State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDS 10046-18
AGENCY DKT. NO. 2019-28160

T.N. AND M.L. ON BEHALF OF J.N.,
Petitioners,
v.
GLOUCESTER TOWNSHIP PUBLIC SCHOOLS BOARD OF EDUCATION,
Respondent.

Jamie Epstein, Esq., for petitioners

Shifra Tarica, Esq. and **Todd H. Zamostien**, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: September 21, 2018 Decided: October 9, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

The petition filed by T.N. and M.L. on behalf of their son, J.N., alleges that Gloucester Township Board of Education (Board) failed to provide a reasonable accommodation under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §701 et. seq., and that the Individualized Educational Program (IEP) offered to J.N. did not provide him with a Free Appropriate Public Education (FAPE). Additionally, petitioners seek compensatory education and reimbursement. The Board maintains that

petitioners' claims are barred in part because they have either been resolved by resolution or withdrawn with prejudice during a prior hearing in the Office of Administrative Law (OAL) involving the same parties (EDS 06956-17). Moreover, the Board maintains that petitioners are not entitled to compensatory education because the Board took immediate action to address petitioners' concerns after the prior due process complaint was withdrawn, including J.N.'s change in placement to a private school, which was incorporated into J.N.'s May 22, 2018 IEP and approved by petitioners. The Board maintains that petitioners have failed to sufficiently plead a cognizable cause of action.

PROCEDURAL HISTORY

Petitioners filed for due process on May 31, 2018. The matter was transmitted to the Office of Administrative Law (OAL) on July 17, 2018 and assigned to me on August 2, 2018. On August 6, 2018, the Board filed a motion to dismiss petitioners' due process petition. I held a prehearing telephone conference on August 8, 2018 to set the hearing date and establish a briefing schedule for the Board's motion. Petitioners requested and were granted twenty days to respond to the Board's motion. On September 11, 2018, I received letters from both parties addressing petitioners' failure to oppose the Board's motion. I granted petitioners additional time, until September 21, 2018, to file their responsive pleading. Petitioners have not filed a response and have not requested additional time to submit their response. Therefore, I closed the record on September 21, 2018.

FACTUAL DISCUSSION

Based upon a review of the documentary evidence and the Certification of Dr. Violet Y. Martin (Exhibit 4) submitted in support of the motion, I **FIND** the following **FACTS**, which are not disputed:

1. On April 17, 2017, T.N. and M.L. on behalf of their son, J.N., filed a due process complaint against Gloucester Township Board of Education with the New Jersey State Office of Special Education Programs (OSEP) that was transmitted to the OAL on May 17, 2017 and assigned docket number EDS 06956-17.

2. In the April 17, 2017 petition, the parents of J.N. alleged a denial of FAPE with respect to how the Board implemented J.N.'s May 17, 2016 IEP. They also alleged violations of Section 504 related to claims involving a "Latchkey Program" that J.N. attended before and after school hours on school grounds.

3. On September 12, 2017, the Honorable Dean J. Buono, ALJ (Judge Buono) entered an Order Granting Partial Summary Decision in EDS 06956-17 dismissing petitioners' claims regarding the Latchkey Program. (Exhibit 1.) Judge Buono determined that petitioners' accommodation requests under Section 504 had been the subject of a prior United States Department of Education Office for Civil Rights (OCR) complaint resolved by a resolution agreement dated March 31, 2017 that was dispositive of the claims.

4. On October 31, 2017, petitioners withdrew their due process petition in EDS 06956-17 at the second hearing date. Petitioners, with the advice of counsel, verbally informed the tribunal that they were withdrawing their petition. Petitioners testified under oath before Judge Buono that they were freely withdrawing their right to proceed, and they asserted their understanding that the allegations in the complaint could not be the subject of any future petition. Petitioners' counsel submitted a written Notice of Withdrawal. (Exhibit 2.)

5. On July 17, 2018, the instant petition was filed in the OAL. The petition contained seventy-eight numbered paragraphs. On August 6, 2018, the Board filed its Answer denying the allegations.

