

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14EDC05816

<p>████ BY PARENT OR GUARDIAN █████. PETITIONER,</p> <p>V.</p> <p>FORSYTH COUNTY WINSTON-SALEM NC BOARD OF EDUCATION RESPONDENT.</p>	<p>FINAL DECISION</p>
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THIS CONTESTED CASE came on to be heard and was heard before J. Randall May, Administrative Law Judge, on December 15, 2014, in the Auditorium of the Education Building of the Winston-Salem/Forsyth County Schools, Winston-Salem, North Carolina.

████, Petitioner, appeared pro se, and Allison Tomberlin, General Counsel, appeared on behalf of the Winston-Salem/Forsyth County Board of Education ("WS/FCS"), Respondent.

Respondent submitted a Proposed Pre-Hearing Order and Petitioner filed a Notice in Opposition. The Court heard oral argument from each side and ruled in favor of Respondent. Pursuant to such Order, the issues for hearing were as follows:

1. Under NC 1501-3.3(c), does █████ IBP require that he be educated in a school other than the school where he would attend if nondisabled?
2. If so, is █████ Middle School the school closest to █████ home where he can be educated according to his IEP?

Petitioner called to testify the following witnesses:

- 1, █████, █████ brother.
2. █████, Petitioner.

Petitioner introduced and the Undersigned admitted the following exhibits:

1. Petitioner's Exhibit 12: One photograph of █████ painting;
2. Petitioner's Exhibit 19: Pages 36 and 37 of the transcript from the parties' Summary Judgment Hearing held October 21, 2014.
3. Petitioner's Exhibit '28: Respondent's Motion for Summary Judgment and Exhibit 7 to that Motion, a MapQuest printout of transportation routes.

At the conclusion of Petitioner's case, Respondent moved for involuntary dismissal of Petitioner's case pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure on the grounds that Petitioner has shown no right to relief upon the facts of the law,

The Undersigned, having reviewed the pleadings, motions, exhibits and memoranda submitted and filed in this matter, and having listened to the presentation of Petitioner's case, including the testimony of witnesses at hearing, upon the greater weight of the evidence, hereby makes FINDINGS OF FACT and CONCLUSIONS OF LAW in accordance with Rule 52(a) of the North Carolina Rules of Civil Procedure as follows:

1. This is a special education case filed pursuant to 20 U.S.C. § 1400, et seq., and its implementing regulations, 34 C.F.R. 300, et seq., and Article 9 of Chapter 115C of the North Carolina General Statutes, alleging Respondent failed to service Petitioner's IEP as close to the child's home as possible.
2. The Petition was filed July 23, 2014.
3. Respondent received Notice of Contested Case and Assignment from the Office of Administrative Hearings ("OAH") on August 5, 2014.
4. Respondent filed a Notice of Insufficiency on August 20, 2014, pursuant to 20 U.S.C. § 1415 (c)(2) (B)(i)(II)
5. Respondent's Notice of Insufficiency was denied because it was not received by the OAH within fifteen (15) days of receiving Petitioner's Petition.
6. Respondent filed a Motion for Summary Judgment on October 13, 2014.
7. The Undersigned entered an Order continuing the contested case hearing until December 15, 2014, on November 5, 2014.
8. The Undersigned entered an Order denying Respondent's Motion for Summary Judgment on November 13, 2014,
9. The parties stipulated to the following findings which were entered in the record on December 15, 2014:
 - a. All parties are properly before the OAH and the OAH has jurisdiction over the parties and the subject matter of this action.
 - b. At the time of the filing of the Petition, [REDACTED] qualified for special education and related services.
 - c. At the time of the filing of the Petition, [REDACTED] primary area of eligibility was [REDACTED].
 - d. [REDACTED] continues to qualify for special education and related services in the area of [REDACTED].
 - e. Petitioner is time-barred from challenging any WS/FCS action or failure to act prior to July 23, 2013.
 - f. The issue of least restrictive environment ("LRE") is not raised in Petitioner's Petition.

