STATE OF NORTH CAROLINA

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

[redacted] by parent or guardian, [redacted]

Petitioner

v.

Charlotte-Mecklenburg Board of Education

Respondent

DECISION

19 EDC 06677

This is an appeal of the Final Decision of Administrative Law Judge Selina Malherbe for the case, [redacted] by parent or guardian, [redacted] v. Charlotte-Mecklenburg Board of Education (19 EDC 06677). The Decision was issued on June 30, 2020. The Respondent appealed the Decision on July 22 and the undersigned Review Officer was appointed on July 23, 2020.

The records of the case received for review were contained on one PDF file which contained: the Petition; Respondent's Motion for Summary Judgment; Petitioner's Response to the Respondent's Motion for Summary Judgment; a Transcript of the ALJ's Hearing on Respondent's Motion for Summary Judgment; extensive evaluations and special education documents pertaining to [redacted] ALJ scheduling orders and correspondence; and the ALJ's Final Decision. This extensive file of documents pertaining to the case was included in a 783 page PDF file prepared by the Petitioner.

Appearances:

For Petitioner: Andrew K. Cuddy; Cuddy Law Firm, PLLC, 104-C Waxhaw Professional Park Dr., Suite C, Waxhaw, NC 28173

For Respondent: Jill Sanchez-Myers; Senior Associate General Counsel, Charlotte-Mecklenburg Schools, 600 E. Fourth St., 5th Floor. Charlotte, NC 28202

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

For the Student/Petitioner – [redacted]
For Parent/Petitioner – [redacted] mother
For Respondent - Respondent; CMS, Charlotte-Mecklenburg Schools

ISSUE

A single issue is before the Review Officer: Was it appropriate for the ALJ to grant the Respondent's Motion for Summary Judgment and dismiss the Petition? The ALJ divided the issue into eight Counts from the Petition. Each are being addressed by this Decision on Appeal.

THE APPEAL

North Carolina provides specific guidelines for the appeal of a decision rendered by an Administrative Law Judge in a special education due process case:

> N.C.G.S. § 115C-109.9. Review by review officer; appeals.
>
> (a) 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 findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 107.2(b)(9) to receive notices.
>
> NC 1504-1.15 Finality of Decision; Appeal; Impartial Review
>
> (a) Finality of hearing decision. A decision made in a hearing conducted pursuant NC 1504-1.8 through NC 1504-1.14 or NC 1504-2.1 through NC 1504-2.5 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and NC 1504-1.7.
> (b) Appeal of decisions; impartial review.
> (1) The hearing required by NC 1504-1.12 is conducted by the Office of Administrative Hearings. Any party aggrieved by the findings and decision in the hearing may appeal to the North Carolina Department of Public Instruction, Exceptional Children Division within 30 days of receipt of the written decision.

Following the issuance of the Administrative Law Judge's (ALJ) Decision, the Petitioner filed a timely appeal on July 22, 2020. The Petitioner appealed all the findings and decisions of the ALJ. When reviewing an appeal of an ALJ's decision, the State Review Officer (SRO) must review the specific issues complained of by the parties in the appeal. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013). Thus, all the findings and decisions of the ALJ will be the focus of this review.

ALJ DECISION

In her Final Decision, the ALJ specifically addressed the eight counts (Seven enumerated and one in an unnumbered paragraph) in the Petitioner's Original Petition:

1. Count I: Respondent met its Child Find obligations under IDEA by conducting special education testing and convening IEP eligibility meeting. Therefore,
2. Count II: Respondent is entitled to summary judgment because Petitioner was not eligible for FAPE and cannot show a denial of FAPE because of a procedural violation. Therefore, summary judgment is granted for Respondent on Count II.
3. Count III: Petitioner cannot forecast evidence that Respondent used only a single measure of data to deny eligibility when Respondent produced multiple documents to show a wide variety of measures of data that were used by the IEP team. Therefore, summary judgment is granted for Respondent on Count III.

