

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EDC 03561

<p>█ by parent or guardian █ Petitioner,</p> <p>v.</p> <p>Wake County Board of Education Respondent.</p>	<p>FINAL DECISION ORDER OF SUMMARY JUDGMENT FOR RESPONDENT</p>
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THIS MATTER is before the undersigned on Petitioner’s *Motion for Summary Judgment*, filed September 12, 2018, and *Motion for Judgment on the Pleadings*, filed September 19, 2018; and, the Respondent’s *Response to Petitioner’s Motion for Summary Judgment and Cross-Motion for Summary Judgment*, filed September 25, 2018.

Recitation of Undisputed Facts

1. The Petition instigating this contested case on June 12, 2018 alleges that the student “**is due compensatory services due to the delay in his eligibility determination of SLD** [Specific Learning Disability].”

2. The present controversy grew out of Petitioner’s previous contested case, filed on April 2, 2018. In paragraphs 9 and 10 of the form Petition in that case, Petitioner wrote:

Since Preschool, my son has demonstrated symptoms warranting an SLD diagnosis. I repeatedly, for more than five years, requested the diagnosis and delivery of services in part under SLD. The latest request was in March 2018. That request was denied. Service for my son need[s] to be rendered in part under an SLD diagnosis, not just ADD. I am requesting a diagnosis and retro / compensatory services for my child.

*Petition for a Contested Case Hearing (Special Education)*¹, 18 EDC 02007 (2 April 2018). On April 26, 2018, the parties agreed to settle the case denominated 18 EDC 02007, and it was voluntarily dismissed. The settlement provided that the Respondent would assign a psychologist that was not currently serving █’s school to review his records and participate in an IEP meeting with the stated purpose of considering “SLD as an area of eligibility.” See Respondent’s *Response*, Exhibit 17, 4th page (hereinafter, “R Ex 17, p 4”).

¹ On OAH Form H-D6E (9/15).

3. Since March 30, 2017, and continuing through the date of the agreed IEP meeting held on May 17, 2018, [REDACTED] had received special education services at his school under the diagnostic designation “other health impaired” (“OHI”). (R Ex 8, pg. 10.) At the IEP meeting, the “IEP team agreed to change [REDACTED]s Primary Area of Eligibility from Other Health Impaired to Specific Learning Disabled and his Secondary Area of Eligibility from None to Other Health Impaired.” (R Ex 4, pgs. 1-2.) However, *the IEP team concluded that no changes in [REDACTED]s special education services were appropriate. Id.*

4. Based upon State law providing that Petitioner may seek relief only for “an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition,” N.C. Gen. Stat. § 115C-109.6(b), Judge Augustus Elkins entered Partial Summary Judgment on July 9, 2018, limiting this claim to alleged occurrences within one year preceding the filing of the Petition. Respondent had provided [REDACTED] with special education services throughout this one year period.

5. Petitioner’s request for relief seeks only compensatory *general* education -- not “special education” -- *i.e.*, additional “instructional and review time ... of academic material already covered or that will be covered, during the preceding academic year and a half, or remainder of the school year.” Petitioner did not specifically allege that Respondent denied [REDACTED] a free and appropriate public education (“FAPE”), did not file supporting affidavits, and did not forecast expert testimony supporting his allegations.

Motion for Judgment on the Pleadings

6. The purpose of N.C. Gen. Stat. § 1A-1, Rule 12(c) is to “dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit.” *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). “All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false.” *Id.*, 286 N.C. at 137, 209 S.E.2d at 499 (1974). Rule 12(c) further provides that if “matters outside the pleadings are presented,” the motion may be “treated as one for summary judgment and disposed of as provided in Rule 56[.]”

7. In the relatively informal administrative context, the petition and the parties’ prehearing statements generally serve as the “pleadings.” *Lee v. N.C. Dep’t of Transp.*, 175 N.C. App. 698, 703, 625 S.E.2d 567, 571 (2006), *aff’d and remanded sub nom*, 360 N.C. 585, 634 S.E.2d 887 (2006). In this instance, the Respondent filed a specific “Response to Petition,” together with its motion for partial summary judgment. See *Partial Motion to Dismiss and Response to Petition for a Contested Case Hearing*, pgs. 5 – 9.

