STATE OF NORTH CAROLINA

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

[redacted] by and through his parents, [redacted] and [redacted]

PETITIONERS,

v.

CHAPEL HILL-CARRBORO BOARD OF EDUCATION

RESPONDENT,

FILED

OCT 14 2019

OFFICE OF ADMIN HEARINGS

DECISION

19 EDC 02149

This DECISION resolves Petitioners' September 11, 2019, appeal of the Honorable Administrative Law Judge Donald W. Overby's August 13, 2019 Decision in the above-referenced matter, necessitating a hearing on remand by the ALJ concerning the Petitioners' claims that the April 16, 2018 IEP failed to provide the child a free appropriate education ("FAPE"), for tuition reimbursement and for any other appropriate relief in the event that the Petitioners are able to prevail at hearing.

The undersigned Review Officer was appointed on September 11, 2019. The records of the case received for review were contained on one (1) CD which contained a certified true copy of the Official Record.

APPEARANCES:

For Petitioners-Appellants: Robert C. Ekstrand, Ekstand & Ekstrand LLP, 110 Swift Avenue, Second Floor, Durham, NC, 27705, *rce@ninthstreetlaw.com*

For Respondent-Appellee: Carolyn A. Murchison and Patricia R. Robinson, Tharrington Smith, L.L.P., 150 Fayetteville Street, Suite 1800, P.O. Box 1151, Raleigh, NC 27602-1151 *cmurchison@tharringtonsmith.com* and probinson@tharringtonsmith.com.

REFERENCES utilized to provide a document that does not contain personally identifiable information regarding the Petitioners and/or for convenience include the following:

For the Petitioner child: [redacted] Petitioner, or the child
For the Parents: [redacted] and [redacted], or Petitioners
For the Respondent: Respondent or Board or District

ISSUES ON APPEAL:

The ALJ correctly decided that any and all claims in the Petition prior to April 16, 2018 are barred by the applicable one-year statute of limitations. The Petitioners have not appealed this decision of the ALJ. However, Petitioners have requested that the SHRO issue a final decision on the issue of whether the ALJ's Final Decision dismissing the Petition for failure to state a claim concerning the allegation that the April 16, 2018 IEP was inappropriate under the IDEA, should be reversed and whether this case should be remanded for a hearing on the merits of Petitioners' claim for reimbursement of private educational costs and any other appropriate relief available under IDEA in the event that the Petitioners prevail at the hearing.

STANDARD OF REVIEW

SHROs review the Office of Administrative Hearing's ALJs' findings and decisions on appeal in accordance with 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, and N.C. Gen Stat. § 115C-109.9. A SHRO "shall make an independent decision" after conducting an "impartial review of the findings and

decision." 20 U.S.C. § 1415(g). "Due weight" should be afforded to the administrative proceedings before the ALJ. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 207 (1982).

The Fourth Circuit Court of Appeals has construed the "due weight" requirement, ruling that when findings of fact are "regularly made," they are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." *Doyle v. Arlington Cnty. Sch. Bd.,* 953 F.2d 100, 105 (4th Cir. 1991). When interpreting the standard by which to determine whether factual findings are "regularly made and entitled to *prima facia* correctness." *Doyle*, 953 F.2d at 105, the Fourth Circuit "ha[s] typically focused on the *process* through which the findings were made." *J.P. v Cnty. Sch. Bd. of Hanover Cnty.,* 516 F.3d 254, 259 (4th Cir. 2008). Irregularly made factual findings are those that "are reached through a process that is far from the accepted norm of a fact-finding process." *Cnty. Sch. Bd. of Henrico v Z.P.,* 399 F.3d 298, 305 (4th Cir. 2005) (internal quotation marks omitted). Irregular findings "are not entitled to deference." *Id.* "After giving the administrative fact-findings such due weight, if any, the district court then is free to decide the case on the preponderance of the evidence, as required by the statute." *Id.*

Of course, if the ALJ has erred in his decisions as a matter of law, the reviewing person can reverse his decision without any constraints.

