definitions apply in this section:
(1) "Assistive technology device" means any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capacities of a child with a disability.
(2) "Aversive procedure" means a systematic physical or sensory intervention program for modifying the behavior of a student with a disability which causes or reasonably may be expected to cause one or more of the following:
a. Significant physical harm, such as tissue damage, physical illness, or death.
b. Serious, foreseeable long-term psychological impairment.
c. Obvious repulsion on the part of observers who cannot reconcile extreme procedures with acceptable, standard practice, for example: electric shock applied to the body; extremely loud auditory stimuli; forcible introduction of foul substances to the mouth, eyes, ears, nose, or skin; placement in a tub of cold water or shower; slapping, pinching, hitting, or pulling hair; blindfolding or other forms of visual blocking; unreasonable withholding of meals; eating one's own vomit; or denial of reasonable access to toileting facilities.
(3) "Behavioral intervention" means the implementation of strategies to address behavior that is dangerous, disruptive, or otherwise impedes the learning of a student or others.
(4) "IEP" means a student's Individualized Education Plan.
(5) "Isolation" means a behavior management technique in which a student is placed alone in an enclosed space from which the student is not prevented from leaving.
(6) "Law enforcement officer" means a sworn law enforcement officer with the power to arrest.
(7) "Mechanical restraint" means the use of any device or material attached or adjacent to a student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove.
(8) "Physical restraint" means the use of physical force to restrict the free movement of all or a portion of a student's body.
(9) "School personnel" means:
a. Employees of a governing body of a public school unit.

b. Any person working on school grounds or at a school function under a contract or written agreement with the public school unit to provide educational or related services to students.
c. Any person working on school grounds or at a school function for another agency providing educational or related services to students.

(10) "Seclusion" means the confinement of a student alone in an enclosed space from which the student is:
a. Physically prevented from leaving by locking hardware or other means.
b. Not capable of leaving due to physical or intellectual incapacity.

(11) "Time-out" means a behavior management technique in which a student is separated from other students for a limited period of time in a monitored setting.

(c) Physical Restraint:
(1) Physical restraint of students by school personnel shall be considered a reasonable use of force when used in the following circumstances:
a. As reasonably needed to obtain possession of a weapon or other dangerous objects on a person or within the control of a person.
b. As reasonably needed to maintain order or prevent or break up a fight.
c. As reasonably needed for self-defense.
d. As reasonably needed to ensure the safety of any student, school employee, volunteer, or other person present, to teach a skill, to calm or comfort a student, or to prevent self-injurious behavior.
e. As reasonably needed to escort a student safely from one area to another.
f. If used as provided for in a student's IEP or Section 504 plan or behavior intervention plan.
g. As reasonably needed to prevent imminent destruction to school or another person's property.

(2) Except as set forth in subdivision (1) of this subsection, physical restraint of students shall not be considered a reasonable use of force, and its use is prohibited.

(3) Physical restraint shall not be considered a reasonable use of force when used solely as a disciplinary consequence.

(4) Nothing in this subsection shall be construed to prevent the use of force by law enforcement officers in the lawful exercise of their law enforcement duties.

(d) Mechanical Restraint:
(1) Mechanical restraint of students by school personnel is permissible only in the following circumstances:
a. When properly used as an assistive technology device included in the student's IEP or Section 504 plan or behavior intervention plan or as otherwise prescribed for the student by a medical or related service provider.
b. When using seat belts or other safety restraints to secure students during transportation.
c. As reasonably needed to obtain possession of a weapon or other dangerous objects on a person or within the control of a person.
d. As reasonably needed for self-defense.

e. As reasonably needed to ensure the safety of any student, school employee, volunteer, or other person present.

(2) Except as set forth in subdivision (1) of this subsection, mechanical restraint, including the tying, taping, or strapping down of a student, shall not be considered a reasonable use of force, and its use is prohibited.

(3) Nothing in this subsection shall be construed to prevent the use of mechanical restraint devices such as handcuffs by law enforcement officers in the lawful exercise of their law enforcement duties.

(e) Seclusion:

(1) Seclusion of students by school personnel may be used in the following circumstances:

a. As reasonably needed to respond to a person in control of a weapon or other dangerous object.

b. As reasonably needed to maintain order or prevent or break up a fight.

c. As reasonably needed for self-defense.

d. As reasonably needed when a student's behavior poses a threat of imminent physical harm to self or others or imminent substantial destruction of school or another person's property.

e. When used as specified in the student's IEP, Section 504 plan, or behavior intervention plan; and

1. The student is monitored while in seclusion by an adult in close proximity who is able to see and hear the student at all times.

2. The student is released from seclusion upon cessation of the behaviors that led to the seclusion or as otherwise specified in the student's IEP or Section 504 plan.

3. The space in which the student is confined has been approved for such use by the local education agency.

4. The space is appropriately lighted.

5. The space is appropriately ventilated and heated or cooled.

6. The space is free of objects that unreasonably expose the student or others to harm.

(2) Except as set forth in subdivision (1) of this subsection, the use of seclusion is not considered reasonable force, and its use is not permitted.

(3) Seclusion shall not be considered a reasonable use of force when used solely as a disciplinary consequence.

(4) Nothing in this subsection shall be construed to prevent the use of seclusion by law enforcement officers in the lawful exercise of their law enforcement duties.

(f) Isolation. – Isolation is permitted as a behavior management technique provided that:

(1) The space used for isolation is appropriately lighted, ventilated, and heated or cooled.

(2) The duration of the isolation is reasonable in light of the purpose of the isolation.

(3) The student is reasonably monitored while in isolation.

(4) The isolation space is free of objects that unreasonably expose the student or others to harm.

(g) Time-Out. – Nothing in this section is intended to prohibit or regulate the use of time-out as defined in this section.

(h) Aversive Procedures. – The use of aversive procedures as defined in this section is prohibited in public schools.

(i) Nothing in this section modifies the rights of school personnel to use reasonable force as permitted under G.S. 115C-390.3 or modifies the rules and procedures governing discipline under G.S. 115C-390.1 through G.S. 115C-390.12.

(j) Notice, Reporting, and Documentation. –

(1) Notice of procedures. – Each governing body of a public school unit shall provide copies of this section and all governing body policies developed to implement this section to school personnel and parents or guardians at the beginning of each school year.

(2) Notice of specified incidents:

a. School personnel shall promptly notify the principal or principal's designee of:

1. Any use of aversive procedures.
2. Any prohibited use of mechanical restraint.
3. Any use of physical restraint resulting in observable physical injury to a student.
4. Any prohibited use of seclusion or seclusion that exceeds 10 minutes or the amount of time specified on a student's behavior intervention plan.

b. When a principal or principal's designee has personal knowledge or actual notice of any of the events described in this subdivision, the principal or principal's designee shall promptly notify the student's parent or guardian and will provide the name of a school employee the parent or guardian can contact regarding the incident.

(3) As used in subdivision (2) of this subsection, "promptly notify" means by the end of the workday during which the incident occurred when reasonably possible, but in no event later than the end of following workday.

(4) The parent or guardian of the student shall be provided with a written incident report for any incident reported under this section within a reasonable period of time, but in no event later than 30 days after the incident. The written incident report shall include:

a. The date, time of day, location, duration, and description of the incident and interventions.
b. The events or events that led up to the incident.
c. The nature and extent of any injury to the student.
d. The name of a school employee the parent or guardian can contact regarding the incident.

(5) No governing body of a public school unit or employee of a governing body shall discharge, threaten, or otherwise retaliate against another employee of the governing body regarding that employee's compensation, terms, conditions, location, or privileges of employment because the employee makes a report alleging a prohibited use of physical restraint, mechanical restraint, aversive

procedure, or seclusion, unless the employee knew or should have known that the report was false.

(k) Nothing in this section shall be construed to create a private cause of action against any governing body of a public school unit, its agents or employees, or any educator preparation programs or their agents or employees or to create a criminal offense. (2005-205, s. 2; 2006-264, s. 58; 2011-282, s. 3; 2022-74, s. 7.7(k).)

§ 115C-391.2. Searches of students.

(a) Policies adopted by governing bodies of public school units governing searches of a student's person or property shall be consistent with the provisions of this Article and the constitutions, statutes, and regulations of the United States and the State of North Carolina. All searches performed by school officials in accordance with the policies shall be executed using methods that are narrowly tailored to be minimally intrusive while investigating the suspected activity.

(b) Each policy adopted by a governing body of a public school unit in accordance with subsection (a) of this section shall require that searches of a student's person are conducted in private by one school official and one adult witness, both of whom shall be the same sex as the student. The policy may provide an exception to this requirement for searches conducted using a walk-through metal detector, handheld wand, or other similar minimally intrusive device designed to detect weapons and regularly used for security scanning. (2023-134, s. 7.76.)

§ 115C-392. Appeal of disciplinary measures.

Appeals of disciplinary measures are subject to the provisions of G.S. 115C-45(c). (1981, c. 423, s. 1.)

§§ 115C-393 through 115C-397. Reserved for future codification purposes.

Disciplinary Protections for Students with Disabilities under the Individuals with Disabilities Act (IDEA) and Section 504 of the Rehabilitation Act

Disciplinary Protections for Students with Disabilities

KEY TAKEAWAYS

- **Manifestation Determination Reviews (MDRs)** are special meetings that must be held by IEP or 504 Teams when a school is trying to suspend or disciplinary remove a student with a disability from their school environment for more than 10 total days in a given school year.
- The **key question** that the Team at an MDR must answer is whether the student's conduct is caused by or is directly or substantially related to the student's disability and/or to the school's failure to implement the student's IEP or 504 Plan as written.
- The **purpose** of Manifestation Determination Reviews is to prevent schools from punishing students for disability-related behaviors that are beyond their control. If the IEP or 504 team finds that the student's behavior was disability-related, that student cannot be suspended unless narrow exceptions apply and steps must be taken to therapeutically address the underlying causes of the misbehavior.

TERMS AND REQUIREMENTS

What is a Manifestation Determination Review?

A Manifestation Determination Review (MDR) is a special IEP or 504 Team meeting that must be held anytime a student with a disability is facing a "disciplinary change in placement." The purpose of the MDR is to determine:

1. **Whether a student's behavior was a manifestation of their disability;**
    a. Behavior is a "manifestation" if it is closely related to the student's disabilities and/or was caused by the school not fully implementing their IEP or 504 Plan.

2. **Whether the student may be suspended;**
    a. If a student's behavior is found to be a manifestation of their disability, the student cannot be suspended.
        - *Exception:* regardless of manifestation, schools can place a student in an alternative setting if their behavior involved weapons or drugs, or caused serious bodily injury.
    b. If a student's behavior is not found to be a manifestation of their disability, the student can be suspended according to the school's general school policies.
        - *NOTE*: those students can still appeal their suspensions through school board policies that apply to all students.

3. **What steps the IEP Team must take** to respond to the student's behavioral needs.
    a. If a student's behavior is found to be a manifestation of their disability, their IEP Team must conduct a **functional behavioral assessment (FBA)** and create a **behavior intervention plan (BIP)** or review the appropriateness of an existing BIP. *NOTE:* Even if behavior is not a manifestation, schools *should* still discuss whether an FBA and/or updated BIP is needed.

When is an MDR Required?

MDRs must be held anytime a school recommends a "disciplinary change in placement." A disciplinary change in placement occurs anytime a student with a disability is suspended or otherwise removed from the classroom because of disciplinary action for **more than ten (10) days in the same school year.** This could include:

- ✓ A **long-term suspension** (more than 10 days, but typically the rest of the semester or school year)
- ✓ A **series of short-term suspensions or other "disciplinary removals"** that involve similar patterns of behavior and add up to more than 10 days *total* over the course of a given school year. This includes:
    - out-of-school suspension days,
    - in-school suspensions days where a student isn't given the services required under their IEP,
    - early pick up requests that cause a student to miss services listed in their IEP, and
    - bus suspensions *if* transportation is a related service in the student's IEP or 504 Plan.

How quickly must an IEP Team meet to hold the MDR?

The IEP Team must meet **within 10 school days** of the school's decision to suspend the student.

Who attends an MDR?

All required members of the IEP Team (parent, school/district decision maker – often an administrator, special education teacher, and regular education teacher) or 504 Team must be present. Parents can invite anyone else who has knowledge about the student's behavior and disabilities (i.e. therapist, counselor, mentor, etc.)

What educational services can students access while they are waiting for the MDR?

All short-term suspended students in North Carolina have the right to:

- ➢ take textbooks home;
- ➢ access all missed assignments and, if feasible, all related materials; and
- ➢ take any examinations missed during the suspension period.

Students with IEPs have the right to, beginning on the 11th cumulative day of suspension/removal for that school year, receive the instruction and other supports they need to make progress on their IEP goals and in their classes. These services may be provided in an alternate environment.

What educational services are students entitled to after the MDR?

The educational services that a student is entitled to receive after an MDR depend on (1) whether the student's behavior is found to be a manifestation of their disability; (2) the nature of their underlying conduct; and (3) whether the student is being served by an IEP or a 504 Plan.

Students whose behavior is found to be a manifestation of their disability: If an IEP or 504 Team determines that a student's behavior is related to their disability and/or the school's failure to implement their plan, the student cannot be suspended and must be immediately returned to their regular school and classroom setting. Exceptions to that default rule include:

a. *Weapons, drugs, or serious bodily injury:* Regardless of manifestation, a student can be removed to and educated in an interim alternative education setting for up to 45 days if their underlying conduct involved weapons, drugs, or serious bodily injury; and

b. *Parent agreement*: Regardless of manifestation, a student can be removed to an alternative education setting if both their parent and their IEP or 504 team agree that the placement would be appropriate.

Students whose behavior is NOT found to be a manifestation of their disability:

a. If an **IEP team** finds that a student's behavior is unrelated to their underlying disability, the student may be suspended but is entitled to continue receiving the services and supports needed to make progress on their IEP goals and in the general curriculum. Those educational services can be provided in an alternative setting.

b. If a **504 team** finds that a student's behavior is unrelated to their underlying disability, the student may be suspended and is not entitled to alternative education unless it is otherwise provided for under state law or school board policy.

Crossover Issues Between School Discipline and Juvenile Court

School Discipline and Juvenile Court Involvement

1. Juvenile court involvement as a trigger for school discipline

Across North Carolina, school districts are increasingly imposing school-based disciplinary consequences in response to community-based misconduct.

- School districts impose **suspensions** pursuant to N.C.G.S. § 115C-390.2(c) for off-campus conduct that "otherwise violates the Code of Student Conduct" and "has or is reasonably expected to have a direct and immediate impact on the orderly and efficient operation of the schools or the safety of individuals in the school environment."

- School districts impose **expulsions** pursuant to N.C.G.S. § 115C-390.11 for conduct alleged to establish that the student's "continued presence in school constitutes a clear threat to the safety of other students or school staff."

- School districts impose **disciplinary reassignments** pursuant to local board policies that typically provide authority to reassign a student in a situation where "a student has been charged with a felony or with any crime that allegedly endangered the safety of others, and it is reasonably foreseeable that the student's continued presence will significantly disrupt the regular educational environment."

Recent changes to the school notification statute, N.C.G.S. § 7B-3101, aim to minimize school disciplinary actions in response to community-based incidents. The newly amended statute now requires principals to, upon receiving notice of pending juvenile matters, "make an individualized decision related to the status of the student during the pendency of the matter and not have an automatic suspension policy."

