

STATE OF NORTH CAROLINA

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

█ by and through parent, █

v.

Franklin County Board of Education

DECISION
INTERLOCUTORY APPEAL
20 EDC 03332

This is an Interlocutory Appeal of the Order of Administrative Law (ALJ) Judge Stacey Rice Bawtinheimer dated September 25, 2020 denying Respondent's October 23, 2020 Motion for a Protective Order. The ALJ denied the Respondent's Motion for a Protective Order and compelled Production of Discovery. The Respondent appealed the ALJ's Order on October 23 and the undersigned Review Officer was appointed on October 27, 2020.

APPEARANCES

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ISSUE

A single issue is before the Review Officer in this interlocutory appeal: Was it appropriate for the ALJ to deny the Respondent's Motion for a Protective Order and to compel production of discovery prior to the hearing for this contested case?

The issue of the contested case, though not before the SRO, was that the Respondent violated the procedural and substantive requirements of the IDEA, state law, and state and federal regulations, thus denying █ a free and appropriate public education. The Petitioner alleges that the Respondent failed to: timely and appropriately evaluate █ in all suspected areas of disability; identify █ as eligible to receive services under the IDEA; develop procedurally and substantively appropriate Individual Education Programs (IEPs) and Behavior Intervention Plans (BIPs); and provide █ a free and appropriate public education (FAPE).

STANDARD OF REVIEW

The State Review Officer (SRO) 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). In *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit provided guidance regarding “due weight.” The SRO, when “deciding what is the due weight to be given an administrative decision under *Rowley* ... a reviewing court should examine the way in which the state administrative authorities have arrived at their administrative decision and the methods employed.” If an SRO determines that an ALJ’s findings were made in accordance with the fact-finding norm, or “regularly made,” these findings are entitled to be considered *prima facie* correct. *Id.* at 105. A decision or finding is not considered to be “regularly made” where it is so far from the accepted norm that the SRO cannot give “due weight” to that decision or finding. *Id.* At 104. On appeal from an administrative decision, if the SRO chooses to depart from the *prima facie* correct decisions, the SRO should explain the departure. *Id.* at 105. The SRO does find that the part of the ALJ’s Order requiring disclosure of privileged personnel files is not “regularly made,” with explanations provided in subsequent sections of this Decision.

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).

JURISDICTION/INTERLOCUTORY 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.

An interlocutory appeal is one made during the pendency of an action seeking orders which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy. *Carriker v. Carriker*, 350 N.C. 71, 73 (1999).

Neither IDEA nor the regulations implemented pursuant IDEA address interlocutory appeals. Therefore, whether interlocutory appeals are allowed in a particular state is determined by state law. (See Letter from OSEP to Perry A. Zirkel, November 19, 2002). The “final decision” language contained in IDEA, just like the NC Rules of Civil Procedure, favors final decisions at each level of the administrative process before moving to the next. However, North Carolina law does provide for interlocutory appeals in clearly defined situations. N.C.G.S. §1-277(a) states “[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, **which affects a substantial right claimed in any action or proceeding.** [*emphasis added*]

In North Carolina’s unique two-tiered system, N.C.G.S. §115C-109.9 provides that a State Review Officer (SRO) has jurisdiction regarding an appeal of any order or decision made by an ALJ. Because of its interlocutory nature, an SRO will not often review the denial of a motion by an ALJ prior to a final judgment by the ALJ. Generally, there is no right to make an appeal while the case is still pending. North Carolina Law, however, permits such an appeal in the rare situation where an order issued during the case affects a substantial right which will be lost if the order is not reviewed

before a final judgment is entered. N.C.G.S. §§ 1-277(a), 7A-27(b)(1). The order appealed in this instance requires the disclosure of employee personnel files. The confidentiality of personnel files involves a substantial right for the Respondent and its personnel. It is, therefore, grounds for an interlocutory appeal. *Wind v. City of Gastonia*, 226 N.C. App. 180. Because the ALJ's order compelled production of privileged files, that order affected a substantial right and was immediately appealable. N.C.G.S. §1-277(b), *Sharpe v. Worland*, 351 N.C. 159 (1999).