Now, having reviewed the records received in connection with this case, including the Certified Official Record, the Review Officer for the State Board of Education independently and impartially proceeds to make Findings of Fact, Conclusions of Law and a Decision in accordance with 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, N.C. Gen. Stat. § 115C-109.9, and the *Policies Governing Services for Children with Disabilities,* NC Policies 1504-1.12. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

FINDINGS OF FACT

1. On April 15, 2019, Petitioners filed a Petition for a Contested Case Hearing ("Petition") against the District alleging that the Respondent violated the Individuals with Disabilities Act (as amended, the "IDEA") and North Carolina state law as set forth in N.C. Gen. Stat. §§ 115C-109.6 *et seq.*
2. Respondent filed its Response to the Petition on May 10, 2019.
3. The Office of Administrative Hearings (the "OAH") issued an Order of Reassignment on May 13, 2019, reassigning the case to the Honorable Administrative Law Judge ("ALJ") Donald W. Overby.
4. The Petition asserts a claim under the IDEA for reimbursement of the cost of [redacted] private educational placement, where [redacted] parents unilaterally placed [redacted] because the Parents allege that Respondent offered an IEP on April 16, 2018 which failed to offer a FAPE. (Petition ¶ 41.)
5. The Petition further alleges that on April 16, 2018, Petitioners rejected the IEP, explained why it failed to offer a FAPE, gave the 10-day notice of their intent to enroll [redacted] privately at public expense, contemplated by 34 CFR § 300.148(d), and, after Respondent allegedly failed to cure the alleged defects in its April 16 IEP, Petitioners enrolled [redacted] in a private placement on August 29, 2018. (Petition ¶¶ 41-47 and 49-57.)
6. The Decision does not cover the April 16, 2018 IEP meeting in any detail.
7. The Petition contains all of the information required by 34 CFR § 300.508(b).
8. The Petition includes (i) the name of the child (Petition OAH Form p 1); (2) the address of the residence of the child (Petition OAH Form p 1); (3) the name of the school the child is

attending (Petition OAH Form p 1); (4) a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem (Petition pp 1-10, ¶¶ 1-62); and (5) a proposed resolution of the problem to the extent known and available to the party at the time of (Petition p 10, ¶ 63).

9. The Petition alleges facts that surpass the minimum pleading requirements prescribed by the IDEA.

10. The Petition asserts a claim under the IDEA for reimbursement of the cost of [redacted] private educational placement at [redacted]

11. The Petition alleges that [redacted] parents unilaterally enrolled [redacted] at [redacted] because Respondent offered an IEP on April 16, 2018 that failed to offer the special education, related services, or placement in the least restrictive environment necessary to provide a FAPE. Petition ¶¶ 41-47, 49-57.

12. Specifically, the Petition alleges that the IEP that Respondent offered to [redacted] on April 16, 2018 "failed to include appropriate behavioral goals and objectives" (Petition ¶ 49); where the IEP established behavioral goals and objectives for [redacted], the IEP did not offer special education or related services necessary to enable [redacted] to meet them (Petition ¶ 49); the April 16, 2018 IEP offered no related services, including the counseling services and psychological services allegedly required to enable [redacted] meet the IEP's behavioral goals. Petition ¶ 50.

13. The Petition alleges that Respondent's April 16, 2018 IEP offered no supplementary aids and services – that is, aids, services, and other supports that IDEA requires to be provided in regular education classes, other education related settings and in extracurricular and nonacademic settings, to enable [redacted] to be educated with nondisabled children to the

maximum extent appropriate in accordance with 34 CFR §§ 300.114-300.116. Petition ¶ 54.

14. The Petition alleges that, as a result of the foregoing and other asserted deficiencies, the April 16, 2018 IEP failed to offer the special education and related services necessary to meet the substantive requirements of a FAPE for [redacted] and failed to offer to educate [redacted] in the least restrictive environment in which he could be educated satisfactorily with the benefit of supplemental aids and services. Petition ¶ 55.

15. The Petition further alleges that, Petitioners rejected the April 16, 2018 IEP; explained the reasons why it failed to offer a FAPE; gave Respondent the 10-day notice of their intent to enroll [redacted] privately at public expense contemplated by 34 CFR § 300.148(d); and, after Respondent refused to cure the asserted substantive deficiencies in its April 16 IEP within the 10-day notice period, Petitioners enrolled [redacted] in the private placement on August 29, 2018. Petition ¶¶ 56-59.

16. The Petition alleges that [redacted] private educational program is appropriate tha[redacted] has made meaningful educational progress in his private placement. Petition ¶¶ 58-60

17. Accordingly, the Petition states a claim for reimbursement of private educational costs under the IDEA based on the April 16, 2018 IEP; the claim was timely filed on April 15, 2019; and Petitioners are entitled to proceed to discovery and hearing on that claim.