4. Count IV: Petitioner knew or should have known at the IEP team meeting held on October 16, 2018, that an Autism Spectrum Disorder evaluation would be conducted and Petitioner was not being evaluated for a Specific Learning Disability and Petitioner signed the Prior Written Notice for this decision at the meeting and any allegations concerning this eligibility decision are time-barred. At the January 16, 2019 eligibility meeting, the IEP team reviewed the data using the discrepancy method and determined that Petitioner was not eligible under the category of Specific Learning Disability and there is no procedural error that denied a FAPE to Petitioner. Therefore, summary judgment is granted for Respondent on Count IV.
5. Count V: Petitioner was not eligible for FAPE and was not entitled to receive an IEP. Therefore, summary judgment is granted to Respondent on Count V.
6. Count VI: Petitioner was not eligible for FAPE and was not entitled to receive an IEP. Therefore, summary judgment is granted to Respondent on Count VI.
7. Count VII: Psychological, assistive technology and functional behavior assessment evaluations are not required for determining eligibility for special education under the IDEA and, therefore, summary judgment is granted for Respondent on Count VII.
8. Count VIII: Petitioner is not entitled to FAPE under the IDEA and cannot allege a violation of the statute of limitations and, therefore, summary judgment is granted to Respondent on Count VIII.

BASED UPON ALL OF THE ABOVE, IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment is granted in favor of Respondent; judgment hereby is entered for Respondent, and the contested case petition is DISMISSED WITH PREJUDICE.

STANDARD OF REVIEW

The State Review Officer must render an independent decision, giving "due weight" to the administrative proceedings before the administrative law judge. *Board of Education v. Rowley*, 458 U.S. 176 (1982). Findings of fact by hearing officers are entitled to be considered *prima facie* correct if they are regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth." *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991). In *Doyle*, the court also noted, "By statute and regulation the reviewing officer is required to make an independent decision . . .." *Doyle*, 953 F.2d at 104

When reviewing an appeal of an ALJ's decision, the SRO may only review the specific issues being appealed by the parties. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013)

Summary Judgment

Summary judgment is proper when the pleadings, the discovery and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c).

The moving party can establish the absence of a genuine issue of material fact by "proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson v. Hogg & Harris*, 353 N.C. 77, 83 (2000); *Messick v. Catawba Cnty.*, 110 N.C. App. 707, 712 (1993). The moving party has the burden of establishing the lack of any triable issue of fact." *Draughon v. Harnett County Bd. Of Educ.*, 158 N.C. App. 208, 580, S.E.2d 732 (2003).

Once the moving party has met its burden, the nonmoving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Roumillat v. Simplistic Enterprises.*, 331 N.C. 57, 63 (1992) quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66 (1989). 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).

"The facts themselves, and the inferences to be drawn therefrom, must be viewed in the light most favorable to the opposing party." *Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008); *Adams v. UNC-Wilmington*, 640 F.3d 550, 556 (4th Cir. 2011).

FINDINGS AND CONCLUSIONS

The SRO makes the following findings and conclusions relative to each of the Counts in the ALJ's Decision:

Count I: Respondent met its Child Find obligations under IDEA by conducting special education testing and convening IEP eligibility meeting.

1. On September 28, 2018, following a private evaluation that resulted in [redacted] having a new diagnosis of Autism Spectrum Disorder, the Petitioner initiated the child find obligation by submitting a request for [redacted] to receive testing for special education. CMS's IEP team carried out its obligations and responsibilities by conducting the necessary evaluations. As the mother ([redacted] had previously submitted seven (7) referrals, and none had resulted in a determination that [redacted] was eligible for special education services, the IEP team confined the process to a determination of [redacted]s eligibility under the new diagnosis of Autism Spectrum Disorder. On October 16, 2018 the team properly notified [redacted] that the determination would be limited to eligibility under the new diagnosis of Autism Spectrum Disorder. [redacted] did not contest this by filing for due process within the one-year time limitation in N.C. Law. She knew that the evaluation was limited to a determination of [redacted]s eligibility under the new diagnosis of Autism Spectrum Disorder.

2. It is also logical for an IEP team to limit the evaluation process to new information or diagnoses if the child has undergone recent IDEA evaluations and found ineligible. A team could choose to give time for interventions being used to produce results. Here, [redacted] was being provided interventions via a 504 plan for which he had been determined eligible. [See the Sixth Circuit's unpublished discussion of this issue in *M.G. v. Williamson County Schools*, 720 F. App'x 280, 6th Cir. 2018. Though the facts are somewhat different, the Court provided interesting guidance relative to repeated referrals for special education testing.]