6. In its motion to dismiss the instant petition, the Board alleges that paragraphs one through forty-eight of the pending due process petition are identical to the allegations in the previous petition, EDS 06956-17. In support of its denials to paragraphs three through forty-five, the Board included a copy of its Answer filed in response to petitioners' prior due process petition as Exhibit A, to show that the first forty-five allegations were also pled in the prior withdrawn due process petition.

7. The Board submits that the instant due process petition, filed on May 31, 2018, referenced claims and issues that are barred under the strict two-year statute of limitations found within the IDEA. 20 U.S.C. 1415(f)(3)(C). Parents and agencies are required to request a due process hearing within two years of the date they knew or should have known about the alleged actions that form the basis of the complaint. The only exception to the two-year deadline is when there is either a specific misrepresentation by the Board or the withholding by the Board of pertinent information. Petitioners demonstrated their knowledge about the alleged actions because they raised concerns about the implementation of the May 17, 2016 IEP in the prior due process petition (EDS 06956-17) that they voluntarily withdrew on October 31, 2017. In addition, there are no allegations of misrepresentation by the Board or the withholding of information.

8. The remaining allegations in the instant petition, numbered paragraphs forty-nine through seventy-eight, reference incidents occurring after the filing of the April 17, 2017 due process petition in EDS 06956-17.

9. In support of its denials, the Board submitted the Certification of Dr. Violet Y. Martin, Director of Special Education. (Exhibit 4.) Dr. Martin described three incidents of escalating behavior concerns involving J.N. On March 20, 2018, J.N. became enraged when asked to complete an assignment and eloped from the classroom. The assistant principal followed J.N. into the bathroom to ensure that J.N. would not elope from the school building. On May 2, 2018, J.N. displayed aggressive and explosive behavior while at the after-school Latchkey Program. On May 15, 2018, J.N. displayed aggressive behavior during the school day that had to be deescalated by the school resource officer to prevent J.N. from causing injury to himself or others. In response to those incidents, the Child Study Team met with J.N.'s parents to discuss proposed changes to his program and permission for a neuropsychological evaluation. At the IEP meeting on May 22, 2018, J.N.'s parents consented in writing to J.N.'s change in placement. As a result, J.N. was placed at First Children Services, an out-of-district, New Jersey Department of Education approved private clinic providing educational services to students with autism and other disabilities, for the remainder of the 2017-2018 school year, 2018 extended school year (ESY), and the 2018-2019 school year.

10. The instant due process petition filed on May 31, 2018 failed to mention the May 22, 2018 IEP or acknowledge J.N.'s change in placement.

11. Petitioners did not oppose or respond to Dr. Martin's certification describing the events that occurred during the 2017-2018 school year which precipitated J.N.'s out-of-district private placement.

CONCLUSIONS OF LAW

The Board argues that its motion to dismiss should be granted because petitioners are precluded from relitigating the following: all claims regarding J.N.'s participation in the Latchkey Program; all issues which were withdrawn by petitioners in their previous due process hearing; and all issues and claims arising prior to the statute of limitations deadline of May 30, 2016. In addition, the Board submits that the allegations that occurred after the filing of the prior due process petition in EDS 06956-17 must be dismissed because petitioners have failed to plead a cognizable cause of action.

The Board presented and relied upon documents outside the Petition and the Answer including: Order Granting Partial Summary Decision in EDS 06956-17, dated September 12, 2017 (Exhibit 1); Notice of Withdrawal in EDS 06956-17, dated October 31, 2017 (Exhibit 2); Order Partially Granting Exclusion of Testimony in EDS 06956-17 (Exhibit 3); and Certification of Dr. Violet Y. Martin (Exhibit 4). Therefore, it shall be treated as a motion for summary decision. In addition, under R. 4:6-2 of the Rules Governing the Courts of New Jersey, when a motion to dismiss is based on the petitioners' failure to state a claim upon which relief can be granted and matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. N.J.A.C. 1:1-12.5 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 "the judgment or order sought shall be rendered 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 allegedly 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 and Trust Co., 17 N.J. 67, 75 (1954)). In this instance, no opposition was offered. If the opposing party fails to raise a material factual issue with competent proofs, then the issue should be resolved on summary decision. Frank v. Ivy Club, 120 N.J. 73, 98-99 (1990).

