STATE OF NORTH CAROLINA

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

[redacted] **by parent or guardian** [redacted]
Petitioner

v.

Cornerstone Charter Academy, Inc.
Respondent

DECISION

18 EDC 05536

This is an appeal of the Final Decision issued by Administrative Law Judge (ALJ) J. Randall May on May 23, 2019. Following the presentation of the Petitioners' case, the Respondent made a motion for judgment in its favor pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. The ALJ found and concluded that the Petitioner failed to show any right to relief and the Respondent was entitled to judgment in its favor. The Petitioner filed an appeal of ALJ May's Decision on June 19, 2019. Pursuant to N.C.G.S. § 115C - 109.9, the State Review Officer was appointed on June 19 to review the case.

The records of the case received for review were contained on one (1) CD which contained: the ALJ's Final Decision; the Petition; Several Motions and Responses by both parties along with ALJ Orders regarding those Motions; Scheduling orders and notices; Continuances; and Correspondence related to the case. Also included on the CD were three (3) transcripts of the hearing. The records also include the Petitioner's Appeal and Written Arguments submitted by both parties to the Review Officer regarding the Appeal.

Appearances:

For Petitioner: Aaron Tierney and Michael Pascale; Cuddy Law Firm, PLLC, 104 Waxhaw Professional Park Drive, Suite C, Waxhaw, North Carolina 28173

For Respondent: James G. Middlebrooks Middlebrooks Law, PLLC, 6715 Fairview Road, Suite C, Charlotte, North Carolina 28210

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; Cornerstone, CCA

WITNESSES

Petitioner's Witnesses: [redacted], Ph.D.

Respondent's Witnesses: None

ADMITTED EXHIBITS

Petitioner's Exhibits

15 [redacted] End of Grade Testing Report for 2016-17 (Fifth Grade) in English Language Arts/ Reading; Mathematics; and Science
27 2018-19 [redacted] Academy Academic Profile for [redacted]
62 2019-02-24 Neuropsychological Evaluation of [redacted]
63 Curriculum Vitae for [redacted], Ph.D.

Respondent's Exhibits:

None

ISSUES

The petition in this case contained five claims:

1. Cornerstone improperly refused to evaluate [redacted] for eligibility as a student with disabilities under the Individuals with Disabilities Education Act ("IDEA").
2. The IEP team failed to consider whether [redacted] qualified for special education based on a traumatic brain injury.
3. Cornerstone failed to create an IEP for [redacted]
4. Cornerstone did not follow [redacted] 504 plan.
5. Cornerstone denied the parent's right to fully participate in an April 2018 IEP team meeting.

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. This will be the focus of the review. When reviewing an appeal of an ALJ's decision, the State Review Officer (SRO) may only review the specific issues complained of by the parties. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013). As the Petitioner's appeal, dated June 19, 2019 indicated that all of the findings and decisions of the ALJ are being appealed, the review by the SRO will encompass the entire Final Decision of the ALJ.

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.

This SRO finds that the ALJ's Findings of Fact in his Decision were regularly made and adopts and incorporates most of them in this Decision. The SRO also includes a few facts from the record that were not in the ALJ Decision. Only facts necessary for reaching a decision regarding the appeal are included in this Decision.

To the extent the Findings of Fact contain conclusions of law or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

FINDINGS OF FACT

1. The Facts in the ALJ's Final Decision and in this SRO Decision are primarily from testimony in the hearing. Only four (4) Exhibits were entered during the hearing. Except for an End of Grade Testing Report for school year 2016-17 (Pet. Ex. 15), none pertain [redacted] educational program or experiences while enrolled in Respondent's school.

2. [redacted] started Cornerstone Charter Academy as a first grader in the 2012-13 school year. (Tr. p. 186) He attended Cornerstone through the sixth grade during the 2017-18 school year. Cornerstone

Charter Academy is an LEA in North Carolina and must provide special education and related services to an enrolled child who has been identified as a "child with a disability."

