

■ by parent or guardian ■

Petitioner

v.

**Charlotte-Mecklenburg Schools**

Respondent

**DECISION**

**18 EDC 05306**

This is an appeal of the Final Decision issued by Administrative Law Judge (ALJ) Selina Malherbe on November 2, 2018 granting Summary Judgment to the Respondent. The Petitioner filed an appeal of ALJ Malherbe's Decision on March 4 and the State Review Officer (SRO) was appointed on March 5, 2019.

The records of the case received for review were contained on one (1) CD which contained: the ALJ's Order granting Summary Judgment; the Petition; Respondent's Response to the Petition; Respondent's Motion for Summary Judgment; Petitioner's Response to Respondent's Motion for Summary Judgment. Also received was a transcript of a hearing on Respondent's Motion for Summary Judgment and the Petitioner's Appeal. In addition, the CD included many other motions, scheduling orders, and correspondence. The records also include Written Arguments submitted by both parties to the Review Officer regarding the appeal

As there was no formal hearing in the case, all facts determined by the Review Officer were drawn from the motions, responses, and transcript of the hearing on Summary Judgment.

**Appearances:**

For Respondent: Chris Z. Campbell, Campbell Shatley, P.L.L.C., 674 Merrimon Ave., Ste. 210, Asheville, NC 28804; and J. Melissa Woods, Charlotte-Mecklenburg Board of Education, 600 E. Fourth St., 5<sup>th</sup> floor, Charlotte, NC 28202

For Petitioner: Aaron Joseph Tierney and Michael Pascale, Cuddy Law Firm, 104 Waxhaw Professional Park Dr., Waxhaw, NC 28173;

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

For the Student/Petitioner - ■

For Parent/Petitioner - ■ mother

For Respondent - Respondent; Charlotte-Mecklenburg Schools; CMS

## WITNESSES and EXHIBITS

There was no testimony of Witnesses nor were any Exhibits entered into the record.

## STANDARD OF REVIEW

The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that “due weight” be given to state administrative hearings. *Doyle* reviewed a product of Virginia's two-tiered administrative system. The court noted, “By statute and regulation the reviewing officer is required to make an independent decision . . .” *Doyle*, 953 F.2d at 104. The court held that in making an independent decision, the state's second-tier review officer must follow the “accepted norm of fact finding.”

North Carolina’s District Court Judge Osteen interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education, Memorandum Opinion and Order 1:05CV818* (M.D.N.C. November 18, 2008) A State Review Officer (SRO) must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made.

## ISSUES

There were seven (7) claims in the Petition:

1. CMS dis-enrolled the student, changing her placement without first consulting the parent.
2. An online academy is not the least restrictive placement for the student.
3. CMS failed to identify the student as a child with a disability under the IDEA.
4. CMS failed to respond to the Parent's referral by evaluating the student.
5. CMS held a referral meeting at a time that was inconvenient for the parent.
6. CMS refused to create an IEP containing an appropriate educational program for the student.
7. CMS failed to respond to the request for independent evaluations.

## FINDINGS and CONCLUSIONS

**As there was no formal hearing in the case, all facts were drawn from the motions, responses, and the transcript of the Hearing on the Motion for Summary Judgment.**

1. ■■■ is a student enrolled in the Charlotte-Mecklenburg Schools. During the time of this case, ■■■ was identified with a disability and being served by Section 504 Plan.
2. ■■■ by her parent ■■■ filed a Petition for a Due Process Hearing on August 28, 2018. ALJ Selina Malherbe was assigned to hear the case.
3. On January 11, 2019 the Respondent filed a Motion for Summary Judgment and a Memorandum in Support of the Motion. On January 22 the Petitioner filed a Response to Respondent's Motion for Summary Judgment. On January 23 a hearing was held on the Motion, with the ALJ issuing a Final Decision Granting Summary Judgment for the Respondent on February 18, 2019.
4. The Petitioner appealed the ALJ's Final Decision on March 4 and the State Review Officer was appointed to review the case on March 5, 2019.

5. The primary issue in this case is whether CMS should have identified [REDACTED] as being eligible for services under IDEA, thus denying a Free Appropriate Public Education (FAPE).

6. The Respondent's Motion for Summary Judgment included affidavits from the school staff with accompanying exhibits. The Petitioner's Response included a single affidavit from the mother with accompanying exhibits. Both made arguments during the hearing on the Motion.

7. Following a hearing on the Motion for Summary Judgment, the ALJ found that the Respondent met its burden of demonstrating that there was no genuine issue of material fact regarding all seven (7) of Petitioner's claims.

8. The ALJ also found that the Petitioner had failed to produce a forecast of evidence through specific facts in the Petition to demonstrate that they could establish a prima facie case during a hearing. The Petition was composed primarily of allegations, disagreements and opinions that the ALJ found not sufficient to survive Summary Judgment.

