STATE OF NORTH CAROLINA COUNTY OF CABARRUS	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 07 EDC 2167

Student, by parent or guardian *Parent*, Petitioners, v. CABARRUS COUNTY BOARD OF EDUCATION, Respondent.	)))))))))	**DECISION**

THIS CAUSE came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on January 25, 2008, in Harrisburg, North Carolina.

APPEARANCES

For the Petitioners: Judy Newbold
Attorney at Law
Legal Aid of North Carolina, Inc.
785 Davidson Dr., NW
Concord, NC 28025

For the Respondent: Sarah A. Motley
Attorney at Law
Womble Carlyle Sandridge & Rice, PLLC
301 South College Street, Suite 3500
Charlotte, NC 28202

ISSUES

Whether Respondent exceeded its authority, acted erroneously, failed to use proper procedure, or failed to act as required by law or rule, and thereby denied Petitioner a free appropriate public education, when it decided to change *Student*'s placement from a resource to separate (self contained classroom) setting, rejecting his parent's request for a one on one assistant in the regular classroom.

EXHIBITS

For Petitioners: No exhibits were admitted.

For Respondent: Respondent's exhibits 1-4, 10, 12-16

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. It is noteworthy to include the fact that at the close of the hearing the parties stated that neither party wished to receive a copy of a transcript, and therefore the Undersigned has not been provided with one. The findings of fact stem from notes of the Undersigned and from the official exhibits admitted into the record.

FINDINGS OF FACT

1. Petitioner *Student* is a five year old kindergarten student at *ABC* Elementary School in Concord, North Carolina. He has attended school at *ABC* Elementary since the beginning of the 2007-2008 school term. There was no factual dispute that under applicable state and federal law, *Student* is a child with a disability, specifically categorized as developmentally delayed. He is eligible for and requires special education and related services pursuant to state and federal law, which includes having in place an Individualized Education Program (IEP). *Student* has an IEP.

2. Respondent, Cabarrus County Board of Education (CCBOE), is the Local Education Agency (LEA) responsible for *Student*'s education. *ABC* Elementary School is a public school operated and maintained by the Respondent, Cabarrus County Board of Education.

3. In January 2005, *Student* enrolled in CCBOE's Head Start Preschool Program at Preschool A. Due to a series of behavior problems at Preschool A, CCBOE provided *Student* with a one-to-one individual assistant (one-to-one). Despite the presence of the one-on-one, *Student* still exhibited behavior problems, including noncompliance, at preschool. (Resp. Ex.2, CCBOE/AH-00011, 0020)

4. *Student*'s mother testified that *Student* has had a long history of behavior problems including aggression. He has been in individual therapy since October 2006. She stated that she noticed significant improvement in *Student*'s behavior at school after he was given a one-on-one assistant. She stated that at the end of the preschool term that ended in the Spring of 2007, a review was conducted of *Student*'s readiness to attend kindergarten. In May 2007, *Student*'s IEP was evaluated and the IEP team began to discuss *Student*'s transition to kindergarten. (Resp. Ex. 2)

5. *Student* became a student at *ABC* Elementary School (*ABC Elementary*) in August 2007. *ABC* is not *Student*'s "home school" (based on *Student*'s domicile, he was assigned to *B. Elementary*) but it is in close proximity to his home. His mother petitioned for him to attend *ABC* and received a waiver to enroll him there. Such waiver must be renewed from one year to the next. *Student* currently spends part of his day in a smaller classroom with other disabled children, and part of his day in a regular classroom setting with non-disabled

children. *Student* has not had a one-on-one assistant while a student at *ABC Elementary* . Parent testified that she contacted an agency prior to the start of the 2007-2008 school year for possible help with a one-on-one assistant for *Student*.

6. *ABC* Elementary School is a K-5 elementary school with 570 students. It is considered a Title I, "at risk" school. Despite being "at risk," *ABC* regularly meets all of its North Carolina Student Performance Goals and No Child Left Behind Average Yearly Progress Goals.

7. On August **, 2007, an IEP team meeting was convened at *ABC Elementary* . The purpose of the meeting was to transition *Student*'s IEP from preschool to kindergarten. Present at this meeting were the Principal, Kindergarten Teacher - *Ms. H.M.*, Resource Teacher - *V.B.*, Preschool Teacher - *Ms. D.L.*, Mother, and Resource Teacher - *Ms. L.D.*. The team decided to increase the amount of Resource time *Student* received. Based on this increase, his setting changed from Regular to Resource. The team believed that the additional Resource time would help set *Student* up for success. Parent informed the IEP team that *Student* struggled with appropriate behavior. The team reviewed his Behavior Intervention Plan. The team rejected outside community support that Parent had mentioned. Resp. Ex. 3.