3. When he was enrolled at Cornerstone, [redacted] did not have an IEP and was not identified as a student with disabilities under IDEA. He, however, had been provided a plan of accommodations and modifications under Section 504 of the Rehabilitation Act of 1973. His plan during the 2017-18 school year had been reviewed in November 2017 and again early June 2018. (Tr. pp. 215-16; 219-20)

4. In the spring of 2018, [redacted] mother, requested that [redacted] be provided an IEP. Though [redacted] alleged that [redacted] had several disabilities that necessitated an IEP, no evidence was introduced during the hearing of any verified diagnoses of disability in [redacted] educational record at that time.

5. The Petition stated that [redacted] had multiple disabilities: Traumatic brain injury, Tourette Syndrome, post-traumatic stress disorder (PTSD), attention-deficit hyperactivity disorder (ADHD), and dysgraphia. The Petition had no attachments or any other verification that [redacted] had been properly diagnosed with any of these. [redacted] also testified concerning [redacted] diagnosed disabilities, but presented no documentation to support her testimony.

6. [redacted] also testified that [redacted] had suffered multiple concussions, several at Cornerstone. She testified that the concussions occurred because of falls attributed to [redacted] disability. The only information at the hearing regarding any alleged concussions was [redacted] oral testimony.

7. A Cornerstone Academy IEP team met in May 2018 and decided, based on his performance in school, that [redacted] did not need to be evaluated. He did not show any signs of needing specialized instruction. The accommodations provided by his 504 Plan were deemed to be appropriate and he was doing well in school. In her testimony, [redacted] stated that during the May 2018 IEP meeting, the team discussed [redacted] grades and academic performance. The teachers showed charts and graphs of his performance. [redacted] just stated that she disagreed with the team's decision. (Tr. p. 200)

8. [redacted] was [redacted] homeroom and History teacher at Cornerstone during the 2017-18 school year. She also served on the IEP team that made the decision not to evaluate [redacted] She was the only witness from Cornerstone called by the Petitioner in this case. She testified that [redacted] was well-liked, very bright, and easy to talk to. He liked to add to Ms. [redacted] classroom by providing information to enhance the material being discussed. (Tr. p. 253)

9. [redacted] could and did advocate for himself. From time to time in Ms. [redacted] class, he asked for extra time because handwriting was more difficult for him. (Tr. p. 259) According to Ms. [redacted], [redacted] handwriting "slowed him down just a little bit, but he had great grades." (Tr. p. 260)

10. Ms. [redacted] stated that [redacted] had a Section 504 plan that was working. She did not believe that he showed signs of needing to be evaluated for special education services. (Tr. pp. 262-63)

11. The only evidence concerning this IEP meeting that was available to the ALJ and the SRO was the testimony of the mother and Ms. [redacted] from Cornerstone. The Petitioner introduced none of the documents that were used by the IEP team or produced at this meeting.

12. The mother decided in the summer of 2018 to withdraw [redacted] from Cornerstone and to enroll him in [redacted] Academy, a private school. (Tr. p. 210)

Education Subsequent to [redacted] Withdrawal from Cornerstone

13. [redacted] was enrolled at [redacted] Academy on [redacted] 2018. At the time of the hearing, he was a [redacted] grader there. (Tr. p. 234)

14. Three staff members of [redacted] Academy testified at the hearing, [redacted] math and science teacher, his English teacher and the Dean of Students. All essentially testified that [redacted] was doing well at [redacted] Academy and making good academic and social progress.

15. A single exhibit from [redacted] academy was introduced, [redacted] Academic Profile. This included [redacted] classes, accommodations, and specific activities. Being a private school, [redacted] does not provide an IEP.

