

STATE OF NORTH CAROLINA

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

█ by parent or guardian █

Petitioner

v.

**Charlotte-Mecklenburg Schools**

Respondent

**DECISION**

**18 EDC 05304**

This is an appeal of the Final Decision issued by Administrative Law Judge (ALJ) Selina Malherbe on November 2, 2018 granting Summary Judgment to the Respondent. The Petitioner filed an appeal of ALJ Malherbe's Decision on March 4 and the State Review Officer (SRO) was appointed on March 5, 2019.

The records of the case received for review were contained on one (1) CD which contained: the ALJ's Order granting Summary Judgment; the Petition; Respondent's Response to the Petition; Respondent's Motion for Summary Judgment; Petitioner's Response to Respondent's Motion for Summary Judgment. Also received was a transcript of a hearing on Respondent's Motion for Summary Judgment and the Petitioner's Appeal. In addition, the CD included many other motions, scheduling orders, and correspondence. 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 the hearing on Summary Judgment.

**Appearances:**

For Respondent: Chris Z. Campbell, Campbell Shatley, P.L.L.C., 674 Merrimon Ave., Ste. 210, Asheville, NC 28804; and J. Melissa Woods, Charlotte-Mecklenburg Board of Education, 600 E. Fourth St., 5<sup>th</sup> floor, Charlotte, NC 28202

For Petitioner: Aaron Joseph Tierney and Michael Pascale, Cuddy Law Firm, 104 Waxhaw Professional Park Dr., Waxhaw, NC 28173;

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 Schools; CMS

## 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.

## ISSUES

There were nine (9) claims in the Petition:

1. CMS dis-enrolled the student, changing her placement without first consulting the parent.
2. An online academy is not the least restrictive placement for the student.
3. The May 2017, October 2017, and May 2018 IEPs do not sufficiently state the educational services that the student should receive under her IEP.
4. CMS failed to appropriately notify the parent that the May 2018 IEP meeting would consider changes to the student's speech/language services.
5. The May 2018 IEP does not include any goals related to the student's speech-language therapy.
6. CMS reduced the student's speech/language services without conducting a new evaluation.
7. The May 2018 IEP provides insufficient levels of speech-language therapy, one of the student's main areas of need.
8. The May 2017, October 2017, and May 2018 IEPs do not provide the parental counseling and training recommended by CMS's own psychological evaluation.
9. CMS failed to respond to the Parent's request for independent evaluations.

## FINDINGS and CONCLUSIONS

**As there was no formal hearing in the case, all facts were drawn from the motions, responses, and the transcript of the Hearing on the Motion for Summary Judgment.**

1. ■■■ is a student enrolled in the Charlotte-Mecklenburg Schools. She is currently identified as child with special needs and is being served through an IEP by the Respondent.
2. ■■■ by her parent or guardian ■■■ filed a Petition for a Due Process Hearing on August 28, 2018. ALJ Selina Malherbe was assigned to hear the case.

3. On January 11, 2019 the Respondent filed a Motion for Summary Judgment and a Memorandum in Support of the Motion. On January 22 the Petitioner filed a Response to Respondent's Motion for Summary Judgment. On January 23 a hearing was held on the Motion, with the ALJ issuing a Final Decision Granting Summary Judgment for the Respondent on February 18, 2019.

4. The Petitioner appealed the ALJ Final Decision to the State Review Officer on March 4, 2019.

5. The Respondent in the Motion for Summary Judgment submitted affidavits from school staff with accompanying exhibits. The Petitioner in Response submitted a single affidavit from the mother with accompanying exhibits.

6. Following a hearing on the Motion for Summary Judgment, the ALJ found that the Respondent met its burden of demonstrating that there was no genuine issue of material fact regarding all nine (9) of Petitioner's claims

7. The ALJ also found that the Petitioner had failed to produce a forecast of evidence through specific facts to demonstrate that they could establish a prima facie case during a hearing. The Petition was composed primarily of allegations, disagreements and opinions that the ALJ found not sufficient to survive Summary Judgment.

8. The SRO agrees with the ALJ's Findings and Conclusions. Most of the Petition was composed of allegations, disagreements and opinions.

9. The first two claims (Issues 1 & 2) have no basis for being submitted. The Petitioner submitted no facts that CMS dis-enrolled the student. [REDACTED] enrolled the student in the [REDACTED] Academy during the summer of 2018. After discovering her error in making this choice, the student never attended the [REDACTED] Academy. The mother brought the student back to CMS's school for the upcoming regular school year. The first two claims are not viable and the ALJ should have granted Summary Judgment regarding these claims.

10. The SRO agrees with the ALJ regarding the claims in Issues 3, 4, 5, 6, 7, and 8. The Petitioner failed to produce a forecast of evidence through specific facts to demonstrate that they could establish a prima facie case during a hearing. Both the Petition and oral arguments during the Hearing on the Motion for Summary Judgment were composed primarily of allegations, disagreements and opinions that are not sufficient to survive Summary Judgment.

11. In addition, the applicable statute of limitations found in N.C.G.S. §115C-109.6(b) forecloses claims arising prior to August 28, 2017. Specifically, the claims in Issues 3 and 8 related to violations prior to August 2017 are foreclosed by North Carolina's one-year statute of limitations. The Petitioner made no argument regarding any exception to the applicable statute of limitations found in N.C.G.S. §115C-109.6(c).

