State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 11247-20

AGENCY DKT. NO. 2021-32280

S.W. AND J.W. ON BEHALF OF J.J.W. [1]

Petitioners,

v.

ELIZABETH CITY BOARD OF EDUCATION,

Respondent.

_____

Saran Q. Edwards, Esq., for petitioners (John Rue & Associates, LLC, attorneys)

Richard P. Flaum, Esq., for respondent (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C, attorneys)

Record Closed: January 1, 2022 Decided: February 9. 2022

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioners, S.W. and J.W., (collectively, petitioners or the parents) on behalf of J.J.W., (student) filed a petition for due process against respondent, Elizabeth City Board of Education (Board or District), alleging that the District denied J.J.W. a free, appropriate

[1] The caption in the petition for due process refers to the minor child as "J.J.W." I am amending the case caption in this matter pursuant to N.J.A.C. 1:1-6.2, to reflect that the minor child shall be referred to as "J.J.W."

public education (FAPE) by failing to provide him with "door-to-door" transportation services.

PROCEDURAL HISTORY

On November 11, 2020, petitioners' filed a due process petition with the Office of Special Education (OSE) seeking FAPE from the Board on behalf of the student, by failing to provide him with "door-to-door" transportation services.

The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on December 11, 2020, pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13.

A settlement conference via Zoom was held on March 8, 2021. A telephone prehearing conference was conducted on March 15, 2021, and April 7, 2021. Respondent then filed the within motion for summary decision on May 18, 2021, and petitioners' filed their opposition to the motion on June 11, 2021.

The underlying Initial Decision is submitted within the time allowed by Executive Order No. 127, as extended by N.J.S.A.26:13-32.

FACTUAL SUMMARY AND FINDINGS

The Parents filed their first due process petition on January 1, 2020, (Petition I), alleging that the District denied the student a FAPE by failing to provide the transportation services contained within the student's June 21, 2019 Individualized Education Program (IEP). The matter was filed with the OAL and assigned to an Administrative Law Judge (ALJ) who conducted a two-day hearing. Thereafter, on February 19, 2021, the ALJ issued a Final Decision and written opinion making findings of fact and conclusions of law that held, inter alia:

> (1) the District's IEPs were appropriate to meet J.W.'s educational needs and provided him with a FAPE;

> (2) an at-home stop was not required for J.W. to access an appropriate education, and
>
> (3) transportation to and from the corner bus stop rather than from J.J.W.'s home did not rise to the level of a denial of FAPE, did not significantly impede the parents' opportunity to participate relative to his education, and did not cause a deprivation of educational benefits.

On November 11, 2020, before the ALJ issued a Final Decision in Petition I, petitioners filed the within petition for due process (Petition II), alleging the same issues contained in Petition I, which would eventually be decided by the ALJ in Petition I. Petitioners' contend that they filed Petition II before the ruling in Petition I because the District proposed to change the IEP on October 27, 2020, challenging the District's proposed change to the student's transportation services.

Petitioners' argue that they filed Petition II "out of an abundance of caution and in an effort to maintain J.J.W.'s stay put program". The petitioners' admit that after the ALJ rendered her decision on February 19, 2021, they "deliberated about whether to file an appeal", and had not done so in May 2021, when the within motion for summary decision was filed. Nevertheless, after "careful consideration", petitioners state they filed their appeal in the United Stated District Court for the District of New Jersey (District Court) on May 19, 2021.

The District has filed the within motion for summary decision and argue that petitioners' claims are barred by the doctrines of res judicata and collateral estoppel, and therefore, the District requests that an Order for summary decision should be granted herein, as an evidentiary hearing was already held on this matter for the same allegations contained in Petition. The District also seeks attorneys' fees incurred in defending, what it alleges is a frivolous litigation.

In opposing the within motion, petitioners' claim that there are genuine issues of material fact that exist, which prevent the entry of the District's motion for summary decision. Namely, petitioners' argue that the circumstances that gave rise to filing Petition

II pertains to the District's proposed IEP in October 2020, that was after they filed Petition I on January 1, 2020. Petitioners' argue that they filed the current petition to "preserve the stay put transportation services contained in the June 21, 2019 IEP, which was triggered by the filing of their first Petition for Due Process." Petitioners' content that had they failed to challenge the October 2020 IEP, "that failure would have constituted an agreement between the Parents and the District to the changed transportation services and would have vitiated both the Parents' first due process matter and the Parents' desire that J.J.W. continue to receive door-to-door transportation services due to his disability. Petitioners now concede that in appealing Petition I to the District Court, it continues the stay put provisions of the June 21, 2019 IEP, which was the subject of Petition I.

Petition II contains the following factual statements, which I **FIND** as **FACT** herein:

1. J.J.W was born on July 25, 2014. He is a seven-year-old male student residing in the area served by the District.

2. J.J.W. is a student with multiple disabilities, and has been diagnosed with Autism Spectrum Disorder, fine motor delay, speech delay, and feeding difficulty in children.

3. The District is a public body organized pursuant to N.J.S.A. 18A:10-l, et seq., to operate the Elizabeth Public Schools, serving students from preschool to twelfth grade who are domiciled in Elizabeth.