16. From the testimony of the [redacted] Academy staff and [redacted] Academic Profile, these facts could be determined:

a. Both Cornerstone and [redacted] Academy utilize a testing program known as MAP that measures academic progress over time in various subjects. (Tr. p. 146) The MAP test was administered to [redacted] upon entering [redacted] at the beginning of the 2018-19 school year. (Tr. pp. 146-47)

b. When [redacted] entered [redacted] in the fall of 2017, his math scores, as measured by the MAP testing program, were on par with typically developing seventh graders. (Tr. p. 145) His math score at that time was "dead on average" for seventh graders. (Tr. p, 146)

c. His reading score for the fall of 2017 when he entered [redacted] was at the 73rd percentile, which was significantly above average for seventh graders. (Tr. pp. 146-47)

d. His language score for the fall of 2017 when he entered [redacted] was high average or above average. (Tr. p. 147)

e. Ms. [redacted], [redacted] math and science teacher at [redacted] admitted that [redacted] testing done at [redacted] in the first month of the academic year showed that he came from Cornerstone and entered [redacted] with average to above average test scores in key academic areas. (Tr. pp. 147-48)

f. Ms. [redacted] appeared to have no knowledge about [redacted] performance at Cornerstone or of the general education curriculum. (Tr. pp. 129, 131)

g. [redacted], the dean of students at [redacted] Academy, testified that, as far as she knew, no one at [redacted] had either observed [redacted] while he attended Cornerstone or had spoken to Cornerstone staff about [redacted] performance there. (Tr. p. 167)

h. Ms. [redacted] testified that page 3 of [redacted] Academic Profile (Pet. Ex. 27), which is titled "Personalized Academic Programming" applies to all [redacted] students and was not individualized in any way for [redacted] (Tr. pp. 169-70)

i. [redacted] Academy's program is focused on children with disabilities. While licensed as a special education teacher, it was interesting that Ms. [redacted] had no understanding of Section 504 nor IDEA requirements in the public schools. She also could not distinguish between accommodations/modifications and specialized instruction, a distinction especially important in this particular case.

j. Mr. [redacted], [redacted] English teacher, testified that [redacted] can be impulsive and frequently needs redirection. (Tr. p. 246) Mr. [redacted] provides no individual accommodations for [redacted] that are not provided to all students. (Tr. pp. 242-44; 249)

Evaluation Conducted During Case/Prior to Hearing

17. [redacted] lawyers referred her to Dr. [redacted] in February 2019 to have [redacted] evaluated so those results could be used in this hearing. (Tr. p. 67) Based upon that referral, Dr. [redacted] conducted a neuropsychological evaluation of [redacted] in February 2019.

18. Dr [redacted] asked both [redacted] and her attorneys for past educational records, but neither provided educational records from Cornerstone Charter where [redacted] had attended since 2012. (Tr. p. 92) She reviewed no educational records, and only those records provided to her by [redacted] and [redacted] lawyers.

19. Dr. [redacted] reviewed [redacted] previous evaluations, beginning with a comprehensive evaluation conducted just shy of his second birthday. Three psychological evaluations from 2012, 2015, and 2017 were reviewed. (Pet. Ex. 62) She also was provided a letter from a physician who had recently treated [redacted] for a concussion.

20. In the report of her evaluation, and in testimony, Dr. [redacted] mentioned [redacted] previous diagnoses and treatments. There, however, was no documentation to support these.

21. Dr. [redacted] report states that [redacted] school-age evaluations all showed academic achievement and cognitive ability scores in the average to above-average range. (Pet. Ex. 62, p. 3)

22. As part of her evaluation, Dr. [redacted] used several rating scales. The Behavior Assessment System for Children, Third Edition (BASC-3) was completed by [redacted] mother, one teacher from [redacted] Academy, and a self-report by [redacted] Only the mother completed the Conners 3 ADHD Index Probability. The Gilliam Autism Rating Scale, Third Edition (GARS-3) was completed by the mother, a family friend and a single teacher from [redacted] (Pet. Ex. 62, pp. 4-5)

23. Dr. [redacted] testified that the choice of individuals to complete the rating scales was not ideal, especially because the evaluation was being used for educational reasons. Input was received from only one teacher, although Dr. [redacted] had asked for rating scales to be completed by more teachers. The choices, however, were made by [redacted]