The Respondent's appeal to the SRO requested a reversal of only the ALJ's Order pertaining to provision of personnel files of employees. When reviewing an appeal of an ALJ's decision, the SRO must review the specific issues complained of by the parties in the appeal. *E.L.* at 535. Thus, this interlocutory appeal is limited to a finding regarding discovery as related to those personnel files. The remainder of the ALJ's Order remains in effect.

FINDINGS AND CONCLUSIONS

1. The Petitioner filed a Petition for a hearing under IDEA on August 26, 2020. ALJ Stacey Bawtinhimer initiated the procedures necessary to schedule the hearing, one of which involved the participation in informal voluntary discovery as provided for in North Carolina's Administrative Code, 26 NCAC 03.0112(d).
2. On September 1, 2020 the Petitioner requested extensive information and documents in an informal discovery request. On September 16, 2020 the Respondent, using various grounds objected to many of the documents requested and did not provide some of them voluntarily.
3. The Petitioner's informal request that lead finally to this appeal was a request for "[c]opies of the unofficial FCBOE personnel file(s) of any FCBOE personnel who has assisted with the implementation of [REDACTED]'s behavioral support and interventions, 504 Plans, and IEP since August 1, 2016, including special education teachers, regular education teachers, and teacher assistants." (Pet. Informal Discovery Request, ¶ 14).
4. The Petitioner's informal discovery request also sought "copies of any written complaints, investigative reports, or other documentation related to such complaints or investigations, regarding [REDACTED]'s special education teacher(s) since August 1, 2016." (Pet. Informal Discovery Request, ¶ 15).
5. The Petitioner's informal discovery request also sought extensive documents and records related to [REDACTED]'s educational program and history in Respondent's schools. The request also included records that are known by all parties not to exist, such as IEP's. This SRO determination does not include discovery unrelated to personnel files, for the review performed by an SRO is limited to that which was appealed. The Respondent complied with some of the informal discovery request and objected to submission of others. On September 16, 2020, Respondent objected to the request for confidential personnel information and asserted the statutory protection in its responses to Petitioner's discovery requests.
6. On September 17, 2020 Respondent also filed a Motion for Protective Order. This Motion sought a protective order from the Court ordering that Respondent not be required to produce the confidential personnel information based upon the protections set out in N.C.G.S. §§ 115C-319, 115C-320, 115C-321, and 115C-325 applicable to the personnel files. The Respondent also made substantial arguments pertaining to the relevancy of the personnel files, asserting that the personnel information requested was not discoverable as it was not reasonably calculated to lead to admissible evidence on Petitioner's claims.

7. The Petitioner responded to Respondent's Motion for Protective Order on September 23, 2020. The Petitioner did not address the relevancy issue, but did indicate that it would agree to a protective order restricting the release of confidential information.
8. On September 25, 2020, the ALJ denied Respondent's request for protection from disclosure of confidential personnel information in her Order Denying Respondent's Motion for a Protective Order and Compelling Production of Discovery. Although requested by the Respondent, the ALJ did not hold a hearing on the Motion. The ALJ did not address the relevancy of the personnel files to the subject matter of the Petition in this case. The ALJ also did not recognize all privileges recognized at law as required by 26 NCAC 03 .0112 (b).

9. The ALJ's September 25, 2020 Order stated:

Respondent's Motion is DENIED. This Tribunal finds Petitioners are entitled to the requested discovery.