12. The Petitioner made some interesting arguments related to claims in Issues 3, 5, 6 and 7, but has only made allegations and statements disagreeing with the decisions made by the IEP team. The Petitioner made no effort to produce a forecast of specific evidence to survive Summary Judgment regarding these claims.

13. The claim in Issue 4 has no basis in law. The mother was provided notice of the pending IEP meetings during which some changes were made to [REDACTED]'s IEP. Nothing in IDEA or state law requires that a parent be notified of each specific change that may be made in a child's IEP. Such notice would defeat one of the purposes of the IEP meeting. An IEP meeting provides the opportunity for all team members, including parents, to review the IEP and make suggestions that may improve the IEP.

14. The claim in Issue 6 has no basis in law. There is no requirement in IDEA or state law that a new evaluation be conducted prior to a change in services.

15. There is no legal basis for the claim in Issue 8. Recommendations made by evaluators are not required to be incorporated into an IEP. The IEP team, independently, makes decisions regarding all recommendations for the provision of FAPE. Again, the Petitioner made no forecast of evidence pertaining to the need for parental counseling that would be necessary to survive Summary Judgment.

16. The applicable statute of limitations in N.C.G.S. §115C-109.6(b) forecloses the claim in Issue 9. Normally a parent's request for an independent evaluation (IEE) triggers the requirements in NC 1504-1.3. The request for an IEE, however, was made on August 10, 2018, more than one year after the evaluation was conducted. The Petitioner made no argument in the Petition or during the Hearing on the Motion on Summary Judgment regarding any exception to North Carolina's statute of limitations found in N.C.G.S. §115C-109.6(c).

17. The Petitioner, in its Written Exceptions and Arguments to the SRO, made extensive arguments that the one-year statute of limitations should not apply to the request for an IEE. The SRO is not convinced. The evaluation conducted by CMS is an "action" as described in N.C.G.S. § 115C-109.6(b) and subject to the statute of limitations.

18. The Petitioner submitted Written Exceptions and Arguments on March 19, 2019. Some of the Exceptions and Arguments were an attempt to introduce evidence, which the SRO will not consider. This is a review of the proceedings up to and through the Hearing on the Motion for Summary Judgment. The Petitioner had ample opportunity to present evidence to the ALJ.

19. The Petitioner at numerous times and again in Written Exceptions and Arguments to the SRO attempts to make an issue of being denied due process because of not being able to cross examine Respondent's staff. There was no hearing during which facts were introduced, so cross examination in the usual sense is not available. This was a Decision granting Summary Judgment. The Petitioner had ample opportunity to respond, and did submit a Response to the Respondent's Motion for Summary Judgment. The Petitioner also made arguments at the Hearing on the Motion.

20. Too many of the Petitioner's arguments are based on a faulty premise, that a due process hearing must take place. The Petitioner would then be able to present evidence and cross examine the CMS staff called upon to be witnesses. The Petitioner, however, must first survive a Motion for Summary Judgment. There is no guarantee that a filed Petition will ever make it to the due process hearing stage that envisioned by framers of IDEA. Due Process was still provided.

21. The Petitioner also had the opportunity in the original Petition, in its Response to the Motion for Summary Judgment, and during the Hearing on the Motion for Summary Judgment to show that there was a viable case for a hearing. The Petitioner could have done so by making a forecast of evidence that would be presented in a full due process hearing. The Petitioner failed to make a convincing argument. Instead, the Petitioner relied primarily on allegations, disagreements and opinions. This is insufficient to meet the burden imposed by a Motion for Summary Judgment. In order to meet its burden, "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.R. Civ. P. 56(e). (*Emphasis added.*)

22. Summary judgment is intended "to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Dalton v. Camp*, 353 N.C. 647, 650 (2001). The moving party can establish the absence of a genuine issue of material fact by "proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29 (1974); *Messick v. Catawba Cnty.*, 110 N.C. App. 707, 712 (1993). Once the moving party meets its burden, the nonmoving party must produce a

forecast of evidence demonstrating specific facts showing that a prima facie case can be established at trial. *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 448 (2003) (*Emphasis added.*)

23. Actions of local board of education are presumed to be correct. See N.C.G.S. 115C-44(b). In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court decided that those who challenge educational decisions made by schools have the burden of proof in these proceedings. Logically, this would translate to challenging a well-presented Motion for Summary Judgment as well. The Petitioner would have had a much better chance of surviving the Motion for Summary Judgment if it could have shown that there was evidence available to support the allegations in the Petition.

24. The Petitioner, in its Written Exceptions and Arguments to the SRO, made extensive arguments regarding the requirement that CMS provide special education based on "peer-review research to the extent practicable," as required by 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The Petitioner had made the allegation that this was not being done, but provided no forecast of evidence that could be introduced in a due process hearing to prove this. This claim cannot survive a Motion for Summary Judgment.

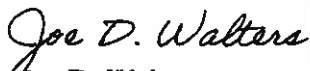
25. The SRO agrees with the ALJ's granting of Summary Judgment regarding all claims in the Petition.

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## DECISION

1. The Final Decision of ALJ Malherbe granting Summary Judgment to the Respondent is upheld.
2. The Petitioner is entitled to no relief.

This the 27<sup>th</sup> day of March 2019

  
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  
(Addressee redacted)

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This the 27<sup>th</sup> day of March 2019

*Joe D. Walters*  
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State Review Officer

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