

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EDC 02111

<p>██████████ by parent or guardian ██████████ Petitioner, v. Wake County Board of Education, Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
---	---

THIS MATTER comes before the undersigned Administrative Law Judge upon Respondent's Motion to Dismiss. Petitioner ██████████ has responded to the Motion in her Petitioner Response to Respondent's Motion to Dismiss.

STANDARD OF REVIEW

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 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).

A respondent may challenge a court's subject matter jurisdiction in two ways under Rule 12(b)(1). "First, the defendant may contend that a complaint fails to allege facts upon which subject matter jurisdiction can be based. In such a challenge, the facts alleged in the complaint are taken to be true. A second way in which the defendant may challenge jurisdiction pursuant to Rule 12(b)(1) would be to claim that, though a complaint alleges sufficient facts to invoke subject matter jurisdiction, those facts are not themselves true." *Kerns v. U.S.*, 585 F.3d 187, 192 (4th Cir. 2009). Where a respondent challenges the truthfulness of the factual allegations in the Petition upon which subject matter jurisdiction is based, the court may consider evidence outside the pleading without converting the motion to dismiss into a motion for summary judgment. *See Richmond*,

Fredericksburg & Potomac R.R. Co. v. U.S., 945 F.2d 765, 768 (4th Cir. 1991) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)).

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.” *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). “In ruling upon such a motion, the complaint is to be liberally construed” *Shepard v. Ocwen Fed. Bank*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)). Conclusory allegations are not sufficient to state a claim under Rule 12(b)(6). “In ruling on a motion under N.C.R. Civ. P. 12(b)(6), a 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).

AFTER REVIEWING the Motion and Petitioner’s Response to Respondent’s Motion to Dismiss, and all other documents in the file, the Undersigned **GRANTS** Respondent’s Motion to Dismiss. The Undersigned finds the following, based on the above and on the applicable federal and State laws and regulations:

1. The Petition in the matter, which alleges violations of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, was filed on or about April 12, 2019, and received by Respondent on April 29, 2019. Petitioner alleged that Respondent denied ■■■ with a free appropriate public education (“FAPE”) due to various procedural violations of the IDEA, including that the Prior Written Notice provided to Petitioner for a December 2018 IEP meeting failed to include information required by the IDEA, that Petitioner was denied the opportunity to examine records or meaningfully participate in the meeting, that the IEP team was not composed of the required team members, and that the IEP team did not allow proper evaluation data to be considered or to reevaluate per the Petitioner’s request at the December 19 meeting. Petitioner also alleged that ■■■ was denied FAPE because the IEP as amended at the December

meeting was not developed to address ██████'s unique needs—specifically, that the IEP team's decision to return ██████ to the regular education was not supported by sufficient data. Finally, the Petition included several additional claims of denial of FAPE based on alleged violations of the *North Carolina Policies Governing Services for Children with Disabilities*.

2. The Petition contained the following requests for relief: (1) assignment of an “independent” LEA and IEP team; (2) “Shelter-In-Place with IEP dated 11/14/18”; (3) disciplinary and license revocation of involved parties; (4) compensatory home/hospital instruction services and related services; (5) “certification of grades, attendance records, student records formal and informal;” (6) private school at state expense; (7) “independent social skills with parent choice of provider;” (8) independent tutor services for one year; and, (9) “assignment of a TA for one year.”

3. On May 17, 2019, Respondent submitted a Motion to Dismiss the Petition. Respondent argued that Petitioner's claims regarding procedural violations of the IDEA should be dismissed because the Petition failed to include any allegations that ██████ was denied FAPE based on the alleged procedural violations. Respondent also contended that Petitioner's substantive claim was based on a dispute regarding ██████'s school assignment and should be dismissed as outside the jurisdiction of this court.

4. On May 28, 2019, Petitioner responded to the Motion to Dismiss. In her response, Petitioner argued that because the Motion to Dismiss was not submitted within 15 days of receipt of the Petition, as required by 20 U.S.C. § 1415(c)(2), the Motion should be denied. Petitioner declined to respond substantively to the arguments in the Motion.

5. As an initial matter, this Tribunal finds that the Motion to Dismiss was timely submitted. Respondent's Motion was made pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim. Such defenses may be raised at any time during the pendency of the proceeding. *See, e.g., Vanwijk v. Profl Nursing Servs., Inc.*, 213 N.C. App. 407, 410, 713 S.E.2d 766, 768 (2011) (a motion to dismiss pursuant to Rule 12(b)(1) may be raised at any time); *see also* N.C.R. Civ. Pro. 12(h); 26 NCAC 03.0101(a) (the North Carolina Rules of Civil Procedure apply in contested case hearings

unless another specific statute or rule provides otherwise). Moreover, because “subject matter jurisdiction is a requirement for the use of judicial authority over any controversy,” *Vanwijk*, 213 N.C. App. at 410, 713 S.E.2d at 768, if this Tribunal concludes that it lacks jurisdiction of the subject matter, it is required to dismiss the action. N.C.R. Civ. Pro. 12(h)(3).

6. The provisions of the IDEA to which Petitioner refers in her response are inapplicable here, as they involve Respondent’s notification to the court that a due process complaint is “insufficient” because it does not meet the basic content requirements prescribed by the statute. *See* 20 U.S.C. § 1415(c)(2) (“The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).”); *id.* § 1415(b)(7)(A) (requiring the due process complaint to include (1) the name and address of the child and the name of the school the child is attending, (2) a description of the nature of the problem, and (3) a proposed resolution to the problem). They do not preclude a respondent from moving to dismiss the claims in a petition based on the applicable rules of civil procedure. Accordingly, Respondent’s Motion was timely submitted and is ripe for disposition.