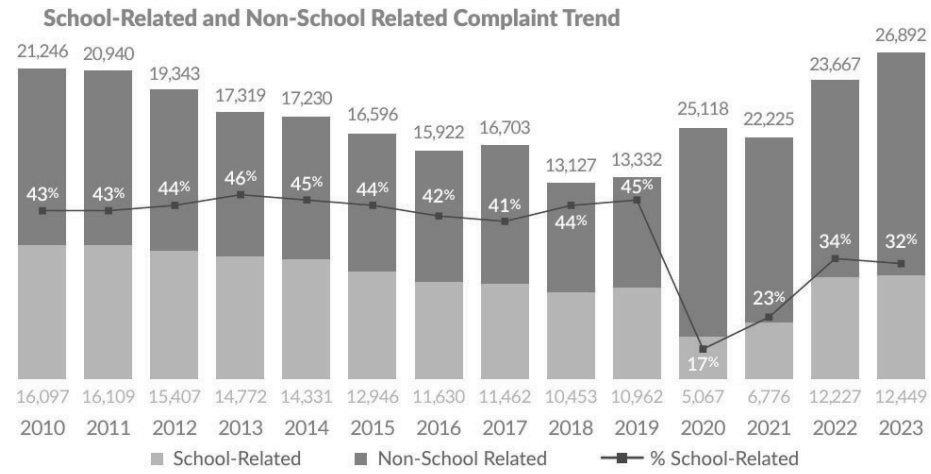
> **§ 7B-3101. Notification of schools when juveniles are alleged or found to be delinquent.**
>
> (a) Notwithstanding G.S. 7B-3000, the juvenile court counselor shall deliver verbal and written notification of any of the following actions to the principal of the school that the juvenile attends:
>
> > (1) A petition is filed under G.S. 7B-1802 that alleges delinquency for an offense that would constitute a Class A, B1, B2, C, D, or E felony if committed by an adult. The principal of the school shall make an individualized decision related to the status of the student during the pendency of the matter and not have an automatic suspension policy.

While this amended statute mirrors portions of the school discipline statute that forbid zero tolerance policies, this statute does not ultimately bar a school from taking action to discipline a student based on juvenile court involvement.

2. School discipline creating or exacerbating juvenile court involvement

a. School-based referrals to juvenile court

School-based incidents continue to comprise a large percentage of the offenses that trigger juvenile court involvement.



School-based offenses overwhelmingly involve misdemeanor offenses.

Top 10 School-Based Offenses: CY 2023	
Charged Offense (M) misdemeanor (F) felony (S) status offense	Complaints
Simple assault (M)	2,477
Simple affray (M)	1,371
Disorderly Conduct at School (M)	1,132
Communicating threats (M)	675
Possession of weapons other than firearms and explosives on school grounds (M)	659
Truant < 16 (S)	596
Simple possession schedule VI controlled substance (M)	393
Communicating Threat of Mass Violence on Educational Property (F)	355
Assault government official / employee (M)	319
Disorderly Conduct by engaging in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence (M)	272

Source: 2023 Division of Juvenile Justice and Delinquency Prevention Annual Report, *available at https://www.ncdps.gov/our-organization/juvenile-justice/datastatisticsreports/juvenile-justice-annual-report*

b. Juvenile Risk Assessment (YASI)

Once a student has been referred to juvenile court, their past disciplinary history can result in them being assessed as higher risk, which heightens the chances they will be placed under court supervision.

10. Total number of out of school suspensions in last 2 years: *Enter the number up to 10, if none enter 0.*	Number of out-of-school suspensions
Total number of in-school suspensions in the last 2 years: Enter the number up to 10, if none enter 0.	Number of in-school suspensions
Total number of expulsions since the first grade: *Enter the number up to 10; if none enter 0*	Number of expulsions

c. Probation Violations

Once a student is placed on probation, their school-related terms of disposition can set them up for probation violations and intensified court involvement, in many cases for things that are outside of their full control.

Term of Disposition	Complicating Factors	Alternate Terms
No suspensions	• Behaviors are disability-related. • Disparities in how schools perceive and respond to student behaviors.	• Remove it entirely • Cooperate with school-based support teams related to improving behaviors
Attend school daily	• School avoidance caused by unaddressed disability-related needs. • School avoidance caused by unaddressed poverty stressors.	• Improve attendance • Cooperate with school-based support teams related to improving attendance
Maintain passing grades in at least four classes	• Unaddressed disability-related needs. • School staffing and quality challenges.	• Remove it entirely • Cooperate with school-based support teams related to improving grades

d. School discipline and related disruption of living situations

In some cases, students may find their living situations disrupted as a result of suspensions or other disciplinary actions that prevent them from attending school.

- Students in foster care who are removed from school and/or placed on virtual school as a disciplinary consequence could face disruptions to their foster care placement if their foster parent is unable to supervise them during the day when they're not at school.
- Youth in juvenile court have been placed in wilderness camps or multi-purpose group homes in response to discipline-related barriers to accessing education.

3. Strategies to improve outcomes for court-involved youth

For most young people, school is where they spend most of their time, where they have access to the most services/supports, and where they build their community. Properly implemented educational services can help to meet the unique needs of youth and keep high-risk youth both in school and in the community.

N.C.G.S. § 7B-2501*:* Within the guidelines set forth in G.S. 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:

1. The seriousness of the offense;
2. The need to hold the juvenile accountable;
    - ***Consider****: How has this already happened and/or could it more effectively happen through restorative solutions within the school setting?*
3. The importance of protecting the public safety;
    - ***Consider****: Is there evidence that making meaningful changes to the student's intervention plans would support the student academically and behaviorally, and improve their long-term stability/success and reduce their risk of recidivism?*
4. The degree of culpability indicated by the circumstances of the particular case;
    - ***Consider****: Was the behavior found to be related to the student's disability? Is there evidence that it related to unaddressed bullying?*
5. The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.
    - ***Consider****: Is there evidence that the student's 504 Plan or IEP can be meaningfully improved and/or enforced to ensure identified needs are being met? In particular, could school-based related services and/or a behavior intervention plans meaningfully assist the youth?*

UNC SCHOOL OF GOVERNMENT

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Juvenile Law Related to the Investigation of Delinquent Acts

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CONTENTS

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Investigations of offenses that are subject to juvenile jurisdiction often require an understanding of both criminal law and juvenile law. Because juveniles have constitutional due process rights in the context of delinquency proceedings,[1] much of the criminal law related to search and seizure also applies in juvenile matters. In addition, juvenile law contains some legal requirements that are unique to juvenile investigations. This bulletin details several of these juvenile law requirements, including:

- components of search and seizure law that are unique to juveniles,
- nontestimonial identification orders,
- investigation of impaired driving when the suspect is under the age of 16, and
- confidentiality that applies to juvenile investigations.[2]

I. Search, Seizure, and Juveniles

The Fourth Amendment's protection against unreasonable search and seizure applies in investigations that involve juveniles in largely the same way that it applies in criminal investigations of adults. The requirement for probable cause and the usual exceptions to that requirement, such as investigative stops based on the lesser standard of reasonable suspicion and searches incident to arrest, generally apply in investigations that involve juveniles.[3] However, there are two areas where juvenile involvement has meaningful impact in the law.

1. Youth is an important factor when evaluating the amount of force used during a seizure.
2. The law governing search and seizure in a school setting is unique, generally requiring only "reasonableness."

A. Youth and Fourth Amendment Excessive Force Analysis

The Supreme Court of the United States established, in *Graham v. Connor*, that an analysis of whether an officer used excessive force during the seizure of a person requires the application of the objective reasonableness standard contained in the Fourth Amendment.[4] Reasonableness is determined by balancing the nature and quality of the intrusion on an individual's Fourth Amendment rights against the countervailing governmental interests.[5] The facts of each case must be weighed, including the severity of the crime, whether the suspect poses an immediate

1. *In re* Gault, 387 U.S. 1 (1967).

2. Juveniles also have enhanced rights during a custodial interrogation. For an analysis of juvenile law that applies during a custodial interrogation, see Jacquelyn Greene, *Juvenile Interrogation*, JUV. L. BULL. No. 2022/02 (UNC School of Government, Sept. 2022), https://www.sog.unc.edu/sites/default/files/reports/2022-09-22%2020220187%20JLB2022-02%20Interrogation_Greene.pdf.

3. *See In re* J.L.B.M., 176 N.C. App. 613 (2006) (applying the body of law requiring reasonable suspicion for an investigative stop in holding that there was no reasonable and articulable suspicion of criminal activity). A complete summary of the law that applies to search and seizure in criminal investigations can be found in Robert L. Farb and Christopher Tyner, Arrest, Search, and Investigation in North Carolina (UNC School of Government, 2021).

4. 490 U.S. 386, 388 (1989).

5. *Id.* at 396.

threat to safety, and whether the suspect is actively resisting or trying to evade arrest.[6] In addition, the reasonableness analysis must be based on the perspective of a reasonable officer at the scene and account for the reality that officers must often make quick decisions in circumstances that are tense, uncertain, and rapidly evolving.[7]

In applying this standard to seizures of children, several federal appellate courts, outside of the Fourth Circuit, have noted that **the young age of a child is an important factor to consider when determining objective reasonableness**.[8] The Seventh Circuit held that an officer holding a gun to the head of a nine-year-old, and threatening to pull the trigger, during a search of the child's home "was objectively unreasonable given the alleged absence of any danger to [the officer] or other officers at the scene and the fact that the victim, a child, was neither a suspect nor attempting to evade the officers or posing any other threat."[9] The court noted that the age of the child was among the most salient facts in the excessive force inquiry.[10]

The Fifth Circuit also held that a jury could find that an officer used objectively unreasonable force when he violently jerked a ten-year-old out of a chair by her arm and dragged her into another room.[11] The officer, who was at the girl's house to arrest her father for sexual abuse of his children, was trying to find out why she and her brother were not in school. He testified that he weighed close to 300 pounds and that there was never a need to use force against the child. The court emphasized the discrepancy between the size of the officer and the young age of the child in its analysis.[12] The court also found it significant that the child was not under arrest and did not pose a threat to anyone.[13]

The Ninth Circuit similarly held that age was a salient factor in the unreasonable detention of and use of force against an 11-year-old child.[14] This case also involved a child who was at home when law enforcement arrived to execute a search warrant and arrest his father. As twenty-three agents descended on the home, the child came out of the garage in bare feet. Confused, he started to run back to the house but then complied with law enforcement's command to turn around with his hands up. An officer had the child lie face down on the driveway, held a gun to his head, searched him, and handcuffed him. Then the officer pulled him up using the chain of the handcuffs, which was behind his back, and sat him on the sidewalk with his feet in the gutter until they removed the father from the house. Law enforcement then took off the child's handcuffs and sat him on a stool in the driveway while fifteen to twenty officers pointed their guns at him. The child was on the sidewalk for ten to fifteen minutes and on the stool for another fifteen to twenty minutes.

Applying the factors established in *Graham*, the court reasoned that the use of force was a substantial invasion of the child's personal security and there was minimal need for force. The court emphasized that the child was not the suspect, "[h]e was cooperative and unarmed, and most importantly, he was eleven years old."[15] The court held that a jury could find that the use

6. *Id.*
7. *Id.* at 396–97.
8. There are no cases from the Fourth Circuit that address this issue.
9. McDonald by McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992).
10. *Id.* at 294.
11. Ikerd v. Blair, 101 F.3d 430 (5th Cir. 1996).
12. *Id.* at 435.
13. *Id.*
14. Tekle v. United States, 511 F.3d 839 (9th Cir. 2007).
15. *Id.* at 846.

of force was greater than what was reasonable under the circumstances and that a reasonable officer should have known there was no need to use a gun or handcuffs. The court also held that the detention was unreasonable, noting that a reasonable officer would have known that an unarmed 11-year-old child who was "barefoot, vastly outnumbered, and was not resisting arrest or attempting to flee should not have been kept in handcuffs for fifteen to twenty additional minutes."[16]

Finally, the Third Circuit suggested that youth was a factor in its excessive force analysis in a case that involved three teenagers.[17] The analysis centered on the use of handcuffs and guns to detain a mother and her three teenage children, who happened to be approaching the home of her oldest son at the same time that officers were executing a drug raid there. Some officers ran into the apartment while others forced the mother and teenagers to the ground at gunpoint and handcuffed them. After the apartment was secured, the officers brought the mother and teens inside. The females were held in the kitchen and remained in handcuffs. A gun was pointed at the mother's head. The teenage boy was searched in a bedroom, and he also remained in handcuffs during the search. The family was released after they were identified, and nothing was found in the search.

While the court held that the initial direction to get down and the length of detention (about twenty-five minutes total) were not unreasonable, it found that the use of handcuffs and guns was not justified under these circumstances. The court noted that law enforcement used these intrusive methods despite having no reason to feel threatened by the family and no fear that anyone would escape. The court emphasized the age of the children in coming to this conclusion, stating, "It was dusk but still daylight as Mrs. Baker, Corey and Jacquine, both age 17, and Tiffany, age 15, approached the apartment. Considering the facts in the light most favorable to the Bakers, the appearances were those of a family paying a social visit, and while it may have been a visit to a wayward son, there is simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used."[18]

Though the legal standards applied in these cases are the same standards used to analyze claims of excessive force against adults, the fact that these cases involved youths was salient to each court's analysis. There are some additional common themes that run throughout these cases: None of the children involved were suspected of any crime. In fact, they all just happened to be present at a time when law enforcement arrived to execute a warrant unrelated to them. None of the children resisted law enforcement, nor did any of them attempt to flee. It may therefore be especially important for law enforcement to exercise caution in using force against children who happen to be present at the execution of a search or arrest warrant, especially when those children are not suspected of committing any offense.

Excessive Force in Schools

Courts have applied the *Graham v. Connor* reasonableness analysis even when the use of force takes place in a school setting. In the Fourth Circuit, claims of excessive force by law enforcement in the school setting are analyzed under the reasonableness criteria established in *Graham v. Connor*,[19] described above. The Fourth Circuit applied those criteria in *E.W. by*

16. *Id.* at 850.
17. Baker v. Monroe Twp., 50 F.3d 1186 (3rd Cir. 1995).
18. *Id.* at 1193.
19. 490 U.S. 386, 388 (1989).

and through T.W. v. Dolgos.[20] E.W., a 10-year-old student, got into a fight with another student on the school bus on a Tuesday. The school contacted the sheriff on Friday about the fight. An officer went to the school, reviewed the video of the incident on the bus, and spoke with the other student who was involved. E.W. was then removed from her classroom and taken to a closed office with the officer and two school administrators. The officer spoke with E.W. about the incident and felt that E.W. did not seem to care about the fight or think it was significant. The officer placed E.W. in handcuffs for about two minutes, and E.W. cried and apologized. The officer then removed the handcuffs and released E.W. to her parents.

The officer asserted that she was concerned for her own physical safety and the safety of the administrators because of what she saw on the video of the school bus incident and because of E.W.'s apparent apathy. Analyzing the reasonableness of the use of force under the totality of the circumstances, the court held that the decision to handcuff E.W. was unreasonable. The court weighed several factors to support its conclusion, including that:

- the severity of the offense was tempered by the fact that the offense was at most a misdemeanor assault;
- the officer could not have believed that E.W. posed any immediate risk of harm since she did not make any threats or have any weapons. She was calm and compliant. She was a foot shorter and 60 pounds lighter than the officer. She was in a closed office, surrounded by the administrators and the officer, and posed little threat even if she did become aggressive. The incident had occurred several days prior to the use of handcuffs and there was no reason to believe it was anything other than an isolated incident. E.W. did not have any previous behavioral issues or involvement with law enforcement;
- there were no allegations that E.W. was resisting or attempting to evade arrest;
- E.W. was young. According to the court, "E.W. was only ten years old at the time of the arrest. She therefore falls squarely within the tender age range for which the use of handcuffs is excessive absent exceptional circumstances";[21]
- the use of force occurred at school. The location weighs against reasonableness because "the use of handcuffs and force is not reasonably expected in the school context because it is counterproductive to the mission of schools and school personnel. For these reasons, the school setting—especially an elementary school—weighs against the reasonableness of using handcuffs";[22] and
- the circumstances were not tense, uncertain, or rapidly evolving.

