



TO: Roger Breed, Ed.D.
Commissioner of Education

FROM: Margaret Worth, General Counsel

SUBJECT: Rule 55 (92 NAC 55), Rules of Practice and Procedure for Due Process Hearings in Special Education Contested Cases

Proposed Board Action:

Grant the Commissioner the authority to approve a hearing draft of Rule 55 (92 NAC 55), Rules of Practice and Procedure for Due Process Hearings in Special Education Contested Cases, and set a date, time and place for a hearing, and to appoint a hearing official to conduct the hearing on behalf of the State Board.

Background Information:

The U.S. Department of Education Office of Special Education Programs (OSEP) has requested changes to the model form for requesting a due process hearing in the Appendix of Rule 55. In response to this request, the model form has been revised and placed on the NDE Office of Special Education web page. Consequently, the model forms are being stricken from the Appendix of Rule 55. In addition, at the request of OSEP, references to early intervention services, which are provided pursuant to Part C of the Individuals with Disabilities Education Act, are being added to the rule.

Estimated Cost:

To place a public notice in the Omaha World Herald and make copies of final adopted rule, approximately \$600.00

Supporting Documentation Included:

Proposed Hearing Draft of Rule 55 (9s NAC 55), Rules of Practice and Procedure for Due Process Hearings in Special Education Contested Cases.

For Additional Information on this item:

Call Margaret Worth (402) 471-0310 or email: Margaret.Worth@nebraska.gov

**TITLE 92 - NEBRASKA DEPARTMENT OF EDUCATION
CHAPTER 55 - SPECIAL EDUCATION CONTESTED CASES**

ALPHABETICAL TABLE OF CONTENTS

<u>Subject or Title</u>	<u>Statutory Authority</u>	<u>Code Section</u>
Appeal	<u>Neb. Rev. Stat.</u> §§ 79-1167, 84-917, 84-919; 20 U.S.C. 1401, and 1415, and 1439	Section 009
Commencement of Special Education Contested Case	<u>Neb. Rev. Stat.</u> §§ 79-1162, 79-1163, 79-1164, 84-913; 20 U.S.C. 1401, and 1415, and 1439	Section 004
Decision and Order	<u>Neb. Rev. Stat.</u> §§ 79-1164, 79-1167, 84-915; 20 U.S.C. 1401 and 1415	Section 008
Ex parte Communications	<u>Neb. Rev. Stat.</u> § 84-914	Section 002
Hearing of Special Education Contested Case	<u>Neb. Rev. Stat.</u> §§ 79-1164, 79-1165, 79-1166, 84-913, 84-913.03 84-914, 84-915.01; 20 U.S.C. 1401 and 1415	Section 007
Hearing Officer	<u>Neb. Rev. Stat.</u> §§ 79-1163, 84-913.04, 84-914; 20 U.S.C. 1401, and 1415, and 1439	Section 005
Intervention	<u>Neb. Rev. Stat.</u> § 84-912.02	Section 003
Prehearing Matters	<u>Neb. Rev. Stat.</u> §§ 79-1164, 84-913, 84-913.01, 84-913.02, 84-913.03, 84-914	Section 006
Scope and Definitions	<u>Neb. Rev. Stat.</u> §§ 79-1162, 84-901, 84-909, 84-909.01; 20 U.S.C. 1401, and 1415, and 1439	Section 001

~~Appendix A~~

~~Sample Petition Form~~

~~Neb. Rev. Stat. § 84-909; 20 U.S.C. 1401
And 1415~~

~~Appendix B~~

~~Sample Answer Form~~

~~Neb. Rev. Stat. § 84-909~~

**TITLE 92 - NEBRASKA DEPARTMENT OF EDUCATION
CHAPTER 55- SPECIAL EDUCATION CONTESTED CASES**

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Appendix A Sample Petition Form	<u>Neb. Rev. Stat.</u> § 84-909; 20 U.S.C. 1401 and 1415	
Appendix B Sample Answer Form	<u>Neb. Rev. Stat.</u> § 84-909	

TITLE 92 -NEBRASKA DEPARTMENT OF EDUCATION
Chapter 55 -Rules of Practice and Procedure for Due Process Hearings in Special
Education Contested Cases

