

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
18 EDC 07450

█ by parent or guardian █

Petitioner,

v.

Wake County Board of Education

Respondent.

**FINAL DECISION**

1. THIS MATTER is before the undersigned Administrative Law Judge upon the Motion to Dismiss ("Motion") filed by Respondent, Wake County Board of Education ("Board").

2. The Motion seeks dismissal of the above-captioned contested case pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure on the grounds that the Office of Administrative Hearings ("OAH") lacks subject matter jurisdiction over the claims raised by Petitioner in this action. The Motion further seeks dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that Petitioner has failed to state a claim for which the OAH may grant them relief.

3. For the reasons explained below, the Undersigned concludes that this contested case should be dismissed in its entirety.

█ by parent or guardian █ pro se.

*Tharrington Smith, LLP by Jason R. Weber for Respondent, Wake County Board of Education.*

I.

**PROCEDURAL BACKGROUND**

4. Petitioner, ██████ filed a Petition for Contested Case Hearing (“Petition”) *pro se* in this matter on behalf of her son, ██████ on 7 December 2018, and served it on the Superintendent of the Wake County Public School System on 14 December 2018.

5. Respondent promptly sought and received an extension of time to respond until 11 January 2019; it also filed a Motion to Continue Hearing requesting a continuance of the hearing date, in part, because of the extended response period and its continuing efforts to schedule a resolution meeting with Petitioner.<sup>1</sup>

6. Respondent timely filed a Response to Petition on 10 January 2019, and filed the Motion on that same day. Petitioner filed a Response to the Motion on 22 January 2019.

7. By Order dated 24 January 2019, the Undersigned determined that the Motion will be decided without oral argument pursuant to 26 N.C. Admin. Code 03.0115(b) and ordered both Petitioner and Respondent to submit a Proposed Final Decision on or before 8 February 2019.

II.

**STANDARD OF REVIEW**

8. Rule 12(b)(1) of the North Carolina Rules of Civil Procedure allows for the dismissal of a claim due to a lack of jurisdiction over the subject matter of the claim. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). In deciding a motion to dismiss for lack

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<sup>1</sup> Respondent’s Motion to Continue was granted by an order of the Undersigned issued on 16 January 2019.

of subject matter jurisdiction, a “trial court may consider and weigh matters outside the pleadings.” *Yeager v. Yeager*, 228 N.C. App. 562, 566, 746 S.E.2d 427, 430 (2013) (internal citations and quotations omitted).

9. The standard of review on a Rule 12(b)(6) motion is whether the allegations alleged in the complaint, taken as true, are sufficient to state a claim upon which relief may be granted. *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). In *Wood*, the North Carolina Supreme Court explained:

Dismissal under Rule 12(b)(6) is proper where one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact which necessarily defeats the plaintiff’s claim.

*Id.* When ruling on a Rule 12(b)(6) motion, the court “will not accept mere conclusory allegations on the legal effect of the events a plaintiff has set out if those allegations do not reasonably follow from the plaintiff’s description of what happened.” *Jordan v. Crew*, 125 N.C. App. 712, 718, 482 S.E.2d 735, 738 (1997).

### III.

#### FINDINGS OF FACT

10. Given the standard of review applicable to a Rule 12(b)(6) motion, the Undersigned accepts as true the facts pleaded in the Petition. The Undersigned nonetheless makes the following factual finds that are material to the resolution of the Motion. *See Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993), *aff’d*, 335 N.C. 234, 436 S.E.2d 588 (1993) (recognizing “the trial need not

make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.”)

11. The Petition commencing this contested case contains numerous references to a settlement agreement between Petitioner and Respondent.

12. In ¶ 9, which asks Petitioner to “[d]escribe the problem and the facts that support your Petition,” Petitioner states, in part:

*We had a settlement agreement and release of claims where an accommodations behavioral plan was not provided and observations in the classroom, speech, and OT while in session were not scheduled.*

Pet. ¶ 9 (emphasis added).

13. In ¶ 10, which asks Petitioner to “[d]escribe the resolution or remedy you are seeking,” Petitioner states, in part:

*This was the second settlement we have had with Wake county and each time they have hidden things from us . . .*

*. . .*

*With the animosity we feel toward us and our son from the assistant principal for special education the years trying to make Wake follow our settlements, the only remedy I see is for him to go to another school or have a different qualified teacher come to our home and teach him.*

Pet. ¶ 10 (emphasis added).