The court did find that the officer was entitled to qualified immunity because E.W.'s right to be free from the use of excessive force was not clearly established when the officer handcuffed her. The court emphasized that "our excessive force holding is clearly established for any future qualified immunity cases involving similar circumstances."[23]

A child's level of resistance has been central to excessive force analyses conducted by other courts as well. In *C.B. v. City of Sonora*,[24] the court held that the case could proceed on the excessive force claim for using handcuffs on a calm and compliant 11-year-old student. The

20. 884 F.3d 172 (4th Cir. 2018).
21. *Id*. at 182.
22. *Id*. at 184.
23. *Id*. at 187.
24. 769 F.3d 1005 (9th Cir. 2014).

court also held that keeping the student in handcuffs during a thirty-minute ride in a vehicle equipped with safety locks was also clearly unreasonable. However, in *J.I.W. by and through T.W. v. Dorminey*,[25] the court did not conclude that a school resource officer's use of force on a 13-year-old middle-school student, which broke the student's arm, violated a clearly established constitutional right. J.I.W. resisted the school staff who tried to calm him down. He also resisted the school resource officer (SRO) who attempted to escort him to the office. The SRO used increasingly forceful wristlock maneuvers, which J.I.W. resisted, and the two eventually went to the floor. The court held that, given the resistance of the student, every reasonable officer in those circumstances may not have believed that the use of force was unreasonable.

B. Search and Seizure in Schools: The Reasonableness Standard and Individualized Suspicion

The one aspect of search and seizure law where the legal standard is substantially different for juveniles than for adults is the search and seizure of students at school. **Generally, search and seizure of students in the school context can occur on the basis of reasonable suspicion alone** instead of probable cause.

School Searches by School Personnel

The United States Supreme Court initially established a reasonableness standard for searches conducted by school officials in a public-school setting in *New Jersey v. T.L.O.*[26] The student in *T.L.O.* was found smoking in the bathroom and a teacher brought her to the principal's office. After the student denied that she had been smoking, the vice principal demanded to see her purse. When he opened it, he discovered a pack of cigarettes and rolling papers. He searched the purse more thoroughly and found a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial amount of one-dollar bills, an index card with what appeared to be the names of other students who owed this student money, and two letters that implicated the student in marijuana dealing.

The Court held that public-school officials function as representatives of the state in carrying out a search and the Fourth Amendment's prohibition on unreasonable searches and seizures therefore applies. At the same time, the Court held that balancing the privacy interests of schoolchildren against the substantial need of school personnel to maintain order in schools does not result in a need for probable cause to conduct a search. Instead, **a twofold reasonableness test applies**. The search must be

1. **justified at its inception and**
2. **reasonably related in its scope to the circumstances that initially justified the interference**.[27]

25. No. 21-12330, 2022 WL 17351654 (11th Cir. December 1, 2022).

26. 469 U.S. 325 (1985).

27. *Id.* at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968). While the Court cited *Terry* in explaining the reasonableness standard, it is not completely clear whether the reasonableness standard established in *T.L.O.* is exactly the same as the reasonableness standard established in *Terry*. *T.L.O.* and its progeny place a strong emphasis on the uniqueness of the schoolhouse setting. How that factor relates to the reasonableness standard established in *Terry* is beyond the scope of this bulletin.)

The Court went on to explain that a search of a student by a school official is usually justified at its inception when there are **reasonable grounds for suspecting that the search will turn up evidence that the student has violated rules of the school or the law**. Such a search is "permissible in its scope when the **measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction**."[28] Applying this standard, the Court found that the initial search of the purse and the second, more thorough search were both reasonable.

The United States Supreme Court took up the question of the need for individualized suspicion to support a school search a decade later in the context of a school policy that required student athletes to comply with random urinalysis drug testing.[29] The Court relied on the special needs that exist in the school setting and the decision in *T.L.O.* to find that a warrant and probable cause requirement was not necessary in this situation. In analyzing the nature of the privacy interest of the students, the Court noted that students have a lesser expectation of privacy than the general population and that the public school's power is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[30] The Court also found that the invasion of privacy required by the urinalysis was not significant.

The Court weighed this lower expectation of privacy and insignificant invasion of privacy against the nature and immediacy of the governmental interest and the efficacy of the random urinalysis policy for addressing that interest. The Court characterized the government's interest in deterring drug use by children as "important—indeed, perhaps compelling."[31] It reasoned that this governmental interest is magnified in the school context because the state has "undertaken a special responsibility of care and direction" of public schoolchildren.[32] The Court also noted that the policy was narrowly directed at student athletes—a group for whom risk of harm to themselves and their opponents was particularly high. Finally, the Court stated that the Fourth Amendment does not require the least intrusive search practicable. The Court held that the random urinalysis policy for student athletes was reasonable given the balance of interests. Individualized suspicion was not required.

The analysis in these two cases shaped the bedrock for analyzing the reasonableness of school searches under the Fourth Amendment. However, questions remained regarding the application of the reasonableness standard to searches conducted in schools by law enforcement. A series of North Carolina and federal cases have answered many of those questions.

School Searches Involving Law Enforcement

The North Carolina Court of Appeals has consistently applied the reasonableness standard established in *T.L.O.* to searches conducted by law enforcement officers who are acting in conjunction with school officials to maintain a safe educational environment. **The application of the reasonableness standard that began as a standard for school officials now includes**

28. *Id.* at 342 (emphasis added).
29. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
30. *Id.* at 655.
31. *Id.* at 661.
32. *Id.* at 662.

searches conducted by school resource officers (SROs) on their own, or at the direction of a school official, and in furtherance of well-established educational and safety goals. The cases include:

- *In re Murray*.[33] The assistant principal of a middle school was notified by a student that Murray had something in his book bag that should not be there. The assistant principal found Murray alone in a room, and he initially denied that he had a book bag. However, when the assistant principal saw a red book bag near Murray and questioned him about it, Murray admitted the bag was his. The assistant principal took Murray to her office, where the student refused to consent to a search of the bag. The assistant principal then contacted the dean of students and the SRO, who came to the office. Murray tightened his grip on the bag when the assistant principal tried to take it from him. The SRO grabbed Murray, and after a brief struggle, he put Murray in handcuffs. The assistant principal opened the bag while Murray was in handcuffs and found a pellet gun. The SRO then removed the handcuffs and called Murray's father.

  The court characterized this as a search by a school official. The SRO placed Murray in handcuffs so that the assistant principal could conduct the search, but he did not conduct the search himself nor did he conduct any other investigation. Applying the *T.L.O.* standard, the court held that the search was reasonable at its inception based on the tip from a classmate and Murray's initial lie about not having a book bag. The court also concluded that the search was reasonable in scope because it was confined to the bag. The use of handcuffs allowed the assistant principal to safely search the bag and helped the SRO control a potentially dangerous situation. In addition, the handcuffs were removed as soon as the pellet gun was found and any danger of disruption dissipated.
- *In re D.D.*[34] A substitute teacher warned the school principal that she'd overheard students discussing a fight that was going to occur on the campus (Hillside) at the end of the day. When the principal saw a group of four girls in the school parking lot just before dismissal, he gathered the SRO and two additional school security officers (who were off-duty police officers employed by the school). The group of law enforcement officers and the principal approached the girls. The officers were armed and in their uniforms. The principal asked the girls who they were and where they went to school. Only one of the students was a student at Hillside. The girls' behavior escalated, and they used vulgarities and tried to walk away. The officers told the girls to hold on. One of the officers searched the purse of one of the girls, and he found a box cutter. The girls were taken to the principal's office, and the principal told the officers that since he had information the girls were coming to fight, he believed he had reason to ask them what they had on their persons. The officers agreed and the principal asked the girls to empty their pockets. D.D., who was not a student at Hillside, took a knife from her pocket and placed it on the principal's desk. The principal and the officer made the decision to charge D.D.

  The court first determined that it was appropriate to apply the *T.L.O.* standard to D.D., even though she was not a student at Hillside, since prohibiting the principal from taking further action because the student was enrolled in a different school would lead to an

33. 136 N.C. App. 648 (2000).
34. 146 N.C. App. 309 (2001).

absurd result. The court also held that the *T.L.O.* standard should apply in this instance because the officers were acting in conjunction with the school official. The court looked to several factors in making this determination, including the following:

- The officer involvement was minimal relative to the actions of the principal.
- At most, the officers acted in conjunction with the principal to further his obligation to maintain a safe and educational environment and to report truants from other schools.
- None of the officers initiated any investigation and the officers were not directing the principal in an investigation to collect evidence of a crime.
- The principal requested the assistance of the officers.
- The officers telling the girls to "hold on" in the parking lot was not an unauthorized detention by the officers. It simply enabled the principal to further investigate his suspicions.
- There was no basis for thinking the principal's action was a subterfuge to avoid the need for a warrant and probable cause requirements.
- This was not an effort to mask an investigation by outside officers.
- It was reasonable to infer that the duties of the SRO were to assist in maintaining a safe and proper educational environment and the principal testified that he understood this to be the role of all the officers involved.

In applying the *T.L.O.* reasonableness standard to the facts of this case, the court found that the principal had sufficient grounds to believe that taking further action would reveal a violation of school rules or of the law. This included the information he had about a pending fight; his knowledge, based on experience, that students often brought weapons to a fight; his obligation to confront anyone trespassing on campus and to report any students from other schools who were on campus; the evasive behavior and profane remarks of these particular students; and the weapon that was found on one of the girls in the parking lot. The court held that the search was not unnecessarily intrusive in light of the circumstances.

- *In re S.W.*[35] A high-school SRO smelled a strong odor of marijuana coming from S.W. The SRO asked two assistant principals and two unidentified students to go with him and S.W. to the school's weight room. Once in the weight room, the SRO asked S.W. if he had anything on him. S.W. said no. The SRO then asked if S.W. would mind if the SRO searched him. S.W. said he did not mind, and the SRO conducted a pat-down search and asked S.W. to empty his pockets. S.W. produced a plastic bag containing ten small plastic bags of marijuana.

  The court reasoned that the *T.L.O.* reasonableness standard applied to this SRO-initiated search because the SRO was assigned to the high school in a full-time capacity, assisted school officials with school-discipline matters and taught law-enforcement-related subjects, was present in school hallways during school hours, and was furthering the school's education-related goals when he stopped S.W. The court distinguished this role from that of (1) a law enforcement officer, who works outside the school, conducting an investigation at the school or (2) an investigation of a non-school-related offense by someone internal to the school and at the behest of law enforcement external to the school. The court emphasized that employment as an SRO requires the SRO to help maintain a drug-free environment at the school.

35. 171 N.C. App. 335 (2005).

In applying the *T.L.O.* reasonableness standard, the court found that the strong odor initially gave the SRO reasonable suspicion that S.W. possessed marijuana in violation of state law and school rules. In addition, the search was reasonably related to that initial suspicion and was not excessively intrusive in light of the age and gender of S.W. and the nature of the suspicion. Though the evidence suggested that S.W. consented to the search, the court held that the search could have been performed without S.W.'s consent.

- *In re D.L.D.*[36] A sheriff's officer assigned to Hillside High School and the assistant principal observed suspicious behavior outside a school bathroom via a camera. The officer had previously arrested more than a dozen suspects for drug activity in that bathroom. The officer and assistant principal went to check on the situation, and they saw one student standing outside the boys' bathroom and another standing outside the girls' bathroom. D.L.D. came out of the boys' bathroom with two other students. When D.L.D. saw the men, he ran back into the bathroom. The officer followed him and saw him put something in his pants. The assistant principal brought the other two students into the bathroom and the officer told the assistant principal what he'd seen. The assistant principal said they needed to check D.L.D., and the officer frisked him. The frisk revealed a BB gun pellet container holding three individually wrapped bags of green leafy material. The officer identified the contents of the bag as marijuana, handcuffed the juvenile, and took him to a conference room. The assistant principal said they needed to check D.L.D. to make sure he didn't have anything else on him. The officer then searched D.L.D. and found $59 in his pockets.

  The court explained that the *T.L.O.* reasonableness standard applies when (1) school officials initiate a search on their own, (2) law enforcement involvement is minimal, (3) law enforcement acts in conjunction with school officials, and (4) SROs conduct investigations on their own or at the direction of school officials and in furtherance of well-established educational and safety goals. According to the court, the facts of this case showed that the officer was working in conjunction with and at the direction of the assistant principal to maintain a safe and educational environment. The court explicitly noted that "keeping schools drug free is vital in maintaining a safe and educational environment."[37]

  Applying the reasonableness standard, the court held that the behavior of the students justified the first search at its inception. Additionally, the scope of the frisk around the waistband was not unnecessarily intrusive given (1) the age and gender of the student, (2) his placement of something in his pants, and (3) the nature of the infraction. The court also held that the second search was reasonable and justified at its inception because the officer had already found drugs on D.L.D. The search was not excessively intrusive in light of the age and gender of the juvenile and the nature of the suspicion.

The Fourth Circuit addressed the need for individualized suspicion under the reasonableness standard in *DesRoches by DesRoches v. Caprio*.[38] This case involved an initial search of all of the backpacks left in a classroom after a pair of tennis shoes went missing during the lunch period. The school had a policy of imposing a ten-day suspension if any student refused to consent to a search. DesRoches, a student who refused to consent to the search of his backpack, was suspended for ten days. He alleged that the search was not constitutional because there was no individualized suspicion underlying the search.

36. 203 N.C. App. 434 (2010).
37. *In re* D.L.D., 203 N.C. App. 434, 439 (2010).
38. 156 F.3d 571 (4th Cir. 1998).

The court explained that the *T.L.O.* decision did not emphasize individualized suspicion as an essential element in school searches because it was easily found under the facts of that case. However, in order for a search to be reasonable, it must be based on individualized suspicion at the inception of the search or be justified by "special needs" beyond the normal need for law enforcement. The court held that the inception of the search of DesRoches's backpack did not occur when the other backpacks in the classroom were searched. Instead, it occurred when DesRoches was punished for not consenting to the search, after being given three opportunities to consent. At that point, eighteen other bags had been searched, and the evidence suggested that only DesRoches and one other student had been in the classroom with access to the shoes. Based on this individualized suspicion, the search was reasonable.

Considering these cases together, it is clear that a search conducted by an SRO in order to maintain a safe and educational environment in a school is subject to the reasonableness standard established in *T.L.O.* The cases do note that probable cause is needed to justify a search conducted by an outside law enforcement officer for a non-school-related offense or done at the behest of an outside law enforcement officer. However, there are no North Carolina cases that illustrate such scenarios.

Strip Searches at School

The United States Supreme Court held that a school search that rises to the level of a strip search requires **a level of suspicion that matches the high degree of intrusion involved in a strip search**.[39] Given the meaning of an intrusive strip search, and the sense of degradation it may cause, this kind of search is in its own category and requires a specific kind of suspicion. In this case, the school nurse and an assistant principal conducted a search of a 13-year-old middle-school girl for prescription-strength ibuprofen and over-the-counter naproxen. After the student was told to remove her jacket, socks, shoes, stretch pants, and T-shirt, she was asked to pull open and shake her bra and to pull open the waistband of her underpants—partially exposing her breasts and pelvic area. The Court held that this kind of search required a reasonable suspicion of danger or a reasonable suspicion that the prohibited medications were hidden in the girl's underwear to "make the quantum leap from outer clothes and backpacks to exposure of intimate parts."[40] The Court did not find any such reasonable suspicion under the facts of the case and held that the search was therefore not justified.