18. The ALJ and the Board have misinterpreted the Petition and incorrectly asserted that Petitioners only contended that Respondent failed to provide a FAPE to [redacted] *after* his parents unilaterally enrolled him in his private educational program at [redacted] Rather, the Petition alleges, as the Petitioners painstakingly stress, that [redacted] parents enrolled [redacted] in a private educational program at [redacted] *because* the IEP Respondent offered to [redacted] on

April 16, 2018 allegedly did not offer a FAPE because it allegedly did not provide the special education, related services [redacted] required to make meaningful educational progress; and it allegedly did not offer to educate [redacted] in the least restrictive environment in which [redacted] could be educated satisfactorily with the benefit of supplemental aids and services. Petition ¶¶ 49-55.

19. The statute of limitations does not bar Plaintiffs claim for reimbursement of the cost of [redacted] private educational placement, and the Petition adequately states that claim.

20. The undersigned received via electronic submission Petitioners' Written Argument in Support of Petitioners' Appeal to the State Hearing Review Officer on October 4, 2019 and on October 3, 2019, also so received Respondent's Written Arguments on Appeal to State Hearing Review Officer.

ANALYSIS & CONCLUSIONS OF LAW

The SHRO briefly addresses his authority to remand cases to an ALJ. Under the IDEA and its regulations, each party has the right to findings of fact and a decision. 34 C.F.R. 300.509(a)(5). Whether directly or after a hearing officer's decision at the administrative level, each party has the right to bring a civil action in a state or federal court, which has the authority to "grant the relief that the court determines to be appropriate" [34 C.F.R. 300.512(b)(3). Emphasis supplied.] In Burlington Sch. Committee v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985), the Court held that under IDEA a court has broad authority to fashion appropriate relief to realize the purposes of IDEA, considering all equitable factors.

Since Burlington, the Office of Special Education Programs ("OSEP") and certain courts have stated that a hearing officer has the same broad authority as a court to grant any such appropriate relief under IDEA.

In Cocares v. Portsmith Sch. Dist., 18 IDELR 461, 462-3 (U.S.D.C. NH 1991), the Court held that given the importance that the IDEA places on the protections afforded by the administrative process, the hearing officer's authority to award relief, including compensatory education, must be coextensive with that of the court. The Court went on to state that to find otherwise "would make 'the heart of the [Act's] administrative machinery, its impartial due process hearing' less than complete." S-1 by and through P-1 v. Spangler, 650 F.Supp. 1427, 1431 (M.D.N.C. 1986, *vacated as moot*, 832 F.2d 294 (4th Cir. 1987), quoting Madecke v. School Bd. of Pinellas County, 762 F.2d 912, 919 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

See, also, *Stancourt v. Worthington City Sch. Dist.,* 841 N.E.2d 812, 830-831 (Ohio Ct. App. 2005): "Because a due process hearing is quasi-judicial in nature and consists of a hearing resembling a judicial trial, we conclude that a hearing officer in such a proceeding is vested with implied powers similar to those of a court."

North Carolina is one of eight (8) of states that has a "two-tier system" of dispute resolution under the IDEA prior to each party filing a court action. Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina's First Tier,* 118 W. Va. L. Rev. 735, 745 (2016). Petitioners were unable to identify any state law prohibiting the SHRO from remanding the case to the IHO. *See, e.g.,* Kan Stat. Ann. § 72-3418 (2018); 707 Ky. Admin. Regs. 1:340(12) (2019); Nev. Admin. Code § 388.315 (2018); N.Y. Comp. Codes R. & Regs. Tit. 8 § 200.5(k) (2016); Ohio Rev. Code Ann. § 3301-51-05(K)(14)(2019); Okla. Admin. Code § 210:25-13-5(a) (2019); S.C. Code Ann. Regs. § 43-243(V)(15)(b)(2)(iii)(2016).

With the exception of New York, which expressly permits SHROs to remand matters to IHOs, the remaining seven (7) states, including North Carolina, do not address a SHRO's ability to remand a matter to the IHO in the state law, regulations, or administrative code. *Compare* N.Y. Comp. Codes R. & Regs. Tit. 8, § 279.10 (2016) ("A State Review Officer may remand a matter to an impartial hearing officer to take additional evidence or made additional findings") *with* Kan. Stat. Ann. § 72-3418(b)(1)(2018) ("The review officer shall…seek additional evidence if necessary [and] render an independent decision on any such appeal not later than five days after the completion of the review."); 707 Ky. Admin. Regs. 1:340(12) (2019) ("A decision made by the Exceptional Children Appeals Board shall be final unless a party appeals the decision to state circuit court or federal district court"); Nev. Admin. Code § 388.315 (2018) ("The officer conducting the review shall…[m]ake an independent on the completion of the review"); Ohio Rev. Code Ann. § 3301-51-05(K)(14) 2019) (The official conducting the review must…[m]ake an independent decision on completion of the review"); S.C. Code Ann. Regs. §43-243(V)(15)(b)(2) (2016) ("The official conducting the review must…[m]ake an independent decision on completion of the review").