001. General.

001.01. Application of Rules. Pursuant to Neb. Rev. Stat. § 84-909.01, the Attorney General shall promulgate model rules of procedure appropriate for use by as many agencies as possible. For rules of procedure adopted on or after August 1, 1994, each agency shall adopt as many of the model rules as is practicable under the circumstances. Agencies may adopt regulations which vary from the model rules; however, any agency adopting a rule of procedure that differs from the model rule shall include in the agency's explanatory statement the reasons why the relevant portions of the Attorney General's model rules are impracticable under the circumstances. This Chapter is based upon the Attorney General's model rule for contested cases with modifications to comply with the requirements of the Nebraska Special Education Act (Neb. Rev. Stat. §§79-1110 to 79-1184) and the Individuals With Disabilities Education Act (20 U.S.C. 1400 to 1487). This Chapter shall apply to all hearings brought by a parent or a public agency pursuant to the Nebraska Special Education Act, Title 92 NAC 51 (Rule 51) or the Individuals With Disabilities Education Act and its implementing regulations which relate to the identification, evaluation or educational placement of a child with a disability, ~~or~~ the provision of a free appropriate public education or early intervention services to a child, or records relating thereto; and only to such hearings.

001.02. Definitions. The following definitions shall apply as used throughout Chapter 55 of these rules and regulations.

001.02A. Commissioner shall mean the State Commissioner of Education.

001.02B. Special education contested case shall mean a proceeding before a hearing officer in which the legal rights, duties, or privileges of specific parties are required by the Nebraska Special Education Act or the Individuals With Disabilities Education Act to be determined after a hearing.

001.02C. Department shall mean the Nebraska Department of Education, which is comprised of the State Board of Education and the Commissioner of Education.

001.02D. Ex parte communication shall mean an oral or written communication which is not on the record in a special education contested case with respect to which reasonable notice to all parties was not given. Ex parte communication shall not include:

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001.02D1. Communications which do not pertain to the merits of a special education contested case;

001.02D2. Communications required for the disposition of ex parte matters as authorized by law; and,

001.02D3. Communications to which all parties have given consent.

001.02E. Hearing officer shall mean the person or persons conducting a special education hearing, contested case, or other proceeding pursuant to the Nebraska Special Education Act or the Individuals With Disabilities Education Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

001.02F. Parent means:

001.02F1. A natural, adoptive or foster parent of a child;

001.02F2. A guardian but not the State if the child is a ward of the State;

001.02F3. A person acting in the place of a natural or adoptive parent (including a grandparent, stepparent or other relative with whom the child lives; or a person who is legally responsible for the child's welfare); or

001.02F4. A surrogate parent who has been appointed in accordance with 92 NAC 51-009.08.

001.02G. Party means the parent of a child with a disability or an infant or toddler with a disability, a competent student of the age of majority with a disability, or a public agency by or against whom a special education contested case is brought or a person allowed to intervene in a special education contested case. The Department shall be named as a party if, and only if, the petition contains an allegation that the Department has acted improperly or has improperly failed to act with respect to its duties under Neb. Rev. Stat. §79-1152.

001.02H. Petition means the initial document filed with the Department and served on the other party that sets forth a claim related to the initiation, change, or termination or the refusal to initiate, change, or terminate the identification, evaluation, or educational placement of a child with a disability or an infant or toddler with a disability; or the provision of a free appropriate public education or early intervention services; or records relating thereto and a request for action.

001.02H1. The petition shall set forth an alleged violation or violations that occurred not more than two (2) years before the date the parent or public agency

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knew or should have known about the alleged action that forms the basis of the claim, except that the exceptions to the timeline described in subsection 004.02 shall apply to the timeline described in this subsection.

001.02I. Public agency includes the state educational agency, lead agency, local educational agencies, educational service agencies, and any other political subdivisions of the state that are responsible for providing education to children with disabilities or early intervention services to an infant or toddler with a disability.

001.02I1. Local educational agency (LEA) means a public board of education or other public authority legally constituted within the state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of the state, or for a combination of school districts or counties as are recognized in the state as an administrative agency for its public elementary or secondary schools. The term includes an educational service agency as defined in subsection 001.02I2 and any other public institution or agency having administrative control and direction of a public elementary or secondary school.