Two Eleventh Circuit decisions provide examples of strip searches in schools that were deemed to be excessive in scope under the reasonableness standard. In *D.H. by Dawson v. Clayton County School District*,[41] the court held that a strip search of a seventh-grade boy was justified at its inception due to the discovery of concealed marijuana on other students. However, the strip search was excessive in scope because it required the boy to stand fully nude in front of his peers.

The court also found the strip search in *T.R. by & through Brock v. Lamar County Board of Education*[42] both unreasonable at its inception and excessive in scope. In this case, a 14-year-old girl was strip-searched by the principal and a counselor after a teacher smelled marijuana smoke in her class and a search of T.R.'s backpack revealed stems and seeds, rolling papers, two lighters,

39. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).
40. *Id.* at 377.
41. 830 F.3d 1306 (11th Cir. 2016).
42. 25 F.4th 877 (11th Cir. 2022).

and various pills. T.R. was strip-searched twice, both times in front of the window on a door to a public hallway. The court held that the search was not justified at its inception because there was no reason to suspect that T.R. was concealing drugs in her underwear. The court also found that conducting two strip searches in front of an open window was unnecessarily intrusive, making them excessive in scope. Finally, the court held that the school officials who conducted the searches should not be granted qualified immunity because both *Safford* and *D.H.* were materially similar cases.

These cases illustrate that a strip search requires a specific suspicion that contraband is hidden in a student's undergarments and that, during any such search, a student's privacy must be protected in order for the search to be reasonable under constitutional requirements.

Student Cell Phone Searches

Courts have also applied the *T.L.O.* reasonableness standard to searches of student cell phones at school. While North Carolina courts have not directly addressed this issue, several federal courts have.

Searches of students' cell phones at school were found to be reasonable under the *T.L.O.* standard in the following cases:

- *J.W. v. Desoto County School District.*[43] A middle-school student was seen checking his phone at school for a text message from his father. A school rule prohibited the possession and use of cell phones at school. A school employee took the cell phone from the student and looked at the student's personal photos on it. The student was escorted to the principal's office after the employee discovered a photo, taken at the student's home, of another student holding a BB gun. The principal and a law enforcement officer then reviewed the other pictures on the phone. They accused the student of having gang pictures and issued a suspension notice based on the violation of a school rule that prohibited the display on school property of any clothing, accessories, drawings, or messages associated with a gang. The court found that the search was reasonable at its inception because possession of the phone at school violated a school rule, and it was therefore reasonable for the school official to then determine the extent to which the student was using the prohibited phone. The court also found the search to be reasonably related in scope to this initial justification.
- *Jackson v. McCurry.*[44] Two school administrators searched the text messages on the cell phone of a high-school senior after other students accused her of sending text messages making fun of another student for not making the volleyball team. The search included text messages to one of the students who made the accusation and to family members, the student's best friend, and her boyfriend. The court held that the search was reasonable at its inception because the text messages may have shown that the student engaged in harassment of another student, a violation of school rules. The search was also reasonable in scope because the school administrator knew that the student could choose how to identify her contacts and she could have disguised messages to other students. The court also noted

43. *Id.*

44. 303 F. Supp. 3d 1367 (M.D. Ga. 2017), *aff'd*, 762 F. App'x 919 (11th Cir. 2019) (unpublished per curiam opinion).

that "[t]hough technology has changed since T.L.O. was handed down, a school official's search of a student's cell phone on school property and during the school day still fits within the framework announced in T.L.O."[45]

- *Simpson, Next Friend of J.S. v. Tri-Valley Community Unit School District No. 3*.[46] A school administrator searched the camera roll of a 15-year-old student's (J.S.) phone as part of an investigation into the creation of a gun meme involving W.J., another student at the high school. W.J. allowed the administrator to see a photo he had posted to Snapchat of himself wearing a black trench coat. He also showed the administrator that two students had taken screenshots of the photo. One of those students (S.D.) was interviewed and reported that J.S. asked him to take a screenshot of the photo and send it to him. S.D. also reported that J.S. had a history of making memes about and bullying W.J. The administrator subsequently searched the camera roll on J.S.'s phone, finding several photos of W.J. The photo used in the gun meme was not found on J.S.'s phone. The search of the photos was reasonable at its inception because the administrator had reasonable suspicion to search for the gun meme and for evidence of bullying. The search was reasonable in scope because it was reasonable to believe that a search of the photos would uncover evidence of the creation of the gun meme or other memes that targeted students. The search was limited to the camera roll, and did not include emails, web-browser history, text messages, or phone calls.

Searches of students' cell phones were found unreasonable under the *T.L.O.* standard in the following cases:

- *Klump v. Nazareth Area School District*.[47] A teacher confiscated a high-school student's cell phone after the phone fell out of the student's pocket. The school had a rule that cell phones could not be used or displayed during school hours. The teacher and an assistant principal then used the cell phone to access the student's text messages and voicemail and to call nine other students to find out whether those students were breaking the rule as well. They also pretended to be the student and sent messages to his younger brother. The court refused to grant a motion to dismiss on the claim that this search violated the student's Fourth Amendment rights. The court found that the initial seizure of the phone was justified because of the violation of a school rule. However, the subsequent search of the phone was not reasonable at its inception because school personnel had no reason to believe the search would reveal that the student was violating another school policy.
- *G.C. v. Owensboro Public Schools*.[48] A student with a history of rule violations and mental health and substance use needs was seen texting on a cell phone during class in violation of a school rule. His teacher confiscated the phone, and the assistant principal read some of the student's text messages because she was concerned that having his phone taken away might cause him to hurt himself or someone else. The court declined to adopt the blanket rule in *Desoto*[49] that it is reasonable to search a cell phone found at school to determine the extent to which the phone is being used to violate school rules. Instead, the court looked to

45. *Id*. at 1378.
46. 470 F. Supp. 3d 863 (C.D. Ill. 2020).
47. 425 F. Supp. 2d 622 (E.D. Pa. 2006).
48. 711 F.3d 623 (6th Cir. 2013).
49. J.W. v. Desoto County School District, No. 2:09-CV-00155-MPM-DAS, 2010 WL 4394059 (N.D. Miss. Nov. 1, 2010).

the fact-specific analysis of reasonableness that was relied on in *Klump*. The court held that the search was not reasonable at its inception because only the general knowledge of the student's background, including his drug abuse and depressive tendencies, did not justify the search of his cell phone at school. School personnel did not have any specific reason to believe that the student was engaging in unlawful activity, that he was about to break more school rules, or that he was thinking of hurting anyone when the search began.

Seizure of Students

Both the North Carolina Court of Appeals and the Fourth Circuit have held that **the reasonableness standard also applies to detainment of students at school by school officials and law enforcement**. The Fourth Circuit first took up this question in *Wofford v. Evans*.[50] The 10-year-old student in *Wofford* was detained in connection with allegations that she brought a gun to school. The first incident occurred the day before Thanksgiving break, after several classmates alleged that the student brought a gun to school. The assistant principal escorted the student to her office, where the student allowed her bag to be searched. A gun was not found, and the student took the bus home. The following Monday, when school reopened, school administrators continued their investigation of the gun allegation, and a classmate reported that he saw the student throw the gun into the woods next to the school. School administrators called the police, brought the student to the office, and questioned her again. Later, three detectives arrived and questioned her. A gun was never found.

The court analyzed the initial seizure of the student before Thanksgiving and the second seizure on the Monday after Thanksgiving using the *T.L.O.* reasonableness standard. In applying this standard to both the school administrators and the law enforcement officers, the court held that the reasonableness standard applies to law enforcement seizure of a student when a student is suspected of breaching a criminal law.[51] The court reasoned that the first seizure was reasonable at its inception because of the allegation by classmates. It was reasonable in scope because the student was not held longer than necessary to address the allegation and determine that she did not have a gun on her person or in her desk. The court also found that the second seizure, which eventually involved law enforcement, was reasonable. Disciplinary interests and the need to assure safety at the school justified the initiation of the second seizure. The scope of the second seizure was also reasonable, as it was reasonable to call law enforcement about the new allegation of a gun in the woods and for police officers to detain the student no longer than necessary to complete their investigation.

The North Carolina Court of Appeals relied on the holding in *Wofford* when applying the reasonableness standard to the detainment of a student on school grounds by an SRO. In *In re J.F.M. and T.J.B.*,[52] an SRO was investigating an affray that occurred at the school. When the officer saw T.B. leaving campus, he asked her to stop three times, but she refused. The assistant principal then informed the officer that T.B. had been involved in the affray and had left school. Later, when the officer saw T.B. and her sister at a bus stop on campus, he approached T.B. and told her he needed to take her back to school to talk with the school administrator about whether she would be suspended. T.B. refused to go with the officer, the officer attempted to grab

50. 390 F. 3d 318 (4th Cir. 2004).
51. *Id.* at 327.
52. 168 N.C. App. 143 (2005).

T.B., and T.B.'s sister scuffled with the SRO in an effort to set T.B. free. At some point, the sister bit the officer and T.B. hit him with an umbrella. Both sisters were adjudicated delinquent for resisting a public officer and for assault on a public officer.

The court determined that the **reasonableness standard applies to the detainment of a student on school grounds by an SRO who is working in conjunction with a school official**. The court held that, in this case, the SRO was working in conjunction with a school official. The court relied on the facts that the detainment occurred while the officer was on duty, on school premises, and that it was close in time to his investigation of the affray. The court noted that the officer clearly intended to immediately present the student to the administrator to discuss the ramifications of her actions under school rules and policies and not as a violation of North Carolina law. Finally, the court stated that practicality demands that SROs who conduct investigations at schools need to have some autonomy, which includes the ability to detain a student when a school administrator is not present in order to bring that student to an administrator.

The court also held that the seizure of T.B. under these circumstances was reasonable. It was justified at its inception because (1) an affray is a violation of law and school policy, (2) the officer was acting as an SRO and was known to T.B., (3) the officer saw T.B. on school grounds after seeing a group of students circled around what appeared to be an affray, (4) the officer told T.B. to stop three times and she ignored him, (5) the officer spoke with the school administrator who told him T.B. was involved in the affray, and (6) the officer saw T.B. soon after speaking with the administrator and detained her.

The court also found that the seizure was reasonably related in scope to the circumstances that justified the initial seizure: there was evidence that tied T.B. to involvement in the affray and there was a danger in allowing the matter to be carried over to another school day. In addition, T.B. was aware of her own culpability. The court held that the Fourth Amendment was not implicated in the escalated measures the officer took to overcome T.B.'s resistance.

Several federal circuit courts have applied the reasonableness standard to the seizure of a student in a school setting. The significant factors in these decisions include the age of the student, the student's level of resistance, the student's threat to safety, the extent of SRO involvement, and the school's interest in protecting students and deterring potentially violent behavior.

Cases in which federal circuit courts have found the seizure of a student to be reasonable include:

- *Milligan v. City of Slidell*.[53] A law enforcement officer was told by a parent that a fight was planned for after school the next day. The officer, the parent, and the football coach went to the high school with a list of the students involved. Several of the students were gathered and questioned for ten to fifteen minutes. They were warned that their parents would be called if a fight occurred and they were associated with it. Milligan was among the detained students. He testified that he felt physically intimidated and not free to leave. The court relied on the standard used in *Vernonia*,[54] noting the need for reasonableness to account for the custodial and tutelary responsibility of schools and the lesser expectation of privacy that students have in school. The court held that the privacy right asserted under these facts did not outweigh the school's interest in student protection, fostering self-discipline, and

53. 226 F.3d 652 (5th Cir. 2000).

54. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

deterring possibly violent misconduct. Use of the least restrictive means is not required. Here, the means used was an effective response to an immediate threat, law enforcement did no more than what a school official could have done, and no more was done than was necessary to deter the fight. The officer's actions were reasonable.

- *K.W.P. v. Kansas City Public Schools*.[55] A teacher asked a law enforcement officer to come to her classroom when the behavior of K.W.P., a seven-year-old second-grade student, escalated after a classmate picked on him. The officer had K.W.P. come with him into the hallway and attempted to walk him to the front office. K.W.P. did not want to go with the officer and tried to walk away. The officer grabbed the child's wrist and the child got upset, crying loudly and trying more forcefully to get away. The officer placed the child in handcuffs and, when they arrived at the office, sat the child in a chair with the handcuffs on. K.W.P stayed on the chair in handcuffs for about fifteen minutes until his father arrived. The handcuffs made his wrists tender and red and he alleged that he suffered mental and emotional distress as a result of the seizure. The court held that there was no violation of K.W.P.'s rights under these circumstances. K.W.P. admitted that he tried to flee and that those attempts could have posed a safety risk to himself. The court concluded that a reasonable officer could have thought that K.W.P.'s behavior constituted an act of violent resistance. Additionally, the fifteen-minute period of time during which the child remained in handcuffs in the office was not long, was related to the behavior that led to the initial use of handcuffs, and was reasonable and necessary to prevent K.W.P. from trying to leave and potentially harming himself.
- *T.S.H. v. Green*.[56] A high-school football coach gathered seven of his players, whom he was supervising at a football camp on a college campus, at the direction of university police who received a report that a cheerleading coach had been photographed through a window while she undressed. The coach kept the players in a room for hours, questioning them and asking to see the photographs on their cell phones. When none of the players confessed, they were expelled from the camp. The court assumed that the coach was acting as an agent of the university police officers and the students were therefore seized within the meaning of the Fourth Amendment. The court also noted that the reasonableness standard has been applied outside of "traditional school grounds" because of school administrator responsibilities for the students entrusted to their care at school events off school grounds.[57] Applying the reasonableness standard to the coach's detainment of the students, the court found that a reasonable officer could have thought that the initial seizure was justified because of possible violations of Title IX or state law. The scope of the detainment was also reasonable, as precedent established that a seizure for a period of hours was reasonable.

Cases in which federal circuit courts have found the seizure of a student to be unreasonable include:

- *Gray ex rel. Alexander v. Bostic*.[58] A 9-year-old student was not doing jumping jacks as required in her PE class. When a teacher told her to go to the wall, the student said something threatening to him. A second teacher then told the student to come over to

55. 931 F.3d 813 (8th Cir. 2019).
56. 996 F.3d 915 (8th Cir. 2021).
57. Shade v. City of Farmington, 309 F.3d (8th Cir. 2002).
58. 458 F.3d 1295 (11th Cir. 2006).

her. The SRO observed these interactions and stepped in before the student got to the second teacher. The SRO escorted the student into the lobby and handcuffed her behind her back, causing her pain. The SRO told the student that being in handcuffs is how it feels when you break the law and go to jail. The student began to cry, and the SRO left her standing in handcuffs for not less than five minutes. He then removed the handcuffs, and the student spent the rest of the PE class in the teachers' office. During discovery, the SRO explained that he placed the student in handcuffs to impress upon her the serious nature of committing crimes that can lead to arrest and to help persuade her to lose her disrespectful attitude. The court held that the use of handcuffs in this situation was objectively unreasonable under the Fourth Amendment. There was no indication that the student was a threat to safety, she complied with the direction given by the teachers, the teachers told the SRO they would handle the situation, the student did not continue to be disruptive, and the SRO admitted that he used handcuffs to punish her. The use of handcuffs under these circumstances was excessively intrusive given that the student was so young and that it was not done to protect people's safety. The officer was not entitled to qualified immunity because using handcuffs on a compliant 9-year-old for the sole purpose of punishment was an obvious violation of her Fourth Amendment rights.