24. After noting a significant disparity in rating scores between Ms. [redacted]'s report and [redacted], Dr. [redacted] requested that [redacted] find another teacher to complete the rating scales. [redacted] did not do so. Dr. [redacted] then allowed [redacted] to have a family friend fill out a third report. (Tr. pp. 85-90) Dr. [redacted] proceeded with the evaluation anyway, but appeared to be somewhat defensive when testifying about the results of the rating scales. (Tr. pp. 89-96)

25. On the behavior rating scale (BASC-3), Ms. [redacted] reported "only mild hyperactivity and somatic concern, with elevations just into the 'at risk' range. Report of anxiety, depression, and attentional problems falls below threshold. This teacher also reported no conduct issues. She notes adequate adaptability, social skills, leadership skills, and functional communication skills." (Pet. Ex. 62, p. 5; Tr. pp. 86-87)

26. Dr. [redacted] testified that, in her opinion, this meant that Ms. [redacted] saw no sign that [redacted] was having significant anxiety, depression, or attentional problems in the school setting. (Tr. p. 86) On

the autism rating scale, Ms. [redacted]s scores were in the normal range, meaning that she saw no likelihood that [redacted] had autism. As Dr. [redacted] interpreted Ms. [redacted]'s autism rating scales, [redacted] was just like other typically developing seventh graders. (Tr. p. 88)

27. [redacted] rating on the BASC-3 indicated possible diagnoses in the areas of ADHD, autistic spectrum, emotional control, and functional impairment. On the Conners 3 the mother rated [redacted] as meeting the criteria for ADHD with sign of depression and anxiety. The mother rated [redacted] as in the very likely range on the Autism Index of the GARS-3. (Pet. Ex. 62, pp. 4-5)

28. The family friend who completed the GARS-3 also rated [redacted] in the very likely range on the Autism Index. (Pet. Ex. 62, p. 5)

29. Dr. [redacted] administered the Wechsler Intelligence Scale for Children - Fifth Edition ("WISC-V"). On this test, [redacted] February 2019 Full Scale IQ score was 100, which is in the average range. (Pet. Ex. 62, p. 6) These results were consistent with [redacted] IQ testing from 2012, 2015, and 2017

30. Dr. [redacted] administered the Woodcock-Johnson IV achievement test to [redacted] in February 2019. (Pet. Ex. 62, pp. 7-8)

31. Based on her evaluation, Dr. [redacted] concluded that [redacted] "[o]verall achievement falls in the high average range, commensurate with ability. Thus, there are no scores to suggest learning disability, and prior testing did not reveal any clear compromise in academic functioning either." (Petitioner Ex. 62, p. 8)

32. Referring to her February 2019 testing of [redacted] Dr. [redacted] stated that [redacted] "has always performed fairly well intellectually, within normal limits, and sometimes above average or high average at least. He's still high averaged language-wise on my testing in terms of his vocabulary and his abstract verbal reasoning." (Tr. p. 48)

33. Dr. [redacted] testified that [redacted] does not present as a student with learning disabilities, nor does he present a profile of a child who had suffered concussions. (Tr. pp. 49-50) The academic testing and profile did not suggest a student in academic trouble. (Tr. p. 105)

34. Dr. [redacted] testified that [redacted] is "doing remarkably well from an academic standpoint." (Tr. p. 58)

35. One of Dr. [redacted] specialities is traumatic brain injuries. An allegation in the Petition for this case is that [redacted] should be identified under the category of Traumatic Brain Injury. Dr. [redacted] never uses this term to refer to [redacted] She very clearly states in her report, "It is encouraging that [redacted] does not display some of the symptoms of serious head injury . . ." (Pet. Ex. 62, p. 12)