001.02I2. Educational service agency (ESA) means a regional public multiservice agency which is authorized by state law to develop, manage, and provide services or programs to LEAs and which is recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the state. The term includes any other public institution or agency having administrative control and direction over a public elementary or secondary school and includes entities that meet the definition of intermediate educational unit in section 602(23) of the Individuals With Disabilities Education Act as in effect prior to June 4, 1997.

001.02J. Day, as used in this Chapter, means calendar day unless otherwise indicated as business day. Business day means Monday through Friday, except for federal and state holidays.

001.02K. Serious bodily injury shall have the meaning given the term under paragraph (3) of Subsection (h) of Section 1365 of Title 18, United States Code.

002. Prohibitions against ex parte communications.

002.01. Prohibitions; when applicable. The prohibitions found in this section shall apply beginning at the time notice for hearing is given.

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002.02. Prohibitions; to whom applicable.

002.02A. Parties and public. No party in a special education contested case or other person outside the Department having an interest in the special education contested case shall make or knowingly cause to be made an ex parte communication to the hearing officer.

002.02B. Persons in decisionmaking roles. No hearing officer shall make or knowingly cause to be made an ex parte communication to any party in a special education contested case or other person outside the Department having an interest in the special education contested case.

002.03. Disclosure of contacts. The hearing officer who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 002.02A through 002.02B shall file in the record of the special education contested case:

002.03A. All such written communications;

002.03B. Memoranda stating the substance of all such oral communications; and,

002.03C. All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

002.03D. The filing shall be made within two (2) business days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

002.03E. Filing and notice of filing provided under subsection 002.03D shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

003. Intervention in a special education contested case.

003.01. Intervention in a special education contested case shall be allowed when the following requirements are met:

003.01A. A petition for intervention must be submitted in writing to the hearing officer at least five (5) days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;

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003.01B. The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests arising under the Nebraska Special Education Act or the Individuals With Disabilities Education Act may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

003.01C. The hearing officer must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

003.02. The hearing officer may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

003.03. If a petitioner qualifies for intervention, the hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Those conditions may include:

003.03A. Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

003.03B. Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and,

003.03C. Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

003.04. The hearing officer, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

003.04A. The hearing officer may modify the order at any time, stating the reasons for the modification.

003.04B. The hearing officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

004. Commencement of a special education contested case.

004.01. A parent or local educational agency shall request a hearing by filing a petition under this Chapter within two (2) years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the petition.

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004.02. The timeline described in subsection 004.01 shall not apply to a parent if the parent was prevented from requesting the hearing due to:

004.02A. specific misrepresentations by the local educational agency that it had resolved the problem form the basis of the petition, or

004.02B. the local educational agency's withholding or information from parent that was required under this chapter to be provided to the parent.

004.03. The special education contested case begins with the filing of a petition with the Department and the service of a copy of the petition on the other party. The petition is the initial document filed with the Department and served on the other party that sets forth a claim and request for action. The petition shall remain confidential. A sample petition ([request for a hearing](#)) is [available from the Nebraska Department of Education Office of Special Education included in this Chapter as Appendix A.](#)

004.04. A party to a special education contested case shall be the parent or public agency by or against whom a special education contested case is brought or a parent or public agency allowed to intervene in a special education contested case.

004.05. A party may appear on his or her own behalf in a special education contested case proceeding or may be represented by an attorney or other representative as permitted by law.

004.06. The pleadings in a special education contested case may include a petition, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the Department. ~~A sample Answer is included in this Chapter as Appendix B.~~ Any pleading filed in a special education contested case shall meet the following requirements:

004.06A. The pleading shall contain a heading specifying the name of the Department and the title or nature of the pleading, shall state material factual allegations and state concisely the action that is being requested shall contain the name and address of the petitioner and respondent, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

004.06A1. Attorneys shall also include their address, telephone number and bar number.

004.06A2. The initial petition shall contain, in addition, the following information which shall remain confidential:

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004.06A2(a). The name of the child whose special education or early intervention services is the subject of the hearing, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

004.06A2(b). A description of the nature of the problem of the child relating to the proposed or refused initiation of, or change in, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education or early intervention services to the child including facts relating to the problem; and,

004.06A2(c). A proposed resolution of the problem to the extent known and available to the party at the time.

