HEARING DECISION

CHILD: K.C.D.

PARENTS: and

REPRESENTATIVE: Honorable James R. Gallini

LOCAL EDUCATION AGENCY: M.C.B.O.E.

REPRESENTATIVE: Honorable Edgar P. Walsh

HEARING DATES: August 3, 2017

DATE OF DECISION: October 13, 2017

HEARING OFFICER: P. Michael Cole
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HEARING DECISION

I. PROCEDURAL HISTORY.

This due process hearing was conducted under the authorization of the Individuals with Disabilities Education Improvement Act (IDEA), 2004 Reauthorization, 20 U.S.C. § 1400, et seq., implementing federal regulations at 34 C.F.R. Part 300, and implementing State regulations, the Rules of the Alabama State Board of Education, Chapter 290-8-9, et seq.

On or about May 8, 2017, the Petitioner, by and through counsel, filed a due process complaint. The unsigned Hearing Officer was appointed by the State Superintendent of Education to hear this action.

This matter arises following a previous due process complaint filed by Petitioner in Case 15-39. Said case was settled by Respondent’s issuance of a June 1, 2015 Offer of Judgment, which was accepted by Petitioner’s counsel on June 2, 2015. An Order was issued by Hearing Officer Wes Romine on June 9, 2015 as to the terms of settlement. In the instant due process complaint, Petitioner contends that Respondent failed to comply with the terms of the June 9, 2015 Order, as well as provisions of the IDEA.

The due process hearing was conducted on August 3, 2017 at the office of the Respondent school district. Prior to commencement of the hearing, a determination was made by this Hearing Officer that Respondent had complied with all aspects of procedural safeguards necessary to have a fair due process hearing. Petitioner was advised of the right to have the hearing open or closed, and Petitioner advised this Hearing Officer that Petitioner desired the hearing to be open. Petitioner also waived the Child’s presence at the hearing.

The parties requested the opportunity to file with this Hearing Officer proposed Orders and/or Closing Briefs. The Respondent has forwarded to this Hearing Officer a Post-Hearing Brief and the Petitioner has forwarded to this Hearing Officer a Closing Brief. Both documents have been reviewed and considered by this Hearing Officer in rendering this Hearing Decision.
II. EXHIBITS ADMITTED INTO EVIDENCE.

At the hearing, exhibits were submitted by the parties and accepted into evidence by this Hearing Officer. These exhibits have been examined by this Hearing Officer subject to the issues heard at the due process hearing and in light of the testimony presented at said hearing. The documents and materials have been in the constant possession of this Hearing Officer until the rendering of this decision. Hereafter, they will be delivered to the State of Alabama Department of Education.

This Hearing Officer placed no weight on the fact that any particular matter was offered by either party since the purpose was to have all of the appropriate documents produced for consideration by this Hearing Officer, so long as they were not prejudicial to the other party participating in the due process hearing based upon objection. The documents were examined and the weight given to each was based upon the contents of the document which was submitted and not on which party introduced said document. This Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter.

A. PETITIONER’S EXHIBITS

1. Petitioner’s Exhibit 1: Administrative Record from ALSDE for Case No. 15-39.
3. Petitioner’s Exhibit 3: Request for Education Records by
5. Petitioner’s Exhibit 5: District’s Enrollment Form.

B. RESPONDENT’S EXHIBITS

1. Respondent’s Exhibit 7: No Show/Registered Student History.
2. Respondent’s Exhibit 8: Phone Log.
III. WITNESSES.

Both parties were permitted to offer testimony by way of witnesses sworn under oath. The testimony from these witnesses has been examined by this Hearing Officer subject to the issues heard at the due process hearing and in light of the testimony presented at said hearing. The testimony has been recorded and transcripts have been delivered to the State of Alabama Department of Education.

This Hearing Officer placed no weight on the fact that any particular testimony was offered by either party since the purpose was to provide all of the appropriate and admissible testimony for consideration by this Hearing Officer. The witnesses were examined and the weight given to each was based upon the substantive nature contained therein for the purpose of making a decision in this matter.