8. Parent testified that *Student* acts impulsively; he can show physical aggression, has difficulty following directions and shows noncompliance. She testified that he has tantrums or meltdowns. These usually begin with clenching his fist, spinning around and/or a growl, stomp, kick, yell or cry. They often occur when he is frustrated particularly if he can't get something right. Tantrums or "melt downs" also occur when *Student* cannot have his way or cannot go first.

9. *Student* and school personnel have been instructed on the use of the "stoplight" method as a means of trying to control *Student*'s behavior to prevent him from going into a tantrum. Testimony indicated that *Student* sometimes moves quickly into poor behavior and is not usually directed at school to use the stoplight technique until after his behavior has moved into a tantrum.

10. Ms. S, a teacher in her sixth year of teaching kindergarten, is the Kindergarten Chair at *ABC* and oversees planning and implementing the North Carolina kindergarten standard course of study. She is certified in birth to kindergarten and this includes a special education concentration. She has not observed *Student* in the classroom and is not his teacher.

11. Ms. S testified that based on a review of his file, *Student* began school as a typical kindergartener. [Ex. 14] She testified as to Exhibits 15 and 16. These exhibits contain reading and math evaluation data for *Student* and also contain information about the evaluations for the other students in his class. Based on this data, which the Undersigned finds to be competent and reliable as testing data and results kept in the ordinary course of business, *Student* is below his peers in many of the tested skills. He failed all 5 literacy tests that were given. Ms. S stated that *Student*'s memorization skills and rote skills were average, but he has difficulty transitioning sounds into words and when compared to his classmates, he is well behind academically.

12. *Student*'s first day of school was the week of August 27, 2007. His first office referral was September 12, 2007. (Ex. 12, CCBOE/AH-0154). *ABC* Principal testified as to the NCWISE computer system. This is a computer program containing student records, including discipline referrals. She stated that the administrator—either herself or Ms. *J.*—are the only employees permitted to enter behavior information into the referral database. The Undersigned finds Respondent's Exhibit 12 to be an accurate business record, created and maintained in the ordinary course of business.

13. As a result of *Student*'s continued disruptive behavior and poor academic performance in class, an IEP team meeting was held on September 28, 2007. Parent testified that in late September, an IEP meeting was held at *W. Elementary* School for the purpose of allowing Parent to observe the self-contained classroom there. At this meeting, the team began to discuss whether *Student* was in the proper placement, discussed Behavior Focused Self Contained (BFSC) classrooms at CCBOE and discussed whether *Student* should be placed at the self contained classroom at *W. Elementary*.

14. *W. Elementary* School is not in close proximity to *Student*'s current home and placement at that location would require that he ride a school bus. *Student*'s mother testified that she believed he is likely to exhibit serious behavior problems when he is on the bus.

15. Based on input from Parent, including information provided by an outside mental health agency, Foundations Behavioral Support (Foundations), the IEP team agreed to maintain *Student*'s current placement and to use the supports provided by Foundations. Foundations would be available by telephone in crisis situations and was to provide interventions with *Student* when his behavior went out of control. (Resp. Ex. 4).

16. Parent testified that she had misgivings about placing *Student* in a self contained classroom. She had asked that instead of placing *Student* in a self contained classroom he be provided with a one-on-one worker in a regular classroom setting at *ABC* to help direct *Student*'s attention and help him with change and transition. Parent testified that *Student* sees a counselor and a psychiatrist, and he was placed on medication in November 2007 to help with his behaviors.

17. CCBOE Program Support Specialist *Ms. T.B.* testified as to the BFSC classrooms. *Ms. T.B.* is a 28-year teaching veteran with experience in teaching in regular, resource, inclusion and self-contained classrooms. She said that she was contacted about *Student* by either *Student*'s EC teacher or by *Student*'s EC teacher, in September 2007 regarding consideration of changing *Student*'s placement from regular classroom setting (with resource) to a self contained classroom.

18. *Ms. T.B.* testified that as the Program Support Specialist for BFSC she now acts as the "gatekeeper" for the BFSC classes. For elementary school, BFSC is located at *ABC* Elementary, C.M. Elementary, *W. Elementary*, R.R. Elementary, and R.B. Elementary. *Ms. T.B.* testified that she attempts to place a student in the BFSC room closest to his/her home school but that she also considers the number of students in each class, the capacity of the classroom and each student's individual needs. Students in the BFSC class are on a "point/level" behavior system and their parents receive daily communication from the school. They also received direct

and focused social skills instruction. She stated that the goal of the BFSC class is to transition its students back to the regular classroom.