004.06A3. A party may not have a due process hearing until the party, or the attorney representing the party, files and serves on the other party a copy of a petition meeting the requirements of subsection 004.06A2.

004.06B. All pleadings shall be made on white, letter-sized (8 1/2 x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

004.07. The initial petition shall be filed with the Department at its official office, at the State Office Building, 6th Floor, 301 Centennial Mall South, Lincoln, Nebraska, 68509 and a copy of the petition shall be served on the other party. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Department, which are 8:00 a.m. to 5:00 p.m. Central Time, Monday through Friday, except state holidays. All subsequent pleadings shall be filed with the hearing officer as directed by the hearing officer. Service of the petition on the other party shall be by U.S. mail return receipt requested. Proof of service by return receipt shall be filed with the Department and the hearing officer.

004.08. Upon receipt of the initial petition, the Department shall assign the petition to a hearing officer and send a notice of assignment to the hearing officer with the petition attached. The Department shall also serve a notice to file an answer and a copy of the notice of assignment and of the petition on each respondent listed in the petition personally or by first-class or certified mail and send copies to the hearing officer and petitioner. Written proof of such service shall be filed with the Hearing Officer. Except as provided in subsection 004.09, each respondent must within ten (10) days of receiving the petition, send to the petitioner and file with the hearing officer an answer that specifically addresses the issues raised in the petition.

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004.09. If a local education agency has not sent a prior written notice to the parent as required by subsection 009.03B of Rule 51 regarding the subject matter contained in the parent's petition, such local education agency shall, within ten (10) days of receiving the petition, send to the parent and file with the hearing officer an answer that shall include:

004.09A. An explanation of why the agency proposed or refused to take the action raised in the petition;

004.09B. A description of other options that the IEP Team or IFSP Team considered and the reasons why those options were rejected;

004.09C. A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

004.09D. A description of the factors that are relevant to the agency's proposal or refusal.

004.10. The petition shall be deemed sufficient unless the party receiving service of a copy of the petition notifies the hearing officer and the other party in writing that the receiving party believes the petition has not met the requirements of subsection 004.06A2.

004.11. The party providing a hearing officer notification under subsection 004.10 shall provide the notification within fifteen (15) days of receiving a copy of the petition.

004.12. Within five (5) days of receipt of the notification provided under Section 004.11, the hearing officer shall make a determination on the face of the petition of whether the petition meets the requirements of subsection 004.06A2, and shall immediately notify the parties in writing of such determination.

004.13. An answer filed by a local education agency pursuant to subsection 004.09 shall not be construed to preclude such local educational agency from asserting that the parent's petition was insufficient where appropriate.

004.14. All pleadings subsequent to the initial petition shall be served by the party filing such pleading upon all attorneys of record or other representatives of record, upon all unrepresented parties, and upon the Department. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the hearing officer.

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004.15. Subsection 009.11 of Rule 51 (92 NAC 51) requires that within fifteen (15) days prior to the opportunity for an impartial due process hearing under this Chapter, the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint for the purpose of resolving the issues raised in the complaint.

004.16. If the local educational agency has not resolved the issues raised in the petition to the satisfaction of the parents within thirty (30) days of the receipt of the petition, a hearing date shall be set by the hearing officer and all of the applicable timelines for a due process hearing under this Chapter shall commence. A written notice of the time and place of hearing and the name of the hearing officer shall be served by the hearing officer upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and shall be filed with the hearing officer.

004.17. In computing time prescribed or allowed by this Chapter of these rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period.

004.18. Within forty-five (45) days after the receipt of a petition by the Department, the hearing officer shall prepare a final decision and order directing such action as may be necessary and mail a copy of the decision and order to each of the parties and to the Commissioner in the manner required by subsection 008.04.

005. Hearing officer; criteria.

005.01. The Department shall assign to a hearing officer the functions of conducting a prehearing conference and/or a hearing and rendering a final decision and order. Hearing officers assigned by the Department shall have exclusive original jurisdiction over cases arising under Neb. Rev. Stat. §79-1152 and §§79-1162 to 1167, and juvenile courts shall not in any event have jurisdiction over such matters.

005.02. A person may serve as hearing officer at successive stages of the same special education contested case.

005.03. The hearing officer shall not be a person who is an employee or officer of a state or local public agency which is involved in the education or care of the child on whose behalf the hearing is being held. A person who otherwise qualifies to conduct a special education contested case hearing is not an employee of the agency solely because the person is paid by the agency to serve as a hearing officer.