A. PETITIONER’S WITNESSES
   1. [Redacted]
   2. [Redacted] (telephonically)
   3. [Redacted]
   4. [Redacted]

B. RESPONDENT’S WITNESSES
   1. [Redacted]

IV. BURDEN OF PROOF.

The burden of proof in this matter is upon Petitioner as the party seeking relief. *Schaffer v Weast*, 546 U.S. 49 (2005); Ala. Admin. Code § 290-8-9.08(9)(c).
V. SUMMARY OF THE TESTIMONY.

This section is a summary of some of the pertinent facts presented to this Hearing Officer. These facts are not necessarily the only facts considered by this Hearing Officer in making this decision. This Hearing Officer has heard all of the testimony and has reviewed the transcript of said testimony. This decision is based on all testimony presented at the hearing as well as exhibits admitted into evidence during the hearing.

A. [Redacted]

[Redacted] is currently the Director of Special Education for Respondent but did not begin that position until after the settlement of Petitioner's previous due process complaint in Case 15-39. (Tr. 16-18). [Redacted] testified that, after the settlement of the previous due process complaint, the Child did not attend the summer school program contemplated in the settlement. [Redacted] later learned that the Child had not re-enrolled in the school system for the 2015-16 school year. (Tr. 30-31). Although [Redacted] acknowledged that Child Find requires Respondent to identify students with disabilities, regardless of whether they are enrolled in the school system, (Tr. 45-46), [Redacted] testified that, in order for Respondent to serve the Child, the Child would need to be enrolled in the school system. (Tr. 31). As a result, Respondent has not served the Child in any way since [Redacted] disenrollment from the school system. (Tr. 31-32). However, [Redacted] testified that Respondent is ready, willing, and able to serve the Child if [Redacted] is re-enrolled in the school system. (Tr. 32).

Regarding evaluation of the Child, [Redacted] testified that Respondent had intended to wait until the Child returned to school during the 2015-16 school year because parts of the evaluation required classroom observation. (Tr. 32). [Redacted] also testified that Respondent has not received parental consent to proceed with the evaluation, and Respondent never received an evaluation request from the private school where the Child enrolled. (Tr. 37, 51).

B. [Redacted]

[Redacted] is the attorney who represented Petitioner in [Redacted] previous due process complaint in Case 15-39. (Tr. 54-55). [Redacted] testified that the settlement of the previous
case was made in good faith after negotiations between the attorneys and essentially tracked the relief that the Petitioner requested in the complaint. (Tr. 55-56). According to [insert name], the substance of the agreement was that there would be an evaluation of the Child, and, based upon the evaluation, if the Child was eligible, the Child would receive an IEP and special education services. (Tr. 56). [insert name] confirmed that the evaluation was intended to precede the development of any IEP and, if the Child did not qualify for special education as a result of the evaluation, there would be no need to develop an IEP. (Tr. 60). In the meantime, the Child was to begin receiving some services during the summer school program. (Tr. 56).

[insert name] confirmed that he accepted the Offer of Judgment on behalf of Petitioner. (Tr. 57). According to [insert name], this was done “more or less” at the request of the Father, who said that he wanted to ensure [insert name] was paid for the work that had been done on behalf of the Child. (Tr. 57). [insert name]’s fees for the due process complaint were paid by the school system. (Tr. 57).

Following negotiation of the settlement agreement, [insert name] does not recall whether he spoke directly with the Parents. (Tr. 67). In any event, it became [insert name]’s understanding that, notwithstanding the settlement, the Parents were no longer interested in working with the school system and that they were going to withdraw the Child and homeschool [insert name] instead. (Tr. 55-56). [insert name] testified that he communicated to Respondent’s counsel that the Parents had changed their mind and did not intend to proceed with the public school system. (Tr. 58).

C. [insert name]

[insert name] is the former Director of Special Education for Respondent; she retired shortly after the settlement of Petitioner’s previous due process complaint in Case 15-39.