- *C.B. v. City of Sonora*.[59] A coach at a middle school called the police regarding an 11-year-old sixth-grade student who was diagnosed with ADHD and was known to experience unresponsiveness during the day. The child, C.B., had "shut down" on the playground and was not responding to the coach's direction to go to her office. C.B. was sitting calmly when the first police officer arrived. The coach told the officer that the child was a "runner" and was not on his medication. When the second officer arrived, he tried to engage C.B., but the child was unresponsive. C.B. immediately complied when that officer told him to stand up and put his hands behind his back. The officer handcuffed the child and put him in the back of a police car, where he remained while the officer drove him thirty minutes to his uncle's place of business. No one ever told the child that he was not under arrest or where he was being taken. It was the police department's policy that officers could handcuff any person they were transporting in the back of their vehicles, and officers routinely handcuffed any student they transported from a school campus, regardless of the reason for transport. After this incident, C.B. experienced psychological and emotional problems. The court held that the seizure of C.B. was unreasonable because the officers did not know of any wrongdoing by the child, the child did not appear to pose a threat to self or others, and the child did not resist while officers were present.
- *Scott v. County of San Bernardino*.[60] The assistant principal at a middle school asked the SRO to counsel a group of girls who were involved in ongoing incidents of bullying and fighting. The officer determined that the girls were behaving disrespectfully and told them he was taking them to jail to prove a point. The SRO handcuffed all seven girls and transported six of them to the sheriff's department in police vehicles. The girls were then separated, interviewed, and released to their parents. No school disciplinary actions or charges followed. The court held that the seizure was not justified at its inception and was therefore unreasonable because an arrest cannot be justified as a scare tactic. But even if the arrests had been justified at their inception, the court noted, they were not reasonable

59. 769 F.3d 1005 (9th Cir. 2014).
60. 903 F.3d 943 (9th Cir. 2018).

in scope: arresting and handcuffing middle-school students and transporting them to the police station was disproportionate to the school's need to dissipate an ongoing feud. The full-scale arrests were excessively intrusive given the young age of the girls, and they were not reasonably related to the school's expressed need. The officers were not entitled to qualified immunity because no reasonable officer could have reasonably believed that the law authorized the arrest of a group of middle schoolers to prove a point.

- *Ziegler v. Martin County School District*.[61] A party bus carrying about forty students was searched by a uniformed SRO after arriving at the prom. He discovered an empty champagne bottle and some cups, which the bus driver stated belonged to the students and which the students alleged were already on the bus when they boarded. The students were then detained outside for almost an hour while they waited to complete breathalyzer tests. Since the party bus was late, the person authorized to administer the tests had gone home and needed to be called back; in addition, there weren't enough mouthpieces, so more had to be retrieved. The students were not permitted to enter the prom, leave on their own, or leave with their parents until every student had taken the breathalyzer test. Because the prom was a school-organized and -supervised event, the court applied the *T.L.O.* reasonableness standard and concluded that the search of the bus and the initial detention of the students while they waited for their breathalyzer tests were reasonable. However, the court held that "when government officials need to conduct breathalyzer or urine tests on students, the testing must be accomplished in a reasonably expeditious time period; once exonerated by the test, the student must be free to go."[62] Detaining students after they passed the breathalyzer tests was excessive in scope.[63]

II. Nontestimonial Identification Orders in Juvenile Cases

A. When Is a Nontestimonial Identification Order (NTO) Required?

Nontestimonial identification "means *identification* by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar *identification procedures requiring the presence of a juvenile*."[64] These procedures are **(1) for identification of the juvenile as the perpetrator and (2) require the presence of the juvenile to be performed.**

The Procedure Must Be for Identification

The North Carolina Court of Appeals described what a procedure for the purpose of identification means in *State v. Whaley*.[65] The court explained that "[m]anifestly, the focus of these statutes is identification of the suspect as the perpetrator, not a determination of whether

61. 831 F.3d 1309 (11th Cir. 2016).

62. *Id*. at 1324.

63. For more details on the legal basis for conducting breath tests at proms, see Shea Denning, *Proms and PBTs*, N.C. Crim. L., UNC Sch. of Gov't Blog (March 10, 2020), https://nccriminallaw.sog.unc.edu/proms-and-pbts/.

64. Chapter 7B, Section 2103 of the North Carolina General Statutes (hereinafter G.S.) (emphasis added).

65. 58 N.C. App. 233 (1982).

the crime has been committed."[66] In *Whaley*, a visual acuity test for a driver accused of involuntary manslaughter and death by vehicle was held not to be a nontestimonial identification procedure. The test was not administered to determine whether the driver was the person who committed the offense. Instead, the results of the test were sought to determine whether an element of the offense—gross negligence—existed.

This issue sometimes arises when juveniles are suspected of driving while impaired. A breath test administered to determine whether the juvenile is impaired is done to determine whether an element of the offense—impairment—is present. It is not done to identify the juvenile as the person who was driving the vehicle. Therefore, the breath test is not a nontestimonial identification procedure and an NTO is not required. Many procedures that involve the collection of evidence from a juvenile's body to establish an element of a crime may still require a search warrant.[67] Criminal law governing search and seizure should be consulted to determine if a search warrant is required.[68]

The Procedure Must Require the Presence of the Juvenile

A nontestimonial identification order is needed only when the procedure requires the presence of a juvenile. Questions sometime arise when one of the items or procedures listed in Chapter 7B, Section 2103 of the North Carolina General Statutes (hereinafter G.S.) can be obtained or accomplished without the presence of a juvenile. For example, a photo lineup might be conducted using a publicly available photo, such as a yearbook photo. A fingerprint legally obtained in the past could be used for comparison purposes related to a new offense.[69] These situations would not require an NTO because they do not require the presence of the juvenile. Other legal considerations regarding these procedures, such as nonsuggestiveness in photo lineups, apply even though an NTO is not needed.[70]

66. *Id.* at 235.

67. The Juvenile Code does not refer to the use of search warrants in juvenile cases. However, the line of constitutional case law beginning with *In re Gault*, 387 U.S. 1 (1967), makes clear that juveniles accused of acts of delinquency have almost all the same constitutional rights as any criminal defendant. The Juvenile Code codifies these rights, including "[a]ll rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury." G.S. 7B-2405. Accordingly, juveniles must be afforded protection against unreasonable search and seizure, including the need for a search warrant. Aside from the reasonableness standard that applies in the school context, as described in Part I of this bulletin, there is no law that establishes a different standard for search and seizure in juvenile matters. Therefore, while the Juvenile Code does not reference search warrants, constitutional criminal law principles require their use under the same circumstances in which they are needed in criminal matters.

68. *See* Robert L. Farb and Christopher Tyner, Arrest, Search, and Investigation in North Carolina (UNC School of Government, 2021).

69. G.S. 7B-2102(c) allows for the use of certain legally retained juvenile fingerprints for investigative or comparison purposes.

70. For more information on these requirements, see Robert L. Farb and Christopher Tyner, Arrest, Search, and Investigation in North Carolina, Chapter 5 (UNC School of Government, 2021).

Almost All Nontestimonial Identification Procedures in Juvenile Cases Require a Court Order

The Juvenile Code contains a mandate to obtain an NTO to conduct almost all nontestimonial identification procedures in juvenile matters. The statute includes a **mandatory prohibition on conducting nontestimonial identification procedures on a juvenile without a court order unless one of the exceptions applies**.[71] Juveniles therefore cannot consent to participate in a nontestimonial identification proceeding.

No Exception for Juveniles in Custody

The criminal NTO process "applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused."[72] Some nontestimonial identification procedures such as fingerprinting, photographing, and lineups are allowed in criminal matters following an arrest. A search warrant is generally required to compel an adult who is in custody to participate in more intrusive nontestimonial identification procedures, such as taking a blood sample.[73] There are no analogous in-custody exceptions to the requirement for a nontestimonial identification order in juvenile matters. Instead, G.S. 7B-2103 strictly prohibits the use of nontestimonial identification procedures without an NTO in juvenile matters unless one of the above-referenced exceptions applies. This includes nontestimonial identification procedures conducted when the juvenile is in custody.

When Fingerprinting and Photographing Are Authorized without a Nontestimonial Identification Order

The Juvenile Code explicitly authorizes the fingerprinting and photographing of juveniles in some circumstances. Most of these circumstances are not related to the identification of the juvenile and therefore would not fall under the definition of nontestimonial identification. At the same time, these are the circumstances in which fingerprinting and photographing should occur in the context of a juvenile proceeding.

Show-Ups

While the show-up is a procedure that requires the presence of the juvenile for the purpose of identifying them as the perpetrator of an offense, the Supreme Court of North Carolina established an exception to the juvenile NTO requirement for show-ups.[74] The court held that as long as the show-up is not conducted in a manner that is so suggestive as to deem it unreliable, the important law enforcement objective of efficiency and protection of the juvenile from more intrusive identification procedures renders this use of nontestimonial identification of a juvenile permissible without a court order. G.S. 15A-284.52(c1)(4) was subsequently enacted to create a requirement to photograph juveniles at the time and place of a show-up when the juvenile is age 10 or older and is reported to have committed a nondivertible offense or common law robbery.[75] Photographing a juvenile at the time and place of any show-up outside of this limited circumstance is not allowed without an NTO.

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71. G.S. 7B-2103.

72. State v. Irick, 291 N.C. 480, 490 (1977).

73. A thorough explanation of this criminal law can be found in Robert L. Farb and Christopher Tyner, Arrest, Search, and Investigation in North Carolina, Chapter 4 (UNC School of Government, 2021).

74. *In re* Stallings, 318 N.C. 565 (1986).

75. S.L. 2019-47.

Fingerprinting and Photographing Certain Juveniles When a Complaint Is Prepared for Filing as a Petition

A juvenile must be fingerprinted and photographed if they are age 10 or older at the time of allegedly committing a nondivertible offense,[76] a complaint has been prepared for filing as a petition, and the juvenile is in the custody of law enforcement or the Division of Juvenile Justice.[77]

Photographing Any Juvenile Committed to a County Juvenile Detention Facility

Every juvenile who is committed to a county juvenile detention facility must be photographed by that facility.[78]

Juveniles Charged as Adults or Transferred to Superior Court for Trial as Adults

Juveniles who are charged with committing motor vehicle offenses under Chapter 20 of the General Statutes at ages 16 and 17 are under original criminal jurisdiction.[79] In addition, any person under the age of 18 who commits an offense and who has previously been convicted in adult criminal court of an offense, other than a misdemeanor violation of Chapter 20 of the General Statutes that did not involve impaired driving, will be processed under the criminal law from the beginning of their case.[80] Any juvenile fitting one of these categories is "charged as an adult" and the juvenile NTO statute does not apply to them.[81] Criminal procedure applies in these cases. Additionally, criminal procedure applies following the transfer of any case that begins as a juvenile matter and is subsequently transferred to superior court for trial as an adult.[82]

Fingerprinting and Photographing Any Juvenile Adjudicated Delinquent for Committing a Felony Offense at Age 10 or Older

If a juvenile (1) is adjudicated delinquent for committing an offense that would be a felony if committed by an adult, (2) was age 10 or older at the time of the offense, and (3) has either not been previously fingerprinted or photographed or previous fingerprints and photographs have been destroyed, then that juvenile must be fingerprinted and photographed.[83]

B. Procedure to Obtain a Nontestimonial Identification Order

A district or superior court judge may issue a juvenile NTO at the prosecutor's request.[84] A request for an NTO can be made before a juvenile is taken into custody or after a juvenile has been taken into custody and before the adjudicatory hearing.[85]

A juvenile nontestimonial identification order can only be issued on a sworn affidavit or affidavits that establish all of the statutorily listed grounds.[86] For everything other than an order to obtain a blood specimen, these grounds include (1) probable cause to believe that an offense

76. G.S. 7B-1701(a).
77. G.S. 7B-2102(a).
78. G.S. 7B-2102(a1).
79. G.S. 7B-1501(7)b.
80. G.S. 7B-1604(b).
81. G.S. 7B-2103.
82. *Id.*
83. G.S. 7B-2102(b).
84. G.S. 7B-2103.
85. G.S. 7B-2104.
86. G.S. 7B-2105.

that would have been a felony if committed by an adult was committed, (2) reasonable grounds to suspect that the named juvenile committed the offense, and (3) that the results of the ordered procedure will be of material aid in determining whether the named juvenile committed the offense.

The grounds for a nontestimonial identification order to obtain a blood specimen from a juvenile are enhanced, requiring (1) probable cause to believe that an offense that would have been a felony if committed by an adult was committed, (2) **probable cause** (not just "reasonable grounds") to suspect that the named juvenile committed the offense, and (3) probable cause to believe that obtaining the blood specimen will be of material aid in determining whether the named juvenile committed the offense.

If the court finds that the statutory grounds have been shown, the judge may issue an NTO following the procedure for issuing NTOs contained in G.S. 15A-274 through 280 and G.S. 15A-282—the criminal procedures for the NTO process.[87] This includes the right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel for that purpose.[88]

Juveniles also have a statutory right to request an NTO if they are in custody for an offense that would be a felony if committed by an adult.[89] Courts are required to issue an order at the juvenile's request if it appears that the results of the procedure will be of material aid in the juvenile's defense.

The Juvenile Code includes specific requirements regarding the destruction of records resulting from nontestimonial identification procedures in juvenile cases.[90] These records must be destroyed by the law enforcement agency having possession of the records if (1) a petition is not filed, (2) the juvenile is not adjudicated delinquent or convicted following transfer to superior court, or (3) the juvenile was adjudicated for an offense that would be less than a felony if committed by an adult and the juvenile is under the age of 13. Records can be retained in the court file when a juvenile over the age of 13 is adjudicated delinquent for an act that would be a felony if committed by an adult. These retained records have limited use. They can only be inspected by law enforcement officers for comparison purposes in the investigation of a crime. Any records related to a nontestimonial identification order in a case that results in conviction following transfer to superior court are to be processed the same way as records in other criminal cases.

C. Willful Violation Is a Crime

G.S. 7B-2109 makes the willful violation of the Juvenile Code provisions prohibiting use of nontestimonial identification procedures without an NTO a Class 1 misdemeanor.

87. G.S. 7B-2106.
88. G.S. 15A-279(d).
89. G.S. 7B-2107.
90. G.S. 7B-2108.

III. Impaired Driving Investigations

All Chapter 20 offenses committed when a juvenile is 16 or 17 years old are excluded from juvenile jurisdiction.[91] This includes offenses that involve impaired driving. All of these motor vehicle offenses are criminal matters from their inception. Therefore, criminal procedure regarding the investigation of suspected impaired driving applies. However, if the juvenile is under the age of 16 at the time of the offense, the case is subject to juvenile jurisdiction and is therefore a delinquency matter from its inception.

A. Implied-Consent Procedures Do Not Apply in Delinquency Matters

G.S. 20-16.2(a) states that "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person." Application of the implied-consent law therefore turns on whether a person is "charged" with an implied-consent offense. G.S. 20-16.2(a1) defines a person "charged" as someone who is "*arrested for it* [an implied-consent offense] or if *criminal process* for the offense has been issued" (emphasis added).

Arrest and criminal process are not part of the Juvenile Code. G.S. 7B-1900 directs that a law enforcement officer may take a juvenile into "temporary custody" if grounds exist for the "arrest of an adult in identical circumstances under G.S. 15A-401(b)." While the Juvenile Code refers only to taking juveniles into temporary custody, the criminal law in G.S. 15A-401 is explicit about arrest. This is one of the many distinctions between juvenile law and criminal law—juveniles are "taken into custody" while adults are "arrested."

It is also long-established in North Carolina law that a delinquency proceeding is a civil proceeding.[92] Therefore, the pleading in a delinquency matter is a petition.[93] Criminal process is not issued. Juveniles who are suspected of impaired driving while under the age of 16, and subject to juvenile jurisdiction, can therefore never meet the definition of being "charged" with an implied-consent offense. They are not arrested nor will criminal process be issued in the matter. Because they are not considered "charged," **the law of implied consent does not apply**.

