

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF WAKE

10 EDC 2522

STUDENT, by Parents A.B. and N.B.,)
Petitioners,)

v.)

FINAL DECISION

WAKE COUNTY BOARD of EDUCATION,)
Respondent.)

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on August 31, 2010 and September 1, 2010 in Raleigh, North Carolina. The record was left open for the parties' submission of materials, including but not limited to supporting briefs, final arguments and proposals. Respondent requested an extension of time which was granted. After filings by Respondent and Petitioner on October 18, 2010 with the Clerk of the Office of Administrative Hearings (OAH), and receipt by the Undersigned on October 20, 2010, the record was closed on October 20, 2010.

APPEARANCES

For Petitioners: Sandra J. Polin
Law Offices of Sandra Polin
8204 Resident Circle
Cary, North Carolina 27519

For Respondent: Christine Scheef
Tharrington Smith, L.L.P.
209 Fayetteville Street
Post Office Box 1151
Raleigh, North Carolina 27602-1151

WITNESSES

For Petitioners: A.B.
N.B.

For Respondent: W.C.
A. J.L.

EXHIBITS

STIPULATIONS

The parties proposed a Pre-Trial Order which was approved and filed in the Office of Administrative Hearings on August 31, 2010. The stipulations contained in this Order and as may otherwise appear in the official record of this contested case are incorporated herein by reference.

PRILIMINARY MATTERS

1. Prior to the hearing in this matter Respondent made a Partial Motion for Summary Judgment. A motions hearing was held on Wednesday, July 7, 2010. Petitioners were represented by Sandra J. Polin and Respondent was represented by Christine T. Scheef. As the Respondent was requesting that all claims prior to May 3, 2009 be dismissed, the Undersigned has treated the Respondent's motion as one for dismissal. After hearing arguments and considering the motion; the deposition transcripts of A.B. and N.B., which were provided in support of the motion; and the written arguments of the parties, the Undersigned concluded that Respondent was entitled to dismissal on all claims arising prior to May 3, 2009.

2. Petitioner STUDENT is a student who has been identified as a child in need of special education services. He is currently enrolled in the Wake County Public School System (WCPSS) and has attended ABC High School since January 2009. Prior to attending Knightdale High School, STUDENT attended DEF High School, beginning in August 2007. STUDENT has attended WCPSS throughout his academic career. Petitioners have had concerns about STUDENT's educational services dating back to elementary school. Deposition of A.B. 13:4-6; Deposition of N.B. 19:12-20:21. STUDENT received some compensatory services from WCPSS when he was in middle school. Deposition of N.B. 25:11-26:6. According to N.B., STUDENT stopped receiving compensatory services during the end of the sixth grade (in the 2004-05 school year) or early in seventh grade (in the 2005-06 school year). Deposition of N.B.27:7-22, 29:4-15.

3. A.B. and N.B. were concerned about the services STUDENT was receiving at DEF High School during the 2007-08 school year. Deposition of A.B. 30:10-19; Deposition of N.B. 66:14-67:1. As a result of their concerns, A.B. and N.B. enrolled STUDENT in Sylvan Learning Center in October 2007. *Id.* Petitioners did not ask the school system to pay for these services prior to enrolling STUDENT in Sylvan. Petitioners filed a Petition for Contested Case Hearing on May 3, 2010, alleging violations of the Individuals with Disabilities Education Act (IDEA) going back to STUDENT's enrollment in elementary school.

4. In accordance with the IDEA, North Carolina State law and regulations grant parents the right to initiate a due process hearing with the Office of Administrative Hearings if

they have certain concerns with the manner in which their child is being educated by the LEA. Under North Carolina law, parents are required to file a petition that “sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition.” Gen. Stat. §115C-109.6(b).

5. There are two exceptions to the one-year statute of limitations in North Carolina law. Specifically, the one-year statute of limitations shall not apply if a parent is prevented from filing a petition because the LEA (1) specifically misrepresented that it had resolved the problems forming the basis of the petition or (2) withheld information required to be provided under state or federal law. Gen. Stat. §115C-109.6(c).

