State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 09856-24

AGENCY DKT. NO. 2024-37829

C.E. AND Y.Z. ON BEHALF OF R.E.,

Petitioners,

v.

TOMS RIVER REGIONAL

BOARD OF EDUCATION,

Respondent.

Michael I. Inzelbuch, Esq., for petitioners

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record closed: December 2, 2024 Decided: December 23, 2024

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

In this case arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482, and the New Jersey special education laws, N.J.S.A. 18A:46-1 to -55 and N.J.A.C. 6A:14-1.1 to -10.2, petitioners C.E. and Y.Z. on behalf of R.E. (petitioners) have filed a due-process petition seeking changes to R.E.'s classification, an

appropriate individualized education program (IEP), and reimbursement from respondent Toms River Regional Board of Education (respondent or Board) for the unilateral placement of their disabled daughter, R.E., at the School for Children with Hidden Intelligence (SCHI) for the 2022–2023 and 2023–2024 school years. The current petition for due process follows the January 2022 petition for due process, which challenged whether R.E.'s August 16, 2021, IEP offered a free, appropriate, and public education (FAPE) and sought tuition and cost reimbursements for the 2021–2022 school year. In a final decision issued on May 22, 2024, this tribunal determined that the August 16, 2021, IEP proposed by the Board offered R.E. a FAPE for the 2021–2022 school year, and thus denied petitioners' demand for reimbursement of tuition and costs for that year. In the current petition, petitioners demand reimbursement of tuition and costs incurred during the 2022–2023 and 2023–2024 school years for R.E.'s continued unilateral placement at SCHI during the duration of the prior due-process hearing.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

R.E., born on June 1, 2016, was a first-grade and second-grade student during the 2022–2023 and 2023–2024 school years, respectively. (Petition at ¶1.) R.E. is classified as eligible for special education and related services under the category of "Autism." (Id. at ¶3.) R.E. is also diagnosed with attention deficit hyperactivity disorder (ADHD), oppositional defiance disorder, and Turner syndrome. (Id. at ¶4.) On May 14, 2021, the Board and parents participated in an Evaluation Planning Meeting. (Id. at ¶5.) On August 16, 2021, the Board proposed an IEP for R.E. (Ibid.) Petitioner Y.E. signed the Consent to Implement the Initial IEP on August 31, 2021. (Res. Motion to Dismiss (MTD) at Exh. 1 and 4.)

On September 24, 2021, petitioners observed R.E.'s proposed classroom for the 2021–2022 school year. (See Petition at ¶7(iii); see also Res. MTD at Exh. 5.) On October 8, 2021, the Board arranged two virtual observations of programs for petitioners. (Petition at ¶6.) By email dated October 12, 2021, petitioners notified the Board that they unilaterally enrolled R.E. in a private school, SCHI. (Id. at ¶13.) Petitioners notified the Board by email, stating:

> "We continue to have serious concerns with the District's proposed program we observed last week (9/24/21). We look forward to meeting on Friday to discuss further, however, as we cannot continue to delay [R.E.'s] education we are currently auditing the SCHI program. As we have already provided notice, should we determine that SCHI is appropriate we will ask the District to render payment as to SCHI unless there is an appropriate program for [R.E.] to attend."
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> Email to Kelly Umbach, dated October 12, 2021 (**Exhibit "M"**)
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> [Id. at ¶14.]

On October 15, 2021, petitioners and the Board met, and petitioners expressed their continued concerns with R.E.'s proposed classroom placement in the district. (Id. at ¶6.) After their self-described unilateral placement, petitioners requested a due-process hearing seeking tuition reimbursement and a finding that the Board's proposed placement according to the August 16, 2021, IEP did not provide R.E. a FAPE and that SCHI was the appropriate placement for R.E. However, after a hearing with several days of witness and expert testimony, the administrative law judge (ALJ) concluded that respondent offered a FAPE to R.E. through the IEP for the 2021–2022 school year. (Id. at ¶24.) The May 22, 2024, decision determined the following legal conclusions:

1. The classification of autism in the IEP as of August 16, 2021, was appropriate at the time.

2. The child-find obligation of the Board has been satisfied.

3. The lack of an educational evaluation or psychological or psychiatric evaluation by the Board did not render the IEP deficient or amount to a failure to provide FAPE.

