

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
SUPERINTENDENT OF PUBLIC INSTRUCTION**

IN THE MATTER OF THE EDUCATION OF)	RULING ON MOTION FOR RULING
)	ON LEGAL ISSUES AND FINAL
)	ORDER
)	
Student and Lake Oswego School District)	Case No. DP 10-123E
)	

HISTORY OF THE CASE

On November 8, 2010, parent filed a request for due process hearing with the Superintendent of Public Instruction. The request included a request for an expedited hearing as well as a request for hearing on non-expedited issues.

The case was referred the Office of Administrative Hearings (OAH) and assigned to Senior Administrative Law Judge (ALJ) Ken L. Betterton. The OAH notified the parties on November 9, 2010 that the case had been assigned to Senior ALJ Ken L. Betterton.

On November 23, 2010, the Lake Oswego School District (district) filed a motion to dismiss, or in the alternative, to strike expedited due process hearing. Parent on November 23, 2010 filed a motion against the district to compel production of documents and a request for admissions from the district.

A telephone pre-hearing conference was held on November 23, 2010. Parent appeared *pro se*. The district was represented by Attorney Richard Cohn-Lee. At the pre-hearing conference, an in-person hearing was scheduled for December 13, 2010 on the expedited issue. A telephone pre-hearing was scheduled for December 10, 2010 for the non-expedited issues in parent's request for hearing. District was ordered to file response to parent's requests for admission by December 1, 2010.

Shortly after the pre-hearing conference concluded, the district filed a motion for ruling on legal issues (summary determination) pursuant to OAR 137-003-0580, that in substance was the same as the motion to dismiss/motion to strike filed the previous day.

Parent on November 29, 2010 filed with the OAH a request for change of an administrative law judge. On December 1, 2010, a Presiding ALJ with the OAH issued an order denying parent's request for change of an administrative law judge.

On December 1, 2010, parent filed a response opposing the district's motion for ruling on legal issues.

ISSUE

Whether the district is entitled pursuant to OAR 137-003-0580 to a ruling that there is no genuine issue of material fact regarding the claims in parent's request for due process hearing in Case No. DP 10-123E, and that parent's claims are barred as a matter of law.

DOCUMENTS CONSIDERED FOR THE RULING

The district's motion for ruling on legal issues and the attached Exhibits 1 through 4, and parent's response to the motion, were made a part of the record for purposes of ruling on the motion.

BASES FOR THE MOTION

The district contends that it is entitled to a ruling in its favor because parent's claims in DP 10-123E are barred as a matter of law because the same claims were litigated or could have been litigated in a previous proceeding.

FACTS RELEVANT TO THE RULING

(1) On June 4, 2009, parent, and student's other parent, filed a request for due process hearing against the district in Case No. DP 09-110. The request alleged that the district violated The Individuals with Disabilities Education Act (IDEA) and failed to provide student with a free appropriate public education (FAPE) from December 2006 through May 2009. (District's Ex. 3 at 3.)

(2) Parents on October 12, 2009 filed a second request for due process hearing against the district in Case No. DP 09-121. The request alleged that the district violated IDEA and failed to provide student with FAPE by, among other reasons, failing to provide justification for a change in placement at an October 7, 2009 Individual Education Program (IEP) meeting, and by failing to consider harmful effects of the placement offered by the district on October 7, 2009. (District's Ex. 3 at 4.) At the hearing on Case No. DP 09-121 in January 2010, parents tried to amend their request for due process hearing to add a claim that the district violated IDEA and failed to provide FAPE by failing to allow student to return to school on October 13, 2009, after parents filed their request for due process hearing. (*Id.*)

(3) On November 30, 2009, parents filed a third request for due process hearing against the district in Case No. DP 09-127E, including a request for an expedited hearing. (District's Ex. 2.) The due process request alleged, among other reasons, that the district erroneously concluded that student's behavior for which student was removed from his/her educational placement was not a manifestation of his/her disability. (*Id.* at 2.) The manifestation determination occurred on November 2, 2009, and concerned an incident when student physically assaulted another student at school on October 29, 2009. (*Id.* at 5-6.) Parents also alleged in their request for hearing that the district violated IDEA and failed to provide student with FAPE by refusing to place student at a private school, Children's Hour Academy. Parents in their request for hearing sought

reimbursement for costs they incurred for tuition and occupational therapy for their private placement of student at Children's Hour Academy. (*Id.* at 18.)