6. It is uncontested that Petitioners were aware of the violations they allege against Respondent in their petition, and there is no evidence that Petitioners meet either of the exceptions to the one-year statute of limitations. The Board is entitled to dismissal as a matter of law on Petitioners’ claims arising more than one year prior to the filing of their Petition on May 3, 2010.

7. Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. *See Brooks v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996). When reviewing dismissal for lack of subject matter jurisdiction, a trial court may consider and weigh matters outside the pleadings. *Department of Transportation v. Blue*, 147 N.C. App. 596, 556 S.E.2d 609 (2001). A court should dismiss an action for want of subject matter jurisdiction if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Evans v. B.F. Perkins Co.*, 166 F.3d 642 (4th Cir.1999) (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765 (4th Cir.1991)). As announced to the parties prior to hearing, the Petitioners’ claims arising prior to May 3, 2009, were dismissed with prejudice.

ISSUES IN THIS DECISION

1. Whether Wake County Public School System denied STUDENT a free appropriate public education (FAPE) by failing to provide all accommodations as required under his Individualized Education Program (IEP).

2. Whether Petitioners are entitled to compensatory educational services and reimbursement for transportation services for academic year 2009-10 and through the conclusion of C.B.’s current IEP.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at this hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making these findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of

the witnesses by taking into account the appropriate facts for judging credibility, including , but not limited to, the demeanor of the witnesses, any interest, bias or prejudice the witness may have, the opportunity of the witnesses 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 including but not limited to the verbal statements at the IEP meetings, the IEP documents, and any and all other competent and admissible evidence.

FINDINGS OF FACT

1. Petitioners A.B. and N.B. are the parents of STUDENT, currently a student at ABC High School. STUDENT has been enrolled in the Wake County Public School System (WCPSS) since kindergarten. At the time of the hearing, STUDENT was 17 years old. STUDENT has been diagnosed with autism. The parties do not dispute that STUDENT is properly identified as a child with special needs who is entitled to services in accordance with IDEA and North Carolina State law. STUDENT is a “quiet, laid-back child, not aggressive, easy to please, wants to do well.” (T. Vol. I, p.15). He “likes things to be in a specific order,” and does not “deal with change very well.” (T. Vol. I, p. 16). STUDENT likes tennis and did tae kwon do up until he received his black belt.
2. Respondent Wake County Board of Education is a local education agency (LEA) receiving funds pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, (IDEA) and was responsible for providing special education to STUDENT pursuant to Article 9, Chapter 115C, of the North Carolina General Statutes.
3. Petitioners filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings on May 3, 2010. The Petition alleged violations of the IDEA dating back to the time STUDENT was enrolled in fifth grade. Petitioners sought an Order:
 - a. Compelling Respondent to reimburse them for \$14,034 in educational services obtained from Sylvan Learning Center between October 2007 and July 2008;
 - b. Compelling Respondent to pay approximately \$24,000 for additional educational services; and
 - c. Compelling Respondent to reimburse them for transportation costs associated with transporting STUDENT to and from ABC High School since he began attending the school in January 2009.
4. As stated under Preliminary Matters above, Respondent was granted dismissal as a matter of law on all claims arising prior to May 3, 2009.

