

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EDC 06873

<p>█ by parent or guardian █ Petitioner,</p> <p>v.</p> <p>Charlotte-Mecklenburg Board of Education Respondent.</p>	<p>FINAL DECISION</p>
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This matter came on to be heard before Administrative Law Judge Selina Malherbe on Respondent's Motion to Dismiss filed on February 12, 2020. Petitioner filed a Response in Opposition and Respondent filed a Reply. The Undersigned, having considered the parties' submissions and supporting affidavits, enters the following Order:

Parties and Counsel

For the Petitioner: Andrew K. Cuddy
Cuddy Law Firm, PLLC
104-C Waxhaw Professional Park Drive
Waxhaw, NC 28173

For the Respondent: Jill Sanchez-Myers
Charlotte-Mecklenburg Board of Education
600 East Fourth Street, 5th Floor
Charlotte, NC 28202

Background

1. On December 13, 2019, the Petitioners filed a Petition for Contested Case Hearing ("Petition"). In their Petition, Petitioners indicated their "willing[ness] to waive the resolution session and participate in mediation." (Pet. 9).
2. Respondent received the Petition on December 17, 2019. Respondent filed a Motion for Extension of Time to File Response, which was granted to allow the Response to be filed by January 6, 2020.
3. On December 20, 2019, the Undersigned issued an Order Setting Hearing and General Pre-Hearing Order setting the hearing for the week of January 27, 2020. The Order stated, "[a] resolution session must be held with both parties present before a due process hearing can

take place. 20 U.S.C. § 1415(f)(1)(B)(i).” The Order directed that a resolution session must convene within 15 days of the Respondent’s receipt of the due process hearing request, unless there was “an agreement to use the mediation process. 20 U.S.C. § 1415(f)(1)(B)(i).”

4. On December 20, 2019, [REDACTED] [REDACTED], Respondent’s Accountability Specialist for Exceptional Children Department emailed Petitioner [REDACTED] the Due Process Resolution Meeting Form and Mediation Request form and requested that [REDACTED] fill out and return the forms. Ms. M [REDACTED] never received a response back directly from [REDACTED] (Resp’t’s Ex. A.)
5. Petitioner’s attorney emailed Respondent’s attorney on December 20, 2019 and acknowledged [REDACTED]’s receipt of the Resolution and Mediation Forms. (Resp’t’s Ex. B). Respondent’s attorney received the signed Resolution and Mediation Forms from Petitioner’s attorney on January 3, 2020, wherein Petitioners agreed to waive the resolution meeting and to participate in mediation. (Resp’t’s Ex. C.)
6. On January 6, 2020, Respondent faxed the Mediation Request to the Department of Public Instruction (“DPI”), which is the process for a mediator to be assigned. (Resp’t’s Ex. A.) Respondent also filed its Response to the Petition for Contested Case Hearing on that date.
7. On January 6, 2020, the Undersigned issued an Order for Mediation Date, Status Report, and Proposed Scheduling Order.
8. On January 9, 2020, DPI assigned a mediator, [REDACTED] [REDACTED], who contacted the parties’ attorneys on that same date to determine the parties’ availability for the mediation session and to schedule the mediation. (Resp’t’s Ex. D.)
9. After numerous email exchanges, the parties and mediator agreed on January 13, 2020, that mediation would take place on January 31, 2020, at 12:30pm, with a second mediation session, if needed, scheduled for February 7, 2020 at 12:30pm. (Resp’t’s Ex. D.)
10. The 30-day resolution period ended on January 15, 2020. On January 15, 2020, the parties filed a Joint Motion to Continue the Hearing to allow time for the parties to resolve the issues raised in the Petition, as mediation had been scheduled, but had not yet occurred. On January 16, 2020, the Undersigned granted the Motion to Continue and ordered the parties to submit a Joint Status Report by February 12, 2020, and proposed alternative hearing dates if the case did not settle at mediation.
11. Prior to the mediation session, Respondent encouraged Petitioners’ participation in mediation/resolution via emails to Petitioners’ counsel on January 29, 30, and 31, 2020. Respondent’s counsel repeatedly informed Petitioners that Respondent was willing to engage in mediation and resolution, up to and including the day of the mediation session. (Resp’t’s Ex. E).
12. On January 31, 2020, [REDACTED] and Respondent’s counsel appeared for mediation at 12:30pm, along with Petitioners’ counsel and the mediator, [REDACTED]. Petitioner [REDACTED] arrived between 1:00pm-1:30pm. After [REDACTED] arrived, she consulted with her attorney and

then cancelled the mediation before it started. The parties did not engage in any discussion of the issues raised in the Petitioners' due process Petition and did not sign the Agreement to Mediate form. (Resp't's Exs. A, F, 1).

