FILED
OFFICE OF ADMINISTRATIVE HEARINGS
11/13/2018 5:00 PM

STATE OF NORTH CAROLINA

COUNTY OF CRAVEN

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
18 EDC 03723

[redacted] by and through his parent [redacted] Petitioners, v. Craven County Public Schools Board of Education Respondent.	**FINAL DECISION**

THIS MATTER comes before the Undersigned on Respondent's Motion for Summary Judgment, Petitioners' Motion for Sanctions and ALJ Intervention, and Respondent's Motion to Strike. Petitioners filed the Petition for Contested Case Hearing on or about June 20, 2018. Respondent filed a timely Response on July 9, 2018 pursuant to the Order Extending Time issued by Administrative Law Judge ("ALJ"), Stacey Bawtinhimer, on July 3, 2018. Petitioners filed a Motion for Sanctions Pursuant to Rule 11 and Motion for ALJ Intervention Pursuant to 34 CFR § 300.510(B)(5) on July 31, 2018. Respondent filed a Response to Petitioner's Motion for Sanctions and ALJ Intervention and a Motion to Strike on August 6, 2018. Respondent filed a Motion for Summary Judgment on August 17, 2018. Petitioners responded to Respondent's Motion to Strike and Motion for Summary Judgment on August 30, 2018. A hearing on all motions was held on September 10, 2018.

STANDARD OF REVIEW

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law.'" *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing N.C.R. Civ. P. 56(c)). A court ruling on a motion for summary judgment must view all the evidence in the light most favorable to the non-movant. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). The moving party bears the initial burden of identifying evidence "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In addition to presenting evidence affirmatively on a material issue, the moving party may also satisfy this burden by pointing out "an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once this initial burden has been met, "a plaintiff must offer evidence of each essential element of negligence beyond mere speculation or conjecture." *Anderson v. Housing Authority*, 169 N.C. App. 167, 172, 609 S.E.2d 426, 429 (2005). "Once the party seeking summary judgment

makes the required showing, the burden shifts to the nonmoving 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). "The real purpose of summary judgment is to go behind or pierce the pleadings to determine if a case has any merit." *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Matters

1. Petitioners' Motion for Sanctions Pursuant to Rule 11 is denied. In the prayer for relief, Petitioners request that "Respondent pay Petitioners attorneys' fees related to the resolution meeting, striking Respondent's Answer, deem all matters averred in the Petition as true, and hold a hearing solely for the determination of damages including statutorily appropriate attorney fees." Petitioners failed to establish the application of Rule 11 to Respondent's failure to hold a resolution meeting within fifteen days of receipt of the Petition. Moreover, in accordance with N.C.G.S. §§ 115C-109.6(j) the State Board of Education through the Exceptional Children Division and the Office of Administrative Hearings ("OAH") were required to develop and enter into a binding memorandum of understanding ("MOU"). In that MOU, under Section 4, the OAH agreed that the Administrative Law Judges would not utilize the practice of imposing monetary sanctions (as well as award attorneys' fees which are further not authorized by federal law) in special education due process cases.

2. Respondent's Motion to Strike Petitioners' Motion for Sanctions is denied.

3. Petitioners' Motion for ALJ Intervention Pursuant to 34 CFR 300.510 is denied because it is moot. The cited regulation allows the Administrative Law Judge ("ALJ") to intervene to start the hearing timeline, but hearing had already been set in this matter, by consent of the Parties, prior to the filing of Petitioners' motion.

Respondent's Motion for Summary Judgment

A. Claims Arising Prior to June 21, 2017

1. Petitioner [redacted] attended [redacted] Elementary School ("[redacted] a public school in Craven County, during the 2015-2016 and 2016-2017 school years.

2. At the end of May 2017, Petitioner [redacted] told [redacted]s teacher she was considering withdrawing him from public school to home school him. Affidavit of [redacted] ¶57. "Around the beginning of June 2017" Petitioner [redacted] told the teacher she was "leaning towards enrolling [redacted] into a private school" or home schooling. *Id.*at ¶ 59. [redacted] states she did this because she believed [redacted] was not making progress and the school was not doing all they could to help him. *Id.*

3. Petitioner [redacted] enrolled [redacted] in a private school, [redacted] ("[redacted] after the end of the 2016-2017 school year. He attended [redacted] for the 2017-2018 school year.

