

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 EDC 03374

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| <p>█ by parent or guardian █ Petitioner,</p> <p>v.</p> <p>Wake County Board of Education Respondent.</p> | <p>FINAL DECISION INVOLUNTARY DISMISSAL WITHOUT PREJUDICE</p> |
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This matter comes on for consideration of the Undersigned's Order Requiring Petitioners' Attorney to Meet *Pro Hac Vice* Requirements (the "Order") which was filed on September 2, 2020. Petitioners' legal counsel Peter G. Albert and Patrick G. Donohue filed a contested case petition filed on Petitioners' behalf. Petitioners' attorneys were given until September 16, 2020 to comply with this Order and have failed to do so. This matter is ripe for adjudication and the Undersigned makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A contested case petition ("Petition") was filed on August 31, 2020 for the Petitioners by their attorneys Peter G. Albert and Patrick G. Donohue. Among other claims, Petitioners contend that Respondent Wake County Public Schools failed to provide █ a student with special needs, with a free appropriate public education.

2. This involuntary dismissal makes no findings or conclusions as to the validity of Petitioners' claims or this Tribunal's jurisdiction over any of those claims.

3. This action is being dismissed only because of the unauthorized practice of law by Petitioners' legal counsel and their failure to comply with the Order which would have permitted them to lawfully represent the Petitioners. In the Order, Petitioners were advised that this matter would be dismissed without prejudice if their counsel failed to comply.

4. In the Petition, both Peter G. Albert and Patrick G. Donohue represented that they jointly represented the Petitioners "collectively" as their legal counsel. Both Mr. Albert and Mr. Donohue appear to be located in the State of New York. Although neither of them referenced their New York State Bar license number, appear to be attorneys licensed in New York. However, neither attorney represents that they are licensed in the State of North Carolina.

5. An Order Requiring Petitioners' Attorney to Meet *Pro Hac Vice* Requirements (the "Order") which was filed on September 2, 2020. Petitioners' attorneys were given until September 16, 2020 to comply with this Order.

6. The Order was mailed to both of Petitioners' attorneys at the addresses listed in the Petition. The addresses listed for Petitioners' legal counsel in the Petition were:

Peter G. Albert
Brain Injury Rights Group, Ltd
300 East 95th Street Suite 130
New York, N.Y. 10128

Patrick G. Donohue
Patrick Donohue Law Firm, PLLC
140 Riverside Boulevard Apt 1209
New York, N.Y. 10069

7. According to the docket listings, Patrick Donohue's Order was "Returned to Sender" and "Undeliverable." All of the prior orders issued by this Tribunal to Mr. Donohue were also returned as undeliverable.

8. An attorney practicing in the Office of Administrative Hearings ("OAH") is responsible for ensuring that his/her mailing address is correct. According to the North Carolina Administrative Code, all pleadings filed with OAH must have the preparer's mailing address. 26 NCAC 02C .0101 (c). In addition, the attorney has the continuing obligation to notify OAH of his/her current address. 26 NCAC 02C .0120(c)&(d). Mr. Donohue has failed to comply with these directives.

9. However, Mr. Donohue's co-counsel, Peter G. Albert, was also served separately with the Order as well as all other notices and orders in this contested case. None of the orders or notices served on Mr. Alberts at his address have been returned as undeliverable. As the attorneys are acting as co-counsel and jointly representing the Petitioners, Mr. Donohue's co-counsel has been served; therefore, Mr. Donohue has also been considered to have been served with the Order.

10. Both of Petitioners' legal counsel are out-of-state lawyers. An out-of-state lawyer cannot practice law in this State unless duly licensed by the State of North Carolina or is allowed to practice *pro hac vice* pursuant to N.C. Gen. Stat. § 84-4.1 while associated with a North Carolina licensed attorney. In addition, lay advocates are not permitted to represent Petitioners in any administrative (including special education) contested cases in the North Carolina Office of Administrative Hearings.

11. Prior to filing a motion for permission to practice *pro hac vice* in this Tribunal, an attorney seeking *pro hac vice* admission must show that the attorney has met all the requirements of N.C. Gen. Stat. § 84-4.1 including the payment of fees to State Treasurer of North Carolina for support of the General Court of Justice and to the North Carolina State Bar. The out-of-state attorney must also associate with an active member in good standing with the North Carolina State Bar. Neither Mr. Albert nor Mr. Donohue complied with the *pro hac vice* admission requirements prior to filing the Petition. Since that time, they have not complied with the *pro hac vice* admission requirements even after being ordered to do so.

12. Messrs. Albert and Donohue were advised in the Order that none of their filings would be considered until the *pro hac vice* conditions had been met. To do otherwise would be aiding and abetting Petitioners' attorneys in the unauthorized practice of law and potentially subject the Undersigned and Petitioners' attorney to criminal charges. N.C. Gen. Stat. § 84-10.1 (aiding and abetting is a criminal action); N.C. Gen. Stat. § 84-8 (unauthorized practice of law is a Class 1 misdemeanor).

13. On or before September 16, 2020, Petitioners' legal counsel were ordered to meet all the requirements of N.C. Gen. Stat. § 84-4.1 and pay the applicable fees and then to file a motion for *pro hac vice* status. Otherwise, they were advised that the Petition would be dismissed without prejudice on September 17, 2020. Petitioners have failed to comply with this Order.

14. Involuntary dismissal under Rule 41(b) is proper if the parties fail to comply with rules and orders of this Tribunal. Petitioners, through their legal counsel, have failed to comply with the rules and orders of the Undersigned. Moreover, the contested case petition was unlawfully filed by the Petitioners' attorneys because they are not duly licensed to practice law in the State of North Carolina and have not availed themselves of the *pro hac vice* admission provisions which would have allowed them to represent the Petitioners in this action.

15. No lesser sanction would be permissible in this situation where a criminal act has occurred in the filing of a contested case petition

16. Moreover, pursuant to Rule 41(b), Petitioners are not prejudiced by this dismissal because they may file a new action based on the same claim with one year or less after this dismissal.

FINAL DECISION

THEREFORE, based on the above, it is hereby **ORDERED** that the contested case petition be **DISMISSED WITHOUT PREJUDICE**.

MOREOVER, because Petitioners' legal counsel are not appropriately before this Tribunal, the Petitioners **SHALL BE SERVED** with a copy of this Final Decision at their address given in the Petition as: [REDACTED]

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 timelines 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 22nd day of September, 2020.



Stacey Bice Bawtinheimer
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:

Peter G Albert
Brain Injury Rights Group Ltd
300 East 95th Street Suite 130
New York NY 10128
Attorney For Petitioner

Patrick Donohue
Patrick Donohue Law Firm PLLC
140 Riverside Boulevard Apt 1209
New York NY 10069
Attorney For Petitioner



Parent

Carolyn A Murchison
Tharrington Smith LLP
cmurchison@tharringtonsmith.com
Attorney For Respondent

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

This the 22nd day of September, 2020.



Anita M Wright
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