13. Respondent documented its efforts to obtain the parent's participation in the resolution process in accordance with legal requirements. (Resp't's Exs. A through E.)
14. On February 12, 2020, Respondent filed a Motion to Dismiss Petitioners' request for a due process hearing ("Motion"). Respondent submitted the affidavit of [REDACTED] Accountability Specialist for Exceptional Children Department, in support.
15. On February 24, 2020, Petitioners responded to the Motion by filing "Petitioners' Opposition to Respondent's Motion to Dismiss" ("Response"), along with the affidavit of Petitioner [REDACTED] [REDACTED]'s parent.
16. On February 28, 2020, Respondent filed a "Reply." Respondent submitted the affidavit of Deja Kemp, Senior Associate General Counsel, in support.

DISCUSSION

Respondent asserts that Petitioners are not entitled to a due process hearing because Petitioners failed to comply with the resolution requirements under the IDEA and NC *Policies*. Respondent's Motion is based on 34 C.F.R. § 300.510(b) and North Carolina *Policies Governing Services for Children with Disabilities* ("NC *Policies*") 1504-1.1, which provide that: "if the [school district] is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using procedures in § 300.322(d)), the [district] may, at the conclusion of the [resolution] period, request that a hearing officer dismiss the parent's due process complaint." 34 C.F.R. § 300.510(b)(4). *See also* NC 1504-1.1. While Petitioners contend that mediation is voluntary and, therefore, they were not required to participate in mediation, in examining the relevant authorities, the Undersigned concludes that the IDEA contemplates and requires discussion of the issues raised in the parent's Petition through a pre-hearing resolution process before a parent is afforded a due process hearing. Thus, Petitioners were required to participate in a resolution session or mediation.

Pursuant to 20 U.S.C. § 1415(f)(1)(B)(i), the local educational agency ("LEA") is required to conduct a resolution meeting "[p]rior to the opportunity for an impartial due process hearing." *See also* 34 C.F.R. § 300.510(a); NC *Policies* 1504-1.11(a). The only exception to this requirement is if the parent and the LEA agree in writing to waive the resolution meeting, or the parent and the LEA agree to "use the mediation process" described in 34 C.F.R. § 300.506.

The IDEA and implementing regulations provide that the purpose of the resolution meeting is for the parent of the child "to discuss the due process complaint, and the facts that form the basis of the due process complaint *so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.*" 34 C.F.R. § 300.510(a)(2) (emphasis added); *see also* 20 U.S.C. § 1415(f)(1)(B)(i)(IV); NC 1504-1.11(a)(2). When the IDEA was reauthorized in 2004, Congress added the requirement that parents and school districts participate in a resolution process

prior to a due process hearing. This Undersigned follows the reasoning of other courts that have considered the issue and looks to congressional intent in creating the resolution process, which was to increase fairness and to minimize litigation. *See e.g., Marinette Sch. Dist.*, 47 IDELR 143, 107 LRP 8221 (SEA WI 2007) (examining “Congressional intent that parents and school districts participate cooperatively in an informal process to resolve complaints prior to holding due process hearings in order to decrease the amount of litigation under the IDEA”); *Clark Cnty. Sch. Dist.*, 107 LRP 67720 (SEA NV 2007). The Senate Committee explained that, “[t]he goal of these new provisions is fairness: to be sure that a district is aware of a problem and has a chance to resolve it in a less formal manner before having to spend the time and resources for a due process hearing. . . .” S. Rep. No. 108-185, at 39.

The U.S. House Committee on Education and the Workforce further explained:

The Committee is clearly concerned about the level of communication that occurs between a parent and the local educational agency when there is a dispute about the services the child is receiving. The Committee feels that parents and local educational agency officials, in most cases, should be able to easily resolve issues when they are brought to the attention of appropriate individuals within the school system. The bill creates a new concept of the resolution session that is intended to improve the communication between parents and school officials, and to help foster greater efforts to resolve disputes in a timely manner so that the child's interests are best served. ... At that meeting the parent and the school officials should work together to determine the nature of the complaint and to work collaboratively to attempt to resolve the complaint.