(4) All three cases were consolidated for hearing on January 5 through 8, 2010 before ALJ John Mann with the OAH. (District's Ex. 3 at 1.)

(5) The hearing in Case No. DP 09-127E covered facts and events from approximately April 8, 2009 through December 2009, including district's attempts to reintegrate student into school in the spring of 2009, the behaviors student demonstrated up through the incident on October 29, 2009, the district's offer of a placement in its DELTA program (DELTA stands for Daily Educational Learning Tools for Achievement) at an October 7, 2009 IEP meeting, and the manifestation and expulsion proceedings following the October 29, 2009 incident. (District's Ex. 2 at 10-16.) ALJ Mann ruled in favor of the district on all issues in Case No. 09-127E, including that the district had properly concluded that student's behavior on October 29, 2009 was not a manifestation of his/her disability. (*Id.* at 17-18.) ALJ Mann denied parents' requests that the district place student at a private school, Children's Hour Academy. He also denied parents' request for reimbursement for costs incurred for tuition and occupational therapy they incurred for their private placement because he ruled that the district did not violate its obligations under IDEA and did offer FAPE to student at the October 7, 2009 IEP meeting. (*Id.* at 18.)

(6) ALJ Mann ruled in favor of the district on all issues in Case Nos. DP 09-110 and 09-121. (District's Ex. 3.) ALJ Mann ruled in Case No. DP 09-121 that the district did not violate IDEA or deny student FAPE. ALJ Mann found that the district provided a justification for a change of placement at the October 7, 2009 IEP meeting, and that the district considered the harmful effects of the placement offered by the district on October 7, 2009. ALJ Mann ruled in Case No. DP 09-121 that parents could not amend their request for due process hearing at the hearing in January 2010 to raise as an issue the district's failure to comply with its stay put obligation by failing to return student to his/her regular education placement on October 13, 2009. ALJ Mann ruled that parents could have amended their request for hearing after they filed their hearing request on October 12, 2009 and before the hearing in January 2010 to allege that ground for relief, but failed to do so. (*Id.* at 27.)

(7) In the instant case, Case No. DP 10-123E, filed November 8, 2010, parent's request for due process hearing covers the same time period and facts covered and addressed in Case Nos. DP 09-110, DP 09-121, and DP 09-127E. (District's Ex. 4.) Parent alleges that the district erred in concluding during the November 2, 2009 manifestation determination meeting that the October 29, 2009 incident was not a manifestation of student's disability, and seeks an order that student's behavior was a manifestation of his/her disability. (*Id.* at 5.) Parent alleges that the district has denied student FAPE by failing to convene an IEP meeting since October 29, 2009; that IDEA triggered stay put when parents filed their request for due process hearing in Case No. 09-121 on October 12, 2009, that the district should be required to place student at Children's Hour Academy; and that parent should be reimbursed for tuition and occupational therapy he/she has expended after October 29, 2009 for parent's private placement of student at Children's Hour Academy. (*Id.* at 5-6.)

(8) Parents have appealed Case Nos. DP 09-110, DP 09-121, and DP 09-127E to the federal district court in Oregon, where they are currently pending. (District's Motion at 3.)

SUMMARY DETERMINATION

OAR 137-003-0580 governs motions for ruling on legal issues or summary determination. That administrative rule provides, in relevant parts:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

(9) A party or the agency may satisfy the burden of producing evidence through affidavits. Affidavits shall be made on personal knowledge, establish that the affiant is competent to testify to the matters stated therein and contain facts that would be admissible at the hearing.

(10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's pleading.

(11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case.

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order * * * incorporating that ruling * * *.

CONCLUSION OF LAW

No genuine issue of material fact exists as to any of the claims in parent's request for due process hearing filed November 8, 2010. Parent's claims are barred as a matter of law. Parent's request for due process hearing is dismissed.

OPINION

The district contends that it is entitled to summary determination as a matter of law because there is no genuine issue of material fact and that parent's request for due process

hearing should be dismissed. Parent opposes the motion and contends there are issues of material fact to be resolved at a hearing. Because the district filed the motion for ruling on legal issues (summary determination), I must consider the evidence in a manner most favorable to the non-moving party, *i.e.*, parent. OAR 137-003-0580(7).

