

STATE OF NORTH CAROLINA
COUNTY OF LEE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EDC 02477, 18EDC02639

<p>█ by parent or guardian █ Petitioner,</p> <p>v.</p> <p>Lee County Board of Education Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER comes for consideration of the Respondent's Motion to Dismiss or in the alternative Motion for Summary Judgment filed on August 30, 2018. Prior to the entry of this Final Decision, after its dispositive motion filings, Respondent also filed a Motion to Dismiss for Failure to Prosecute and Motion for Appropriate Relief. Petitioners' time for responding to these motions has not lapsed. Due to the following decision on the dispositive motions, the Undersigned has pretermitted Respondent's subsequently filed motions and they are now moot.

Petitioners did respond on September 13, 2018 to Respondent's dispositive motions filed on August 30, 2018; therefore, Respondent's Motions to Dismiss and/or for Summary Judgment are now ripe for adjudication.

Based on the applicable standard of review, after careful consideration of the Respondent's Motion for Summary Judgment with all supporting exhibits, Petitioner's Response without any forecast of evidence, and all relevant documents in the record, the Undersigned **GRANTS** Respondent's Motion for Summary Judgment and dismisses Petitioners' original and amended Petitions **WITH PREJUDICE**.

APPEARANCES

For Petitioners: █ Petitioner and mother of █ *pro se*

For Respondent: Rachel P. Nicholas
Rachel B. Hitch
Schwartz & Shaw, P.L.L.C
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P.O Box 2350
Raleigh, NC 27602

STANDARD OF REVIEW

Summary judgment is granted when 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 any party is entitled to a judgment as a matter of law.” *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quotations and citations omitted).

A respondent/defendant is entitled to summary judgment by “1) proving that an essential element of the [petitioner’s/]plaintiff’s case is non-existent, 2) showing through discovery that the [petitioner/]plaintiff cannot produce evidence to support an essential element of his or her claim, or 3) showing that the [petitioner/]plaintiff cannot surmount an affirmative defense.” *Lail v. Cleveland Cnty. Bd. of Educ.*, 183 N.C.App. 554, 557, 645 S.E.2d 180, 183-184 (2007).

RELEVANT PROCEDURAL BACKGROUND

General

In April of 2018, Petitioners filed two Petitions case file numbers 18-EDC-2477 and 18-EDC-2639 (“Consolidated Petitions”) which were consolidated for hearing and deemed filed on April 20, 2018. *See* May 15, 2018, Order of Consolidation, and July 12, 2018, Order Granting Amendment of Petition’s Filing Date to April 20, 2018.

On June 7, 2018, with leave of this Tribunal, Petitioner ██████ filed an amended due process petition (“First Amended Petition”). On July 23, 2018, also with leave of this Tribunal, Petitioner ██████ filed a second amended petition (“Second Amended Petition”) The Second Amended Petition included allegations relating to the 2016-17 and 2017-18 academic years only. ██████ has not amended her due process petition since July 23. The Consolidated Petitions, First Amended Petition, and Second Amended Petition will be collectively called the “Petition” in this Final Decision.

Prior Orders and Order on Stay Put

The findings and conclusions of law in all priors Orders in this contested case are reaffirmed and incorporated herein by reference.

Discovery

In a July 9, 2018 Scheduling Order, this Tribunal ordered that the “discovery deadline shall be completed on or before August 16, 2018 by 5:00 p.m.” *See* Post Prehearing Conference Order, Order on Pending Motions, and Scheduling Order.

In the same scheduling order, this Tribunal ordered the parties to disclose expert witnesses and subject matter of expert testimony on or before August 16, 2018, by 5:00 p.m. Petitioners did not disclose any expert witnesses.

Petitioner filed a Motion to Compel Discovery on August 20, 2018. The discovery had either been produced by Respondent or were new requests issued after the discovery deadline; therefore, Petitioners' Motion to Compel was denied by the Undersigned on September 4, 2018. On September 5, 2018, Petitioner also sought to continue the contested case and extend all deadlines for 365 days due to the [REDACTED] placement in a treatment program. This request was also denied.

Petitioners' Response

Significant to summary judgment, through discovery and in their response, Petitioners have failed to forecast any expert testimony to support any of their claims in the Petition. Other than questioning the credentials of Dr. S [REDACTED], Petitioners did not dispute the facts as proven by Respondent's affidavits, deposition testimony, and/or other exhibits.

Instead of responding to the dispositive motions, Petitioner [REDACTED] improperly presented her settlement terms and asked, in the alternative, that the case be dismissed without prejudice due to potential future claims. Petitioners' only exhibit disputing the dispositive motions was a DEC-5 from an IEP meeting held on August 24 and 28, 2018 which is not relative to the current Petition. Petitioners failed to produce any evidence supporting the Petition and failed to raise any questions of material fact in their response or the attachment.

FINAL DECISION

Based on the applicable standard of review for summary judgment and construing all facts in favor of the non-movant, the Undersigned finds that there are no genuine issues of material fact and **GRANTS** Respondent's Motion for Summary Judgment. As summary judgment has disposed of all claims in the Petition, the Undersigned need not rule on Respondent's alternative Motion to Dismiss. Respondent's subsequent motions are rendered **MOOT** by this decision.

THEREFORE, the Contested Case Petitions in case file numbers 18-EDC-2477 and 18-EDC-2639, as amended, are **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 17th day of September, 2018.

A handwritten signature in black ink, reading "Stacey Bice Bawtinheimer", written over a solid black horizontal line.

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:



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Attorney for Respondent

This the 17th day of September, 2018.

A handwritten signature in cursive script, reading "Anita M. Wright".

Anita M Wright
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