3. The Petitioner, in the current petition, contests the IEP team's determination that [redacted] is ineligible for identification of a child with special needs and thus must be provided a Free Appropriate Public Education (FAPE). The Petitioner, however, has not provided a forecast of evidence to be presented in a due process hearing to defeat the Respondent's claim that [redacted] does not meet the eligibility requirements for identification of a child with special needs. The evidence forecast in the Petitioner's Response to the motion for Summary Judgment and in the

brief hearing before the ALJ on that Motion is minimal. Most of that evidence appears to be merely allegations and subjective determinations by [redacted] Although a diagnosis of Autism Spectrum Disorder was provided, this alone does not meet the requirements for an eligibility determination. Having a disability is only one factor in the eligibility determination, though this is not information that the mother wants to hear. Many who are not directly involved in providing IDEA services make the assumption that having a disability automatically entitles that individual to be determined eligible for special education services. Instead, there must be an interpretation of all the data available about the child. The recommendations from private evaluators and medical practitioners are part of this data and alone are insufficient to show that the IEP team made an incorrect decision. There has been no forecast of evidence to show that these individuals have the expertise to make educational decisions.

4. IDEA clearly specifies the requirement that must be met for an eligibility determination:

> The term "child with a disability" means a child—
>
> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.
>
> 20 U.S.C. §1401(3)(A)

5. North Carolina law also provides:

> Child with a disability. – A child with at least one disability who because of that disability requires special education and related services. N.C.G.S. §115C-106.3(1)
>
> (*and*)
>
> Child with a disability means a child evaluated in accordance with NC 1503-2 through NC 1503-3 as having autism, deaf-blindness, deafness, developmental delay (applicable only to children ages three through seven), hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, serious emotional disability, specific learning disability, speech or language impairment, traumatic brain injury, or visual impairment (including blindness), and who, by reason of the disability, needs special education and related services. NC 1500-2.4(a)(1)

6. Thus, both federal and North Carolina law provides that it must be determined that the child has a qualifying disability and is in need of special education and related services. This determination is to be made by a group of qualified professionals and the parent. NC 1503-2.7(a)(1). In the instant case this group was an IEP team that did include the parent. There was no forecast of evidence to show that the parent was not involved in the discussion that resulted in the team making its decision.

7. There is nothing in the law that allows a parent to overrule the decision of the IEP team. The only option available, if the parent disagrees with the group decision, is to resort to a due process hearing, as was done in this case.

8. In a due process proceeding, educators can be expected to offer "a cogent and responsive explanation" for their decisions. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017). If they have done so, ALJ's and SRO's may not substitute their "own notions of sound educational policy for those of the school authorities" whose decisions are under scrutiny. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206. The professional judgment of teachers and other school staff is an important factor . . . . The IDEA does not deprive these educators of the right to apply their

professional judgment." *Hartmann by Hartman v. Loudoun Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

9. The Respondent's Motion for Summary Judgment filed May 18, 2020 and the Reply in Support of Respondent's Motion for Summary Judgment filed June 19, 2020 have provided "cogent and responsive explanations" for determining that [redacted] was ineligible. The Petitioner has not presented a forecast of evidence demonstrating that she will be able to make at least a prima facie case at trial relative to Count I.

10. The SRO must uphold the ALJ's summary judgment for Respondent on Count I.

Count II: Respondent is entitled to summary judgment because Petitioner was not eligible for FAPE and cannot show a denial of FAPE because of a procedural violation.

11. The Petitioner's referral for testing was provided to Respondent on September 28, 2018. The Respondent did not complete its eligibility determination until January 16, 2019. This exceeds the 90-day timeline set forth in NC 1503-2.2(c)(1). Though minor, it is still a procedural violation.
12. Unless it is determined that a procedural violation denied the child a FAPE there is no violation of the IDEA. *R.F. v. Cecil County Public Schools*, 919 F.3d 237, 74 IDELR 31 (4th Cir. 2019). (*Also, see* 20 U.S.C. § 1415(f)(3)(E)(ii)).
13. Only a child who has been identified as a child with a disability in accordance with federal and state law is entitled to FAPE. [redacted] has been determined ineligible *(See Count 1)* and has not been harmed or lost educational opportunity. No relief is available.
14. The SRO must uphold the ALJ's summary judgment for Respondent on Count II.

Count III: Petitioner cannot forecast evidence that Respondent used only a single measure of data to deny eligibility when Respondent produced multiple documents to show a wide variety of measures of data that were used by the IEP team.

15. The Petitioner asserts that the Respondent relied on a single measure, [redacted]s grades, to make a determination that [redacted] was ineligible for special education services. The Petitioner claims that the Respondent did not carefully consider all the data available, and there was considerable data to review.
16. The only support for this claim is the mother's personal opinion. The Prior Written Notice from the January 19, 2019 meeting clearly delineates the data considered by the IEP team prior to making the decision that [redacted] was ineligible. There is no forecast of evidence to support the mother's personal opinion.
17. The SRO must uphold the ALJ's summary judgment for Respondent on Count III.