[insert name] became aware of the Child towards the end of the 2014-15 school year, after Petitioner filed [insert name] first due process complaint. (Tr. 74-75). [insert name] testified that the substance of the settlement was that the Child would attend summer school to see if any improvement occurred in academic performance and that an evaluation would be conducted in the fall when school resumed. (Tr. 90). [insert name] testified that it would be
necessary to evaluate the Child before an IEP could be developed. (Tr. 92). disputed that the Child had been identified as Other Health Impaired and therefore eligible for special education services notwithstanding an evaluation. (Tr. 94, 100-101).

contacted the Respondent’s attorney who contacted the Petitioner’s attorney. was advised by the Respondent’s attorney that the Petitioner’s attorney had stated that the Parents had decided that the Child would not attend the summer program. (Tr. 102-103).

When school started in the fall, staff checked with the Child’s school to see if the Child had returned to start the evaluation process. (Tr. 106). After several checks were made, it was determined that the Child was not returning to school. (Tr. 106). Based upon the communications from Petitioner’s attorney to Respondent’s attorney, it was’s understanding that the Parents did not intend to proceed with the public school system. (Tr. 108). In 2015, Respondent received a request for a transcript indicating that the Parents had enrolled the Child at a private school. (Tr. 108).

Regarding Child Find, acknowledged that it is the responsibility of the school system to identify children suspected of having a disability but testified that the parents still must give consent for an evaluation. (Tr. 110-11). In this case, testified that the Parents never submitted any document consenting to an evaluation, and Respondent relied on the representations of Petitioner’s attorney that the Parents did not intend to proceed any further with the public school system. (Tr. 113).

Testified concerning Respondent’s Exhibit #7, a No Show/Registered Student History, which indicated that the Child was going to be homeschooled. (Tr. 116). She also testified concerning Respondent’s Exhibit #8, which shows that a call was made on 2015 to the Child’s Parents. (Tr. 117-18).

concluded that she believes the Respondent complied with all applicable federal guidelines regarding the Child. (Tr. 119). In a response to a question from this Hearing Officer as to whether or not received any calls from the Parent after the
settlement in regard to the settlement or the IEP. [Redacted] testified that she never received any calls from the Parents after the settlement of the first litigation (Case 15-39). (Tr. 124-125). She further testified that she was not aware of anyone trying to call her secretary or leaving a message in that regard. (Tr. 125).

D. [Redacted]

[Redacted] contacted attorney [Redacted] on [Redacted] 2015. (Tr. 130-31). The purpose of retaining [Redacted] was to obtain an IEP for the Child. (Tr. 132). [Redacted] testified that she had requested an evaluation in [Redacted] 2015 but Respondent did not comply; therefore, she sought assistance from [Redacted] and authorized him to file a due process complaint. (Tr. 132-33).

After an initial meeting to file the due process complaint, [Redacted] says she never spoke directly with [Redacted] again. (Tr. 136). She says she left messages at [Redacted]’s office, but only spoke with his paralegal. (Tr. 136). When [Redacted] spoke to [Redacted]’s paralegal, she was told that there was still another process before an IEP could be obtained for the Child. (Tr. 146, 149). When the end of the year arrived, [Redacted] was aggravated because she felt time had run out to obtain the IEP. (Tr. 143-45). [Redacted] claims that no one told her about the offer of summer school during the summer of 2015. (Tr. 149-50, 157). Being unaware of the offer, [Redacted] admits that the Child did not attend summer school. (Tr. 162). [Redacted] acknowledged that she did not attempt to contact [Redacted] after [Redacted] 2015. (Tr. 175).

[Redacted] disputed [Redacted]’s testimony that the Parents were no longer interested in an IEP for the Child. (Tr. 147). She denied being informed of the terms of Respondent’s Offer of Judgment, nor was she aware [Redacted] had accepted it on their behalf. (Tr. 147-48). [Redacted] testified that she did not become aware of the terms of the Offer until after she retained a new attorney and obtained a copy of the records relating to the previous case (Case 15-39). (Tr. 152). The [Redacted] testified that she did attempt to contact [Redacted] during the process of Case 15-39 prior to [Redacted] 2015. [Redacted] also testified that she was told that [Redacted] was out of the office on medical leave at that time. (Tr. 150). According to [Redacted] every time that she did call [Redacted], she was told that [Redacted] was either in a meeting or not available. She never had any contact with [Redacted] but would leave a message with the
secretary. (Tr. 150). [Redacted] testified that no one from [Redacted]'s office ever called her back. [Redacted] did not receive anything in the mail from [Redacted] and did not have any additional contact with [Redacted] after [Redacted] 2015. (Tr. 151). Nor did she have any additional contact from the District. She was not aware of a summer program. (Tr. 151).