19. *Ms. T.B.* testified that despite the presence of a one-to-one in preschool, *Student* did not learn the social and coping skills needed to have proper behavior in the kindergarten setting. She stated that the BFSC class would benefit *Student* in learning how to control his behavior. She testified that the IEP team makes the decision to change a student's placement to BFSC. Once a student's placement is decided, *Ms. T.B.*, as the program administrator, determines which classroom location the student will attend.

20. Psychologist *M.P.* testified. She is a Cabarrus County Schools psychologist and mostly works with high risk EC students. She is also the chair of the behavior support team, a behavior support liaison with the North Carolina Department of Public Instruction, and a positive behavior support trainer. She stated that when a student has an one-on-one for behavior issues, the student can become dependent on that person for directions and prompts, fostering an external locus of control.

21. In the BFSC class, because of the intensive social skills instruction, the student learns how to make choices and behavior options, giving them an internal locus of control. She testified that it is better for a student to learn how to have an internal locus of control. She testified that assistants in a regular class ore not certified but that assistants in the self contained setting are certified.

22. On September 28, 2007, *Student* exhibited disruptive behavior. A summary of this behavior is provided in Respondent's Exhibit 12. As *Principal B.* testified, *Student* refused to stay in line, ran outside, attempted to climb a pole, and refused to walk on his own. School staff attempted to contact Foundations, as was discussed earlier that day in the IEP meeting. They also used the "stop light" method that was presented by Foundations and that was also supported by *Student*'s private therapist, Dr. Sandra Ritter.

23. Office referrals on October 4, October 10, October 18, and October 22, 2007 resulted in out-of-school suspensions for *Student*.

24. An IEP meeting was held on October 26, 2007. Parent testified that at this meeting, the team discussed placement options and modifications for *Student*. She testified that she was told that the school was concerned about his academics. She was told that the classroom teacher assistant was currently functioning almost as a one-on-one for *Student* and that this intense intervention was not successful. (Resp. Ex. 3).

25. *Student* receives counseling services with a licensed professional counselor, Dr. Sandra Ritter, Ph.D., who has seen *Student* on a weekly basis since October 2006. Dr. Ritter testified at the hearing. Dr. Ritter works with *Student* to help him control his behavior, and to help him process his feelings. Dr. Ritter sometimes meets with *Student* one on one, but about half of the sessions are held with others present, usually his two younger siblings. She has observed *Student* having temper tantrums in her office.

26. Dr. Ritter testified that *Student* has ADHD, Impulse Control Disorder and developmental delays. Dr. Ritter testified that certain events will trigger *Student*'s bad behavior.

He typically throws tantrums/has "melt downs" when he doesn't get to be first, when he doesn't get his way, and when he is confronted with changes in setting or routine. Dr. Ritter testified that *Student* has significant problems with change in environment. Dr. Ritter stated that *Student*'s difficulties with change in environment are such that he would benefit from a one-on-one assistant for any change in school environment, such as at the beginning of each school year, until he could become comfortable with his new setting.

27. Dr. Ritter testified that she has never taught. She stated she had never visited or observed *Student* in the school setting. Dr. Ritter has observed one BFSC in Cabarrus County but this was in connection with another student. She had a therapeutic foster child in a self contained setting.

28. At the October meeting, the IEP team reviewed a letter from Dr. Ritter. Dr. Ritter submitted a statement to *Student*'s IEP team in support of her position that *Student* should be afforded a one-on-one assistant at school because she could not be present for the October 2007 IEP team meeting. In this letter she stated that she believed that a one-to-one was appropriate for *Student*. She also stated that the school had failed to implement *Student*'s IEP. During cross-examination, she testified that this was an improper statement and that to her knowledge; *Student*'s IEP was being implemented.

29. At the end of October, 2007, the IEP team agreed that *Student* should be moved to a self contained classroom. The members of the IEP team who testified each stated that they believed a one-on-one worker would be a more restrictive for *Student* than would a self contained classroom setting.

30. *Principal B.* testified that *Student* has been suspended because of his behavior seven times for a total of eight days while a student at *ABC* Elementary School. In comparison, she stated that three other students had been suspended during the same time at *ABC* for one day each.

