

STATE OF NORTH CAROLINA

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

█ together with parent █

Petitioner

v.

**Charlotte-Mecklenburg Schools Board of
Education**

Respondent

DECISION

18 EDC 03019

This is an appeal of one issue in the Final Decision Order issued by Administrative Law Judge Selina Malherbe on November 2, 2018. No formal hearing has yet been held in the case. The Order granted Partial Summary Judgment to the Respondent. The Respondent filed an appeal of a portion of Judge Malherbe's Order on December 2 and the State Review Officer (SRO) was appointed on December 3, 2018. The appeal was with regard to one issue, the standing of █

The records of the case received for review were contained on one (1) CD which contained: the ALJ's Order granting Partial Summary Judgment; the Petition; Petitioner's Motion for Summary Judgment; Respondent's Motion for Partial Summary Judgment; and Respondent's Memorandum in support of the Motion for Partial Summary Judgment; Petitioner's Response to Respondent's Motion for Partial Summary Judgment. Also received were two transcripts of a telephonic hearing on Respondent's Motion for Partial Summary Judgment and the Respondent's Appeal. In addition, the CD included many other motions, orders, and correspondence not related to this appeal. The records also include Written Arguments submitted by both parties to the Review Officer regarding the appeal

As there was no formal hearing in the case, all facts determined by the Review Officer were drawn from the motions, responses, and transcript of telephonic hearings that comprised the records of the case.

Appearances:

For Respondent: J. Melissa Woods and Jill Y. Sanchez-Myers; Charlotte-Mecklenburg Board of Education, 600 E. Fourth St., 5th floor, Charlotte, NC 28202

For Petitioner: Ann M. Paradis and Corey Frost; Ann Paradis Law PLLC, 301 Kilmayne Drive, Suite 102, Cary, NC 27511

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

For the Student/Petitioner - █

For Parent/Petitioner - █ mother

For Respondent - Respondent; Charlotte-Mecklenburg Public Schools

WITNESSES and EXHIBITS

There was no testimony of Witnesses nor were any Exhibits entered into the record.

STANDARD OF REVIEW

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 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."

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.

FINDINGS OF FACT and CONCLUSIONS OF LAW

As there was no formal hearing in the case, all facts were drawn from the motions, responses, and the transcript of a telephonic hearing that comprised the records of the case.

1. ■■■ is a student enrolled in the Charlotte-Mecklenburg Schools. ■■■ along with ■■■ his mother, filed a Petition for a Due Process Hearing on May 17, 2018. ALJ Selina Malherbe was assigned to hear the case.
2. On September 4 the Respondent filed a Motion for Partial Summary Judgment followed by a Memorandum in Support of the Motion for Partial Summary Judgment. On September 19 the Petitioner filed a Response to Respondent's Motion for Partial Summary Judgment. Both made very good arguments related to the issue of this appeal. Following a telephonic hearing on the Motion, the ALJ issued Final Decision Order Granting Partial Summary Judgment for the Respondent on November 2, 2018.
3. The Respondent filed an appeal of one of the three holdings in the ALJ Final Decision Order to the State Review Officer. The issue appealed was the standing of ■■■ with regard to this case. This is the single issue before the State Review Officer.
4. The Petitioner, in Written Arguments to the Review Officer, maintains that the ALJ's Decision was not appealable at this stage, for no Final Decision following a hearing has been issued. Although the SRO is inclined to agree, N.C.G.S. § 115C-109.9(a) simply states: "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 law is not specific. It does not state that the entire hearing process must be completed. The ALJ did issue a decision. With this in mind, the SRO undertook the appeal.

5. In her Final Decision Order, the ALJ simply stated that "...Respondent's Motion for Partial Summary Judgment is denied concerning [REDACTED]'s standing as a proper Petitioner." The ALJ gave no background information nor provided any legal reasoning for her holding on this issue.

6. [REDACTED] attained the age of 18 on March 24, 2018, prior to the filing of the Petition on May 17, 2018.