4. Petitioners allege that Respondent violated its Child Find obligation by failing to identify [redacted] as a student with a disability and provide special education and related services during the 2015-2016 and 2016-2017 school years, while he attended [redacted]

5. Petitioners later withdrew all Individuals with Disabilities Education Act ("IDEA") related claims for the 2015-2016 school year.

6. Petitioners' remaining claims regarding Child Find and a deprivation of a free and appropriate public education ("FAPE") while he was enrolled in the Craven County Schools during the 2016-2017 school year are time-barred by the North Carolina one-year statute of limitations. N.C.G.S. § 115C-109.6(b).

7. A party filing a petition for contested case hearing with the Office of Administrative hearings must do so within one year of the time the party knew or reasonably should have known about the alleged action that forms the basis of the petition. N.C. Gen. Stat. § 115C-109.6(b). A cause of action under the IDEA arises when petitioners "knew of the facts that gave rise to th[e] injury, whether or not they knew they were actionable." *Richards v. Fairfax County Sch. Bd.*, 798 F. Supp. 338, 341 (E.D. Va. 1992).

8. In the Petition and in the Affidavit of Petitioner [redacted] Petitioner establishes that she had knowledge of the facts giving rise to her Petition prior to the end of the 2016-2017 school year. Petition ¶ 31 ("[a]t the end of the 2016-2017 school year, [redacted] informed [redacted] that she was transferring [redacted] to [redacted] for the 2017-2018 school year, primarily because they would not test him to determine if he had a disability or need specialized instruction."); *See also,* Affidavit of [redacted] ¶35-37 (during a conference in December 2016, [redacted] teacher told [redacted] that he "struggled in every area" and she did not have the time to reteach him); ¶39 (in January or February of 201 [redacted] teacher "tested" [redacted] and informed his mother that his scores were "lower than his first grade year"); ¶53-54 (in mid-April [redacted] [redacted] told his teacher she was concerned because he was not making progress and was struggling in

school). The Petition and affidavit of [redacted] establish that [redacted] was aware of her concerns about [redacted]s academic progress at the time they arose during the 2016-2017 school year; they were not discovered sometime later.

9. The last day, or "the end" of the 2016-2017 school year was June 9, 2017. *See* N.C.G.S. § 115C-84.2(d) (the last day of school "shall be no later than the Friday closest to June 11"). Petitioner did not file a due process petition until June 20, 2018, more than one year after the time Petitioner knew or reasonably should have known about the alleged action that forms the basis of the petition. N.C. Gen. Stat. § 115C-109.6(b); N.C. 1504-1.12(e).

10. The IDEA contains two specific exceptions to the one-year statute of limitations. 20 U.S.C. §1415(f)(3)(C), (D); 34 C.F.R. §300.511(e), (f); N.C. Gen. Stat. §115C-109.6(c).

11. The one-year limitations period "shall not apply to a parent if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent." 20 U.S.C. § 1415(f)(3)(D); N.C.G.S. § 115C-109.6(c).

12. For the misrepresentation exception, Petitioners "must show that the school intentionally misled them or knowingly deceived them regarding their child's progress." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 246 (3d Cir. 2012).

13. For the withholding exception, "only the failure to supply statutorily mandated disclosures can toll the statute of limitations. Plaintiffs can satisfy this exception only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 246 (3d Cir. 2012).

14. In addition, a petitioner "must also show that the misrepresentations or withholding *caused* her failure to request a hearing or file a complaint on time." *Id.* (emphasis in original).

15. The Petition does not invoke either exception to the statute of limitations. However, Petitioner argues that she sufficiently pled facts which would support application of the exceptions.

16. Petitioners failed to plead facts or produce sufficient evidence to support a finding that Respondent intentionally misled Petitioners or knowingly deceived them regarding the

matter forming the basis of their Petition, or that Respondent had resolved the problem forming the basis of the Petition.