I **CONCLUDE** that this matter is ripe for summary decision.

Petitioners' claims regarding J.N.'s participation in the Latchkey Program were previously decided by Judge Buono in his Order dated September 12, 2017. Under the doctrine of *res judicata*, a cause of action that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding. Roberts v. Goldner, 79 N.J. 82 (1979). Petitioners did not challenge Judge Buono's Order. I **CONCLUDE** that the claims in the instant petition are identical to the claims in EDS 06956-17, thereby barring the relitigation of any and all claims pertaining to J.N.'s participation in the Latchkey Program. Therefore, the claims set forth in numbered paragraphs thirty-two through forty-five are **DISMISSED** under the doctrine of *res judicata*.

The Board submits that the allegations set forth at paragraphs one through forty-seven are the same issues that were withdrawn by petitioners on October 31, 2017 in their previous due process petition in EDS 06956-17. Petitioners withdrew their previous due process complaint on the second day of hearing. Before accepting the withdrawal,

Judge Buono questioned M.L. and T.N., under oath, to determine their understanding and to impress upon them the consequences of their action. The petitioners represented that they understood that by withdrawing their petition, they were giving up their right to litigate these issues in any subsequent proceeding.

Collateral estoppel is an equitable principle that bars relitigation "when an issue of fact or law is actually litigated and determined by a valid and final judgment." Winters v. N. Hudson Reg'l Fire and Rescue, 212 N.J. 67, 85 (2010) (citing Restatement (Second) of Judgments §27 (1982)). As our Supreme Court has stated:

> [Collateral estoppel] serves the important policy goals of finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness . . . . If an issue between the parties was fairly litigated and determined, it should not be relitigated.
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> [First Union Nat'l Bank v. Penn Salem Marina, 190 N.J. 342, 352 (2007)]

Our courts have recognized that the "question to be decided is whether a party has had his day in court on an issue . . . ." McAndrew v. Mularchuk, 38 N.J. 156, 161 (1962). Thus, collateral estoppel bars relitigation of an issue if

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the 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 to the earlier proceeding.
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> [Winters, 212 N.J. at 85.]

In its motion the Board relies on Judge Buono's *voir dire* of the petitioners on October 31, 2017 during the second day of the hearing in EDS 06956-17. Judge Buono instructed the petitioners that any future petition could not involve the issues that were part of the proceeding in EDS 06956-17. The petitioners acknowledged their consent and understanding. It is generally recognized that the judicial principles underlying

collateral estoppel and other doctrines of issue preclusion, such as *res judicata* and *laches*, serve important policy goals that apply in both administrative law and judicial settings. Hackensack v. Winner, 82 N.J. 1, 31-33 (1980). I agree that petitioners have brought the same issues before this Court which were withdrawn before Judge Buono in EDS 06956-17 on October 31, 2017. The hearing had commenced on September 19, 2017. Petitioners were afforded a full and fair opportunity to present their claims within said hearing for a final decision on the merits. Judge Buono did not accept petitioners' withdrawal until he subjected them to questioning under oath to ensure their understanding of the ramifications of their actions. The issues in paragraphs one through forty-seven of the instant due process petition are identical to the issues presented in EDS 06956-17. The parties are the same. Petitioners had the opportunity for a full and fair hearing on the merits but chose to withdraw. Therefore, I **CONCLUDE** that collateral estoppel precludes petitioners from relitigating the issues previously withdrawn in EDS 06956-17. Paragraphs numbered one through forty-seven of the instant due process petition are **DISMISSED**.

I further **CONCLUDE** that any claims set forth in the petition that predate May 30, 2016 are precluded under the IDEA statute of limitations because petitioners demonstrated their knowledge and awareness about concerns with the May 17, 2016 IEP by requesting a due process hearing on April 18, 2017. Therefore, I also **CONCLUDE** that any issues occurring after May 30, 2016 that could have been brought within the prior petition (EDS 06956-17) are also precluded.