5. In January 2009, STUDENT began attending ABC High School (Knightdale) so that he could receive the support of an Autism Support Teacher (AST). (T. Vol. I, p. 24, Vol. II, p. 194-195). The AST at ABC is W.C.
6. STUDENT's IEP in effect at the time of his enrollment at ABC was adopted on January 13, 2009. (R.Ex. 2). There is no dispute between the parties about whether the goals are appropriate or whether the special education services (i.e., a daily Curriculum Assistance class taught by Mr. W.C.) required under the IEP were delivered.
7. When STUDENT transferred to ABC in January 2009, he received transportation as a related service. (T. Vol. I, p. 30-31). When N.B. and A.B. were contacted to confirm STUDENT's transportation, they were told that STUDENT would be picked up at 6 a.m. in order to get to school at 8 a.m. (T. Vol. I, p. 63), (P.Ex. 6).
8. In response to the transportation schedule, A.B. and N.B. provided to the school system a letter from STUDENT's doctor dated March 9, 2009. The letter stated that STUDENT's school transportation was scheduled to take two hours. Dr. Sikich stated that the two-hour drive was unacceptable and would cause STUDENT anxiety. (P.Ex. 6).
9. When STUDENT transferred to ABC in January 2009, his twin brother also transferred. (T. Vol. I, p. 26). Twin Brother is not a special education student, and he is not entitled to special transportation.
10. STUDENT's parents transported him to school during the spring semester of the 2008-09 school year. Prior to the filing of the contested case petition in May 2010, WCPSS agreed to reimburse A.B. and N.B. for the cost of transporting STUDENT during the spring 2009 semester. That issue is not before the Undersigned.
11. STUDENT's IEP team met in June 2009 to discuss STUDENT's transportation services for the 2009-10 school year. (R.Ex. 5). A representative from the Transportation Department attended the meeting. The team discussed options at that meeting about how to provide transportation to STUDENT and gradually phase it in. (T. Vol. II, p. 266).
12. STUDENT's IEP team agreed that STUDENT would be the last student picked up in the morning and the first student dropped off in the afternoon. (T. Vol. I, p. 113-114). With this change, STUDENT's ride to and from school would take the same amount of time as if he were transported by his parents. This change resolved the issue addressed in Dr. Sikich's letter.
13. In response to concerns raised by A.B. and N.B., the IEP team also discussed other steps that could be taken to alleviate STUDENT's anxiety about school transportation since he had been riding to school with his twin brother. Those steps included introducing him to school transportation gradually while accompanied by someone that he knew (T. Vol. I, p. 113); (R.Ex. 20) and assigning an aide to travel with STUDENT (T. Vol. I, p. 158).

14. Audrey Jones-Langston, a senior administrator in Wake County Special Education Services, spoke with STUDENT's doctor about other ways to alleviate any anxiety STUDENT might have about taking school transportation. (T. Vol. II, p. 264-265). Dr. Sikich did not tell Ms. Jones-Langston that STUDENT should not ride school transportation. (T. Vol. II, p. 268). Ms. Jones-Langston testified that learning to use transportation independently is a common transition goal for high school students. (T. Vol. II, p. 269).
15. Ms. Jones-Langston recounted her conversation with Dr. Sikich at an IEP meeting held in September 2009, during which STUDENT's IEP team again discussed transportation options for STUDENT (R.Ex. 4). During the meeting A.B. and N.B. continued to raise concerns about STUDENT using school transportation. N.B. testified that as long as STUDENT's twin brother was at ABC, it was in STUDENT's best interests to be transported with his brother. (T. Vol. I, p. 68-69).
16. N.B. and A.B. ultimately decided that they would continue to transport STUDENT to school until his twin brother, M.B., graduated from ABC. (R.Ex. 20); (T. Vol. II, p. 213-214). At a January 11, 2010, IEP meeting, A.B. declined transportation as a related service in favor of he and N.B. transporting STUDENT to and from school. (R.Ex. 3, p. 00038).
17. STUDENT's January 13, 2009, IEP calls for the following accommodations in every class: extended time of 50 percent on tests, preferential seating, read aloud, and copy of class notes. (R.Ex. 2, p. 00030). In non-elective classes, STUDENT's January 13, 2009, IEP calls for the following additional accommodations: study guides and a second set of books/CD. (*See id.*). In STUDENT's core academic courses, his January 13, 2009, IEP calls for small group test administration, and in Language Arts, for rubrics, graphic organizers, and audio books when available. (*See id.*).
18. STUDENT's January 11, 2010, IEP calls for the following accommodations: extended time of 45 minutes for test and quizzes, with extended time on projects to be determined by STUDENT's teacher and case manager; read aloud on tests and quizzes, with read aloud for class assignments at student request; study guides; rubrics; copy of teacher notes; preferential seating (near speaker); mark in book; testing separate setting; and use of calculator as needed. STUDENT would also be able to take advantage of the Curriculum Assistance Lab. (R.Ex. 1). This IEP does not require a second set of textbooks.
19. N.B.'s understanding of the accommodations that STUDENT should be getting included receiving teacher notes and getting a second set of textbooks. N.B. testified that "that has been standing since he went into middle, all through high school." (T. Vol. I, p. 19).
20. N.B. testified that she expected STUDENT to receive teacher notes that had been modified so that STUDENT would be able to understand them. (T. Vol. I, p. 19-20).