9. The SRO agrees with most of the ALJ's Findings and Conclusions. Most of the Petition was composed of allegations, disagreements and opinions. The first two claims (Issues 1 & 2) have no basis for being submitted. The Petitioner submitted no facts that CMS dis-enrolled the student. [REDACTED] enrolled the student in the [REDACTED] Academy during the summer of 2018. After discovering her error in making this choice, the student never attended the [REDACTED] Academy. The mother brought the student back to CMS's school for the upcoming school year. The first two claims are not viable and the ALJ should have granted Summary Judgment regarding these claims.

10. The SRO disagrees with the ALJ on Issues 3, 4, & 6. The Petitioner did produce facts that [REDACTED]'s performance was declining. Although the Petition was not as complete as it could have been in presenting this information, there were facts presented that appeared to support the decline in [REDACTED]'s performance during the school year 2017-18. In its own production of documents, CMS even clarified and supplemented Petitioner's information. (*See: Exhibit B of Affidavit of [REDACTED] in the Motion for Summary Judgment.*) Interpreting these facts in a manner favorable to the Petitioner, this needs to be examined further.

11. The mother did refer [REDACTED] for evaluation to determine if she was eligible to be provided special education under the provisions of IDEA. The SRO makes no finding regarding such eligibility, but the production of facts about the student's declining performance would be a forecast of evidence sufficient to deny the Motion for Summary Judgment regarding this issue.

12. The claims that the Respondent failed to evaluate and possibly identify [REDACTED] as a child eligible to be served with an IEP should be decided in a due process hearing.

13. The ALJ correctly granted Summary Judgment on the claim that [REDACTED] was prevented from participation in the referral hearing (Issue 5). The mother specifically refused to attend the scheduled meeting. There was no disagreement on this issue.

14. The ALJ correctly granted Summary Judgment on the claim that CMS refused to respond to the request for an independent evaluation (Issue 7). Under IDEA, an Independent Educational Evaluation (IEE) must be provided only after the parent disagrees with the school's evaluation. As there was no evaluation conducted by CMS prior to the submission of the Petition in this case, this claim does not support a legal claim for action. The proper claim, instead, was CMS's failure to perform its child find obligations as required by IDEA. 20 U.S.C. §§ 1401(3)(A), 1412(a)(3)(A)

15. The Petitioner, in Written Exceptions and Arguments submitted to the SRO on March 19, 2019, made extensive arguments regarding the requirement that CMS provide special education based on "peer-review research to the extent practicable," as required by 20 U.S.C. § 1414(d)(1)(A)(i)(IV). This claim fails because CMS had never identified [REDACTED] as being eligible for special education and had not

provided special education to [REDACTED] Also, this claim was not in the Petition and cannot survive a Motion for Summary Judgment.

16. In Written Exceptions and Arguments submitted to the SRO, the Petitioner made an attempt to introduce evidence, which the SRO will not consider. This is a review of the proceedings up to and through the Hearing on the Motion for Summary Judgment. The Petitioner had ample opportunity to present evidence to the ALJ.

17. Too many of the Petitioner's arguments are based on a faulty premise, that a due process hearing must take place. The Petitioner would then be able to present evidence and cross examine the CMS staff called upon to be witnesses. The Petitioner, however, must first survive a Motion for Summary Judgment. There is no guarantee that a filed Petition will ever make it to the due process hearing stage as envisioned by the framers of IDEA.

18. In the instant case, the SRO finds that the Petitioner did set forth specific facts with regard to [REDACTED]'s performance that shows that there is a genuine reason for holding a due process hearing with regards to claims 3, 4, & 6 in the Petition.

19. The records of the case have many references regarding the Respondent having initiated the evaluation process subsequent to the filing of the Petition and may currently have a program in place to appropriately serve [REDACTED]. If this is the situation, the parties are encouraged to resolve this case without resorting to the Hearing.

### DECISION

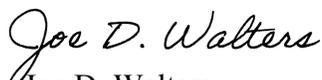
1. The Final Decision of ALJ Malherbe is upheld in part and reversed in part. Summary Judgment for the Respondent was proper for Issues 1, 2, 5 and 7. The Decision providing Summary Judgment for Respondent is reversed pertaining to Issues 3, 4 and 6.

2. The Petitioner did produce sufficient facts, when taken in a manner favorable to the Petitioner, would be a forecast of evidence sufficient to deny the Motion for Summary Judgment regarding Issues 3, 4 and 6.

3. This case is hereby remanded to the ALJ to proceed to the Hearing for a determination if [REDACTED] was denied FAPE because of the Respondent's failure to evaluate her, and as a result, possibly identify her as child with a disability that would require that she be served with an appropriate IEP.

4. An alternative to the Hearing would be for the parties, with the ALJ's concurrence, to negotiate a settlement to resolve the case. This may be possible in light of the events that have taken place since the filing of the Petition. The case records have many references indicating that the Respondent has now undertaken the evaluation process.

This the 27<sup>th</sup> day of March 2019

  
Joe D. Walters  
State Review Officer

### NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C.G.S. 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415.

I hereby certify that this Decision has been duly served on the Petitioner and Respondent by electronic and U.S. Mail, addressed as follows:

█ and █  
Petitioner  
(Address redacted)

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This the 27<sup>th</sup> day of March 2019

*Joe D. Walters*  
Joe D. Walters  
State Review Officer

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