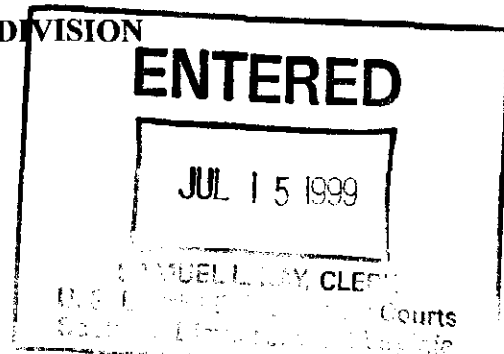


**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION



BENJAMIN H., by his next friend, Georgann H.,
DAVID F., by his guardian, Carolyn B.,
LORI BETH S., by her next friend, Janie J.,
THOMAS V., by is next friend, Patricia V., and
JUSTIN E., by his next friend, Sherry E.,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 3:99-0338

JOAN OHL, Secretary of the Department
of Health and Human Resources,

Defendant.

ORDER DENYING MOTION TO DISMISS

The defendant filed a motion to dismiss in the above-captioned matter, asserting that the plaintiffs had failed to state a claim for which relief might be granted.

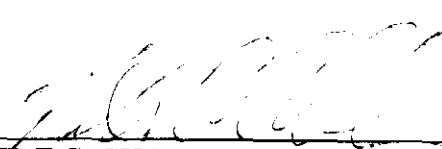
Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the defendant may move to dismiss if the plaintiff has failed to state a claim for which relief may be granted. A Rule 12(b)(6) motion tests the sufficiency of the pleading; it does not resolve factual disputes, the merits of a claim or the applicability of defenses. *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992), *cert. denied*, 510 U.S. 828 (1993). In considering the motion, the claims must be viewed in the light most favorable to the nonmoving party and all allegations accepted as true. *Id.* Dismissal is appropriate only when it appears beyond a doubt that no set of facts would entitle the

pleader to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The motion to dismiss for failure to state a claim is viewed with disfavor and rarely granted. *See Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). *See generally* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 1356 and 1357 (1990 and 1999 Supplement).

The defendant's motion recited the same arguments the defendant asserted in her response to the preliminary injunction motion, with no additional support or elaboration. Based upon the Court's conclusions, as stated in the Memorandum Opinion and Order entered July 15, 1999, the Court **DENIES** the motion to dismiss **WITHOUT PREJUDICE**. The defendant may in future renew her motion to dismiss, provided she cites additional grounds or authority to support her request for relief.

The Clerk is directed to send a copy of this order to all counsel of record and any unrepresented parties.

ENTER: July 15, 1999



ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE