

STATE OF NORTH CAROLINA
COUNTY OF DARE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EDC 03501

<p>██████████ by parents ██████████, Petitioners,</p> <p>v.</p> <p>Dare County Schools Board of Education, Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
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THIS MATTER comes before the undersigned Administrative Law Judge upon Respondent’s Motion to Dismiss, which was filed June 20, 2019, in the North Carolina Office of Administrative Hearings (“OAH”). The time for response by the Petitioners has expired and no response has been received. The Undersigned having considered the entire record finds that the matter is now ripe for disposition.

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). 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).

Courts must liberally construe pro se complaints, and a “pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, courts “cannot ignore a clear failure to allege facts” that set forth a cognizable claim. *Johnson v. BAC Home Loan Servicing, LP*, 867 F. Supp. 2d 766, 776 (E.D.N.C. 2011). “The ‘special judicial solitude’ with which a ... court should view such pro se complaints does not transform the court into an advocate. Only

those questions which are squarely presented to a court may properly be addressed.” *Walter v. Dep’t of Soc. Servs. for the City of Baltimore*, 901 F.2d 387, 391 (4th Cir. 1990).

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)). However, 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 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, and on the record in this case.

1. The Petition in the matter, which alleged violations of Section 504 of the Rehabilitation Act of 1973, as amended (“Section 504”), was filed at the Office of Administrative Hearings on or about June 18, 2019 (as shown in the OAH records), with Respondent filing a date stamped first page of the Petition on June 19, 2019 (showing receipt of the Petition by Respondent on June 14, 2019). Petitioners alleged that [REDACTED] has documented disabilities that substantially limit major life activities, including Attention-Deficit Disorder (“ADD”), Working Memory, and Headache Disorder Eligibility. (Petitioner’s ¶ 9) An impairment that substantially limits a student in a major life activity is the standard for eligibility under Section 504, 34 C.F.R. § 104.3(j); not the standard for eligibility under the Individuals with Disabilities Education Act (IDEA), 34 C.F.R. § 300.8.

2. Petitioners alleged that [REDACTED] is entitled to Section 504 accommodations and that Respondent has denied [REDACTED] Section 504 accommodations. (Petitioner’s ¶ 9) Petitioners requested that [REDACTED] receive Section 504 accommodations of “brain breaks,” multiple testing sessions, separate setting for Dare County Schools and North Carolina assessments, and that [REDACTED] have a water bottle available throughout the day. (Petitioner’s ¶ 10) The Petitioners do not seek special education through an Individualized Education Program (“IEP”) under IDEA

3. On June 20, 2019, Respondent submitted a Motion to Dismiss the Petition. Respondent argued that Petitioners’ Section 504 claims were not within the subject matter jurisdiction of the

Office of Administrative Hearings and that Petitioners' had failed to state a claim upon which relief may be granted.

4. 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. Prof'l 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).

5. 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 subject matter jurisdiction, it is required to dismiss the action. N.C.R. Civ. Pro. 12(h)(3).

6. This Tribunal concludes that Petitioners have failed to allege sufficient facts to support claims of violations under the IDEA. Petitioners here did not allege that [REDACTED] is a student with a disability as defined by the Individuals with Disabilities Education Improvement Act ("IDEIA" or "IDEA"), 20 U.S.C. § 1400 *et seq.* Petitioners did not allege that [REDACTED] is entitled to special education and related services under the IDEA.

7. 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 identification, evaluation, or placement under Section 504 do not arise under the IDEA, this Tribunal has no jurisdiction over them. *See*, N.C. Gen. Stat. § 150B(1)(e)(1).

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 Petitioners 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 the 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 2nd day of August, 2019.

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



Parent

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

Rachel Blevins Hitch
Schwartz & Shaw, P.L.L.C.
rhitch@schwartz-shaw.com
Attorney for Respondent

This the 2nd day of August, 2019.

A handwritten signature in blue ink that reads "Anita M. Wright".

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