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005.04. No hearing officer shall participate in any way in any hearing or matter in which the hearing officer may have a conflict of interest including any personal or professional interest that would conflict with his or her objectivity in the hearing.

005.05. Hearing officers shall possess knowledge of, and the ability to understand, the provisions of the Individuals with Disabilities Education Act (20 U.S.C. 1400 to 1487) and regulations pertaining to this Act and the Nebraska Special Education Act (Neb. Rev. Stat. §§79-1110 to 79-1184) and regulations pertaining to this Act, and legal interpretations of these Acts by federal and state courts;

005.06. Hearing officers shall possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

005.07. Hearing officers shall possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

006. Prehearing Procedures.

006.01. Prehearing conferences and orders. A hearing officer designated to conduct a hearing may determine whether a prehearing conference will be conducted. If a prehearing conference is not held, a hearing officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

006.01A. If a prehearing conference is conducted:

006.01A1. The hearing officer shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter and shall give notice to other persons entitled to notice.

006.01A2. The notice referred to in subsection 006.01A1 shall include the following:

006.01A2(a). The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

006.01A2(b). The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

006.01A2(c). A statement of the time, place, and nature of the prehearing conference;

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006.01A2(d). A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

006.01A2(e). The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

006.01A2(f). A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a special education contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act unless otherwise precluded by law; and

006.01A2(g). Any other matters that the hearing officer considers desirable to expedite the proceedings.

006.01B. The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

006.01C. The hearing officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

006.02. Discovery in special education contested cases.

006.02A. The hearing officer, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

006.02B. Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

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006.02B1. Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

006.02B2. State the reasons supporting the motion;

006.02B3. Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

006.02B4. Be filed with the hearing officer. The moving party must serve copies of all such motions to all parties to the special education contested case and to the Department.

006.02C. Other than is provided in subsection 006.02B4 above, discovery materials need not be filed with the hearing officer or served on the Department.

006.03. Continuances. Except as specified in subsection 007.07C2 for expedited hearings, the hearing officer may, in his or her discretion, grant specific extensions of time or continuances of hearings beyond the forty-five (45) day time limit for rendering a final decision in subsection 004.18 at the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties and the Department.

006.03A. Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

006.03A1. Illness of the party, legal counsel or witness;

006.03A2. A change in legal representation; or

006.03A3. Settlement negotiations are underway.

006.04. Amendments.

006.04A. A petition may be amended only if the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to 92 NAC 51-009.11A or if the hearing officer grants permission for a party to amend its petition at any time not later than five (5) days before a due process hearing occurs.

006.04B. The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended petition, including the timeline under 92 NAC 51-009.11A.

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006.04C. A hearing officer may allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

006.05. Informal Disposition. Unless otherwise precluded by law, informal disposition may be made of any special education contested case by stipulation, agreed settlement, consent order, or default.

007. Conducting a special education contested case hearing.

007.01. Order. At the discretion of the hearing officer, the hearing may be conducted in the following order:

007.01A. The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

007.01B. The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the petition filed under Section 004, unless the other party agreed otherwise.

007.01C. Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

007.01D. Presentation of evidence.

007.01D1. Evidence will be received in the following order:

007.01D1(a). Evidence is presented by the petitioner;

007.01D1(b). Evidence is presented by the respondent;

007.01D1(c). Rebuttal evidence is presented by the petitioner; and

007.01D1(d). Surrebuttal evidence is presented by the respondent.

007.01D2. With regard to each witness who testifies, the following examination may be conducted:

007.01D2(a). Direct examination conducted by the party who calls the witness;

007.01D2(b). Cross-examination by the opposing party;

007.01D2(c). Redirect examination by the party who called the witness;
and,

007.01D2(d). Recross-examination by the opposing party.

007.01E. After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit briefs in lieu of closing arguments.

007.02. Evidence.

007.02A. In special education contested cases the hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

007.02B. Any party to a formal hearing before the hearing officer, from which a decision may be appealed to the courts of this state, may request that the hearing officer be bound by the rules of evidence applicable in district court by delivering to the hearing officer at least three (3) days prior to the holding of the hearing a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, excluding the cost of court reporting services which the hearing officer shall procure for the hearing.