- N.B. acknowledged during her testimony that STUDENT's IEP does not require that his class notes be modified though she stated the team had talked about it. (T. Vol. I, p. 57).
21. N.B. testified that she never saw any teacher notes at home or in STUDENT's backpack. (T. Vol. I, p. 20-21). N.B. did testify that Mr. W.C. sends home flash cards that he and STUDENT made up together. If STUDENT had an exam coming up, Mr. W.C. would send an email so N.B. would know flash cards would be coming home for STUDENT to study. N.B. testified she saw flash cards (and study guides) but never saw any teacher notes. (T. Vol. I, p. 51-53).
 22. N.B. testified that the purpose of a second set of books was so A.B. and N.B. would be able to assist STUDENT in studying and "if it was something we didn't know, the textbook would be there to also assist us to help STUDENT" (T. Vol. I, p. 20-21). N.B. testified that STUDENT did not have a second set of textbooks for any of his classes. (T. Vol. I, p. 22). N.B. testified that teachers have informed her and A.B. that they don't always work from a textbook. (T. Vol. I, p. 54-55).
 23. N.B. testified that she and A.B. communicated concerns with STUDENT's education through Mr. W, C., the Autism Support Teacher, and that they "always sent emails" or notes when they had questions. (T. Vol. I, p. 23-24). N.B. and A.B. did not introduce any evidence at the hearing that they ever emailed or sent notes to Mr. W. C. about their inability to find teacher notes or a second set of textbooks.
 24. N.B. testified that the Petitioners' claim regarding the failure to implement STUDENT's IEP occurred because of the school system's failure to provide class notes ("teacher notes" according to STUDENT's January 2010 IEP) and a second set of textbooks (pursuant to STUDENT's 2009 IEP), as well as the failure of the school system to get information to and from STUDENT's parents in a timely manner so they could assist STUDENT (T. Vol. I, p. 49).
 25. A.B. testified that he was aware of two accommodations that were not provided—teacher notes and a second set of textbooks. A.B. testified that "modification of the class notes may not be required," though he believed the teacher notes should have come home. (T. Vol. I, p. 148).
 26. N.B. and A.B. testified that if they had been provided with class notes and a second set of textbooks, they would have been able to work with STUDENT on his coursework and he might not have failed the classes that he failed. Regarding math, N.B. testified that with those accommodations, A.B. would have been able to help STUDENT understand math the "way STUDENT needs to be taught it." (T. Vol. I, p. 37).
 27. A.B. testified that he emailed STUDENT's Spring 2010 teachers in May 2010 to ask whether STUDENT's IEP accommodations were being implemented. STUDENT's Healthful Living teacher responded that he was providing some of STUDENT's