7. This Tribunal concludes that Petitioner has failed to allege sufficient facts to support her claims of procedural violations under the IDEA. Although Petitioner claims that she was denied the ability to meaningfully participate in the December 19, 2018, IEP meeting, the Petition also contains factual allegations describing Petitioner’s extensive involvement and participation in the meeting. In addition, although Petitioner claims that the IEP team failed to use proper procedures regarding an evaluation or reevaluation of her [REDACTED] the Petition contains no factual allegations to suggest that an evaluation or reevaluation was requested or reviewed during the December meeting. Finally, a procedural violation will not support a cognizable claim under Part B unless the parent can show the procedural violation actually interfered with the child’s FAPE. *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *see Dibuvo ex rel. Dibuvo v. Bd. Of Educ. Of Worcester Cty.*, 309 F.3d 184, 190-91 (4th Cir. 2002). The Petition here contains no allegations that any of the alleged procedural violations contributed to a denial of FAPE to [REDACTED]. Because Petitioner fails to allege cognizable claims under the IDEA, the Office of

Administrative Hearings has no jurisdiction over her claims regarding procedural violations in this case.

8. This Tribunal also concludes that it lacks jurisdiction over Petitioner's claims that [REDACTED] was denied a FAPE because the December 2018 IEP was not based on appropriate data. The Petition alleges that the IEP team disregarded the instructions of her [REDACTED] medical providers, who had stated [REDACTED] "could not function in the school environment due to trauma suffered from the bullying, harassment and hostile environment experienced" at [REDACTED] School, and that the team failed to develop the IEP to address [REDACTED]'s needs "the actual school that he was currently assigned to and would be returning to." Petitioner's claims thus appear to be based on her contention that her [REDACTED] was unable to function at a particular school.

9. Although decisions regarding a child's placement, that is, the extent to which he is educated with his non-disabled peers, must be made by a child's IEP team, decisions regarding a child's school assignment are administrative and therefore fall outside the purview of the child's IEP team. See [REDACTED] *ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 683 (4th Cir. 2007) ("As it is used in the IDEA . . . location refers to something geographic in nature: a place or locale. This understanding is consistent with the notion that § 1414(d)(1)(A)(i)(VII) deals with practical, logistical considerations."); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d at 373, 379 (5th Cir. 2003) ("The provision that requires the IEP to specify the location is primarily administrative.").

10. The North Carolina General Statutes confer the Office of Administrative Hearings with jurisdiction over "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). The statutes do not confer the Office of Administrative Hearings with jurisdiction to hear other types of claims brought against a school system. Consequently, because complaints regarding a student's school assignment do not arise under the IDEA, this Tribunal has no jurisdiction over them.

11. To the extent not addressed above referencing IDEA violations, Petitioners' other claims citing violations of the *North Carolina Policies Governing Services for Children with Disabilities* are dismissed for failure to state a cognizable claim under the IDEA. Petitioner claims that ■■■ experienced denial of FAPE because the IEP team failed to use "scientifically based research" in the development of the December IEP, citing to NC 1500-2.28. NC 1500-2.28 does not mention "scientifically based research" and instead discusses the reevaluation process for a child with a disability. Although the IDEA requires that, in developing a student's IEP, his team must consider the strengths of the child, the concerns of the parents for enhancing the education of her child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child, nothing in the IDEA requires that an IEP must be developed based on "scientifically based research." See also 20 U.S.C. § 1414 (d)(1)(A)(i)(iv) (referencing services and aids "based on peer reviewed research to the extent practicable") Petitioner also claims that the Board "failed to provide access to physical education activities under the education in separate facilities clause of the "NC statu[t]e," citing to "1501-2.6/d". However, the Petition does not contain any specific factual allegations regarding the Board's purported failure to provide access to physical education activities to ■■■ Such vague and conclusory allegations are not sufficient to state a claim under the IDEA.

12. Petitioner claims that the Board "failed to draft an IEP with services that allow for the opportunity for [Full Educational Opportunity]." The IDEA's implementing regulations do provide that "[t]he State must have in effect policies and procedures to demonstrate that the State has established a goal of providing full educational opportunity to all children with disabilities, aged birth through 21, and a detailed timetable for accomplishing that goal;" however, this provision applies to the State itself and not to local educational agencies. Moreover, aside from Petitioner's conclusory allegation that the Board failed to provide a "full educational opportunity," the Petition states no other specific facts on which this claim can be based.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Respondent's Motion to Dismiss is GRANTED. All claims and causes of action contained in the Petition are

DISMISSED WITH PREJUDICE and all relief sought by Petitioner on those claims is hereby denied.

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 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."

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.

IT IS SO ORDERED.

This the 4th day of June, 2019.

A handwritten signature in black ink that reads "Augustus B. Elkins II". The signature is written in a cursive style and is positioned above a solid horizontal line.

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:

[REDACTED]

Parent

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

Lindsay Vance Smith
Tharrington Smith, LLP
lsmith@tharringtonsmith.com
Attorney for Respondent

This the 4th day of June, 2019.



Anita M Wright
Paralegal
N. C. Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Phone: 919-431-3000