

Student by Father
Petitioner
v.
Granville County Board of Education
Respondent

DECISION

11 EDC 1459

This is an appeal of the Decision of Chief Administrative Law Judge Julian Mann III issued on May 10, 2011. The Petitioner combined the appeal of this case with the appeal of 11 EDC 0703 and 11 EDC 2219 which were all heard consecutively on the same day and had the same title. A separate Decision was written for each case by Judge Mann. A review Decision is also being provided for each case.

The records of the case received for review included:

1. Transcript of Preliminary Hearing on March 7, 2011 to Dismiss and/or Continue this case and cases 11 EDC 0703 and 11 EDC 2219.
2. Transcript of Preliminary Hearing on April 18, 2011 to Continue this case and cases 11 EDC 0703 and 11 EDC 2219.
3. Transcript of the hearing on May 3, 2011 on the Motion for Summary Judgment. Separate transcripts were made for the hearings on May 3, 2011 on the Motion for Summary Judgment for cases 11 EDC 0703 and 11 EDC 2219.
4. The Official Record of the case issued by the Office of Administrative Hearings; which included the Decision of Judge Mann, motions, procedural documents, and orders.
5. Additional written arguments submitted to the Review Officer.

Preliminary Hearings for this case was held before Chief Administrative Law Judge Julian Mann III on March 7, 2011 and April 18, 2011 in Oxford, North Carolina. Judge Mann then held a Hearing on a Motion for Summary Judgment on May 3, 2011 in Oxford, North Carolina.

Appearances:

For Petitioner	<i>Father, pro se</i> ; North Carolina
For Respondent	James E. Cross, Jr. and Dale W. Hensley; Royster Cross & Hensley, LLP; PO Drawer 1168, Oxford, North Carolina 27565

To provide a document that does not have personally identifiable information regarding the Petitioner and/or for convenience, the following will be used to refer to the parties:

For the Child/Petitioner	-	<i>Student</i> ; the child
For Parent/Petitioner	-	<i>Father</i> ; Petitioner; parent; father
For Respondent	-	Respondent; Granville County Schools; LEA

ISSUES

The issue for the hearing was whether the Respondent should be granted Summary Judgment. The Respondent, in a Motion for Summary Judgment, stated that there were no genuine issues of material fact to be decided in a full hearing on the Petitioner's Petition.

The Petitioner's Petition had included two (2) issues:

1. The Respondent held a scheduled meeting which significantly impeded the parents opportunity to participate in the decision making process regarding the provision of FAPE to the student.
2. The violation caused a deprivation of educational benefit.

LIST OF WITNESSES

There were no witnesses for either party. The hearing consisted solely of oral arguments.

EXHIBITS

There were no exhibits entered during the hearing by either party. The Respondent's Motion for Summary Judgment, with attachments, and the Petitioner's Response, with attachments, were the focus of the arguments during the hearing.

PRELIMINARY STATEMENT

Judge Mann's decision was appealed by the Petitioner on May 17, 2011 and the undersigned was appointed as Review Officer on May 20, 2011. The parties were provided a Request for Written Arguments on May 20, with Written Arguments due on June 7, 2011. The Decision was to be completed by June 16, 2011, within the 30 day timeline established by 34 CFR 300.515(b) and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.16(b).

Standard of Review by the State Review Officer

The review of this case is in accordance with the provisions of G.S. 115C-109.9 and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15. The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that "due weight" be given to state administrative hearings. *Doyle* reviewed a product of Virginia's two-tiered administrative system. The court first noted, "By statute and regulation the reviewing officer is required to make an independent decision . . ." *Doyle*, 953 F.2d at 104 The court held that in making an independent decision, the state's second-tier review officer must follow the "accepted norm of fact finding."

In North Carolina, District Court Judge Osteen further interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, Memorandum Opinion and Order 1:05CV818 (M.D.N.C. November 18, 2008) A State Review Officer (SRO)

must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth."

Having reviewed the records of the case, the Review Officer for the State Board of Education independently makes Findings of Fact and Conclusions of Law in accordance with 20 U.S.C. 1415(g); 34 CFR §300.532; G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15.

The Review Officer finds that the ALJ's Facts are regularly made. The Review Officer's Findings of Fact are consistent with those of the ALJ. The Review Officer concurs with and uses many of the ALJ's Facts. Some Facts concerning the ALJ's Hearing and Decision have been added. The overall impression one gets when reading the ALJ's Facts and the Review Officer's Facts is the same. Some of the Review Officer Conclusions of Law are stated differently but are consistent with those of the ALJ and supported by IDEA, Federal Regulations, and state law. None of the Conclusions reached by the Review Officer are inconsistent with those of the ALJ. To the extent that the Findings of Facts may contain Conclusions of Law, or that the Conclusions of Law may include Findings of Fact, they should be so considered without regard to the given labels.