H.R. Rep. 108-77, at 114 (2003).

While Petitioners’ claim that mediation is not mandatory, the plain language of 34 C.F.R. § 300.506 requires a mediation if the parties choose that option over a resolution meeting. In explaining Congress’s intent regarding the mediation process, the U.S. Senate explained:

The committee does not intend that either party would have the right to refuse to participate in the resolution session. However, the parties may agree to waive the resolution session, such as in cases where the local educational agency is aware of the parent’s complaint, and has already attempted to resolve the matter during an IEP team meeting, or when the parties have agreed to take their dispute to mediation.

S. Rep. No. 108-185, at 38, <https://www.congress.gov/108/crpt/srpt185/CRPT108srpt185.pdf>. This demonstrates Congressional intent that a parent must participate in either a resolution meeting or mediation.

If a parent refuses to participate in the resolution process or the school district is unable to obtain the parent’s participation, dismissal of the due process claim is proper. *See* 34 C.F.R. § 300.510(b). This Court’s conclusion that dismissal of a parent’s complaint is proper when the parent fails to participate in the resolution process is consistent with decisions made by other courts and administrative hearing officers in analogous factual situations. For example, in dismissing the due process complaint in *Cobb County School District*, 114 LRP 9548 (SEA GA 2014), the

administrative law judge (“ALJ”) explained that “[b]y requesting a due process hearing under IDEA, [petitioner] triggered an expedited process that requires both parties to participate in either a pre-hearing resolution meeting or mediation. As neither one has occurred, this matter is not ripe for hearing.” *Id.*; see also *Washington Twp. Bd. of Educ.*, 107 LRP 38419 (SEA NJ 2007) (ALJ dismissed request for due process hearing due to “petitioners’ refusal and/or failure to participate” in a resolution meeting or mediation); see also *Clark Cnty. Sch. Dist.*, 107 LRP 67720 (SEA NV 2007) (hearing officer concluded that because petitioners did not “participate” in the resolution process as required, dismissal of the due process complaint was appropriate).

Further, a parent must actually *participate* in the resolution process and discuss the issues raised in the petition; mere attendance is insufficient. See 20 U.S.C. § 1415(f)(1)(B)(i)(IV) (requiring parent to “use the mediation process” described in 34 C.F.R. § 300.506); see 34 C.F.R. § 300.510(a)(3)(ii); see also NC 1504-1.11(a)(3)(ii); see also *e.g.*, *Clark Cnty. Sch. Dist.*, 107 LRP 67720 (SEA NV 2007). In *Clark*, the parent appeared for the resolution meeting, which ended after fifteen minutes of discussion unrelated to the due process complaint. *Id.* The hearing officer examined the plain language of 34 C.F.R. § 300.510(a)(2) to determine what level of parent “participation” was required to avoid dismissal by a hearing officer and determined:

[I]t is reasonable to conclude the Congress’ (and the [state] legislature) purposeful use of the term “participation”, coupled with the requirement that the parents discuss the due process complaint, suggest that more than just “attendance” at the meeting is required. Furthermore, the definition of “participate” includes “to partake” which is further defined as “to participate in a discussion.”

Id. citing Black’s Law Dictionary 581 (5th ed. 1989). The hearing officer also considered congressional intent in adding a mandatory resolution process, which was to provide the school district with an opportunity to resolve the dispute. The hearing officer “conclude[d] that a reasonable interpretation would require parents *to actually engage in discussions regarding the due process complaint*, rather than just ‘attend’ such meetings.” *Id.* (emphasis added).

Here, the Undersigned concludes that, because Petitioners were required to participate in the resolution process as a prerequisite to a due process hearing, Petitioners failed to comply with the requirements of IDEA and NC *Policies*. Both parties agreed to use the mediation process, in lieu of a resolution meeting. Mediation was scheduled for a mutually-agreeable time on January 31, 2020. Although the parties appeared for the mediation session, the mediation process never commenced. It is undisputed that mediation was cancelled by Petitioners before the Agreement to Mediate form was even signed. The exhibits and affidavits submitted by the parties is evidence that the parties did not engage in any discussion of the issues at the scheduled mediation, and thus, Respondent was not provided an opportunity to resolve the dispute at the mediation. As a result of Petitioners’ refusal to engage in the resolution process, Respondent was not provided “the opportunity to resolve the dispute that is the basis for the due process complaint.” 34 C.F.R. § 300.510(a)(2).