17. In the Petition and affidavit of [redacted] Petitioner identifies numerous instances during the 2016-2017 school year when she alleges school staff members failed or refused to resolve the issues in response to her complaints. *See* Affidavit of [redacted] ¶23-25 (Petitioner alleges that during an October 2016 meeting with the principal to discuss [redacted]s concerns about [redacted]s lack of progress, the Principal stated, "there was nothing she could do at this time"), (Petitioner [redacted] alleges she threatened the principal that she would complain to the Craven County Board of Education because [redacted] had not yet been "tested."); and ¶ 57-59 (Petitioner states that at the end of May 2017 and first week of June 2017, [redacted] expressed to his teacher that she was considering homeschooling [redacted] and then that she was considering enrolling him in private school, and the teacher simply responded that it "was a good idea").

18. Moreover, Petitioners assert in their Petition that staff and parent repeatedly discussed concerns over [redacted] academic progress and were frank with [redacted] about his academic struggles.

19. Petitioner's own allegations and evidence preclude a finding that Respondent intentionally mislead or knowingly deceived [redacted] about the progress [redacted] was making or that it had resolved her concerns regarding his academic progress.

20. Petitioners did not produce evidence in response to Respondent's Motion for Summary Judgment of specific misrepresentations that would meet the requirements of 20 U.S.C. § 1415(f)(3)(D). Further, Petitioners failed to allege or submit evidence that Petitioner [redacted] was prevented from filing a timely Petition by any specific misrepresentation by Respondent.

21. Respondent has met its burden in submitting sufficient evidence that Respondent did not intentionally mislead Petitioners or knowingly deceive them regarding [redacted]s progress.

22. Petitioner [redacted] failed to allege or produce evidence demonstrating that Respondent withheld statutorily mandated information which prevented her from filing a timely petition regarding the 2016-2017 school year.

23. The withholding exception to the statute of limitations addresses the IDEA requirement that school districts provide parents with prior written notice and procedural safeguards. *D.K. v. Abington Sch. Dist.* at 246. School districts must provide parents with prior written notice whenever it proposes or refuses to initiate or change the identification, evaluation or

educational placement of a child. *See* 20 U.S.C. §1415(b)(3); 34 CFR §300.503(a). School districts must provide parents with a complete explanation of the IDEA procedural safeguards upon the occurrence of one of the following events: (1) upon initial referral or parental request for evaluation; (2) upon the first occurrence of the filing of a due process complaint; and (3) upon request by a parent. *D.K. v. Abington Sch. Dist.* at 246; *see also* 20 U.S.C. § 1415(d)(1)(A).

24. The Petition contains no allegation that Respondent failed to provide statutorily mandated written notice or procedural safeguards.

25. Respondent produced evidence that Petitioner did not specifically request an evaluation under the IDEA during the 2016-2017 school year that would trigger Respondent's statutory duty to provide written notice or procedural safeguards. *See* Motion for Summary Judgment (Affidavits of [redacted] and [redacted]). Although Petitioner [redacted] alleges that she asked for [redacted] to be "tested" at various times, she produced no evidence to support her contention that Respondent's staff should have understood this to be a request for an evaluation under the IDEA, as opposed to a general question about regular education testing provided to all students.

26. Even if Respondent were required to provide procedural safeguards, Petitioner did not demonstrate that Respondent's failure to do so prevented her from timely requesting a due process hearing. Accordingly, Petitioners have not alleged facts that would support application of the exceptions in 20 U.S.C. § 1415(f)(3)(D) or N.C.G.S. § 115C-109.6.

27. This Tribunal is granted limited subject matter jurisdiction by statute and lacks jurisdiction to hear any claims falling outside the one-year statute of limitations established by N.C.G.S. § 115C-109.6. Because Petitioners' claims from the 2016-2017 school year do not fall within the applicable one-year statute of limitations, and no statutory exceptions apply, all claims from the 2016-2017 school year are dismissed in their entirety for lack of subject matter jurisdiction.

B. Claims Arising During the 2017-2018 School Year

1. Petitioner, [redacted] enrolled [redacted] in [redacted] ("[redacted] a [redacted] school in Craven County, for the 2017-2018 school year.