Alcohol Screening Tests

The statute that allows for alcohol screening test administration when a person is suspected of driving while less than 21 years old after consuming alcohol or drugs has different language than the law that dictates when implied-consent procedure applies. G.S. 20-138.3(a) establishes that it is unlawful for a person under the age of 21 to drive a motor vehicle on a highway or public vehicular area while consuming alcohol or at any time while previously consumed alcohol or a controlled substance (not lawfully obtained and taken in therapeutically appropriate amounts) remains in their body. Subsection (b2) of this statute states that an alcohol screening test may be administered to a driver who is "suspected of" violating this statute.

This permission to conduct an alcohol screening test sits outside the law of implied consent and does not explicitly connect only to criminal procedure. It is structured to "notwithstand" any other provision of law. In addition, juvenile petitions must allege a criminal offense, even

91. G.S. 7B-1501(7)b.
92. *In re* Burrus, 275 N.C. 517 (1969); *see also* G.S. 7B-2412.
93. G.S. 7B-1801.

though the proceeding is civil in nature.[94] Juveniles under the age of 16 can therefore be "suspected of violating" G.S. 20-138.3(a), even though they cannot be criminally prosecuted for that violation. Reading these statutes together, it appears that there is authority to conduct an alcohol screening test on anyone suspected of driving while less than 21 years old after consuming alcohol or drugs, including juveniles who are under the age of 16.

Chemical Analysis

While the law of implied consent does not apply to juveniles under the age of 16, the law governing search of a juvenile's person does apply. Juveniles have the ability to consent to a search, including the type of search carried out by a chemical analysis. As with searches of adults, consent must be voluntary.

If a juvenile does not consent, then there are three potential pathways to obtain chemical analysis.

1. A search warrant can be issued to require chemical analysis. Chemical analysis in this circumstance is done in order to prove the elements of impaired driving, not to identify the juvenile as the perpetrator. Therefore, as described in Part II of this bulletin, a nontestimonial identification order is not needed. Instead, as a search of the juvenile's person for evidence that an offense was committed, a search warrant is needed.
2. It is likely that a breath test may be legally administered as a search incident to taking a juvenile into custody. The Supreme Court held that warrantless breath tests incident to arrest are permitted under the Fourth Amendment in *Birchfield v. North Dakota*.[95] While the language of this decision relates to arrest, there is generally no distinction in Fourth Amendment jurisprudence (outside of the schoolhouse) that distinguishes the legal standards in juvenile matters from those that apply in criminal matters. It is therefore likely that this holding applies in juvenile matters.[96]
3. It is also likely that blood can be drawn when the juvenile is unconscious and suspected of driving while impaired under the exigency standard established by the Supreme Court in *Mitchell v. Wisconsin*.[97] Because the decision in *Mitchell* was based on Fourth Amendment jurisprudence, and there is little distinction in the application of Fourth Amendment law to juveniles (outside of the schoolhouse), it is again likely that the standard applies in a juvenile matter.

94. G.S. 7B-1802.

95. 579 U.S. 438 (2016).

96. For more information on this case, see Shea Denning, *Breath Tests Incident to Arrest Are Reasonable but Prosecution for Refusing a Blood Test Goes Too Far*, N.C. Crim. L., UNC Sch. of Gov't Blog (June 29, 2016), https://nccriminallaw.sog.unc.edu/breath-tests-incident-arrest-reasonable-prosecution-refusing-blood-test-goes-far/.

97. 139 S. Ct. 2525 (2019). You can read more about this standard in Shea Denning, *Supreme Court Announces New Exigency Test for Blood Draws from Unconscious DWI Suspects*, N.C. Crim. L., UNC Sch. of Gov't Blog (July 9, 2019), https://nccriminallaw.sog.unc.edu/supreme-court-announces-new-exigency-test-for-blood-draws-from-unconscious-dwi-suspects/.

B. Dispositions for Driving While Impaired Are Governed by the Juvenile Code

Because these cases are delinquency matters under juvenile jurisdiction, the procedure is governed by the usual Juvenile Code process of adjudication followed by disposition. The **criminal sentencing and punishment provisions in G.S. 20-179 do not apply.** Instead, the juvenile court must conduct a dispositional hearing and follow the law in G.S. Chapter 7B, Article 25, governing dispositional levels and alternatives for juveniles who have been adjudicated delinquent. Juveniles adjudicated delinquent for driving while impaired are subject to the same range of dispositional alternatives as juveniles adjudicated delinquent for other offenses. The available options are governed by the juvenile's dispositional level. The court has the authority to select from the statutorily available options for the applicable disposition level.

C. DMV Notification and Impact on Driving Privileges

The revocation process for people charged with implied-consent offenses[98] does not apply in juvenile matters because, as explained above, the law of implied consent does not apply to drivers who are under the age of 16. Therefore, **revocation reports should not be completed in delinquency cases and there is no associated report of revocation to the DMV**.

The question of whether an adjudication for impaired driving will impact a juvenile's driving privileges is answered by the disposition ordered in the case. One of the dispositional alternatives available to the court for any juvenile who is ordered to a Level 1 or Level 2 disposition is that the court may "[o]rder that the juvenile shall not be licensed to operate a motor vehicle in the State of North Carolina for as long as the court retains jurisdiction over the juvenile or for any shorter period of time. The clerk of court shall notify the Division of Motor Vehicles of that order."[99] If the court includes such an order in the disposition, then the DMV receives notice. If such an order is not included as part of the disposition, there is no impact on the juvenile's driving privileges and there is no notice to the DMV.

IV. Juvenile Investigations and Confidentiality

A. Law Enforcement Records

The Juvenile Code requires that "all law enforcement records and files concerning a juvenile" must be

- kept separate from adult law enforcement records and files and
- withheld from public inspection.[100]

Juvenile law enforcement records can only be examined or copied by people who are specifically listed in the statute or pursuant to a court order.[101] The people who can examine and obtain copies of juvenile law enforcement records without a court order include

- the juvenile or their attorney,
- the parent, guardian, or custodian of the juvenile or that person's authorized representative,
- the prosecutor,

98. G.S. 20-16.5.
99. G.S. 7B-2506(9).
100. G.S. 7B-3001(b).
101. *Id.*

- juvenile court counselors, and
- law enforcement officers who are sworn in North Carolina.[102]

All other access to juvenile law enforcement records is only allowed if a court orders that access. There are no criteria in the statute regarding the circumstances under which the court can order such access.

This confidentiality applies to juvenile law enforcement records as long as the matter remains a juvenile matter. If the case begins under juvenile jurisdiction and is subsequently transferred to superior court for the juvenile to be tried as an adult, **these confidentiality provisions apply during the time that the case is under juvenile jurisdiction. Once the case is transferred to superior court, the juvenile confidentiality provisions no longer apply**.[103] The law enforcement records then become subject to the public records law related to law enforcement records in criminal investigations.[104]

B. School Notification

The Juvenile Code includes specific authority for school notification of pending delinquency charges under certain circumstances and following a specific procedure. **There is no authority to provide information about a juvenile investigation to a school outside of these provisions**.

When School Notification Is Authorized

G.S. 7B-3101 provides explicit authority for school notification about certain delinquency matters. School notification is allowed only when

- a delinquency petition alleging a felony offense is filed,
- the case ceases to be a delinquency matter, either because the case is transferred to superior court (making it a criminal proceeding) or the petition alleging a felony is dismissed, or
- the court issues, modifies, or vacates a dispositional order concerning a juvenile alleged to be or found delinquent for a felony offense.

Motor vehicle offenses, which are included in G.S. Chapter 20, are not included in this statutory authorization for school notification.[105] Because these offenses are excluded, school notifications regarding motor vehicle offenses that originate as delinquency proceedings, including impaired driving offenses, are not permitted.[106]

102. *Id.*
103. *Id.*
104. G.S. 132-1.4.
105. G.S. 7B-3101(a).
106. G.S. Chapter 20 motor vehicle offenses that are alleged to have been committed by a juvenile who is 16 or 17 years old are not subject to juvenile court jurisdiction and are treated as criminal charges. School notification of criminal charges is governed by G.S. 15A-505. That statute also excludes G.S. Chapter 20 offenses from school notification of criminal matters.

School Notification Procedure

School notification pursuant to G.S. 7B-3101 **can only be done by a juvenile court counselor and can only be made to the principal of the school**.[107] There is no statutory authority for law enforcement to make the notification. Notification must be made both verbally and in writing.[108] Verbal notification must occur in person or by telephone before the beginning of the next school day. Delivery of written notice must be made in person or by certified mail and must occur as soon as practicable and at least within five days of the action that triggered the notification.

G.S. 7B-3101(a) describes the information that is required to be part of the notification. A notification that a felony delinquency petition has been filed must describe the nature of the offense. Notification of an initial order of disposition, a modified or vacated order of disposition, or transfer of the case to superior court must describe the court's action and any applicable disposition requirements. The statute is silent as to the contents of a notification of the dismissal of a felony petition.

Education law[109] provides the following **very specific rules for how information obtained by a school as a result of a school notification** made pursuant to G.S. 7B-3101 can be stored and used.

- Written notifications and information obtained are confidential and are not public records.
- The principal must maintain any documents in a safe, locked record storage that is separate from the student's other school records.
- The principal may not make copies of the documents.
- Any documents received by the principal can only be used "to protect the safety of or to improve the education opportunities for the student or others."[110]
- The principal is directed to share each document only with those individuals who have (1) direct guidance, teaching, or supervisory responsibility for the student and (2) a specific need to know in order to protect the safety of the student or others.
- Each person who is given access to the document must indicate in writing that they have read it and that they will maintain its confidentiality.
- Information gained through G.S. 7B-3100 (information sharing) cannot be the sole basis for a decision to suspend or expel the student.

The education statute provides serious consequences for failure to maintain the confidentiality of a school notification or other juvenile justice document received as part of information sharing. **Failure to maintain the confidentiality of the documents is grounds for the dismissal of employees**.[111]

Schools are not authorized to retain school notification documents indefinitely. If the student graduates, withdraws from school, is suspended for the remainder of the school year, is expelled, or transfers to another school, then the documents must be returned to the juvenile court counselor. If the student transfers, the principal must also provide the juvenile court

107. G.S. 7B-3101(a).
108. *Id*.
109. G.S. 115C-404.
110. G.S. 115C-404(b).
111. *Id.*

counselor with contact information for the new school. The juvenile court counselor must then deliver the notification to the new school as soon as practicable, either in person or by certified mail.[112]

The principal is also required to shred, burn, or otherwise destroy documents received pursuant to G.S. 7B-3100 (information sharing) when the principal

- receives notification that the case was dismissed, transferred to superior court, or the student's petition for expunction was granted, or
- when the principal finds that the school no longer needs the information to protect the safety of or to improve educational opportunities for the student or others.[113]

The school notification provisions of G.S. 7B-3101 apply to public and private schools authorized under G.S. Chapter 115C (Elementary and Secondary Education).[114] Because these statutes apply only to the elementary- and secondary-education system, community colleges are not included. While most youths who are subject to juvenile jurisdiction are not enrolled in the community college system, it is possible that some may be enrolled in adult education GED programs or other programs at a community college. There is no law that allows for school notification of delinquency proceedings in these circumstances.[115]

112. G.S. 7B-3101(b).

113. G.S. 115C-404(a).

114. G.S. 7B-3101(d).

115. G.S. 7B-3100 also allows for information sharing between local agencies, including local law enforcement agencies, after a petition is filed alleging that a juvenile is delinquent. Information can be shared only for the protection of the juvenile and others or to improve educational opportunities of the juvenile. Because this provision applies only after a petition is filed, it is largely outside the scope of this bulletin.

UNC SCHOOL OF GOVERNMENT

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Juvenile Interrogation

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CONTENTS

The law that governs custodial interrogation of juveniles encompasses the Fifth Amendment privilege against self-incrimination as well as enhanced statutory protections contained in North Carolina's Juvenile Code. This bulletin describes these rights, including their meaning, scope, and application in North Carolina appellate caselaw.

Part I: Juvenile Rights Related to Custodial Interrogation

Miranda Rights

The constitutional privilege against self-incrimination applies to juveniles.[1] Therefore, the legal framework that attaches to the custodial interrogation of adults under *Miranda v. Arizona*[2] also applies to the custodial interrogation of juveniles. In order to assess whether a juvenile

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1. *In re* Gault, 387 U.S. 1, 55 (1967); *see also In re* K.D.L., 207 N.C. App. 453, 458 (2010).
2. 384 U.S. 436 (1966).

was subjected to a custodial interrogation under the *Miranda* framework, one must determine whether the juvenile was (1) in custody and (2) subject to an interrogation. The meaning and application of these terms to juveniles are explored in Part II of this bulletin.

Additional Statutory Right to Parent, Guardian, or Custodian Presence

Section 2101(a) of Chapter 7B of the North Carolina General Statutes (hereinafter G.S.) codifies these constitutional protections and adds the right for a juvenile to have a parent, guardian, or custodian present during questioning. G.S. 7B-2101(a) states that any juvenile in custody must be advised of the following rights prior to questioning:

1. that the juvenile has a right to remain silent;
2. that any statement the juvenile does make may be used against the juvenile;
3. that the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
4. that the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

Rights Apply to Everyone under Age 18

The rights afforded to juveniles under G.S. 7B-2101 are part of Subchapter II of Chapter 7B of the General Statutes. Generally, the statutes in that section of the Juvenile Code apply only to undisciplined and delinquency matters. However, the North Carolina Supreme Court held that the rights contained in G.S. 7B-2101 apply to all youth under the age of 18, regardless of whether the matter falls under the original jurisdiction of the juvenile court or the criminal court.[3] This was a significant ruling when it was issued, since at that time all offenses committed at ages 16 and 17 were under the original jurisdiction of the criminal court.

Beginning on December 1, 2019, nearly all offenses alleged to have been committed at ages 16 and 17 were shifted to the original jurisdiction of the juvenile court.[4] However, original criminal jurisdiction remains in place for G.S. Chapter 20 offenses (motor vehicle offenses) committed at ages 16 and 17 and for any juvenile who has a previous qualifying conviction in criminal court and who subsequently commits any new offense after that conviction. All prior criminal convictions are considered qualifying convictions for purposes of preventing original juvenile jurisdiction, except misdemeanors or infractions under G.S. Chapter 20 that do not involve impaired driving.[5] The enhanced interrogation rights for juveniles found in G.S. 7B-2101 continue to apply in these matters even though they are not subject to juvenile jurisdiction.

Obligation to Electronically Record Interrogations in Places of Detention

The North Carolina Criminal Procedure Act contains a provision that mandates electronic recording of all custodial interrogations of juveniles in criminal investigations conducted at any *place of detention*.[6]

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3. State v. Fincher, 309 N.C. 1 (1983).
4. S.L. 2017-57, §§ 16D.4.(a)–(tt).
5. G.S. 7B-1501(7)b., -1604(b).
6. G.S. 15A-211(b); *see also id.* § 15A-211(c)(3) (defining "place of detention" as "a jail, police . . . station, correctional or detention facility, holding facility for prisoners, or other facility where persons are held in custody in connection with criminal charges").

A plain reading of the statute indicates that (1) custodial interrogations of juveniles who are subject to criminal prosecution (2) that take place in criminal detention settings (3) must be electronically recorded.

A question remains regarding whether the mandatory electronic recording requirement in the Criminal Procedure Act applies to interrogations occurring during investigations of all offenses involving juvenile suspects or only those offenses that can result in criminal prosecution. Some have suggested that the statute likely means that custodial interrogation of all juveniles—including those subject to juvenile jurisdiction for allegations of delinquency who are interrogated in places of detention—must be electronically recorded.[7] This question has never been addressed by the North Carolina appellate courts.