36. In the conclusion of her report, Dr. [redacted] states:

> It is my opinion that most if not all of [redacted]s issues can be explained by his highly over focused attentional style, which in my opinion, meets criteria for an autistic spectrum disorder (ASD). [He] displays a neuro-cognitive profile that is characteristic of children on the mild autistic spectrum . . . . parents and teachers will meet with the most success if they handle [redacted] as a child with high functioning autism. (Pet. Ex. 62, p. 12)

37. In the concluding paragraphs of her evaluation, Dr. [redacted] states: "[redacted] has been receiving a wide array of accommodations, and I concur with those recommendations and that they should be ongoing as needed in this new educational environment" She was referring to his new school, [redacted] Academy. (Pet. Ex. 62, p. 14)

38. Dr. [redacted] testified that the "accommodations" and "recommendations" to which her report referred were contained in a communication dated October 9, 2015, from a D[redacted] [redacted] MD (Tr. p. 105) Dr. [redacted] produced a copy of that communication from her file, but it was not entered into evidence.

39. Dr. [redacted] conceded that none of Dr. [redacted] recommended "accommodations" and "recommendations" endorsed by her required direct special education services from an Exceptional Children's teacher. Instead, each of these accommodations and modifications, according to Dr. [redacted] could be, and had been, implemented by regular education teachers. (Tr. pp. 108-113)

40. Interestingly, Dr. [redacted] referred only to those "accommodations" and "recommendations" contained in a communication dated October 9, 2015, from [redacted] [redacted] She never referred to any accommodations actually being used by [redacted] Academy or that had been used at Cornerstone. *(Emphasis added)*

41. Dr. [redacted] actually had little or no information about either of [redacted] educational placements or his actual performance in either. She did not seek that information, relying solely on input from [redacted] and [redacted] lawyers.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) and the State Review Officer (SRO) 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. The Petition in this case was filed on September 10, 2018. N.C.G.S. § 115C-109.6(b) contains a one-year statute of limitations restricting the scope of a contested case hearing to "alleged violation[s] that occurred not more than one year before the party knew or reasonably should have known about the alleged action[s] that forms the basis of the petition." Petitioner offered no evidence to show that any exception to North Carolina's one-year statute of limitations was applicable. Accordingly, the relevant time period for this case is from mid-September 2017 through the remainder of the 2017-18 academic year.

3. Neither OAH nor the SRO have jurisdiction over claims brought pursuant to Section 504 of the Rehabilitation Act of 1973. Accordingly, neither have jurisdiction over the fourth claim of the Petition (alleging that Respondent failed to follow [redacted] Section 504 plan).

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

5. Decisions made by schools in implementing IDEA are normally entitled to substantial deference. *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley,* 458 U.S. 176, 206 (1982) A hearing conducted under IDEA is not "an invitation to the courts to substitute their own notions of sound educational policy for those of chosen school authorities which they review." *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017) (Quoting *Rowley* 458 U.S. at 206) Therefore,

the ALJ and SRO have an obligation to defer to the IEP team unless it can be clearly be shown that the IEP team decision has not been made in accordance with the law.

6. Following the presentation of the Petitioner's case during the hearing, the Respondent moved for entry of judgment pursuant to North Carolina Rule of Civil Procedure 41(b). Rule 41(b) states in part: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

7. Under Rule 41, the ALJ may render judgment against Petitioner, not only if she failed to make out her case, but also based on the facts as found by the trier of fact. *See Goodrich v. Rice,* 75 N.C. App. 530,331 S.E.2d 195 (1985). The ALJ is empowered to make his own findings of fact and then to apply the law to those findings.

8. Based upon the evidence presented in this case, the ALJ found that the Petitioner had not met her burden of proof by making a *prima facie* case which shows that Respondent: (a) improperly refused to evaluate [redacted] for eligibility under IDEA; (b) improperly refused to evaluate him for IDEA eligibility under the category of traumatic brain injury; (c) improperly failed to develop an IEP for him; or (d) improperly denied Petitioner the right to meaningfully participate in an April 2018 IEP team meeting.