- accommodations “upon request.” (P.Ex. 3). STUDENT earned an A or a B in Healthful Living. (T., Vol. I, p. 135).
28. The 2010-11 school year is C.B’s fourth year in high school. (T. Vol. I, p. 59). STUDENT is still classified as a tenth grade student because he has not passed the courses required to advance his grade. (T., Vol. I, p. 60-61). He took English I three times before passing. (R.Ex. 41).
 29. N.B. and A.B. had STUDENT evaluated at the University of North Carolina at Chapel Hill in August 2008. (R.Ex. 12). The evaluation states that “Based on this assessment of STUDENT’s cognitive, achievement, and executive functioning skills, it is likely that completing the standard diploma in a traditional school setting would be very challenging for him.”
 30. Mr. W.C. testified that as STUDENT’s case manager, he communicates with STUDENT’s teachers on a weekly basis, teaches his Curriculum Assistance class, and checks in to STUDENT’s classes. (T. Vol. II, p. 195-197). Mr. W.C. also helps STUDENT stay organized by checking his notebook and agenda. (T. Vol. II, p. 197-198). Mr. W.C. helped STUDENT maintain a notebook divided by subject. Each subject contained “class notes, past homework, past quizzes, and past tests.” (T. Vol. II, p. 200-201).
 31. During the three semesters that STUDENT completed at ABC as of the date of the hearing, he was in a Curriculum Assistance class alone or with one other student. (T. Vol. II, p. 199-200). According to Mr. W.C., he and STUDENT would spend time during Curriculum Assistance class converting class notes into flash cards that STUDENT could use to study. (T. Vol. II, p. 203, p. 228). Mr. W.C. testified that teacher notes were sent home with STUDENT in a form that STUDENT could understand. (T. Vol. II, p. 238).
 32. Mr. W.C. testified that some of STUDENT’s Curriculum Assistance class time would be used re-teaching concepts that he had learned in his academic classes, including re-teaching by the same teacher who taught STUDENT the subject during the school day. (T., Vol. II, p. 204-206). Mr. W.C. testified that he had copies of STUDENT’s textbooks in his Curriculum Assistance class. Not all of STUDENT’s teachers used textbooks, including his Theatre teacher and his math teacher. Mr. W.C. did send home a compact disk of the math textbook “that had enrichment lessons as well as practice problems.” Mr. W.C. specifically recalled STUDENT having copies of the texts that he read in English class. He recalled that STUDENT’s Biology book was sent home. (T. Vol. II, p. 207-208, p. 232-34). Mr. W.C. did not recall conversations or email exchanges with A.B. and/or N.B. about receiving a second set of textbooks or class notes. (T. Vol. II, p. 208).
 33. In accordance with 20 U.S.C. § 1415(h) all safeguards were accorded including “(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.”

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 jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301. 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. The IDEA is the federal statute governing education of students with disabilities. The controlling state law for students with disabilities is N.C. Gen. Stat. Section 115C. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301. Federal laws (IDEA and its regulations) prevail whenever they conflict with State laws/district policies when compliance with both is impossible or where the State laws/district policies are an obstacle to the accomplishment of the purposes and objectives of the IDEA. *Pacific Gas & Electric v. State Energy Resource Conservation & Dev. Comm.*, 461 U.S. 190 (US Sup. Ct. 1983). See also *Parks v Illinois DMH*, 554 IDELR 197 (App. Ct. IL 1982)
3. The burden of proof in an administrative hearing challenging an Individualized Education Program (IEP) is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). In this case that party is STUDENT as represented by his parents (together, the Petitioners). The Petitioners have the burden of proof by a greater weight 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 overbears, in some degree, the weight upon the other side.
4. STUDENT is a child with a disability for the purposes of the IDEA, 20 U.S.C. §1400 *et seq.* and a child with special needs within the meaning of N.C. Gen. Stat. 115C, Article 9. Being classified as Autistic, he is entitled to a free appropriate public education (FAPE) from the LEA in which he is domiciled.
5. STUDENT is entitled to the preparation and implementation of an Individualized Education Program as a consequence of being identified as a child with special needs.

The IDEA requires an education plan likely to produce progress, not regression or trivial educational advancement. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985). The floor of educational benefit cannot be so low as to allow the child to squander his untapped potential for learning. “Trivial education advancement” is insufficient to satisfy the requirement for a FAPE. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1998), *cert denied*, 488 U.S. 1030 (1989).

6. Petitioners have failed to meet their burden of proving that Respondent failed to implement STUDENT’s IEP. Mr. W.C.’s testimony established that STUDENT was provided with class notes and, when a textbook was used, with a second set of textbooks. Although STUDENT’s IEP did not require Mr. W.C. to modify the teacher notes, his testimony establishes that he did modify the notes so that they would be in a form most useful to STUDENT

7. Even if Respondent failed to implement some portion of STUDENT’s IEP, in examining a claim that an LEA failed to implement an IEP, the Fifth Circuit has stated that:

“to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP’s but it still holds those agencies accountable for material failures and for providing disabled child a meaningful educational benefit.”

