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OFFICE OF
ADMINISTRATIVE HEARINGS

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STATE OF NORTH CAROLINA
COUNTY OF GRANVILLE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11-EDC-2219

STUDENT by PARENT or GUARDIAN,)
Father)
)
Petitioner,)
)
vs.)
)
)
GRANVILLE COUNTY BOARD)
OF EDUCATION,)
)
Respondent.)

**FINAL DECISION
GRANTING MOTION FOR
SUMMARY JUDGMENT**

Respondent's Motion for Summary Judgment was heard before Chief Administrative Law Judge Julian Mann, III, in the Granville County Courthouse on Tuesday, May 3, 2011, pursuant to Rule 56 of the N.C. Rules of Civil Procedure and N.C. Gen. Stat. § 150B-36(d). After reviewing the record, pleadings, Respondent's motion with supporting affidavit, Respondent's amended motion with supporting affidavit, and Petitioners' documents in response thereto, and after hearing arguments of both counsel and Petitioner *Father*, the undersigned makes the following:

UNCONTROVERTED FINDINGS OF FACT

1. A Petition for a Contested Case Hearing was filed and accepted by the Office of Administrative Hearings on February 19, 2011, alleging Respondent failed to allow Petitioners to participate in the IEP development, failed to implement the IEP, failed to maintain proper records and failed to have proper personnel present at case conference meetings.

2. This Petition was received by the Granville County Board of Education on February 21, 2011.

3. On March 2, 2011, *Ms. A.M.*, Director of Exceptional Children's Program, filed a response to Petition of the Petitioners.

4. On January 27, 2011, Granville County Schools sent Petitioner *Father* an invitation to an IEP Team meeting scheduled for February 9, 2011. The purpose of the meeting

was to review the results of the assistive technology evaluation that Petitioner *Father* had requested.

5. Petitioner *Father* received the prior notice (*Invitation to Conference*) and indicated his agreement to participate in the IEP Team meeting scheduled at 2:00 p.m. for February 9, 2011. Petitioner *Father* indicated that he would be available by telephone conference and provided the telephone number. *Ms. A.M.*'s invitation stated, "If this time is inconvenient, I will be happy to reschedule the meeting at a mutually agreeable time before February 18, 2011."

6. The Exceptional Children's Program Director e-mailed Petitioner *Father* a draft copy of the assistive technology evaluation report at 11:08 a.m. on February 8, 2011, so that he could review it prior to the meeting. The purpose of the meeting was to review the results of the evaluation as a team and not to amend the IEP. Petitioner did not participate in the meeting.

7. On February 9, 2011, Petitioner *Father* notified *K.T.*, Principal of ABC Elementary School that he had invited three individuals to attend the meeting: the student's mother, an educational consultant that he had employed, and himself, and requested that each be connected by telephone conference call.

8. On February 9, 2011, the principal at ABC Elementary School notified Petitioner *Father* that the school's telephone system could not accommodate four individuals by way of a conference call.

9. On February 9, 2011, at 1:40 p.m., Petitioner *Father* called *Principal K.T.* to request that the IEP Team meeting be cancelled because the school's telephone system could not accommodate a conference call with four individuals. The IEP Team followed procedure by holding the meeting, reviewing the evaluation results, and discussing *Ms. J.S.*'s questions. No changes or decisions were made to *A.J.*'s BIP or IEP. The purpose of the meeting was limited to only reviewing the Assistive Technology Evaluation Reports.

10. At 2:23 p.m. on February 9, 2011, Petitioner *Father* called ABC Elementary School. Since the IEP Team meeting was in progress, the school staff invited Petitioner *Father* to participate by telephone, and he responded that the remaining IEP team could proceed if we felt that it was legal.

11. All school personnel that are required members of the IEP Team were present, met and reviewed the Assistive Technology evaluation, as well as the Speech Language Evaluation on February 9, 2011.

12. The current IEP, effective from November 22, 2010, is being implemented and daily behavior checklists are sent home for Petitioner *Father's* review and information. These records are kept in Petitioner *Student's* folder along with other documents that are formative assessments or teacher data.

