

STATE OF NORTH CAROLINA
COUNTY OF FRANKLIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 EDC 03332

<p>█ by and through his parent █ Petitioner,</p> <p>v.</p> <p>Franklin County Board of Education, Respondent.</p>	<p>ORDER DENYING RESPONDENT'S MOTION FOR A PROTECTIVE ORDER AND COMPELLING PRODUCTION OF DISCOVERY</p>
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THIS MATTER comes on for consideration of Respondent's Motion for a Protective Order filed on September 17, 2020. Petitioner responded to the Motion on September 23, 2020; therefore, this matter is now ripe for adjudication.

The North Carolina Administrative Code ("Administrative Code") mandates "[t]he parties in any contested case shall immediately commence to exchange information voluntarily, to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material." 26 N.C. Admin. Code 03.0112(d). The Administrative Code further provides that "[a]ny means of discovery available pursuant to the North Carolina Rules of Civil Procedure, G.S. 1A-1, is allowed." 26 N.C. Admin. Code 03.0112(b).

Discovery is not limited to information that is admissible in a due process hearing before the Office of Administrative Hearings ("OAH"). North Carolina Gen. Stat. §1A-26(b)(1). Instead, a party's discovery requests must be "relevant to the subject matter involved in the pending action." *Id.*

A Motion for Protective Order is appropriate when "justice [is] require[d] to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense." North Carolina Gen. Stat. §1A-26(c). A protective order may seek to limit the scope and terms of discovery or to prevent discovery from being improperly disclosed. *Id.*

When the Tribunal denies such a motion "in whole or in part," the Tribunal may "on such terms and condition as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion." North Carolina Gen. Stat. §1A-26(c). Rule 37(a)(4) provides that upon denial of a motion, "the court shall, after opportunity for hearing, require the moving party to pay to the party . . . who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." North Carolina Gen. Stat. §1A-37(a)(4).

Respondent's Motion sought to limit Petitioners' right to receive discovery that is either part of the student's cumulative educational record or "relevant to the subject matter involved in the pending action." North Carolina Gen. Stat. §1A-26(b)(1).

However, as the Memorandum of Understanding, between the Office of Administrative Hearings and the North Carolina Department of Public Instruction, does not permit this Tribunal to award attorneys' fees, even as sanctions, this Tribunal will not entertain any motion by Petitioners for sanctions against Respondent for bringing this motion.

Respondent's Motion is **DENIED**. This Tribunal finds Petitioners are entitled to the requested discovery.

FURTHERMORE, IT IS ORDERED:

1. Respondent must produce to Petitioners all of the following materials requested through informal discovery:

- a. Educational records of [REDACTED]
- b. Educational programming of [REDACTED]
- c. Communications regarding [REDACTED] with personally identifiable information of other students redacted as needed;
- d. Related service records, as well as nursing and counseling service, records even if not a related service;
- e. All notes maintained by FCBOE employees related to [REDACTED] since August 1, 2016;
- f. Internal truancy reports regarding [REDACTED] with other students' names redacted if applicable;
- g. Copies of all reports including investigations and written documentation including photographs and videos related to discipline, restrain, seclusion, isolation, bullying, or other behavioral incidents pertaining to [REDACTED] including any communications related to such incidents since August 1, 2016, with other students' names redacted if applicable;
- h. All lesson plans, as required by Board Policy 3120, used with [REDACTED] in FCBOE since August 1, 2016;
- i. All underlying progress monitoring documentation and data;
- j. The November 22, 2019, 504 Plan and all documentation regarding this plan including implementation; and

- k. [REDACTED]'s class schedules since August 1, 2016 as well as the modified day scheduling started on December 3, 2019.
2. Respondents are to comply with this order on or before October 14, 2020, and in sufficient time for Petitioners to review prior to conducting mediation, unless otherwise agreed by both parties.
3. Respondent is to create and provide Petitioners with a privilege log that complies with Rule 26(b)(5). If questions arise about whether the information is privileged, Petitioners may, by motion seek an "in camera" review by the Undersigned.
4. Respondent and Petitioners are to confer as to a Joint Protective Order for the school staff personnel files and any investigations or complaints regarding [REDACTED]'s special education teachers since August 1, 2016. The Parties shall file the Joint Protective Order on or before October 14, 2020. If the Parties cannot reach an agreement as to the terms, each Party shall file their own proposed order on that date.

IT IS SO ORDERED.

This the 25th 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:

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This the 25th day of September, 2020.



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