4. The Board proved by a preponderance of the competent and credible evidence that the August 16, 2021, IEP proposed by the Board offered R.E. a FAPE with the opportunity for meaningful educational benefit appropriate to R.E. within the least restrictive environment.

5. "As per N.J.S.A. 6A:14-2.10, reimbursement for unilateral placement by parents is only required upon a finding that the District did not make a FAPE available to the student in a timely manner prior to the enrollment. Parents who unilaterally change their child's placement, without the consent of local school officials, do so at their own financial risk and are barred from recovering reimbursement if it is ultimately determined that the program proposed by the [Board] affords the child with a FAPE. School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 373-374 (1985)." C.E. and Y.Z. ex rel. R.E. v. Toms River Reg'l Bd. of Educ., 2024 N.J. AGEN LEXIS 528, Final Decision at **183–84 (May 22, 2024).

6. The parents' demand for tuition and costs reimbursement due to their unilateral placement of R.E. at SCHI was denied.

C.E. and Y.Z. ex rel. R.E. vs. Toms River Reg'l Bd. of Educ., 2024 N.J. AGEN LEXIS 528 at **171–184; see also (Petition at Exh. Q.)

During the prior due-process hearing, petitioners continued R.E.'s unilateral placement at the private school and provided the Board with notice of same. (See Petition at ¶1.) On August 15, 2022, for the 2022–2023 school year, petitioners wrote:

> This shall serve as formal unilateral notice that we intend to *continue* [R.E.] at the NJDOE approved SCHI School (Lakewood, New Jersey) for the upcoming 2022-2023 school year and request full reimbursement from the district for any and all costs/expenses incurred by us, including, but not limited to: tuition; related services; transportation etc.
>
> [Petition at Exh. N; Res. MTD at 12.]

Similarly, for the 2023–2024 school year, petitioners wrote, by letter dated August 8, 2023:

> This shall formally serve as unilateral notice that we intend to *continue* [R.E.] at The SCHI School (Lakewood, New Jersey) for the 2023-2024 school year and request full reimbursement from the district for any and all costs/expenses incurred by us, including, but not limited to: tuition; related services; transportation etc.
>
> Lest there be any alleged misunderstanding we *continue* to seek a public placement that is appropriate for our child that has yet to be offered.
>
> [Petition at Exh. O; Res. MTD at 12.]

On June 26, 2024, petitioners requested a due-process hearing with the Office of Special Education, alleging that respondent denied R.E. a FAPE for the 2022–2023 and 2023–2024 school years. (Id. at ¶32.) The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on July 23, 2024. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On July 12, 2024, respondent filed a Motion to Dismiss in Lieu of an Answer and requested sanctions for a frivolous lawsuit. On July 25, 2024, petitioners filed opposition to respondent's motion. On September 6, 2024, respondent filed a "Reply in Further Support of Motion to Dismiss and Award Sanctions." On September 16, 2024, petitioners filed a sur-reply. On October 21, 2024, respondent filed a Sur-Sur-Reply in Further Support of Motion to Dismiss And Award Sanctions. By letter dated October 23, 2024, petitioners filed a response, to which respondent objected by letter dated October 24, 2024.

As discussed further, I am converting respondent's motion to dismiss to a motion for summary decision and granting the Board's motion for summary decision because even with viewing the evidence in the light most favorable to petitioners, petitioners never affirmatively requested reevaluation for the 2022–2023 and 2023–2024 school years. Accordingly, petitioners failed to state a claim under which respondent should be responsible for reimbursing tuition and costs for school years 2022–2023 and 2023–2024.

Respondent filed what is effectively a motion for summary decision, arguing that the appropriateness of the program that the Board offered R.E. in the August 16, 2021, IEP and the question of whether petitioners were entitled to reimbursement for the unilateral placement of R.E. at the SCHI have already been determined by the May 22, 2024, decision. The Board reiterates that petitioners are not permitted to relitigate those facts.

