**STATE OF NORTH CAROLINA**

**BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C – 109.9**

**Johnston County Board of Education**
Petitioner

v.

**[redacted] by his parent [redacted]**
Respondent

# DECISION

**14 EDC 01705**

This is an appeal of the Decision of Administrative Law Judge Donald W. Overby issued on July 24, 2014 and amended on August 4 and August 14, 2014 Judge Overby's hearing for this case was held on June 17, 2014 in Smithfield, North Carolina. The Respondent appealed Judge Overby's Decision on September 4, 2014 and the Review Officer was appointed on September 10, 2014. The Review was conducted pursuant to the provisions of N.C.G.S. 115C – 109.9.

The records of the case received for review were:

1. One (1) Set of ALJ Records, which contained Judge Overby's Decision, Orders, Motions, Correspondence, Hearing Exhibits and Miscellaneous records of the case.
2. One (1) Transcript.
3. Written Arguments from both parties.

Appearances:

For Petitioner: Carolyn A. Waller, Melissa J. Michaud; Tharrington Smith, L.L.P. Post Office Box 1151, Raleigh, North Carolina 27602-1151

For Respondent: [redacted] *pro se*

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

For Petitioner - Petitioner; Johnston County Schools; LEA
For the Child/Respondent - [redacted] the child
For Parent/Respondent - Petitioner; [redacted] mother

## WITNESSES

For Petitioner:

Francine Knott
Barbara Jennings
Jill McKenna

For Respondent:

None

## EXHIBITS

The following exhibits were received into evidence:

Petitioner's Exhibits:

1. Affidavit of Francine Knott
2. Psychoeducational Evaluation
4. Invitation to Conference 1/09/13
5. Invitation to Conference 3/7/13
6. Invitation to Conference 4/15/13

Respondent's Exhibits: None

## ISSUES

Petitioner contends that the issues are:

1. Was Petitioner's evaluation of [redacted] in January 2013 appropriate?
2. Is Respondent entitled to an independent educational evaluation at public expense?

Respondents contend that the issue is:

1. Is Respondent entitled to an independent educational evaluation at public expense?

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. 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."

The Review Officer finds that the ALJ's Facts were regularly made and incorporates most of them in this Decision. Several facts, supported by the record, have been added.

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 makes the following:

## FINDINGS OF FACT

1. [redacted] was evaluated by the school system in January, 2013. The mother, [redacted] met with the school psychologist following the evaluation so that the evaluation could be discussed. Several IEP meetings to develop [redacted]s IEP were also held. [redacted] had agreed to an IEP meeting on February 6, but called the special education teacher the night before to tell that she could not attend. The meeting was held without [redacted] because [redacted]s IEP was due to expire the next day. The Team used the information from the evaluation to develop [redacted]s IEP. The Team agreed to meet again to include [redacted] Additional IEP meetings were held on March 3 and April 30. At each of these meetings the evaluation was explained and discussed. [redacted] was present at these meetings but did not question or object to the January evaluation. (Petition; T. pp. 34 - 38)

2. The Respondent requested an independent educational evaluation (IEE) at public expense on December 17, 2013. The IEP Team had no reason for an additional evaluation at that time. Barring some real change in [redacted] his next evaluation would not be scheduled for several years. The Petitioner attempted to determine the objection to the January 2013 evaluation. [redacted] gave no specific reasons, other than she thought that the psychologist did not have enough time and rushed in the performance of the evaluation. (Petition)

3. The school system then offered to perform another evaluation, but that was not acceptable to [redacted] The Petitioner, on February 28, 2014, filed for a due process hearing to show that its January 2013 evaluation was appropriate, and that Respondents request for an IEE at public expense be denied. (T. pp. 40 - 41)

4. Following the Petition for a Due Process Hearing, the Respondent never filed any response. The Petitioner then filed a motion for immediate hearing and provided the Respondent with all the information and materials that were required by law to be

exchanged prior to the hearing. The Respondent did not provide the information and materials that were required to be exchanged. During the prehearing phone conference, the Respondent requested a continuance, which was granted. The presiding ALJ set a new date for the hearing.

5. During the second prehearing phone conference, the Respondent again asked for a continuance, but did not propose an alternate hearing date. The presiding ALJ did not grant the continuance at that time, but issued an order on June 13, 2014 specifying that arguments for another continuance could be made prior to the beginning of the June 17, 2014 scheduled hearing.

6. The ALJ's order of June 13, 2014 stated:

> On the 6th day of June, Respondent filed a Motion to Continue. Respondent's motion will be taken up immediately preceding the call of the hearing, and if granted, the assigned administrative law judge will set the continued date, time, and location of the hearing. If the Respondent's motion is denied, the hearing will proceed. Respondent will be allowed to appear by telephone for the purpose of arguing her motion to continue. The presiding judge will determine how to proceed if the motion is denied, as to whether Respondent will be allowed to continue their appearance by telephone.