8. Respondent’s “Response to Petition” alleges: that [REDACTED] has received special education since being found eligible for such services on March 30, 2017; that all IEP team members – and Petitioner [REDACTED] – agreed on May 17, 2018 that Respondent’s service delivery continued to be appropriate, and thus a change in eligibility category from OHI to SLD did not indicate a need to change [REDACTED]s special education services; that “Petitioner acknowledges that ‘services under SLD and OHI may at times be exactly the same in content and delivery;’” and, that “[t]he Petition contains no

facts to suggest any alleged deficiencies in the educational program and services that [REDACTED] has received since being found eligible for special education services on March 30, 2017.”

Applicable Law Governing Motion for Summary Judgment

9. Summary judgment is appropriate when the record shows “that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). All evidence must be viewed in the light most favorable to the party against whom summary judgment is proposed, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “According to well-established North Carolina law, when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in her pleading, *Ind-Com Elec. Co. v. First Union Nat. Bank*, 58 N.C. App. 215, 217, 293 S.E.2d 215, 216–17 (1982), and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment.” *Steele v. Bowden*, 238 N.C. App. 566, 768 S.E.2d 47, 57 (2014). “An Administrative Law Judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case.” N.C. Gen. Stat. § 150B-34(e).

10. “A genuine issue of material fact is one that can be maintained by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and means more than a scintilla or a permissible inference.” *Ussery v. Branch Banking and Trust Co.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278-79 (2015) (citations omitted). “Factual disputes that are irrelevant or unnecessary will not be counted[.] . . . A fact is material only if it might affect the outcome of the suit under governing law.” *Anderson v. Liberty Lobby*, 477 US 242, 247-48 (1986).

11. “Rule 56 does not require that a party move for summary judgment in order to be entitled to it.” *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C.App. 149, 151, 334 S.E.2d 499, 501 (1985), *disc. review denied*, 315 N.C. 391, 338 S.E.2d 880 (1986). “Summary judgment, when appropriate, may be rendered against the moving party.” *Erthal v. May*, 223 N.C. App. 373, 387, 736 S.E.2d 514, 523 (2012). Judgment “shall be rendered forthwith” if the pleadings and evidence of record show “that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). “Although a party does not have to move for summary judgment to be entitled to it, the nonmovant must be entitled to the judgment as a matter of law.” *Carriker v. Carriker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999).

CONCLUSIONS

1. Respondent having pled facts constituting a complete defense to the Petitioner’s allegations, the Petitioner’s *Motion for Judgment on the Pleadings* must be denied. N.C. Gen. Stat. § 1A-1, Rule 12(c).

2. Petitioner has failed to forecast any substantial evidence that Respondent's provision of educational services to ■■■ was affected by a delay in changing ■■■'s diagnostic label from OHI to SLD during the one year period preceding the filing of the Petition scrutinized in this contested case. Petitioner did not specifically allege that Respondent denied ■■■ a free and appropriate public education ("FAPE"), and did not allege facts showing that Respondent violated the Individuals with Disabilities Education Act ("IDEA"). Consequently, the Respondent is entitled to summary judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c).

3. As the summary judgment renders the remaining pending motions moot, they must be denied. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1).

FINAL DECISION

Petitioner's *Motion for Judgment on the Pleadings* is **DENIED**.

Respondent is entitled to judgment as a matter of law, and the Petition must be, and hereby is, **DISMISSED**.

The remaining pending motions in this contested case are **DENIED**, as moot.

NOTICE OF APPEAL

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.

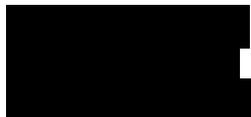
This the 1st day of October, 2018.



J Randolph Ward
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

Eva Blount DuBuisson
Tharrington Smith, LLP
eva@tharringtonsmith.com (served electronically on October 1, 2018)
Attorney For Respondent

This the 2nd day of October, 2018.

A handwritten signature in blue ink that reads "Jerrod Godwin".

Jerrod Godwin
Administrative Law Judge Assistant
N. C. Office of Administrative Hearings
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