First, respondent argues that petitioners inappropriately seek here what amounts to an appeal of the May 22, 2024, decision. Respondent contends that

> the 2022 [p]etition was not limited to only challenging the program offered by the Board for the 2021-2022 school year, but specifically sought **continued and ongoing relief** including:
>
> (6.) An **appropriate out-of-district program/placement**, to wit, *continuation* at the New Jersey Department of Education ("NJDOE") approved SCHI School, Lakewood, New Jersey;
>
> (7.) Reimbursement (and *continued* reimbursement) for any and all costs associated with R.E.'s attendance at an **appropriate out-of-district program/placement**, to wit, *continuation* at the New Jersey Department of Education ("NJDOE") approved SCHI School, Lakewood, New Jersey;
>
> (8.) Transportation (and *continued* transportation) to an **appropriate out-of-district program/placement**, to wit, *continuation* at the New Jersey Department of Education ("NJDOE") approved SCHI School, Lakewood, New Jersey;
>
> . . . .
>
> (13.) Reimbursement for any and all costs due to the districts ***failure*** to provide a free and appropriate public education ("FAPE") to R.E., including, but not limited to, Evaluations and on-going therapies . . . ."
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> [Res. MTD at 1 citing Pet. at Ex. I at 30–31.]

Second, respondent argues that the August 16, 2021, IEP was accepted and consented to by petitioners in writing on August 31, 2021, and has been determined to have provided a FAPE, and thus, with petitioners' unilateral placement of R.E. in a private school, the Board has no responsibilities to R.E. absent an affirmative request by petitioners for a reevaluation. (Id. at 3.) Respondent argues that petitioners' letters to the Board before the start of the 2022–2023 and 2023–2024 school years "in no way approaches the kind of affirmative action that triggers a public school's responsibilities to a private school child, under the IDEA." (Id. at 12–13.)

Respondent further argues that absent a subsequent agreement to the contrary, R.E.'s pendent placement was governed by the August 16, 2021, IEP. (Id. at 14–15.) Respondent contends that §1415(e)(3) of the IDEA mandates that "the education program outlined in R.E.'s August 16, 2021 IEP acted as R.E.'s stay put placement, pending the resolution of [p]etitioner's January 6, 2022 Due Process Petition." (Id. at 15.) Respondent concludes that petitioners' claims are barred because R.E.'s pendent placement was in-district as established in the August 16, 2021, IEP, which, absent agreement of the parties, remained the operative education plan for R.E. (Ibid.) Respondent also points out that the ALJ found further evidence that petitioners were "engaged in gamesmanship to attempt to surreptitiously engineer a placement at their desired school, [SCHI], while never affording the Board an opportunity to provide R.E. a FAPE." (Id. at 2.) Finally, respondent argues that petitioners' purposeful attempts to relitigate claims from the failed 2022 due-process petition constitute frivolous litigation and warrant an award of attorney fees to the Board.

Petitioners contend that the August 16, 2021, IEP is not the subject of the instant matter. (Pet. Opp. to MTD at 8.) While petitioners "concede that the prior judgement on the August 16, 2021, IEP was 'valid, final, and on the merits' . . . they do not cede in any way that the prior judgment was correct which is why an appeal has been filed." (Ibid.) Petitioners argue that the issue in the present matter is the Board's failure to evaluate R.E. and develop an accurate IEP for her despite petitioners' "notification and/or request." (Id. at 9.) Petitioners further argue that res judicata does not apply because they are asking for relief based on a new set of facts. (Ibid.) Additionally, petitioners insist that the Board had an obligation to conduct evaluations of R.E. per the child-find obligation of

the IDEA pursuant to 20 U.S.C. § 1412(a)(3)(A) and N.J.A.C. 6A:14-1.2(b)(3). (Id. at 10.) Finally, petitioners contend that R.E.'s placement is not governed by the "stay put" provision of the IDEA because the August 16, 2021, IEP expired on June 22, 2022. Petitioners maintain that respondent's motion that the instant petition constitutes frivolous litigation is without merit.