[Redacted] testified that, if Respondent had proceeded with the evaluation of the Child, she would not have un-enrolled the Child from the Respondent school system. (Tr. 155). [Redacted] testified she made the decision to enroll the Child in private school after it became apparent that Respondent was not going to provide an IEP in time for the next school year. (Tr. 157-58, 167, 169).

[Redacted] testified that she is willing to give consent for Respondent to evaluate the Child, but she has never completed a consent form to do so. (Tr. 159, 162).

[Redacted] testified that she is not aware of anyone telling the school system that the Child was to be homeschooled as reflected in Respondent’s Exhibit #7, and she does not recall receiving the phone call reflected in Respondent’s Exhibit #8. (Tr. 164-66).

The Child began homeschooling in [Redacted] 2016 and has not attended the Respondent school system since 2015. (Tr. 172-73).

E. [Redacted] denied telling [Redacted] that he did not want the Child to attend summer school, and he denied telling [Redacted] that he did not want the Child in the public school system for the 2015-16 school year. (Tr. 194-95). [Redacted] also denied telling [Redacted] that he wanted him to complete the settlement to ensure that he received payment for the work performed. (Tr. 195). [Redacted] denied having any direct communication with [Redacted] other than at their first meeting regarding the due process complaint. (Tr. 195)

VI. STATEMENT OF THE ISSUES.

Based upon the relief requested by Petitioner in [Redacted] Closing Brief, the following issues are before the Hearing Officer:

1. Whether the Parents are entitled to reimbursement for the cost of private
school tuition for the 2015-16 school year.

2. Whether the Hearing Officer should order Respondent to conduct personnel training on IDEA.

3. Whether the Hearing Officer should order Respondent to conduct a referral meeting and evaluation of the Child.

4. Whether Petitioner is the prevailing party.

VII. DISCUSSION OF THE ISSUES.

A. Legal Framework.

The IDEA is a comprehensive federal law that confers upon students with disabilities the right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1400, et seq. The IDEA defines the notion of a FAPE as "special education and related services" which are publicly funded; meet the standards of the state’s educational agency; provide an “appropriate” education; and are provided in conformity with a student’s IEP. 20 U.S.C. § 1401(9).

B. Request for Tuition Reimbursement.

This Hearing Officer has authority to order private school tuition reimbursement if Petitioner shows that (1) Respondent failed to make an offer of FAPE, and (2) the alternative program chosen by the parents was appropriate. R.L. v. Miami-Dade Cty. Sch. Bd., 757 F.3d 1173, 1182 (11th Cir. 2014) citing M.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1096 (11th Cir.2006).¹

¹ Respondent cited a number of pre-2009, non-Eleventh Circuit cases for the proposition that tuition reimbursement is not available if the child has not previously received special education or related services. This Hearing Officer questions the continued applicability of those cases following the Supreme Court’s 2009 decision in Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009), which held that the IDEA does not categorically bar reimbursement of private-education tuition if a child had not previously received special education and related services through the public school. However, this Hearing Officer does not reach this issue since the requested relief is denied on other grounds.
This Hearing Officer finds insufficient evidence to support an award of tuition reimbursement to Petitioner. First, this Hearing Officer finds insufficient evidence to demonstrate that Respondent failed to make an offer of FAPE. On the contrary, it appears to this Hearing Officer that Respondent’s Offer of Judgment was an offer of FAPE. Although the Parents now contend they were unaware of the Offer, the Hearing Officer finds that Respondent was justified in relying upon the representation of Petitioner’s previous attorney that the Parents had decided to withdraw the Child and did not intend to proceed with the public school system.

Additionally, very little evidence was presented regarding the nature of the private educational program that the Child attended during the 2015-16 school year. Significantly, none of the Child’s teachers or any of the personnel from the [redacted] testified in this case. The Mother offered very little testimony about the curriculum or services provided by the private school. Therefore, this Hearing Officer finds insufficient evidence to determine that the Child’s placement at the private school was “appropriate” for consideration of reimbursement of the tuition for the private school by the District.