- g. The issue of whether [REDACTED] is receiving a free, appropriate, public education ("FAPE") is not raised in Petitioner's Petition.
- h. Neither party desires an amendment to the pleadings.

[REDACTED] Testimony

- 10. [REDACTED] enjoys activities such as doing artwork, watching television, swimming and playing games.
- [REDACTED] communicates with [REDACTED]
- 12. [REDACTED] is tired when he gets off of the bus.
- 13. [REDACTED] gets off the bus around 4:30 p.m. or 4:45 p.m. on some days.
- 14. [REDACTED] is not present at home every day when [REDACTED] gets off the bus,

[REDACTED] Testimony

- 15. [REDACTED] is a happy and loving boy.
- 16. [REDACTED] can communicate "hello" and can answer "yes" and "no."
- 17. When [REDACTED] was in elementary school he was given a choice of schools where he could be educated in a separate setting.
- 18. The choices included [REDACTED] Elementary School and [REDACTED] Elementary School.
- 19. [REDACTED] is in middle school.
- 20. The curriculum at [REDACTED] Middle School includes functional skills.
- 21. [REDACTED] bus route between his home and [REDACTED] Middle School is approximately fifty minutes in the morning and approximately forty minutes in the afternoon.
- 22. [REDACTED] Middle School is [REDACTED] neighborhood school.
- 23. [REDACTED] Middle School is closer to [REDACTED] home than [REDACTED] Middle School.

Other Findings of Fact and Conclusions of Law

- 24. Petitioner has the burden of proof to show that [REDACTED] IEP does not require him to be educated in a school other than his neighborhood school.
- 25. Petitioner has the burden to show that a school closer to her home can service [REDACTED] IEP.
- 26. Petitioner has failed to meet her burden on these issues.
- 27. Petitioner has not shown that there is a school closer to her that is able to service [REDACTED] IEP.
- 28. On a Motion for Involuntary Dismissal pursuant to Rule 41(b), the Undersigned must consider and weigh all the competent evidence before him, assessing the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom.

29. On such a Motion, the Undersigned is not required to view evidence in the light most favorable to Petitioner, and is free to make conclusive findings supported by competent evidence.
30. [REDACTED] IEP requires him to be educated somewhere other than his neighborhood school because it requires him to be placed in a separate school setting and to be educated on a functional curriculum.
31. The closest [REDACTED] can be educated to his home is [REDACTED] Middle School.
32. The Winston-Salem/Forsyth County Schools has met the requirements of NC 1501-3.3(c).
33. NC 1504-1.8 provides Petitioner the right to file a new petition at any time to raise issues not raised in the instant Petition, so long as such issues fall within the one-year statute of limitations.

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Undersigned hereby adjudges, decrees and orders as follows:

1. Petitioner's case is hereby involuntarily dismissed, and Petitioner shall have and recover nothing thereon.
2. Respondent is the prevailing party for the purposes of attorney's fees, costs, and litigation expenses.
3. Each party shall be solely responsible for their own attorney's fees, costs and litigation expenses.
4. Pursuant to NC 1504-1.8, Petitioner has the right to file a new petition at any time to raise issues not raised in the instant Petition, so long as such issues fall within the one-year statute of limitations.

NOTICE

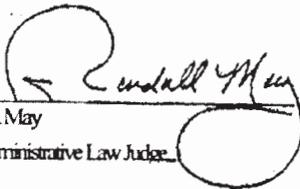
In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C106.1 *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 or G.S. 115C-109.8 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 from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

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

IT IS SO ORDERED.

This the 20th day of January, 2015.


J.R. May
Administrative Law Judge

On this date mailed to:

[REDACTED]

PETITIONER

ALLISON C TOMBERLIN
ATTORNEY AT LAW
P.O. BOX 2513
WINSTON SALEM NC 27102-2513

ATTORNEY FOR RESPONDENT

This the 20th day of January, 2015.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
Telephone: 919/431-3000
Fax: 919/431-3100