Because the statute states that it applies "to all custodial interrogations of juveniles in criminal investigations conducted at any place of detention,"[8] it appears clear that the mandate applies at least to juvenile cases that could result in criminal prosecution. This includes any felony offenses committed by a juvenile at age 13 or older as well as any G.S. Chapter 20 offenses committed by a 16- or 17-year-old youth.[9]

Whether or not the obligation to electronically record all custodial interrogations applies to juveniles when their cases could not result in transfer to criminal court also remains an open question. However, the exact charges in a matter may not be clear to law enforcement prior to the custodial interrogation of a juvenile. A case that appears to involve only lower-level misdemeanor charges may not remain that way following a more complete investigation. Given the evolving nature of charges during the investigatory stage, the most prudent practice would be to electronically record all custodial interrogations of youth under 18 in places of detention.

Part II: What Constitutes a Custodial Interrogation of a Juvenile?

The rights contained in G.S. 7B-2101 apply only when a juvenile is subjected to a custodial interrogation.[10] The analysis of whether a juvenile is being questioned as part of a custodial interrogation requires an assessment of whether the juvenile is in custody and, if so, whether the questioning amounted to an interrogation.

7. *See generally* Janet Mason, *2011 Legislation Enacted: Juvenile Law*, "Abuse, Neglect, Dependency, and Termination of Parental Rights" 5 (UNC School of Government, Oct. 2011), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Mason%20Juvenile%20Legislation_0.pdf (noting that most other statutes in G.S. Chapter 15A do not use the term "juvenile" but instead refer to a defendant's age range, making it "possible, if not likely, that the intent was to make the recording of custodial interrogations mandatory when an investigation involves an offense committed before a juvenile reaches age 16—that is, to delinquency cases, not criminal cases involving young people").

8. G.S. 15A-211(b).

9. *See* G.S. 7B-1501(7), -2200, -2200.5.

10. State v. Gaines, 345 N.C. 647, 661, *cert. denied*, 522 U.S. 900 (1997).

Custody

The first question to ask is whether the juvenile is in custody.[11] That determination is based on an objective assessment of whether, given the totality of the circumstances, there was a formal arrest or a restraint on the juvenile's freedom of movement to the degree associated with a formal arrest.[12] This is the same standard used for the determination of whether an adult is in custody.

However, the custody analysis for a juvenile differs from the custody analysis for an adult in one significant way. The adult analysis requires an objective assessment of how a reasonable person in the suspect's situation would assess their freedom to terminate the encounter.[13] The juvenile analysis requires the child's age, if it was known or would have been objectively apparent to a reasonable officer, to be included in the objective custody analysis.[14] The analysis is based on how a reasonable child who is the age of the juvenile would feel in the situation and not how a reasonable adult would feel.[15]

North Carolina's appellate courts have held that there are many factors to consider when determining whether a juvenile is in custody during questioning. Those factors include

- whether the juvenile is told they are under arrest or free to leave,
- the location of the questioning,
- the voluntary nature of the juvenile's participation in questioning,
- the length of questioning,
- whether the juvenile is offered breaks, and
- the presence of uniformed officers and their weapons.

The following circumstances were found not to have been custodial:

- Questioning by a detective in the juvenile's home and in the presence of his mother and brother. The detective prefaced the interview by telling the juvenile that he did not have to talk with her and that she was not going to arrest him or take him with her. Proceedings had not been initiated, and the purpose of the visit was solely to investigate allegations.[16]
- Questioning of a 16-year-old by two unarmed, plain-clothes officers in a comfortably furnished office. The juvenile voluntarily went with the investigators for questioning and was told that he was not under arrest, did not have to talk to the investigators, and was free

11. *In re* Butts, 157 N.C. App. 609, 612 (2003).
12. *Gaines*, 345 N.C. at 662.
13. Yarborough v. Alvarado, 541 U.S. 652, 662 (2004).
14. J.D.B. v. North Carolina, 564 U.S. 261 (2011).
15. The court noted in *J.D.B.* that "[t]his is not to say that a child's age will be a determinative, or even a significant factor in every case. . . . It is, however, a reality that courts cannot simply ignore." 564 U.S. at 277 (citations omitted). For more analysis of the *J.D.B.* decision, see LaToya B. Powell, *Applying the Reasonable Child Standard to Juvenile Interrogations After J.D.B. v. North Carolina*, Juv. L. Bull. No. 2016/01 (UNC School of Government, Feb. 2016), https://www.sog.unc.edu/sites/default/files/reports/2016-02-24_20160045_Reasonable%20Child%20Standard.pdf.
16. *In re* Hodge, 153 N.C. App. 102 (2002). This case was decided before *J.D.B.* was decided. Therefore, the objective standard applied was a reasonable person standard and not a reasonable child standard.

to leave at any time. The juvenile was offered bathroom breaks, was left unattended in the office when the interviewing officers took a break, and was not shackled or handcuffed. No threats or promises were made, and no pressure was exerted during the interview.[17]

- Questioning of a 17-year-old who confessed to two plain-clothes detectives in their unmarked car after voluntarily agreeing to ride with them to discuss several breaking and entering cases. The juvenile voluntarily spoke with the detectives, was told that he was free to leave the vehicle at any time, sat in the front seat, and the encounter lasted under two hours. The juvenile was 17 years and 10 months old, and his proximity to age 18 was taken into consideration as part of the custody analysis.[18]
- Questioning of a 13-year-old found walking briskly away from the scene of a car crash. A responding officer questioned the juvenile at the scene. There was no evidence that the juvenile was subjected to even a minimal amount of restraint on his freedom of movement or ability to act as he chose. The court noted that an officer may ask a moderate number of questions during a routine traffic stop to determine identity and obtain information confirming or dispelling the officer's suspicions without requiring *Miranda* warnings.[19]
- Questioning of a 14-year-old, by two armed officers, 10 feet outside of the juvenile's home after the juvenile's parents told him to cooperate with the officers. The juvenile was asked to step outside and was not subjected to formal restraint. All three people stood at arm's length and one of the officers wore plain clothes. The conversation took place in the juvenile's yard during daylight and his parents were nearby. Questioning lasted about five minutes. There was no indication of any coercion, no indicia of formal arrest, and the parents were not acting as agents of law enforcement.[20]

The North Carolina Court of Appeals has tended to find that juveniles are in custody when questioning occurs in an interview room of a law enforcement office and when the juvenile has been formally taken into custody. For example, juveniles were found to have been in custody in the following circumstances:

- Questioning of a 17-year-old in an interview room at a jail when the juvenile was incarcerated at the jail on other charges.[21]
- Questioning of a 15-year-old in an interview room at a sheriff's department after law enforcement called to request that the juvenile's family come to the sheriff's office and the family complied.[22]
- Questioning of a 16-year-old at a sheriff's department after he was taken into custody at his home, handcuffed by an officer, and transported to the sheriff's department by the officer.[23]

17. State v. Jones, 153 N.C. App. 358 (2002). This case was decided before *J.D.B.* was decided. Therefore, the objective standard applied was a reasonable person standard and not a reasonable child standard.

18. State v. Yancey, 221 N.C. App. 397 (2012).

19. *In re* A.N.C., Jr., 225 N.C. App. 315 (2013).

20. *In re* D.A.C., 225 N.C. App. 547 (2013).

21. State v. Williams, 209 N.C. App. 441 (2011). The parties in this case agreed, and the court noted that the evidence supported, that the juvenile was already in custody at the jail when he was brought into the interview room. *But see* Howes v. Fields, 565 U.S. 499 (2012) (holding that there is no categorical rule that a person is in custody when that person is a prisoner who has been removed from the prison's general population and questioned about events that occurred outside of the prison).

22. *In re* M.L.T.H., 200 N.C. App. 476 (2009).

23. State v. Branham, 153 N.C. App. 91 (2002).

- Questioning of a 16-year-old at a police station after he was arrested on a city bus, taken to the station, handcuffed, and shackled to the floor.[24]
- Placing a juvenile in the back seat of a patrol car after putting her in investigative detention and handcuffing her.[25]

Schoolhouse Custody Analysis

The custody analysis regarding questioning that occurs at school can become complicated, especially when questioning occurs in the presence of school administrators as well as law enforcement officers. It is clear that questioning done only in the presence of a school administrator who is not acting as an agent of law enforcement is never custodial.[26] However, when law enforcement and school administrators are both involved in questioning, the circumstances may rise to the level of custody. This is true even when the officer does not participate in asking the questions.[27]

The North Carolina Court of Appeals provided the following seven factors that are most relevant in determining whether a juvenile is in custody during an interview that occurs at school:[28]

1. Traditional indicia of arrest. Use of handcuffs, transport in a police car, search of a student or their belongings, and use of other bodily restraints are strong indications that the student was in custody.
2. Location of the interview. A location that a reasonable child might consider confining tends to show that the student was in custody. The size of the room, whether the door was closed or locked, and the student's familiarity with the location are also relevant considerations.
3. Interview length. Long, drawn-out questioning tends to show that a student was in custody, while very brief questioning does not. Whether the student was offered a place to sit and common courtesies like bathroom breaks, food, and water is also relevant.
4. Age. The younger the student, the more sensitive they will be to circumstances that could be coercive.
5. What a student is told about the interview. Telling the student that they are free to leave and are not required to answer questions or offering them the opportunity to call a parent or guardian tends to reflect that the student is not in custody. Failing to tell the student about the nature of the interview or whether they must stay or are free to leave weighs in favor of the student being in custody. Expressly telling a student that they cannot leave renders the encounter custodial.
6. People present during the interview. Custody tends to be shown when questioning occurs in the presence of multiple law enforcement officers, or even by numerous school officials. The presence of a parent, guardian, or other advocate for a student weighs against custody.
7. Purpose of questioning. Questioning that is the result of and is conducted in the investigation of specific criminal suspicion toward a student tends to show custody. Questioning done with a school disciplinary purpose and that is unlikely to involve the

24. State v. Watson, 250 N.C .App. 173 (2016).
25. *In re* L.I., 205 N.C. App. 155 (2010).
26. *In re* Phillips, 128 N.C. App. 732 (1998), *In re* D.A.H., 277 N.C. App. 16, 28 (2021).
27. *D.A.H.*, 277 N.C. App. at 29.
28. *Id.* at 30.

justice system is not considered custody. Purpose can be revealed by the degree and nature of cooperation between school officials and law enforcement (including school resource officers).

The court used these factors to hold that the juvenile in *In re D.A.H.* was in custody when he was questioned at school. The court emphasized that the juvenile came to school knowing that his peer had been caught with marijuana sold to him by the juvenile, that the juvenile had been so worried about it that he had not attended school for the previous two days, and that he knew he was in trouble.[29] The court also noted that the two authority figures involved in this case (the school principal and a school resource officer) sat next to one another and opposite the juvenile, that the officer was in uniform, and that the interview appeared to be for the purpose of a criminal investigation and not a mere school disciplinary matter.[30] Finally, the court emphasized that the juvenile was not told that he was free to leave, that he did not have to answer questions, or that he could call his guardian.[31]

Interrogation

If a juvenile is in custody, then it is essential to determine if the questioning of that juvenile amounts to interrogation. The law that governs whether questioning of an adult constitutes interrogation applies in the same way to juveniles. Interrogation includes express questioning as well as words or actions by law enforcement that they should have known were reasonably likely to elicit an incriminating response—known as the *functional equivalent* of express questioning.[32]

The Functional Equivalent of Express Questioning

Several factors are relevant to the determination of whether a law enforcement officer should have known that their words or actions were reasonably likely to elicit an incriminating response, including

1. the intent of the officer,
2. whether the practice was designed to elicit an incriminating response, and
3. knowledge that the officer may have had regarding the juvenile's unusual susceptibility to a specific form of persuasion.[33]

The Supreme Court of North Carolina held in *State v. Smith* that a juvenile can be subjected to the functional equivalent of questioning even when few express questions are asked of the juvenile.[34] The 16-year-old juvenile in this case was picked up by law enforcement at his home, brought to the police station, and placed in the police chief's office for questioning. The juvenile was read his *Miranda* rights on the way to the police station and again in the police chief's office. He requested his mother's presence after he was read his rights the second time. Officers then began to look for his mother. After about fifteen or twenty minutes, an officer returned to the room, asked the juvenile not to speak, and told him he wanted to tell him some things about the statement of another suspect. The police chief also entered the room and asked the

29. *Id*. at 36.
30. *Id.*
31. *Id*.
32. *In re* L.I., 205 N.C. App. 155, 160 (2010).
33. *Id.* at 160–61.
34. 317 N.C. 100, 108 (1986), *abrogated on other grounds by* State v. Buchanan, 353 N.C. 332 (2001).

juvenile if he wanted to straighten it out. The officer informed the juvenile that (1) another suspect stated that the juvenile was primarily responsible for the injuries to the victim and that he would testify against the juvenile at trial, (2) the alleged crimes were serious and could result in murder charges if the victim died, and (3) the trial court could consider a confession a mitigating circumstance. The court held that these statements, while not direct questions posed to the juvenile, constituted behavior that the officer should have known was likely to elicit a response from the juvenile. The court emphasized that the conversation focused on the juvenile's participation in, and the serious nature of, the crimes.

The North Carolina Court of Appeals held that a juvenile was subjected to the functional equivalent of questioning when an officer placed a juvenile in his car in investigative detention following a roadside stop, asked her where the marijuana was that he knew she had, and told the juvenile that he was taking her downtown and that if she took drugs into the jail, it would be an additional charge.[35] In holding that these circumstance constituted interrogation, the court relied on the officer's testimony that his objective purpose was to obtain the juvenile's admission that she possessed marijuana. The court concluded that the officer knew or should have known that his statement to the juvenile was reasonably likely to elicit an incriminating response.

Spontaneous Statements

Spontaneous statements made by a juvenile are not protected by the Fifth Amendment and are therefore admissible when *Miranda* warnings are not provided and when the statements are made without a parent, guardian, custodian, or attorney being present. The North Carolina Court of Appeals applied this rule in *In re D.L.D.*[36] There, an officer saw the juvenile put something in his pants in a school bathroom, frisked him, and found individually wrapped bags of a green leafy material in a container on his person. After the officer handcuffed the juvenile and escorted him to a conference room, the school's assistant principal, who had accompanied the officer to the bathroom, spoke with the juvenile. No one informed the juvenile of his rights. The officer did not ask any questions and more fully searched the juvenile, finding $59 in his pocket. The juvenile immediately stated that the money "was not from selling drugs."[37] Although the totality of the circumstances suggested that the juvenile was in custody, the juvenile's statement was not provoked by questioning or the functional equivalent of questioning. The court therefore held that this statement was admissible because it was unsolicited and spontaneous.

Schoolhouse Interrogation Analysis

Much like the custody analysis, the interrogation analysis in the context of the schoolhouse can be complicated. Questioning at school often involves both school personnel and law enforcement (who may or may not be a school resource officer). When law enforcement officers are present and the juvenile is in custody, it is possible that questioning by administrators can rise to the level of interrogation, even when the law enforcement officer does not ask any questions.

35. *L.I.*, 205 N.C. App. 155.
36. 203 N.C. App. 434 (2010).
37. *Id*. at 443.

The North Carolina Court of Appeals highlighted the following factors as most relevant to the analysis of whether questioning at school constitutes an interrogation:[38]

1. The nature of the questions asked. Mostly open-ended questioning is less likely to constitute interrogation than is questioning presented in the context of imperative statements that suggest mandatory compliance. The tone of voice, volume, and body language of the person asking the questions is also relevant. The court cited a case holding that questioning did not constitute custodial interrogation when the conversation was calm and cordial in tone and the detectives involved offered the suspect food or drink.[39]
2. The willingness of the juvenile's responses. As discussed above, a wholly unsolicited or spontaneous statement does not constitute interrogation. Situations in which a juvenile is reluctant or hesitant to answer, claims ignorance, or must be coaxed into answering are more likely to be considered interrogation.
3. The extent of school resource officer involvement. Situations in which both a school resource officer and a school official are present can rise to the level of interrogation, even when the officer does not ask any questions. An officer's absence during parts of the questioning can weigh against the questioning being an interrogation. Law enforcement direction of or heavy participation in the questioning weighs in support of the questioning being an interrogation.

