

■ by parent or guardian ■
Petitioner

v.

Wake County Board of Education
Respondent

DECISION

18 EDC 07450

This is an appeal of the Final Decision issued by Administrative Law Judge (ALJ) Tenisha S. Jacobs on March 6, 2019. The ALJ dismissed the case. The Petitioner filed an appeal of ALJ Jacob's Decision on April 2 and the State Review Officer (SRO) was appointed on April 3, 2019.

The records of the case received for review were contained on one (1) CD which contained: the ALJ's Order Dismissing the Case; the Petition; Respondent's Response to the Petition; Respondent's Motion for Dismissal; Petitioner's Response to Respondent's Motion for Dismissal; Respondent's Proposed Decision, and Petitioner's Proposed Decision. In addition, the CD included many other motions, scheduling orders, and correspondence. The records also include the Petitioner's Appeal and Written Arguments submitted by both parties to the Review Officer regarding the Appeal.

The Petitioner's Appeal was addressed to "The Honorable Court of Appeals of North Carolina," though sent as required to the State Department of Public Instruction. As this is a *pro se* parent submitting the appeal, the error in addressing the appeal was overlooked and the appeal was allowed to proceed as intended in accordance with N.C.G.S. 115C-109.9.

As there was no formal hearing in the case, all facts determined by the Review Officer were drawn from the petition, motions, and responses.

Appearances:

For Petitioner: ■ *pro se* parent; (Address redacted)

For Respondent: Stephen Rawson and Jason Weber; Tharrington Smith, LLP; PO Box 1151, Raleigh, NC 27602

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; Wake County 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.

ISSUES

The ALJ determined that there was a single issue in the Petition: Whether or not the Respondent had adhered to an agreement reached by the parties as a settlement in a previous due process case. Although the Petition was difficult to interpret, the SRO agrees that this is the single issue to be decided.

FINDINGS and CONCLUSIONS

As there was no formal hearing in the case, all facts were drawn from the motions and responses.

1. The Petitioner [REDACTED] filed a Petition for Contested Case Hearing *pro se* in this matter on behalf of her son, [REDACTED] on December 7, 2018. The Petition was served on the Superintendent of the Wake County Public School System on December 14, 2018.
2. The Respondent filed a Response to Petition and Motion for Dismissal on January 10, 2019. The Motion for Dismissal was made pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure on the grounds that the Office of Administrative Hearings lacks subject matter jurisdiction over the claims raised by Petitioner. The Motion also sought dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that Petitioner failed to state a claim for which an ALJ may grant relief.
3. The Petitioner filed a Response to the Motion for Dismissal on January 22, 2019.
4. The ALJ determined that the Motion for Dismissal would be decided without oral argument and ordered both parties to submit a Proposed Final Decision.
5. Rule 12(b)(1) of the North Carolina Rules of Civil Procedure allows for the dismissal of a claim due to a lack of jurisdiction over the subject matter of the claim. The standard of review on a Rule 12(b)(6) motion is whether the allegations in the complaint, taken as true, are sufficient to state a claim upon which relief may be granted.

6. In reading all the Petitioner's submissions, it is obvious that this *pro se* parent possibly had a problem with the Respondent's provision of FAPE for [REDACTED]. The initial petition, however, was faulty and not sufficient. It was difficult to interpret, for the only complaint that seemed certain was the Petitioner's insistence that that Respondent did not adhere to a previously agreed upon settlement agreement.

7. On May 13, 2016 the Petitioner had previously filed a petition titled: [REDACTED] *by and through his mother* [REDACTED] *v. Wake County Public School System Board of Education* (16 EDC 04959). It was later voluntarily dismissed with prejudice on December 7, 2016 as part of a Settlement Agreement and Release of Claims.

8. In the current petition and in several other documents, notably the January 22, 2019 Response to the Motion for Dismissal, the Petitioner made it clear that the current case is a continuation of the previous case 16 EDC 04959. The Petitioner alleges that the Respondent is not complying with the settlement agreement from November 2016. The allegations in the petition and in the Response to the Motion for Dismissal are made in the context of the Respondent's failure to abide by this settlement agreement.

9. In the Petitioner's Response to the Respondent's Motion for Dismissal, the Petitioner also made the claim that the Respondent did not give proper notice in that the Respondent failed to assist her in completing her petition. Nowhere in IDEA or state law is there such a requirement.