2. Petitioners claims that Respondent (a) failed to provide FAPE during the 2017-2018 school year, (b) failed to develop an appropriate Private School Services Plan ("PSSP"), and (c)

denied parents the opportunity to participate in the development of [redacted] PSSP are all outside OAH's jurisdiction and fail to state a claim reviewable by this tribunal.

3. When Petitioner, [redacted] enrolled [redacted] in [redacted] [redacted] became a "parentally-placed private school student" as defined by the IDEA. *See* 34 C.F.R. 300.130. Districts are not required to provide FAPE to parentally-placed private school students. 34 C.F.R. § 300.137.

4. The IDEA places two obligations on the Craven County Schools with regard to children with disabilities enrolled by their parents in private schools within Craven County:
   a. [redacted] "locate, identify, and evaluate" such children (34 C.F.R. 300.131(a)); and
   b. "[t]o the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district," make provision "for the participation of those children in the program assisted or carried out under Part B of the Act". 34 C.F.R. § 300.132(a).

5. Unlike public school students, LEA's do not have an obligation to provide a Free, Appropriate Public Education ("FAPE") to parentally-placed private school students; the law requires only that the LEA expend a "proportionate amount of Federal funds" provided to the local educational agency ("LEA") under the IDEA on services to private school students. 34 C.F.R. § 300.133 *et seq.*

6. "No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a); *see also Gary S. v. Manchester Sch. Dist*., 241 F. Supp. 2d 111, 114 (D.N.H. 2003), *aff'd*, 374 F.3d 15 (1st Cir. 2004) ("it is now beyond reasonable dispute that a disabled child who has been placed by his parents in a private school does not have an individually enforceable right to receive special education and related services."); *accord, D.L. ex rel. K.L. v. Baltimore Bd. Of Sch. Commissioners*, 706 F.3d 256, 260 (4th Cir. 2013).

7. While Respondent has no FAPE obligation to parentally-placed private school students, the IDEA does require Respondent to spend a proportionate amount of the district's IDEA funds on "equitable services" to these students.

8. The LEA makes the final decision regarding the services to be provided to an eligible child in accordance with that child's proportionate share of Federal funds. 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. §§ 300.132, 137. Due process procedures may not be used to raise complaints that an LEA has failed to meet the requirements of 20 U.S.C. § 1412(a)(10)(A) regarding the provision of equitable services to parentally-placed private

school students. 34 C.F.R. § 300.140. Accordingly, the OAH does not have jurisdiction over Petitioners' claims regarding PSSP development or for particular services Petitioners claim [redacted] should have received from the Craven County Schools.

9. Petitioners' sole reviewable claim regarding the 2017-2018 school year is Respondent's alleged violation of its Child Find obligation. Petitioners claim that Respondent failed to fulfill its Child Find obligation by failing to timely identify and evaluate [redacted] during the 2017-2018 school year.

10. Petitioners allege that two requests for an evaluation were made to Respondent: one verbal request by a staff member of [redacted] private school in November 2017, and one written request by Petitioner [redacted] on February 21, 2018 via email. Petitioner alleges that Respondent failed to initiate the referral and evaluation process in a timely manner after Petitioner made these requests.

11. Respondent submitted undisputed evidence that it did initiate an evaluation of [redacted] in April 2018. *See* Motion for Summary Judgment (Affidavit of Lynn Hardison). The evaluation was completed, and he was found eligible as a student with a disability under the IDEA on July 12, 2018.

12. For a parentally placed private school student such as [redacted] a comprehensive evaluation and eligibility determination is the only available remedy for a Child Find violation, and that remedy has been provided.

13. At the time the Petition was filed, a comprehensive evaluation was already underway, and eligibility was determined shortly thereafter, leaving no further issues for this Tribunal to resolve. *See Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 158 (1st Cir. 2004), *abrogated on other grounds by Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009) ("Once Greenland identified Katie as a child with a disability in September 2001, the district had performed every act reviewable by a hearing officer; any subsequent obligations it had to provide educational services to Katie were matters for the state administrative procedure . . . ").