LEGAL DISCUSSION

The rules of the Administrative Procedure Act do not detail the criteria governing motions to dismiss. The OAL applies the motion for summary decision standard to motions to dismiss. Under N.J.A.C. 1:1-12.5(a), "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." A motion for summary decision may be granted "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." N.J.A.C. 1:1-12.5(b). And, if "a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. In determining whether a genuine issue exists, the appropriate test is "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." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

The IDEA is designed to ensure that disabled children may access a FAPE that is tailored to their specific needs. 20 U.S.C. § 1400(d). Under the New Jersey regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to -10.2, each district board of education is responsible for "the location, identification, evaluation, determination of eligibility, development of an IEP and the provision of a [FAPE] to students with disabilities" who reside in the district. N.J.A.C. 6A:14-1.1(d); N.J.A.C. 6A:14-1.3. When a Board is aware that a child has a disability, the Board must "conduct an immediate review of the services plan and shall provide comparable services pending completion of any necessary assessments and, as appropriate, the development of an IEP for the student" and "[a]n

IEP for the student shall be in place within 60 calendar days from the date of enrollment in the school district." N.J.A.C. 6A:14-4.1(m).

An IEP is "a written plan that sets forth a student's present levels of academic achievement and functional performance, measurable annual goals, and short-term objectives or benchmarks and describes an integrated, sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives." N.J.A.C. 6A:14-1.3. While "an IEP need not maximize the potential of a disabled student, it must provide 'meaningful' access to education and confer 'some educational benefit' upon the child for whom it is designed." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 192, 200 (1982)). In other words, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017).

However, when a parent unilaterally places their child in a private placement without agreement from the district, their relief is limited. Pursuant to N.J.A.C. 6A:14-2.10(a), "Except as provided at N.J.A.C. 6A:14-6.1(a), the district board of education shall not be required to pay for the cost of education, including special education and related services, of a student with a disability if the district board of education made available a free, appropriate public education and the parents elected to enroll the student in a nonpublic school . . . or an approved private school for students with disabilities." To that end, a public school may only be required to reimburse parents for the cost of enrolling their special education child in private school if two conditions are met: (1) the public school did not provide a FAPE; and (2) the private placement is proper. See M.D. v. Vineland City Bd. of Educ., 2024 U.S. Dist. LEXIS 9095 at **37–38 (January 17, 2024) (citations omitted); see also N.J.A.C. 6A:14-2.10(b).

Parents may request a due-process hearing before an ALJ if they believe a school district has denied their child a FAPE. N.J.A.C. 6A:14-2.7(a). When a dispute arises concerning the proper or pendent placement for a special education child, "stay put" may be invoked. The stay put provision of the IDEA provides in relevant part that "during the

pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j). The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remains in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2024); N.J.A.C. 6A:14-2.7(u). The stay put provision functions as an automatic preliminary injunction. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996). Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F. Supp. 2d 267, 270–71 (D.N.J. 2006). As the term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked." Drinker, 78 F.3d at 867 (quoting the unpublished Woods ex rel. T.W. v. New Jersey Dep't of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993)); see also Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F.3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement").

For a unilateral placement to become the pendent placement for stay put, an administrative or judicial decision must first confirm that the parental placement is appropriate because the decision will effectively constitute agreement by the local educational agency to the change of placement. School Comm. of Burlington v. Dep't of Educ., 471 U.S. at 372; see also Raelee S., 96 F.3d at 84, 86 (finding that special appeals panels ruling in favor of parents must be treated as an agreement of the state and noting that "[w]hile parents who reject a proposed IEP bear the initial expenses of a unilateral placement, the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position"). As a matter of law, no statutory support under the IDEA or within any case law enables such action by the parents to establish a unilateral placement as the "stay put" in subsequent litigation, without subsequent agreement of the parties to the placement or judicial review of its appropriateness. Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., 202 F.3d 642, 651 (3d Cir. 2000). In Michael C., the Third Circuit held that "where a parent unilaterally

removes a child from an existing placement determined in accordance with state procedures, and puts the child in a different placement that was not assigned through proper state procedures, the protections of the stay put provision are inoperative until the state or local educational authorities and the parents agree on a new placement." Ibid. "Only once state authorities and parents have reached such agreement does a 'then-current educational placement' come into existence." Ibid.