14. Attached to the Petition are a number of documents, including one labeled “2 of 3.” This document is specifically referenced in ¶ 9 of the Petition and contains the following notation: [REDACTED] by parent [REDACTED] Petitioners v. Wake County Public School System Board of Education Respondent, Admin Hearings 16 EDC 04959.

#### IV.

#### CONCLUSIONS OF LAW

15. The Undersigned makes the following Conclusions of Law for purposes of this Final Decision.

*A. Respondent's Rule 12(b)(1) Motion to Dismiss<sup>2</sup>*

16. Respondent, in the Motion, contends that "Petitioners' claims relate entirely to an alleged breach of [a] 2016 Settlement Agreement and should be dismissed as outside of the jurisdiction of the [OAH] pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure." (Motion, ¶ 9.) For the reasons explained below, the Undersigned concurs.

17. Prior to commencing the instant action, Petitioner commenced another contested case against Respondent in the OAH. The case was filed with the OAH on 13 May 2016 and docketed as: █████ by and through his mother █████ v. Wake County Public School System Board of Education, OAH case no. 16 EDC 04959.<sup>3</sup> It was later voluntarily dismissed with prejudice on 7 December 2016 as part of a Settlement Agreement and Release of Claims (the "Settlement Agreement"). (Motion, Ex. 3.) The Settlement Agreement became effective on 30 November 2016. (*Id.*)

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<sup>2</sup> This portion of the Final Decision draws several facts from the Motion in addition to those contained in the Petition and set forth in Section III, *supra*. Because Respondent seeks dismissal of this contested case on jurisdictional grounds, *see* ¶ 8, *supra*, the Undersigned concludes that it is appropriate to rely upon such matters in deciding this portion of the Motion.

<sup>3</sup> The same contested case is referenced in an attachment incorporated into Petitioner's response to ¶ 9 of the Petition, seeks a description of "the problem and facts that support your Petition." *See* ¶¶ 12 and 14, *supra*.

18. Petitioner seeks to invoke the jurisdiction of the OAH for the purpose of enforcing the Settlement Agreement. Petitioner filed this claim to contest an alleged breach of the Settlement Agreement. This conclusion is compelled by the face of the Petition, *see* ¶¶ 12 and 13, *supra*, as well as Petitioner [REDACTED]'s own admissions regarding the nature of this contested case. For example, in a communication to staff for Respondent dated 26 December 2018, Petitioner [REDACTED] stated, in part, that:

*My Due Process is a continuation of the settlement agreement which the school did not comply*

....

*This is not for a new IEP this is all about the settlement agreement not being met by the school.*

(Motion, Ex. 5.) (emphasis added). Petitioner [REDACTED] makes similar admissions in an email dated 3 January 2019 sent to counsel for Respondent and the Tribunal, *see* (Motion, Ex. 6.) (Petitioner [REDACTED] stating that “. . . this is an ongoing case 16-EDC-4959”), and at the Prehearing Conference held in this matter on 8 January 2018. (Petitioner [REDACTED] stating that the “settlement we had . . . is not being done” and the instant contest case was “based on the one before”).

19. “A settlement agreement is a contract resolving a dispute without a trial.” *Clayton v. Branson*, 170 N.C. App. 438, 450, 613 S.E.2d 259, 268 (2005). Here, the question raised by the Motion is whether the Tribunal has the authority to enforce such an agreement against Respondent in a subsequent due process contested case. Given the Tribunal’s jurisdiction, the Undersigned concludes that a due process hearing is not the proper vehicle to enforce a settlement agreement.