14. The OAH has no authority to award compensatory education services to compensate for a possible delay in the provision of equitable services to a parentally-placed private school student. First, any provision of compensatory education would necessarily involve a determination that [redacted] has an individual entitlement to any particular services from Respondent. The OAH may not make such a determination. *See* 34 C.F.R. § 300.137(a) ("No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive

if enrolled in a public school)." An award of compensatory education is not within the OAH's power in response to a parentally-placed private school "child find" claim. *See P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.,* 585 F.3d 727, 731-38 (3d Cir. 2009) (where student remained at private school throughout the period of alleged delay in evaluating and therefore had no individual entitlement to special education services, delay was purely a procedural error and "a procedural violation alone cannot support a compensatory education award.").

15. As in *Michael P.,* Petitioner in this case does not allege that had the evaluation been timely, she would have transferred [redacted] back to the Craven County School District, but clearly intended for [redacted] to remain at his private school throughout the 2017-2018 school year. Even when offered an IEP in July 2018, Petitioner declined and chose to keep [redacted] in his private school. Therefore [redacted] had no individual entitlement to special education services, and the delay was purely a procedural error, which alone cannot support a compensatory education award. *Michael P* at 738.

16. Even if the OAH had jurisdiction to award compensatory services for a delayed evaluation, the matter would be moot in this case because the remedy has already been provided. *See McAdoo v. Univ. of N. Carolina at Chapel Hill*, 225 N.C. App. 50, 68, 736 S.E.2d 811, 823 (2013) (a case will become moot and subject to dismissal when a plaintiff has "effectively obtained the relief sought"). It is undisputed that Respondent offered [redacted] compensatory services in an amount greater than the amount of services [redacted] could have received if the evaluation timeline had started as of the first date [redacted] alleges she sent a written request. *See* Policies Governing Services for Children with Disabilities NC 1503-2.2.

17. "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Simeon v. Hardin,* 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994); *see also Beason v. N. Carolina Dep't of Sec'y of State,* 741 S.E.2d 663, 666 (N.C. Ct. App. 2013) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.")

18. Because Craven County Schools has identified and evaluated [redacted] Respondent has already provided the only relief available to Petitioners for the alleged Child Find violation, and the Petition contains no claim reviewable by this Tribunal. *See Greenland* at 158. Accordingly, Respondent is entitled to judgment as a matter of law.

19. Finally, Petitioner accuses Respondent of treating [redacted] differently during the identification, testing and evaluation process because [redacted] is African American and enrolled in a predominately African American private school. Petitioners' claims of racial discrimination standing alone were not shown to be "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.G.S. 115C-109.6(a). Petitioners produced no evidence to substantiate these claims in response to Respondent's Motion for Summary Judgment.

FINAL DECISION

IT IS HEREBY ordered and adjudged that Petitioner's claims arising from the 2016-2017 school year and before are dismissed as they are untimely and outside the relevant statute of limitations, and no exceptions apply.

FURTHER, Respondent is entitled to summary judgment on Petitioner's "child find" claim arising from the 2017-2018 school year because it is moot. Petitioner's other claims arising from the 2017-2018 school year are outside the jurisdiction of the Office of Administrative Hearings and can only be raised in a state complaint. Based on the foregoing and pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, it is therefore ordered that summary judgment is entered in favor of Respondent.

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. §§ 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."

This Final Decision was served on the parties as indicated on the Certificate of Service

attached to this Final Decision.

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 close of the appeal filing period.

IT IS SO ORDERED.

This the 13th day of November, 2018.

Augustus B Elkins II
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:

Saleisha Nadia Averhart Esq.
Bowens & Averhart, PLLC
saleisha@bowens-averhart.com
Attorney For Petitioner

Stephon John Bowens
Bowens & Averhart, PLLC
stephon@bowens-averhart.com
Attorney For Petitioner

Teresa Silver King
NC Department of Public Instruction
due_process@dpi.nc.gov
Affiliated Agency

Eva Blount DuBuisson
Tharrington Smith, LLP
eva@tharringtonsmith.com
Attorney For Respondent

Catherine Rogers Laney
Tharrington Smith, LLP
claney@tharringtonsmith.com
Attorney For Respondent

This the 13th day of November, 2018.

Lisa J. Garner
North Carolina Certified Paralegal
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Telephone: 919-431-3000