7. The Respondent chose not to attend the scheduled hearing scheduled hearing on June 17, 2014. Instead, [redacted] participated by phone. She limited her participation to an argument for another continuance. The ALJ denied her request for the continuance and the hearing began. The Respondent then asked for the hearing to be delayed briefly until her lunch hour so that she could continue to participate via phone. The phone link was re-established shortly after noon and the Petitioner's attorneys began the presentation of the case for the Petitioner. The Respondent then disconnected the phone linkage. Following repeated attempts to re-establish the phone linkage, the ALJ continued the hearing without the Respondent. (T. pp. 15, 18 - 23)

8. The Petitioner used the testimony of three witnesses: the Psychologist that conducted the January evaluation, [redacted]s Special Education Teacher, and the Exceptional Children Director.

9. The school psychologist, Ms. Knott, has been a school psychologist for 14 years and performs an average of 50 to 70 of these evaluations each year. She performed the evaluation of [redacted] during three different days in January, and provided the written evaluation on January 29, 2013. (T. pp. 24 - 25, Pet. Exhibit 2)

10. Ms. Knott, in conducting her evaluation, used the following strategies and assessments:

    a. She reviewed [redacted]s cumulative file and special education records, including the background information contained in those records.
    b. She interviewed [redacted] to gather information on interpersonal and socialization skills.
    c. She gathered information on [redacted]s behavior from classroom teachers regarding what they observe in the classroom.
    d. She administered the Wechsler Intelligence Scale for Children – Fourth Edition to [redacted] to gather information about intellectual functioning and cognitive ability.

e. She administered the Woodcock-Johnson Test of Achievement – Third Edition normative Update (WJ III NU) to gather information about academic achievement in reading, mathematics, and written language. (Exhibit 2)

11. Ms. Knott had received training regarding the instruments she used and was confident in the methodology she used. The evaluation was conducted properly and she sufficient time to complete the evaluation and write the evaluation report. (T. pp. 28 - 29)

12. Ms. Knott included recommendations in her evaluation report. She was confident in her recommendations. These recommendations were not based on a single test or observation. (T. p. 29)

13. Ms. Jennings was the special education teacher and case manager for [redacted] She testified that the IEP Team used the information from the January evaluation in the IEP meetings of February 6, March 3, and April 30 to develop and change [redacted]s IEP. [redacted] was present in the meetings of March 3 and April 30 when the evaluation results were discussed. At no time during these meetings did [redacted] request an independent evaluation. ( T. pp. 32, 35 - 37)

14. Jill McKenna, the Exceptional Children Director, testified that she refused to grant [redacted]s request for an IEE after it was requested in December 2013. The school system made repeated offers to conduct a subsequent evaluation to address any concerns the Respondent was raising with regard to the January 2013 evaluation. The Respondent did not cooperate with the attempts to schedule a meeting to discuss the request for an IEE. (T. pp. 40 - 41)

15. The Petitioner had two options available regarding the request for an IEE. The school system could pay for an IEE, or file for a Due Process Hearing to have the school system's evaluation determined to be appropriate. (T. p. 41)

16. The Petitioner chose to petition for a Due Process hearing and this hearing resulted. The hearing lasted less than one hour.

17. The Respondent did not present any evidence, witnesses, nor did she enter any exhibits. It was obvious that she was not prepared for the hearing, nor did she want the hearing to take place.

18. The Respondent appealed the ALJ's decision on September 4, 2014 and this Review Officer was appointed on September 10.

19. Written Arguments were requested. The Respondent submitted arguments on September 23 and the Petitioner on September 24, 2014.

20. The Respondent, in her Arguments, did not actually address the ALJ's Decision. She did, however, attempt to submit arguments and exhibits that should have been submitted at the hearing. Those issues could not be addressed by the Review Officer. The Respondent had opportunity to have these addressed at the hearing

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; 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; 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. The Petitioner 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 the Johnston County Schools. The Petitioner 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; G.S. 115C, Article 9; and the North Carolina *Policies,* NC 1500. These acts and regulations require the Petitioner to provide FAPE for those children in need of special education.

4. [redacted] is a child eligible to be served under IDEA, 20 U.S.C. §1400 et seq. and G.S. 115C - Article 9. This would entitle [redacted] to a free appropriate public education (FAPE) from the Petitioner and that any evaluation of [redacted] be in accordance with these laws.

5. G.S.115C-109.6 - 109.9 and the *Policies* (NC 1504, 1.12 - 1.17) provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer must be conducted in accordance with these provisions.

6. The Respondent had requested an IEE without giving any reason, although the law does not require her to state a reason why she disagreed with the school district evaluation. She then refused to cooperate with school officials when they sought to answer her questions about the January 2013 evaluation. She also refused another evaluation by the schools. The LEA cannot be faulted for then pursuing this hearing. It was the only viable option, for once an IEE is requested the schools must either provide it at public expense or show that their evaluation is appropriate.

7. The Respondent chose not to respond to the petition in this case, sought several continuances, never submitted any materials in the case, and failed to attend the hearing.

This provides interesting insight, for the Respondent obviously did not want the hearing and without representation had difficulty with her case.

8. The ALJ acted properly in proceeding with the case without the Respondent. The Respondent had sufficient notice that the hearing was going to take place on June 17.