20. The OAH is an independent, quasi-judicial agency established as part of the executive branch of government and is vested with only those judicial powers necessary to accomplish the purposes for which it was created. *Employment Sec. Commn. v. Peace*, 128 N.C. App. 1, 8, 493 S.E.2d 466, 470 (1997). The North Carolina Administrative Procedure Act (“APA”) establishes a uniform system of adjudicatory procedures in OAH for state agencies, N.C. Gen. Stat. § 150B-1(a); it specifically excludes local units of government from its definition of “agency.” N.C. Gen. Stat. § 150B-2(1a). “Local school boards and local school administrative units are local government units, and, as such, are not “agencies” for the purpose of the APA.” *Thomas Jefferson Classical Academy Charter Sch. v. Cleveland Cnty. Bd. of Educ.*, 236 N.C. App. 207, 215, 763 S.E.2d 288, 295 (2014); *see also Coomer v. Lee Cnty. Bd. of Educ.*, 220 N.C. App. 155, 157, 723 S.E.2d 802, 803 (2012) (recognizing that “local boards of education are generally excluded from the requirements of the APA”). Because Respondent is a “local unit of government,” it is not an “agency” as defined by the APA. OAH therefore lacks jurisdiction to hear any claims brought against it *unless* such jurisdiction is specifically conferred by an “organic” statute outside of the APA. *See, e.g., Empire Power Co. v. N.C. Dept. of Environment, Health & Natural Resources*, 337 N.C. 569, 579, 447 S.E.2d 768, 774 (1994) (discussing prior North Carolina Supreme Court precedent recognizing that a petitioner could appeal to the OAH “only by virtue of another statute” where the appeal was “expressly exempted from the hearing provisions” of the APA).

21. The statute conferring jurisdiction on the OAH for claims against local boards of education, and which Petitioner relies upon in bringing this due process contested case, is N.C. Gen. Stat. § 115C-109.6(a). This provision sets forth the grounds upon which a party may file a due process petition with OAH. These grounds include “any matter relating to the *identification, evaluation, or educational placement* of a child, or the *provision of a free appropriate public education* of a child, or a *manifestation determination*.” N.C. Gen. Stat. § 115C-109.6(a) (emphasis added). The Tribunal’s scope of review in due process hearings *is limited* to those grounds set out in subsection (a) of General Statute 115C-109.6. N.C. Gen. Stat. § 115C-109.6(b).

22. In this action, Petitioner seeks review of a matter outside of the limited scope of subsection (a) of General Statute 115C-109.6. Petitioner seeks to enforce the provisions of the Settlement Agreement in this due process contested case. An enforcement dispute of this nature is purely a matter of determining Respondent’s obligations under the Settlement Agreement and is governed by “established rules relating to contracts.” *Clayton*, 170 N.C. App. at 450, 613 S.E.2d at 268 (internal citations omitted). It therefore does not concern the “*identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education of a child, or a manifestation determination,*” and, as such, it is a dispute that is outside the jurisdiction of this Tribunal in a due process contested case.

23. Indeed, the Tribunal has previously recognized its lack of jurisdiction over breach of settlement agreement claims in due process contested cases. *See O. V., by his parents, P. V. and M. P. v. Durham Pub. Sch. Bd. of Ed*, OAH case no. 15-EDC-



05966 (2016) (Order entered by Administrative Law Judge Augustus B. Elkins, II, on January 6, 2016, granting Durham Public School's Motion for Partial Summary Judgment). This is consistent with rulings from other courts that have been presented with the same issue. *See, e.g., Sch. Bd. of Lee County v. M.C.*, 796 So.2d 581, 581-83 (Fla. Dist. Ct. App. 2001) (affirming that the Florida OAH lacked jurisdiction to set aside an agreement settling a previous due process petition); *see also D.B.A. ex rel. Snerling v. Special Sch. Dist. No. 1, Minneapolis, Minn.*, 2010 WL 5300946, at 4 (D. Minn. Dec. 20, 2010) ("It is certainly true that a Hearing Officer has no authority to enforce settlement agreements . . . . Yet there is no such prohibition on a Hearing Officer's ability to review and interpret a settlement agreement for the purposes of determining whether jurisdiction exists.")

24. Although the Undersigned's conclusion appears to leave Petitioner without a venue to enforce the Settlement Agreement against Respondent, it does not. Section 6. I of the Settlement Agreement specifically provides:

The parties agree that this Agreement may be enforced as a contract *by a court of competent jurisdiction in the State of North Carolina, or by the North Carolina Department of Public Instruction* through the state complaint process pursuant to the Policies Governing Services for Children with Disabilities, NC 1504-2.8.