FINDINGS OF FACT

1. The Petitioner, *Father*, is a resident of Granville County and the father of *Student*. At the time of the hearing *Student* was nine years old and was in the fourth grade at S Elementary School in Granville County.

2. The Respondent is a local education agency (LEA) receiving funds pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, (IDEA) and is responsible for providing special education to the child pursuant to Article 9, Chapter 115C, of the North Carolina General Statutes.

3. *Student* has been identified as a child with a disability, categorized as having a Serious Emotional Disability (SED). He has Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). As such, he is eligible for and requires special education and related services, including an Individualized Education Program (IEP) pursuant to state and federal law.

4. On January 27, 2011 the Respondent sent the Petitioner *Father* an invitation to an IEP meeting scheduled for February 9, 2011. The purpose of the meeting was to review the results of the assistive technology evaluation that the Petitioner had requested.

5. The Petitioner received the notice of the meeting and indicated his agreement to participate via phone in the meeting that was scheduled for 2:00 p.m. on February 9. *Father* provided a phone number. The invitation had also stated that if the time was inconvenient, the meeting could be rescheduled at a mutually agreeable time before February 18, 2011.

6. On February 9, 2011. the Petitioner notified the Principal of the school that he had invited two other individuals to attend the meeting: the child's mother, and an educational consultant that he had employed. The Petitioner requested that each be connected by telephone conference call.

7. The school attempted to accommodate but discovered that the school's phone system could not accommodate a four way conference call. Prior to this request, the possibility of a four way conference call had never been explored. The Principal then notified the Petitioner that the school's telephone system could not accommodate his request.

8. On February 9, 2011, at 1:40 p.m. the Petitioner called the Principal to request that the IEP meeting be cancelled because the school's telephone system could not accommodate a conference call with four individuals. This was twenty minutes before the meeting. The IEP Team met and reviewed the evaluation results. As the Petitioner was not present, no changes or decisions were made to *Student's* IEP or BIP.

9. At 2:23 p.m., while the IEP meeting was in progress, the Petitioner called the school. *Father* was invited to participate, and he responded that the team could proceed "if we felt that it was legal."

10. The Petitioner filed a petition for a due process hearing on February 11, 2011, alleging that Respondent held a scheduled meeting which significantly impeded the Petitioner's opportunity to participate in the decision making process regarding the provision of FAPE and caused a deprivation of the educational benefit of parental participation.

11. A Preliminary hearing on Motions for Dismissal and Continuance was conducted by Chief Administrative Law Judge Julian Mann III in Oxford, North Carolina on March 7. Continuance was granted. The Respondent filed a Motion for Summary Judgment on April 8. On April 15 the Petitioner filed a Motion to Continue. On April 18 a preliminary hearing was held regarding the Respondent's Motion for Summary Judgment and the Petitioner's Motion to Continue. The ALJ continued the hearing until May 3, at which time arguments concerning the Respondent's Motion for Summary Judgment would be heard.

12. On May 3, 2011 the ALJ held hearings on the Motion for Summary Judgment on this case as well as cases 11 EDC 0703 and 11 EDC 2219. The purpose of this hearing was to determine if there were genuine issues of material fact that needed to be decided in a hearing or whether the Respondent's Motion for Summary Judgment should be granted.

13. Based on the Petition, Respondents Motion with supporting affidavit, Petitioner's documents in response, and arguments by both parties, specific facts in this case could be determined.

14. In the Petitioner's response to the Motion for Summary Judgment, the Petitioner provided no specific facts contrary to those included in the affidavit attached to the Motion.

15. In arguments during the hearing on the Motion for Summary Judgment, the Petitioner introduced no specific facts or other evidence that countered the Respondent's Motion. The Petitioner merely presented allegations and denials.

16. Judge Mann issued a Final Decision on May 10, 2011, stating:

The undersigned Chief Administrative Law Judge finds and holds that there are no genuine issues as of any material fact and Respondent is entitled to judgment as a matter of law. Respondent's Motion for Summary Judgment is GRANTED. Therefore, the Undersigned finds that the Respondent appropriately addressed A.J.'s needs so as to provide him with FAPE in the least restrictive environment, and that Petitioners are not entitled to the relief asserted in their petition.

17. Judge Mann's decision was appealed by the Petitioner on May 17, 2011 and the undersigned was appointed as Review Officer on May 20, 2011. The parties were provided a Request for Written Arguments on May 20.

18. The Parties submitted Arguments to the Review Officer on June 7, 2011.

Based on the Findings of Fact, the Review Officer for the State Board of Education makes Conclusions of Law independently of those of the ALJ. They are consistent with those of the ALJ. A few are essentially the same, but many utilize law not included in the ALJ's Decision. Those added are consistent with IDEA, state law, federal regulations, state policies, and court interpretations. The Review Officer makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C, Article 9 of the North Carolina General Statutes (N.C.G.S.); NC 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A), IDEA; the implementing federal regulations, 34 C.F.R. Part 300; N.C.G.S. 115C, Article 9; and NC 1500 *Policies Governing Services for Children with Disabilities*. All these provisions have specific procedures that a LEA must follow in making FAPE available.