10. The ALJ and SRO can only examine and review those specifics within the initial, or amended, petition. The Petitioner, however, never amended the initial petition. Without specifics concerning the dispute, the ALJ and SRO have few options. The Petition, as written, clearly had a single issue - the alleged failure of the Respondent to abide by a settlement agreement.

11. With regard to the Rule 12(b)(1) Motion, enforcement of a settlement agreement is outside the scope of the jurisdiction of Administrative Law Judges and State Review Officers under the provisions of N.C.G.S. § 115C 109.6(a); N.C.G.S. § 115C 109.9; and NC 1504-1.8(a)(1).

12. The Petitioner has a venue for enforcement of a settlement agreement. The appropriate venue for Petitioner's dispute is in NC 1504-1.11(d)(2) and NC 1504-2.8. The Petitioner could have sought enforcement in a state court or through the state complaint process. In fact, the enforcement mechanism was spelled out in Section 6.I of the settlement agreement of November 30, 2016:

The parties agree that this Agreement may be enforced as a contract by a court of competent jurisdiction in the State of North Carolina, or by the North Carolina Department of Public Instruction through the state complaint process pursuant to the Policies Governing Services for Children with Disabilities, NC 1504-2.8. (Motion for Dismissal, Ex. 3 at p. 7)

13. Regarding the Rule 12(b)(6) Motion to Dismiss, the Petitioner failed to give notice of facts, taken as true, that would support a claim for relief. North Carolina provides a model form for filing a petition for a due process hearing as authorized by NC 1504-1.10. The Petitioner used this form, including the checklist on the form, in submitting her petition. [REDACTED] checked four of the items listing the disputed issues with the Respondent: Evaluation, Placement, FAPE, and Other. No specific facts, however, were given regarding any of the four issues that would be a forecast of evidence regarding these disputes that would be presented at a due process hearing.

14. Later in the process when submitting a proposed decision, the Petitioner finally presented information that would have been appropriate in the initial petition. The Petitioner seemed to allege a possible current failure in the provision of FAPE without reference to a settlement agreement. Such allegations, with specific facts that would be a forecast of evidence for a hearing, would probably survive a Rule 12(b)(6) Motion to Dismiss. This would allow the ALJ to proceed with the hearing.

15. Current failures in the provision of FAPE, not the alleged noncompliance with a previous settlement agreement, should have been the focus of the Petition.

16. The Petitioner, in Written Arguments to the State Review Officer, also presented many facts that would possibly be a forecast of evidence that could have been presented in a hearing. These should have been in the original petition and may have been sufficient to survive a Motion to Dismiss.

17. Throughout this process, the Petitioner has the burden. The actions of a Board of Education are presumed to be correct and the burden of proof shall be on the complaining party to show the contrary. N.C.G.S. § 115C-44(b); (See also: *Schaffer v. Weast*, 546 U.S. 49 (2005)). The Petitioner failed to meet the burden of showing the ALJ that there were issues to be decided in a due process hearing.

18. This is an appeal of an order granting a motion to dismiss before any hearing was held or any evidence was produced or taken. Only the factual allegations presented in the Petition and the findings and conclusions in the ALJ's Final Decision are before the State Review Officer.

19. The factual allegations raised by Petitioner after the Petition was filed, including any facts or allegations contained in the proposed final decision submitted to the ALJ and arguments submitted on appeal to the SRO, are given no consideration in this review. When reviewing an appeal of an ALJ's decision, the SRO may only review the specific findings and decision that are appealed. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528 (M.D.N.C. 2013).

20. Although she had been through this once before, ■ was unfamiliar with the complex process of preparing for a hearing. It is not sufficient for a *pro se* Petitioner to claim that she does not understand the process of presenting a case under IDEA and applicable state law. While the Review Officer is sympathetic to *pro se* parents in special education due process proceedings, there is still the expectation that they adhere to the same standard as attorneys. To allow otherwise would be clear bias in favor of one party. Parents who operate *pro se* are normally at a disadvantage in bringing claims under IDEA, for school systems often employ attorneys with extensive experience with special education due process hearings.

DECISION

1. The ALJ's Final Decision dismissing the case is upheld.
2. The use of the due process hearing is not the appropriate venue for enforcement of a settlement agreement.
3. The Petitioner is entitled to no relief.

This the 22nd day of April 2019

Joe D. Walters
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:



(Address redacted)

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This the 22nd day of April 2019

Joe D. Walters

Joe D. Walters
State Review Officer