Mirroring the language in the North Carolina law, Kansas, Nevada, Ohio, and South Carolina require the SHRO to seek additional evidence if necessary. Kan Stat. Ann. § 72-3418(b)(1) (2018); Nev. Admin. Code § 388.315 (2018); Ohio Rev. Code Ann. § 3301-51-05(K)(14)(b)(iii)(c) (2019); S.C. Code Ann. Regs. § 43-243(V)(15)(b)(2)(iii) (2016). And, as in North Carolina, the SEA in those states has not interpreted this silence in state law as a denial of authority of SHROs to remand; indeed, SHROs in both Ohio and South Carolina routinely remand cases to IHOs. *See, e.g.,* York County Sch. Dist. Four, 117 LRP 20629 (SC SEA 2017) (remanding a case to the IHO to make additional factual findings); Charleston County Sch. Dist. 117 LRP 20598 (SC SEA 2017) (remanding the case to the IHO to determine the appropriate remedy); Cardinal Local Sch. Dist., 108 LRP 15763 (OH SEA 2007)

(remanding a case to the IHO to make a final determination on a Section 504 issue); Northwest Local Sch. Dist., 104 LRP 55885 (OH SEA 2004) (reversing IHO's decision to dismiss petitioners' case and remanding for a new due process hearing). That other states with two-tiered systems routinely permit SHROs to remand to IHOs - in the absence of state law, regulation, or administrative code to the contrary - reinforce that it is a permissible practice under the IDEA.

State law grants subject matter jurisdiction to the Office of Administrative Hearings (OAH) to hear due process hearings in special education matters. N.C.G.S § 115C-109.6. An Administrative Law Judge (ALJ), acting as the Impartial Hearing Officer (IHO) presides over the hearing and issues a written decision with findings of fact and conclusions of law. N.C.G.S. § 115C-109.6(f). An aggrieved party may appeal the ALJ's findings and decision to the State Board within 30 days after receiving notice of the ALJ's decision. N.C.G.S. § 115C-109.9(a). State law provides that the State Board shall appoint a SHRO who "shall conduct an impartial review of the findings and decision" of the ALJ, and "shall make an independent decision upon completion of the review." *Id.* State law does not require nor prohibit SHROs from remanding cases to ALJs.

Additionally, North Carolina, as is its prerogative, has shown a willingness to exclude authority from ALJ's and SHROs where federal law recognizes that such decisions are best left to the states.

For example, the IDEA does not address whether hearing officers may raise and resolve issues of noncompliance, if the party requesting the hearing does not raise the issues. The rationale is that this type of decision is best left to the state, and best addressed in its procedures for conducting due process hearings. 71 Fed. Reg. 46,706 (2006).

In the MOU the OAH specifically agrees:

The OAH agrees that the ALJs will not utilize the following practices in special education due process hearings.

(a) Permit parties to raise issues at the hearing that were not raised in the due process petition (or amended petition), unless the other party agrees otherwise.

(b) Stay the contested case action except for the purpose of granting an extension at the request of the parties;

(c) Impose monetary sanctions; and

(d) Award attorneys' fees.

MOU at 4B(4) on page 6.

Accordingly, had North Carolina wanted to remove a SHRO's authority to remand where appropriate for a hearing, it could have done so specifically as it has done in other areas. Such removal would not be consistent with the overall legislative scheme in North Carolina which contemplates that the OHA conducts hearings. It would also lead to anomalous results. For example, were a SHRO to overturn a sufficiency challenge (or in this case a 12(b)(6) motion) sustained by the ALJ, it would be left to the SHRO to conduct the full-blown administrative hearing, again something not envisaged by North Carolina's procedures.

Without law or policy prohibiting SHROs from remanding issues to the ALJs, SHROs in North Carolina have regularly remanded cases to ALJs. *See, e.g.,* 18 EDC 5306 (reversing the ALJs grant of summary judgment and remanding to the ALJ for a hearing): Charlotte-Mecklenburg Sch. Bd of Educ., 119 LRP 20690 (NC SEA 2018) (reversing the ALJs dismissal and remanding for further proceedings); 15 EDC 5966 (remanding to the ALJ to determine an appropriate remedy). In these cases, and in all cases involving a remand from the SHRO, DPI has never intervened to prohibit an SHRO from remanding any case to an ALJ. As the SEA, DPI has the authority to structure the MOU to specify how the SHRO "must seek additional evidence if necessary." DPI has repeatedly chosen not to do so.