31. *Assistant Principal A.J.* testified as to *Student*'s behaviors at school. Ms. *J.* has a background in behavior studies, including the Kentucky Behavior Institute, the Crisis Prevention Institute, and PBS. The Undersigned received as an exhibit the Comprehensive School Counseling Standard Course of Study. (Resp. Ex. 1) *Ms. A.J.* discussed these goals and expressed her concern and opinion that with a one-to-one guiding *Student*'s social interactions, he would be unable to access this portion of the standard course of study. (*See* Resp. Ex. 1 /CCBOE/AH-0176, 0178 - describing skills for managing feeling, establishing self control and developing coping skills). It is her opinion that the BFSC class is more appropriate for *Student* than a one-to-one support in a regular class. She testified that a one-to-one assistant in the regular class is not a certified teacher.

32. *Ms. A.J.* testified about various incidents of *Student* misbehaving. She described the numerous interventions that she has been involved with for *Student*, including the use of the "stop light" method and contact with Foundations. She stated that she has spent and spends a lot more time in his kindergarten classroom than any other room at the school. She testified that *Student*'s behavior disrupts his classroom. His resource time is not back to back resulting in

multiple transition times during the day and many disruptions outside the classroom such as the hall, playground, etc.

33. Assistant Principal A.J. stated that Foundations was called during times of crisis, but did not consistently respond. She said that Foundations is not physically present on site at *ABC* and they must come from a location which is approximately 30 minutes away. She stated that Foundations came out two times to observed but had not come out during the time of crisis. *Ms. A.J.* testified that on one occasion she used intervention techniques with *Student* and was successful in preventing him from going into a tantrum.

34. Ms. *V.B.* testified. *Student*'s EC teacher is a resource teacher at *ABC* and is *Student*'s EC Case Manager. She also has taught the BFSC class for two years. She works with *Student* twice a day for a total of ninety minutes. He also meets once a day with another resource teacher. (Resp. Ex. 10).

35. *Student*'s EC teacher testified as to Respondent's Exhibit 10, a behavior analysis that she conducted. *Student* receives a daily behavior card because of his frequent behavior problems. This card is sent home daily. Most students at *ABC* only receive a weekly card. *Student*'s EC teacher testified that out of the 20 EC students that she serves; only 2 of them receive Daily Behavior Cards (one being *Student*). *Student*'s EC teacher described what the behavior cards indicate and explained her analysis. She concluded that *Student*'s most frequent misbehavior is not following directions. She concluded that these are most frequent during the morning hours when *Student* participates in small group phonetics instruction and classroom reading instruction.

36. At the October IEP meeting, *Ms. T.B.* proposed that *Student* join the BFSC class at *W. Elementary*. *Ms. T.B.* and others testified that the self-contained classroom includes specific instruction for socializing students, with an emphasis on behaviors. At first, the student would be in the self contained classroom throughout the day. She said that the goal is to gradually increase the disabled student's interaction with non-disabled students, so that they move in and out of the self-contained classroom during the day. She stated that the goal of the BFSC class is to transition its students back to the regular classroom as quickly as possible.

37. *Ms. T.B.* testified that she would now recommend that *Student* be placed in the self contained classroom at *ABC Elementary* , instead of *W. Elementary*. Parent was informed that a seat had opened at *ABC* and therefore *Student* could be in that classroom and he would not have to change schools. [Resp. Ex. 2, CCBOE/AH-0005, 0017].

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to applicable State and Federal laws. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. The parties

received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. Petitioner has the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

3. Petitioner, *Student*. is a child with a disability pursuant to State and Federal laws. Respondent is the Local Educational Agency (LEA) responsible for providing *Student* a free and appropriate public education (FAPE) in the least restrictive environment (LRE).

4. The Individuals with Disabilities Education Act (IDEA) and corresponding federal regulations are the federal laws that apply to Petitioner's allegations that Respondent failed to provide *Student* with a free and appropriate public education when the IEP Team made the decision to change his placement from resource to separate. The controlling State law for students with disabilities is Section 115C, Article 9 of the North Carolina General Statues and the corresponding State procedures.

5. The IDEA defines free appropriate public education as one that provides the child with the disability with personalized instruction and sufficient support services to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *In re Conklin*, 946 F.2d 306 (4th Cir. 1991); *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982). In *Rowley,* the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. Quoting from the Court, "First has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more."

6. In determining the educational placement of a child with a disability, the Respondent must ensure that the placement is in the least restrictive environment (LRE). The placement decision must be based on the IEP after meaningful consideration of evaluation results, programming recommendations from Respondent, input from the Petitioner and consideration of the variety of options that may represent a continuum of placement.