9. The SRO concurs with the finding of the ALJ. The Petitioner did not meet her burden to show that the Respondent violated the requirements of IDEA or corresponding state law with regard to the claims in the Petition.

10. With regard to Petitioner's first claim that the Respondent improperly refused to evaluate [redacted] the Petitioner simply did not produce any evidence that the IEP team's decision not to evaluate [redacted] in May 2018 was improper.

11. The Petitioner produced no evidence that [redacted] performance during the 2017-18 school year would have caused a reasonable educator to suspect the need for special education evaluation. He had good grades at Cornerstone, and the educators there had put a Section 504 plan in place for him that was working appropriately. He was able to access the educational program despite any disability that he may have. This was the information available to the IEP team at the May 2018 meeting.

12. The early testing at [redacted] Academy showed that [redacted] was at or above average in the major core academic subjects. He did not come to [redacted] with academic deficits and was clearly in the average range for math and above average in reading.

13. To qualify as a "child with a disability," the child must meet the requirements of NC 1504-2.4(a):

> (1) 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.
>
> (2) If it is determined, through an appropriate evaluation under NC 1503-2 through NC 1503-3, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under IDEA.

14. Under IDEA, if an IEP team has reason to suspect that a student is a "child with a disability," the team must then follow appropriate procedures to determine whether that child should be evaluated for special education eligibility. Petitioner offered no evidence that the IEP team improperly failed to perform this duty, nor did the Petitioner show that [redacted] needed special education services.

15. Amazingly, there was no evidence introduced regarding the IEP meeting in May 2018. The action taken by the IEP team at this meeting was the primary issue in this case. IDEA and state law require substantial documentation of any such meeting, certainly a form DEC-5 or Prior Written Notice regarding any decision made by the IEP team. No documentation whatsoever was produced and made available for the ALJ and SRO.

16. The only information available concerning the May 2018 IEP meeting was in testimony by the mother and one teacher from Cornerstone that testified. Nothing in their testimonies provided any useful details about the decision-making of the IEP team. Essentially, the teacher (who was on the team) testified that the team determined that [redacted] did not need special education. The mother testified that she disagreed with the decision of the team, but did not give specifics.

17. The evidence available shows that, in approximately April 2018, [redacted] asked Cornerstone to evaluate her son. Cornerstone convened an IEP team in May 2018 to consider that request. [redacted] as well as [redacted] father, participated in that meeting. The team decided not to evaluate [redacted] for special education services because he was making progress in the general education curriculum commensurate with that of his non-disabled peers and with the support of a Section 504 plan. [redacted] was performing consistently at, or above average, in his core subjects. The Petitioner did not offer any evidence of academic struggles during the 2017-18 academic year. [redacted] did testify that [redacted] was struggling academically, but offered no evidence to support her allegations.

18. Evidence that a student (including a student with evidence of some impairment) has made non-trivial educational progress after receiving general education interventions (such as accommodations and modifications under a Section 504 plan) is a strong indicator that he does not require IDEA services. *See MP. v. Arkansas Pass Indep. Sch. Dist.*, 67 IDELR 58 (S.D. Tex. 2016).

19. As the Petitioner had the burden to prove that, in May 2018, a reasonable educator would have suspected that [redacted] was a "student with disability" and thus should be evaluated for IDEA eligibility. Because she failed to produce such evidence, Cornerstone is entitled to judgment on that claim.

20. With regard to Petitioner's second and third claims: Cornerstone improperly refused to develop an IEP for [redacted] under the traumatic-brain-injury category; and Cornerstone improperly denied him an IEP, are effectively the same claim. The Petitioner produced no evidence that the IEP team could have used in May 2018 to make the decision that [redacted] required an IEP or that he needed specially designed instruction.