Although parents have the right to an impartial due-process hearing on any issue pertaining to their child's placement, a parent's request is subject to the doctrine of res judicata and may be dismissed under the doctrine should a final judgment have been made on a previous petition that involved identical parties and an identical cause of action raised in the current petition. S.P. ex rel. M.P. v. East Brunswick Bd. of Educ., EDS 06670-98, Final Decision (September 1, 1998), http://lawlibrary.rutgers.edu/oal/final/eds6670-98.html. Here, while petitioners concede that res judicata would apply to the May 22, 2024, decision that determined the August 16, 2021, IEP provided R.E. a FAPE, they raise arguments as if they are not bound by the inextricable consequences of that determination. When parents unilaterally place a student in a private school and the district offers a FAPE, the parents are barred from seeking any tuition reimbursement. N.J.A.C. 6A:14-2.10(a). In light of the May 22, 2024, decision, the only potential cause of action set forth by petitioners in this case is whether petitioners affirmatively requested reevaluations to no avail, resulting in the Board's procedural violation of FAPE.

New Jersey regulations clearly delineate the rights and responsibilities of the school district and parents with respect to reevaluations. See N.J.A.C. 6A:14-3.8. Students eligible for special education services should be reevaluated every three years. N.J.A.C. 6A:14-3.8(a). If a student unilaterally enrolls in a private school, the school district of residence is only obliged to conduct an annual review of the student's IEP in three situations: "(1) [w]here the child is enrolled in public school; (2) [w]here the child is enrolled in private school and the parents request reevaluations pursuant to 34 C.F.R. § 300.536; or (3) [w]here the privately enrolled child re-enrolls in public school." Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1072 (D.N.J. 2011) (quoting 64 Fed. Reg. 12406-01, 12601 (Mar. 12, 1999)).

Requests for reevaluation under the IDEA have been narrowly construed. The Third Circuit explained that "general expressions of concern [do not] constitute a 'parental request for evaluation.'" D.K. v. Abington Sch. Dist., 696 F.3d 233, 247 n.5 (3d Cir. 2012). In D.K., a kindergarten student exhibited behavioral issues that the parents and district monitored and addressed through behavior plans, parent-teacher conferences, social skills groups, and academic support throughout the student's second kindergarten year and first grade. Id. at 240–41. After first grade, the district evaluated D.K. at the parents' request and concluded that D.K. was not in need of special education services, and D.K. was promoted to second grade. Ibid. Before third grade, D.K.'s parents requested a second, more comprehensive evaluation, which determined that D.K. was eligible for special education services for ADHD. Id. at 242. D.K.'s parents requested a due-process hearing and an award of compensatory education beginning from the time D.K. was in the second year of kindergarten to the implementation of the IEP in third grade. Ibid. The court rejected the parents' argument that their expressions of concern over the years regarding D.K.'s academic and behavioral progress amounted to a request for an evaluation, triggering the school district's duty to provide them with a procedural safeguard notice and a permission to evaluate form. Id. at 247 n.5.

Similarly, in H.D. v. Kennett Consolidated School District, the Pennsylvania Eastern District Court held that a school district did not deny a child a FAPE by failing to perform "further evaluation in anticipation of possible reenrollment" because the parent's request was not clearly made. 2019 U.S. Dist. LEXIS 173481 at *61 n.11 (E.D. Pa. Oct. 4, 2019). In H.D., the parents unenrolled their student from the district; however, the parents and the district continued to communicate following H.D.'s unenrollment. The parents asked the district whether it would continue to evaluate H.D., to which the district responded that the district would continue with the evaluation "when/if H.D. returns to the district." Id. at 26.