(Motion, Ex. 3 at p. 7 (emphasis added).) Petitioner therefore has a procedural mechanism to seek the relief requested in this contested case – enforcement of the Settlement Agreement – to the extent Petitioner satisfies any necessary conditions precedent for bringing such an action in the venues contemplated under the terms of the Settlement Agreement.

25. For the reasons discussed above, the Undersigned concludes that Respondent's Rule 12(b)(1) motion to dismiss for a lack of subject matter jurisdiction over the instant contested case should be granted.

**B. Respondent's Rule 12(b)(6) Motion to Dismiss**

26. Respondent further argues that dismissal is warranted under Rule 12(b)(6) because Petitioner fails to state a claim for relief under General Statute 115C-109.6 and other applicable law (*e.g.*, IDEA). (Motion, ¶¶ 23-30.) Again, the Tribunal concurs with Respondent.

27. "A motion to dismiss under [Rule 12(b)(6)] generally tests the legal sufficiency of the complaint: Has the pleader given notice of such facts as will, if true, support a claim for relief under some legal theory?" *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E. 2d 137 (1986). Notice is particularly important in due process hearings because a "party requesting the hearing may not raise issues that were not raised in the petition" without the agreement of the other party. N.C. Gen. Stat. § 115C-109.6(b).

28. As explained, in due process hearings, the Tribunal is expressly granted jurisdiction over "any matter relating to the *identification, evaluation, or educational placement* of a child, or the *provisions of a free appropriate public education* of a child, or a *manifestation determination*." N.C. Gen. Stat. § 115C-109.6(a) (emphasis added).

29. Petitioner indicated on the Petition that this dispute concerned: (i) the evaluation of a child, (ii) the placement of a child, (iii) the denial of FAPE and (iv) other matters. *See* Pet., ¶ 8. The Petition, however, fails to allege any specific facts relating to such matters. While the Petition does allege that Respondent failed to take certain actions with regards to providing a behavioral plan and certain other matters, these allegations are made in the context of Respondent acting in violation of the Settlement Agreement<sup>4</sup> and Petitioner now seeking an alternative placement (*e.g.*, going to another school or having a different teacher instruct ██████ as a remedy after “years of trying to make [Respondent] follow [their] settlements.” *See* Pet., ¶ 10. Again, the Tribunal has no jurisdiction over such enforcement matters, which includes determining the proper remedy for the breach of a settlement agreement, in a due process contested case. *See supra*. The Petition, therefore, fails to state a claim for which the Tribunal can grant relief and should also be dismissed pursuant to Rule 12(b)(6). *See, e.g., Wood*, 355 N.C. 161, at 166, 558 S.E.2d at 494 (a complaint which “on its face reveals the absence of facts sufficient to make a good claim” should be dismissed.)

## V.

### FINAL DECISION

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<sup>4</sup> *See, e.g.,* Pet. ¶ 9 (Petitioner asserts that, in violation of the Settlement Agreement, Respondent did not provide a behavior plan, did not invite Petitioner to observe ██████’s classroom, speech therapy, and occupational therapy sessions, and held only two parent-teacher conferences. Petitioner also asserts that Respondent did not provide homework, data sheets, grades, artwork, or teacher notes.)

30. WHEREFORE, based on the foregoing reasons, the Tribunal concludes that it lacks subject matter jurisdiction over Petitioner's claim regarding the alleged breach of the Settlement Agreement and, because the Petition essentially only seeks relief in the form of enforcement of the Settlement Agreement, Petitioner also fails to state a claim for which the Tribunal can grant relief. The Tribunal, therefore, GRANTS the Motion. The instant due process contested case is hereby DISMISSED pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure without prejudice.

31. Having concluded that this contested case should be dismissed, the Tribunal does not address Respondent's claims, raised in the alternative, regarding the statute of limitations. (*See* Motion, ¶ 31.)

## VI.


### NOTICE OF APPEAL RIGHTS

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 dismissal.

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 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 the State Board's designee, further notices and/or additional time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

SO ORDERED, this the 6th day of March, 2019.



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Tenisha S Jacobs  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:



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This the 6th day of March, 2019.

A handwritten signature in cursive script, reading "Jerrod Godwin", positioned above a solid horizontal line.

Jerrod Godwin  
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