4. The District is the local education agency (LEA) responsible for J.J.W.'s education.

5. J.J.W. is domiciled in Elizabeth, N.J.

6. On or about September 13, 2019, Petitioners filed a complaint with the Department of Education's Office of Special Education Policy and Dispute Resolution ("DOE") alleging that the District did not provide required transportation services.

7. The DOE issued a report on or about November 19, 2019. The DOE found that: "[J.W.]'s IEP does not require any additional transportation accommodations such as a seat harness or additional supervision. No behavioral issues have been reported that would require a consultation by a behavioral specialist to assist the transportation staff or the parent in getting the student to the bus or onto the morning bus." Id. The DOE concluded that the District must "invite the parent to an IEP meeting for the purpose of conducting further discussions regarding transportation as a related service, for the student and implementing any mutually agreed upon accommodations." (Id.).

8. In accordance with the DOE's directive, an IEP meeting took place on or about December 17, 2019. Petitioners did not agree to the proposed transportation services and filed for due process on or about January 1, 2020 [Petition I].

9. On November 11, 2020, Petitioners filed the instant petition [Petition II] seeking door-to-door transportation- the exact same relief as their January 1, 2020 petition. (Exhibit B to Pujara Cert, January 1, 2020, Due Process Petition at Pages 7-8.)

10. The ALJ dismissed Petitioners' Petition I on February 19, 2021, and found that "transportation to and from the corner bus stop rather than from J.W.'s home did not rise to the level of a denial of FAPE, did not significantly impede the parents' opportunity to participate relative to his education, and did not cause a deprivation of educational benefits." (Exhibit A to Pujara Cert., Final Decision at Page 28.

11. On May 19, 2021, Petitioners filed an appeal of the Final Decision in Petition I.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5(b) provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)). The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252.

The issues for disposition are limited to the claims set forth in the due process petition. 20 U.S.C. § 1415(f) (3)(B); See, N.J.A.C. 6A:14-2.7(c) (the request for due process must "state the specific issues in dispute, relevant facts and the relief sought".) The regulations provide that "a request for due process hearing . . . serves as notice to the respondent of the issues in the due process complaint." N.J.A.C. 6A:14-2.7(f). This is especially more important where, as in New Jersey, a respondent school district has the burden of proof and the burden of moving forward. See: N.J.S.A. 18A:46-1.1.

Petitioners' argue that genuine issues of material fact exist in this matter. First, Petitioners' dispute that the same facts are at issue in Petition I and Petition II, as the circumstances that gave rise to Petition II pertain to an IEP that was proposed by the District after they filed Petition I. Petitioners' argue that since the District attempted to change J.J.W.'s transportation services during the pendency of Petition I, the within petition pertains to the District's October 27, 2020 IEP, which was proposed subsequent to the filing of Petition I. Consequently, Petitioners' argue Petition II pertains to a different set of facts than the first and is therefore "not a carbon copy of the initial matter".

However, despite their argument herein, in Petition II, Petitioners' state:

> The Parents file the within petition for due process in an abundance of caution (in light of the District's seeming oblivion to the "stay put" provision of the IDEA), to confirm their disagreement with the October 27, 2020 IEP, to maintain the transportation services provided for in the June 21, 2019 IEP, and to ensure that no non-frivolous argument can be made for the District's failure to comply with "stay put" during the pendency of the dispute.
>
> (Petition II at paragraph 23)

Petitioners' acknowledge that in appealing Petition I to the District Court, the stay put provision requiring transportation services continues, which Petitioners'' allege the District continues to "willfully ignore". However, Petitioners' concede that the appeal of Petition I is no longer a disputed fact as a matter of law "because the desire to preserve the stay put pending appeal eliminates the basis for the District's motion."

I CONCLUDE that this matter is ripe for summary decision since there are no issues of material fact in dispute and that respondent is entitled to summary decision as a matter of law as set forth below.

The District argues that Petitioners' claims are barred by the doctrines of res judicata and collateral estoppel. I agree.

Res Judicata

In order for res judicata to apply, there must be (1) a valid, final judgment on the merits in the prior action, (2) the parties in the second action must be identical to, or in privity with, those in the first action, and (3) the claim in the subsequent action must arise out of the same transaction or occurrence as the claim in the first action. See, e.g., Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991); see also Olds v. Donnelly, 291 N.J. Super. 222, 232 (App. Div. 1996) (explaining that the doctrine applies when "the judgment relied upon [is] valid, final and on the merits; the parties in the two actions [are] either identical or in privity with one another; and the claims [grew] out of the same transaction or occurrence"); Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989) (noting that there must be "substantially similar or identical causes of action and issues, parties and relief sought" and that there must be a final judgment in the earlier action).

In this case, all three elements for res judicata have been met. The first element, a final decision on the merits, is clearly met by way of the ALJ's final decision regarding Petition I. The second element, identical parties, is also satisfied as both petitions were filed by S.W. and J.W. on behalf of J.J.W. and named the District as the respondent. Thus, there is not dispute that the parties to both litigations are the same. The third element, the identity of the cause of action, is also met here because the acts complained of and the demands for relief are the same in Petition II as already filed and adjudicated in Petition I.