9. The Petitioner has the burden of proof in this due process hearing. *Schaffer v. Weast*, 546 U.S. 49 (2005). Thus, the Petitioner has the burden to show by a preponderance of evidence that the Petitioner's evaluation of [redacted] was appropriate.

10. Generally, parents have a right to an independent educational evaluation (IEE) at public expense if the parent disagrees with the evaluation performed or obtained by the school system. 34 CFR 300.502(b)(1) and *N.C. Policies* NC 1504-1.3(b)(1). If a request is made for an IEE, the school system, without unnecessary delay, may request a due process hearing to show that its evaluation is appropriate. 34 CFR 300.502(b)(2)(i) and *N.C. Policies* NC 1504-1.3(b)(2). If as a result of the hearing, the ALJ determines that the school system's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. 34 CFR 300.502(b)(3) and *N.C. Policies* NC 1504-1.3(b)(3). Clearly, this also places the burden of proof on the Petitioner in this case.

11. The IDEA establishes the basic requirements for an evaluation:

> In conducting the evaluation, the local educational agency shall
> (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining
> (i) whether the child is a child with a disability; and
> (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;
> (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
> (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
> 20 U.S.C. §1414(b)(2)

12. The IDEA also establishes additional specific requirements:

> Each local educational agency shall ensure that
> (A) assessments and other evaluation materials used to assess a child under this section
> (i) are selected and administered so as not to be discriminatory on a racial or cultural basis;
> (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;
> (iii) are used for purposes for which the assessments or measures are valid and reliable
> (iv) are administered by trained and knowledgeable personnel; and
> (v) are administered in accordance with any instructions provided by the producer of such assessments;
> (B) the child is assessed in all areas of suspected disability;
> (C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.
> 20 U.S.C. §1414(b)(3)

13. North Carolina uses these same criteria and are found in *N.C. Policies* NC 1503-2.5(b) and 1503-2.5(c).

14. Relying on these criteria, courts have usually denied parent requests for an IEE at public expense if the evaluation was conducted by qualified persons, relied on various methods to collect data, and provided information that was pertinent and useful to the IEP Team. See *e.g.*, *Council Rock School District v. Bolick,* Civil Action 09-5604, (E.D. Pa. 2010), affd. 462 Fed. Appx. 212, (3rd. Cir. 2012) and *DeMerchant v. Springfield School District,* 2007 WL 2572357 (D. Vt. 2007).

15. One of the best analyses of this issue can be found in *Wentzville R-IV School District,* 61 IDELR 116, 113 LRP 12657, (Hearing Panel for Missouri State Educational Agency, March 10, 2013):

> To assess the adequacy of the District's evaluations, we must determine whether those evaluations meet the criteria set forth by the IDEA and the State Plan. More specifically, the IDEA requires that: (1) the evaluation be conducted by qualified persons; (2) the testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and should be provided and administered in the student's primary language or other mode of communication; (3) any standardized tests used must have been validated for the specific purpose for which they were used; (4) testing must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producers of the tests; (5) evaluation materials must be tailored to assess specific areas of educational need, rather than merely provide a single general intelligence quotient; (6) tests must be selected and administered so as to ensure that the results accurately reflect the aptitude or achievement level of a child with impaired sensory, manual, or speaking skills; (7) no single procedure may be used as the sole criterion for determining whether a child is disabled, or for determining an appropriate educational program for the child; (8) the child must be assessed in all areas related to the suspected disability; (9) the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs; (10) the evaluator must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; and (11) the evaluator must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. See 34 C.F.R. § 300.304 (2006).

16. Although the Petitioner did not address each and every one of these criteria in this case, it did address those that appear to be most relevant.

17. The actions of the Petitioner in conducting the evaluation in January 2013 were very consistent with these court decisions and the law included in 20 U.S.C. §1414(b)(2), 20 U.S.C. §1414(b)(3), 34 C.F.R. § 300.304, and *N.C. Policies* NC 1503-2.5(b) and 1503-2.5(c).

18. The Petitioner has met the burden of showing that the Petitioner's evaluation of [redacted] was appropriate.

19. The Petitioner should follow through with the second paragraph of the ALJ's Decision by making a reasonable attempt to meet with Respondent for the purpose of discussing further testing of [redacted]

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

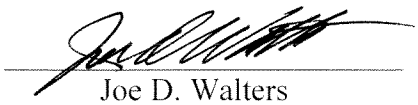
## DECISION

1. The Decision of the ALJ is upheld.

2. The Petitioner has met the burden of showing that the January 2013 evaluation of [redacted] was appropriate.

3. The Respondent is not entitled to an independent evaluation at public expense.

This the 30th day of September 2014.



Joe D. Walters
Review Officer

## NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in G.S. 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.

CERTIFICATE OF SERVICE

I hereby certify that this Decision has been duly served on the Petitioners, Respondent, and Respondent's counsel by e-mail and U.S. Mail, addressed as follows:

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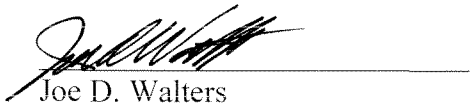
This the 30th day of September 2014.



Joe D. Walters
Review Officer