Conversely, in Moorestown, parents were found to have made a request for IDEA purposes where they submitted letters to the district requesting that the child study team conduct specifically enumerated evaluations. The parents' letter in Moorestown read, "[W]e are requesting that the child study team conduct appropriate evaluations for [M.D.],

who is currently attending Orchard Friends School, including: neuropsychological evaluation, speech and language assessment, learning assessment, assistive technology assessment and occupational therapy assessment." Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d at 1062.

Here, petitioners did not request a reevaluation. Petitioners' letter sent before the start of the 2022–2022 school year stated:

> This shall serve as formal unilateral notice that we intend to *continue* [R.E.] at the NJDOE approved SCHI School (Lakewood, New Jersey) for the upcoming 2022-2023 school year and request full reimbursement from the district for any and all costs/expenses incurred by us, including, but not limited to: tuition; related services; transportation etc.
>
> [Petition at Exh. N; Res. MTD at 12.]

In the letter sent before the 2023–2024 school year, petitioners wrote:

> This shall formally serve as unilateral notice that we intend to *continue* [R.E.] at The SCHI School (Lakewood, New Jersey) for the 2023-2024 school year and request full reimbursement from the district for any and all costs/expenses incurred by us, including, but not limited to: tuition; related services; transportation etc.
>
> Lest there be any alleged misunderstanding we *continue* to seek a public placement that is appropriate for our child that has yet to be offered.
>
> [Petition at Exh. O; Res. MTD at 12.]

The letters that petitioners sent in August 2022 and 2023 informed the Board that R.E. would be attending SCHI. The letters did not request a reevaluation. Petitioners' statement that they "continue to seek a public placement that is appropriate for our child that has yet to be offered" cannot be construed as a request for reevaluation. Petitioners' letters are akin to the parent's communications in D.K. and do not even mention "further evaluation" like the parents of the student in H.D., which the Third Circuit still deemed insufficient as a request for reevaluation under IDEA. Petitioners' letters demonstrate

petitioners' "general expressions" of disagreement about the proposed IEP that was ultimately determined to be appropriate. Accordingly, respondent was not obligated to conduct evaluations or provide an IEP for R.E. for the 2022–2023 or 2023–2024 school years.

The doctrine of res judicata, also identified as claim preclusion, bars the "relitigation of claims or issues that have already been adjudicated" in a prior suit based on the same cause of action. Tarus v. Borough of Pine Hill, 189 N.J. 497, 520 (2007) (citing Velasquez v. Franz, 123 N.J. 498, 505 (1991)). Res judicata, or claim preclusion, requires the same three basic elements under federal law and New Jersey law: "(1) the judgement in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one." Watkins v. Resorts Int'l Hotel and Casino, Inc., 124 N.J. 398, 412 (1991) (citations omitted); see also Pittman v. La Fontaine, 756 F. Supp. 834, 841 (D.N.J. 1991) (citing Culver v. Ins. Co. of N. America, 115 N.J. 451, 460 (1989)).

In applying the doctrine of res judicata to a petition for due process, an ALJ may dismiss the petition when all factors for res judicata are met. S.P ex rel. M.P. v. East Brunswick Bd. of Educ., EDS 06670-98, Final Decision (September 1, 1998), http://lawlibrary.rutgers.edu/oal/final/eds6670-98.html. In S.P., M.P.'s mother filed a petition for due process seeking the resolution of whether an autism class at the in-district school was an appropriate placement for M.P. Ibid. This same issue had been resolved a year earlier in another matter wherein the placement was determined inappropriate, and S.P.'s appeal of that decision was also ultimately dismissed with prejudice. Ibid. The ALJ determined that the doctrine of res judicata warranted dismissal of the petition because, even if facts regarding M.P.'s slight progress were true, "the other indicia relied upon by the district and by parents still lead to the conclusion that no material facts are different now than when the original case was litigated." Ibid.