FURTHERMORE, IT IS ORDERED:

1. Respondent must produce to Petitioners all of the following materials requested through informal discovery:
 - a. Educational records of ██████
 - b. Educational programming of ██████
 - c. Communications regarding ██████ with personally identifiable information of other students redacted as needed;
 - d. Related service records, as well as nursing and counseling service, records even if not a related service;
 - e. All notes maintained by FCBOE employees related to ██████ since August 1, 2016;
 - f. Internal truancy reports regarding ██████ with other students' names redacted if applicable;
 - g. Copies of all reports including investigations and written documentation including photographs and videos related to discipline, restraint, seclusion, isolation, bullying, or other behavioral incidents pertaining to ██████ including any communications related to such incidents since August 1, 2016, with other students' names redacted if applicable;
 - h. All lesson plans, as required by Board Policy 3120, used with ██████ in FCBOE since August 1, 2016;
 - i. All underlying progress monitoring documentation and data;
 - j. The November 22, 2019, 504 Plan and all documentation regarding this plan including implementation; and
 - k. ██████'s class schedules since August 1, 2016 as well as the modified day scheduling started on December 3, 2019.
2. Respondents are to comply with this order on or before October 14, 2020, and in sufficient time for Petitioners to review prior to conducting mediation, unless otherwise agreed by both parties.
3. Respondent is to create and provide Petitioners with a privilege log that complies with Rule 26(b)(5). If questions arise about whether the information is privileged, Petitioners may, by motion seek an "in camera" review by the Undersigned.
4. Respondent and Petitioners are to confer as to a Joint Protective Order for the school staff personnel files and any investigations or complaints regarding ██████'s special education teachers since August 1, 2016. The Parties shall file the Joint Protective Order on or before October 14, 2020. If the Parties cannot reach an agreement as to the terms, each Party shall file their own proposed order on that date.

IT IS SO ORDERED.

10. On October 12, 2020 the Respondent filed a Motion for Reconsideration and/or Clarification of the ALJ's Order.
11. On October 14 and 15, the Petitioner and Respondent filed separate Protective Orders as required by paragraph 4 of the ALJ's Order.
12. On October 23, 2020 the Petitioner filed a Response to Respondent's Motion for Reconsideration and/or Clarification.
13. On October 23, 2020 the Respondent filed a Notice of Interlocutory Appeal and an Appeal to a State Review Officer (SRO).
14. There is no record of an ALJ response to the Respondent's Motion for Reconsideration and/or Clarification of the ALJ's Order. The Respondent stated in the appeal to the SRO that the 30 day window for appeal of the ALJ's September 25 Order required an immediate filing of an appeal to

the SRO or forfeit the right to appeal. “It is well settled that an interlocutory order affects a substantial right if the order deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered.” *Sharpe*, at 162.