7. On the issue of parental standing regarding an adult child's rights under IDEA, North Carolina Law and Policies are subject to several interpretations. The North Carolina General Statute that provides guidance states that:

When a child with a disability reaches the age of 18, --- All other rights accorded to parents under this Article and IDEA transfer to the child. (N.C.G.S. § 115C-109.2(a)(2))

Notwithstanding subsection (a) of this section, for a child with a disability who has reached the age of majority under State law and who has not been determined incompetent but is determined to not have the ability to provide informed consent with respect to his or her education program, the State Board shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility under this section. (N.C.G.S. § 115C-109.2(b))

8. North Carolina *Policies Governing Services for Students with Disabilities* has several provisions that provide guidance:

A parent may not file a petition on behalf of a student who has reached the age of majority unless the court has granted guardianship to the parent. (NC 1504-1.8)

When a child with a disability reaches the age of 18 (except for a child with a disability who has been determined to be incompetent under State law) -- All other rights accorded to parents under Part B of the IDEA transfer to the child. (NC 1504-1.21(a)(2))

A student who has reached the age of 18 shall be presumed to be a competent adult unless one of the following actions has been taken: . . . The adult student designates, in writing, by power of attorney or similar legal document, another competent adult to be the student's agent to receive notices and to participate in meetings and all other procedures related to the student's educational program. (NC 1504-1.21(b)(ii)).

9. Applying the above North Carolina Law and Policies in this case, all rights previously held by [REDACTED] have now been transferred to [REDACTED]. Although the parent normally may not file a petition on behalf of the adult student, North Carolina has chosen a limited way (NC 1504-1.21(b)(ii)) to permit parents to still participate in the procedures to provide the adult child's educational program. To "participate in all other procedures" would include IDEA's due process procedures.

10. [REDACTED] has not been declared to be incompetent, nor has he been determined to not have the ability to provide informed consent. [REDACTED] is indeed competent and has designated [REDACTED] to act for him under the provisions of NC 1504-1.21(b)(ii). This certainly allows the mother to initiate action on behalf of [REDACTED].

11. That [REDACTED] can initiate action on behalf of [REDACTED] can be found in North Carolina's provisions regarding power of attorney:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to do all of the following: (1) Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, . . . (N.C.G.S. § 32C-2-212(1))

12. The apparent conflict between NC 1504-1.8, (*which specifies that a parent may not file a petition on behalf of an adult child*) and N.C.G.S. § 32C-2-212(1) (*which authorizes an agent with power of attorney to initiate a claim*) must be decided in favor of the statute. A law prevails over an administrative policy. [REDACTED] the parent with power of attorney, can initiate action on behalf of [REDACTED].

13. It is not reasonable to think that NC 1504-1.21(b)(ii) was intended to allow [REDACTED] to give [REDACTED] the authority to engage in the decision-making process related to his educational program and not allow [REDACTED] to participate in a petition for a due process hearing. (*See: Stanek v. St. Charles Community School District #303, 783 F.3d 634 (2015). Even though state law specified that upon reaching the age of majority all rights had transferred to the child, the adult child had delegated the authority to parents act on his behalf with regards to IDEA. The Seventh Circuit stated that there is no reason to think that such delegation that would give control over educational decisions to a parent would not also allow a parent to follow through with litigation if necessary.*)

14. No judicial authority could be found on this issue in North Carolina. The prevailing view in the few lower court decisions that could be found is that parents cannot initiate petitions on behalf of adult children. Most, however, do not entail the power of attorney delegation as in this case and in *Stanek*. The SRO finds the *Stanek* case persuasive.

15. [REDACTED] certainly has the right to initiate a due process case under IDEA, and indeed he is a party in this case. As [REDACTED] has given [REDACTED] the power of attorney to act on his behalf, [REDACTED] can certainly initiate an action to seek relief for [REDACTED]. The power of attorney, however, does not give [REDACTED] the right to pursue her own IDEA claims in this due process petition, for she has no IDEA rights at stake. IDEA is specific on this point. All rights accorded to parents by IDEA transfer to a child who attains the age of majority. (10 U.S.C. § 1415(m)(1)(B))

16. If "standing," in its simplest definition, means the right to initiate action, then [REDACTED] has "standing" because of being given the power of attorney. She does not, however, have "standing" to pursue her own claims in this IDEA proceeding.

DECISION

1. The Final Decision Order of ALJ Malherbe is upheld, with modification.
2. Having been given power of attorney, [REDACTED] can pursue claims only on behalf of [REDACTED]. She has no IDEA rights at stake and cannot pursue her own claims in this case.

This the 18th day of December 2018


Joe D. Walters
State 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 N.C.G.S. 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415.

I hereby certify that this Decision has been duly served on the Petitioner and Respondent by electronic and U.S. Mail, addressed as follows:


█ and █
Petitioner
(Addresses redacted)

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This the 18th day of December 2018


Joe D. Walters
State Review Officer

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