

sanction of dismissal is not the only sanction available and is discretionary, dismissal is to be applied only when “the trial court determines that less drastic sanctions will not suffice.” See generally *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Before dismissing an action with prejudice, the trial court must make findings and conclusions, which indicate that it has considered less drastic sanctions. If it does so, the resulting order will be reversed on appeal only for an abuse of discretion. See *Miller v. Ferree*, 351 S.E.2d 845, 847 (1987).

FINDINGS OF FACT

1. This Petition for Contested Case Hearing was brought by Petitioner, *Parent*, on behalf of his daughter, a *Student* with a disability enrolled in the Onslow County Schools.

2. In his Petition, *Parent* included a request for mediation conducted by an Administrative Law Judge at the NC Office of Administrative Hearings (OAH). The NC Department of Public Instruction concurred with the request.

3. By Order of Chief Administrative Law Judge, Julian Mann III, a mediation was conducted by Administrative Law Judge Beecher R. Gray in the Pender County Courthouse on March 21, 2007. After extensive discussions and negotiations, Judge Gray declared an impasse and the parties agreed to proceed to a hearing on the merits.

4. On April 13, 2007, Respondent filed a motion to allow Michele Neal of the N.C. Department of Health and Human Services to observe *Student* and review her records in conjunction with her consultation with Respondent regarding the appropriate education services and placement *Student*.

5. On April 18, the Undersigned issued a Request for Response to Motion, giving Petitioner until April 27, 2007, to respond to Respondent’s April 13 motion. Receiving no response from Petitioner, the Undersigned, by Order dated May 1, 2007, granted Respondent’s motion. To allow sufficient time to conduct the observation and review, the Undersigned also granted Respondent’s motion to continue the hearing of this case until June 6, 2007.

6. On May 7, 2007, the Undersigned issued a Notice of Rescheduled Hearing, setting the hearing for June 7-8, 2007, beginning at 10:00 a.m., in the Old Pender County Courthouse Annex in Burgaw, North Carolina.

7. On May 23, 2007, the Undersigned issued a General Pre-Hearing Order, scheduling a telephone conference with Petitioner and counsel for Respondent on May 29, 2007, at 1:30 pm. The Order listed the phone numbers for the parties that would be used for the call and instructed the parties to contact OAH if the contact information was incorrect. At the scheduled time on May 29, 2007, calls were placed to Petitioner and Respondent’s counsel.

Petitioner did not respond until 1:45 pm.

8. During the conference call with the parties on May 29, 2007, the Undersigned reviewed the requirements for exchange of witness lists and exhibits between the parties and both parties agreed that the exchange would occur by Petitioner *Parent* leaving his materials and retrieving Respondent's materials at the Office of the Superintendent of the Onslow County Schools on Friday, June 1, 2007, on or after 3:00 pm. Both parties also confirmed that they were prepared to proceed with the hearing as scheduled on June 7, 2007.

9. Respondent prepared its exhibit notebook and witness list and had the same available for retrieval by Petitioner on June 1, 2007. Petitioner did not provide Respondent with his exhibits and witness list as required by order of the Undersigned, nor did he retrieve the materials prepared by Respondent and made available for him at the Superintendent's Office.

10. The Undersigned, the Court Reporter assigned to this case, and Respondent's counsel and witnesses were present at the Old Pender County Courthouse Annex, at 10:00 a.m. on June 7, 2007 for the contested case hearing.

11. Petitioner was not present nor was a representative of the Petitioner present at the Old Pender County Courthouse Annex, at 10:00 a.m. on June 7, 2007. The Undersigned Administrative Law Judge waited until 10:30 a.m. to allow Petitioner time to appear for the contested case hearing. At 10:30 a.m., thirty minutes after the hearing was scheduled to begin, the Undersigned contacted the Office of Administrative Hearings, who further contacted personnel at the Pender County Courthouse to determine whether Petitioner had called to explain his absence. Counsel for Respondent also contacted her office to determine whether Petitioner had called to explain his absence.

12. The Petitioner failed to appear at the June 7, 2007 contested case hearing and no representative for the Petitioner appeared. Further no communication from Petitioner was made to explain his absence.

13. At 10:35 a.m., the undersigned Administrative Law Judge officially called the contested case hearing to order, and heard Respondent's Motion to Dismiss for failure to prosecute due to Petitioner's failure to appear for hearing.

14. The Petitioner, *Parent*, has engaged in a failure to prosecute his claims and his contested case by failing to advance his action toward its conclusion. The Petitioner has manifested an intention to thwart the progress of this contested case by his failure to appear for hearing after numerous notices.

15. The Undersigned has carefully considered sanctions lesser than dismissal. The lack of response to the Office of Administrative Hearings prohibits even an examination by the Administrative Law Judge of excusable neglect by Petitioner *Parent*. After careful consideration, the Undersigned finds that no sanction less than dismissal is adequate or

appropriate to respond to the noncompliance presented by Petitioner, and best serve the interests of justice.

CONCLUSIONS OF LAW

1. N.C. Gen. Stat. § 150B-33(b)(10) authorizes an Administrative Law Judge to “[i]mpose the sanctions provided for in G.S. § 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.” Per the Memorandum of Understanding by and between the North Carolina State Board of Education, through the Department of Public Instruction, Exceptional Children Division and the North Carolina Office of Administrative Hearings, the Office of Administrative Hearings (OAH) agrees that an Administrative Law Judge will not impose monetary sanctions in special education due process hearings.

2. Petitioner was properly notified of the June 7, 2007 contested case hearing in this matter, and failed to appear at such hearing, offering no explanation for his absence. Petitioner’s actions show that a failure to comply with the Orders of the Undersigned are those actions contemplated and addressed by Rule 41 of the Rules of Civil Procedure.

3. Imposition of sanctions and disposition of this case by dismissal of the Petition because of the Petitioners’ failure to prosecute in accord with Chapter 3 of Title 26 of the North Carolina Administrative Code, and N.C. GEN. STAT. § 150B-33(b)(10) and N.C. GEN. STAT. § 1A-1, Rule 41 of the North Carolina Rules of Civil Procedure is proper and lawful.

DECISION

NOW, THEREFORE, based on the foregoing, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above and grants the Respondent’s Motion to Dismiss for **failure to prosecute**. It is hereby **ORDERED** that this contested case be **DISMISSED with prejudice**.

NOTICE

The North Carolina Department of Public Instruction has notified the Office of Administrative Hearings that a Final Decision based on an Order of Dismissal is not subject to appeal to the NC Department of Public Instruction.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of this Final Decision, Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

IT IS SO ORDERED.

This the 27th day of June, 2007.

Augustus B. Elkins II
Administrative Law Judge