A comparison of the two petitions disproves any suggestion that there are "new issues or legal theories" asserted here that were not already asserted in the final decision of Petition I. Both petitions seek door-to-door transportation services. Both petitions allege that the failure to provide door-to-door transportation services constitutes a denial of FAPE.

Accordingly, **I CONCLUDE** that the doctrine of res judicata is clearly applicable to the within matter as to the final decision made in Petition I. For res judicata to apply there must be "(1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties, and (4) identity of the cause of action." McAllister, 327 N.J. Super.

at 172-173 (citing T.W. v. A.W., 224 N.J. Super. 675, 682 (App.Div.1988)), which I **CONCLUDE** exists, in Petition I filed herein, and as determined by the ALJ in Petition II.

Collateral Estoppel

The doctrine of collateral estoppel bars re-litigation of an issue raised in the request because it was conclusively resolved through a previous action. W.R. and K.R. ex rel. H.R. v. Union Beach Borough Bd. of Educ., EDS 10392-09, Final Decision (July 19, 2010), < http://lawlibrary.rutgers.edu/oal/html/initial/eds10392-09_1.html>; K.S. o.b.o. K.S., v. Hackensack Board of Education, 2016 WL 285125, at *6.

Collateral estoppel forecloses re-litigation of an issue when the party asserting the bar demonstrates that:

(1) the issue to be precluded is identical to the issue decided in the prior proceeding;
(2) the issue was actually litigated in that prior proceeding;
(3) the court in the prior proceeding issued a final judgment on the merits;
(4) the determination of the issue was essential to the prior judgment; and
(5) the party against whom the doctrine is asserted was a party to or in privity with a party of the earlier proceeding.

Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005).

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." State v. Brown, 394 N.J. Super. 492, 502 (App. Div. 2007). Both res judicata and collateral estoppel serve the important policy goals of finality and repose; prevention of needless and duplicative litigation; reduction of burden of time and expense, and basic fairness. See First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007).

I CONCLUDE that Petitioners' assertions concerning stay put are precluded by the collateral estoppel doctrine since they go against the findings of the ALJ in the final decision of Petition I, which Petitioners' are appealing to the District Court. The ALJ's

final decision of Petition I was a final agency decision on the merits, and therefore, I **CONCLUDE** Petitioners' are now collaterally estopped from reopening the issue of whether the District should have provided door-to-door transportation during the 2019-2020 academic year.

Similarly, I **CONCLUDE** that Petitioners are collaterally estopped from arguing that J.J.W. is entitled to compensatory education for the time period in which he was transported to school from the bus stop, as the identical was raised and rejected by the ALJ in the final decision of Petition I.

The District also seeks attorney's fees in defending the within litigation, as it claims that the same is a frivolous litigation.

In accordance with 20 U.S.C.A. § 1415(i)(3)(B)(i)(II), a prevailing school district may seek attorney's fees if the due process action or subsequent court case is "frivolous, unreasonable, or without foundation." Further, under 20 U.S.C.A. § 1415(i)(3)(B)(i)(III), prevailing school districts may seek attorney's fees from the parent or his attorney "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."

The District claims that the within petition was improperly maintained, as Petitioners' failure to withdraw the petition after the ALJ's Final Decision of Petition I. The District contends that the filing of Petition II and the Petitioners' decision not to withdraw the same was frivolous and without any reasonable basis in law and intended for the purpose of harassment.

Petitioners' dispute the District's request for attorney's fees and costs, as they claim that the OAL lacks jurisdiction to award the same. Under 20 U.S.C.1415(i)(3)(B)(i)(III), "reverse fee shifting" can only be imposed against a parent on a showing that the parents' case is "frivolous, unreasonable, or without foundation" or "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the

cost of litigation." I **CONCLUDE** that the District has failed to present proofs to establish that the filing of Petition II satisfies the statutory definition in 20 U.S.C.1415(i)(3)(B)(i)(III), and therefore, I **CONCLUDE** that the District's request for attorneys' fees and costs is **DENIED.**

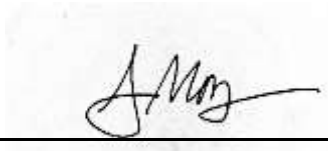
I **CONCLUDE** that respondent District is entitled to summary decision dismissing petitioner's due process petition as petitioners have not offered any new facts that warrant another hearing, and Petition II should be dismissed it is barred by the doctrines of res judicata and collateral estoppel.

ORDER

It is hereby **ORDERED** that the District's motion for summary decision be **GRANTED,** and the District's request for attorney's fees and costs is **DENIED.**

It is hereby **ORDERD** that Petitioners' due process petition is **DISMISSED.**

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2021) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2021). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.



February 9, 2022
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: February 9, 2022

Date E-Mailed to Parties: February 9, 2022

JCM/lr

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Petitioners:

P-1 Opposition Brief to Summary Decision Motion

P-2 Certification of Saran Q. Edwards, and exhibits

For Respondent:

R-1 Brief in support of motion for summary decision

R-2 Certification of Counsel with exhibits