007.02C. Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

007.02D. All evidence including records and documents in the possession of the hearing officer of which he or she desires to avail himself or herself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

007.02E. A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Any witness compelled to attend or produce evidence shall be entitled to fees and expenses allowed in district court. Any failure to respond to subpoenas and orders issued under this subsection shall be certified by the hearing officer to the district court of Lancaster County for enforcement or for punishment for contempt of the district court.

007.02F. The hearing officer shall give effect to the rules of privilege recognized by law.

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007.02G. The hearing officer may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within his or her specialized knowledge and the rules and regulations adopted and promulgated by the Department.

007.02G1. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

007.02G2. Parties shall be afforded an opportunity to contest facts so noticed.

007.02G3. The record shall contain a written record of everything officially noticed.

007.02H. The hearing officer may utilize his or her experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

007.02I. The hearing officer may produce evidence on the officer's own motion. If the hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

007.02I1. Public expense means that the school district either pays for the full cost of the evaluation or insures the evaluation is otherwise provided at no cost to the parent.

007.02J. If the parent obtains an independent educational evaluation of his or her child at private expense, the results of the evaluation may be presented as evidence at a hearing under this Chapter regarding the child.

007.02K. Except as specified in subsection 007.11A for expedited hearings, at least five business days prior to a hearing conducted pursuant to this Chapter, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

007.02L. A hearing officer may bar any party that fails to comply with subsection 007.02K from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

007.02M. Except as specified in subsection 007.11A for expedited hearings, any party shall have the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing.

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007.03. Conducting the hearing by electronic means. The hearing officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

007.04. Official record.

007.04A. The Department shall prepare an official record, which shall include testimony and exhibits, in each special education contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested by a party for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the Department upon request. Parties other than parents may also request the transcript and official record for the purpose of rehearing or appeal and it shall be furnished by the Department upon request and tender of the cost of preparation.

007.04B. The Department shall maintain an official record of each special education contested case under the Nebraska Special Education Act or the Individuals With Disabilities Education Act for at least five (5) years following the date of the final order.

007.04C. The Department record shall consist only of the following:

007.04C1. Notices of all proceedings;

007.04C2. Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Department or the hearing officer pertaining to the special education contested case;

007.04C3. The record of the hearing before the Department, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the hearing officer during the proceeding, and all proffers of proof and objections and rulings thereon; and

007.04C4. The final order.

007.04D. As provided in subsection 002.03 the hearing officer who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the special education contested case.

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007.04E. Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the Department record shall constitute the exclusive basis for action in special education contested cases under the Nebraska Special Education Act or the Individuals With Disabilities Education Act and for judicial review thereof.

007.05. Costs. All formal hearings shall be recorded by a court reporter at the expense of the Department. All other costs of a formal hearing shall be paid by the party or parties incurring the costs, unless otherwise ordered by a United States district court pursuant to the Individuals With Disabilities Education Act.

007.06. Parties' Rights. Any party to a hearing conducted pursuant to this Chapter shall be accorded:

007.06A. The right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

007.06B. The right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

007.06C. The right to obtain a written, or, at the option of the parents, electronic verbatim record of the hearing; and,

007.06D. The right to obtain written, or, at the option of the parents, electronic findings of fact and decisions.

007.06E. Except as specified in subsection 007.07C2 for expedited hearings, the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing.

007.07. Appeals Related to Placement in Alternative Educational Settings.

007.07A. In general.

007.07A1. The parent of a child with a disability who disagrees with any decision regarding placement under 92 NAC 51 – 016; or the manifestation determination under 92 NAC 51-016.02E; or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing by filing a petition pursuant to the procedures in this Chapter.

007.07A2. The hearing officer shall hear, and make a determination regarding, an appeal requested under subsection 007.07A.

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007.07B. In making the determination under subsection 007.07A2 the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may:

007.07B1. Return a child with a disability to the placement from which the child was removed; or

007.07B2. Order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than forty-five (45) school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

007.07C. Placement during appeals. When an appeal under subsection 007.07A has been requested by either the parent or the local educational agency-

007.07C1. The child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in subsection 016.02C of Rule 51 (92 NAC 51), whichever occurs first, unless the parent and the State or local educational agency agree otherwise, and

007.07C2. The hearing officer shall arrange for an expedited hearing , which shall occur within twenty (20) school days of the date the hearing is requested and shall result in a determination within ten (10) school days after the hearing.