Here, all three elements for res judicata are met. First, the May 22, 2024, decision was a valid, final decision on the merits. This is not disputed by petitioners. The second element requiring identical parties in the prior and current action is also undisputed. Both

the January 2022 and June 2024 petitions were filed by the parents on behalf of R.E. against the Toms River Regional School Board. The third element, requiring the claim in the later action to grow out of the same transaction or occurrence as the earlier claim, is also met. The January 2022 petition alleged that the August 16, 2021, IEP did not offer R.E. a FAPE and sought tuition reimbursement for unilateral placement at a private school for the 2021–2022 and subsequent school years. Similarly, the June 2024 petition is seeking tuition reimbursement for the 2022–2023 and 2023–2024 school years for the same unilateral placement that stems directly from the same August 16, 2021, IEP and the same allegation that it failed to offer a FAPE for R.E. Petitioners' contention that the June 2024 petition is not seeking the same relief as the January 2022 petition because the school years are not identical is a distinction without a difference.

Petitioners' argument that R.E. did not have a "current education placement at the start of the 2022–2023 school year" because the August 16, 2021, IEP was not operating so her physical education placement, SCHI, becomes the "current education placement" is not based in law. Like the parents in Michael C., the petitioners removed R.E. from respondent's in-district placement, which was ultimately determined to offer a FAPE, and unilaterally placed R.E. in SCHI, a private school. The protections of the stay put provision were inoperative unless and until the state or local educational authorities and the parents agreed on a new placement. It is undisputed that no such agreement has occurred. Without a favorable administrative decision vindicating petitioners' claim that the August 16, 2021, IEP did not provide R.E. a FAPE, petitioners are barred from seeking tuition reimbursement and costs for their ongoing and continued unilateral placement of R.E. at SCHI.

The IDEA, 20 U.S.C. § 1415(i)(3)(B), gives a federal district court jurisdiction to award attorney's fees in special education cases to a parent who is a prevailing party. 20 U.S.C. § 1415(i)(3)(B)(i)(I). No similar provision exists in New Jersey's relevant special education laws. Although ALJs have discretion to award attorney fees when a party fails to appear at a proceeding, N.J.A.C. 1:1-14.4(c)(2)(ii), or for failure to comply with orders, N.J.A.C. 1:1-14.14(a)(4), the Uniform Administrative Procedure Rules do not extend this discretion any further. In addition, it has been recognized that 20 U.S.C. § 1415(i)(3)(b)'s grant of jurisdiction to a court is to be extended to courts only. W.Z. ex rel. G.Z. v.

Princeton Reg'l Bd. of Educ., EDS 02563-07, Decision (April 26, 2007), http://lawlibrary.rutgers.edu/collections/oal/html/initial/eds02563-07_1.html. "[T]he OAL is part of the executive, not the judicial, branch and the OAL is not a 'court' within the intent of the above-cited section of the IDEA. ALJs are executive branch judges. Consequently, ALJs do not have authority to grant claims for attorney's (or expert's) fees in Special Education cases." Ibid. (referencing N.J.S.A. 52:14F-1, -4). Therefore, I cannot exceed the OAL's jurisdiction by entertaining petitioners' request.

For these reasons, I am granting respondent's motion to dismiss the June 2024 petition and denying respondent's request to award sanctions against petitioners.

ORDER

It is **ORDERED** that the respondent's motion to dismiss the June 2024 petition is hereby **GRANTED**. It is **FURTHER ORDERED** that respondent's request to award sanctions against petitioners is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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 (2024). 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.

December 23, 2024
DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

DJB/onl

APPENDIX

List of Moving Papers

For petitioner

- Petitioners' response to Motion to Dismiss and Award Sanctions dated July 25, 2024
- Letter requesting leave to file sur-reply dated September 6, 2024
- Letter in response to letter requesting denial of leave to file sur-reply dated September 11, 2024
- Petitioners' sur-reply to respondent's reply of September 6, 2024, dated September 16, 2024
- Petitioners' response to respondent's sur-sur reply dated October 23, 2024

For respondent

- Motion to Dismiss and Award Sanctions dated July 12, 2024
- Reply brief in further support of Motion to Dismiss dated September 6, 2024
- Letter requesting denial of leave to file sur-reply dated September 10, 2024
- Respondents' sur-sur reply brief in support of Motion to Dismiss dated October 21, 2024
- Letter of rejection of Petitioner's unauthorized submission dated October 24, 2024