Count IV: Petitioner knew or should have known at the IEP team meeting held on October 16, 2018, that an Autism Spectrum Disorder evaluation would be conducted and Petitioner was not being evaluated for a Specific Learning Disability and Petitioner signed the Prior Written Notice for this decision at the meeting and any allegations concerning this eligibility decision are time-barred. At the January 16, 2019 eligibility meeting, the IEP team reviewed the data using the discrepancy method

and determined that Petitioner was not eligible under the category of Specific Learning Disability and there is no procedural error that denied a FAPE to Petitioner.

18. Normally an IEP team evaluates a child in the areas of all suspected disabilities. Having previously evaluated [redacted] on seven (7) previous occasions and not finding him eligible for special education services, the team chose to limit the evaluation that occurred after the September 28, 2018 referral. The mother had just presented the Respondent the results of a private evaluation that resulted in a diagnosis of Autism Spectrum Disorder. The Respondent chose to limit the assessment to autism and provided prior notice of this limitation to the mother.
19. If any procedural violation was committed by the Respondent by limiting the area to be assessed, it would be subject to the one-year time limitation in North Carolina law. The mother referred the child on September 28, 2018. She was notified of the limited assessment but failed to act within one year. This present Petition was not filed until December 2, 2019.
20. In its Motion for Summary Judgment, the Respondent also presents sufficient analysis of the data available to the IEP team at the time of the meeting on January 16, 2019. The data shows that [redacted] would not have met the requirements for determination of being Learning Disabled. In the Response to the Motion for Summary Judgment and in the Hearing on the Motion, the Petitioner did not present a forecast of evidence to support its claim that [redacted] met the requirements for determination as Learning Disabled.
21. The SRO must uphold the ALJ's summary judgment for Respondent on Count IV.

Count V: Petitioner was not eligible for FAPE and was not entitled to receive an IEP.

22. The Petitioner's claims in Count V are almost a repeat of those from Count I. The Petitioner claims that the Respondent did not develop an IEP based on the recommendations from the private evaluations. The recommendations from any evaluators are simply recommendations. There is no necessity that any team making a determination of eligibility are required to base their decisions solely on such recommendations. Recommendations from evaluators are only one factor in the eligibility determination. As in Count I, there is no forecast of evidence demonstrating that the Petitioner will be able to make at least a prima facie case at trial relative to this issue.
23. The entitlement to an IEP to provide FAPE is available only to a child who has been identified as a child with a disability in accordance with federal and state law. [redacted] has not been determined to be eligible.
24. The SRO must uphold the ALJ's summary judgment for Respondent on Count V.

Count VI: Petitioner was not eligible for FAPE and was not entitled to receive an IEP.

25. The Petitioner's claim in this Count is redundant, for it has the same elements of several of the preceding ones. The primary claim here is the failure to provide FAPE because of the failure to develop an IEP as recommended by private evaluators.
26. The entitlement to an IEP to provide FAPE is available only to a child who has been identified as a child with a disability in accordance with federal and state law. [redacted]. has not been determined to be eligible.
27. The SRO must uphold the ALJ's summary judgment for Respondent on Count VI.

Count VII: Psychological, assistive technology and functional behavior assessment evaluations are not required for determining eligibility for special education under the IDEA.

28. Although this Count is poorly worded by the ALJ, it actually refers to the Respondent's denial of IEE's (Independent Education Evaluations) that were requested by the Petitioner following the eligibility meeting in early 2019. On February 28, 2019 the Respondent agreed to pay for only some of the IEE's requested by the Petitioner.
29. The parent's request for the IEE's did not state that the parent disagreed with any evaluation conducted by the Respondent. The parent was troubled by some aspects of the child's performance and simply requested additional testing. (Petition, p. 6) There is nothing in the record to show that the Petitioner wanted IEE's because she disagreed with a Respondent's evaluation. Thus, the requirement in NC 1504-1.3(b)(2)(i) that the Respondent defend its evaluation through the use of a due process hearing is not triggered.
30. A parent has the right to an independent educational evaluation at public expense only if the parent disagrees with an evaluation obtained by the LEA. (NC 1504-1.3(b)(1)). There is nothing that prevents the Respondent from paying for additional IEE's chosen by the Respondent, even if the parent had not disagreed with one of the Respondent's educational evaluations.
31. One of the evaluations requested, a psychological, was a repeat of a recent private psychological provided by the parent. The IEP team had used this psychological rather than conducting one of its own for the purpose of the eligibility meeting on January 16, 2019. The other IEE's denied are not required for the determination of eligibility for any category of disability in North Carolina.
32. The Petitioner has not presented a forecast of evidence demonstrating that she will be able to make at least a prima facie case at trial that there was an entitlement to the requested IEE's at public expense.
33. The SRO must uphold the ALJ's summary judgment for Respondent on Count VII.