7. IDEA and the respective federal and state regulations state that "least restrictive environment means that, to the maximum extent appropriate, children with disabilities shall be educated with children who are not disabled, and . . . removal of children with disabilities from the regular school 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." 34 C.F.R. § 300.114; N.C. Gen. Stat. § 115C-106.3. Based on this language, the placement decision must be appropriate.

8. The "LRE principle is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully." 34 C.F.R. Part 300, Appendix A (64 Fed. Reg. 48, 12471). Although there is a presumption in favor of inclusion, "IDEA does not mandate regular education for every disabled child." *Id.*

9. The Fourth Circuit has articulated the following test for determining when mainstreaming is not necessary:

> (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class;
>
> (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or
>
> (3) the disabled child is disruptive force in a regular classroom setting.

Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997).

10. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. 300.116. The preference for mainstreaming does not outweigh the need to provide a child with an appropriate education. *Carter by and through Carter v. Florence County School Dist. Four* 950 F.2d. 156 (1991).

11. Courts have generally concluded that if a child with a disability has behavioral problems that result in disruption in a regular classroom that the education of other children is significantly impaired, and the needs of the child with a disability cannot be met in that environment. If an IEP can not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE placement for that child at that time, because his unique educational needs cannot be met in that setting. 34 C.F.R. Parts 300 and 301, 71 Fed. Reg. 156, 46589 (*citing Roncher v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Damel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); and *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 163 (8th Cir. 1987)).

12. In this case, *Student* demonstrated and continues to demonstrate serious behavioral difficulties which Respondent attempted to address in the regular classroom setting. Of significance is the testimony that despite the presence of a one-to-one in preschool, *Student* did not learn the social and coping skills needed to have proper behavior in the kindergarten setting. Further, even with his classroom assistant acting periodically as a one-on-one, and the persistent interventions by the resource teacher and administrators, *Student* still displayed inappropriate behavior and was not accessing his education and learning. The evidence shows that the nature and severity of *Student*'s disability is such that he can not be satisfactorily educated in the regular classroom *at this time* even with the use of supplementary aids and services.

13. The Petitioner has failed to satisfy her burden of establishing, by a preponderance of the evidence that Respondent denied *Student* a FAPE by an IEP which proposed a placement in a separate classroom.

14. The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law in accordance with N.C.G.S. § 115C-109.6 *et seq.* and N.C.G.S. § 150B-23 *et. seq.* There is also in place a Memorandum of Understanding 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.

15. "The IDEA specifically provides for two approaches to administrative challenges. A parent is entitled to "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). If the state elects to allow the local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency. *Id.* § 1415(g)(1). If the due process hearing is held by the state, no appeal is required." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

16. "North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision is considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

17. A court must try to give meaning to all provisions of a statute and additionally to consider the intent of the legislature when creating the statute. *Wilkins v. North Carolina State University*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006). A court should not construe a statute in such a way that renders part of it meaningless. *Id.* at 380-81, 631 S.E.2d 224. Policy reasons for passing the statute as well as the history of the legislation are also helpful when interpreting. *Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294-95 (1991). In accord with N.C.G.S. § 150B-34, the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a decision. Harmonizing the provisions of § 150B with § 115C so as "not rendering any part of them meaningless," and in light of the above cited case law, should a decision in special education matters be appealed to a state review officer (who renders the final official position of the state education agency), then N.C.G.S. § 150B-36 shall apply.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on those conclusions and the facts in this case, The IEP developed for *Student*. and the recommended placement were appropriate to provide FAPE and thus meet the standards outlined in the IDEA. The Undersigned finds that Petitioners have failed in their burden of proof regarding substantial error by Respondent.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) cited as the IDEA, and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with Federal law, 20 U.S.C. § 1415(f), the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i). In accordance with 20 U.S.C. § 1415(g) "if the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in the hearing may appeal such findings and decision to the State educational agency."

The State educational agency shall conduct an impartial review of the findings and decision appealed. In accordance with 20 U.S.C. § 1415(h) "any party to a hearing conducted pursuant to subsection (f) . . . , or an appeal conducted pursuant to subsection (g) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children disabilities; (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and, (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions."

Under State law, North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*), and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

"North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North

Carolina, in which the hearing is conducted by the state and appealed to the state, the state review official's decision is considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

The decision of the review officer which is the final official state agency decision is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. In accordance with N.C. Gen. Stat. § 150B-36 the decision of the Administrative Law Judge shall be adopted unless it is demonstrated that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The review officer must also consider any further evidence presented in the appeal process. In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge's decision shall be adopted unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

This the 20th day of February, 2008.

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Augustus B. Elkins II
Administrative Law Judge