007.08. Maintenance of current educational placement.

007.08A. Except as provided in subsection 007.07C, during the pendency of any administrative or judicial proceeding regarding a special education contested case under this Chapter, unless the state or local agency and the parents or the lead agency and the parents of the child agree otherwise, the child involved in the special education contested case must remain in his or her current educational placement or must continue to receive the early intervention services currently being provided in the setting identified in the IFSP that is consented to by the parents.

007.08B. If the special education contested case involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings. If the case involves an application for initial early intervention services the infant or toddler shall receive the services not in dispute.

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007.08C. If the decision of the hearing officer in a special education contested case agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for the purposes of subsection 007.08A.

007.09. Parental rights at hearings.

007.09A. Parents involved in hearings must be given the right to:

007.09A1. Have the child who is the subject of the hearing present; and

007.09A2. Open the hearing to the public.

007.09B. The record of the hearing and the findings of fact and decisions described in subsections 007.06C and 007.06D must be provided at no cost to parents.

007.10. Each hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

007.11. Expedited special education contested case hearings under Section 007, are appealable consistent with subsection 008.09 and shall:--

007.11A. Meet the requirements of this Chapter except the time periods identified in subsections 007.02M and 007.02K regarding disclosure of certain evidence shall be two business days; and

007.11B. Be conducted by a hearing officer who satisfies the requirements of this Chapter.

008. Decision and order in a special education contested case.

008.01. Every decision and order adverse to a party to the proceeding, rendered by the hearing officer in a special education contested case, shall be in writing or stated in the record and shall be accompanied by a jurisdictional statement and by findings of fact and conclusions of law.

008.02. Subject to subsection 008.03, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education or early intervention services.

008.03. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education or early intervention services only if the procedural inadequacies:

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008.03A. Impeded the child's right to a free appropriate public education or early intervention services;

008.03B. Significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education or early intervention services to the parents' child; or

008.03C. Caused a deprivation of educational benefit.

008.04. Nothing in subsections 008.02 and 008.03 shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

008.05. Nothing in this Chapter shall be construed to affect the right of a parent to file a complaint with the Department pursuant to 92 NAC 51-009.09.

008.06. The decision and order should include:

008.06A. The name of the Department and name of the proceeding;

008.06B. The time and place of the hearing;

008.06C. The names of all parties or their attorneys who entered an appearance at the hearing;

008.06D. The findings of fact consisting of a concise statement of the conclusions upon each special education contested issue of fact;

008.06E. The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

008.06F. The order consisting of the action taken as a result of the facts found and the legal conclusions arising therefrom.

008.07. Parties to the proceeding shall be notified of the decision and order or by certified mail in the manner required by subsection 008.08. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record in the manner required by subsection 008.08.

008.08. At the completion of the proceedings, the hearing officer shall prepare a report based on the evidence presented containing findings of fact and conclusions of law. The report shall contain a description of the substance of the evidence presented at the hearing and a list of exhibits offered into evidence together with a statement of which exhibits were received and which were not. Within forty-five (45) days after the receipt

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of a request for a hearing by the Department, or longer if continuances are granted pursuant to subsection 006.03, the hearing officer shall prepare and mail a final decision and order directing such action as may be necessary. The report and the final decision and order shall be delivered via certified mail to each party or attorney of record and to the Commissioner of Education.

008.09. A decision made in a hearing conducted pursuant to this Chapter shall be final, except that any party involved in such hearing may appeal such decision under the provisions of law referred to in Section 009.

008.10. The hearing officer shall forward to the Department the original pleadings, orders, and exhibits in the case. Such materials shall be forwarded within five (5) calendar days of the date of the final decision and order.

009. Appeals to state or federal court; enforcement.

009.01. Any person aggrieved by the findings, conclusions, and final decision in a special education contested case is entitled to judicial review under the Nebraska Special Education Act or the Individuals With Disabilities Education Act.