The Board argues that its motion to dismiss should be granted because petitioners have failed to plead a cognizable cause of action. The Board relies upon the requirements set forth in N.J.A.C. 6A:14-2.7(c) to show that all due process petitions must include the specific issues in dispute, the relevant facts, and the relief sought. This language tracks the language found in the IDEA, at 20 U.S.C. 1415(b)(7)(A). According to the petition, the allegations set forth in paragraphs numbered forty-nine through seventy-eight occurred after April 18, 2017, the date of the filing of the prior petition in EDS 06956-17. Petitioners allege that respondent failed to implement the Functional Behavior Analysis (FBA) recommended by its private evaluator. Petitioners allege that the IEP in place was the IEP adopted on May 17, 2016; however, petitioners do not allege whether the FBA

was included as part of that IEP. According to the petition, J.N.'s inappropriate behaviors escalated. There were no details or dates provided in the petition. Dr. Martin certified that it was not until an incident on March 20, 2018 that J.N. started to exhibit behaviors that differed in intensity and character. The March 20, 2018 incident was followed by an incident during the Latchkey Program on May 2, 2018 and another school incident on May 15, 2018. The petition also failed to acknowledge that in response to these incidents, members of the CST met with J.N.'s parents to discuss changes to J.N.'s program. The CST determined that J.N. required an out-of-district setting that was able to provide J.N. more intensive and individualized support in a smaller school environment. On May 22, 2018, the parties convened for an IEP meeting that resulted in J.N. being placed at First Children, where according to Dr. Martin he is making progress. Dr. Martin's certification was not refuted.

Petitioners filed the instant due process petition on May 31, 2018. Petitioners request for relief seeks three findings:

> 1. that the Board failed to comply with IDEA/504/ADA procedural safeguards resulting in a loss of educational opportunity for J.N., seriously depriving him and his parents of their participation rights, or to have caused a deprivation of J.N.'s educational benefits;
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> 2. that the Board failed to offer an IEP that was reasonably calculated to offer J.N. FAPE in the least restrictive environment; and
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> 3. that the Board's failure to provide J.M. reasonable accommodations for his disabilities was discriminatory based on his protected class as a disabled student in violation of Section 504 and ADA causing J.M. to be unlawfully excluded and denied the benefits of his public education at his school and his public program at the Latchkey Program.

Because petitioners attempted to relitigate issues and claims from their April 18, 2017 petition that they withdrew on October 31, 2017, it is difficult to determine on this record what specific failures by the Board the petitioners are seeking to redress in the instant petition. It also appears that the May 22, 2018 IEP rendered certain claims moot. In accordance with Dr. Martin's certification, there was an escalation in J.N.'s behaviors beginning in March 2018 that was addressed in the May 22, 2018 IEP and resulted in a

change in placement. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. Moreover, petitioners failed to oppose the motion and refute the certification of Dr. Martin.

In addition to the above, petitioners seek compensatory education. Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded "for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem." M.C. o/b/o J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 392 (3d Cir. 1996). The Board stated that J.N.'s behavior issues escalated beginning with the March 2018 incident. As noted by the May 22, 2018 IEP and the change in placement, there is nothing to suggest that the Board did not act within a reasonable time to rectify the problem and make appropriate program changes and a change in placement.

I **CONCLUDE** that petitioners have not set forth a cognizable claim for relief. It is unclear from the petition how J.N. was denied FAPE or how the Board violated his rights under 504. Petitioners' failure to oppose this motion have left me to consider the Board's account of the incidents set forth in the certification of Dr. Martin. I **CONCLUDE** that Dr. Martin's certification and the May 22, 2018 IEP changing J.N.'s placement show that the Board acted reasonably to prevent a denial of FAPE to J.N.

CONCLUSION AND ORDER

Based upon the Board's moving papers, supporting exhibits and certification, I **GRANT** the Board's motion to dismiss the petitioner's due process petition.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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 Programs.

October 9, 2018
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency

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