The doctrine of claim preclusion (*res judicata*) prevents a party or their privies from raising claims or issues in a subsequent proceeding that were litigated in a prior proceeding. *Holcombe v. Hosmer*, 477 F3d 1094 (9th Cir 2007). The doctrine also applies to issues that were not only actually litigated in the prior proceeding but that could have been raised in the prior proceeding, even if those matters were not actually adjudicated. *Id.* at 1097.

Oregon law states that the doctrine of claim preclusion prohibits a party from relitigating the same claim or splitting a claim into multiple actions against the same opponent. *G.B. v. Morey*, 229 Or 605, 608 (2009), *rev den* 347 Or 608 (2010). (Citation omitted.) The doctrine also forecloses a party who has litigated a claim against another from further litigating on that same claim on any ground or theory of relief that the party could have litigated in the first instance. *Id.* (Citation omitted.) A “claim” is defined broadly as “a group of facts which entitle [the] plaintiff to relief.” *Id.* (Citation omitted.) In deciding whether a group of facts is part of the same claim, courts look to whether the “transactions were ‘related in time, space, origin, or motivation, [and] whether they form a convenient unit,’ as well as whether they were ‘substantially of the same sort and similarly motivated.’” *Id.* at 608-09. (Citations omitted.)

Federal courts have applied the doctrine of claim preclusion to administrative proceedings. *Taylor v. Heckler*, 765 F2d 872 (9th Cir 1985). Issue preclusion applies in proceeding under IDEA. *Katz v. Timberland Regional School Dist.*, 184 F Supp 2d 124 (D NH 2002). (“Claim preclusion principles are just as relevant in the context of successive administrative proceedings as they are when dealing with successive judicial proceedings.”) *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. 200 and Illinois State Bd. of Educ.*, 8 F Supp 2d 801, 807 (ND Ill 1998), *aff’d* 203 F3d 462 (7th Cir 2000).

I believe all the claims parent alleges in his/her request for due process hearing in Case No. DP 10-123E filed November 8, 2010 either were addressed by ALJ Mann in the previous three cases that parent filed, or could have been alleged by parent in his/her three previous hearing requests.

ALJ Mann ruled in Case No. DP 09-127E that the district properly concluded that student’s behavior on October 29, 2009 was not a manifestation of his/her disability. ALJ Mann ruled that the district’s placement offer at the October 7, 2009 IEP meeting constituted FAPE; he denied parents’ request that the district place student at the private school parents where parents wanted to place student; and he denied parents’ request for reimbursement for costs parents incurred for tuition and occupational therapy following their private placement of student at the school. Parent can raise these issues on appeal in federal court if parent disagrees with any of ALJ Mann’s rulings. Parent had had a full opportunity to litigate the issues he/she has alleged in the instant request for due process hearing. Parent cannot litigate those issues again in another due process hearing.

ALJ Mann also ruled in Case No. DP 09-121 that parents could not amend their request for due process hearing at the time of hearing to allege the stay put violation. The correctness of that ruling can be addressed on appeal in federal court. If parent is successful on appeal on that issue, the case can be remanded for the issue to be addressed. Parent is precluded in this request for due process hearing from alleging an issue that could have been properly raised in the prior proceeding, even if not actually adjudicated. *Holcombe v. Hosmer, supra* at 1097.

In the instant case, parent alleges that the district denied student FAPE by failing to convene an IEP meeting after October 29, 2009. Parent could have raised that issue either in his request for due process hearing filed November 30, 2009, or raised it in his request for hearing filed October 12, 2009 by asking to amend his request prior to the hearing in January 2010. *Holcombe v. Hosmer, supra* at 1097.

Parent is precluded as a matter of law from raising the issues in his/her request for hearing filed November 8, 2010.

RULING ON MOTION FOR RULING ON LEGAL ISSUES

The district's motion for ruling on legal issues (summary determination) is granted.

ORDER

The parent's request for due process hearing filed November 8, 2010 (DP 10-123E) is dismissed.

Ken L. Betterton, Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

ENTERED at Salem, Oregon this 6th day of December 2010 with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE, Salem, OR 97310-0203.