21. Even after the February 2019 evaluation performed by Dr. [redacted] there is no evidence that [redacted] qualifies as being identifiable under the category of Traumatic Brain injury. Dr. [redacted] who has done a lot of work in the area of traumatic brain injury, clearly did not include this as a diagnosis nor did she ever use the term in connection with [redacted] during her testimony. She indicates in her evaluation report, and later testified, that any concussions [redacted] might have had do not appear to have resulted in any impairment.

22. There was testimony by the Petitioner that [redacted] had suffered what [redacted] herself characterized as concussions, but there was no evidence: (a) that the incidents were indeed medically diagnosed as concussions; (b) establishing when those alleged concussions occurred; or (c) that they impacted [redacted] during the 2017-18 school year. In fact, [redacted] expert testified that, in February 2019, she saw none of the impacts that she might have expected to see of a concussion victim

23. The Petitioner simply failed to produce evidence that, during the 2017-18 school year, the IEP team should have suspected that [redacted] might have suffered a traumatic brain injury leading to the need for specialized instruction. Without more information an ALJ or SRO must accept the decision that was made by the IEP team in May 2018.

24. The Petitioner produced no evidence tending to show that [redacted] needed special education or related services as a result of any statutorily recognized disability. Dr. [redacted] admitted that the accommodations and modifications she endorsed did not include the provision of direct special education services.

25. Moreover, the evidence presented by the [redacted] Academy staff who testified was about accommodations that were given to *all* [redacted] students, and did not include special education that had been individualized for [redacted]

26. The Petitioner did not offer any evidence tending to show that Cornerstone's May 2018 decision not to evaluate [redacted] for special education services was contrary to applicable law. She had the burden of proof to establish that the IEP team's decision was not made following proper procedure, or that the decision made was contrary to governing legal standards. She simply did not offer such evidence. Instead, [redacted] based her case on arguments and allegations. Without substantive evidence, the party bearing the burden of proof cannot prevail.

27. Regarding the last claim, that Respondent denied Petitioner's right to participate in an April 2018 IEP team meeting, Petitioner produced no evidence relating to this claim. She presented no evidence that there was an IEP team meeting in April 2018, much less that she was denied the ability to participate in it. Accordingly, this claim is deemed abandoned. Alternatively, the burden of proof as to this claim was not met, and Petitioner failed to make a *prima facie* case of procedural violations in this regard.

28. This case can be best described as one almost totally lacking in evidence. One would expect numerous exhibits with supporting testimony regarding to the claims made, especially from the party that has the burden of proof.

DISCUSSION

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

The Written Arguments/Exceptions received from the Petitioner in this case necessitates some discussion and/or response by the Review Officer.

While it is clear that the Petitioner did not meet her burden during this hearing, some good arguments were made to the Review Officer in response to the request for Written Arguments. Why the Petitioner did not attempt to present testimony and exhibits during the hearing that would support these

arguments is puzzling. The purpose of the hearing is to present all those facts pertinent to the case to show the ALJ that the claims made in the petition are supported by convincing evidence. The Petitioner failed to do this. Instead, the Petitioner attempted to present many exhibits supporting those claims during the appeal process. These were accompanied by extensive written arguments. The Review Officer, of course, did not review those proposed exhibits for they were not introduced during the hearing.

The Petitioner even cited NC 1504-1.15(b)(2)(iii) which authorizes the SRO to seek additional evidence if necessary. The SRO does not find it necessary. The SRO would deem it necessary only if the ALJ made significant procedural errors that denied one of the parties due process. This did not occur. It was the Petitioner who failed to introduce the evidence at the hearing and now wants to remedy that error. There is no reason to believe that those exhibits, and accompanying testimony, were not available and could have been entered during the hearing. If significant exhibits had been entered into the record during the hearing, along with persuasive testimony, the outcome of the case may have been different. IDEA cases must be based on facts duly entered into the record during the hearing. Without those, extensive arguments are meaningless.