The court applied these factors in *In re D.A.H.* to determine that the questioning of a 13-year-old by a school principal, while the school's resource officer sat beside the principal and observed, constituted an interrogation. The court emphasized that the juvenile was asked multiple questions before his guardian was notified and that the questions were intended to elicit a confession.[40] The court also pointed to the differential treatment that the juvenile received compared to a peer who was found in possession of the marijuana that the questioned juvenile was suspected of providing. The father of this peer was contacted immediately. The peer asked if he could speak freely, and the resource officer told him to wait until his father arrived. In contrast, the juvenile's guardian was not called until after he confessed, and he was never advised not to answer questions. The court found that these facts weighed heavily toward the criminal purpose of the interview.[41] The court also discussed how the resource officer's intimate involvement in the investigation from its outset made him an officer investigating a crime while he was present for the questioning, rather than a mere observer of a school disciplinary conversation.[42]

If, given the totality of the circumstances, questioning rises to the level of a custodial interrogation, then all the rights set out in G.S. 7B-2101 apply to everyone under the age of 18.

38. *In re* D.A.H., 277 N.C. App. 16 (2021).
39. *Id*. at 34 (citing State v. Hammonds, 370 N.C. 158, 164 (2017)).
40. *Id*. at 37.
41. *Id*. at 38.
42. *Id*.

Part III: Who Counts as a Guardian or Custodian?

Because G.S. 7B-2101(a) gives all minors the right to have a parent, guardian, or custodian present during a custodial interrogation, it is essential to understand who qualifies as a guardian or custodian under this statute. Only people who have established a legal relationship with the child are considered guardians and custodians for purposes of this statute.[43] North Carolina's appellate courts have held that adults who have a relationship with the juvenile, and who may even have enrolled the child in school, do not count as a guardian or custodian for purposes of this statute if they have not established a relationship with the child through a legal process. Consider the following examples:

- A 16-year-old asked to call his aunt before making a statement. The juvenile occasionally stayed with the aunt, and she testified that she was a mother figure to him. The court held that the juvenile did not have a right to the aunt's presence during custodial interrogation because she had no legal relationship to the juvenile and therefore did not qualify as a guardian or custodian under the statute.[44]
- An uncle, who had been housing his 13-year-old nephew for a year and a half, was the child's sole support, had enrolled the child in school, and was considered by the Department of Health to be the child's guardian, was found not to be the child's guardian or custodian under the statute because he and the child never had any legal relationship established through a court proceeding.[45] The juvenile in this case had no parent, guardian, or custodian who lived in the United States.

Because a sibling is not a parent, guardian, or custodian, juveniles do not have a right to have a sibling present during interrogation. In addition, the presence of a sibling will not fulfill the statutory requirement of the presence of a parent, guardian, custodian, or attorney.[46]

Part IV: Juvenile Invocation and Waiver of Rights

Juveniles must be advised of their rights under G.S. 7B-2101 prior to any custodial interrogation. In most circumstances, it is then up to the juvenile to determine whether they want to invoke or waive their rights. For instance, juveniles always have the discretion to waive their right to remain silent. However, as described below, the right to the presence of a parent, guardian, custodian, or attorney cannot be waived by juveniles under the age of 16.

Rights That Cannot Be Waived by Youth under Age 16

The Juvenile Code provides that in-custody admissions or confessions made by juveniles who are under the age of 16 are never admissible into evidence unless the juvenile's parent, guardian, or custodian or an attorney is present at the time the admission or confession is made.[47] A juvenile under the age of 16 therefore cannot waive their right to have either (1) a parent, guardian, custodian or (2) an attorney present during a custodial interrogation. Because the relevant

43. State v. Oglesby, 361 N.C. 550 (2007).
44. *Id*.
45. State v. Benitez (*Benitez I*), 258 N.C. App. 491 (2018).
46. *In re* M.L.T.H., 200 N.C. App. 476 (2009).
47. G.S. 7B-2101(b).

statute refers to either a parent, guardian, or custodian or an attorney, otherwise admissible statements made by juveniles under 16 are admissible when their attorney is present and the parent, guardian, or custodian is not and when the parent, guardian, or custodian is present and an attorney is not.

Practical barriers sometimes arise when a parent, guardian, or custodian cannot possibly be present for a custodial interrogation of a juvenile, as occurred in *State v. Benitez*, referenced in the last bulleted item in Part III, above. In that case, the juvenile's parents did not live in the United States and no legal guardian or custodian had been established by court order. There are two potential ways that a custodial interrogation could be lawfully conducted under these circumstances, depending on the age of the juvenile.

1. A juvenile who is age 16 or 17 can execute a valid waiver of the right to have a parent present.
2. A juvenile under the age of 16 can execute a valid waiver of the right to have a parent present and the custodial interrogation can continue only if an attorney is present.

There is no legal path to continue with a custodial interrogation of a juvenile if the juvenile does not waive their right to the presence of a parent, guardian, or custodian and if the parent, guardian, or custodian cannot be present.

Invocation of Rights

Unambiguous Invocation Required

If a juvenile is fully advised of their rights and subsequently answers questions without clearly invoking their rights, that will be deemed a waiver of the juvenile's rights.[48] The issue of the invocation of the right to parental presence during a custodial interrogation of a 16-year-old was central to the ruling in *State v. Saldierna* (*Saldierna I*).[49] The juvenile in this case was interrogated at a police station. A law enforcement officer provided him English and Spanish versions of a juvenile waiver-of-rights form, read the rights on the form to him, and paused after each right was read aloud to ask if he understood. The juvenile initialed each right on the English form. Next to the waiver of the right to have a parent present, the words "I do wish to answer questions now" was circled and the juvenile signed the form. The officer noted the time and date for the audio recording and then the juvenile asked to call his mother. He was allowed to place the call and reached someone other than his mother. Questioning resumed when he returned from placing his call and he confessed.

To answer the question of whether the juvenile in this case invoked his right to have a parent present, the court applied the objective test for a defendant's invocation of the right to counsel—whether a reasonable officer under the circumstances would have understood the defendant's statement to be an invocation of their right to have an attorney present.[50] The court held that the juvenile did not clearly and unambiguously invoke his right to have a parent present because

- he never gave any indication that he wanted his mother present;
- he did not condition his interview on first speaking with his mother;

48. The need for a juvenile to invoke their rights applies only to rights that the juvenile can waive. Because a juvenile under the age of 16 must have a parent, guardian, or custodian or an attorney present during a custodial interrogation, this right does not need to be invoked.

49. 369 N.C. 401 (2016).

50. *Id.* at 407 (citing Davis v. United States, 512 U.S. 452, 459 (1994)).

- his purpose for making the telephone call was never established; and
- he did not articulate his desire to have a parent present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for a parent, especially given that he had just signed a waiver-of-rights form.[51]

The court also held that law enforcement did not have a duty to ask clarifying questions or to stop questioning, given the ambiguous nature of the youth's request to call his mother.[52]

In addition, mistakenly indicating on a juvenile rights waiver form that a parent is present does not constitute invocation of the right to have a parent present when the juvenile being questioned never made a statement invoking this right.[53]

Questioning Must Stop if Juvenile Invokes Rights After Interrogation Begins

According to G.S. 7B-2101(c), questioning of a juvenile must stop if the juvenile indicates in any manner and at any stage of the interrogation that they do not want to be questioned further. This includes any statement made by a juvenile, after interrogation begins, that they would like to have a parent, guardian, or custodian present. Once the juvenile requests the presence of their parent, questioning must stop and cannot resume until the parent is present or the juvenile initiates further communication.[54]

Waiver of Rights

Only the Juvenile Can Waive Their Rights

G.S. 7B-2101(b) states that "a parent, guardian, or custodian may not waive any right on behalf of the juvenile." Therefore, none of the rights that a juvenile has during a custodial interrogation can be waived by anyone other than the juvenile.

This is true even when the juvenile is very young. The first appellate court decision upholding this statute involved a 10-year-old who was adjudicated delinquent for unlawfully and willfully taking and carrying away toys from a department store.[55] The court held that the juvenile's mother could not waive any of the rights that the juvenile had during the interrogation, including the right against self-incrimination.[56]

A parent's refusal to be present after a juvenile invokes their right to have their parent present during interrogation does not constitute waiver of parental presence on the part of the juvenile. This is true when a parent refuses to enter the interrogation room[57] and when a parent leaves the interrogation room before the interrogation is over.[58] The juvenile is the only person who can waive their right to have a parent present, regardless of the parent's willingness to be part of the interrogation.

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51. *Id*. at 408–09.
52. *Id*. at 409.
53. State v. Watson, 250 N.C. App. 173 (2016).
54. State v. Hunt, 64 N.C. App. 81 (1983), State v. Smith, 317 N.C. 100 (1986). *See also* State v. Branham, 153 N.C. App. 91 (2002) (holding that the juvenile did not initiate further communication after he requested his mother's presence). *But see* State v. Williams, 209 N.C. App. 441 (2011) (holding that the juvenile did initiate the resumption of questioning without any further interrogation by law enforcement).
55. *In re* Ewing, 83 N.C. App. 535 (1986).
56. *Id*.
57. *Branham*, 153 N.C. App. 91.
58. *In re* Butts, 157 N.C. App. 609 (2003).

Waiver Must Be Knowing, Willing, and Understanding

Juveniles can waive any of their rights that attach during an interrogation, with the exception of the requirement that any juvenile age 15 or younger must have a parent, guardian, or custodian or an attorney present during any custodial interrogation.[59] In order for a waiver to be valid, it must be made knowingly, willingly, and understandingly.[60]

The U.S. Supreme Court held that the analysis of whether a juvenile's waiver is knowing and voluntary requires consideration of the totality of the circumstances, including

- the juvenile's age, experience, education, background, and intelligence and
- whether the juvenile has the capacity to understand
  - the warnings given,
  - the nature of the juvenile's Fifth Amendment rights, and
  - the consequences of waiving those rights.[61]

The Court applied those factors to its analysis of the interrogation of a 16-year-old who requested the presence of his probation officer. The Court held that the request for the probation officer was not tantamount to a request for an attorney and that the juvenile executed a knowing and voluntary waiver of his Fifth Amendment rights.[62] The Court emphasized that police took care to ensure that the juvenile understood his rights, that they fully explained to him that he was being questioned in connection with a murder, and that there was no indication that he did not understand what was said to him. The Court also emphasized that the juvenile clearly expressed his willingness to waive his Fifth Amendment rights and continue with the interrogation after he requested the presence of his probation officer and that there were no special factors to indicate that he was unable to understand the nature of his actions. Finally, the Court pointed to the juvenile's considerable experience with the justice system; that there was no indication he was of insufficient intelligence to understand his rights or the consequences of waiver; and that the questioning did not involve improper tactics that wore him down, lengthy questioning, or trickery or deceit.[63]

When the validity of a juvenile waiver is challenged, the State is required to show by a preponderance of the evidence that the waiver was knowingly and intelligently made, given the totality of the circumstances.[64] Expert testimony is not required to establish that the juvenile understood their rights.[65] Instead, the juvenile's understanding is a question of law to be decided by the trial court based on the evidence presented by both sides.[66]

An express written waiver of rights is strong proof that the waiver was valid. However, it is not necessarily sufficient evidence of a valid waiver on its own.[67] It is not possible for a juvenile to execute a valid waiver when the juvenile has not been fully informed of all of their rights, including the right to have a parent, guardian, or custodian present.[68] It is also not possible for

59. *See* discussion *supra* "Rights That Cannot Be Waived by Youth under Age 16."
60. G.S. 7B-2101(d).
61. Fare v. Michael C., 442 U.S. 707, 725 (1979).
62. *Id*. at 727.
63. *Id.* at 726–27.
64. State v. Saldierna (*Saldierna II*), 371 N.C. 407, 422 (2018).
65. State v. Benitez (*Benitez II*), ___ N.C. App. ___, ___, 2022-NCCOA-261, § 15.
66. *Id*.
67. *Saldierna II*, 371 N.C. at 422.
68. State v. Fincher, 309 N.C. 1, 11 (1983).

a juvenile to execute a valid waiver when they have been erroneously informed of their rights. For example, signing a juvenile rights form that erroneously states that the juvenile could have a parent, guardian, custodian, or any other person present during questioning does not constitute a knowing, willing, and understanding waiver.[69]

North Carolina appellate courts have found knowing, willing, and understanding waivers in the following circumstances.

- A 17-year-old signed a form with the adult *Miranda* warnings on it. A law enforcement officer handwrote "do you wish to answer questions without your parents/parent present" on the form. The juvenile stated that he wanted his mother present, and questioning stopped until the mother arrived. After again being advised of his rights, again stating that he wanted his mother there, and acknowledging that she was now present, the juvenile signed the form. During the ensuing questioning, the officer told the juvenile that he knew he was lying because his mother told officers something different about where he had been. The juvenile began to look uncomfortable, and the officer asked him if he wanted his mother to step out of the room. The juvenile said that his mother might as well leave, and she moved to a bench outside the door of the interrogation room. The door remained open, the juvenile could see his mother if he leaned forward, and he heard officers tell his mother that she could come back into the room whenever she wanted. The juvenile then confessed. The court held that this was a knowing and intelligent waiver of the juvenile's right to have his mother present because (1) he understood his rights, (2) he knew what he was doing when he said she could leave, and (3) he knew where she was if he wanted her to return to the room.[70]
- A 16-year-old with a low IQ was interrogated by investigators in an office at the police department. The central holding in this case was that the juvenile was not in custody.[71] However, the court continued to discuss the validity of a waiver of rights by the juvenile, assuming, arguendo, that the juvenile was in custody. The juvenile was read his rights and indicated verbally and by writing his initials on a form that he understood them. The officer read the waiver portion of the form to the juvenile, who then stated that he understood and wanted to talk with officers. He then signed the waiver. After a two-hour interview he confessed. The court found that the circumstances did not result in the juvenile's will being overborne or in critical impairment of his capacity for self-determination. While there was conflicting evidence regarding the juvenile's true mental capacity, the defendant's own expert testified that the juvenile's verbal and performance IQ scores placed him two points above the threshold for mental retardation and that his full-scale IQ was one point below that threshold. The court found that there was ample evidence that the juvenile knowingly and intelligently waived his rights. There was also no evidence that the juvenile was mistreated or coerced by the police in any way.[72]
- A 16-year-old was provided a juvenile rights waiver form in English and in Spanish, was advised of his rights in English, and signed the English waiver form. The transcript from the juvenile's trial on charges related to breaking or entering indicated that, in all but two instances, the juvenile affirmatively responded when asked that he understood each right

69. *In re* M.L.T.H., 200 N.C. App. 476 (2009).
70. State v. Miller, 344 N.C. 658 (1996).
71. See *State v. Jones*, 153 N.C. App. 358 (2002), discussed in Part II of this bulletin, *supra* note 17.
72. *Jones*, 153 N.C. App. 358.

of which he was advised. The remaining two responses were not audible. The detective who explained the rights to the juvenile testified that the juvenile understood English and that he understood his rights. There was no evidence that the juvenile ever expressed a lack of willingness to speak, that he was unable to communicate with officers, or that he sought to invoke his rights. There were also no allegations of coercive police conduct or improper interrogation techniques.[73]

73. *Saldierna II*, 371 N.C. 407.