

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 EDC 02035

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| <p>█ by parent or guardian █ and █ Petitioner,</p> <p>v.</p> <p>Corvian Community School Respondent.</p> | <p>FINAL DECISION ORDER OF DISMISSAL</p> |
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THIS MATTER is before the undersigned Administrative Law Judge on Respondent's Second Motion to Compel and for Sanctions. Petitioner filed a Response. Oral argument was heard on the record on August 18, 2021. After hearing the arguments of Counsel and reviewing the entire record herein, the Undersigned finds and decides as follows.

FINDINGS OF FACT

1. On June 3, 2021, Corvian issued its First Set of Discovery Requests to Petitioner that included standard interrogatory and production requests related to potential expert witnesses. Petitioner responded that no expert witnesses had been identified on June 18, 2021.

2. On July 7, 2021, Respondent filed its first Motion to Compel and to Limit Witnesses. Petitioner filed a Response.

3. On July 8, 2021, Corvian issued a Second Set of Discovery Requests for documents relating to Petitioner and 13 individuals and entities that Corvian might have expected to be named as expert witnesses. It also sought social media posts (and raw video footage of those posts) by Petitioner's parents relating to his time at Corvian.

4. On July 21, 2021, the undersigned entered an Order Compelling Discovery Responses.

5. Petitioner did not provide a response to the Second Set of Discovery Requests on the due date of July 23, 2021.

6. On August 2, 2021, the undersigned heard oral argument and granted Respondent's first Motion for Sanctions. A written Order was entered on August 3, 2021, banning Petitioner from using expert witnesses as a sanction for failing to comply with the Order Compelling Discovery entered on July 21, 2021. The undersigned did not ban the use of the 16 individuals as fact witnesses by the Petitioner's counsel as requested in oral argument.

7. Even though Petitioner's counsel argued to salvage those 16 witnesses as fact witnesses, he still has not fully complied with the Order Compelling Discovery Responses entered on July 21, 2021. He has only recently begun producing documents after Respondent filed the within Second Motion to Compel.

8. Of the 16 proposed expert witnesses named by Petitioner, at least six were named in Corvian's Second Set of Discovery Requests. Petitioner provided no requested documents relating to Petitioner and the named individuals when he responded on July 30, 2021.

9. Petitioner produced a few documents from M [REDACTED], R [REDACTED], and K [REDACTED] on August 9th and 12th, weeks after having been ordered to do so in this tribunal's July 21st Order Compelling Discovery was granted and a week after Corvian filed its Second Motion to Compel and for Sanctions.

10. Also on August 2, 2021, Corvian filed a Second Motion to Compel Discovery and for Sanctions concerning discovery related to social media postings by [REDACTED]

11. On the morning of August 18th, the date oral argument was scheduled on Corvian's Second Motion for Sanctions, Petitioner's counsel produced records relating to Petitioner and [REDACTED].

12. During the August 18th hearing, Petitioner's counsel admitted that he had not contacted the non-Corvian proposed expert witnesses when he listed them on July 21st after the Order Compelling Discovery was granted and, thus, could not know what their opinions might be apart from their written reports (to the extent those existed).

13. Despite having argued that Petitioner should not be prevented from using the 16 proposed expert witnesses as fact witnesses, Petitioner now argues that he should not have to answer discovery requests regarding those individuals because they cannot testify as Petitioner's experts. His argument fails to recognize that Corvian remains entitled to this information without regard to how Petitioner is allowed (or not allowed) to use any particular witness.

14. Petitioner remains in violation of the July 21st Order Compelling Discovery. Corvian had a right to have its discovery requests answered even if Petitioner could no longer use (or planned to use) someone as a witness.

15. There also was extensive discussion concerning discovery related to social media postings.

16. Petitioner admits that [REDACTED] is a frequent poster on social media such as Instagram and Facebook. Petitioner has refused to produce videos posted by [REDACTED] to social media platforms relating to disagreements with Corvian over her son's education there. Petitioner's counsel claimed in his response that this discovery request was "unduly burdensome" but now claims in his briefing that statements made on social media cannot be relevant in any way to the remaining issue in this litigation. Providing Corvian with a few screenshots of posts is insufficient. Counsel for Petitioner admitted in the hearing on August 18th that they had not personally checked [REDACTED] mobile devices for responsive information either in a social media app or the devices' underlying photo/video

storage space. Instead, counsel claimed lack of technical sophistication as an excuse for not checking.

17. The out-of-court statements of Petitioner's parents have no potential relevance to the issue of FAPE. Even if only for the purpose of impeachment, such statements might be admissible. Corvian's requests were reasonably calculated to lead to the discovery of admissible evidence.

18. This case is less than two weeks from the scheduled start of the hearing. More than two months after the First Set and a month after the Second Set of Discovery Requests, Petitioner has not produced responsive documents based on claims of undue burden without substantiation.

19. A showing of prejudice is not required for the imposition of sanctions, but Corvian has been severely prejudiced in its preparations by the delay and the cost in pursuing responses that should have been forthcoming.

20. Petitioner has offered no legitimate excuse or justification for failing to timely respond to discovery or to comply fully with the Undersigned's Order to Compel entered on July 21, 2021.

19. Respondent has made its discovery motions in good faith after making various good faith efforts to resolve discovery issues with Petitioner through counsel.

CONCLUSIONS OF LAW

1. The Undersigned has considered lesser sanctions than dismissal of Petitioner's lawsuit with prejudice. Lesser sanctions would be unjust and inappropriate in view of the totality of the circumstances of the case, which demonstrate the severity of the disobedience of Petitioner in refusing to provide discovery in a lawsuit he instituted, his unjustified noncompliance with the mandatory North Carolina Rules of Civil Procedure, and his failure to comply fully and timely with this Court's Order of July 21st even after being sanctioned on August 2nd.

2. Rule 37(b)(2)(c) of the North Carolina Rules of Civil Procedure authorizes dismissal of an action with prejudice for failure to fully respond to Respondent's discovery requests and to comply with the Undersigned's Order Compelling Discovery.

3. The Office of Administrative Hearings also has that power under 26 NCAC 03 .0114 and its inherent authority as a judicial body. Dismissal of the petition and all claims therein is the appropriate sanction in this case.

FINAL DECISION

NOW, THEREFORE, based on the foregoing, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above and imposes Sanctions. It is hereby ORDERED that the within due process petition be **DISMISSED** with prejudice.

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.

IT IS SO ORDERED.

This the 23rd day of August, 2021.



Selina Malherbe
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 23rd day of August, 2021.



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