Count VIII: Petitioner is not entitled to FAPE under the IDEA and cannot allege a violation of the statute of limitations.

34. This Count was not one of those enumerated by the Petitioner in the Petition. It appears to have been created by the ALJ because of assertions made in the Motion for Summary Judgment, the Response to the Motion for Summary Judgment, and arguments made during the Hearing on the Motion.
35. As stated several times in the previous Counts, [redacted] is not entitled to FAPE. He has not been determined eligible for identification as a child with a disability as required by federal and state law. There has not been a forecast of evidence sufficient to make a prima facie case at trial that [redacted] is entitled to FAPE nor a forecast of evidence that application of North Carolina's statute of limitations is an issue for trial.
36. Summary Judgment is appropriate on this issue.

Petitioner's Arguments on Appeal

37. Following the issuance of the ALJ's Final Decision, the Petitioner filed a timely appeal dated July 22, 2020. This SRO was appointed on July 23 and both parties were requested to submit Written Arguments to the SRO. Both submitted timely arguments and responded specifically to the ALJ's decision related to the Petition's specific Counts.
38. In addition to responding to the specific Counts as set forth in the ALJ's Final Decision, the Petitioner argued several other issues in an attempt to include them in the case. The issue of parental participation and involvement was the primary focus of the arguments. At length, the Petitioner argued that the parent is being disenfranchised and not meaningfully involved in decisions regarding [redacted]s educational program. This was not in the Petition and therefore not

reviewed by the SRO. Unless the Petition is amended to include other issues, ALJs and SROs are limited to dealing with those issues in the initial Petition.

39. The Petitioner also argued on appeal that by not allowing the case to go to a full hearing the ALJ was denying due process. A full hearing on the issues in the Petition is not absolutely required for due process to be afforded. In North Carolina, these cases often do not go to a full hearing but are disposed of through other means. Dismissal is often sought by a Respondent to avoid the expense of a full hearing. ALJs can dismiss a case prior to the full hearing if it does not appear that the Petitioner has produced a forecast of evidence demonstrating that it can make a prima facie case in a full hearing. That occurred in this instance. As permitted by federal and state law, the Petitioner chose to appeal the ALJ's dismissal following the procedures set forth in N.C.G.S. § 115C-109.9 and NC 1504-1.15. Due process has been provided.

CONCLUSIONS OF LAW

Jurisdictional and Legal Conclusions

1. The Office of Administrative Hearings and the State Review Officer have jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education (FAPE) pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Part 300 et seq. The provisions of 20 U.S.C. §1415 and N.C. G. S. § 115C- 109.6(a) control this review.

2. Charlotte-Mecklenburg Schools is subject to the provisions of applicable federal and state laws and regulations.

3. As the party seeking relief, the burden of proof for this action lies with Petitioners. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005)..

4. [redacted] the parent of [redacted] was entitled to procedural safeguards available in IDEA and N.C.G. S. § 115C, Article 9. She also has the right to meaningful participation in the IEP process while [redacted] was being evaluated for eligibility for specially designed instruction under the IDEA.

5. The professional judgment of teachers and other school staff is an important factor in determining the outcome of due process cases. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann by Hartman v. Loudoun Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982) (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

6. ALJ's and SRO's may not substitute their "own notions of sound educational policy for those of the school authorities" whose decisions are under scrutiny. *Rowley*, 458 U.S. at 206.

7. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017), the Court held that in due process proceedings educators can be expected to offer "a cogent and responsive explanation" for their decisions. The SRO determines that the explanations in the

Respondent's Motion for Summary Judgment filed May 18, 2020 and the Reply in Support of Respondent's Motion for Summary Judgment filed June 19, 2020 meet this criterion.

8. Recipients of federal assistance must establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed the procedural safeguards with respect to the provision of a free and appropriate public education. 20 U.S.C. § 1415(a)

9. A child is denied a FAPE when the IEP team commits procedural violations that:

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits."
20 U.S.C. § 1415(f)(3)(E)(ii).