For example, the issue of whether a SHRO has the authority to remand arose in *O.V., by and through his parents, M.P. and P.V., v. Durham Public Sch. Bd. of Educ.,* 15 EDC 5966. In this case, the SHRO partially reversed the decision the ALJ rendered against the parents and remanded the case to the ALJ to seek additional evidence regarding a specific remedy. The ALJ noted her disagreement with the SHRO's authority to remand to the ALJ on any issue; however, the ALJ ordered the parties to brief the remanded issue and then issued her decision on the remand. When Petitioners appealed the ALJ's decision on the remand, DPI assigned a different SHRO decide the Appeal. The second SHRO concluded the SHRO lacked authority to remand issues to the ALJ. *Id.* SHRO Decision filed December 18, 2018, ¶ 2, p.7. Notwithstanding the split in opinions of the only two (2) SHROs deciding appeals at that time, DPI elected not to revise the MOU to clarify whether SHROs may remand issues to the ALJ. DPI's election constructively ratifies the use of remand by SHROs in North Carolina.

The pleading requirements of a complaint asserting claims for relief under the IDEA are set out in the federal regulations. Specifically, 34 CFR § 300.508(b) provides that –

> The due process complaint…must include –
>
> (1) The name of the child;
> (2) The address of the residence of the child;
> (3) The name of the school the child is attending;
> (4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending.;
> (5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
> (6) A proposed resolution of the problem to the extent known and available to the party at the time.

Id.

N.C.R. Civ. P. 12(b)(6) tests the legal sufficiency of the allegations in the Petition. *See e.g., Skinner v. Reynolds*, 237 N.C. App. 150, 152, 764 S.E.2d 652, 655 (2014). The question is whether, as a matter of law, "the allegations state a claim for which relief may be granted." *Id.* Although a petition is viewed liberally in the petitioner's favor, a petition "must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Id.* (internal citations omitted).

The hearing officer has decided that the Petition concerning the appropriateness of the April 16, 2018 IEP, contains sufficient facts, etc., to comply with 34 CFR § 300.508(b). However, the ALJ also has his inherent or residual right in the performance of his duties, in the pre-hearing context, to efficiently and fairly manage the administrative due process hearing, to require the Parents to clarify certain aspects of the Petition before the hearing if need be.

In this regard, the hearing officer finds the reasoning of the Court in *Escambia County Bd. of Educ. v. Benton,* 44 IDELR 272 (S.D.AL 2005) highly persuasive:

> …But the statute does not specify that all facts relating to the parents' dissatisfaction must be spelled out in the notice, much less that every legal theory must be set forth in painstaking detail at that time to avoid waiver. Such a burdensome, unwieldy standard would far exceed that to which federal court plaintiffs are held, and seems antithetical to the more nimble, less rule-intensive character of administrative proceedings. The Board has come forward with no court authorities reading this section so expansively, and the Court's own research has disclosed none. [Footnote omitted]. To the contrary, in the only published federal decision citing § 1415(b)(7)(B)(ii) the Supreme Court recently observed that Congress has legislated IDEA due process hearing procedures by "imposing minimal pleading standards." *Schaffer ex rel. Schaffer v. Weast,* ___ U.S. ___, 126 S.Ct. 528, 532 (2005).

DECISION

The SHRO decides that the ALJ's Final Decision of August 13, 2019 dismissing the Petition for failure to state a claim concerning the allegations concerning the April 16, 2018 IEP is reversed.

Accordingly, the case is remanded to the ALJ for a hearing on the merits of Petitioners' claim concerning the appropriateness of the April 16, 2018 IEP and for tuition reimbursement and any other appropriate relief available under the IDEA in the event that the Petitioners prevail at the hearing.

ENTER: 10/ 10 /2019

John V. Robinson

John V. Robinson, 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. Gen. Stat.§ 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. § 1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the Court.

This 10th day of October, 2019.

John V. Robinson

John V. Robinson, Review Officer

CERTIFICATE OF SERVICE

The foregoing DECISION was served on the attorneys for Petitioner and the attorneys for the Respondent via E-mail on October 10, 2019, addressed as follows:

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The foregoing DECISION was served on the Petitioners, North Carolina Department of Public Instruction, Dispute Resolution Consultant, Office of Administrative Hearings, and the **Chapel Hill-Carrboro City Schools Board of Education** via **regular U.S. mail**, addressed as follows:

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This 10th day of October, 2019

John V. Robinson

John V. Robinson, Review Officer

cc: Teresa King, Teresa.King@dpi.nc.gov