While Petitioner ██████ claims that she withdrew from mediation due to her belief that it would be futile, Petitioner’s reason for refusing to participate in the mediation is irrelevant because Petitioners were required to participate in a resolution session or the mediation process. See *e.g.*

Marinette Sch. Dist., 47 IDELR 143, 107 LRP 8221 (SEA WI 2007) (when parent refused to discuss district’s proposed resolutions because she wanted a confidentiality agreement in place first, hearing officer dismissed petition based on her failure to participate in the resolution process). Further, guidance from the Office of Special Education Programs indicates that it would be “inconsistent with the requirements in 34 C.F.R. § 300. 510(a)(2) regarding the purpose of the resolution meeting for [a party] to refuse to discuss the issues raised in the parent’s due process complaint during the meeting.” *Letter to Casey*, 61 IDELR 203, 113 LRP 19186 (OSEP 2013).

While Petitioners also reference permissible adjustments to the resolution period under 34 C.F.R. § 300.510(c), that provision is inapplicable to the issue at hand. Because the mediation session in this case never began, it could not be continued. For this Undersigned to hold otherwise would permit every parent to agree to waive a resolution meeting and use the mediation process instead, and then withdraw from mediation prior to the commencement of the mediation session, without the school district ever being afforded the opportunity to resolve the dispute. Such a determination flies in the face of Congress’s purpose in creating the resolution process as a prerequisite to a due process hearing.

The Undersigned notes that, in Petitioner’s Response and affidavit, [REDACTED] indicated she is now willing to participate in a resolution session or mediation. However, the Court determines her cooperation is untimely. *See Clark Cnty. Sch. Dist.*, 107 LRP 67720 (SEA NV 2007) (petitioners’ offer to participate in resolution meeting or mediation after motion to dismiss was filed and after resolution period ended was “untimely” based on the IDEA’s strict timelines). Like in *Clark*, Petitioners did not indicate a willingness to attend and participate in a resolution meeting or mediation until after Respondent’s motion to dismiss was filed and after the resolution period ended. Thus, Petitioners’ subsequent offer to participate in the resolution process is untimely.

Petitioners also claim they “participated in mediation with Respondent via pre-session communications, including in emails.” (Response, 5). As explained above, however, participation requires discussion of the issues by the parties at the resolution or mediation session. Pre-mediation communications or the exchange of written proposals is not a substitute for a resolution meeting or mediation. *See, e.g., Marinette Sch. Dist.*, 47 IDELR 143, 107 LRP 8221 (SEA WI 2007) (holding parent did not participate in good faith resolution with district when parent refused to participate in resolution meeting, even though parties had exchanged written proposed resolutions). “The IDEA contemplates and requires discussion by the parties in a resolution meeting not a written exchange of proposed resolutions . . .” *Id.* Therefore, any exchange of proposals between Petitioners’ and Respondent’s attorneys or any communications prior to the mediation session does not satisfy the IDEA’s requirement that Petitioners participate in a resolution session or mediation.

CONCLUSION

The IDEA and NC *Policies* provide that participation in a resolution meeting or mediation is a prerequisite to a due process hearing. Because Petitioners agreed to waive a resolution meeting and use the mediation process, but failed to participate in mediation and cancelled the mediation session, Petitioners failed to comply with the requirements of IDEA and NC *Policies*. Due to Petitioners’ refusal to participate in the mediation process, Respondent was not afforded the

opportunity to attempt to resolve the issues in the due process Petition, as required under the IDEA and NC *Policies*. Based on the affidavits and exhibits submitted, the Court finds and concludes that the District made reasonable efforts and good faith attempts to engage the Petitioners in the resolution process. Because resolution meetings and mediation are part of the due process procedures, consistent with 34 C.F.R. § 300.510 and section 615(f)(1)(B) of the IDEA, Petitioners' request for a due process hearing shall be dismissed.

BASED UPON the foregoing, the Undersigned enters the following:

DECISION

It is hereby **ORDERED**:

1. Petitioners are not entitled to a due process hearing because they failed to participate in the resolution or mediation process as required.
2. Respondent's Motion to Dismiss is hereby granted, and the Petition is dismissed without prejudice.
3. Respondent is the prevailing party.

IT IS SO ORDERED.

NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C 106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "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. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding the State Board's designee, further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina, prior to the required close of the appeal filing period.

This the 31st day of March, 2020.

Selina Malherbe

Selina Malherbe
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 31st day of March, 2020.



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