3. Respondent is a local education agency receiving funds pursuant to 20 U.S.C. §1400 et seq. and the agency responsible for providing educational services to students enrolled in Granville County. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. §1400 et seq.; 34 C.F.R. Part 300; N.C.G.S. 115C, Article 9; and the North Carolina *Policies*, NC 1500. These acts and regulations require the Respondent to provide FAPE for those children in need of special education.

4. *Student* is a child with a disability for the purposes of IDEA, 20 U.S.C. §1400 et seq. and a child with special needs within the meaning and definition of N.C.G.S. 115C-106.3(1). *Student* was enrolled in Respondent's school during the period relevant to this controversy. Being classified as having a serious emotional disability, he is entitled to a free appropriate public education (FAPE) from the Respondent.

5. N.C.G.S. 115C, 109.6-109.9 and the *Policies* (NC 1504, 1.8-1.16) provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer are required to be conducted in accordance with these provisions.

6. The North Carolina Rules of Civil Procedure provide that a party against whom a claim is sought may move at any time for summary judgment. N.C.G.S. 1A-1, Rule 56(b)

7. The ALJ had authority to grant summary judgment pursuant to N.C.G.S. 1A-1, Rule 56; N.C.G.S. 150B-36(d); 26 N.C.A.C. 03.0101; and 26 N.C.A.C. 03.0115. Summary judgment is properly granted when there is no genuine issue as to any material fact and the party is entitled to a judgment as a matter of law. This eliminates the need to hold a formal hearing to determine the facts. N.C.G.S. 1A-1, Rule 56

8. The initial burden regarding a Motion for Summary Judgment is on the moving party:

On a Motion for Summary Judgment, the moving party has the burden of establishing the lack of any triable issue of fact. *Draughon v. Harnett County Bd. of Education*, 158 N.C. App. 208 (1985). The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim. The trial judge must view the presented evidence in a light most favorable to the non-moving party. *Dobson v. Harris*, 352 N.C. 77 (2000)

9. The burden then shifts to the non-moving party:

Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. *Gaunt v. Pittaway*, 139 N.C. App. 778 (2000). When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. N.C.G.S. 1A-1, Rule 56(d)

10. In addition to the burden Petitioner has under N.C.G.S. 1A-1, Rule 56, the Supreme Court in *Schaffer v. Weast*, 546 U.S. 49 (2005), stated that parents who challenge educational decisions made by schools have the burden of proof in due process hearings. Thus, the Petitioner has the burden to show that the Respondent's Motion for Summary Judgment should be denied.

11. The Respondent provided significant and substantial evidence that it gave Petitioner opportunity to participate in the IEP meeting. The Team was justified in holding the meeting that had been previously planned and noticed. Following the Petitioner's late request to have others participate in the meeting via phone, the school made attempts to accommodate but discovered that the school's phone system could not accommodate a four way conference call. A last-minute request by the Petitioner to cancel the meeting was insufficient reason for the IEP Team not to proceed with the meeting. Federal regulations and the North Carolina Policies recognize that an IEP meeting may be held without the parent's presence. 34 CFR. 300.322; NC 1503-4.3(d)

12. Once the Respondent had shown that there was no genuine issue as to any material fact, the Petitioner failed to respond as required by N.C.G.S. 1A-1, Rule 56. The Petitioner's assertions, pleadings, and argument cannot and did not satisfy the Petitioner's burden to show a genuine issue of fact.

13. The ALJ properly concluded that that the Respondent met the threshold burden of showing no issue of fact and the Petitioner failed to counter with specific facts at issue. It was appropriate for the ALJ to grant the Motion for Summary Judgment.

14. A significant portion of the Petitioner's pleadings and arguments concerned issues that have been previously settled and adjudicated in due process hearings. The ALJ properly concluded that the Petitioner cannot re-litigate these issues.

15. The Petitioner, acting *pro se*, tried to argue that he should not be held to the same requirements as an attorney. It is true that a *pro se* parent is given more leeway and flexibility in the

process. In the end, however, the parent must still must enter specific facts and make substantial arguments to support the Petition. There is no doubt that there are some substantial issues with regard to the education of *Student*, but the Petitioner did not meet the required burden of showing that the Respondent failed in its responsibilities under the law.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

DECISION

The Review Officer holds that the ALJ did not err in his decision to grant Summary Judgment for the Respondent. There were no genuine issues of material fact to be decided in a hearing. The Petitioner failed to adequately respond to the Motion for Summary Judgment and did not set forth specific facts showing that there are genuine issues of material fact necessitating a full hearing. The Petitioner is not entitled to any relief.

This the 13th day of June, 2011

Joe D. Walters
Review Officer