10. The procedural violations must "result in some loss of educational benefit or opportunity" and "cannot simply be a harmless error." *A.K. ex rel. J.K. v. Alexandria City Sch.*, 484 F.3d 672, 684 (4th Cir. 2007).

11. A substantive procedural violation is one that causes the child to lose any educational opportunity. *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

12. Unless an ALJ or SRO determines that a procedural violation denied the child a FAPE, the ALJ or SRO may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief. *R.F. v. Cecil County Public Schools*, 919 F.3d 237, 74 IDELR 31(4th Cir. 2019), cert. denied, 119 LRP 11105 (U.S. 10/07/19)(No. 18-1591).

DISCUSSION

The intent of this section is to provide insight into the Review Officer's reasoning. It is not intended to be a substitute for the Facts and Conclusions.

There is no doubt that [redacted] is a child with a disabling condition, though not one who necessarily meets the definition of a "child with a disability" under the definitions of federal and state law. This SRO is of the opinion that [redacted] might indeed meet that definition but cannot arrive at that conclusion based on the information presented.

Also, the SRO cannot arrive at the conclusion that the ALJ erred in granting Summary Judgment. The ALJ's certainly provided minimal information with no analyses to support her conclusions, but that does not make her decision invalid. The SRO has attempted to provide more justification for his decision.

The Respondent developed a very good Motion for Summary Judgment, followed later with a Reply in Support of Respondents Motion for Summary Judgment. The Petitioner presented a wealth of data in support of the Petition, yet based much of its argument on allegations and personal opinions. The Petitioner never directly challenged, with admissible evidence, the eligibility determination that was the central issue for the entire case. Even considering the arguments of the Petitioner in a most favorable light, the SRO cannot conclude that the forecast of evidence would be sufficient to support a prima facie case in a full hearing.

The Petitioner seemed to believe that since a psychologist or medical practitioner diagnosed [redacted] with a particular disability then [redacted] would automatically be entitled to a special education

program under IDEA. Both federal and state law, however, require that to be determined a "child with a disability" the child by reason of the disability is in need of special education. Only then is there a requirement to provide FAPE. Psychologists and medical practitioners who do evaluations and make diagnoses are not automatically qualified to determine that a child needs special education. They can make recommendations and they can be members of a team that makes a determination, but one cannot rely solely on them. This is a common mistake many parents make when dealing with the very complex requirements of IDEA. The Petitioner made no forecast of evidence, such as testimony of expert special educational practitioners, that would show that [redacted] is in need of special education.

There was never an attempt made to amend the Petition. In the Response to the Motion for Summary Judgment, during the Hearing on the Motion, and on appeal the Petitioner made an attempt to include an issue that was not in the Petition. Numerous times these documents noted that there was an issue concerning parent participation and parent involvement. Even very strong terms like "parental disenfranchisement" were used. Parental participation is certainly an important issue in the implementation of IDEA, with many requirements imposed on schools to insure effective parental participation. The Petitioner, however, did not include this as an issue in the Petition and cannot be addressed by the ALJ or SRO.

Based on the foregoing, the State Review Officer makes the following:

DECISION

The Final Decision of Administrative Law Judge Selina Malherbe dated June 30, 2020 is upheld. The granting of Summary Judgment and subsequent dismissal of the case was appropriate.

This the 17th day of August 2020

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 attorneys for Petitioner and Respondent by electronic and certified U.S. Mail, and to others by U.S. Mail addressed as follows:

[redacted]
(Address redacted)
Petitioner

Ernest Winston, Superintendent
Charlotte-Mecklenburg Schools
PO Box 30035
Charlotte, NC 28230-0035

Andrew K. Cuddy
Cuddy Law Firm, PLLC
104 Waxhaw Professional Park Dr., Suite C
Waxhaw, NC 28173
acuddy@cuddylawfirm.com
Attorney for Petitioner

Jill Sanchez-Myers
Senior Associate General Counsel
Charlotte-Mecklenburg Schools
600 E. Fourth St., 5th Floor
Charlotte, NC 28202
jill1.sanchez-myers@cms.k12.nc.us
Attorney for Respondent

Sherry H. Thomas, Director
Exceptional Children Division
N.C. Department of Public Instruction
6356 Mail Service Center
Raleigh, NC 27699

Office of Administrative Hearings
State of North Carolina
6714 Mail Service Center
Raleigh, NC 27699

This the 17th day of August 2020

Joe D. Walters

Joe D. Walters
State Review Officer