009.02. Under the Nebraska Special Education Act (Neb. Rev. Stat. §79-1167), parties desiring to appeal a hearing officer decision must file a petition for review in the district court of the county in which the main administrative offices of the school district are located within two (2) years after service of the final decision and order by the hearing officer on the party seeking such review. The two (2) year period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

009.03. The provisions of Neb. Rev. Stat. §79-1167 specify the procedure for and effect of taking an appeal to state district court under the Nebraska Special Education Act.

009.04. Under of the Nebraska Special Education Act (Neb. Rev. Stat. §79-1167), any party of record may seek enforcement of the final decision and order of the hearing officer by filing a petition for appropriate relief in the district court of the county in which the main administrative offices of the school district are located within one year after the date of the hearing officer's final decision and order.

009.05. Under Section 1415(I)(2) of the Individuals With Disabilities Education Act (20 U.S.C. 1415), any party aggrieved by the findings and decision made under this Chapter shall have the right to bring a civil action with respect to the complaint presented pursuant to this Chapter, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. Under Section 1415(I)(3)(B) of the Individuals with Disability Education Act (20 U.S.C. 1415), in any action brought under Section 1415 of the Act, the United

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States District court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party.

009.06. The provisions of 20 U.S.C. 1415(I)(2)(B) and 1439(a)(1) specify the requirements applicable to state or federal court in a civil action appealing a special education due process case under the Individuals With Disabilities Education Act.

009.07. The provisions of 20 U.S.C. 1415(I)(3)(B) - (G) govern the availability and amount of attorney's fees that may be awarded by the United States District Court under the Individuals With Disabilities Education Act (20 U.S.C. 1401 to 1487).

009.08. The party bringing a civil action under subsection 009.05 shall have ninety (90) days from the date of the decision of the hearing officer to bring such action; or, if the state has an explicit time limitation for bringing such action under Part B of the Individuals With Disabilities Education Act (20 U.S.C. 1411 to 1444), in such time as the state law allows.

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APPENDIX A: Sample Petition Form for Special Education Contested Cases

~~BEFORE THE STATE DEPARTMENT OF EDUCATION
STATE OF NEBRASKA~~

(Name) _____) CASE NO. (LEAVE BLANK)

(Address) _____)

)
Petitioner, _____)

)
vs. _____) PETITION

(Name) _____)

(Address) _____)

)
Respondent. _____)

~~Petitioner, in accordance with Title 92, Chapter 55, of the Nebraska Administrative Code, states and alleges as follows:~~

- ~~1. (Set forth a concise statement of the grounds upon which the Department's authority or jurisdiction depends.)~~
- ~~2. (Specifically state the legal rights, duties, or privileges of the petitioner that the hearing officer is required by law to determine.)~~
- ~~3. (Concisely set forth all material facts upon which the petition or appeal is based. The petition MUST include: (A) the name of the child whose special education is the subject of the hearing, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending; (B) a description of the nature of the problem of the child relating to the proposed or refused initiation of, or change in, the identification, evaluation, or educational placement of the child, or the provision of a free public education to the child including facts relating to the problem; and, (C) a proposed resolution of the problem to the extent known and available to the party at the time.)~~
- ~~4. (Attach as exhibits copies of any documents discussed above. If this is an appeal of a decision of a public agency, attach a copy of its determination.)~~

~~WHEREFORE, Petitioner requests that the State Hearing Officer _____ (state _____ remedy sought) _____.~~

~~Dated this _____ day of _____, _____.~~

(Signature)

(If attorney for petitioner, list address)

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APPENDIX B: Sample Answer Form for Special Education Contested Cases

BEFORE THE STATE DEPARTMENT OF EDUCATION
STATE OF NEBRASKA

(Name) _____) CASE NO. _____

(Address) _____)
_____,
)
Petitioner, _____)
vs. _____) ANSWER
)

(Name) _____)

(Address) _____)
_____,
)
Respondent. _____)

COMES NOW Respondent, _____ (Name) _____, and, for his/her Answer
to the Petition of the Petitioner, admits, denies, and alleges as follows.

(Respondent should specifically deny or admit each material allegation of the pleading being
answered and should completely advise all parties as to the nature of the objection to the
Petition.)

WHEREFORE, Respondent prays that the Hearing Officer dismiss the Petition in this
matter _____ (and/or state any additional _____
action sought) _____.

(Signature of Respondent or signature
and address of his or her attorney)