15. The basic issue of the Petition is a “child find” claim. The Petitioner alleges that the Respondent failed to: timely and appropriately evaluate █████ in all suspected areas of disability; identify █████ as eligible to receive services under the IDEA; develop procedurally and substantively appropriate Individual Education Programs (IEPs) and Behavior Intervention Plans (BIPs); and provide █████ a free and appropriate public education (FAPE).
16. In preparing for a due process hearing, North Carolina Law clearly provides that: “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” N.C.G.S. § 1A-26 (Rule 26)
17. The concept in Rule 26 that discovery must be relevant applies directly to the issue of this appeal. In the requests for discovery and motions of the Petitioner, the Petitioner merely states that the content of the personnel files of Respondent’s employees is relevant, with no substantiation. No attempt was made to show that the private content of an employee’s personnel file would provide information pertaining to █████ possible eligibility as a child with a disability, that he is entitled to FAPE, or that the Respondent failed to provide FAPE.
18. Also, Rule 26 provides another barrier to the discovery of employee personnel files. North Carolina clearly provides protections for the unnecessary disclosure of confidential and private information maintained in personnel files. Those files are privileged and statutorily protected as confidential. N.C.G.S. §§ 115C-319, 115C-320, and 115C-321. The privilege can be overcome by a proper court order, but that would certainly necessitate a determination that the information sought from those files is relevant. There has been no showing of relevancy in this case.
19. The SRO finds that there is a substantial right affected by the ALJ’s Order denying the Respondent’s Motion for a Protective Order and compelling the production of discovery related to the confidential personnel files of the Respondent’s employees. The personnel files are private and protected under North Carolina Law. *See: N.C.G.S. §§ 115C-319, 115C-320, and 115C-321.* The Respondent maintains those files and serves as the custodian. The Respondent’s employees are not parties to this case and thus not aware of the possible disclosure of their private records. Therefore, it is reasonable and appropriate for the Respondent, as custodian of those confidential records, to file this interlocutory appeal.
20. If the Respondent is required to produce the requested personnel files, the right to confidentiality for the employee and Respondent will be lost before an appeal of a final decision. Once confidential personnel file information is disclosed, it is impossible to reverse the disclosure. *Wind*, at 183. The release of personnel files to parents and their counsel in special education matters without a showing of relevance to the issue is counter to public policy. The threshold is and should be high for a determination that personnel evaluations, medical information, financial information and other extremely sensitive and confidential information in personnel files should be disclosed in a special education hearing.
21. The statutory protection for personnel files even limits a proper court order. Wholesale access to the entire personnel file of an employee is limited by the plain wording of the applicable statute that allows some access through a proper court order. “A party by authority of subpoena or proper court order may **inspect** and **examine** a **particular** confidential **portion** of an employee’s personnel record.” N.C.G.S. §115C-321(a)(4). The informal discovery request in this case was a request for the entire file of numerous employees. In applying a statute regarding city personnel

records which is substantially similar to the personnel records statute for public school employees, the North Carolina Court of Appeals noted that the use of the word “examine,” as opposed to “copy” or another word pertaining to mass publication, indicates the legislature's intent to limit the exposure of these personnel files. *Release of Silk Plant Forest Citizen Review Comm.'s Report & Appendices v. Barker*, 216 N.C. App. 268 (2011). [*emphasis added*]

22. The SRO cannot conceive of any information in teacher’s personnel files that would be relevant to the child find claim, the basic issue of the Petition. It is difficult to ascertain how the content of personnel files would provide information about a child’s alleged disability or any failure to provide FAPE because of that disability. The content of personnel files is simply not relevant to the issues of the Petition for this case. The proper source for information regarding the issues of the Petition would be ██████’s educational file and other educational records maintained by the Respondent.
23. Also, if the access to personnel files is for the purpose of determining the qualifications of employees working with ██████ there is no independent right of action relating to the qualifications of any school personnel under IDEA. School personnel decisions are not under the jurisdiction of the ALJ or SRO. 20 U.S.C. § 1412(a)(14)(E).
24. In its Consent Joint Protective Order with a draft date of October 13, 2020, the Respondent provided, in Section II, information from personnel files that it would agree to disclose. None of it would normally be deemed confidential and/or private, nor would it require a court order. Still the SRO has reservations concerning the relevancy of the information.
25. The SRO concludes that:
 - a. The Interlocutory appeal is allowable, and the SRO has jurisdiction.
 - b. Personnel files of Respondent’s employees are not relevant to the issues of this case.
 - c. Personnel files of Respondent’s employees are privileged and there is no showing that that privilege should be abrogated.
 - d. Portions of the ALJ’s Order of September 25, 2020 must be reversed.

DECISION

Based on the foregoing:

1. Paragraphs 1 - 3 of the ALJ Bawtinheimer’s Order of September 25, 2020 remain in effect.
2. Paragraph 4 and any other portions of the Order that could be interpreted to require disclosure of personnel files is reversed.
3. The Respondent is not required to disclose information from employee personnel files.

This the 9th day of November 2020



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

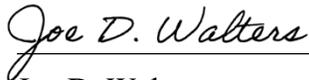
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This the 9th day of November 2020



Joe D. Walters
State Review Officer