The Petitioner also, in Written Arguments, claimed that the ALJ made procedural errors that should result in a reversal upon review. If the ALJ made any procedural errors, they were minor and did not result in any denial of due process. Though not an exhaustive list, these are representative of the Petitioner's argument relating to ALJ's procedural errors:

a. The Petitioner claimed that the ALJ improperly applied North Carolina'a one year statute of limitations by denying the Petitioner the opportunity to enter certain evidence. What actually occurred is that the Respondent objected to the introduction of the evidence and the ALJ sustained that objection. At that point the Petitioner had the burden to make an argument that one of the exceptions in North Carolina law applies and that the evidence should be admitted. No such attempt was made. The Petitioner did not even request that it be entered as background or historical information. The Respondent had the right to make the objection and it was up to the Petitioner to counter with a legal argument. The ALJ made no procedural error.

b. The Petitioner claimed that the ALJ improperly denied the admission into evidence a physician's letter regarding head injuries sustained by [redacted] The Petitioner, in written arguments to the Review Officer gave references to North Carolina Rules of Evidence that the letter would be an exception to hearsay. Why this same argument was not made to the ALJ is puzzling. Even if the ALJ erred in this regard, it would probably have no effect on the outcome of the case. The Petitioner stated that the IEP team had this letter and had used it to make their decision during the IEP meeting. The letter supposedly gave recommendations for [redacted] physical education because of his head injuries. The Supreme Court in *Rowley* (458 U.S. at 206) cautions us not to substitute our judgment for that of the IEP team, without sufficient reason. The letter alone would not be sufficient reason, as it would only be a recommendation made to the IEP team. The team, based on many inputs, makes decisions. Simply producing a letter from a physician is not enough to show that the IEP team failed to perform its duty regarding the child. If, however, the physician and/or an expert on adaptive PE testified during the hearing it may be another matter.

c. The Petitioner claimed that she was denied due process because the ALJ delegated the responsibility of drafting a proposed decision to the Respondent's attorney. This is not a procedural

error. This is standard practice, especially when the ALJ announces at the close of the hearing that the ALJ is deciding the case in favor of one of the parties. The way to counter this is for the Petitioner to present an effective case showing that she should prevail. In this hearing, this clearly did not happen. Another issue was stated as a procedural error, the ALJ in using the terminology in the Respondent's proposed decision did not use the correct legal definition of "special instruction." Assuming *arguendo* that the ALJ did not use the proper definition of "special instruction," this was still not a significant procedural error that denied any rights of the Petitioner. It certainly would not affect the outcome of the case, for the Petitioner never introduced clear evidence that [redacted] needed special education.

d. The Petitioner also made extensive arguments on appeal that the ALJ erred in not holding that the Petitioner's private placement was appropriate for [redacted] This is not material to the case unless the Petitioner first shows that the Respondent denied FAPE to [redacted] The burden is on the Petitioner to show a failure to provide FAPE. Once it has done so, then the ALJ must address a parent's private unilateral placement. It was proper for the ALJ and this SRO to avoid any reference to the appropriateness of the Petitioner's unilaterally chosen private education, for there had been no determination that FAPE was denied.

IDEA, state law, and the courts have placed a significant burden on the Petitioner when challenging an LEA's decision in a special education case. Unless there is convincing evidence that the school has improperly failed to provide FAPE or significantly denied procedural rights of parents/children, then an ALJ and SRO must find in favor of the schools. In this instance, the Petitioner simply failed to produce that evidence. Making an effort to remedy this by attempting to submit evidence and substantial arguments during the appeal process defeats the purpose of the hearing.

DECISION

The Final Decision Administrative Law Judge J. Randall May issued on May 23, 2019 is upheld. Judge May did not err in granting Respondent's motion for entry of judgment after the completion of the presentation of Petitioner's evidence. The Petitioner is entitled to no relief.

This the 15th day of July 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.

CERTIFICATE OF SERVICE

I hereby certify that this Decision has been duly served on the attorneys by electronic and certified U.S. Mail, and to all others by U.S. Mail addressed as follows:

[redacted] and [redacted]
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This the 15th day of July 2019

Joe D. Walters

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State Review Officer