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

[redacted] **III, by parent or guardian,** [redacted]

Petitioners

v.

New Hanover County Board of Education

Respondent

DECISION

15 EDC 05964

This is an appeal of the Summary Judgment Decision issued by Administrative Law Judge Philip E. Burger, Jr. on December 4, 2015. No hearing has been held for this case. The Petitioner appealed Judge Burger's Decision and the Review Officer was appointed on December 21, 2015. 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 Summary Judgment Decision by Administrative Law Judge Philip E. Burger, Jr.
2. The original Petition or Petitioner, [redacted]
3. Written Arguments from both parties.

Appearances:

For Petitioner: [redacted] Parent *pro se*; [redacted]

For Respondent: Wayne A. Bullard; New Hanover County Board of Education, 6410 Carolina Beach Road, Wilmington, NC 28412

For convenience and privacy, the following will be used in this Decision to refer to the parties:

For the Student/Petitioner - Petitioner; [redacted]
For Parent/Petitioner - Parent; [redacted] (mother)
For Respondent - Respondent; New Hanover Schools; LEA

ISSUES

The issues in the original petition are varied and difficult to ascertain. The Review Officer attempts to summarize them:

1. Failure of the Respondent to allow parental access to educational records.
2. Failure of the Respondent to allow meaningful parental participation.
3. IEP services are not individualized by Respondent.
4. Progress reports not provided by Respondent.
5. IEP services insufficiently implemented by Respondent.
6. Failure by Respondent to safeguard privacy of student records.
7. Numerous allegations regarding Respondent that are not IDEA issues.

Issue on Appeal to State Review Officer

As no hearing was conducted on the substantive issues in the original petition, a single procedural issue was before the State Review Officer:

Were the Petitioners' rights provided by IDEA denied by the Summary Judgment Decision of Judge Berger?

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. This two-tiered system of administrative remedies used by North Carolina has recently been upheld by the United States Court of Appeals for the Fourth Circuit. (E.L. v. Chapel Hill-Carrboro Board of Education, 773 F.3d 509, 64 IDELR 192 (4th Cir. 2014).

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 and that the review officer must follow the "accepted norm of fact finding."

North Carolina's District Court Judge Osteen 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 §300.514; G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15.

Having reviewed the records of the case, the Review Officer makes the following:

FINDINGS OF FACT

1. The student, [redacted] had been identified as having a disability in the area of [redacted] and was provided an Individualized Education Program (IEP) that provided [redacted] and was given accommodations for his [redacted]

2. An IEP meeting was held on June 15, 2015 without the mother being present. The IEP Team determined that [redacted] had met the goals on his IEP and that he was no longer eligible for special education services. The Team removed him from the special education program, placing him in regular education.

3. A petition was filed by Petitioner on August 12, 2015, alleging that the IDEA rights of [redacted] III have been violated by the Respondent. The mother claims that she was not properly notified of the June 15 IEP meeting and thus was not allowed to participate. She also claimed that the IEP Team should have conducted evaluations to determine other areas of disability.

4. The Respondent filed two Motions for Summary Judgment. The first was denied by ALJ Augustus B. Elkins, II. The second, made to ALJ Philip E. Burger is the primary issue for this appeal.

5. Following the Second Motion for Summary Judgment, the Petitioner failed to respond as required by law.

6. Judge Burger, on November 17, 2015, ordered the parties to participate in a Pre-Hearing telephone conference on December 4, 2015 at 11:00 A.M. The Petitioner failed to participate in that conference phone call. The Participant later alleged that she had phone problems.

7. A Decision was filed by Judge Berger immediately after the phone conference on December 4, 2015. In that Decision the ALJ granted Summary in Respondent's favor:

> ..... the Respondent's Second Motion for Summary Judgment is hereby GRANTED and judgment is hereby entered in favor of Respondent on all of Petitioners' claims in this matter.

8. The Petitioners appealed the ALJ's Decision to the State Board of Education following the procedures established in North Carolina Law.

9. This Review Officer was appointed on December 21, 2015.

10. On December 28 the Petitioner attempted ex parte communications via e-mail with the Review Officer providing information related to the case. The Review Officer notified her that she was prohibited from ex parte contact, and filed her information without reading it.

11. Written Arguments were requested from the parties on December 22 and received from both parties on January 4, 2016.

12. In her Written Arguments, the Petitioner raises many issues that cannot be addressed by the Review Officer. The Review Officer is restricted by IDEA and North Carolina Law to issues regarding a Free Appropriate Public Education (FAPE).

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 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 in New Hanover 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; 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. 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. Those provisions clearly restrict ALJ's and Review Officers to IDEA issues. Many of the allegations and Arguments made by the Petitioner are civil rights issues that can only be heard by a court that has jurisdiction over these issues.

5. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176, 206 (1982) the Supreme Court established both a procedural and a substantive test to evaluate compliance with the IDEA. The Court provided:

   > First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

6. Only the procedural test needs to be applied in this case. Did the Respondent comply with the procedures to determine [redacted] continued eligibility for special education services and did the Respondent provide an opportunity for parental participation in the process of determining eligibility?

7. The Petitioners have not shown by a preponderance of the evidence that the Respondent failed to comply with the procedures to determine [redacted] continued eligibility for special education services.

8. The Petitioners have not shown by a preponderance of the evidence that the Respondent failed to provide an opportunity for parental participation in the process.

9. A third procedural test must be applied in this case. Did the Petitioners have the opportunity to exercise due process rights if there is a disagreement with an action by the Respondent?

10. The Petitioners have not shown by a preponderance of the evidence that they were not afforded the opportunity to exercise due process rights granted by IDEA. The Mother offered arguments from her own perspective that the Petition for this case did not get a fair chance to be heard by the ALJ. Her arguments, however, are mostly speculation and are self-serving.

11. The Petitioners seem to argue that once a petition has been filed, a hearing must take place. Due Process only affords the opportunity for a hearing, it does not guarantee that there will be a hearing. North Carolina has many steps in the process leading up to a hearing. If a party fails to follow the procedures exactly, the other party has the right to object. This can result in a loss of the opportunity to be heard.

12. There is no doubt that a *pro se* parent has a difficult task when filing a due process petition. There are many potential roadblocks or obstacles to overcome. While attorneys live daily with the processes and procedures necessary to get a case to a hearing, the layperson is at a certain disadvantage. IDEA does not grant any special privilege to a *pro se* parent. That parent is held to the same requirements as an attorney. The failure to meet a single requirement during the journey to resolve the issue can prove fatal to the effort.

13. From the perspective of the Review Officer, the real underlying issue in this case is the education of [redacted] The Petitioners' Arguments were persuasive in the sense that questions were raised that deserve to be answered. Although she was unsuccessful in this effort, there is nothing in IDEA or state law that would prohibit her from trying again.

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

DECISION

1. The Summary Judgment of the Administrative Law Judge dated December 4, 2015 is upheld.

2. The Petitioners are not entitled to any relief.

This the 6th day of January 2016.

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 and the attorney for the Respondent by certified U.S. Mail and e-mail. It has been served on others by U.S. Mail, addressed as follows:

[redacted]
Parent, *pro se*
Petitioner

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This the 6 th day of January 2016 .

Joe D. Walters
Review Officer