13. The issues herein are similar to or substantially the same as the issues involved in the Petitioners' previously filed due process cases. 10 EDC 8869 and 10 EDC 2914 are incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individual Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.*, and implementing regulations, 34 C.F.R., Part 300. All parties have been correctly designated and there is no question as to misjoinder or non-joinder. The parties received prior notice of the Respondent's Motion For Summary Judgment and appeared at the hearing. 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. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, N.C. Gen Stat. § 150B-36(d) and 26 N.C.A.C. 03.0101 and 26 N.C.A.C. 03.0115, the undersigned has authority to grant summary judgment.

3. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter law. N.C. R. Civ. P. 56. N.C.R. Civ. P. 56(c) (2008). Summary Judgment "is designed to eliminate the necessity of a formal trial where only questions of law are involved." *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001).

4. On a Motion for Summary Judgment, the Court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials, and the undersigned may also consider facts which are subject to judicial notice and any presumptions that would be available at trial. *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1985); *Gebb v. Gebb*, 67 N.C. App. 104, 107, 312 S.E.2d 691, 694 (1984).

5. "The moving party has the burden of establishing the lack of any triable issue of fact." *Draughon v. Harnett County Bd. Of Educ.*, 158 N.C. App. 208, 580 S.E.2d 732 (2003). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). "When considering a motion for summary, the trial judge must view the presented evidence in a light most favorable to the non-moving party." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707. "Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E. 2d 660, 664 (2000). A party opposing a properly supported motion for summary judgment must present significant probative evidence to support the Petition, especially

when the non-moving party bears the burden of proof. An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond according to law, Summary Judgment, if appropriate, shall be entered against him. N.C. R. Civ. P. 56(e).

6. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this contested case, Petitioners are the parties seeking relief and therefore bear the burden of proof for the remedies sought. Petitioners must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary defines "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." Respondent bears the burden of proof on their motion.

7. The IDEA regulations require the local educational agency (LEA) to provide the parent with a copy of an evaluation report upon request and before the IEP team meeting if it is available. There is no requirement for providing this report a specific number of days in advance.

8. Respondent provided significant and substantial evidence that it allowed Petitioner *Father* to meaningfully participate in the IEP development process, implemented the IEP as written, maintained proper records, and had the proper personnel present at the conference meetings. Petitioner's *Father's* assertion of additional remedies or causes of action which are not part of the remedies sought by Petitioners in their original petition are disallowed. "The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint ..." 34 C.F.R. 300, 511(d).

9. Petitioners failed to respond as required by Rule 56(e) and did not set forth specific facts as required, showing that there is a genuine issue of material fact for trial. Assertions, pleadings and argument cannot satisfy Petitioners' burden to establish a genuine issue of fact.

10. Because Respondent met the threshold burden of showing no issue of fact, and Petitioners failed to counter with specific facts at issue, Summary Judgment is appropriate in this contested case.

11. Petitioners cannot re-litigate issues settled and adjudicated in the previously referenced due process hearings and those decisions are incorporated herein to supplement this contested case decision to grant summary judgment for Respondent and to bar or otherwise preclude issues that have been previously and finally adjudicated in these previous decisions.

BASED UPON the foregoing Findings of Fact and Conclusion of Law, the undersigned makes the following Decision and Order:

DECISION

The undersigned Chief Administrative Law Judge finds and holds that there are no genuine issues as of any material fact and Respondent is entitled to judgment as a matter of law. Respondent's Motion for Summary Judgment is GRANTED. Therefore, the Undersigned finds that Respondent allowed Petitioner to participate in the IEP development, implemented the IEP, maintained proper records and had proper personnel present at conference meetings.

NOTICE

In order to appeal this final decision, the party seeking review must file a written notice of appeal with the Director of the Exceptional Children's Division, North Carolina Department of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the parties' receipt of notice of the decision. North Carolina Procedures Governing Programs and Services for Children with Disabilities § .1512J(2).

IT IS SO ORDERED.

This is the _____ day of May, 2011.

Julian Mann, III
Chief Administrative Law Judge