Houston Ind. School Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000), *cert. denied*, 531 U.S. 817 (2000); *see also* J.P. ex rel. Peterson v. County School Bd. of Hanover Co., Va., 447 F.Supp.2d 553 (E.D. Va. 2006), *vacated on other grounds*, 516 F.3d 254 (4th Cir. 2008).

8. Though STUDENT’s Healthful Living teacher did not fully implement several of STUDENT’s accommodations, STUDENT nonetheless passed Healthful Living with an A or a B, according to A.B.’s testimony. As such, the failure to implement all of STUDENT’s accommodations in Healthful Living was not substantial or significant.

9. Petitioners’ evidence taken in whole, under current case law analysis, does not overcome the Respondent’s evidence, and Petitioners have failed to carry their legally required burden of proof.

10. Petitioners also seek reimbursement for transporting STUDENT to and from ABC High School during the 2009-10 school year and through the remainder of STUDENT’s current IEP. LEAs are required to develop IEPs that are “reasonably calculated to enable the child to receive educational benefits.” *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458

U.S. 176, 206 (1982). Related services, including transportation, are services required to assist a child with a disability to benefit from special education. 34 C.F.R. 300.34.

11. Petitioners have failed to prove by a greater weight of the evidence that STUDENT must be transported with M.B. (his non-disabled twin brother) or by his parents in order to benefit from special education. Respondent addressed the concern raised by STUDENT's physician in her March 2009 letter and once that issue was addressed, the preponderance of the admissible evidence does not support a claim that STUDENT could not ride school transportation.
12. 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. The OAH does not conduct a hearing on behalf of the Local Educational Agency (LEA) but by and through the State Educational Agency (SEA). An OAH decision is a final decision.
13. "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.)

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

FINAL DECISION

1. Disposition of Petitioners' claims arising prior to May 3, 2009 by dismissal in accord with Chapter 3 of Title 26 of the North Carolina Administrative Code, and N.C. GEN. STAT. § 150B-33 and N.C. GEN. STAT. § 1A-1, Rule 12 of the North Carolina Rules of Civil Procedure, as well as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300, is proper and lawful, and; it is **ORDERED** that those claims are **DISMISSED with prejudice**.
2. The Undersigned finds that Petitioners have failed in their burden of proof regarding substantial error by Respondent that would deny a free appropriate public education to STUDENT. The preponderance of the evidence in the issues for hearing failed to substantiate that Respondent did not implement STUDENT's IEP, or, in the alternative,

did not implement substantial or significant provisions of the IEP. Further the greater weight of the evidence failed to show that providing STUDENT a free appropriate public education required Respondent to reimburse petitioners for transporting STUDENT to and from ABC High School. The Respondent acted lawfully and consistent with the Individuals with Disabilities Education Act regarding those matters presented at hearing.

NOTICE regarding FINAL DECISION, ORDER OF DISMISSAL

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. Appeal rights are as follows.

Under Federal Law

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.

Under State Law

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.

NOTICE regarding FINAL DECISION

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

Under Federal Law

In accordance with 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." In accordance with 20 U.S.C. § 1415(g) "if the hearing . . . 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 hearing in this case was not conducted by the local educational agency but rather by the North Carolina Office of Administrative Hearings by and for the State educational agency.

A decision made in a hearing conducted pursuant to federal law that does not have the right to an appeal under subsection (g), (*see* above), may bring civil action in State court or a district court of the United States. 20 U.S.C. § 1415(i).

Under State Law

Under 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 . . . 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.

The decision of the review officer 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 (now called Policies Governing Services for Children with Disabilities); and case law. The review officer must also consider any further evidence presented in the appeal process.

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 8th day of November, 2010.

Augustus B. Elkins II
Administrative Law Judge