C. Personnel Training.

The level of training provided to Respondent’s employees was not addressed at the due process hearing. Moreover, this Hearing Officer does not find that the issues raised in this case are due to an apparent lack of training on the part of Respondent. Instead, it appears that the Parents’ grievance arise either from an affirmative decision to decline the evaluation offered by Respondent, or from a miscommunication with their own attorney. Therefore, this Hearing Officer denies Petitioner’s request to order personnel training.

D. Evaluation.

As an initial matter, this Hearing Officer notes that a proper evaluation is a procedural pre-requisite to the development of an IEP. See K.I. ex rel. Jennie I. v. Montgomery Pub. Sch., 805 F. Supp. 2d 1283, 1293 (M.D. Ala. 2011) (school district’s failure to properly evaluate student before developing her IEP resulted in procedural violation of IDEA). Thus, this Hearing Officer gives no credence to the suggestion that the Child should have received
an IEP prior to being evaluated, nor does this Hearing Officer find that Respondent's Offer of Judgment should be read as offering such.

This Hearing Officer finds that any issue regarding lack of an evaluation prior to June 1, 2015 was resolved by Respondent's Offer of Judgment and its acceptance by Petitioner's prior attorney. In Alabama, "An attorney has authority to bind his or her client, in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court." Ala. Code § 34-3-21. Under this statute, Petitioner's previous attorney had authority to bind Petitioner by way of a signed agreement, or an entry of the settlement with the Court. Here, □ signed an acceptance of Respondent’s Offer of Judgment, and the terms were incorporated in an Order issued by Hearing Officer Wes Romine in Case 15-39.

This Hearing Officer notes that the due process complaint filed by □ in Case 15-39 contains, in bold-faced type, a "Demand for Communication through Attorneys," which states, in pertinent part: "PETITIONER DOES HEREBY DEMAND THAT ALL COMMUNICATION REGARDING THIS COMPLAINT ... BE THROUGH THE OFFICES OF THE RESPECTIVE PARTIES' ATTORNEYS." (P. Ex. 1).

Additionally, this Hearing Officer does not find that Petitioner has established a violation of the IDEA based upon the events occurring after the settlement and the entry of Hearing Officer Romine’s Order in Case 15-39. Again, this Hearing Officer finds that the Respondent justifiably relied upon the representation of Petitioner's previous attorney that the Parents did not intend to proceed with the public school system. Although the Parents claim that their previous attorney did not accurately convey their intentions, there does not appear to be any dispute that their attorney made this representation to Respondent.

Finally, Petitioner presented no evidence that Respondent is presently refusing to conduct an evaluation of the Child. Petitioner has already obtained an Order from Hearing Officer Wes Romine requiring Respondent to evaluate the Child. Petitioner did not present any evidence that they have since requested, or that Respondent has subsequently refused to conduct that evaluation. In absence of any such evidence that Respondent is refusing to comply with the Order in Case 15-39, this Hearing Officer decline to enter another Order
for an evaluation. This Hearing Decision does not in any way void the previous Order entered by Hearing Officer Wes Romine in Case 15-39.

E. Prevailing Party Status.

Having denied all of the relief requested by Petitioner, this Hearing Officer denies Petitioner’s request to be considered as the prevailing party in this matter.

XIII. SPECIFIC RULINGS.

1. This Hearing Officer FINDS that the Petitioner has failed to demonstrate a violation of IDEA or denial of FAPE to the Child.

2. This Hearing Officer FINDS that the Respondent is the prevailing party in this matter.

IX. NOTICE OF APPEAL RIGHTS.

Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. §1415(i)(2). The party dissatisfied with this decision must file a notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action. Ala. Admin. Code, §290-8-9-.8(9)(c)16.

DONE and ORDERED this 13th day of October, 2017.

P. Michael Cole
Hearing Officer
X. CERTIFICATE OF SERVICE

I hereby certify that a copy of this Decision has been forward to the following individuals by Certified Mail with postage prepaid and return receipt requested properly addressed as well as by electronic mail on this the 13th day of October, 2017.

1. Honorable James R. Gallini
   
2. Honorable Edgar P. Walsh
   
R. Michael Cole
Due Process Hearing Officer