

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11-EDC-5058

Student, by parent or guardian, *Parent*,)
Petitioner,)
v.)
Wake County Board of Education,)
Respondent.)

**FINAL DECISION
ORDER OF DISMISSAL**

THIS CAUSE comes before the undersigned Administrative Law Judge following a telephone conference with the parties after filing by Respondent of a Motion to Remove from Expedited Calendar. That conference was converted to a motions hearing regarding dismissal of the claim alleging dispute related to a manifestation determination. After discussion with Respondent’s counsel, Robert M. Kennedy, Jr. and Petitioner *Parent*, and upon review of the entire record, the Undersigned hereby makes the following findings of fact and conclusions of law.

STANDARD OF REVIEW

An action should be dismissed for failure to state a claim only if it appears that the plaintiff (Petitioner) can prove no set of facts that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Further, 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, 181 (4th Cir. 1996). When reviewing a motion to dismiss, the court assumes the facts alleged in the complaint (Petition) are true, *see McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996), and construes the allegations in the light most favorable to the pleader (in this instance the Petitioner). *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

1. Respondent Wake County Board of Education is a local education agency (LEA) receiving funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (IDEA) and is responsible for providing special education to *Student* pursuant to IDEA and Article 9, Chapter 115C, of the North Carolina General Statutes.
2. The Petitioners filed a Due Process Petition in the Office of Administrative Hearings (OAH) citing dispute with the placement of *Student*, a decision regarding a manifestation determination for *Student*, and *Student*’s denial of a free, appropriate, public education. That Petition was given the OAH number 11 EDC 4590. By Order of the Undersigned

the dispute regarding the manifestation determination was separated out and assigned the above cited number (11 EDC 5058).

3. In the Office of Administrative Hearings case 11 EDC 4590, the Petitioners have filed a Due Process Petition challenging the decision to change *Student's* placement from resource to separate setting. The Respondent is keeping *Student* in the resource setting pursuant to the "stay put" provision of IDEA during the pendency of the proceedings in 11 EDC 4590.
4. Regarding the subject of this Petition, i.e., the claim associated with the findings of a manifestation determination review (and as a consequence holding an expedited hearing), the Respondent asserts that *Student's* IEP team determined that *Student's* behavior was a manifestation of his disability at the March 31, 2011 manifestation determination review meeting.
5. Petitioner *Parent* has concurred that the IEP team did find *Student's* behavior was related to his disability and she has no dispute with that determination. Such conclusion leads to a meritorious defense by Respondent and dismissal of the claim disputing the decision of a manifestation determination review is allowed.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, disposition of this case 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 41 of the North Carolina Rules of Civil Procedure, as well as the Federal Regulations relating to IDEA, is proper and lawful. It is hereby **ORDERED** that this matter be **DISMISSED with prejudice**.

NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

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 6th day of May, 2011.

Augustus B. Elkins II
Administrative Law Judge